AMENDED RULE 37(e): PROBLEM SOLVER OR PROBLEM MAKER?

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Nearly everything people do on a daily basis involves some type of electronic device. From sending emails, making copies, browsing the internet, talking on the phone, driving a car, watching TV, updating Twitter or Facebook, typing a letter, etc. In fact, "[l]ess than one-percent of all communications will ever appear in paper form[,]"[1] and more than ninety-percent of all information is generated in electronic form.[2] North American businesses exchange more than 2.5 trillion emails per year.[3] As one commentator expressed:

> [T]he world has changed. Now, millions of e-mails are sent daily; a typical person receives more than 30 a day. Drafts and redrafts of important business and other word processing documents are viewed and commented upon by many people and stored on computers located in many different locations. Conversations between business associates are occurring in realtime with instant messaging. Many individuals and businesses use individual or joint calendars. Many documents, data and other electronic materials are no longer being converted to paper but are created, revised and stored in electronic form.[4]

All of these electronic devices create potentially relevant information that may be necessary in the course of litigation. Therefore, in addition to the traditional tangible discovery—such as hard copies of letters and contracts—

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1. Clare Kealey, Note, *Discovering Flaws: An Analysis of the Amended Federal Rule of Civil Procedure 37(e) and Its Impact on the Spoliation of Electronically Stored Evidence*, 14 RUTGERS J. L. & PUB. POL'Y 131, 133 (2016).

2. Nicole D. Wright, Note, *Federal Rule of Civil Procedure 37(e): Spoiling the Spoliation Doctrine*, 38 HOFSTRA L. REV. 793, 804 (2009).

3. Kealey, *supra* note 1, at 133.

4. John L. Carroll, *Developments in the Law of Electronic Discovery*, 27 AM. J. TRIAL ADVOC. 357, 357 (2003) (citing Michael R. Arkfeld, *The Wired Lawyer: Electronic Discovery Here to Stay*, AZ. ATT'Y 8 (July-Aug. 2002)).

lawyers can also pursue production of the electronically stored information[5] contained within the multitude of electronic devices individuals and businesses use on a daily basis.

In an effort to assist judges and lawyers in the discovery of ESI, the Federal Rules of Civil Procedure provide the method lawyers must utilize in requesting and producing ESI.[6] The Rule also allows judges to sanction parties for the spoliation of ESI pursuant to the amended Federal Rule of Civil Procedure 37(e).[7] Spoliation is "[t]he intentional destruction, mutilation, alteration, or concealment of evidence, usu[ally] a document."[8]

This Note will discuss why Rule 37(e) was amended and the problems it was meant to correct. It will further discuss how courts have defined and applied amended Rule 37(e), and the problems that still exist more than two years after its enactment.

I. THE ORIGINAL 37(e) AND WHY IT WAS AMENDED

Rule 37(e) was first effective December 2006.[9] In its original form, the Rule prevented courts from imposing sanctions for lost ESI unless a party exhibited culpable conduct.[10] The 2006 version also contained a "safe harbor" provision that stated: "[a]bsent exceptional circumstances, a court may not impose sanctions under [the Federal Rules of Civil Procedure] 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."[11] This "safe harbor" provision was created so parties would not be penalized for inadvertent destruction of ESI requested in pending litigation.[12] It was not intended to protect parties who intentionally destroyed ESI.[13]

As ESI evolved and became a predominant form of discovery, many believed Rule 37(e), as it was originally promulgated in 2006, was too limited

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5. The term "electronically stored information" will be referred to herein as "ESI."

6. *See generally* FED. R. CIV. P. 26.

7. The most recent version of Fed. R. Civ. P. 37(e) was amended and promulgated in December 2015.

8. *Spoliation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

9. The rule was originally adopted as Fed. R. Civ. P. 37(f), but was redesignated in 2007 as 37(e). For purposes of clarity, this article will refer to all iterations of the Rule as "37(e)."

10. JAY E. GRENIG & JEFFREY S. KINSLER, HANDBK. FED. CIV. DISC. & DISCLOSURE § 12:16 (4th ed.), Westlaw (database updated July 2018).

11. FED. R. CIV. P. 37(f) (2006); John E. Motylinski, Note, *E-Discovery Realpolitik: Why Rule 37(E) Must Embrace Sanctions*, 2015 U. ILL. L. REV. 1605, 1620 (2015) (citing FED. R. CIV. P. 26).

12. Motylinski, *supra* note 11, at 1619.

13. *Id.* at 1619–20.

and ultimately ineffectual.[14] For instance, under the 2006 version of Rule 37(e), parties who acted in "good faith" were exempt from spoliation sanctions; however, the Rule provided no guidance as to what "good faith" meant.[15] Courts also varied in their definition of "culpability exceeding negligence" as it pertained to spoliation of ESI.[16] Because the required culpability was not defined in the Rule, courts often employed a general tort definition of intent.[17] The failure to define these terms in the Rule led to a variance among judges.[18] Courts now had to determine what conduct was considered "good faith" and therefore saved by the safe harbor provision, and what conduct reached the level of "culpable conduct."

This ambiguity resulted in inconsistent sanctioning by the various circuits.[19] For example, the Second Circuit favored adverse-inference instructions upon a showing of mere negligence.[20] In the influential case of *Residential Funding Corp. v. DeGeorge Financial Corp.*, the Second Circuit analyzed whether there was a "culpable state of mind" when relevant ESI was destroyed.[21] The court considered the issue by looking to see if there was a "knowing[], even if without intent to [breach a duty to preserve it], or negligent" destruction of ESI.[22] The Fourth, Sixth, Ninth, and D.C. Circuits

14. Hon. James C. Francis IV & Eric P. Mandel, *Limits on Limiting Inherent Authority: Rule 37(e) and the Power to Sanction*, 17 SEDONA CONF. J. 613, 615 (2016).

15. *See* FED. R. CIV. P. 37(f) (2006) ("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."); Motylinski, *supra* note 11, at 1620.

