I.B. RULE 37(e): FAILURE TO PRESERVE ESI

Introduction

During its meeting in April, 2014, the Civil Rules Advisory Committee voted unanimously to recommend adoption of a new Rule 37(e) to replace current Rule 37(e). The new rule differs from the proposed amendment published for public comment in August, 2013, but the Advisory Committee unanimously decided that republication would not be necessary to achieve adequate public comment and would not assist the work of the Advisory Committee on this subject.

The public comments on the package of Civil Rules amendments were strikingly, perhaps uniquely, comprehensive and vigorous. A total of 2,345 written comments were received and posted on Regulations.gov. Many of the comments submitted later in the process referred to or built upon comments submitted earlier. Three public hearings were held, with a total of more than 120 witnesses speaking. The rule revisions made after publication respond to the public comments.

At the end of this Report is the proposed new Rule 37(e) and the recommended Committee Note. The amendment proposal is presented as an amendment to the current rule, which seemed simpler than presenting it as a revision of the published proposal. For purposes of background, an Appendix to this memorandum presents the published amendment proposal. Also included in the agenda materials should be a summary of written comments and of the testimony on Rule 37(e) at the public hearings.

This Report introduces the issues the Advisory Committee (and its Discovery Subcommittee) have addressed during this redrafting effort, and which inform the rule proposal below.

Background

Present Rule 37(e) was adopted in 2006. The Advisory Committee recognized then that the continual expansion of electronically stored information ("ESI") might provide reasons to consider a more detailed response to problems arising from the loss of ESI. A panel at the Duke Conference in 2010 presented a unanimous recommendation that the time had come for a more detailed rule.

Two goals have inspired this work. One has been to establish greater uniformity in the ways in which federal courts respond to a loss of ESI. The courts agree unanimously that a duty to preserve ESI arises when a party reasonably anticipates litigation. But they differ significantly in the approaches taken after finding a loss of ESI that should have been preserved. A new rule that illuminates the purposes and methods of responding to the loss can do much to promote uniformity and to encourage desirable judicial responses.

The other goal has been to relieve the pressures that have led many potential litigants to engage in what they describe as massive and costly over-preservation. An accumulation of

information from many sources, including detailed examples provided in the public comments and testimony, persuasively supports the proposition that great costs are often incurred to preserve information in anticipation of litigation, including litigation that never is brought. Given the many other influences that bear on the preservation of ESI, however, it is not clear that a rule revision can provide complete relief on this front.

During the two years following the Duke Conference, the Subcommittee considered several basic approaches, including successive drafts that undertook to establish detailed preservation guidelines. These drafts started with an outline proposed by a Duke Conference panel, which called for specific rule provisions on when the duty to preserve arises, its scope and duration in advance of litigation, and the sanctions or other measures a court can take when information is lost. In the end, however, it became apparent that the range of cases in federal court is too broad and too diverse to permit such specific guidelines. The Subcommittee chose instead to pursue a different approach that addresses court actions in response to a failure to preserve information that should have been preserved in the anticipation or conduct of litigation.

Under this approach, as with present Rule 37(e), the proposed Rule 37(e) does not itself create a duty to preserve. The new rule takes the duty as it is established by case law. Cases uniformly hold that a duty to preserve information arises when litigation is reasonably anticipated. Although some comments urged that the rule should eliminate any duty to preserve before an action is actually filed, the Advisory Committee continues to believe that a rule so limited would result in the loss or destruction of much information needed for litigation. The Committee Note, responding to concerns expressed in the comments, also makes clear that this rule does not affect any common-law tort remedy for spoliation that may be established by state law.

