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DROWNING IN DATA: HOW THE FEDERAL RULES ARE STAYING AFLOAT IN A FLOOD OF INFORMATION

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I. Introduction

As technology continues to permeate our everyday lives, the amount of data we generate increases—and rapidly. Consistent with Moore’s Law,² in 2013, 90% of all the world’s data was created within the previous two years alone.³ Technological advances have not only changed the way we work and interact, but also how we litigate. The rise of “big data” and the commensurate rise of “big discovery” have drastically altered the quantity and types of information produced throughout the discovery phase in litigation.⁴ While increased access to information by parties involved in

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² “Moore’s law refers to an observation made by Intel co-founder Gordon Moore in 1965. He noticed that the number of transistors per square inch on integrated circuits had doubled every year since their invention.” *Moore’s Law*, INVESTOPEDIA, <http://www.investopedia.com/terms/m/mooreslaw.asp#ixzz4bOstogr5> (last visited Oct. 16, 2017). Although referring specifically to integrated circuits, Moore’s Law, by extension, predicts that the exponential growth of circuit capability will result in smaller, faster and more capable computers and greater public access to and usage of technology. Of course, all of these things create (potentially discoverable) electronically stored information (ESI). *Id.*

³ Åse Dragland, *Big Data, for better or worse: 90% of world’s data generated over last two years*, SCIENCE DAILY (May 22, 2013), www.sciencedaily.com/releases/2013/05/130522085217.htm.

⁴ Scott Unger, *Federal Rule Amendments Were Enacted to Deal with ESI*, 222 N.J. L.J. 34, 34 (2016).

litigation can generally be seen as a positive development, it has also created opportunities for abuse.

5

Perhaps the most common, or at least the most obvious, scenario for what may be termed “eDiscovery abuse” arises when there is a large discrepancy in the quantity of information controlled between opposing parties in litigation.⁶ When one party possesses substantially more information than the other, there is little or no downside to making broad and burdensome discovery requests.⁷ Shrewd litigants can use carefully timed and tailored discovery techniques as a tool to exact larger (or pay smaller) settlements than they might have otherwise been able to obtain.

For some perspective on the cost of eDiscovery, consider that, as of 2014, most Fortune 1000 corporations spent between \$5 million and \$10 million annually on eDiscovery costs.⁸ Seventy percent of those costs were spent on the physical review of data⁹—often, the most time consuming and costly part of eDiscovery.¹⁰ This equated to approximately \$18,000 per gigabyte of data produced.¹¹ To illustrate, a single employee can easily produce an entire pickup truck worth of data.¹² Furthermore, companies utilizing electronic storage methods, save for avoiding liability in lawsuits, have little incentive to discard old data.¹³ It is often easier and cheaper simply to keep old data than to sort what is no longer needed—especially when copies are likely to exist in backups or in other

⁵ See Karel Mazanec, *Capping E-Discovery Costs: A Hybrid Solution to E-Discovery Abuse*, 56 WM. & MARY L. REV. 631, 635 (2014).

⁶ See *id.* at 642-46.

⁷ See *id.*

⁸ Jennifer Booton, *Don't Send Another Email Until You Read This*, MARKETWATCH (Mar. 9, 2015, 10:10 AM), <http://www.marketwatch.com/story/your-work-emails-are-now-worth-millions-of-dollars-to-lawyers-2015-03-06>.

⁹ *Id.*

¹⁰ James N. Dertouzos, Nicholas M. Pace & Robert H. Anderson, *The Legal and Economic Implications of Electronic Discovery: Options for Future Research*, RAND INST. FOR CIV. JUST. 2-3 (2008), http://www.rand.org/pubs/occasional_papers/OP183.html.

¹¹ Booton, *supra*, note 8.

¹² *Id.*

¹³ Erick Schonfeld, *The Only Reason Companies Delete Emails Is To Destroy Evidence*, TechCrunch, (Feb. 12, 2012), <https://techcrunch.com/2012/02/12/the-only-reason-companies-delete-emails-is-to-destroy-evidence/>.

retrievable locations.¹⁴ Considering the amount of data created and retained, it is no wonder that the costs of eDiscovery have skyrocketed.¹⁵

Another potential abuse that can occur is the resolution of litigation based on spoliation sanctions (or just the threat thereof) rather than on the merits of a dispute. As a foreword, it is not and never has been “easy” to obtain sanctions for the spoliation of electronic evidence. However, the application of Federal Rule of Civil Procedure 37 subsection e,¹⁶ which addresses the spoliation of electronic evidence, varied markedly between jurisdictions and evolved in many seemingly unintended ways. Some of these variations amongst jurisdictions likely contributed to the practice of parties to rely on the threat of sanctions, instead of their cases’ merits, to reach a settlement. This ability was often due to their adversary’s failure to preserve electronically stored information (“ESI”) or doing so in a negligent or grossly negligent manner. Further, certain of these variations incentivized forum shopping, as some jurisdictions would award sanctions for negligent or grossly negligent spoliation¹⁷ while others required proof of bad faith¹⁸ or irreparable prejudice to the innocent party.¹⁹

Therefore, electronic discovery practices were the target of some prominent amendments to the Federal Rules of Civil Procedure that took effect in December 2015. Perhaps most important for

¹⁴ *Delete At Your Peril: Preserving Electronic Evidence During The Litigation Process*, FINDLAW, <http://corporate.findlaw.com/litigation-disputes/delete-at-your-peril-preserving-electronic-evidence-during-the.html#sthash.Ut7ecAK8.dpuf> (last visited Oct. 23, 2017).

¹⁵ Mazanec, *supra*, note 5.

¹⁶ Fed. R. Civ. P. 37(f) was re-codified as 37(e) in 2007.

¹⁷ *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002). Although decided before the 2006 Rule, *Residential Funding* remained good law after its passage.

¹⁸ *See Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006); *See also, 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.”).

¹⁹ *See, e.g., Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 644 (S.D. Tex. 2010) (“The sanction of dismissal or default judgment is appropriate only if the spoliation or destruction of evidence resulted in irreparable prejudice and no lesser sanction would suffice.”).

the field of electronic discovery was the complete overhaul of Rule 37 subsection e, which was amended to limit the circumstances under which parties may obtain sanctions for spoliation of ESI.

²⁰ More broadly, changes to Rule 26 subsections (b)(1) and (b)(2)(C)(iii) limit the scope of discovery requests to that which is proportional to the needs of the case.²¹ Now that more than a year has elapsed since the amendments, this note will examine whether these changes have had their intended effects or whether they continue to produce unintended consequences and inconsistent results.