16. Motylinski, *supra* note 11, at 1618; Lauren R. Nichols, Note, *Spare the Rod, Spoil the Litigator? The Varying Degrees of Culpability Required for an Adverse Inference Sanction Regarding Spoliation of Electronic Discovery*, 99 KY. L.J. 881, 886 (2010).

17. Nichols, *supra* note 16, at 886.

18. *Id.*

19. *See* Mins., Fed. Rules Comm. Mtg., April 10–11, 2014 at 369; *see* Motylinski, *supra* note 11, at 1622–24; *see also* Ariana J. Tadler & Henry J. Kelston, *What You Need to Know About the New Rule 37(e)*, TRIAL, Jan. 2016, at 21 ("A dominant theme [according to the Advisory Committee's Report] . . . was resolving a split among the federal circuits regarding the use of the most severe sanctions: Some courts authorized case-terminating sanctions or an adverse inference (a presumption that missing information would have been unfavorable to the party responsible for its loss) on a finding of bad faith, while others allowed adverse inferences based on negligent or grossly negligent conduct."); *see also* Nichols, *supra* note 16, at 886.

20. James S. Kurz & Daniel D. Mauler, *A Real Safe Harbor: The Long-Awaited Proposed FRCP Rule 37(e), Its Workings, and its Guidance for ESI Preservation*, 62-AUG FED. L. 62, 64 (2015).

21. Nichols, *supra* note 16, at 890.

22. Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002); *see also* Nichols, *supra* note 16, at 890 (emphasis omitted).

agreed with the Second Circuit's approach and held that mere negligence was sufficient to support sanctions under Rule 37(e).[23]

On the other end of the spectrum, however, the Third, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits each required proof that the information was lost due to bad faith before such sanctions were imposed.[24] According to these circuits, negligent destruction of evidence was insufficient to impose harsh sanctions.[25] Because of the "significantly different standards for imposing sanctions or curative measures on parties who fail[ed] to preserve"[26] ESI, attorneys and their clients were unsure of the requirements for preservation and the consequences that would be imposed. "The cumulative effect is that the 2006 Rule 37(e)'s Safe Harbor provision offer[ed] little guidance to courts and litigants, thereby resulting in low predictability."[27] This caused parties to engage in costly and laborious "over-preservation" of ESI for fear that any mistake may hold severe consequences.[28] To address these concerns and others, the discovery subcommittee set out to completely re-write Rule 37(e).[29]

II. THE AMENDED RULE EXPLAINED

The amended version of Rule 37(e)[30] became effective in December 2015.[31] The Committee's goal in rewriting the Rule was to provide courts

23. Motylinski, *supra* note 11, at 1623.

24. Kurz & Mauler, *supra* note 20, at 64; Motylinski, *supra* note 11, at 1622–23.

25. *See* Motylinski, *supra* note 11, at 1622–23.

26. FED. R. CIV. P. 37 advisory committee's note to 2015 amendment.

27. Motylinski, *supra* note 11, at 1624.

28. Mins., Fed. Rules Comm. Mtg., April 10–11, 2014 at 370; Tadler & Kelston, *supra* note 19, at 21; *see* Jeffrey A. Parness, *Lost ESI Under the Federal Rules of Civil Procedure*, 20 SMU SCI. & TECH. L. REV. 25, 27–28 (2017).

29. GRENIG & KINSLER, *supra* note 10.

30. Amended FED. R. CIV. P. 37(e) provides:

> (e) Failure to Preserve Electronically Stored Information.
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> If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.

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

with a "consequences-only" rule that offered guidance to courts on when to impose sanctions if a party failed to preserve ESI.[32] Hopefully, resolving the ambiguities created by the prior version would ameliorate the circuit split and help reduce the cost of over-preservation.

Amended Rule 37(e), like its predecessor, applies only to ESI. The structure of the new Rule is essentially a three-part test.[33] First, a court must determine if a party had a duty to preserve the lost information and whether the information is truly lost. If this first part is satisfied, then the court must determine whether a party has been prejudiced because the ESI is lost. If so, courts may impose remedies to cure the prejudice but no more.[34] Thus, a court should not impose a sanction as a form of punishment under 37(e)(1). However, if a court finds a party acted with an "intent to deprive," then the court may impose the most severe sanctions provided under 37(e)(2). Thus, unlike its 2006 version, the 2015 amended 37(e) covers both the intentional and unintentional spoliation of ESI.

The scope of amended Rule 37(e) is limited to the loss of ESI. Rule 37(e) does not pertain to the loss of tangible evidence, such as paper discovery. There are significant distinctions between paper discovery and ESI that impact the way courts analyze which rule or law to apply in order to resolve discovery disputes.[35] Because of this, combined with the ever-changing electronic landscape, courts remain uncertain as to what exactly constitutes ESI. For instance, courts are split on whether evidence in the form of cell phones,[36] video recordings,[37] digital cameras, etc. are considered ESI or fall under more traditional discovery forms. This split of opinion can lead to complicated case analysis and varying interpretations of the Rule.

Rule 37(e) provides courts with remedies they may impose when ESI "that should have been preserved" is lost, and the loss occurred "because a party

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32. Tadler & Kelston, *supra* note 19, at 21; *see e.g.*, Mins., Fed. Rules Comm. Mtg., April 10–11, 2014 at 370–73.

33. Kurz & Mauler, *supra* note 20, at 64.

34. *Id.* at 65.

35. Carroll, *supra* note 4, at 358.

36. *See generally* Browder v. City of Albuquerque, 187 F. Supp. 3d 1288, 1295 (D.N.M. 2016) (loss of cell phone treated as tangible property); *but see cf.* Living Color Enters., Inc. v. New Era Aquaculture, Ltd., Case No. 14-cv-62216, 2016 WL 1105297 (S.D. Fla. Mar. 22, 2016) (loss of cell phone meant loss of text messages which was treated as ESI).

