RULE 37(E): THE END OF DISCOVERY OR THE BEGINNING OF JUSTICE?

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I. INTRODUCTION

Federal Rule of Civil Procedure 37(e)[1], passed in 2006, presently provides for safe harbor when inadvertent, good-faith mistakes are made in the discovery process. There is a proposed change to this safe-harbor rule that would not allow sanctions against a party unless the conduct was willful and the seeking party can prove the information is both relevant and is the essence of their case. Will these proposed 2015 amendments to Rule 37(e) end the discovery process as we know it and take the civil process back to pre-1938 chaotic legal practices? Or will this change ensure justice and allow cases to be heard on their merits and be decided on compliance issues? This paper examines the two opposing views on sanctions, the proposed new rule, and suggests recommendations concerning electronic discovery.

With the emergence of electronically stored information (ESI) in the past decade, litigants, companies and courts have been part of a learning process to determine how much data to retain, how much data to request, how to retrieve the data and the best methods for all these processes. Best practices in electronic discovery have emerged over the past 10 years, which include litigation holds,[2] early case assessments,[3] meet-and-confers,[4]

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[1] The original safe harbor provision was numbered 37 (f) but with other changes became 37 (e). It will be referred to as 37(e) in this paper.

[2] A legal hold is an affirmative act by an organization to prevent the destruction of documents, including physical documents such as paper, as well as electronically stored information (commonly referred to as ESI) relevant to a lawsuit. The Sedona Conference® Commentary on Legal Holds, (August 2007 Public Comment Version). In *Pension Committee* the court held that "the failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information." Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010). "[O]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' [also known as a legal hold] to ensure the preservation of relevant documents." Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

proportionality,[5] transparency,[6] and technology-assisted reviews for retrieval.[7]

Further, there have been progressions of cases, conferences and organizations to establish best practices and rules that allow smooth and effective discovery process. In 2003, Sedona Working Group 1 was developed to set best practices for ESI and e-discovery. This working group has approximately 42 publications on various aspects of e-discovery dating from 2003 to 2013 and has yearly conferences on various aspects of the subject matter.[8] In addition, during the past decade there has been incredible progress made in the development of software to aid the parties in searching and retrieving electronically stored data. The software has gone from

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[3] An industry-specific term generally used to describe a variety of tools or methods for investigating and quickly learning about a Document Collection for the purposes of estimating the risk(s) and cost(s) of pursuing a particular legal course of action. The definition is from *The Grossman-Cormack Glossary of Technology-Assisted Review with a forward by John M. Facciola*, 7 FED. COURTS LAW REVIEW 14 (2013).

[4] Federal Rule of Civil Procedure 26 requires parties to litigation to meet and confer and exchange information. The parties must meet to discuss these issues no later than 21 days before a Rule 16(b) scheduling order is due or scheduling conference is to be held, unless the court orders otherwise or the matter involves a proceeding exempted from initial disclosure (Fed. R. Civ. P. 26(f)). It must contain preservation methods and a discovery plan.

[5] Pursuant to Federal Rules of Civil Procedure 26(b)(2)(B), 26(b)(2)(C), 26(g)(1)(B)(iii), and other federal and state procedural rules, the legal doctrine that Electronically Stored Information may be withheld from production if the cost and burden of producing it exceeds its potential value to the resolution of the matter. Proportionality has been interpreted in the case law to apply to preservation as well as production. Definition by Maura R. Grossman & Gordon V. Cormack, *The Grossman-Cormack Glossary of Technology-Assisted Review with a forward by John M. Facciola*, 7 FED. COURTS LAW REVIEW 1, 26-27 (2013).

[6] Transparency is the concept in TAR that allows all steps to be understandable and revealed to all parties. In Judge James Peck in the case Da Silva Moore v. Publicis Groupe; No. 11 Civ. 1279 (ALC) (AJP), 2012 U.S. Dist. LEXIS 23350 (S.D.N.Y. 2012). There was concern than the procedure left the Plaintiffs, the Defendants and the Court will never know whether the Defendants' predictive coding process met any acceptable standard for the production of documents responsive to Plaintiffs' document requests because the process was not transparent.

[7] Technology-Assisted Review (TAR): A process for prioritizing or coding a collection of documents using a computerized system that harnesses human judgments of one or more subject matter expert(s) on a smaller set of documents and then extrapolates those judgments to the remaining document collection. Some TAR methods use machine learning algorithms to distinguish relevant from non-relevant documents, based on training examples coded as relevant or non-relevant by the subject matter experts(s), while other TAR methods derive systematic rules that emulate the expert(s)' decision-making process. TAR processes generally incorporate statistical models and/or sampling techniques to guide the process and to measure overall system effectiveness. Definition Grossman-Cormack Supra note 4, at 32.

[8] Sedona Working Group I, Sedona Conference (2002) available at www.thesedonaconference.org. This Sedona working group has a yearly meeting serving as a think tank for the legal, technical and business community.

keyword searching to more sophisticated Technology Assisted Research (TAR) that uses artificial intelligence. [9]

Even with the emergence of best practices, failure to secure and to produce electronically stored information (ESI) can be an issue in litigation. To protect litigants who act in good faith the 2006 amended Rules included a safe harbor provision.[10] The purpose of the safe harbor provision in Rule 37(e) was to make sure parties were not sanctioned for mistakes and mere negligence in the storage and retrieval of ESI.[11] The present Rule 37(e) reads as follows:

> (e) 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. [12]

This Rule was meant to protect litigants who negligently deleted electronically stored information. The Rule gave the court great leeway in determining whether the actions were in good faith and routine versus willful or gross negligence. If the court did not find that the safe harbor provisions of 37(e) applied, they could impose sanctions. Sanctions can vary from fines, attorney fees, costs, adverse inference instructions, to outright dismissal of the case.[13] The purpose behind the current Rule 37(e) is to distinguish between inadvertent mistakes and outright obstruction. [14]

II. BEST PRACTICES AND THE PROPOSED AMENDMENTS

Best practices developed over the last decade dictated that parties should institute and maintain a litigation hold when they knew or should have

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[9] The first federal case in which TAR was accepted as a search method was: Da Silva Moore v. Publicis Groupe, Case No. 11 Civ. 1279 (ALC) (AJP), 2012 WL 607412 (S.D.N.Y. 2012), *aff'd*, 2012 WL 1446534 (S.D.N.Y. 2012). Judge Peck found in this case that the use of TAR was appropriate for the following reasons :(1) the parties' agreement, (2) the vast amount of ESI to be reviewed, (3) the superiority of computer-assisted review to the available alternatives (i.e., linear manual review or keyword searches), (4) the need for cost effectiveness and proportionality under Rule 26(b)(2)(C) and (5) the transparent process proposed by [defendants].

