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Jeffrey A. Parness*

I. INTRODUCTION

In 2006, Federal Rule of Civil Procedure (FRCP) 37(e) came into effect, declaring that lost electronically stored information (ESI) could not prompt "sanctions . . . on a party" absent "exceptional circumstances." Sanctions were limited to where the loss resulted from "the routine, good-faith operation of an electronic information system."1 Effective December 1, 2015, Rule 37(e) now contemplates limited "measures . . . to cure the prejudice" caused by lost and irreplaceable ESI arising from a party's failure "to take reasonable steps to preserve," where the lost ESI "should have been preserved in the anticipation or conduct of litigation."2 For more culpable conduct, the new rule contemplates possible sanctions.3

The rule was amended in 2015 because the 2006 norm had "not adequately addressed the serious problems resulting from the continued exponential growth in the volume" of ESI and because it had prompted in the federal circuits "significantly different standards for imposing sanctions or curative measures on parties who fail to preserve" ESI.4 The 2015 rule incorporated only some of the 2013 recommended amendments to FRCP 37(e).5

This article will first review the basic features of the old and new FRCP 37(e), as well as their place amongst other FRCP and judicial precedents on information preservation in anticipation of and during federal civil litigation.

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2. FED. R. CIV. P. 37(e).
3. FED. R. CIV. P. 37(e)(2).
4. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

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It will then comment on some likely challenges posed to those utilizing or affected by the new federal rule on lost ESI. 6

II. BASIC FEATURES OF THE 2006 FRCP 37(E)

Before 2006, lost ESI and non-ESI were comparably addressed in the FRCP. Thus, since 1993, Rule 37(c) has stated that a party who “fails to provide information . . . is not allowed to use that information . . . to supply evidence . . . unless the failure was substantially justified or is harmless.” 7 Additionally, such information could be used where the jury is informed of the “party's failure” or where other sanctions are deemed more “appropriate.” 8 Alternatively, such information could be used where the jury is informed of the “party's failure” or where other sanctions are deemed more “appropriate.” 8

The 2006 FRCP 37(e) on lost ESI lasted until 2015. 10 As noted, the 2006 rule authorized, with a finding of “exceptional circumstances,” judicial

6. Whether under the new Fed. R. Civ. P. 37(e) or its predecessors, ESI discovery is often guided by party agreement, frequently per a Fed. R. Civ. P. 16 scheduling order. In the absence of agreement there can be a local rule providing a default standard for ESI discovery. See, e.g., N.D. Ohio L.R. App. K. Seemingly, such an agreement might include different, and contractually enforceable, norms on curative measures or sanctions for lost ESI. Compare, e.g., Fed. R. Civ. P. 26(a)(1) (stipulations on initial disclosures); Fed. R. Civ. P. 26(d)(1) (stipulation on discovery before Fed. R. Civ. P. 26 (f) conference); Fed. R. Civ. P. 26(d)(3) (stipulation on sequence of discovery); and Fed. R. Civ. P. 16(c) (at pretrial conference a represented party must authorize an attorney “to make stipulations”). Any such agreements would not limit judicial initiatives on curative measures or sanctions for lost ESI, as when there is alleged contempt of court. On the need for greater facilitation of party agreements on ESI costs, see Genevieve H. Harte, Electronic Discovery in Civil Litigation: Avoiding Surprises in Cost Shifting Decisions, 12 Seton Hall Cir. Rev. 267, 287 (2016).

10. While the 2006 rule operated in the federal district courts for only nine years, it has been adopted and continues to operate in several different state courts. See, e.g., Ala. R. Civ. P. 37(g); Haw. R. Civ. P. 37(f); Kan. Stat. Ann. § 60-237(e); Md. Rule § 2-433(b); Minn. R. Civ. § 37.05; Mont. Code Ann. tit. 25, ch. 20, Pt. V. Rule 37(f); N.J. Stat. Ann. § 4:23–6; N.C. Gen. Stat. § 1A-1, Rule 37 (b1); Tenn. R. Civ. P. 37.06; V.R.C.P. Rule 37(f). See also Utah R. Civ. P. 37(e) (adoption of 2006 Federal Rule 37(e) accompanied by an explicit recognition of continuing “inherent” judicial power to deal with lost ESI or non-ESI “in violation of a duty” to preserve), and 2013 Ohio Civ. R. 37(F) (a 2008 rule that, in addition to adding the 2006 Federal Rule 37(e), sets out five factors that courts may consider when determining whether to sanction). But see Ariz. R. Civ. P. 37(g) (containing the 2015 Federal Rule 37(e)
“sanctions . . . on a party” who lost ESI due to “the routine, good-faith operation of “an electronic information system.”