First, I will begin with a brief discussion of the genesis of the Federal Rules of Civil Procedure's attempts to address electronic discovery issues and analyze what shortfalls developed since the Rules were last amended to address electronic discovery in 2006. Next, I will analyze recent applications of the newly amended rules by federal courts and assess whether the amendments are having their intended effect as well as whether district courts' attempts to circumvent some changes have been or will be successful. I will then offer some critique on cost shifting and capping models designed to limit eDiscovery costs and will finally conclude with a look at possible solutions courts and practitioners could adopt to minimize the burden and costs of eDiscovery, without sacrificing its scope, specifically, that courts utilize rule-based tools already at their disposal to eliminate abusive eDiscovery practices and implement the use of predictive coding and other technology to lower costs and increase efficiency in eDiscovery.

II. The Dawn of eDiscovery

The concept of eDiscovery was first recognized in the Federal Rules of Civil Procedure in 1970 in an advisory committee note to Rule 34 indicating that electronic data compilations were

²⁰ FED. R. CIV. P. 37(e).

²¹ FED. R. CIV. P. 26(b)(1), (2)(C)(iii).

discoverable and included within the meaning of the term “documents.”²² The next mention of electronic discovery in the Federal Rules did not occur for another thirty-six years until passage of the 2006 amendments.²³ Between 1970 and 2006, technology changed dramatically.²⁴ Technological developments created a new industry of third-party vendors specializing in electronic discovery software and services that continue to grow rapidly.²⁵ Many of these new products and services focus on streamlining the collection, review and production of ESI. Unlike paper documents, ESI can incorporate hidden information, known as metadata,²⁶ which often requires technological experts to withhold, produce, view or preserve it.²⁷ However, permitting third-party contractors

²² Steven C. Bennet, *E-Discovery: We Still Haven't Found What We're Looking For*, LEXISNEXIS: LEGAL NEWSROOM (Aug. 17, 2015, 2:21 PM), <https://www.lexisnexis.com/legalnewsroom/litigation/b/litigation-blog/archive/2015/08/17/e-discovery-we-still-have-n-t-found-what-we-re-looking-for.aspx>.

²³ FED. R. CIV. P. 37(e).

²⁴ See Alison E. Berman & Jason Dorrier, *Technology Feels Like It's Accelerating - Because It Actually Is*, SINGULARITYHUB, (Mar. 22, 2016), <https://singularityhub.com/2016/03/22/technology-feels-like-its-accelerating-because-it-actually-is/>.

²⁵ See Press Release, *eDiscovery Market to Exhibit 16.20% CAGR due to Increasing Use of Social Media in Organizations Worldwide: TMR*, TRANSPARENCY MARKET RESEARCH (Aug. 19, 2016), <https://globenewswire.com/news-release/2016/08/19/865510/0/en/eDiscovery-Market-to-Exhibit-16-20-CAGR-due-to-Increasing-Use-of-Social-Media-in-Organizations-Worldwide-TMR.html>.

²⁶ THE SEDONA CONFERENCE, THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY AND DIGITAL INFORMATION MANAGEMENT 29 (Sherry B. Harris & Paul F. McVoy eds., 4th ed. 2014) (defining metadata as “[t]he generic term used to describe the structural information of a file that contains data about the file, as opposed to describing the content of a file.”). Metadata is often simplistically described as “information about information.” *An Introduction to the World of Metadata - Master of Information*, Rutgers Online, <http://online.rutgers.edu/resources/articles/an-introduction-to-metadata-master-of-information/?program=mi> (last visited Nov. 27, 2017). However, this idiom does not fully explain the breadth and importance of what can be contained within a document’s metadata. Metadata will include information concerning the file’s author(s), date of its creation, location, and may even contain a log of the changes it has undergone. See Eileen B. Libby, *What Lurks Within: Hidden Metadata in Electronic Documents Can Win or Lose Your Case*, ABA CENTER FOR PROFESSIONAL RESPONSIBILITY (Apr. 2007), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/what_lurks_within.authcheckdam.pdf. Metadata revealing the changes a document has undergone can be particularly important in litigation. See Jason Krause, *Metadata Minefield*, ABA JOURNAL (April 2007), http://www.abajournal.com/magazine/article/metadata_minefield/; Alex Berenson, *Merck Agrees to Settle Vioxx Suits for \$4.85 Billion*, N.Y. TIMES, Nov. 9 2007, <http://www.nytimes.com/2007/11/09/business/09merck.html?ex=1352350800&en=5f9476255c744271&ei=5124&partner=permalink&expod=permalink> (discussing how in a products liability suit leading to one of the largest settlements on record, metadata revealed that Merck removed information concerning a drug study to be published in the New England Journal of Medicine about the cardiovascular risks associated with the drug Vioxx).

²⁷ See Amanda E. Gordon, *The E-Usual Course of Business: ESI Application to Rule 34 Requirements*, ABA (June 16, 2016), <http://apps.americanbar.org/litigation/committees/businessstorts/articles/spring2016-0616-the-e-usual-course-of-business-esi-application-to-usual-course-of-business-requirement.html>.

access to important client data presents a minefield of issues.²⁸ Client’ apprehension regarding non-lawyer review of proprietary information and information security in the hands of third-party vendors is understandable, particularly if it is privileged information. Not wanting to miss an opportunity to stake out a corner of a booming market, many larger law firms have responded to this fear by incorporating in-house electronic discovery software and services to avoid the use of third-party technology vendors in litigations requiring complex eDiscovery.²⁹

a. The 2006 Federal Rules Addressing ESI

When first addressed by the Rules in 2006, discovery of ESI was treated similarly to discovery of paper documents and other information,³⁰ except in regard to the safe harbor provision of Rule 37(f).³¹ The safe harbor provided that “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.”³² Because of the costs associated with storing large amounts of ESI ad infinitum, overwriting and eventual deletion of backup information and old data is a necessary part of maintaining an electronic

²⁸ The Advisory Committee on Professional Ethics, appointed by the Supreme Court of New Jersey, released an advisory opinion that attorneys must exercise reasonable care in ensuring electronically stored client documents are protected against unauthorized access and disclosure. Accordingly, attorneys must make sure that any third parties to whom they permit access have adequate security measures in place to safeguard the documents. Electronic Storage and Access of Client Files, N.J. Advisory Comm. on Prof'l Ethics Op. No. 701 (Apr. 10, 2006).

²⁹ For example, Herrick Feinstein LLP offers clients data management services to assist in electronic discovery. INFORMATION GOVERNANCE, <http://www.herrick.com/information-governance> (last visited Oct. 17, 2017).