37. *See generally* Doe v. Cty. of San Mateo, Case No. 3:15-cv-05496-WHO, 2017 WL 6731649 (N.D. Cal. Dec. 29, 2017) (applied same sanctions to the loss of video recordings and the loss of paper documents); *but see cf.* Wooden v. Barringer, Case No. 3:16-cv-446-MCR-GRJ, 2017 WL 5140518 (N.D. Fla. Dec. 6, 2017) (held the lost video recordings constituted ESI).

failed to take reasonable steps to preserve it."[38] However, the Rule fails to define when a duty to preserve is established,[39] and what reasonable steps they can take to satisfy that duty.[40] Instead, the Committee recognized that the duty to preserve is well established in modern common-law, statutory authority, other federal rules, or even from professional responsibility standards guiding lawyers.[41] The Rule does not create a new preservation duty.[42]

Before the court determines what sanctions should be applied, if any, the court must first determine whether the information lost should have been preserved and the party failed to take "reasonable steps to preserve it."[43] The text of the Rule does not explain what "reasonable steps" are required in any particular situation, but the Committee Notes emphasize that proportionality should be considered when determining what is reasonable.[44]

Courts have determined that "reasonable steps" do not require perfection.[45] As the Advisory Committee acknowledged:

> [T]he information may not be in the party's control. Or information the party has preserved may be destroyed by events outside the party's control—the computer room may be flooded, a "cloud" service may fail, a malign software attack may disrupt a storage system, and so on. Assuming the party acted reasonably, the new rule does not apply to such situations because it cannot be said that the party was responsible for the failure to preserve the information . . . .[46]

Therefore, Rule 37(e) is not a strict liability rule that requires application whenever ESI is lost regardless of the circumstances.[47] Instead, there is a "genuine safe harbor" for parties that exercise reasonable steps to preserve ESI.[48] In the famous decision of *Zubulake v. UBS Warburg*, the court held

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

39. *Id.*

40. *Id.*

41. *See* FED. R. CIV. P. 37 advisory committee's note to 2015 amendment; Kealey, *supra* note 1, at 135–36.

42. FED. R. CIV. P. 37 advisory committee's note to 2015 amendment.

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

44. *See* FED. R. CIV. P. 37 advisory committee's note to 2015 amendment.

45. Marten Transp. Ltd. v. Plattform Advert., Inc., No. 14-cv-02464-JWL-TJJ, 2016 WL 492743, at *10 (D. Kan. Feb. 8, 2016) (court cautioned against requiring "perfection").

46. Mins., Fed. Rules Comm. Mtg., April 10–11, 2014 at 385.

47. Thomas Y. Allman, *Amended Rule 37(e): What's New and What's Next for Spoliation*, JUDICATURE, Vol. 101, No. 2, Summer 2017, at 48.

48. Matthew Enter., Inc. v. Chrysler Grp., No. 13-cv-04236-BLF, 2016 WL 2957133, at *1 (N.D. Cal. May 23, 2016).

that "reasonable steps" included a party suspending its routine document policy and putting in place "a 'litigation hold' to ensure the preservation of relevant documents."[49] Ultimately, whether a party exercised the appropriate "reasonable steps" to preserve relevant ESI is case-specific and is left to the discretion of the court.

Even if a party fails to take reasonable steps, sanctions are still not available if the lost ESI can be restored or replaced through additional discovery.[50] As expressed in the Committee Notes: "Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere."[51] Accordingly, courts may first order additional discovery pursuant to Rules 16 and 26 before imposing sanctions under 37(e).[52] It is only after the three predicate conditions are satisfied (ESI is lost, party failed to take reasonable steps to preserve it, and the ESI cannot be recovered by additional discovery) may the court then determine if remedies or sanctions are appropriate under sections (1) or (2) of 37(e).[53]

Subsections (e)(1) and (e)(2) each require a showing of prejudice; however, neither party is automatically burdened with the responsibility of proving or disproving prejudice.[54] Rule 37(e) purposely gives the court discretion to determine which party must bear the burden. As the Committee Notes state: "The rule leaves judges with discretion to determine how best to assess prejudice in particular cases."[55] The flexibility of where to place the burden is important because the situation in every case is different, as is the value of the lost ESI. For instance, it may be fair to require the party seeking the lost ESI to prove why and how the information is valuable to his case, but at the same time, it may be difficult for the party to demonstrate this if the

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

50. Allman, *supra* note 47, at 48; *see also* Marquette Transp. Co. Gulf Island v. Chembulk Westport M/V, No. 13-6216 c/w 14-2071, 2016 WL 930946, at *3 (E.D. La. Mar. 11, 2016) (Rule 37(e) does not apply where complete ESI was ultimately produced).

51. FED. R. CIV. P. 37 advisory committee's note to 2015 amendment.

52. ILWU-PMA Welfare Plan Bd. of Trs. v. Conn. Gen. Life Ins., No. C 15-02965 WHA, 2017 WL 345988, at *6–7 (N.D. Cal. Jan. 24, 2017) (court ordered additional discovery at the expense of the non-moving party to first determine if the lost ESI could be "restored or replaced"); *see, e.g.*, FED. R. CIV. P. 16(c)(2)(F); *see* FED. R. CIV. P. 26(b)(2)(A).

53. Tadler & Kelston, *supra* note 19, at 22.

54. FED. R. CIV. P. 37 advisory committee's note to 2015 amendment.

55. *Id.*

requesting party has never had the opportunity to see the ESI due to the conduct of the other party.[56]

Like most other aspects of Rule 37(e), courts apply varying interpretations to the amount of prejudice that must be demonstrated by the loss of ESI. For instance, the Southern District of West Virginia held it is not enough for a party to argue that it must "piece together" information from various sources,[57] while the District of Utah determined it was enough that the loss "may very well have an effect" on the moving party's ability to pursue his claim.[58] Alternatively, the Second Circuit has ruled that there is no prejudice when the injured party cannot prove with sufficient evidence that the missing ESI would have made any difference at trial.[59]

III. SANCTIONS TO CURE PREJUDICE UNDER 37(e)(1)

Unlike subsection (e)(2), subsection (e)(1) does not specify what remedies courts may impose to cure the prejudice. Instead, subsection (e)(1) instructs courts to impose remedies that are "no greater than necessary" to cure the prejudice,[60] and the Committee Notes warn that the "remed[ies] should fit the wrong."[61] Thus, the selection of applicable remedies is left to the discretion of the court.[62] The only caveat is that the most severe sanctions—those imposed by subsection (e)(2)—are not available under (e)(1) because they require a showing of "intent to deprive," which is not a predicate to relief available under (e)(1).[63] This leaves courts with a plethora of options to employ in an effort to cure the prejudice including: "forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation . . . or argument, other than instructions to which subdivision (e)(2) applies."[64] Below is a discussion of different remedies courts have utilized.