ESI and non-ESI were, at these times, distinguished in federal procedural law norms beyond the lost information context. Thus, since the 2006 Federal Rule 26(b)(2)(B) stated that “[a] party need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of an undue burden or cost,” that party carried the burden unless the “requesting party shows good cause.” Since 1993, Federal Rule 26(f) has stated, a now-mandatory “discovery plan” must “state . . . any issues about disclosure, discovery, or preservation of [ESI], including the form or forms in which it should be produced.” And, since 2006, Federal Rule 34(b)(2)(E) has stated that a party may object “to the requested form or forms for producing” ESI.

Other federal discovery norms lumped together ESI and non-ESI from 2006–2015. Since 2006, the rule on required disclosures has spoken of providing a copy or description of certain “documents, electronically stored information, and tangible things” in the disclosing party’s “possession, custody, or control.” Additionally, the rule on requests for production has spoken of serving “any designated documents or electronically stored information . . . from which information can be obtained.” This rule comparably situates documents and ESI for those producing discovery.

III. 2013 PROPOSED CHANGES TO FEDERAL RULE 37(E)

Not long after the promulgation of Federal Rule 37(e) in 2006, litigants and potential litigants expressed concerns to the federal judicial rule makers that “preservation problems . . . nonetheless increased.” The chief concerns involved “the increasing burden of preserving information for litigation, par-

and also articulating the parameters of the “duty to take reasonable steps to preserve” ESI and guidelines on what constitutes such steps).

14. Id.
18. FRCP 34(a) (codified as amended at FRCP 34(a)(1)(A) (2015)).
20. FRCP 37(e) advisory committee’s note to 2013 amendment, at 44.
particularly with regard to electronically stored information." The rule makers further observed "[s]ignificant divergences among federal courts across the country" prompted great uncertainties for "potential parties" regarding "what preservation standards they will have to satisfy to avoid sanctions" in later civil actions.

In 2013, the Civil Rules Advisory Committee responded to concerns about information preservation issues by suggesting amendments to Rule 37(e), which would establish "a uniform set of guidelines . . . to all discoverable information, not just [ESI]" and would impose information preservation duties "recognized by many court decisions." The Federal Rules no longer tied lost ESI to an "electronic information system," as under Federal Rule 37(f) in 2006, which distinguished some lost ESI from other lost ESI and other lost non-ESI.

Upon breach of the new Federal Rule 37(e), the 2013 proposal envisioned ordering "additional discovery, . . . curative measures, or . . . the party to pay the reasonable expenses, including attorney's fees, caused by the failure." The court could impose other sanctions or give "adverse-inference jury instruction[s]," following a breach where either a party's actions "caused substantial prejudice . . . and were willful or in bad faith" or a breach "irreparably deprived a party of any meaningful opportunity" to litigate. The amendment proponents suggested "factors" within the new Federal Rule 37(e) on how to assess "a party's conduct" to determine if that conduct caused a breach of the duty to preserve information. In 2015, Congress never fully adopted the 2013 proposal.

IV. BASIC FEATURES OF THE 2015 FEDERAL RULE 37(E)

As noted, the 2015 Federal Rule 37(e) speaks to lost ESI once found within and outside of an "electronic information system." It also contemplates both curative measures and sanctions for lost and now irreplaceable

21. Id.
22. Id.
23. Id.; see also NMRA, 1-037 Committee Commentary for 2009 Amendments (determining, in rejecting an adoption of Federal Rule 37(f), that its rules should not treat different any ESI and non-ESI lost as a result of "good faith routine destruction" of potential evidence).
24. FED. R. CIV. P. 37(e).
25. FED. R. CIV. P. 37(e) advisory committee's note to 2013 amendment, at 43.
26. Id. at 43, 48 (intending this to be a "more demanding" test than the 2006 "substantial prejudice" test).
27. Id. at 43–44.
28. FED. R. CIV. P. 37(e)(2) advisory committee's notes to 2015 amendments.
29. Id.
ESI, which does not require “exceptional circumstances.” Further analysis of the 2015 Federal Rule 37(e) follows.