[10] Originally the safe harbor provision was 37(f) but when the Rules were revised they became 37(e). In this paper it will be referred to as 37(e).

[11] Thomas Y. Allman, *Rule 37(f) Meets Its critics: the Justification for a limited Preservation Safe Harbor for ESI*, 5 NW. J TECH & INTELL. PROPER. 1, 3 (2006).

[12] Fed. R. Civ. P. 36 (e).

[13] Fed. R. Civ. P. 26(g), 30(d), and 37.

[14] Fed. R. Civ. P. 37 (f).

known litigation was imminent.[15] The purpose of the litigation hold was to protect potentially relevant data from being destroyed. The idea behind the safe harbor rule was to allow parties assurance that they could implement and rely on their policies that provided for the routine and frequent destruction of electronic evidence and still be protected from civil sanctions when they were unable to produce relevant electronic evidence through mere negligence.

In one case the court found that it was not enough to show that the opposing party deleted evidence but that "Plaintiff must be able to point to something for which the court can conclude not just that general duties were violated, but that *specific* duties to preserve were violated in *bad faith*."[16] In another similar case, the court agreed that defendant's failure to locate certain emails was a breach of the duty to preserve and constituted spoliation, no sanctions were imposed absent evidence of bad faith.[17] Yet in another case plaintiff sought sanctions for defendants' allegedly intentional spoliation of evidence, but defendants' spoliation was merely negligent. Thus, absent a showing of actual prejudice, the Magistrate Judge recommended that plaintiff's motion be denied.[18]

Even before the 2006 amendments were passed, courts attempted to set best practices in civil litigation that included litigation holds of ESI. The landmark case is the series of motions in the *Zubulake v. Warburg* case decided between the years of 2003 and 2005 in the United States District Court for the Southern District of New York. Judge Shira Scheindlin made the decisions in this case.[19] The case began as a gender discrimination and retaliation case but is best known for Judge Scheindlin's rulings on ESI and the parties' responsibilities to retain and retrieve ESI. The *Zubulake* rulings became the guideline on ESI throughout the United States and throughout the common law countries even after the Federal Rules of Civil Procedures were amended in 2006. The discovery rules amended in 2006 included ESI but departed from the *Zubulake* case by adding the safe harbor provision.[20]

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[15] Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212 (S.D.N.Y. 2003).

[16] Sokn v. Fieldcrest Cmty. Unit School Dist. No. 8, No. 10-cv-1122, 2014 WL 201534 (C.D. Ill. 2014).

[17] Puerto Rico Tel. Co., Inc. v. San Juan Cable, LLC, No. 11-2135 (GAG/BJM), 2013 WL 5533711 (D.P.R. 2013).

[18] Herrmann v. Rain Link, Inc., No. 11-1123-RDR, 2013 WL 4028759 (D. Kan. 2013).

[19] Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212 (S.D.N.Y. 2003).

[20] Fed. R. Civ. P. 36 (Zubulake v. UBS Warburg is a series of motions heard between 2003 and 2005 in the United States District Court for the Southern District of New York. Plaintiff Laura Zubulake filed suit against her former employer UBS, alleging gender discrimination, failure to promote, and retaliation. The real interest in the case came when it was alleged that the defendant had failed to produce numerous documents stored electronically. The Judge in this case, Shira Scheindlin, was one of the first to issue opinions about electronic discovery.

Presently, there is a proposed change to Rule 37(e) that will expand the safe harbor provisions. The proposed new Rule 37(e)[21] reads as follows:

> the proposed rule would permit sanctions only if the destruction of evidence was (1) caused substantial prejudice and was willful or in bad faith or (2) irreparably deprived a party of any meaningful opportunity to present or defend its claim.[22]

The notes to the proposed Rule 37(e) suggests this rule would require the innocent party to prove that "it has been substantially prejudiced by the loss" of relevant information, even where the spoliating party destroyed information willfully or in bad faith.[23]

The proposal notes further explain that with these new rules sanctions will be allowed rarely. The court must find bad faith, combined with substantial prejudice and the moving party must show how the lack of this information will materially altered their ability to pursue or defend their case. This trio of conditions will make it almost impossible for the courts to sanction a party for failure to provide e-discovery or following the court's orders concerning e-discovery. Further, the rule admonishes the court to use more curative measures rather than sanctions. Curative methods might include ordering additional discovery and discovery not normally considered reasonably accessible or data that normally would go beyond the proportionality analysis of Rule 26(b)(1) and (2)(C)[24].

Judicial reasons for the change in Rule 37(e) is to prevent "gotcha litigation" and allow cases to be heard on the merits.[25] Some courts found they were spending more time on discovery issues rather than the issues of

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Her opinions have been influential in all cases decided since her rulings. The opinions are known as Zubulake I, Zubulake III, Zubulake IV and Zubulake V.

[21] The process to amend the Rule starts with the Judicial Conference Advisory Committee. First it posted the formal proposal and invited the public to submit comments until February 15, 2014. After the comment period ended, the Advisory Committee has reconvened to consider the public comments, and then will decide if they are going to revise the rule. Then the proposal will then be sent on to the Standing Committee, which, if it approves the changes, will send the proposed rule change to the Judicial Conference. Next the changes are sent to the Supreme Court, which can accept or reject them. If the Supreme Court accepts the changes, then Congress has six months to act. Congress can reject the changes, modify them, or take no action. If Congress takes no action, the proposal becomes part of the Federal Rules of Civil Procedure in December 2015.

[22] Fed. R. Civ. P. 37(e).

[23] *Advisory Committee on Civil Rules Report to the Standing Committee,* U.S. COURTS (May 8, 2013), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2013.pdf.

[24] Fed. R. Civ. P. 26(b)(1) and (2) (C).

[25] Chin v. Port Authority of N.Y & N.J., No. 10-1904-cv(L), 2012 U.S. App. Lexis 14088 (2d Cir. 2012).

the case.[26] In addition to these concerns, the notes in the proposed Rule 37(e) give additional reasons for making the changes that included complaints and concerns of preserving ESI, uncertainty of preservation before litigation, protection for litigants from abusive cost-leveraging and finally divergence of decisions.[27] The Rules Committee did not provide facts, statistics, specific cases or sources for the reasons listed to make changes.