The Published Rule 37(e) Proposal

The published rule proposal is in the Appendix. It included a number of features that were modified after the public comment period. It relied on a distinction between curative measures and sanctions, invoking Rule 37(b)(2)(A) as a source for the latter. The published proposal provided that a court could take steps to cure the loss of information such as permitting additional discovery, ordering curative measures, or ordering the party that lost the information to pay the reasonable expenses, including attorney's fees, caused by the loss. It provided that a court generally could not impose sanctions unless it found that the loss of information caused substantial prejudice and was willful or in bad faith. But it also provided that sanctions would be permissible without that finding of culpability in the rare case in which the loss "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation." The proposed rule also included a list of factors to be applied in determining whether a party failed to retain information it should have retained in anticipation of litigation, and whether its failure was willful or in bad faith.

The invitation for comment included five questions: (1) whether the rule should be limited to ESI; (2) whether the rule should allow sanctions when the loss "irreparably deprived a party of

any meaningful opportunity to present or defend against the claims in the litigation"; (3) whether present Rule 37(e) should be retained; (4) whether the phrase "substantial prejudice" as used in the rule proposal should be defined; and (5) whether the term "willful" should be defined.

As a review of the summary of comments shows, there was a great deal of comment about the language in the published proposal and these five questions. In particular, both the "willful" and "bad faith" standards for sanctions were questioned by many who commented. Many also argued that the "irreparably deprived" provision might "swallow the rule" by permitting judges to circumvent the culpability requirements for sanctions. Other comments stressed that the "substantial prejudice" standard for cases in which actions were proven to be "willful or in bad faith" was too demanding, and that those culpability requirements would be too difficult to satisfy in many cases.

Modifications Based on Public Comments

The Advisory Committee's Discovery Subcommittee began deliberating on appropriate reactions to the public comments with a half day meeting in Dallas immediately after the third public hearing. The Subcommittee held six conference calls after that meeting, carefully examining the issues raised by the public comments. Many of the public comments reinforced conclusions previously reached by the Subcommittee, while others provided valuable new insights. Some of the general conclusions will be addressed here, with more specific explanations provided in the discussion of specific rule recommendations.

The Advisory Committee remains firmly convinced that a rule addressing the loss of ESI in civil litigation is greatly needed. The explosion of ESI in recent years has affected all aspects of civil litigation; the preservation of ESI is a major issue confronting parties and courts; and the loss of ESI has produced a bewildering array of court cases.

Loss of electronically stored information has produced a significant split in the circuits. Some circuits, like the Second, hold that adverse inference jury instructions (viewed by most as a serious sanction) can be imposed for the negligent or grossly negligent loss of ESI. Other circuits, like the Tenth, require a showing of bad faith before adverse inference instructions can be given. The public comments credibly demonstrate that persons and entities over-preserve ESI out of fear that some might be lost, their actions with hindsight might be viewed as negligent, and they might be sued in a circuit that permits adverse inference instructions or other serious sanctions on the basis of negligence. Resolving this circuit split with a more uniform approach to lost ESI remains a primary objective of the Advisory Committee. The Advisory Committee is satisfied that the new proposed rule will resolve the circuit split.

At the same time, the public comments made the Advisory Committee more sensitive to the need to preserve a broad range of trial court discretion for dealing with lost ESI. Among other steps after its Dallas meeting, the Discovery Subcommittee took an intensive look at cases addressing the loss of information relevant to litigation. The public comments and this analysis highlighted the

wide variety of situations faced by trial courts and litigants when information is lost, and strongly underscored the need to preserve broad trial court discretion in fashioning curative remedies. The revised rule proposal therefore retains such discretion.

The public comments also made clear that the explosion of ESI will continue and even accelerate. One industry expert reported to the Advisory Committee that there will be some 26 billion devices on the Internet in six years — more than three for every person on earth. Significant 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. Most of this information will be stored somewhere in the "cloud," complicating the preservation task. In other words, the litigation challenges created by ESI and its loss will increase, not decrease, and will affect unsophisticated as well as sophisticated litigants. The need for broad trial court discretion in dealing with these challenges will likewise increase. The Advisory Committee accordingly concluded that the published proposal's approach of limiting virtually all forms of "sanctions" to a showing of both substantial prejudice and willfulness or bad faith was too restrictive.