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56. STEVEN S. GENSLER, *Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions*, FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY, (Feb. 2018 update), Westlaw.

57. In re Ethicon, Inc., No. 2:12-cv-00497, 2016 WL 5869448, at *4 (S.D. W.Va. Oct. 6, 2016).

58. McQueen v. Aramark Corp., No. 2:15-cv-492-DAK-PMW, 2016 WL 6988820, at *3 (C.D. Utah Nov. 29, 2016).

59. *See* Mazzei v. Money Store, No. 15-cv-2054, 2016 WL 3902256, at *560 (2d Cir. July 15, 2016).

60. FED. R. CIV. P. 37(e)(1).

61. FED. R. CIV. P. 37 advisory committee's note to 2015 amendment.

62. Allman, *supra* note 47, at 49.

63. FED. R. CIV. P. 37(e); GENSLER, *supra* note 56.

64. GRENIG & KINSLER, *supra* note 10, at 2.

Preclusion of evidence is an available remedy under subsection (e)(1). According to the Committee Notes, "it may be appropriate to exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence."[65] The purpose of this sanction is to "level the playing field," so to speak, because both parties will be unable to present certain evidence (either because the evidence was lost or by court ordered sanction).[66] However, courts must be careful when exercising this option because it remains unavailable if the lost ESI pertains to evidence that is central to the party's only claim or defense unless the intent requirement of subsection (e)(2) is satisfied.[67]

District courts have not been shy in imposing this remedy. The Southern District of New York in *Feist v. Paxfire, Inc*. prevented the plaintiff from arguing that statutory damages should be awarded when it was shown the plaintiff used a cleaner program on her computer to erase her internet browsing history.[68] The court did not apply severe (e)(2) sanctions because it could not be proven that the plaintiff acted with "intent to destroy" the relevant evidence.[69] The Northern District of Illinois prohibited a party from presenting evidence of what had been seen on a "lost" videotape.[70] The District of Maryland prohibited a party from introducing an email at trial because of its failure to preserve ESI which might have rebutted its authenticity.[71]

The Committee Notes to amended Rule 37(e) permit parties, upon the discretion of the court, to present evidence to a jury about a party's failure to preserve ESI.[72] A court may allow "the parties to present evidence to the jury concerning the loss and likely relevance of information . . . if no greater than necessary to cure prejudice."[73] This includes allowing argument about the inferences the jury is permitted to draw from the lost ESI, even in the absence of an "intent to deprive."[74] However, the court is not permitted to "instruct the

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65. FED. R. CIV. P. 37 advisory committee's note to 2015 amendment.

66. GENSLER, *supra* note 56.

67. Thomas Y. Allman, *Spoliation After Amended Rule 37(e)* 1, 20 (Aug. 8, 2017), http://www.lfcj.com/uploads/3/8/0/5/38050985/2017spoliationafteramendedrule37_e__august_2017.pdf.

68. Feist v. Paxfire, Inc., No. 11-cv-5436, 2016 WL 4540830, at *4–5 (S.D.N.Y., Aug. 29, 2016).

69. *Id.* at 4.

70. Cahill v. Dart, No. 13-cv-361, 2016 WL 7034139, at *3 (N.D. Ill. Dec. 2, 2016); Allman, *supra* note 47, at 49.

71. Ericksen v. Kaplan Higher Educ., No. RDB-14-3106, 2016 WL 695789, at *2 (D. Md. Feb. 22, 2016).

72. Allman, *supra* note 47, at 49.

73. FED. R. CIV. P. 37 advisory committee's note to 2015 amendment.

74. Allman, *supra* note 47, at 49.

jury that it may *presume* from the loss that the lost information was unavailable to the party that lost it."[75] That instruction is only available upon a finding of "intent to deprive" under subsection (e)(2).[76]

For example, in *Storey v. Effingham County*, "[g]iven the unique and irreplaceable nature of the evidence," the Southern District of Georgia informed the jury that relevant ESI was not preserved and allowed the parties to present evidence and argument at trial regarding the implication this had on the case.[77] However, consistent with 37(e), the court did not give the jury an adverse inference instruction under subsection (e)(2).[78]

The Western District of North Carolina allowed witnesses to testify regarding the contents of lost text messages and the jury was permitted to decide for themselves whether to believe the testimony.[79] The parties were also permitted to "explore in front of the jury the circumstances surrounding the destruction" of the text messages.[80]

Additionally, the Western District of Virginia, despite no indication of prejudice due to the loss of evidence, forbade the offending party from presenting certain evidence at trial.[81] The court also instructed the jury that the ESI was requested to be preserved but was not preserved, and that the jury should not assume that the lack of evidence due to the lost ESI undermined the non-offending party's version of events.[82]

While courts continue to employ this type of sanction under (e)(1), it is important that courts not "overemphasize" the importance of the missing evidence.[83] This practice can be very dangerous because "[o]nce a jury hears evidence of spoliation, it may see the parties in a light that unduly prejudices its ability to fairly resolve the issues on the merits."[84]

Monetary sanctions such as attorneys' fees and costs may be imposed as a remedy to cure prejudice. This would be an appropriate curative measure where one party expends considerable time and effort pursuing a relevant source of evidence that should have been preserved, but the other party failed

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75. GENSLER, *supra* note 56.