Another reason the Rules Committee contemplated change was the uncertainty of preservation before litigation. A 2010 Forbes survey found that companies produced an average of 1,000 pages in discovery in major cases for every one page used at trial, or one-tenth of one percent.[28] In the Forbes survey there is no comparison to pre-electronic document production nor does this survey address the issues of why a company maintains this amount of data. The Rules Committee received more than 4,000 comments from interested parties, including businesses of all sizes, software vendors, attorneys, judges, and individuals. General Electric's comments to the Judiciary Committee to the proposed changes stated to preserve emails alone they must preserve approximately 4,770 terabytes of data. In another incident in which litigation has not been filed, GE incurred "fees of $5.4 million to collect and preserve 3.8 million documents totaling 16 million pages."[29] Pfizer stated that it currently has over 300 active legal holds in place impacting over 80,000 employees, and presently preserves five billion emails. Allstate reported that in the past five years it has spent over $17 million on e-discovery costs alone.[30] In a Fulbright study conducted in 2012, 86% of companies surveyed were sued in the past year, and more than a third were involved in more than 20 lawsuits. In addition, 59% of companies had sued someone in the past year of the study. Further, 72% of the companies relied on their IT functions for discovery and only 35% used TAR for the e-discovery.[31]

Judge Facciola, Magistrate Judge for the United States District Court for the District of Columbia stated the following:

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[26] *Id*.
[27] Proposed rule 37 (e) n (proposed 2014) to be codified at Fed. R. Civ. P. 37 (e). *Advisory Committee on Civil Rules Report to the Standing Committee,* U.S. COURTS (May 8, 2013), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2013.pdf.
[28] Barry Murphy, *e-discovery 2012: The Year in Review,* FORBES (Dec. 26, 2012) http://www.forbes.com/sites/barrymurphy/2012/12/26/ediscovery-2012-the-year-in-review/.
[29] Mark Chenowith, *New Corporate Survey Illustrates Burden of Document Preservation and Benefits of Proposed Reform,* FORBES (Mar. 6, 2014) http://www.forbes.com/sites/wlf/2014/03/06/new-corporate-survey-illustrates-burdens-of-document-preservation-and-benefits-of-proposed-reform/.
[30] *Id*.
[31] Barry Murphy, *e-discovery 2012: The Year in Review*, FORBES (Dec. 26, 2012), http://www.forbes.com/sites/barrymurphy/2012/12/26/ediscovery-2012-the-year-in-review/.

> Of course, defendant may be the victim of its own failure to maintain a responsible record-keeping process in which a principled decision-making process guides what will be kept and what will be thrown out. And, as anyone knows who has ever cleaned out a closet or an old hard drive, keeping everything is no solution. It only increases the expense and cost of finding what you want or need.[32]

Other reasons for the change were complaints and concerns of preserving ESI. From the beginning of the new Rules the courts have sanctioned parties who have failed to retain or to retrieve data. The courts have refused to grant safe harbor when the parties' excuses have been lack of knowledge, lack of skills, or lack of follow-up.

The trend in the ESI cases from 2011 to the present has emphasized proportionality and relevance in e-discovery. Proportionality standards were included in Rule 26 of the Federal Rules of Civil Procedure passed in 2006.[33] Yet as early as 2008 Judge Paul Grimm called Rule 26(g) the most underutilized and misunderstood rule in the book.[34] This case involved a discovery dispute and the court ordered the parties to meet and confer and to remember that the statement in Rule 26(g)(1)(B)(iii) that discovery must be proportional to what is at stake in the litigation.[35] Rule 26(b)(2)(C) empowers courts to control the amount of discovery requested and the methodology. Under this Rule, discovery requests that are cumulative, duplicative, or may be obtained from another less expensive or easier source. Further, Rule 26(g) imposes a requirement on attorneys to certify they are engaging in proportional discovery or face sanctions. An additional proportionality provision specific to eDiscovery is found in Rule 26(b)(2)(B), which limits the discovery of ESI if the data are not reasonably accessible or the retrieval may cause undue burden or cost.[36] Litigants can receive protective orders under this rule from "annoyance, embarrassment, oppression, or undue burden or expense."[37] This Rule has been underused, but within the last few years has been cited by the courts. The Sedona Proclamation issued a

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[32] Maura R. Grossman & Gordon V. Cormack, *The Grossman-Cormack Glossary of Technology-Assisted Review with a forward by John M. Facciola*, 7 FED. COURTS LAW REVIEW 1, 26-27 (2013).
[33] Fed. R. Civ. P. 26.
[34] Mancia v. Mayflower Textile Servs. Co., 2008 U.S. Dist. Lexis 83740 (D. Md. 2008).
[35] *Id*.
[36] Fed. R. Civ. P. 26(b)((2)B.
[37] *Id*.

Cooperation Proclamation October 2012.[38] The Sedona Proclamation found the "key to reducing the cost and delay associated with e-discovery is judicial attention to discovery issues starting early in, and continuing throughout, any given stage of an action.[39] The Sedona Proclamation advised as follows:

1. Judges should adopt a hands-on approach to case management early in each action.
2. Judges should establish deadlines and keep parties to those deadlines
3. Judges should demand attorney competence.
4. Judges should encourage the parties to meet before discovery commences to develop a realistic discovery
5. Judges should encourage proportionality in preservation demands and expectations and in discovery requirements
6. Judges should exercise their discretion to limit or condition disproportionate discovery and shift disproportionality.
7. Judges should use their authority to issue sanctions under the relevant statutes, rules or the exercise of inherent authority parties and/or counsel unnecessary costs or delay or who otherwise frustrate the goals of discovery by gaming the system. Judges should adopt a hands-on approach to case management early in each action.[40]

Another argument for changing the safe harbor rule is that litigants need protection from abusive cost leveraging by opposing parties. The argument here is that those who understand e-discovery process can somehow win a case by pursuing sanctions against a party who does not have the same e-discovery sophistication and education. Bloggers call the people who understand e-discovery "in the Sedona Bubble" or "In the Bubbles" or "Sedonites."[41] If the question is between those who have knowledge and those who do not, then education and employing experts is the answer. Further, the direction given to litigants by prior cases, and specifically the Facebook case found 'communication among counsel is crucial to a

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[38] *Sedona Conference Cooperation Proclamation: Dialogue Designed to Move the Law Forward in a Reasoned and Just Way,* THE SEDONA CONFERENCE (2008), https://thesedonaconference.org/download-pub/3802.

[39] *Id*.

[40] *Id*.

[41] *See generally* Ralph Losey, E-DISCOVERY TEAM (2012), www.e-discoveryteam.com. Ralph Losey is a practicing attorney where he lead's the firm's Electronic Discovery practice group. Ralph is the author of five books on electronic discovery. Paul D. Weiner coined the term Sedona Bubble. He is a national e-discovery attorney, lecturer and officer about the technical and legal issues governing electronic discovery.

successful electronic discovery process'"[42] Courts have required meaningful meet-and-confers since 2006 and re-enforced by Judge Grimm in the *Macia* case.[43] Another stated reason for the proposed change in the rule was a claim of a divergence of decisions; however, the reality is that until the last couple of years, the majority of cases have only granted sanctions if the behavior had been willful or in bad faith. Only in the last couple of years has a noticeable split in decisions existed.