The value of preserving judicial flexibility was reinforced by a related conclusion. One reason for significantly limiting sanctions was to reduce the costly over-preservation that had been emphasized by many; the hope was that reducing the risk of sanctions would correspondingly reduce the incentives for over-preservation. The Advisory Committee continues to believe that this is a worthwhile goal, but has realized that the savings to be achieved from reducing over-preservation are quite uncertain. Many who commented noted their high costs of preservation, but none was able to provide any precise prediction of the amount that would be saved by reducing the fear of sanctions. And many incentives for significant preservation will remain — the need for the information in everyday business operations, preservation obligations imposed by statutes and regulations rather than the prospect of litigation, and the desire to preserve information that could be helpful in litigation. So the potential savings from reducing over-preservation, although still worth pursuing, are too uncertain to justify seriously limiting trial court discretion.

The Advisory Committee also concluded that any reference in the new rule to "sanctions," or to Rule 37(b)(2)(A) as a source of sanctions, should be deleted. The Advisory Committee concluded that allowing curative measures was clearly appropriate for the loss of ESI, and found that drafting a rule became quite complicated if it sought to distinguish between curative measures and sanctions. Another concern was that the sanctions listed in Rule 37(b)(2)(A) are justifiably called sanctions because they result from disobeying a court order, whereas the same measures in other settings might rightly be viewed as curative. Some of the (b)(2)(A) sanctions, further, seem inapposite to failure to preserve information in the absence of a court order — for example, (iv) "staying further proceedings until the order is obeyed" and (vii) contempt.

Further questions were raised during the public comment period about the references in the published draft to "substantial prejudice" and "willful or in bad faith." Many comments urged that

further definitions should be adopted. Particularly forceful concerns were raised about the use of the word "willful." Depending on the context, "willful" has been defined by courts in many different ways. Under some definitions, willfulness could be found from an act intentionally done even though there was no thought about the effect on information that should be preserved for anticipated or pending litigation. A party, for example, might "willfully" trade in a smart phone without any thought about preserving the information stored in it. Nor did "bad faith" entirely escape criticism.

The published provision that allowed sanctions when the loss of information "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation" drew particular criticism. Many expressed concern that it risked undoing the attempt to limit "sanctions" to circumstances of substantial prejudice and either willfulness or bad faith. "[I]rreparably deprived" and "any meaningful opportunity to present or defend against the claims in the litigation" were said to lie in the eye of the beholder. A judge who is not prepared to find willfulness or bad faith might seize on these phrases to justify sanctions in circumstances not covered by what was intended to be a very narrow exception to the requirements of substantial prejudice and willfulness or bad faith.

Although the Rule 37(e) proposal authorizes a wider range of measures to cure demonstrated prejudice, it carefully cabins use of several very severe measures — presuming that the lost information was unfavorable to the party that lost it, giving the jury an instruction that it may or must presume that the information was unfavorable, dismissing the action, or entering a default judgment. These measures may be used only on a finding that the party lost the information with the intent to deprive another party of its use in the litigation. As specified in the revised Committee Note, the rule rejects the view of such cases as *Residential Funding Corp. v. DeGeorge Financial Corp*., 306 F.3d 99 (2d Cir. 2002), that would permit adverse-inference instructions on the basis of negligence or gross negligence.

Finally, after much discussion, the Advisory Committee concluded that the list of "factors" specified in Rule 37(b)(2) of the published proposal was unnecessary and might cause confusion. Accordingly those rule provisions were removed, but Committee Note language retains a discussion of how several of those considerations might affect the application of the revised rule.