A. Choice of Law

The new Federal Rule “forecloses reliance on inherent authority or state law to determine when certain measures should be used” in addressing lost ESI within a pending civil case and aims to eliminate, or at least reduce, the “significantly different standards” within the circuits. Measures addressing lost ESI depend upon the finding of a breach of the, presumably federal, “common-law duty” regarding the preservation of “relevant information when litigation is reasonably foreseeable” or pending. Such measures should comparably apply in federal cases involving federal question and nonfederal question claims.

While state laws on curative measures or sanctions within a federal court case against a party who loses ESI are not to be employed, any “independent tort claim for spoliation” may be used. Since the federal rule explicitly covers ESI that “should have been preserved in the anticipation or conduct of litigation,” it seems that one can pursue state spoliation tort claims for ESI lost before or during federal civil litigation. These spoliation claims thus may operate where there may be no Rule 37(e) sanction available, such as when a spoliation tort does not require—as does a Rule 37(e) sanction—a failure “to take reasonable steps to preserve.” For example, consider lost ESI prompting strict liability under a state information preservation statute.

30. Id. These differences are not always recognized or deemed significant. See, e.g., Gonzalez-Bermudez v. Abbott Labs. PR Inc., No. CV 14-1620(PG), 2016 WL 5940199, at *23 n.10 (D.P.R. Oct. 9, 2016) (stating the new Federal Rule 37(e) has “substantially similar” considerations on imposition of sanctions as did former rule).

31. FED. R. Civ. P. 37(e) advisory committee’s notes to 2015 amendments.

32. Id.; see, e.g., Silvestri v. General Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) (applying federal, not New York, spoliation principles during a discovery dispute in a product liability case arising from a New York accident); Martin Transp., Ltd. v. Platform Advert., Inc., No. 14-CV-02464-JWL-TJJ, 2016 WL 492743 (D. Kan. Feb. 8, 2016) (going so far, and too far, to say a pre-lawsuit duty to preserve arises “any time a party receives notification that litigation is likely to commence” in the case of cease and desist letter which was acknowledged and acted upon within a few days).

33. FED. R. Civ. P. 37(e) advisory committee’s note to 2015 amendment.

34. FED. R. Civ. P. 37(e).

35. Id.

36. See, e.g., 210 ILL. COMP. STAT. ANN. 90/1 (West 2016) (hospital duty to keep certain X-rays); Rodgers v. St. Mary’s Hosp. of Decatur, 597 N.E.2d 616, 620 (Ill. 1992) (implied cause of action arises from statute, to be governed by prin-
B. Irreplaceable Lost ESI

The new federal rule only addresses curative measures or sanctions for lost ESI that "cannot be restored or replaced through additional discovery." Presumably, other rules will guide judicial responses to lost ESI that is restorable or replaceable. Here, rules guiding lost ESI and non-ESI discovery will apply comparably. These rules likely will authorize measures or sanctions against the party losing replaceable information, such as an assessment of any expenses related to ESI resurrection.

C. Culpability

The 2006 version of Rule 37(e) exempted sanctions for ESI lost via "good faith" conduct in the "operation of an electronic information system." The 2015 version allows curative measures for lost ESI arising from failures "to take reasonable steps to preserve." Non-systemic failures to preserve ESI, such as text messages, are now covered.


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

38. Outside the Article III Federal courts, lost and replaceable ESI, lost and irreplaceable ESI, and lost non-ESI typically prompt the same judicial sanction guidelines. See, e.g., ILL. PATTERN JURY INSTRUCTIONS CIV. § 5.01 (2017 rev. ed.) (allowable adverse inference instruction for failure to offer evidence within a party's power to produce). So, between jurisdictions there can be different jury instruction guidelines. Cf. Domanus v. Lewicki, 742 F. Supp. 3d 290, 296, 299 (N.D. Ill. 2012) (on lost ESI, there could be a “spoliation charge” to the jury (also known as a “permissible inference instruction”) or “an adverse inference charge” to the jury, where only the latter directs the jury to presume the missing evidence would have been adverse to the spoliating party).