After the Rules were passed at the end of 2006 until the end of 2011, the majority of courts issued sanctions when the parties' failure to retain and retrieve ESI was due to willful conduct or gross negligence; however, courts have granted a safe harbor ruling when the litigants' errors were the result of negligence. The courts determined whether the erring party made a timely effort to correct the problem and was forthright in disclosing the problem.

A study conducted by these authors in 2011 found both federal and state courts were more likely to grant sanctions the longer the rules had been in effect. From 2007 to 2011 only 11 of 240 cases in both state and federal courts were granted safe harbor, while during the same time period sanctions were granted in 194 cases.[44] The incidence of sanctions was fewer in 2007 but increased each year with the highest number of sanctions occurring in 2009. In 2010 and 2011 the severity of sanctions ordered increased, and fewer safe harbor findings occurred in 2011 than in 2008.[45]

No Sanctions	# Cases
Safe Harbor found	11
Court found not enough evidence for sanctions	10
Insufficient harm found to great sanctions	5
Court found that information could be found in another source	3
Court found that litigant did not prove relevancy of e-discovery	3
Court found both parties were equally at fault	3

[42] In re Facebook PPC Advertising Litigation, No. C09-03043JF (HRL), 2011 WL 1324516, at *1-2 (N.D. Cal. 2011).

[43] Mancia v Mayflower Textile Servs. Co., 253 F.R.D. 354 (D. Md. 2008).

[44] Vicki Luoma & Milton Luoma, *After Five Years of E-Discovery Missteps: Sanctions or Safe Harbor?* Proceedings of the ADFSL 2012 Conference on Digital Forensics, Security, ASSOC. OF DIGITAL FORENSICS, SEC. & LAW (2012), *available at* http://www.digitalforensics-conference.org/files/cdfsl-2012.pdf.

[45] The cases came from Lexis Nexis using keywords "sanctions" & e-discovery" and "sanctions & electronic discovery." The case for this study is available from the author on request.

Court gave the party a warning	3
Court deferred ruling	4
Court found the parties motion for sanctions were untimely	2
Court found party inexperienced	1
No Preservation order	1
Sanctions Imposed (Court often imposed more than one sanction)	**# Cases**
Granted attorney fees	36
Court ordered Negative Inferences	24
Court granted Summary Judgment	29
Monetary Damages/Costs	63
The Attorney Sanctioned	3
Court ordered a forensic expert	8
Court ordered Restoration	1
Court granted partial summary judgment	1
Court made the patents unenforceable	1
Court denied party the right to assert affirmative defense	10
Court would not allow party to assert privilege	5
Party jailed for Contempt	1
Both Attorneys were warned and forced to sign affidavits that they had rules of civil procedure	1
The case was remanded to the trial court to issue sanctions	3
Change of Burden of Proof	1
Limit use of expert witness	2
Not allow objections to privilege	2
Cost Shifting	3
Total	**194**

Another study, conducted by Willoughby, et. al, reviewed 401 federal cases from 1981 to January 1, 2010 found that sanctions were ordered in 230 cases. Many of the cases in the Willoughby study were prior to issues created

by ESI. This study also found that sanctions increased each year.[46] Both the Luoma study and the Willoughby studies found that 2009 saw the highest number of sanctions.[47]

In both studies a consistency in the court decisions is apparent rather than diversity in decisions as argued by the proponents of change. In the Luoma study both federal and state courts consistently ordered sanctions when the actions were willful and amounted to gross negligence. The courts would grant safe-harbor when the mistake was inadvertent and steps were taken to correct it. Both studies found that courts were less tolerant of failures in retention and deletion as more time had elapsed since the new rules were passed. Interestingly, Kroll on Track, a leading consultant in ESI and digital forensics, conducted a study of 70 cases and found that the courts were less likely to find sanctions now than in the past.[48]

The probability of receiving sanctions seems to depend on the harm the missing information has caused or could cause, as well as the bad faith involved in the failure to provide discovery. The severity of bad faith conduct increases the severity of the sanctions imposed. Often the litigant has either had numerous acts of misconduct, or egregious actions that resulted in negative-inference jury instructions or summary judgment. However, in 2012 and 2013 a change in attitudes by various courts and a split in opinions emerged as to when sanctions should be ordered. A majority of the courts questioned whether mere negligence was possible after a decade of electronic rules and cases. In a minority of cases, the court restricted sanctions to the cases in which the party willfully destroyed ESI. A few cases added the additional requirement that the opposing party be able to prove that the data was both relevant and irreplaceable.

The results of a second study conducted by these authors of cases from 2011 to 2013 concerning e-discovery violations shows that sixty per cent of the cases granted sanctions for willful violations of e-discovery and 40 % granted safe harbor. The results are summarized in a table as follows:

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[46] Dan Willoughby, Rose Hunter Jones & Gregory R Antine*, Sanctions For E-Discovery Violations: By the Numbers*, 60 DUKE L. J. 789, 790 (2010).
[47] *Id*.
[48] *See generally Ediscovery case law summaries by topic, jurisdiction or keyword - you pick*, E-DISCOVERY.COM,
http://www.ediscovery.com/pulse/case-law/ (last visited Nov. 11, 2014).

Sanctions v. Safe Harbor – 2012 to 2013				
Year	**Case Name**	**Sanctions?**	**Safe Harbor?**	**Comments**
2012	Scentrsy v. B.R. Charse	Yes		Unacceptable Litigation Hold
2012	Hynix Semiconductor	Yes		Earlier Trigger Date for Litigation Hold
2012	Apple v. Samsung Elect.	Yes		Adverse Inference For data Spoliation
2012	Chin v. Port Authority		Yes	No prejudice
2012	Omogbehin v. Cino		Yes	
2012	GenOn Mid-Atlantic LLC v. Stone & Webster		Yes	No Prejudice
2012	BYU v. Pfizer		Yes	12 years too long for trigger event
2012	Danny Lynn Electrical v. Veolia ES Solid		Yes	No bad faith, no prejudice
2012	Tracy v. NVR, Inc.		Yes	No duty to preserve for opt in Plaintiffs
2012	State National Insurance Co. v. County of Camden		Yes	Failure to issue legal hold
2012	Pouncil v. Branch Law Firm Case	Yes		
2012	915 Broadway Association, LLC v. Paul, Hastings, Janofsky & Walker	Yes		Sanctions
2012	Pippins v. KPMG LLP	Yes		
2012	Voom HD Holdings LLC v. EchoStar Satellite	Yes		Failure to issue Legal Hold
2012	Perez v. Vezer Industrial Professionals, Inc.	Yes		Small amount of monetary sanctions for failure to issue Litigation holds due to lack of gross negligence
2013	In re Pradaxa (Dabigatran Etexilate) Products Liability Litigation		Yes	Trigger not started; routine destruction
2013	Sokn v. Fieldcrest Cmty. Unit School Dist. No. 8,		Yes	No bad faith
2014	Calderon v. Corporation Puertorrique a de Salud	Yes		Selective retention
2013	Zest IP Holdings, LLC v. Implant Direct Mfg., LLC,	Yes		No Litigation Hold