³⁰ Rule 37(f) is most pertinent to the subject matter of this note. Other changes to the 2006 FRCP addressed ESI as well, but were mostly aimed at equalizing discovery of ESI and non-ESI. Some notable changes include: Amended Rule 34(a) permitted reviewing parties to test and sample ESI and to control the form of its production under Rule 34(B); Rule 33(d) permitted parties to produce ESI as an answer to interrogatories; Rule 36(a)(1)(b) added ESI to the list of initial disclosures in a case; Numerous changes to Rule 26 addressed the scope and costs of discovery, amongst other things; and Rule 16(b)'s inclusion of ESI discovery issues in scheduling orders.

³¹ FED. R. CIV. P. 37(f).

³² *Id.*

information system.³³ Regardless, as explained in the following section, the protection purportedly offered under the safe harbor provision failed to materialize in many jurisdictions.

b. Common Law Developments & the Ensuing Circuit Split

Simultaneous developments in common law,³⁴ statutes, and other sources established an affirmative duty on parties to preserve ESI that can be reasonably anticipated to be relevant in current or future litigation.³⁵ This obligation has become known in practice as issuing a “litigation hold.”³⁶ Fulfillment of this obligation is often accomplished by circulating a memo to specific managers, employees or other individuals who are custodians of company information believed to be potentially relevant to the litigation.³⁷ A litigation hold notice should describe the nature and types of information that are to be retained and include guidelines regarding the time frame from which data is sought and include a length of time that the information should be retained.³⁸ This duty often necessitates suspending the operation of routine information retention policies to ensure that ESI is not lost if the obligation to preserve information has arisen.³⁹ However, the affirmative duty to preserve ESI has often led to confusion because of its tension with Rule 37(f)’s safe harbor provision. Where the former would require affirmative action, the latter promised insulation from liability for good-faith inaction—a narrow line indeed.

Further complicating matters, a split developed amongst circuit courts over the requisite level of intent necessary for constituting “bad faith” as required by Rule 37(f) and, subsequently, the

³³ FED. R. CIV. P. 37(f) committee’s note to 2006 amendment.

³⁴ See *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003); *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1070 (N.D. Cal. 2006).

³⁵ See FED. R. CIV. P. 37(f) committee’s note to 2006 amendment (“A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case.”).

³⁶ See *In re Napster*, 462 F. Supp. 2d at 1070.

³⁷ Paul D. Steinman, *Best Practices for Avoiding Spoliation*, LAW360 (June 22, 2015, 4:13 PM) <https://www.law360.com/articles/670670/best-practices-for-avoiding-spoliation>.

³⁸ *Id.*

³⁹ See FED. R. CIV. P. 37(f) committee’s notes to 2006 amendment.

award of sanctions for the spoliation of ESI. In some jurisdictions, mere negligence or gross negligence would suffice,⁴⁰ while others require a showing of bad faith, more akin to recklessness.⁴¹ Others still, would only award the most severe, case-terminating sanctions upon a finding of “irreparable prejudice,” even in cases of intentional spoliation.⁴² As a result of the confusion, large companies—for whom eDiscovery issues are particularly acute due to their susceptibility to frequent litigation and the tremendous amount of ESI they generate—grappled with the choice of whether or not to broadly preserve ESI. Most were often persuaded by the threat of sanctions to err on the side of over-preservation—an often-costly result.⁴³

Many courts also relied on their inherent authority to sanction behavior found to be abusive of the judicial process.⁴⁴ Courts’ ability to control the proceedings before them has long been recognized as a valid exercise of their inherent authority.⁴⁵ This includes the ability to sanction a parties’ bad or abusive conduct.⁴⁶ Although courts are urged to use discretion when wielding their broad inherent authority,⁴⁷ utilizing this power to sanction spoliation of ESI and non-ESI was not an altogether uncommon practice.⁴⁸ A court’s inherent authority to sanction a party is often broader than and concurrent with the explicit power to impose sanctions codified in the Federal Rules of Civil Procedure.⁴⁹ Enter the 2015 Amendments.

⁴⁰ Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 99 (2d Cir. 2002).

⁴¹ See Leon v. IDX Sys. Corp., 464 F.3d 951, 961 (9th Cir. 2006); See also Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997).

⁴² See, e.g., Rimkus Consulting Grp, Inc. v. Cammarata, 688 F. Supp. 2d 598, 644 (S.D. Tex. 2010).

⁴³ Alexander N. Gross, Note, *A Safe Harbor from Spoliation Sanctions: Can an Amended Federal Rule of Civil Procedure 37(e) Protect Producing Parties?*, 2015 COLUM. BUS. L. REV. 705, 723 (2015).

⁴⁴ See Ceglia v. Zuckerberg, 600 F. App'x 34, 36 (2d Cir. 2015); see also Haeger v. Goodyear Tire & Rubber Co., 793 F.3d 1122, 1129-30 (9th Cir. 2015).

⁴⁵ Chambers v. Nasco, Inc., 501 U.S. 32, 43 (1991) (citing United States v. Hudson, 11 U.S. 32 (1812)); see also Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980).

⁴⁶ Chambers, 501 U.S. at 46.

⁴⁷ *Id.* at 44 (finding that because of their very potency, inherent powers must be exercised with restraint and discretion).

⁴⁸ Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 465-66 (S.D.N.Y. 2010); Haeger, 793 F.3d at 1127.

⁴⁹ Chambers, 501 U.S. at 49; Haeger, 739 F.3d at 1131.

c. The 2015 Amendments

Aimed at unifying and streamlining the disparate eDiscovery procedures, the 2015 Amendments sought to achieve greater cooperation between parties to a litigation as well as closer judicial oversight and earlier case management.⁵⁰ Of the many amendments to the Rules, particularly pertinent to the field of eDiscovery was the change to Rule 26(b)(1) limiting the scope of discovery from that which is “reasonably calculated to lead to the discovery of admissible evidence,” to that which is “proportional to the needs of the case.”⁵¹ The inclusion of proportionality in the definition of the scope of discovery is intended to signal to courts that they should participate more actively in limiting the amount of evidence that is to be considered discoverable in an action.⁵²

Perhaps most important for eDiscovery however, was the change to Rule 37(e) that limited the award of sanctions for spoliation of ESI. New Rule 37(e) introduced a two-part threshold inquiry, specifically limiting its application to ESI that should have been preserved but is “lost.”⁵³ This was a big departure from the previous iteration of the Rule that only provided a safe harbor for good faith document retention policies.⁵⁴ First, in order to fall within the scope of the rule, a party must have first had an obligation to preserve, triggered either by some event, statute, regulation or

⁵⁰ Fed. R. Civ. P. 16(b) and 26(f) were amended to encourage discovery plans and orders that address preservation and production of ESI. Also consider courts ability to authorize additional discovery. Orders may be issued under Rule 26(b)(2)(B) requiring discovery from sources normally considered to be inaccessible or under Rule 26(c)(1)(B) permitting the court to allocate the expenses of recovery.