The Rule in Detail

Limiting the Rule to ESI

The Advisory Committee recommends that the rule be limited to ESI. That is the subject that launched this venture in the first place, and it clearly is the subject which most requires uniform guidance. Review of numerous cases led to the conclusion that the law of spoliation for non-ESI is well developed and long-standing, and should not be supplanted without good reason. There was little complaint about this body of law as applied to information other than ESI, and the Advisory

Committee concluded that this law should be left undisturbed by a new rule designed to address the unprecedented challenges presented by ESI.

The Advisory Committee recognizes that its decision to confine Rule 37(e) to ESI could be debated. Some contend that there is no principled basis for distinguishing ESI from other forms of evidence, such as hard-copy documents, at least in terms of the approaches set out in Rule 37(e). But repeated efforts have shown that it is very difficult to craft a rule that deals with failure to preserve tangible things. The classic case is *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001), which upheld dismissal of the action after the plaintiff failed to preserve the allegedly defective airbag. The published proposal — which was not limited to ESI — sought to accommodate such cases by allowing "sanctions" if a party's actions in failing to preserve information "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation." As already noted, this provision drew many comments suggesting that it opened the door to avoiding the limits otherwise imposed on "sanctions." Limiting the new rule to ESI avoids this complication.

In addition, there are some pertinent practical distinctions between ESI and other kinds of evidence. ESI is created in volumes previously unheard of and often is duplicated in many places. The potential consequences of its loss in one location often will be less severe than the consequences of the loss of tangible evidence. ESI also is deleted or modified on a regular basis, frequently with no conscious action on the part of the person or entity that created it. These practical distinctions, the difficulty of writing a rule that covers all forms of evidence, and an appropriate respect for the spoliation law that has developed over centuries to deal with the loss of tangible evidence, all persuaded the Advisory Committee that the new Rule 37(e), like the present Rule 37(e), should be limited to ESI.

The Advisory Committee recognizes that the dividing line between ESI and other evidence may in some instances be unclear. But it concludes that courts are well equipped to deal with this dividing line on a case-by-case basis, and that the reasons for limiting the rule to ESI outweigh the potential complication presented by this issue.

Reasonable steps to preserve

The revised rule applies if ESI "that should have been preserved in the anticipation or conduct of litigation of litigation is lost because a party failed to take reasonable steps to preserve it." The rule calls for reasonable steps, not perfection, in preserving ESI, and is thus consistent with other rules on related subjects. For example, Fed. R. Evid. 502(b)(2), dealing with inadvertent disclosure of material that is privileged or work-product material, focuses on whether "the holder of the privilege or protection took reasonable steps to prevent disclosure," and Rule 502(b)(3) asks whether the privilege holder "promptly took reasonable steps to rectify the error."

Revised Rule 37(e) adopts the same approach to preservation for use in litigation. As

explained in the Committee Note, determining the reasonableness of the steps taken includes consideration of party resources and the proportionality of the efforts to preserve. The Note also recognizes that the party's sophistication with regard to litigation may bear on whether it should have realized what should be preserved.

Restoration or replacement of Lost ESI

If reasonable steps were not taken, and information was lost as a result, the rule directs that the next focus should be on whether the lost information can be restored or replaced through additional discovery. As the Committee Note explains, nothing in this rule limits the court's powers under Rules 16 and 26 to order discovery to achieve this purpose. In particular, discovery regarding sources of ESI that might otherwise be regarded as inaccessible or allocation of expenses might be important. At the same time, however, the quest for lost information should take account of whether the lost information likely is only marginally relevant or duplicative of other information that remains available.

(e)(1)

Proposed Rule 37(e)(1) provides that the court may:

> upon finding prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice.

This proposal preserves broad trial court discretion to cure prejudice caused by the loss of ESI that cannot be remedied by restoration or replacement of the lost information. Unlike the published preliminary draft, it adds a limit urged by many of the comments – that the measures be no greater than necessary to cure the prejudice. As the Note also makes clear, a court is not required to exhaust all possibilities of curing prejudice.