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

77. Storey v. Effingham Cty., No. CV415-149, 2017 WL 2623775, at *5 (S.D. Ga. June 16, 2017).

78. *Id.* at n.5.

79. Shaffer v. Gaither, Case No. 5:14-cv-00106-MOC-DSC, 2016 WL 6594126, at *3 (W.D.N.C. Sept. 1, 2016).

80. *Id.*

81. Wali Muhammad v. Mathena, Case No. 7:14CV00529, 2017 WL 395225, at *3 (W.D. Va. Jan. 27, 2017).

82. *Id.*

83. Allman, *supra* note 47, at 50.

84. *Id.* at 49–50.

to properly preserve the information.[85] Courts have held it is legitimate to require the party that lost the information to pay for the other party's reasonable expenses "to remedy the financial prejudice incurred from those doomed pursuits."[86]

Such an award was made by the Southern District of New York in *CAT3 v. Black Lineage* to address "the burden and expense of ferreting out the malfeasance and seeking relief from the court."[87] Also in *GN Netcom v. Plantronics*, the District of Delaware, in addition to other sanctions, awarded attorneys' fees and costs in connection with curing the prejudice caused by the lost ESI.[88]

IV. EXPLANATION OF 37(e)(2)

The curative measures set forth in subsection (e)(2) are only available after finding the party that lost the information "acted with intent to deprive another party of the information's use in the litigation."[89] This means that the intent to destroy or alter the missing ESI is not enough to satisfy the Rule.[90] "The test is not whether the information was intentionally destroyed, but the *reason* for the destruction."[91] It also means that courts can no longer justify an inference or presumption that missing ESI was harmful to a party solely by a showing of mere negligence.[92] Alternatively, there is no requirement that the court find prejudice when there is an intent to deprive. "[T]he finding of intent . . . can support . . . an inference that the opposing party was prejudiced by the loss of information that would have favored its position."[93]

The Committee Notes explain that "[i]nformation lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have."[94] Instead, courts are now required to flush out exactly what "intent" the party had when the information

85. GENSLER, *supra* note 56.

86. *Id.*

87. CAT3 v. Black Lineage, 164 F. Supp. 3d 488, 501 (S.D.N.Y. 2016).

88. GN Netcom, Inc. v. Plantronics, Inc., No. 12-1318-LPS, 2016 WL 3792833, at *14 (D. Del. July 12, 2016).

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

90. Allman, *supra* note 67, at 14.

91. Allman, *supra* note 47, at 50 (emphasis in original).

92. *See* Allman, *supra* note 67, at 24.

93. FED. R. CIV. P. 37 advisory committee's note to 2015 amendment; Parness, *supra* note 28, at 31.

94. FED. R. CIV. P. 37 advisory committee's note to 2015 amendment.

was lost before 37(e)(2) applies. However, nothing in the Rule or the Committee Notes sheds light on the issue of intent[95] even though "[a]scertaining a party's intent is one of the most difficult determinations that a judge makes."[96]

V. PROBLEMS STILL EXIST WITH AMENDED RULE 37(e)

Now that the interpretation and implementation of amended Rule 37(e) has been explained, one can begin to understand the problems that still surround spoliation of ESI. Despite the years of debate and public comment before its implementation, there are still several problems surrounding amended Rule 37(e). One such problem surrounds the court's ability—or inability—to exercise its inherent authority or inherent powers.

Inherent powers are those "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others . . . ."[97] Federal courts enjoy inherent powers "not conferred by rule or statute, 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'"[98] This power was recognized and applied by the U.S. Supreme Court as early as 1812.[99] While courts are required to adhere to applicable statutes and rules, they may exercise their inherent power when the statutes or rules are not "up to the task."[100] Indeed, although not explicitly expressed by the Supreme Court, federal courts have routinely recognized their ability to exercise inherent powers to impose spoliation sanctions.[101] And before the 2015 amendment to 37(e), courts routinely exercised their inherent powers to sanction parties for the intentional or negligent spoliation of ESI.[102]

Despite all of this, however, it appears that in an effort to achieve nationwide standardization when applying sanctions for ESI spoliation, the

95. Charles Yablon, *Byte Marks: Making Sense of New F.R.C.P. 37(e)*, 69 FLA. L. REV. 571, 581 (2017).

96. *Id.*; Letter from Hon. James C. Francis IV to Comm. on Rules of Practice and Procedure 5 (Jan. 10, 2014), http://www.lfcj.com/uploads/3/8/0/5/38050985/frcp_usdc_southern_district_of_new_york__james_francis_1_10_14.pdf.

97. United States v. Hudson & Goodwin, 11 U.S. 32, 34 (1812).

98. Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178, 1186 (2017) (citing to Link v. Wabash R. Co., 370 U.S. 626, 630–31 (1962)).

99. *See generally* Hudson & Goodwin, 11 U.S. at 32 (holding that the federal judiciary has "certain implied powers" and "inherent authority" independent of any statutory grant from Congress); Francis IV & Mandel, *supra* note 14, at 618–19.

100. Chambers v. NASCO, Inc., 501 U.S. 32, 33 (1991).

101. Francis IV & Mandel, *supra* note 14, at 648.

102. *See* Mins., Fed. Rules Comm. Mtg., April 10–11, 2014 at 371.

Advisory Committee intended for amended Rule 37(e) to prohibit courts from exercising inherent powers when assessing spoliation sanctions. The Committee Notes to the 2015 amendment explicitly state: "It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used."[103] The Rule itself, however, is silent on the issue of inherent power.[104] Are courts mandated to stick to the four corners of amended Rule 37(e) when imposing sanctions, or are they permitted to exercise their inherent authority when the Rule does not meet the unique needs of a given case?