Sanctions v. Safe Harbor – 2012 to 2013				
Year	**Case Name**	**Sanctions?**	**Safe Harbor?**	**Comments**
2013	Puerto Rico Tel. Co., Inc. v. San Juan Cable, LLC, No. 11-2135		Yes	No bad faith in failure to issue Litigation Hold
2013	Cognex Corp. v. Microscan Sys. Inc.		Yes	No proof of materiality and only 1 disk destroyed
2013	Herrmann v. Rain Link, Inc., No. 11-1123-RDR, 2013		Yes	No showing of actual prejudice
2013	Sekisui Am. Corp. v. Hart		Yes	
2013	Cottle-Banks v. Cox Commc'ns, Inc., No. 10cv2133-GPC (WVG)		Yes	Only negligence; no material harm
2013	Pillay v. Millard Refrigerated Servs., Inc.	Yes		Failure to issue legal hold
2013	SK Hynix, Inc. v. Rambus, Inc., No. C-00-20905 RMW,	Yes		Money held for later
2013	Gatto v. United Air Lines, Inc., No. 10-cv-1090-ES-SCM	Yes		Failure to preserve
2013	EEOC v. The Original Honeybaked Ham Co. of Georgia, Inc.	Yes		
2013	Gabriel Techs., Corp. v. Qualcomm, Inc., No. 08CV1992	Yes		Failure to preserve
2013	Branhaven LLC v. Beeftek, Inc	Yes		
2013	Peerless Indus., Inc. v. Crimson AV, LLC, No. 1:11-cv-1768	Yes		Insufficient to rely on 3rd party to preserve
2013	Micron Tech., Inc. v. Rambus, Inc., No. 00-792	Yes		Bad faith
2012	Day v. LSI Corp., No. CIV 11-186-TUC-CKJ,	Yes		Wilfull
2012	Bozic v. City of Washington, No. 2:11-cv-674	Yes		Bad Faith
2012	Taylor v. Mitre Corp	Yes		Willful

Sanctions v. Safe Harbor – 2012 to 2013				
Year	**Case Name**	**Sanctions?**	**Safe Harbor?**	**Comments**
2012	United States ex rel. Baker v. Cmty. Health Sys., Inc	Yes		Willful
2012	Peter Kiewit Sons', Inc. v. Wall Street Equity Group, Inc.,	Yes		Willful
2012	Multifeeder Tech. Inc. v. British Confectionery Co. Ltd., No. 09-1090 (JRT/TNL	Yes		Willful destruction
2012	Ceglia v. Zuckerberg, No. 10-CV-00569A	Yes		Willful
2012	E.E.O.C. v. Fry's Elecs. Inc., No. C10-1562RSL	Yes		Willful

The best example of the two opposing views on sanctions is the three cases out of New York decided in the years 2010 to 2013.[49] Two cases decided in 2010 and 2013 by Judge Scheindlin found that failure to retain data after a litigation hold is gross negligence per se and sanctions should be issued.[50] The case with the opposing view was decided in 2012 and affirmed by the U.S. Second Circuit Court of Appeals. That case found that failure to retain data is not gross negligence and sanctions should not be imposed unless the opposing party can prove that failure to provide the information would cause substantial prejudice, was willful or in bad faith, and the missing documents would prevent that party from presenting their case. The *Chin* case[51] decided in 2012 was in total opposition to the past progression of ESI cases, but was indicative of the movement that has become the proposed Rule 37(e).

The details of the cases show the divergence in position on eDiscovery and sanctions that occurred. In the first case, Judge Scheindlin granted sanctions against 13 plaintiffs for their failure to properly preserve, collect and produce electronic documents. She further found that litigants were still conducting electronic discovery in an "ignorant and indifferent fashion."[52] The court further found "the failure to issue a written litigation hold

[49] Sekisui America Corp. v Hart, No 12 Civ. 3479 (SAS) (FM), 2013 U.S. Dist. LEXIS 84544 (S.D.N.Y. 2013).

34 The Pension Comm. On the Univ. of Montreal Pension Plan v. Banc of Am. Sec., 2010 U.S. Dist. LEXIS 4546 (S.D.N.Y. 2010).

[51] Chin v. Port Authority of N.Y. & N.J., 685 F.3d 135; Nos. 10-1904-cv(L), 10-2032-cv(XAP) (2d. Cir. 2012).

[52] *Pension*, 2010 U.S. Dist. Lexis 4546 at 34.

constitutes gross negligence because that failure is likely to result in the destruction of relevant information."[53] The court also found that six of the 13 plaintiffs were grossly negligent, and ordered a jury instruction that applies a burden-shifting test. The jury instruction allowed the jury to consider the following:

> (i) hear and consider evidence pertaining to these plaintiffs' evidence spoliation; and
> (ii) consider drawing an inference that the lost evidence would have been helpful to the defendants.[54]

In the analysis to determine whether the defendants were merely negligent or grossly negligent, the court observed that these litigants had "years of judicial decisions," to guide them in satisfying their duty to preserve electronic evidence.[55] Therefore, the court further found that any failure to take all appropriate measures to preserve and collect records is "surely negligent."[56] Finally, the court found that the parties (or any litigants) who failed to follow the steps outlined by *Zubulake* are mostly likely guilty of gross negligence. The failure to follow the *Zubulake* outline of preservation standards should warrant imposition of sanctions.[57] The majority of the cases searched found this theme throughout cases.