39. See, e.g., CAT3, LLC v. Black Lineage, Inc., 164 F. Supp. 3d 488, 497–98 (S.D.N.Y. 2016) (even though Rule 37(e) is not applicable, inherent authority can be used to sanction parties for lost ESI). On discovery cost allocations in the federal district courts, see A. Benjamin Spencer, Rationalizing Cost Allocation in Civil Discovery, 34 REV. LITIG. 769, 812 (2015) (urging rejection of the nascent argument that the producer-pays rule should be abandoned in favor of a requester-pays rule).


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

Further, unlike in 2006, judicial measures addressing lost ESI no longer are only available under "exceptional circumstances."43 Yet, a curative measure under current Rule 37(e) for negligently lost ESI always requires "prejudice to another party."44 Available judicial responses are broader when conduct prompting lost ESI is caused by a party's actions intending "to deprive another party of the information's use in the litigation."45 The Rule 37(e) requisites for "intent to deprive" remain unclear,46 however, as with the possible imputations of intent due to reckless conduct (though "grossly negligent loss" of ESI is clearly outside the definition of intent).47 When there is an intent to deprive, there is no "requirement that the court find prejudice to the party deprived of the information."48 "[T]he finding of intent . . . can support . . . an inference that the opposing party was prejudiced by the loss of information that would have favored its position."49

D. Burden of Proof

Seemingly, the burden of proof for the failure to preserve lost, irreplaceable ESI is on the party seeking a Rule 37(e) measure or sanction. This should encompass burdens as to the "possession, custody or control" of the ESI,50 as well as to the breach of the aforementioned "common-law duty"


44. FED. R. CIV. P. 37(e)(1).
45. FED. R. CIV. P. 37(e)(2).
47. On distinguishing between negligent and reckless acts causing lost ESI, see, for example, Pegasus Aviation I, Inc. v. Varig Logistica, 46 N.E. 3d 601, 605–06 (N.Y. 2015).
48. FED. R. CIV. P. 37(e)(2).
49. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment. On ways to approach "intentional" acts in other settings, see, for example, Bullock v. BankChampaign, N.A., 133 S. Ct. 1754, 1755 (2013) (describing "defalcation" in Bankruptcy Code settings).
50. See, e.g., FED. R. CIV. P. 37(a)(1) (request "to produce" or "inspect, copy, test, or sample"); see also FED. R. CIV. P. 45(a)(1)(C) (production or inspection request accompanying "a subpoena commanding attendance at a deposition, hearing, or trial"). Thorny questions have emerged regarding who has "posse-
regarding information preservation. However, Rule 37(e) "does not place a burden of proving or disproving prejudice on one party or another," leaving "judges with discretion to determine how to best assess prejudice in particular cases."51 Thus, where "the content of the lost information may be fairly evident," placement of the burden on the party seeking judicial responses to lost and irreplaceable ESI to prove prejudice "may be reasonable."52 When determining the content of lost information is difficult, it may be unfair to place the burden on the party seeking judicial action, as the losing party has far more information on the lost ESI than the seeking party.

E. Curative Measures and Sanctions

Judicial responses to lost and irreplaceable ESI under the 2015 rule include curative measures for unintentional acts and sanctions for more culpable acts. Generally, upon a finding of prejudice arising from unintentional loss of irreplaceable ESI, per the current Rule 37(e), a court can impose measures "no greater than necessary to cure."53 A broad range of measures are "entrusted to the court's discretion,"54 including foreclosing certain evidence and allowing evidence and argument to the jury regarding the lost ESI.55

When a party loses ESI by acting "with the intent to deprive another party of the information's use in litigation,"56 per current FRCP 37(e), a sanctioning court can—though it need not—presume the lost ESI "was unfavorable to the party;" instruct the jury that it "may or must presume" such disfavor,57 dismiss the case, or enter a default judgment.58 The sanctioning

51. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.
52. Id.
53. FED. R. CIV. P. 37(e)(1).
54. FED. R. CIV. P. 37(e)(1) advisory committee's note to 2015 amendment.
56. FED. R. CIV. P. 37(e)(2).
court may leave the issue of intent to the jury.\textsuperscript{59} Without intent, while there can be no jury instruction mandating or permitting a jury "to infer from the loss of information that it was, in fact, unfavorable to the party that lost it,"\textsuperscript{60} there can be evidence on the loss and on the likely relevance of the lost ESI.\textsuperscript{61}

\textbf{F. Party}

As noted, since 2006, FRCP 37(e) has addressed curative measures against "a party" for lost ESI as a result of a failure to take reasonable steps to preserve.\textsuperscript{62} When a party is an entity like a corporation or a governmental office, a question arises of whose acts within the entity can prompt entity responsibility for lost ESI. To date, some courts have employed an unsatisfactory test focusing on the "key" players in private entity settings.\textsuperscript{63} But here, culpability for key player conduct sometimes includes findings not only on the players’ bad acts but also on the entity’s independent failure to monitor those bad acts.\textsuperscript{64} Vicarious entity liability alone may not suffice everywhere. Cautious lawyers and judges should explore acts beyond a particular agent’s conduct to assess whether the entity itself can be deemed to have culpability.