⁵¹ FED. R. CIV. P. 26(b)(1).

⁵² FED. R. CIV. P. 26 Committee Notes on Rules—2000 Amendment. The old “reasonably calculated” language to define the scope of discovery was described in the 2000 Committee Notes as being capable of “swallow[ing] any other limitation on the scope of discovery.” The 2000 amendments tried to prevent such usage by adding “relevant” to the beginning of the sentence, in an attempt to make clear that “‘relevant’ means within the scope of discovery as defined in this subdivision.” The “reasonably calculated” phrase continued to create to lead to overbroad discovery, however, and was therefore removed and replaced by the statement that “information within this scope of discovery need not be admissible in evidence to be discoverable.” Discovery of inadmissible and non-privileged information remains discoverable as long as it is within the scope of discovery, i.e. “proportional.”

⁵³ FED. R. CIV. P. 37(e); *Id.* Committee Notes on Rules—2015 Amendment.

⁵⁴ Fed. R. Civ. P. 37(f) (amended 2006).

court order.⁵⁵ The Committee Note points out that this language is not intended to create a new duty to preserve, but rather refers only to pre-existing obligations, recognized in all jurisdictions to one degree or another.⁵⁶ Second, ESI must have been “lost”—a far more complex categorization than appears on its face. When one party, even intentionally, destroys ESI, that same ESI may be found in another source. For example, with a lost or destroyed email, a copy is stored not only in the senders’ mailbox, but also the mailboxes of all recipients. Further, even when deleted, emails may still be recoverable from trash or archive folders or similar backup sources. Once the “loss” threshold is met, the rule presents two lines of inquiry for the court to follow.

First, if the court finds that the loss of ESI caused prejudice to another party, the court “may order measures no greater than necessary to cure the prejudice.”⁵⁷ Under this inquiry, the court will not assess the intent of the spoliating party, so long as the opposing party was prejudiced by the loss.

⁵⁸ The committee notes instruct that courts have a range of sanctions that are appropriate in cases falling under 37(e)(1), but warns that they should not reach the same level of severity as sanctions permitted under 37(e)(2),⁵⁹ analyzed under the second possible line of inquiry.

Rule 37(e)(2) governs sanctions for the spoliation of ESI when the spoliation was intended to deprive another party of its use in the litigation.⁶⁰ When the spoliation of ESI is intentional, courts will not address whether or not prejudice occurred to another party.⁶¹ The committee note informs

⁵⁵ See *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003); *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1070 (N.D. Cal. 2006).

⁵⁶ FED. R. CIV. P. 37(e) Committee Notes on Rules—2015 Amendment; The Sedona Conference, *The Sedona Conference Commentary on Legal Holds: The Trigger and The Process*, 11 SEDONA CONF. J. 265, 271 (2010) (Determining whether there was a duty to preserve is a fact specific inquiry, unique to the circumstances of the case with varying requirements, depending on jurisdiction).

⁵⁷ FED. R. CIV. P. 37(e)(1).

⁵⁸ *Id.* Committee Notes on Rules—2015 Amendment.

⁵⁹ *Id.*

⁶⁰ FED. R. CIV. P. 37(e)(2) advisory committee’s note to 2015 amendment.

⁶¹ *Id.*

us that that is because when intentional spoliation occurs, the finding of intent to commit spoliation is strong enough to “support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position.”⁶² Accordingly, Rule 37(e)(2) permits courts to impose the harshest sanctions, such as an adverse jury instruction that requires or permits the presumption that the information lost was unfavorable to the despoiling party, dismissal of the action or entry of a default judgment, against intentional ESI spoliators.⁶³

This newly amended Rule was designed not only to resolve the split between circuit courts, but also to stop courts from imposing sanctions for negligent or even grossly negligent ESI spoliation. The Committee Note also provides that the amended Rule 37(e) was specifically intended to foreclose reliance by courts on their historically recognized ability to rely on their “inherent authority” to impose sanctions or other curative measures for the spoliation of ESI.⁶⁴ The rule however, does not alter the applicability of independent state tort claims for spoliation.⁶⁵

III. Applications of the Newly Amended Rules

Despite the Amendments to Rule 37(e) and 26(b), discord still seems to be brewing amongst district courts. Recent decisions show unwillingness by some district courts, particularly those in the Second Circuit, to depart from the old standard of sanctioning negligent or grossly negligent spoliation of ESI, contrary to the purported intent of Rule 37(e)’s changes if not the letter, by adopting a narrow reading of the rule’s revision and by relying on the court’s inherent authority. Further, courts are questioning how the amendments targeting discovery of ESI will affect

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

non-electronic discovery, and whether creating differing standards for ESI and non-ESI discovery is in fact the desired outcome of the amendments.

a. Spoliation Sanctions Under New Rule 37(e)

In *Cat3 LLC v. Black Lineage, Inc.*,⁶⁶ one of the first cases decided under the newly amended Rules, the court faced a motion for sanctions on grounds that the Plaintiff, by changing its email storage system, altered the domain name that appeared on all of the emails Plaintiff sent that were retained and produced during discovery.⁶⁷ The litigation was a trademark infringement claim, and it hinged in part upon the domain name originally used by the Plaintiff and when.⁶⁸ Despite finding that near duplicates of the lost information were produced, Magistrate Judge James C. Francis still found that loss had occurred because even though the contents of the emails were the same, the domain name addresses from which they were sent appeared different than the versions in the possession of the receiving party.⁶⁹ The changes cast doubt on which version had greater authenticity.⁷⁰ Magistrate Francis found that imposing sanctions on the Plaintiff in this case was warranted because the loss of information caused prejudice to the Defendant.⁷¹ However, the analysis did not stop there. Perhaps more important for the field of eDiscovery than the courts application of 37(e) to this case of minimal ESI spoliation was Magistrate Francis statement that he

⁶⁶ 164 F. Supp. 3d 488 (S.D.N.Y. 2016).

⁶⁷ *Id.* at 493-94.

⁶⁸ *Id.* at 491.

⁶⁹ *Id.* at 497.