In a 2010 case, Judge Grimm's decision and opinion on the issue is indicative of that of many judges. He is "dumb-founded to find yet another case where a party fails to implement a litigation hold on key data sources and fails to take any reasonable measures to preserve data."[58] Just as it appeared that the courts were going to hold parties to a very high standard, another case in New York caused a fury because it rejected the standards put in place by the *Zubulake* and *Montreal Pension* cases. In *Chin* the court found that the case should be decided on the merits of the case and not strictly on a discovery issue.[59] The court further decided that the failure to issue a written litigation hold that resulted in the destruction of relevant and unique documents did not constitute gross negligence and did not warrant sanctions.[60] In this case, eleven Asian-American police officers claimed that they were victims of racial discrimination and brought suit against the Port Authority of New York and New Jersey. The Port Authority had received a

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[53] *Id*.
[54] *Id*.
[55] *Id.*
[56] *Id*.
[57] *Id*.
[58] Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251 (D. Md. 2008).
[59] *Chin*, at 51.
[60] *Id.*

litigation hold notice, but still destroyed 32 promotion folders prior to litigation. The defendants did not dispute they had notice to preserve these documents and that the documents contained unique and relevant information and that they had failed to issue a written litigation hold. As a result of these facts, the plaintiffs asked the court for an adverse inference against the defendant, Port Authority. The district court denied the motion for adverse inference stating that although the defendant was negligent in failing to preserve the ESI, there was insufficient evidence to show that the defendant intentionally destroyed the information. The court further found that the plaintiffs could provide other evidence to prove their claims of discrimination.[61] On appeal one of the losing plaintiffs asserted that the district court's failure to issue an adverse inference or other sanction was reversible error. Further, the plaintiff argued that the defendant's failure to preserve the data constituted gross negligence per se, citing Judge Schieldin in the Pension case.[62]

The U.S. Second Circuit Court of Appeals held that the district court in the Chin case was correct in its ruling, and that a party's failure to issue a litigation hold is not gross negligence per se, nor should it necessarily lead to sanctions.[63] The Second Circuit Court found that the failure to preserve this evidence was just "one factor in the determination of whether discovery sanctions should issue."[64] The court asserted that a case-by-case approach in determining whether sanctions are appropriate is the correct approach rather than the rules outlined in Judge Scheindlin's *Pension Committee* decision.[65] In upholding the *Chin* decision, the Second Circuit Court found that even if a party acted with gross negligence in destroying relevant documents, a trial court has the discretion to impose (or not impose) sanctions based on the totality of the circumstances.[66]

In 2013 in the *Sekisui* case Judge Scheindlin found the following:

> A decade ago, I issued a series of opinions regarding the scope of a litigant's duty to preserve electronic documents and the consequences of a failure to preserve such documents falling within the scope of that duty… Such obligation should, at this point, be quite clear—especially to the party planning to sue.[67]

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[61] *Id.*
[62] Opinion and Order, Pension Committee of the Univ. of Montreal Pension Plan, et al., v. Banc of America Securities, LLC, et al., 592 F. Supp. 2d 608, No. 05-civ-9016 (SAS) (S.D.N. Y. 2009).
[63] *Chin*, at 51.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Sekisui*, at 49.

In this case a group of employees resigned their positions. The company sued the former employees, and when discovery began, it found that emails were missing. During discovery the defendants, Hart and his wife, contended that Sekisui should be sanctioned for destroying evidence and sought an adverse inference instruction, arguing that Sekisui acted with "willful, wanton, and reckless disregard for its discovery obligations."[68] Sekisui argued that any prejudice to the Harts was "minimal and that deleting the e-mails was a mistake, and its lawyers disclosed the deletion to the Harts' counsel, and the HR manager authorized the deletion of the e-mail folders.[69] Regardless the deletion the attorney was able to retrieve 36,000 e-mails. In addition, Sekisui argued the e-mails were irrelevant to the claims in the lawsuit.

The court evaluated the following three factors to determine whether an adverse inference instruction was appropriate:

> (a) the party having control over the evidence had an obligation to preserve it; (b) the records were destroyed with a 'culpable state of mind'; and (c) the destroyed evidence was 'relevant' to the moving party's claim or defense, 'such that a reasonable trier of fact could find that it would support that claim or defense.'[70]

The court found Sekisui's failure to impose a litigation hold when it filed its notice of claim was negligent and led directly to the destruction of the e-mails, and "may well rise to the level of gross negligence."[71] Judge Scheindlin ruled that an adverse influence jury instruction maybe entered against a party that destroys evidence knowingly, or even negligently, and even in the absence of prejudice to the adverse party.[72] Judge Scheindlin further found that the obligation to preserve is difficult to dispute when the plaintiff is the one that failed to retain its documents. She further found that "[t]he law does not require a showing of malice to establish intentionality with respect to the spoliation of evidence."[73] Judge Scheindlin also found that "failure to meet even the most basic document preservation obligations constitutes gross negligence."[74] Proving the missing data is relevant is not part of the sanctions analysis, but the fact that evidence was destroyed either intentionally or through gross negligence is usually sufficient to establish

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[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*

relevance.[75] Judge Scheindlin also determined that to require an innocent party to prove relevance rewards bad behavior and allows the opposing party to be rewarded for the destruction of evidence.[76] Thus, reviewing the foregoing cases clearly illustrates the emerging attitudes of the bench regarding the divergence in electronic discovery policies that have led to the proposed rules.

III. IMPACT OF PROPOSED AMENDMENTS

If the proposed amendments are adopted, the discovery procedure will radically change and possibly destroy our present discovery process. The concept of discovery is not a new concept in the United States. In the first session of the United States Congress, the Judiciary Act of 1789 was passed. It not only established the U.S. Federal Judiciary but also set out the rights to view documents. It states:

> And it be further be enacted, that all the said courts of the United States, shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order, to produce books or writings, it shall be lawful for the courts respectively, on motion, to give the like judgment for the defendant as in cases of nonsuit; and if a defendant shall fail to comply with such order, to produce books or writings, it shall be lawful for the courts respectively on motion as aforesaid, to give judgment against him or her by default.[77]

Even with the Judiciary Act in place there was little actual discovery in federal courts. There were no rules in place, and as a result early litigators complained of chaotic system of civil litigation.[78] In 1911, a proposal was made to support legislation to have the Supreme Court set rules of civil procedure at the American Bar Association (ABA).[79] It was opposed for over

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[75] *Id.*
[76] *Id.*
[77] Judiciary Act of 1789, § 15, 1 Stat. 73, 82, (1789). *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates 1774 – 1875 Statutes at Large,* 1st Congress, 1st Session.
[78] Stephen Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 BOS. COLL. LAW REV. 691 (1998).
[79] *Id.*

23 years on grounds that the discovery process would cause both a resistance to disclose information and the fear that there would be demand for too much information.[80] The main argument against the discovery rules was that if they were adopted then cases would no longer be heard on their merits. Further, there would be a tendency "to resist disclosure and to discover every shred of potential evidence."[81] These arguments are very similar to the arguments now made by the proponents of the proposed Rule 37(e) that the cases can no longer be tried on its merits and that will be too much discovery.

Those early proponents of adopting the Federal Rules of Civil Procedure argued, "False and fictitious causes and defenses thrive under a system of concealment and secrecy in the preliminary stages of litigation followed by surprise and confusion at trial. . . . "[82] If the proposed new Rule is adopted, discovery will only occur if both parties are willing to be transparent and take a less adversary role in the process. If a party has destroyed their data or never saved it, then there will be no repercussion unless the moving party now meets very difficult burdens to prove what is missing, why they need it, and that it will make their case impossible to go forward without the information.