Proposed (e)(1) says that the court must find prejudice to order corrective measures, but it does not say which party bears the burden of proving prejudice. Many comments raised concerns about assigning such burdens, noting that it is often difficult for a party to prove it was prejudiced by the loss of information it has never seen. Under the proposed rule, each party is responsible for providing such information and argument as it can; the court may draw on its experience in addressing this or similar issues, and may ask one or another party, or all parties, for further information.

This proposed rule departs from the published proposal's approach of limiting all "sanctions" under Rule 37(b)(2)(A) to a showing of substantial prejudice and bad faith. It preserves the trial court's ability to use some measures included in Rule 37(b)(2)(A) to cure prejudice. For example, in cases of serious prejudice, a court may preclude a party from presenting evidence or deem some facts as having been established. *See* Rule 37(b)(2)(A)(i); (ii). The proposed rule does not attempt

to draw fine distinctions as to the measures a trial court may use to cure prejudice under (e)(1), but instead limits those measures in three more general ways — measures under (e)(1) require a finding of prejudice, the measures must be no greater than necessary to cure the prejudice, and the court may not impose the severe measures limited by (e)(2) unless it makes a finding that the party acted with the intent to deprive another party of the information's use in the litigation. Finally, because (e)(1) measures are not "sanctions," there should be no concerns about whether they raise professional responsibility issues.

(e)(2)

Proposed (e)(2) provides that the court may:

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation:

(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.

A primary purpose of this provision is to eliminate the circuit split on when a court may give an adverse inference jury instruction for the loss of ESI. As noted above, some circuits permit such instructions upon a showing of negligence or gross negligence, while others require a showing of bad faith. Subdivision (e)(2) resolves the circuit split by permitting adverse inference instructions only on a finding that the party "acted with the intent to deprive another party of the information's use in the litigation." This intent requirement is akin to bad faith, but is defined even more precisely. The Advisory Committee views this definition as consistent with the historical rationale for adverse inference instructions.

The Advisory Committee's Discovery Subcommittee carefully analyzed the existing cases on the use of adverse inference instructions. Such instructions historically have been based on a logical conclusion — when a party destroys evidence for the purpose of preventing another party from using it in litigation, one reasonably can infer that the evidence was unfavorable to the destroying party. Why else would the party have destroyed it? Some courts hold to this traditional rationale and limit adverse inference instructions to instances of bad faith loss of the information. *See, e.g., Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) ("The adverse inference must be predicated on the bad faith of the party destroying the records. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.")(citations omitted).

Circuits that permit adverse inference instructions on a showing of negligence or gross negligence adopt a different rationale — that the adverse inference restores the evidentiary balance, and that the party that lost the information should bear the risk that it was unfavorable. *See, e.g.*, *Residential Funding Corp. v. DeGeorge Finan. Corp.*, 306 F.3d 99 (2d Cir. 2002). Although this approach has some logical appeal, the Advisory Committee has several concerns with this approach when applied to ESI. First, negligently lost information may have been favorable or unfavorable to the party that lost it. Consequently, an adverse inference may do far more than restore the evidentiary balance; it may tip the balance in ways the lost evidence never would have. Second, in a world where ESI is more easily lost than tangible evidence, particularly by unsophisticated parties, the sanction of an adverse inference instruction imposes a heavy penalty for losses that are likely to become increasingly frequent as ESI multiplies exponentially and moves to the "cloud." Third, permitting an adverse inference for negligence creates powerful incentives to over-preserve, often at great cost. Fourth, the ubiquitous nature of ESI and the fact that it often may be found in many locations presents less risk of severe prejudice from negligent loss than may be present due to the loss of tangible things or hard-copy documents.

These reasons have caused the Advisory Committee to conclude that the circuit split, at least with respect to ESI, should be resolved in favor of the traditional reasons for an adverse inference. ESI-related adverse inferences drawn by courts when ruling on pretrial motions or ruling in bench trials, and adverse inference jury instructions, should be limited to cases where the party who lost the ESI did so with an intent to deprive the opposing party of its use in the litigation. Subdivision (e)(2) extends the logic of the mandatory adverse-inference instruction to the even more severe measures of dismissal or default. The Advisory Committee thought it anomalous to allow dismissal or default in circumstances that do not justify the instruction.