⁷⁰ *Id.*

⁷¹ *Id.* at 501.

could have reached the same result by relying on the courts' inherent authority⁷²—the Advisory Committee's Note proscribing such reliance notwithstanding.⁷³

The court in *Cat3* grounded its ability to impose sanctions based on its inherent authority on the Supreme Court's decision in *Chambers v. NASCO*,⁷⁴ stating that courts' reliance on inherent powers are indispensable to the court and not abrogated by the existence of procedural rules that sanction the same conduct.⁷⁵ The court further adds that where a parties' conduct fails to meet Rule 37(e)'s threshold inquiry, the court can still use its inherent authority to address abuses of the judicial process.⁷⁶ Stated plainly, this means that where no loss of information or prejudice occurs and Rule 37(e) is not invoked, a court would still be able to sanction a party under the court's inherent authority, if the conduct is sufficiently offensive to be considered abusive of the judicial process.⁷⁷ This treatment of Rule 37(e) is not limited to district courts in the Second Circuit, as district courts in other circuits have rendered decisions on similar grounds or at least signaled a willingness to reach similar outcomes.⁷⁸

The district court decisions in the Second, Third and Ninth Circuits expressing willingness to sanction ESI spoliation by way of the courts' inherent authority should be contrasted with the

⁷² *Id.* at 497-98.

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

⁷⁴ 501 U.S. at 42-43 (1991) (internal quotations omitted) (“It has long been understood that certain implied powers must necessarily result to our Courts of justice from the nature of their institution, powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others. . . . These powers are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”).

⁷⁵ *Id.* at 49; *Cat3*, 164 F. Supp. 3d at 498.

⁷⁶ *Id.*

⁷⁷ *See id.*

⁷⁸ *See e.g.*, *Freidman v. Phila. Parking Auth.*, No. 14-6071, 2016 U.S. Dist. LEXIS 32009, at *23 (E.D. Pa. Mar. 10, 2016); *Cohn v. Guaranteed Rate, Inc.*, 318 F.R.D. 350, 354 (N.D. Ill. 2016) (“The Court also has broad, inherent power to impose sanctions for failure to produce discovery and for destruction of evidence, over and above the provisions of the Federal Rules.”); *InternMatch, Inc. v. Nxtbigthing, LLC*, No. 14-cv-05438-JST, 2016 U.S. Dist. LEXIS 15831, at *11 n.6 (N.D. Cal. Feb. 8, 2016). *But see*, *FiTeq Inc. v. Venture Corp.*, 169 F. Supp. 3d 948, 956 (N.D. Cal. 2016); *First Fin. Sec., Inc. v. Freedom Equity Grp., LLC*, No. 15-cv-1893-HRL, 2016 U.S. Dist. LEXIS 140087 (N.D. Cal. Oct. 7, 2016).

attitude of the district courts in other circuits. Take for example, the language used in a footnote by the District Court for Southern District of the Florida (in the 11th Circuit) where Magistrate Judge William Mathewman states in no uncertain terms that reliance on a court's inherent authority has been foreclosed when it comes to sanctioning spoliation of ESI.⁷⁹

b. Amended 37(e)'s Effect on Spoliation of Non-ESI Evidence

Since the amendment of Rule 37(e), courts have begun to question whether they should be applying a uniform standard for sanctions for spoliation of ESI and non-ESI evidence. While there are of course many inherent differences between ESI and non-ESI, courts have questioned whether it is desirable to have differing standards for spoliation sanctions, and whether the distinction is meaningful or fair.⁸⁰ After all, destruction of evidence is a nefarious act regardless of whether or not the evidence was electronic or physical—why then should it be treated any differently?

In *Best Payphones Inc. v. City of New York*,⁸¹ the court considered a motion for sanctions for the negligent spoliation of both ESI and non-ESI evidence, specifically, financial and business statements and emails.⁸² Magistrate Judge Vera Scanlon noted in the court's opinion that the court could award sanctions for the spoliation of the physical documents but not for the ESI, despite the intent being the same for the loss of both types of evidence.⁸³ Concern for this discrepancy was echoed in *Living Color Enterprises v. New Era Aquaculture, Ltd.* where Magistrate Judge William Mathewman predicted in a footnote that this issue would lead to the various circuits reaching

⁷⁹ *Living Color Enters. v. New Era Aquaculture Ltd.*, No. 14-cv-62216-MARRA/MATTHEWMAN, 2016 U.S. Dist. LEXIS 39113, at *12 n.2 (S.D. Fla. Mar. 22, 2016) (“Clearly, when confronting a spoliation claim in an ESI case, a court must first look to newly amended Rule 37(e) and disregard prior spoliation case law based on ‘inherent authority’ which conflicts with the standards established in Rule 37(e).”).

⁸⁰ *See id.*; *See Best Payphones, Inc. v. City of N.Y.*, No. 1-CV-3934 (JG) (VMS), 2016 U.S. Dist. LEXIS 25655, at *10 (E.D.N.Y. Feb. 26, 2016).

⁸¹ *Id.*

⁸² *Id.* at *2.

⁸³ *Id.* at *10.

independent conclusions.⁸⁴ The *Best Payphones* court did not discuss its ability to rely on inherent authority to sanction the loss of the emails. This may be because the court did not award sanctions for any of the spoliation that occurred.⁸⁵

But there are reasons why there should be differential treatment between ESI and tangible documents and things. First, whereas paper documents once discarded are often gone for good, deleted data, as evidenced by its definition in the Sedona Conference Glossary, is not destroyed as easily.⁸⁶ Further, the same ESI can often be stored in multiple locations, such as a local hard disk, cloud, or on a backup drive.⁸⁷ It therefore often requires substantially greater effort to destroy ESI than paper documents. Accordingly, there is a greater likelihood of intentional spoliation when ESI is involved versus traditional documents and things. However, while in some respects more durable than paper, ESI is also more fragile. Consider the fact that metadata, which accompanies ESI and is often used as an authentication tool,⁸⁸ is easily destroyed and altered, even by actions as seemingly innocuous as accessing the document, moving it or copying it.⁸⁹ By requiring evidence of intent to

⁸⁴ *Living Color*, 2016 U.S. Dist. LEXIS 39113, at *12 n.2.

⁸⁵ *See Best Payphones*, 2016 U.S. Dist. LEXIS 25655, at *12-14.

⁸⁶ “[Deleted Data is] information that is no longer readily accessible to a computer user due to the intentional or automatic deletion of the data. Deleted data may remain on storage media in whole or in part until overwritten or wiped. Even after the data itself has been wiped, directory entries, pointers or other information relating to the deleted data may remain on the computer. Soft deletions are data marked as deleted (and not generally available to the end-user after such marking) but not yet physically removed or overwritten. Soft-deleted data can be restored with complete integrity.” Sherry B. Harris & Paul H. McVoy, *The Sedona Conference Glossary: E-Discovery and Digital Information Management*, THE SEDONA CONFERENCE WORKING GROUP SERIES 11 (Apr. 2014), https://thesedonaconference.org/system/files/sites/sedona.civicaactions.net/files/private/drupal/filesys/publications/The%20Sedona%20Conference%20Glossary%20E-Discovery%20%2526%20Digital%20Information%20Management_4th%20Ed-July%202014.pdf.