Edson Sunderland, college professor and early proponent of passing the Federal Rules, argued that "discovery procedure serves the same function in the field of law as the x-ray does to the field of medicine and surgery…."[83] This concept has been the guiding principle in our discovery rules. To have a fair trial both parties must have the opportunity to know what data, documents, information, parties and issues are actually available and then determine what is relevant and crucial to make or to defend their case. If "gotcha" litigation occurred after the 2006 amendments to 37(e) it was because a party was not diligent in its obligations and duties. The real "gotcha" trials will occur after this rule is adopted. If the moving party does not know something exists how can they ask for it to be revealed? Without effective discovery there will be an increased number of incidents of "Gotcha" moments at trial. The failure to conduct effective discovery will lead to the chaos of litigation before the 1938 adoption of the Federal Rules. The concept of transparency in the law will be gone. Edson Sunderland further argued that if the original 1938 discovery rules were passed "litigation will cease to be a game of chance…."[84] The only way a case can

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[80] *Id*.
[81] *Id.* at 706.
[82] *Id.* citing Edson R. Sunderland, *Foreword to* GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL iii (1932).
[83] *Id.*
[84] *Id*.

be fully litigated on its merits and justice prevail is if parties have the opportunity to have full disclosure of evidence.

A further issue will be the fact that the courts will be stripped of their main powers in maintaining order and ensuring justice in court. If the court no longer has the ability to punish litigants who ignore the rules and procedures in discovery, the court will have no enforcement tools. With the new rules, the court cannot issue sanctions without traversing complicated hurdles. The first hurdle the court must address is willfulness. What is the definition of willfulness? What if the original deletion of ESI was negligent but the problem is not corrected in a timely fashion or the opposing side is not informed? Will this scenario be considered willful? What if the litigants admitted either that they destroyed evidence or never attempted to save data, the moving party must still prove that they were irreparably deprived of any meaningful opportunity to present or defend against the claims in the litigation before sanctions can be issued.[85] These requirements take away the court's ability to maintain authority over the parties. In effect, the burden of proof has switched to the moving party and unless that party can establish the importance of data they may not know exists. It is impossible for a party to prove the necessity of information that they may not know exists without first conducting complete discovery.

The Committee cited the case of *Silversti v. General Motors Corp*[86] to prove how this provision is effective. Mark Silvestri filed a products liability case against General Motors for the failure of his airbag to deploy. In this case, the plaintiff's attorney hired two experts and the experts then examined the car and subsequently made a report. GM was not notified for a period of three years that litigation was imminent nor than the plaintiff would claim a design defect. The car was sold and repaired before GM could view or test the car. When GM finally inspected the car it did not find any defects. The court found that destruction of this evidence had prejudiced General Motors and dismissed the case. On appeal the court affirmed that the plaintiff had a duty to preserve and breached its duty not to spoil evidence. Clearly this case was correctly dismissed and illustrates how a party could not defend its case without the material evidence. However, the committee failed to cite other cases in which the key information was only discovered in the discovery process. The following case illustrates this point succinctly.

On October 21, 1989, Shannon Mosley while driving his 1985 GMC pickup truck he was struck on the driver's side by another pickup truck driven by a drunk driver. The drivers were driving at a slow rate of speed, but as a result of the impact the sidesaddle fuel tank on Mosley's truck ruptured and burst into flames. Mosley was killed from thermal burns and smoke

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[85] *Id*.

[86] Silversti v. General Motors Corp., 271 F.3d 583, 590 (4th Cir 2001).

inhalation. The Mosley family settled with driver in a separate action, but pursued a lawsuit against GM for its design defect. The alleged design defect was that the sidesaddle fuel tank was located outside the truck's frame rails in a vulnerable position. Most other similar vehicles had their fuel tanks mounted inside the frame rails where they were more protected.

The family requested that in lieu settlement they wanted GM to recall these trucks, but GM refused. In the discovery process Mosleys discovered that GM was aware of the defect and chose not to recall the truck after an economic analysis comparing the cost of a recall to the cost of potential settlements in wrongful death cases.[87] Under the new rules Mosley would not have been able to find this information if it had been deleted or not produced by GM because the plaintiff would not have been able to argue that this information was crucial to their case. The litigants would not have been able to show substantial prejudice and the case could not have been fairly decided by a jury. The amendments to the Rule further narrows the court's ability to grant sanctions by the requirement that lost information must be central to the litigation. This requirement makes it nearly impossible for a party to prove this element except in a case like *Silversti v. General Motors Corp*. It will never provide the justice needed to uncover key information as in the *Mosley* case.

IV. IMPLICATIONS OF PROPOSED AMENDMENTS

If the amendments to the rules are adopted our common law system of discovery civil procedure will become very like the civil law system common in Europe. In the civil law countries discovery is generally not allowed. A litigant must request the information from a three-judge panel and be prepared to reveal what information is needed, where it is located, and then convince the court of its importance in the case. Discovery is rarely granted in civil law systems.[88]

As a result of the new system companies may decide not to try to comply with retention and deletion rules. They can admit to willful conduct and then the burden will switch to the moving party to prove the information was not only necessary, that it is impossible to maintain a meaningful case without the information. This situation portends a return to the chaos of the pre-1938 legal system. There may be an increase of cases that actually are tried because litigants may think their case is stronger than it actually is until information of which they were unaware is revealed at trial. There may be more cases dismissed on summary judgment motions because without a

[87] General Motors Corp. v. Moseley, 213 Ga. App. 875 at 886, 447; S.E.2d 302, 312 (1994).
[88] MILTON H. LUOMA & VICKI M. LUOMA, COMPLYING ACROSS CONTINENTS: AT THE INTERSECTION OF LITIGATION RIGHTS AND PRIVACY RIGHTS 186-94 (M. Sorrel ed., 2009).

thorough discovery process, litigants may not be able to prove their case. There will likely be more cases in which the decisions will be made by the surprise information presented for the first time at trial. Further, the courts will have fewer powers to control the flow of their cases.

If the proposed amendments are not adopted, parties have an obligation to learn and adopt best practices, prepare for litigation and not collect all data indiscriminately. They will need to be familiar with technology-assisted-review (TAR) systems and be prepared for early case assessment (ECA). They need to prepare for arguments about proportionality and transparency as well as educate themselves and understand the present potential of ESI. On the other hand, if the proposed amendments are adopted, litigants must be prepared to use other forms of discovery differently, such as interrogatories and depositions to attempt to learn what exists that may be crucial to their case. These litigants must be prepared to make arguments about relevance and how the information is pivotal to proving their case. Litigants must also be prepared for opposing parties who do not even attempt to establish litigation holds. In short, a litigant must be prepared for a new chaotic form of justice in our civil system.