A difficult drafting issue presented by (e)(2) arises from the multiplicity of instructions that may be available to guide a jury's consideration of a failure to preserve ESI. Subdivision (e)(2) covers any instruction that directs or permits the jury to infer from the loss of information that the information was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial. These issues are examined in the Committee Note.

Subdivision (e)(2) does not include an express requirement that the court find prejudice to the party deprived of the information. This is because the adverse inference permitted under this section can itself satisfy the prejudice requirement: if a court or jury infers the lost information was

unfavorable to the party that lost it, the same inference suggests that the opposing party was prejudiced by the loss. An express prejudice requirement is also omitted because there may be rare cases where a court concludes that a party's conduct is so reprehensible that serious measures should be imposed even in the absence of prejudice. In such rare cases, however, the court must still find the intent specified in subdivision (e)(2).

Factors in published Rule 37(e)(2)

The published proposal included a list of factors that it said the court should employ in determining whether a party should have retained information and whether it lost the information willfully or in bad faith. Proposed Rule 37(e)(2) was as follows:

> (2) *Factors to be considered in assessing a party's conduct.* The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith. The factors include:
>
> (A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;
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> (B) the reasonableness of the party's efforts to preserve the information;
>
> (C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation;
>
> (D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and
>
> (E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

This list of factors received much attention during the public comment period. Some saw the factors as providing useful guidance to parties trying to determine what to preserve, and to courts presented with motions under the rule. But many others raised substantial concerns about whether the list was incomplete and possibly misleading. Some factors received particular criticism. Factor (C), for example, raised concerns about whether some courts might read it as requiring compliance with even extremely unreasonable demands to preserve. Factor (E) was criticized on the ground that it offered no help to a party faced with a preservation decision before suit was filed, and also on the ground that it might promote motion practice once a case has commenced.

The arguments against lists of factors are familiar. The list may be mistaken as exclusive,

or the list may become a routine set of items to be checked off, approached without sufficient care. Or the enumerated factors themselves may be less important than other factors omitted from the examples, either when the rule is adopted or as the world changes — and changes in the world of ESI are notoriously rapid. Or a wisely chosen list of factors may be expressed poorly. Or confusion may arise from the proper use of factors that bear differently on different determinations. The reasonableness of efforts to preserve information, for example, may have scant bearing in determining whether the loss caused prejudice — at most, there is a common element in the apparent importance of the information. For reasons like these it is common experience to begin with rule drafts that list factors, then to demote the factors to discussion in a Committee Note, and perhaps to take the final step of expunging all references to suggested factors for decision.

The eventual decision of the Advisory Committee was to remove the factors from the rule. Substantial portions of the Committee Note discussion of the factors have been retained, particularly as they bear on the question whether information should have been retained, and whether reasonable steps to preserve were taken.

Acts of God

The published version attempted to address a concern raised by the Standing Committee — whether the rule would permit sanctions to be imposed for events outside the party's control. The example given was the destruction of a hospital's computer records by flooding from SuperStorm Sandy. The published draft met this problem by providing for "sanctions" only if "the party's actions" caused the loss.

The same protection exists in the current recommendation. The revised rule authorizes the specified measures only when a party fails to "take reasonable steps to preserve" information that should be preserved in anticipation of litigation. As the Committee Note observes generally, such reasonable steps need not lead to perfect preservation. More specifically, the Note also acknowledges that a party cannot be held responsible for loss of information that occurs despite such steps. If the information is not in the party's control, or other events beyond its control — such as a flood, failure of a "cloud" service, or a malign software attack — cause the loss of information, the rule does not authorize measures under either Rule 37(e)(1) or (e)(2).