⁸⁷ JOHN M. BARKETT, *THE ETHICS OF eDISCOVERY* 4-7 (2009), http://apps.americanbar.org/abastore/products/books/abstracts/5310380chap1_abs.pdf.

⁸⁸ “[E]lectronic evidence may be authenticated under Rule 901(b)(4) ...by examining the metadata [of] the evidence.” *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 547 (D. Md. 2007).

⁸⁹ *See Michael D. Berman, The Duty to Preserve ESI (Its Trigger, Scope, and Limit) & the Spoliation Doctrine in Maryland State Courts*, 45 U. BALT. L. F. 129, 130 (2015).

award sanctions for spoliation of ESI and not tangible documents and other things, the Committee sought to tailor a standard that better fit the simultaneous resilience and fragility of ESI.

IV. The Future of eDiscovery

While technology is sure to continue evolving, the Federal Rules, as they relate to eDiscovery, are likely to remain static for the foreseeable future. Fortunately, litigants have significant and constantly improving tools at their disposal to ease the pains of litigation without relying on the courts for intervention. However, even where judicial intervention is unavoidable, judges should become increasingly able to appropriately address eDiscovery issues as they increase in frequency and prominence, simply as a result of better familiarity with the subject.

a. For Answers, Look to the Algorithm

Technology assisted review (“TAR”) or predictive coding, is a budding technology that may significantly reduce the costs associated with far reaching discovery requests. TAR is essentially a search method that employs algorithms to analyze human keyword inputs to search large quantities of data and predict which documents will be responsive or relevant.⁹⁰ Interestingly, TAR has not only been adopted by parties as a way of streamlining the process of searching databases for responsive documents, known as culling, but has also been court ordered in a few instances.⁹¹ In *National Day Laborer Organization Network v. U.S. Immigration & Customs Enforcement Agency*,⁹² District Judge Shira Scheindlin —of *Zubulake v. Warburg* fame—wrote that usage of TAR and similar

⁹⁰ “[TAR] is used to prioritize or code documents based on seed sets coded by humans by extrapolating the human judgments to the remaining document collection using sophisticated algorithms or systematic rules.” Heyward D. Bonyata & Jarret O. Coco, *To TAR or not to TAR: deciding when to use TAR*, NELSON MULLINS RILEY & SCARBOROUGH LLP (Aug. 25, 2015), <http://www.lexology.com/library/detail.aspx?g=acb4c89b-dea8-4740-a282-9c132845e5ed>.

⁹¹ See generally *Nat’l Day Laborer Org. Network v. U.S. Immigration & Customs Enf’t Agency*, 877 F. Supp. 2d 87 (S.D.N.Y. 2012); *Global Aerospace, Inc. v. Landow Aviation, L.P.*, No. CL 61040 (Va. Cir. 2012).

⁹² *Nat’l Day Laborer*, 877 F. Supp. 2d at 87.

technologies are emerging as a best practice in the eDiscovery field.⁹³

TAR was recently cast into the spotlight with the turbulent 2016 presidential election. First, when questions originally surfaced surrounding Hillary Clinton's use of a private server in her capacity as Secretary of State, her legal team was tasked with identifying work related emails from the 60,000 that were stored on the private server.⁹⁴ Using keyword searches and header information, Clinton's lawyers turned up 30,000 responsive documents.⁹⁵ Unsatisfied, the F.B.I. employed the even more basic technique of reading each individual email and found several thousand more responsive emails not proffered by Clinton's lawyers.⁹⁶ The techniques employed by Clinton's legal team are known to produce potentially incomplete results⁹⁷ and lag behind the techniques employed in most large law firms today.⁹⁸ However, TAR's influence on the election did not end there. On October 28, 2016 the F.B.I. reopened its investigation into Clinton's emails after an unrelated investigation into Anthony Weiner, husband of long-time Clinton aide Huma Abedin, uncovered 650,000 more emails potentially relevant to the earlier investigation.⁹⁹ The F.B.I. revealed only a few days later that it had completed its review of the newly uncovered emails and was again closing the investigation into Clinton without bringing any charges against her.¹⁰⁰ Critics immediately questioned how the investigation into these 650,000 emails could have been completed so quickly.¹⁰¹ However,

⁹³ *Id.* at 109.

⁹⁴ Ian Lopez, *The E-Discovery Issue with the FBI's Investigation into the Clinton Emails: The question over e-discovery keyword searches is prevalent in the FBI's investigation of Hillary Clinton's emails*, LEGALTECH NEWS (Jul. 6, 2016), <https://www.law.com/legaltechnews/almID/1202761830629/>.

⁹⁵ *Id.*

⁹⁶ *Id.* Whether any of the emails uncovered were of any value is beyond the scope of this note.

⁹⁷ *Id.*

⁹⁸ Herrick, *supra* note 29.

⁹⁹ Adam Goldman & Matt Apuzzo, *How the F.B.I. Reviewed Thousands of Emails in One Week*, N.Y. TIMES (Nov. 7, 2016), <https://www.nytimes.com/2016/11/08/us/politics/hillary-clinton-donald-trump-fbi-emails.html>.

¹⁰⁰ *Id.*

¹⁰¹ Michael Flynn (@GenFlynn), TWITTER (Nov. 6, 2016, 2:29 PM), <https://twitter.com/genflynn/status/795392694411468800?lang=en> ("IMPOSSIBLE: There R [sic] 691,200 seconds in 8 days. DIR [sic] Comey has thoroughly reviewed 650,000 emails in 8 days? An email / second? IMPOSSIBLE RT [sic]").

we now know technology such as TAR is what made it all possible.¹⁰² Had advanced TAR techniques been employed earlier by both Clinton’s lawyers and the F.B.I., more accurate results would likely have been returned long before the November 8th election.

As the Clinton saga demonstrates, some of the benefits of utilizing TAR are easy to envision. Removing the human element from collecting and searching responsive ESI will avoid the human inclination to withhold or mishandle ESI and provide an impartial response to inputs. Additionally, employing TAR will cut discovery costs by eliminating expansive document review by attorneys or other legal staff who may expend multitudes of hours combing through largely irrelevant documents while searching for the few needles of useful documents in the haystack.¹⁰³

TAR however, is not the end-all be-all solution to eDiscovery issues. Its usage has raised concerns about TAR’s reliability and ability to avoid disclosure of privileged information. Although accidental disclosure of privileged ESI as a practical matter can severely and adversely affect a party’s claim or defense, parties are still permitted to enter into claw back agreements to recover privileged ESI produced in discovery. Federal Rule of Evidence 502¹⁰⁴ provides that such agreements are enforceable between the parties¹⁰⁵ and when incorporated in a court order, can prevent waiver in any subsequent proceeding, even when used by non-parties to the original suit.¹⁰⁶

b. E-Neutrals

“E-Neutrals” are electronic discovery experts acting as independent arbiters of electronic

¹⁰² Andy Greenberg, *Yes, Donald Trump, The FBI Can Vet 650,000 Emails In Eight Days*, WIRED (Nov. 6, 2016, 10:37 PM), <https://www.wired.com/2016/11/yes-donald-trump-fbi-can-vet-650000-emails-eight-days/>.