The use of agency principles to assign culpability should not always be comparably applied to private and public entities. In at least some instances, those who run or oversee certain aspects of private entities have more control over entity employees who store ESI than do public entity employees. Public

\textsuperscript{59} FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment, at 20.

\textsuperscript{60} Id. at 19.


\textsuperscript{63} See, \textit{e.g.}, \textit{In re NTL}, Inc. Sec. Litig., 244 F.R.D. 195, 197 (S.D.N.Y. 2007) (with a duty to preserve, entity needs to notify, and then remind, “key players” within entity and those key persons outside the entity over whom the entity has “control,” about the need to preserve); Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494, 512 (D. Md. 2009); \textit{In re Ethicon}, Inc. Pelvic Repair Sys. Product Liability Litig., 299 F.R.D. 502, 513–14 (S.D. W. Va. 2014).

\textsuperscript{64} See, \textit{e.g.}, Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 434 (S.D.N.Y. 2004) (party must monitor its employees’ preservation efforts to ensure its employees were compliant).
entities, unlike private entities, often have less—or perhaps no—choice on how their information is stored electronically. At times, separate public entities may be statutorily vested with record development and recordkeeping in order to facilitate general public access rights that are only applicable to public entities.

When a party is an individual in federal civil litigation, whose acts can prompt the responsibility of that individual for lost ESI? If an individual party is an employer, it seems more fair to hold the employer accountable for an employee's loss of ESI than to hold a non-employer responsible for another's loss of ESI, such as when a spouse or child deletes information on an account holder's phone or computer. Employees are often more susceptible to individual employer oversight than one family member over another.

Thus, even if agency is found between two parties, an entity or an individual party may not always be strictly liable for the ESI lost by the agent. Liability may depend on whether the party also can be shown to have acted unreasonably regarding the preservation of ESI, such as through negligent hiring, training, or supervision of an employee responsible for information preservation. In at least one case, a court determined that an entity was responsible for the intentionally malicious acts of agents who only acted in order to aid the entity. Generally, employers are vicariously responsible for some, but not all, acts of their employees. Thus there are differences between actions such as bad driving (where the principal is liable) and discrimination during the course of employment (where the principal is not always liable).

65. See, e.g., Silvestri v. General Motors Corp., 271 F.3d 583, 592 (4th Cir. 2001) (claimant’s lawyer is not responsible for lost non-ESI information as claimant personally failed to notify potential defendant though he clearly anticipated future litigation).

66. But an employee deleting an individual employer's work-related information from her private email account is often less susceptible to oversight than is a minor child who deletes family-related information from an email account set up and paid for by her parent(s).

67. GN Netcom, Inc. v. Plantronics, Inc., No. CV 12-1318-LPS, 2016 WL 3792833, at *8 (D. Del. July 12, 2016) (company responsible for rogue employee who failed to adhere to company’s preservation directives, as his bad faith was undertaken to protect the company, not himself; yet others in the company also acted badly after learning of the rogue employee’s acts, including conduct involving “repeated obfuscation and misrepresentations” relating to the lost ESI and the company’s “investigation” of it).

The issues would be easier if a party’s agent was similarly analyzed in all civil procedure settings. But such uniformity does not exist. Consider a law firm’s agent faced with one of several civil procedure contexts. For sanctions arising from frivolous pleadings or motions, FRCP 11 expressly recognizes a law firm’s responsibility for its lawyer’s violations. Yet for sanctions arising from statutory breaches involving vexatious multiplication of proceedings, for now in at least some federal circuits, law firms are not vicariously liable. Consider, as well, a party’s “representative” in the work product context, who by rule includes the “party’s attorney, consultant, surely, indemnitor, insurer or agent.”