Replacing Present Rule 37(e)

The published preliminary draft called for replacing present Rule 37(e) with the new rule. The invitation for public comment included the question whether the present rule should be preserved. There were some comments that favored retaining some of the present rule, but the great majority saw no need for retaining the current rule once the new rule is adopted. The Advisory Committee recommends replacing the current rule with the new rule.

The Advisory Committee concluded that retaining the present rule would cause confusion

in light of the new rule's text. For example, the present rule refers to "sanctions," while the new rule does not. The present rule talks in terms of "good faith," while the existing rule focuses on reasonable steps, prejudice, and the specific intent required in (e)(2). The present rule was designed to leave inherent power available for the loss of ESI, while the new rule displaces inherent power. The present rule includes a potentially open-ended exclusion of cases involving "exceptional circumstances," while the new rule does not. In light of these potential sources of confusion, and because the Advisory Committee believes that the proposed rule provides even more protection for parties who act reasonably than does the present rule, the Advisory Committee concluded that present Rule 37(e) should be replaced. Borrowing the language of the present rule, the Committee Note does state that the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information.

Conclusion and Gap Report

The public comment period was very helpful in presenting issues regarding Rule 37(e). The Discovery Subcommittee carefully considered the public comments during a series of meetings and conference calls that produced the proposed rule. The Advisory Committee is confident that the proposed rule strikes the right balance on this important subject. Public comments also confirmed that rulemaking in this area is genuinely needed. For the guidance of the Standing Committee, the Gap Report regarding changes since publication is presented below.

Gap Report

The revised rule is a modification of the published draft in several ways: (1) It applies only to electronically stored information; (2) It removes the provision in the published draft that authorized "sanctions" against a party that lacked the culpable state of mind called for in the rule if the loss of information caused "irreparable prejudice" to another party's ability to litigate; (3) It does not speak in terms of "sanctions" and no longer invokes the list of sanctions contained in Rule 37(b)(2)(A); (4) It places primary emphasis on measures to restore or replace lost electronically stored information; (5) On finding prejudice to a party due to loss of the information, it authorizes the court to order measures "no greater than necessary" to cure the prejudice; (6) It does not use the culpability standard "willful or bad faith", substituting the standard that the party "acted with the intent to deprive another party of the information's use in the litigation"; (7) Only when that culpability standard is met, it authorizes the court to presume that the lost information was unfavorable to the party that lost it, to instruct the jury it may so infer from the loss of the information, or to dismiss the action or enter a default judgment; (8) It no longer includes in the rule a list of factors for the court's consideration in applying the rule. Recognizing that these changes are substantial, the Civil Rules Advisory Committee unanimously decided that republication would not be necessary to achieve adequate public comment and would not assist the work of the rules committees.

PROPOSED RULE 37(e)

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

* * *

(e) Failure to Preserve ~~Provide~~ 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.~~ 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 may:

(1) upon finding prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation:

(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.

Committee Note

Present Rule 37(e), adopted in 2006, provides: "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." This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.

New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to

determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim.

The new rule applies only to electronically stored information, also the focus of the 2006 rule. It applies only when such information is lost. Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.

The new rule applies only if the lost information should have been preserved in the anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it. Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises.

In applying the rule, a court may need to decide whether and when a duty to preserve arose. Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant. A variety of events may alert a party to the prospect of litigation. Often these events provide only limited information about that prospective litigation, however, so that the scope of information that should be preserved may remain uncertain. It is important not to be blinded to this reality by hindsight arising from familiarity with an action as it is actually filed.

Although the rule focuses on the common-law obligation to preserve in the anticipation or conduct of litigation, courts may sometimes consider whether there was an independent requirement that the lost information be preserved. Such requirements arise from many sources — statutes, administrative regulations, an order in another case, or a party's own information-retention protocols. The court should be sensitive, however, to the fact that such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation. The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and the fact that the party failed to observe some other preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case.