¹⁰³ Dertouzos, *supra* note 10, at 2-3.

¹⁰⁴ Fed. R. Evid. 502.

¹⁰⁵ Fed. R. Evid. 502(e).

¹⁰⁶ Fed. R. Evid. 502(b).

discovery issues.¹⁰⁷ Parties may request incorporation of an alternative dispute resolution (ADR) agreement appointing a neutral third party to decide e-Discovery issues in the judge's scheduling order.¹⁰⁸ By utilizing the services of an e-Neutral, parties can quickly and efficiently resolve disputes that arise throughout the course of discovery without turning to costly and lengthy motion practice.¹⁰⁹ Another benefit of having an e-Neutral oversee discovery is that it permits parties to utilize an expert to resolve issues in the highly specialized field of e-Discovery.¹¹⁰

Utilizing e-Neutrals however, is not without concerns. Adequate scrutiny should always be given whenever the role of a judge is supplanted by a privatized alternative. Mandatory arbitration agreements have recently come under intense scrutiny by the public¹¹¹ after a string of Supreme Court decisions upheld the enforceability of such agreements.¹¹² However, many—if not all—of the concerns that affect the public's view of mandatory arbitration agreements are not present in the e-Neutral context. Whereas mandatory arbitration agreements are routinely incorporated in consumer transactions and often, adhesion contracts,¹¹³ e-Neutral agreements are negotiated between attorneys and are subject to judicial approval when incorporated into a scheduling order.¹¹⁴ E-Neutral agreements also are designed only to govern the discovery process and not a final

¹⁰⁷ Lawrence H. Kolin, *Mediate ESI Issues Early and Get Back to the Merits of your Case*, AM. BAR ASS'N (Oct. 2014), https://www.americanbar.org/content/dam/aba/events/dispute_resolution/Newsletter/articles/Kolin.authcheckdam.pdf.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Anthony J. Rospert & Jake Evans, *5 Tips For Negotiating And Drafting Joint E-Discovery Plans*, LAW360 (May 26, 2016, 10:33 AM), <https://www.law360.com/sports/articles/798437/5-tips-for-negotiating-and-drafting-joint-e-discovery-plans>.

¹¹¹ A 2014 poll found that 74% of the public found forced arbitration “[n]ot acceptable.” DEF. RESEARCH INST., 2014 NATIONAL POLL GRAPHICS (2014), <http://www.dri.org/poll-charts-graphs/2014-poll-graphs-and-chartsorg/poll-charts-graphs/2014-poll-graphs-and-charts>.

¹¹² *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); *See also* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

¹¹³ Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191, 1192 (2001).

¹¹⁴ Kolin, *supra* note 106.

adjudication of the merits of a case.¹¹⁵

c. Other Reform Approaches

The topic of eDiscovery and the unique problems it presents have spawned significant literature. Creative thinkers have advocated for implementation of numerous policies and reforms to help curb excessive discovery costs and minimize the waste that it generates. One novel idea is to implement a cost-capping rule that would limit a producing party's discovery expenses to a certain limit—half of the value of the case has been floated as a starting point—and shifting any additional costs to the requesting party.¹¹⁶ While this idea may be helpful in limiting costs of litigation and preventing meritless claims,¹¹⁷ it also presents a number of problems. The idea of capping and shifting eDiscovery costs is premised on striking a balance between the American discovery rule where each party assumes their own litigation costs and the English model, where the loser in a suit pays the winner's costs.¹¹⁸ While both approaches have benefits, two main problems with this proposed synthesis come to mind.

First, limiting a party's eDiscovery costs to a certain portion of the total value of the claim (cost-capping) is no small matter. Judges will be required to weigh in early in the discovery process to put a dollar value on a claim. Judges would also have to evaluate cases using incomplete data, as discovery would not yet have been completed. This extra step will create one more hurdle on the road to final adjudication for the parties to belabor. This is all to say nothing of the chilling effects such a policy would have on non-frivolous but low-value claims or the problem of valuing claims

¹¹⁵ Kolin, *supra* note 106.

¹¹⁶ Mazanec, *supra* note 5, at 634.

¹¹⁷ Mazanec, *supra* note 5, at 634.

¹¹⁸ Mazanec, *supra* note 5, at 633-634.

seeking non-monetary relief.¹¹⁹

Consider the negative effects a cost-capping or shifting rule would have on low value cases, or even high value cases brought by parties unable to bear the shifting expenses of eDiscovery. Under a cost-capping scheme, low value cases would routinely be afforded inadequate eDiscovery budgets, as a case's value does not dictate its discovery needs. Although some argue that an exception to the rule for low value cases or indigent litigants could be one possible solution,¹²⁰ there are other foreseeable negative consequences likely to stem from such a rule. For example, the fear of losing at trial and being responsible for the eDiscovery costs above the threshold is more likely to keep poorer litigants from bringing claims than more affluent ones, thus mirroring general criticisms of the English Rule.¹²¹

Further, the Federal Rules already provide for recovering litigation costs by making them recoverable under Rule 54 subsection d.¹²² The costs for which recovery may be sought are set forth in 28 U.S.C. § 1920.¹²³ Critics will not incorrectly point out that recoverable costs have been viewed narrowly by the Supreme Court¹²⁴ and are often very limited in scope.¹²⁵ However, Rule 54's cost-shifting provision remains available to serve as a vehicle for courts to offset discovery costs when justice so warrants.

The common law also recognizes exceptions to the American Rule. The Supreme Court

¹¹⁹ HENRY COHEN, CONG. RESEARCH SERV., 94-970, AWARDS OF ATTORNEYS' FEES BY FEDERAL COURTS AND FEDERAL AGENCIES (2008) https://www.americanbar.org/groups/professional_responsibility/policy/charts.html.

¹²⁰ Mazanec, *supra* note 5, at 659.

¹²¹ Betsy Z. Russell, *Critics worry about new Idaho 'loser pays' court rule*, WASH. TIMES, Dec. 18, 2016, <http://www.washingtontimes.com/news/2016/dec/18/critics-worry-about-new-idaho-loser-pays-court-rul/>.