State civil procedure laws sometimes apply in the federal courts. Here, there are also differing approaches to agency. For example, under Illinois law, a party’s agent differs in attorney-client communication and ex parte communication settings. Only in the attorney-client privileged communication setting is a corporation’s agent defined by the control group test. While Illinois attorney-client communication norms control in federal courts hearing diversity or supplemental jurisdiction claims, they will not apply when federal question claims are litigated. Then, for example, the federal norm rejecting the control group test will control.

Nonparty entities or individuals can fail to preserve ESI with acts that cannot be attributed to parties who are entities or individuals. Such a non-
party entity includes, e.g., a defending party’s insurance company that has taken control of the defense under an insurance contract. Such a nonparty individual includes, e.g., a complaining party’s attorney who has been delegated the control of a claim presentation under a retainer agreement. Non-party ESI preservation failures can prompt independent spoliation claims, usually in tort, by their insureds’ or clients’ adversaries. Yet such claims are difficult since claimants must prove that, but for the lost ESI, they would have prevailed on the merits of any claim related to the lost ESI. But when such claims are unavailable, as when would-be claimants would or do prevail, the failures nevertheless hinder the civil litigation processes. Should such nonparties be subject to Rule 37(e) sanctions, as there are no other apparent curative measurers, for lost and irreparable ESI? If not under the rule itself, might such sanctions be employed per inherent judicial powers?

At times, written civil procedure laws explicitly address sanctions against nonparties for their acts negatively impacting civil litigation. For example, FRCP 11(c)(1) authorizes sanctions for frivolous pleadings to be assessed against “any” attorney or law firm “that violated the rule or is responsible for the violation,” with law firm vicarious responsibility for violations “by its partner, associate or employee” in the absence of “exceptional circumstances.” And, per FRCP 37(b)(2)(A), certain discovery violations can prompt sanctions on a nonparty, including certain witnesses. Finally, sanctions may be imposed by statute on jurors for certain civil litigation misconduct. The absence of any explicit recognition of sanctioning authority involving lost or irreplaceable ESI by a nonparty per FRCP 37(e) is troublesome, though curable via inherent powers.

G. Spoliation Torts

Once a federal civil action has been commenced, lawyers (and often their party clients, and at times others, like witnesses) generally must preserve evidence relevant to the pending claims. Under ABA Model Rule of Professional Conduct 8.4(d), lawyers may not themselves “engage in conduct that is prejudicial to the administration of justice” and must not assist or induce others to engage in such conduct. More specifically, Model Professional Conduct Rule 3.4(a) demands that a lawyer not act in ways that “un-

76. Id. at 195.
77. Id. at 192.
78. FED. R. CIV. P. 11(c)(1).
80. See FED. R. CIV. P. 37(c)(1)(B). See 28 U.S.C. § 1866(g) (failure by summoned juror to appear can result in a fine of no more than one thousand dollars, imprisonment for no more than three days, and/or an order to perform community service).
81. MODEL RULES OF PROF’L CONDUCT r. 8.4(d) (2016).
lawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."82 These and other83 model attorney conduct rules applicable to information preservation typically are employed in the federal courts,84 as are special state attorney conduct rules governing ESI.85

Both post-lawsuit and pre-lawsuit, there are also responsibilities for non-lawyers that are somewhat different, though they can also apply to some lawyer conduct. The Illinois Supreme Court said this about evidence preservation in 1995 under general tort law in *Boyd v. Travelers Insurance Company*:

> The general rule is that there is no duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, contract, a statute . . . or . . . special circumstance. Moreover, a defendant may voluntarily assume a duty by affirmative conduct. . . In any of the foregoing instances, a defendant owes a duty of due care to preserve evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action.86

Elsewhere there are different general tort laws, as well as special tort law principles, on information preservation by non-lawyers relating to future and pending civil litigation. For example, spoliation needs to be intentional in some jurisdictions for a tort claim to arise,87 while elsewhere there is no

82. **Model Rules of Prof’l Conduct** r. 3.4(a) (2016).

83. See, e.g., **Model Rules of Prof’l Conduct** r. 3.2 (Am. Bar Ass’n 2016) (a lawyer “shall make reasonable efforts to expedite litigation”); **Model Rules of Prof’l Conduct** r. 3.3(b) (Am. Bar Ass’n 2016) (a lawyer in an adjudicative proceeding who knows a person has engaged in fraudulent conduct “shall take reasonable remedial steps”).