The duty to preserve may in some instances be triggered or clarified by a court order in the case. Preservation orders may become more common, in part because Rules 16(b)(3)(B)(iii) and 26(f)(3)(C) are amended to encourage discovery plans and orders that address preservation. Once litigation has commenced, if the parties cannot reach agreement about preservation issues, promptly seeking judicial guidance about the extent of reasonable preservation may be important.

The rule applies only if the information was lost because the party failed to take reasonable steps to preserve the information. Due to the ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving

all relevant electronically stored information is often impossible. As under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information, although the prospect of litigation may call for reasonable steps to preserve information by intervening in that routine operation. This rule recognizes that "reasonable steps" to preserve suffice; it does not call for perfection. The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation.

Because the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve. For example, the 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. Courts may, however, need to assess the extent to which a party knew of and protected against such risks.

Another factor in evaluating the reasonableness of preservation efforts is proportionality. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data — including social media — to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

When a party fails to take reasonable steps to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation, and the information is lost as a result, Rule 37(e) directs that the initial focus should be on whether the lost information can be restored or replaced through additional discovery. Nothing in the rule limits the court's powers under Rules 16 and 26 to authorize additional discovery. Orders under Rule 26(b)(2)(B) regarding discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B) on allocation of expenses may be pertinent to solving such problems. If the information is restored or replaced, no further measures should be taken. At the same time, it is important to emphasize that efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information to claims or defenses in the litigation. For example, substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.

Subdivision (e)(1). This subdivision applies only if information should have been preserved in the anticipation or conduct of litigation, a party failed to take reasonable steps to preserve the

information, information was lost as a result, and the information could not be restored or replaced by additional discovery. In addition, a court may resort to (e)(1) measures only "upon finding prejudice to another party from loss of the information." An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation.

The rule does not place a burden of proving or disproving prejudice on one party or the other. Determining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be unfair. In other situations, however, the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be reasonable in such situations. The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.

Once a finding of prejudice is made, the court is authorized to employ measures "no greater than necessary to cure the prejudice." The range of such measures is quite broad if they are necessary for this purpose. There is no all-purpose hierarchy of the severity of various measures; the severity of given measures must be calibrated in terms of their effect on the particular case. But authority to order measures no greater than necessary to cure prejudice does not require the court to adopt measures to cure every possible prejudicial effect. Much is entrusted to the court's discretion.

In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as 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 of such evidence or argument, other than instructions to which subdivision (e)(2) applies. Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation. An example of an inappropriate (e)(1) measure might be an order striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case. On the other hand, 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.

Subdivision (e)(2). This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the information acted with the intent to deprive another party of the information's use in the litigation. It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or

gross negligence.

Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information 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. The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.

Similar reasons apply to limiting the court's authority to presume or infer that the lost information was unfavorable to the party who lost it when ruling on a pretrial motion or presiding at a bench trial. Subdivision (e)(2) limits the ability of courts to draw adverse inferences based on the loss of information in these circumstances, permitting them only when a court finds that the information was lost with the intent to prevent its use in litigation.

Subdivision (e)(2) applies to jury instructions that permit or require the jury to presume or infer that lost information was unfavorable to the party that lost it. Thus, it covers any instruction that directs or permits the jury to infer from the loss of information that it was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial.

Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.

Courts should exercise caution in using the measures specified in (e)(2). Finding an intent

to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.

Subdivision (e)(2) does not include an express requirement that the court find prejudice to the party deprived of the information. The adverse inference permitted under this subdivision can itself satisfy the prejudice requirement: if a court or jury infers the lost information was unfavorable to the party that lost it, the same inference suggests that the opposing party was prejudiced by the loss. In addition, there may be rare cases where a court concludes that a party's conduct is so reprehensible that serious measures should be imposed even in the absence of prejudice. In such rare cases, however, the court must still find the intent specified in subdivision (e)(2).