¹²² FED. R. CIV. P. 54(d)(1). The rule treats attorney's fees separately from costs. *Id.* at (d)(2).

¹²³ Recoverable are "[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case." 28 U.S.C. § 1920(4) (2008).

¹²⁴ *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2006-2007 (2012) (limiting recoverable costs associated with interpreters under § 1920(6) to those providing oral translation and not the translation of written documents).

¹²⁵ Whereas § 1920 provides for recovery of expert witness fees, § 1821 limits that fee to \$40.00 per day. 28 U.S.C. § 1920(6); 28 U.S.C. § 1821(b) (1990).

recognized that an award of counsel fees to the winning party is warranted when a party to a suit, acts “in bad faith, vexatiously, wantonly, or for oppressive reasons.”¹²⁶ This is known as the bad faith exception and it applies to litigants as well as their attorneys.¹²⁷ Utilizing common law avenues and Rule 54’s cost-shifting provision allows judges the flexibility needed to render justice without adopting a one-size-fits-all approach to awarding eDiscovery costs.¹²⁸

d. Ethical Obligations as Regulatory Force in eDiscovery

The age of eDiscovery has brought with it many new ethical obligations for attorneys to become familiar with and concerns to be wary of. While federal jurisdictions apply differing local rules governing professional conduct, most jurisdictions’ rules bear similarity to the ABA Model Rules of Professional Conduct.¹²⁹ At their most basic, ethics rules contain language that requires lawyers to provide competent representation.¹³⁰ This requirement includes an obligation to “keep abreast of changes in the law and its practice” and comprehend “the benefits and risks associated with relevant technology.”¹³¹ A similarly important rule however, is Model Rule 3.4’s prohibition on

¹²⁶ Hall v. Cole, 412 U.S. 1, 5 (1973) (citation omitted).

¹²⁷ Roadway Express, Inc. v. Piper, 447 U.S. 752, 765-67 (1980) (“If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes.”). Further, note, the bad faith exception only permits fee shifting when the actions taken in bad faith were committed after the claim arose or during litigation, not when the underlying claim itself is based on a party’s bad faith. See Shimman v. Int’l Union of Operating Eng’rs, Local 18, 744 F.2d 1226, 1230-32 (6th Cir. 1984) (en banc), cert. denied, 469 U.S. 1215 (1985).

¹²⁸ It is important to point out that the Supreme Court was concerned with the possible chilling effects that could occur if plaintiffs are too frequently saddled with their opponent’s litigation costs. The Court seems to agree that the unfortunate reality of weak claims being brought against deep-pocketed companies does not outweigh the discouraging effect that awarding litigation costs—in this case, eDiscovery costs—to the victor would have on the public. See Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978) (warning courts about the danger of engaging in “*post hoc* reasoning” stating that “[t]his kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.”).

¹²⁹ The ABA publishes charts that compare state rules to the model rules. See *Charts Comparing Professional Conduct Rules*, AM. BAR ASS’N, http://www.americanbar.org/groups/professional_responsibility/policy/charts.html (last visited Nov. 2, 2017). A prominent exception is California that has not adopted a version of the ABA Model Rules.

¹³⁰ MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 2016).

¹³¹ MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 8; Massachusetts has an identical requirement. See, e.g., MASS. RULES OF PROF’L CONDUCT r. 1.1 (2015).

“mak[ing] a frivolous discovery request or fail[ing] to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.”¹³² Similarly, attorneys must not run afoul of their ethical obligations not to “bring. . . or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous...[.]”¹³³

Judges can and should rely on these ethical obligations to ensure that attorneys are not only well versed in current eDiscovery practices, but that they are not using eDiscovery for improper purposes. Enforcing stricter adherence to attorney’s ethical obligations is likely to yield better results in combating eDiscovery abuse than relying on other reform ideas or rule changes because attorneys, if not more likely to be the source of the problem, at a minimum have an ethical obligation not to abuse discovery procedures and to become and remain familiar with changes in law and technology. Therefore, the responsibility for abusive discovery practices should lie with the attorneys and not the clients, who typically bear the financial burden under discovery cost-shifting models. Using ethical rules to improve eDiscovery practice will refocus the blame for vexatious litigation from the litigants—who are less likely to be familiar with the law and civil procedure—and place it where it more likely belongs: incompetent or unscrupulous attorneys.

V. Conclusion

The recent amendments concerning eDiscovery procedures had laudable goals in streamlining eDiscovery practices. However, the amended rules remain a point of confusion across jurisdictions with respect to both the culpable level of intent required for imposing sanctions for the

¹³² MODEL RULES OF PROF’L CONDUCT r. 3.4(d). New Jersey has an identical requirement. *See, e.g.*, N.J. RULES OF PROF’L CONDUCT r. 3.4(d) (2016).

¹³³ MASS. RULES OF PROF’L CONDUCT r. 3.1 (2015). Other ethical obligations likely to pose problems in the eDiscovery context are other ethical concerns likely to be encountered within electronic discovery are the duty to maintain client confidences, candor toward a tribunal, fairness to opposing counsel and communications with unrepresented parties. *See*, N.J. RULES OF PROF’L CONDUCT r. 1.6, 3.3-4 and 4.3.

spoliation of ESI and the appropriate application of the heightened standards to non-ESI. As technological advancements continue to provide solutions to some of the more common eDiscovery issues, courts should not be apprehensive to mandate their usage. Doing so will ensure that discovery practices continue to evolve with technology and that courts will be able to weed out wasteful practices and streamline the adjudication of disputes.

Finally, while concerns over the cost and potential abuse of eDiscovery practices are well founded and very real, the tail cannot wag the dog. Fear of eDiscovery abuse should not serve as a basis for limiting the amounts of information litigants can obtain, especially when such efforts will hurt small businesses and individuals far more than larger corporate adversaries. Allowing the potential for abuse to limit litigants' access to ESI would contravene the overarching goal of Rule 1 of the Federal Rules of Civil Procedure—that the rules should serve to “secure the *just*, speedy, and inexpensive determination of every action and proceeding.”¹³⁴ Future committee review of the Federal Rules should be careful to amend the rules as necessary to keep them up to date with changes in technology and good practice but should remain wary of fundamentally altering the cost allocation of eDiscovery. The most efficient way to eliminate waste is not to shift the burden of those costs or to implement judicial evaluation and cost-capping of claims, but rather is to implement TAR and other technological advancements to lower eDiscovery costs and to rely on and enforce the ethical rules and the Federal Rules that are already in place to curb and correct any abuses that do arise.

¹³⁴ FED. R. CIV. P. 1 (emphasis added).