V. CONCLUSION

It appears that after a decade of forging an eDiscovery framework, adoption of the proposed amendments will upend discovery again. Allowing parties to escape sanctions for willful acts will not just encourage "sloppy behavior" as predicted by Judge Shira Scheindlin,[89] but will allow willful behavior disguised as inadvertent mistakes to rule the day. Companies will conduct their own cost analysis, as did General Motors in *Mosley*, and decide that the cost of complying is greater than the cost of the risk of exposure by the opposing party and its ability to meet its burden of proof. Litigation will once again be mired in secrecy, surprise, and confusion.

Companies have had a decade to comply with the existing rules requirements with a safe harbor provision that can be a failsafe for good faith errors. Now, after spending the time and resources to institute the eDiscovery litigation teams, retention and deletion policies, and firms that have created support software, the new rules will encourage companies to hide information, and even if discovered, will make the requesting party prove that the missing information is relevant, assuming the requesting party even knows what is in the missing data. As Judge Scheindlin stated, requiring an innocent party to prove prejudice in these instances would be inappropriate as it "incentivizes bad behavior on the part of would-be spoliators" and

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[89] *Sekisui*, at 49.

"would allow parties who have destroyed evidence to profit from that destruction."[90] How can the courts try a case on its merits when all the information is not available to review? If parties no longer have to fear sanctions, then the main motivator for companies to have a retention and deletion policy in place is gone and courts' effectiveness will have been reduced. Individuals or companies can decide to opt out of the requirements and take a chance the opposing party will not be able to prove the relevance of information they seek, or that they can make a successful argument that such actions were not willful.

Is there really a problem that needs to be solved? What percent of lawsuits end up having a discovery problem? In 2012 there were 513,000 civil lawsuits filed in Federal Courts (Lawyers, 2013) yet only small percent ends up in appellate cases, and an even smaller percentage concerns discovery issues. The fact that companies are over-preserving ESI could be resolved by a method less dramatic than destroying the present rules. Companies can have a system in place to delete data on routine basis and rely on the safe harbor provision if done in good faith.

Without these amendments being passed to solve perceived problems, the courts have guided litigants to better practices by supporting proportionality, technology assisted review, early case assessment and meaningful meet-and-confer sessions requiring data maps. Pursuing these issues makes more sense than returning to the pre-1938 Federal Rules of Civil Procedure. The 2006 safe harbor provision was created to prevent sanctions if a party made a good faith effort to maintain its records. The surveys and bloggers also do not address advances in culling this information with methods such as technology-assisted reviews (TAR). These authors suggest that the proposed rules not be implemented. Instead, the courts need to continue to require proportionality analysis. Courts have expressed less patience with litigants who are not complying and often express frustration in their orders. As Judge Grimm stated in the *Victor Stanley* case, "discovery pertains only to relevant documents" and is "neither absolute, nor intended to cripple organizations."[91] Judge Grimm, United States District Court Judge of Maryland, prepared a four-page discovery order that requires attorneys and parties practicing before him to conduct discovery in two phases that emphasize both proportionally and cooperation. The order states "the parties and counsel are expected to work cooperatively during all aspects of discovery to ensure that the costs of discovery are proportional to what is at issue in the case, as more fully explained in Mancia v. Mayflower…"[92]

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[90] *Id.*

[91] Victor Stanley, Inc. v. Creative Pipe, Inc., "Victor Stanley II"; 2010 U.S. Dist. LEXIS 93644 (D. Md. 2010).

[92] Victor Stanley, Inc. v. Creative Pipe, Inc., Discovery Order, 2010.

The courts have reinforced the idea of proportionality in most recent cases. In one 2012 case the court ruled "the burden and expense to Defendants in completely reproducing its entire ESI production far outweighs any possible benefit to Plaintiffs." Again in this case the court ruled "those discovery efforts need only satisfy a standard of reasonableness, not perfection" [93]

In another case the court invoked the proportionality standards to deny the majority of plaintiff's production requests. In this case the court denied the plaintiff's request that the defendants produce ESI from more than 200 company representatives. The court found that the request was unduly burdensome since the defendant had already provided 12 million pages from 75 custodians at a cost of $10 million in discovery costs. The additional requested documents were marginally relevant and the burdens and the estimated expense of the discovery outweighed its likely benefits.[94] In yet another case, Judge Grewal refused to compel Apple to produce electronically stored information (ESI) finding that "expense of the proposed discovery outweighed its likely benefit."[95] Another case in which the court found proportionality to be the key, the defendant requested the production of the plaintiff's usernames and passwords for websites and requested the plaintiff's computer for a forensic examination. The court found the request for usernames and passwords were too broad. The court also found that even though requiring forensic imaging is appropriate when the opposing party is not cooperating or is unable to provide this information, those were not the facts in this case. The defendant's only reason for requesting this exam was based on its "desire to check that the opposition has been forthright in its discovery process."[96]

In conclusion, the proposed amendments to the Rule are correcting a problem that does not exist. Rather than changing the Rules, companies and their counsel must prepare for litigation by taking the following actions:

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[93] Larsen v. Coldwell Banker Real Estate Corp., No. SACV 10-00401-AG (MLGx), 2012 WL 359466 (C.D. Cal. 2012). *See* Brigham Young Univ. v. Pfizer, Inc., No. 2:06-cv-890 TS, 2012 WL 1302288, at *5-6 (D. Utah 2012). In this case the court refused to grant sanctions best on the good faith efforts of company. In Grabenstein v. Arrow Electronics, No. 10-cv-02348-MSK-KLM, 2012 WL 1388595 (D. Colo. 2012) the court refused to sanction a company for eliminating emails pursuant to a good faith document retention policy. This case a party's preservation obligations must be analyzed through the lens of reasonableness and proportionality.

[94] Eisai Inc. v. Sanofi-Aventis U.S., LLC, No. 08-4168 (MLC), 2012 WL 1299379, at *6 (D.N.J. 2012).

[95] Apple Inc. v. Samsung Electronics Co. Ltd.; No.: 12-CV-0630- LHK (PSG), 2013 U.S. Dist. LEXIS 67085 (N.D. Cal. 2013).

[96] NOLA Spice Designs, LLC v. Haydel Enterprises, Inc.; No. 12- 2515 SECTION "J" (2), 2013 U.S. Dist. LEXIS 108872 (E.D. La. 2013).

1. Understand the data they are collecting and determine what data is necessary based on compliance rules.
2. Prepare a data map.
3. Determine regulatory requirements for data retention.
4. Set quality control standards.
5. Review document retention and management policies periodically.
6. Choose a methodology to retrieve data that works best for the company and litigation.
7. Be prepared for meet-and-confer sessions, including consulting discovery experts.
8. Be transparent and honest when mistakes are made and remember the courts do not require perfection.
9. Be prepared to communicate with the court and opposing side with questions and problems.