It is widely recognized that "'[a]n advisory committee's note is not part of the Rule itself.' Rather, '[a]n Advisory Committee note is an explanation of, or an aid to interpretation of, a procedural rule. It is somewhat similar to a legislative history not having the force of law.'"[105] As Justice Scalia explained in *Tome v. United States*: "Having been prepared by a body of experts, the [Committee] Notes are assuredly persuasive scholarly commentaries—ordinarily *the* most persuasive—concerning the meaning of the Rules. But they bear no special authoritativeness . . . ."[106] Therefore, because the Committee's apparent intent to prohibit courts from exercising their inherent power was not made explicit in the Rule itself, the limitation on a court's inherent authority is merely persuasive and not authoritative.[107] In fact, some courts continue to exercise their inherent powers when assessing spoliation sanctions while others refrain from doing so.

For instance, in *CAT3 v. Black Lineage*, the Southern District of New York interpreted the Committee Notes to only prohibit reliance on inherent powers to "dismiss a case as a sanction for merely negligent destruction of evidence."[108] That court determined that a dismissal or an adverse inference instruction are available sanctions "under either Rule 37(e) or the court's inherent authority."[109] The Northern District of Illinois also believes it is appropriate to exercise inherent powers alongside Rule 37(e). In *Cohn v. Guaranteed Rate*, the court reasoned that Rule 37(e) articulates only some of the available remedies, and the court "has broad, inherent power to impose

103. FED. R. CIV. P. 37 advisory committee's note to 2015 amendment.

104. *See generally* FED. R. CIV. P. 37(e).

105. Francis IV & Mandel, *supra* note 14, at 644.

106. *Id.* at 644–45; Tome v. United States, 513 U.S. 150, 167 (1995) (Scalia, J., concurring in part and concurring in the judgment).

107. *See* Tome, 513 U.S. at 167 (Scalia, J., concurring in part).

108. CAT3 v. Black Lineage, 164 F. Supp. 3d 488, 497 (S.D.N.Y. 2016).

109. *Id.* at 501.

sanctions for failure to produce discovery and for destruction of evidence, over and above the provisions of the Federal Rules."[110]

Alternatively, the Northern District of Florida, in *Wooden v. Barringer*, recently determined that while the court's inherent powers are available for spoliation of documents, that power may not be exercised when applied to the spoliation of ESI.[111] The court cited to the Committee Notes as its authority, holding that "Rule 37(e), therefore, significantly limits a court's discretion to impose sanctions for ESI spoliations."[112]

Also, in *GN Netcom v. Plantronics*, the District Court of Delaware imposed a $3 million punitive monetary sanction due to the bad-faith and intentional conduct of Plantronics' corporate executive in the destruction of prejudicial ESI.[113] This hefty sanction was levied in addition to the requirement that Plantronics pay GN's reasonable fees and costs incurred in connection with the lost discovery, and in addition to the jury receiving an adverse inference instruction.[114] The court determined that a $3 million sanction was a "lesser measure[]" pursuant to 37(e)(1) that may be "sufficient to redress the loss" even though there was an established "intent to deprive" that permitted sanctioning under subsection (2).[115]

Though the District Court of Delaware in *GN Netcom v. Plantronics* appears to have regarded this sanctioning method as permitted under 37(e), it is more likely the court exercised its inherent authority to craft a sanction that it felt adequately addressed the situation in the case.[116] Other courts have also relied on their inherent power to justify reimbursement of fees under similar circumstances.[117]

Another reason amended Rule 37(e) fails is because it does not cover all possible forms of spoliation. For instance, what about situations where a party attempts to destroy evidence but is unsuccessful? It would seem that amended Rule 37(e) does not apply because the information has not been "lost" as

110. Cohn v. Guaranteed Rate, Inc., 318 F.R.D. 350, 354 (N.D. Ill. 2016).

111. Wooden v. Barringer, No. 3:16-cv-446-MCR-GRJ, 2017 WL 5140518, at *3 (N.D. Fla. Nov. 6, 2017).

112. *Id.*

113. GN Netcom, Inc. v. Plantronics, Inc., Case No. 12-1318-LPS, 2016 WL 3792833, at *14 (D. Del. July 12, 2016).

114. *Id.*

115. *Id.* at *12.

116. *See* Allman, *supra* note 47, at 49.

117. *See* Richards v. Healthcare Resources Grp., Inc., No. 2:15-cv-134-RMP, 2016 WL 7494292, at *2 (E.D. Wash. Sept. 29, 2016); *see also* Friedman v. Phila. Parking Auth., No. 14-6071, 2016 WL 6247470 at *6 (E.D. Pa. Mar. 10, 2016).

required under the Rule.[118] Or what about the attempted alteration or fabrication of evidence? Fabrication, just like destruction, is a form of spoliation that is meant to disturb the fact-finding process.[119] Courts have traditionally treated fabrication and destruction of evidence alike, but fabricated evidence has not been "lost" and therefore is not addressed by amended Rule 37(e).[120] Also, what about instances where a party degrades the ESI and destroys relevant, discoverable information not contained on the face of the electronic document?[121] This is also a form of spoliation, but it is outside the purview of Rule 37(e) because the information can still be obtained in some form.[122]

Additionally, there are situations where ESI is lost due to negligence and not intent.[123] The Advisory Committee made it clear that severe sanctions are prohibited for negligent conduct.[124] Thus, limiting sanctions to circumstances involving "intent to deprive" is not a gap permitting the use of inherent authority.[125] These are all examples of situations where the Rule is not sufficient to meet the needs of the court. However, courts are apparently prohibited from exercising their inherent powers to craft an appropriate sanction for such actions.

An additional problem concerning amended Rule 37(e) is courts are permitted to impose different sanctions for the spoliation of tangible discovery versus ESI. Rule 37(e) is applicable to ESI only. Limiting Rule 37(e) to the spoliation of ESI did not come without great debate, research, and consideration among members of the bench, bar, and the academic community.[126] That debate led to a consensus that there are important quantitative and qualitative differences between tangible discovery and ESI,[127] warranting the need to treat them differently.

For instance, ESI is typically very voluminous and is often duplicated in many places.[128] If one set of ESI is lost, it is very likely to be found somewhere

118. Francis IV & Mandel, *supra* note 14, at 653; GENSLER, *supra* note 56.
119. Francis IV & Mandel, *supra* note 14, at 656.
120. *Id.* at 657.
121. *Id.* at 659.
122. *Id.* at 659–660.
123. *Id.* at 660.
124. *Id.* at 661.
125. *Id.* at 663.
126. Carroll, *supra* note 4, at 358.
127. *Id.* at 358–59.
128. Mins., Fed. Rules Comm. Mtg., April 10–11, 2014 at 374.

else.[129] This is generally not true for tangible discovery.[130] Additionally, ESI is typically deleted or altered regularly as part of system wide protocols, often without any specific action on the part of the person or entity who created the ESI in the first place.[131] Again, this is not the case with tangible forms of evidence. ESI is easier to duplicate and manipulate than paper discovery.[132] ESI also contains important metadata that paper discovery does not.[133] ESI is generated at a much faster rate than paper discovery.[134] This can make finding relevant evidence even more difficult and time consuming than the pursuit of relevant evidence amongst traditional means.

Do these differences mean ESI and paper discovery should be treated differently in terms of preservation and imposing sanctions? Should courts be stripped of their inherent authority when imposing sanctions for lost ESI but permitted to exercise inherent authority when imposing sanctions for lost tangible discovery? The Committee drafting 37(e) determined that the law of spoliation for non-ESI discovery is "well developed and long-standing, and should not be supplanted without good reason,"[135] and therefore it was appropriate to limit amended Rule 37(e) to ESI only.[136]

However, despite all of these practical distinctions, there are many reasons why ESI and non-ESI evidence should be treated the same when it comes to spoliation sanctions. The first and probably most obvious reason is the ever-changing climate of ESI. One industry expert reported that by 2020 there will be 26 billion devices connected to the internet.[137] This equates to three devices for every person on the planet.[138] The Committee itself recognized that "[s]ignificant amounts of ESI will be created and stored not only by sophisticated entities with large IT departments, but also by unsophisticated persons whose lives are recorded on their phones, tablets, eye glasses, cars, social media pages, and tools not even presently foreseen."[139] This increasingly complicated area of law cannot be adequately legislated. By the time rules are implemented, the entire landscape surrounding the purpose of

129. *Id.*
130. *Id.*
131. *Id.*
132. Carroll, *supra* note 4, at 359.
133. *Id.*
134. *Id.* at 358.
135. Mins., Fed. Rules Comm. Mtg., April 10–11, 2014 at 374.
136. *Id.*
137. *Id.* at 371.
138. *Id.*
139. *Id.*

the rule will change. Even the Committee recognized courts should have broad discretion in dealing with these challenges.[140]

Another problem is that there are many forms of evidence that teeter the line between ESI and non-ESI. For instance, courts have spent considerable time trying to determine whether Rule 37(e) applies to surveillance videos, cell phones, digital photographs, etc.[141] The Committee recognized that the line is often blurred between ESI and non-ESI evidence, but concluded that courts are "well equipped to deal with this dividing line on a case-by-case basis."[142] Making these determinations, however, takes a considerable amount of time and resources.

The case of *Best Payphones v. City of New York* is a perfect example.[143] There, the Eastern District of New York engaged in an arduous examination determining the applicable sanctions for the spoliation of tangible evidence and ESI that ultimately ended in conflicting results as to each form of evidence.[144] Alternatively, some courts simply do not apply Rule 37(e) when ESI is part of the tangible evidence, even when the court acknowledges the digital component.[145] While it is true courts may be equipped to make distinctions between the types of evidence on a case-by-case basis, the amount of time and effort to do so is intolerable and pointless when one standard can be applied equally to all forms of evidence. It also negates the Rule's ultimate purpose of streamlining the application of sanctions for the spoliation of ESI.

Another major problem concerning the amended Rule is the issue of intent. Determining a party's intent is one of the most challenging determinations a judge makes.[146] The parties most likely to be sanctioned for the spoliation of ESI are corporations and businesses.[147] However, a corporation's or business's "intent" must be inferred through the thoughts and actions of their agents, and the law surrounding this is "frequently obscure and inconsistent."[148]

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140. *Id.*

141. Allman, *supra* note 47, at 52.

142. Mins., Fed. Rules Comm. Mtg., April 10–11, 2014 at 375.

143. *See e.g.*, Best Payphones v. City of N.Y., No. 1-CV-3924, 2016 WL 792396, at *4 (E.D.N.Y. Feb. 26, 2016).

144. *Id*.

145. *See* e.g., Creighton v. City of N.Y., No. 12-CV-7454, 2017 WL 636415 (S.D.N.Y. Feb. 14, 2017).

146. Letter from Hon. James C. Francis IV to Comm. on Rules of Practice and Procedure, *supra* note 96, at 5.

147. Yablon, *supra* note 95, at 573.

148. *Id.*

Another problem surrounding amended Rule 37(e) is it does not alleviate the "over-preservation" issue that plagued many of the proponents of the new rule. When contemplating the language for the new Rule, the Committee itself recognized that its goal to reduce the costly over-preservation of potentially relevant evidence was uncertain and unlikely:[149] "We should downplay any strong justification in terms of reducing over-preservation. Now we see that our rule will not much affect that behavior, so the tradeoff in lost judicial latitude is too costly."[150]

Moreover, despite efforts to the contrary, many of the incentives for preservation remain because such duties are imposed by statutes and regulations,[151] or parties determine the evidence is necessary to help them win their case even though they may not be required to preserve it.[152] In fact, several witnesses that were originally concerned with the cost of over-preservation testified that "they would actually not do anything different if the new rule were in effect."[153]

Additionally, the Committee's belief that preservation efforts would change because of the implementation of 37(e) suggests that attorneys advise their clients based upon the severity and possibility of sanctions.[154] As explained by Magistrate Judge James Francis IV, "[t]his is a dim view of attorneys, and one for which there is no empirical evidence."[155] This assumes lawyers think like criminals and adjust their behavior solely on the ultimate penalty they may face.[156]

Despite Rule 37(e)'s goal of streamlining sanctions and eliminating jurisdictional splits, not all courts are applying the amended Rule 37(e) equally, if at all. Some courts have set out to strictly comply. For instance, in *Nuvasive, Inc. v. Madsen Medical, Inc.*, the Southern District of California vacated an adverse inference ruling just one month before trial based on the new requirements imposed by amended Rule 37(e)(2) because there was no finding that the offending party intended to deprive its adversary of the use of

149. Mins., Fed. Rules Comm. Mtg., April 10–11, 2014 at 372.

150. *Id.* at 424.

151. *Id.* at 372.

152. *Id.* at 409.

153. *Id.*

154. *See* Tadler & Kelston, *supra* note 19, at 24.

155. Letter from Hon. James C. Francis IV to Comm. on Rules of Practice and Procedure, *supra* note 96, at 4.

156. *Id.*

the lost information.[157] Courts have also held that "willful conduct"[158] and even "gross negligence"[159] are not enough to satisfy the Rule. On the other hand, over seventy opinions do not reference Rule 37(e) at all even though the facts of the case indicate the Rule should apply.[160] Courts continue to impose adverse inference jury instructions though such sanctions would not be permissible if Rule 37(e) had been applied.[161]

It appears that the main purpose of 37(e), to simplify and standardize sanctions for the spoliation of ESI, [162] has not come to fruition. Federal courts remain split as to whether they can exercise their inherent powers to better serve the individual and unique aspect of a given case. Just as ESI comes in a multitude of forms and is constantly evolving, so too are the methods available for the destruction of evidence. It is not possible to craft a rule that will meet the needs of every possible scenario related to the destruction of ESI. Therefore, courts continue to vary in their interpretation of 37(e), and to their approach in applying sanctions for the spoliation of ESI. Not all courts appreciate the requirements of amended Rule 37(e) equally, nor should they. It is precisely the unique situations where the Rule is not adequate that courts should be permitted to exercise their inherent powers.

There simply is no principled reason why the imposition of sanctions for the spoliation of evidence should hinge on the form of the evidence.[163] The two main goals the Committee wished to achieve by implementing amended Rule 37(e)—standardizing sanctions throughout the jurisdictions[164] and reducing the cost of preservation[165]—have not been realized. Expanding Rule 37(e) to include all forms of discovery would end the confusion surrounding the different forms of evidence. It would also alleviate the need to apply two

157. *See* Nuvasive, Inc. v. Madsen Med., Inc., No. 13cv2077 BTM, 2016 WL 305096, *1–3 (S.D. Cal., Jan. 26, 2016); Kevin Broughel, et al., *The New Federal Rule of Civil Procedure 37(e): What Have the First Three Months Revealed?*, PAUL HASTINGS (Mar. 2, 2016), https://www.paulhastings.com/publications-items/details/?id=89a3e869-2334-6428-811c-ff00004cbded.

158. *See* CTB, Inc. v. Hog Slat, Inc., No. 7:14-CV-157-D, 2016 WL 1244998, at *9, *12, *13 (E.D. N.C. Mar. 23, 2016) ("'Willful conduct is equivalent to conduct that is intentional, purposeful, or deliberate,' whereas bad faith requires 'destruction for the purpose of depriving the adversary of the evidence.'").

159. Applebaum v. Target Corp., 831 F.3d 740, 745 (6th Cir. 2016) ("A showing of negligence or even gross negligence will not do the trick.").

160. Thomas Y. Allman, *Amended Rule 37(e): Case Summaries* 1 (May 27, 2017), https://law.duke.edu/sites/default/files/centers/judicialstudies/judicature/2017rule37etodaycasesummaries.pdf.

161. *Id.*

162. Mins., Fed. Rules Comm. Mtg., April 10–11, 2014 at 369.

163. Allman, *supra* note 47, at 51.

164. Mins., Fed. Rules Comm. Mtg., April 10–11, 2014 at 369.

165. *Id.* at 370.

different standards for spoliation of evidence within the same dispute, often with different outcomes.[166] While this may not reduce the costs of preservation, it would help to ameliorate the unnecessary and costly expenditure of judicial resources.

VI. CONCLUSION

All in all, it appears the hotly debated and long anticipated amended Rule 37(e) is not the be all and end all to the problems surrounding ESI discovery. The new Rule was meant to alleviate the circuit split concerning the imposition of the most severe sanctions for the spoliation of ESI and help corporations reduce the costs involved with over-preservation.[167] However, amended Rule 37(e) resulted in only a pyrrhic victory.[168] There still remains differences in sanctioning, there is still over-preservation, and there is still uncertainty whether courts may exercise inherent authority in the context of imposing sanctions for ESI.

Due to the ever-changing and evolving world of technology, the amount of intensity for which ESI is created on a daily basis, and the seemingly unlimited types of electronic devices that can store important data, the discovery process for ESI will constantly be a moving target. Courts should be permitted to fluctuate and adapt, within reason, to the individual and unique characteristics that each case brings. Courts have been granted inherent powers for just these types of situations. The bright-line rule presented by amended Rule 37(e) is too restricting. It binds the hands of the justice system and restricts the courts' ability to sanction parties for a clear obstruction of justice. Instead, courts should be permitted to utilize a case-by-case analysis when deciding whether and what sanctions should be imposed for the spoliation of ESI.

Sadly, the Rule's goal of providing clear guidance to the courts in spoliation matters has only made the courts' job more difficult. In actuality, a less restrictive rule that permits the courts to exercise their discretion and inherent powers would provide the flexibility needed to adjust to this increasingly complicated area of law. Only then will the goal of a "just, speedy, and inexpensive determination of every action and proceeding" ever be achieved.[169]

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166. Allman, *supra* note 47, at 52; *see also* Best Payphones, 2016 WL 792396, at *3.

167. *See* Mins., Fed. Rules Comm. Mtg., April 10–11, 2014 at 369–70; *see also* Tadler & Kelston, *supra* note 19, at 21.

168. Yablon, *supra* note 95, at 573.

169. FED. R. CIV. P. 1.