84. The ABA Model Rules have been widely adopted by the states and thus generally regulate licensed lawyers wherever they practice, including within federal courts. Some local federal courts expressly look to the state professional conduct laws for lawyers in their states. See, e.g., 11th Cir. r. 1 add. 8 and 4th Cir. r. 46(g).

85. See, e.g., **N.Y. Rules of Prof’l Conduct** r. 4.4 (b) (lawyer receiving inadvertently sent ESI shall promptly notify the sender).


independent tort for spoliation of evidence by a non-party.88 A state law recognizing an “independent tort claim for spoliation” has been deemed by the 2015 FRCP 37(e) judicial rule makers to be applicable to lost ESI (and likely other information) during (or relevant to) federal lawsuits.89

There are also special state evidence preservation statutes and court rules that could be employed in federal cases. In the pre-lawsuit setting, an illustrative Illinois statute requires that hospitals generally retain an x-ray for at least five years, and for up to twelve years if notified within five years that there is pending litigation in which the x-ray is “possible evidence.”90 In the post-lawsuit setting, an exemplary special court rule is the Illinois Supreme Court Rule which requires parties receiving inadvertently produced privileged or opinion work product materials to sequester (if not return or destroy) the documents.91 Employment of special state preservation laws will not be utilized in federal courts, however, if their use would “significantly interfere with federal control of discovery.”92

Outside statutory, rule, contract, and voluntary act settings, third persons—those who are not prospective or actual parties in litigation, or their lawyers—as well as potential litigants can have common law pre-lawsuit evidence preservation duties per the Boyd case, and comparable state law precedents, under a “special circumstance” analysis. Insurers of alleged tortfeasors who become aware of likely claims by third parties against their insureds generally have no evidence preservation duties unless they assumed control over the evidence.94 Perhaps even lawyers who become aware of likely claims against their clients and who assume control over evidence have evidence preservation duties to non-clients.95

88. See Ortega v. City of New York, 876 N.E.2d 1189, 1197 (N.Y. 2007) (no independent tort claim for evidence spoliation against nonparty); Temple Community Hosp. v. Superior Court, 976 P.2d 223, 228 (Cal. 1999) (“no tort remedy should be available” for “intentional spoliation of evidence by third parties”); but see id. at n.3 (not deciding whether there ever may be a claim for negligent spoliation of evidence).

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

90. 210 ILL. COMP. STAT. ANN. 90/1.

91. ILL. SUP. CT. R. 201(p).

92. See Passmore v. Baylor Health Care System, 823 F. 3d 292, 298 (5th Cir. 2016) (detailing a Texas statute (on negative effects of a failure to serve an expert report within 120 days) does not apply in a federal court).


95. See, e.g., ILL. SUP. CT. RULES OF PROF’L CONDUCT r. 1.1 cmt. 8 (“competence” means “a lawyer should keep abreast of . . . the benefits and risks associated with relevant technology”).
Where there are evidence preservation duties, breaches may be addressed in at least two different ways by federal courts. There can be curative measures or sanctions under FRCP 37(e) and other federal rules, and there can be independent spoliation claims. Against nonparties (or third parties), there will only be spoliation claims if nonparties are generally not subject to judicial measures or sanctions for conduct unrelated to formal discovery, as suggested earlier. Spoliation claims often will be heard “concurrently with the underlying suit on which it is based,” assuming valid jurisdiction. Spoliation claimants must typically show how, with the evidence that was lost or destroyed, the claimants had a reasonable probability of succeeding on their underlying cases.

Jurisdictional issues over state spoliation claims loom within the new Rule 37(e). The rule is intended not to “affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim.” Does this mean that state spoliation claims are only available where the federal court has a related diversity of citizenship or supplemental jurisdiction state law claim before it? Or does it mean that one can pursue state spoliation claims in a federal district court even when the pending dispute


97. Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 272 (Ill. 1995) (detailing product liability and negligence claims against manufacturer of a heater and a spoliation claim against claimant’s employee’s insurer for loss of heater); Schaefer v. Universal Scaffolding & Equip., LLC, 839 F. 3d 599, 602 (7th Cir. 2016) (detailing workers’ compensation and spoliation claims against worker’s employer). At times, res judicata principles require spoliation claimants to present their spoliation claims in the underlying suits, at least against the defendants. See, e.g., Davis v. Wal-Mart Stores, Inc., 756 N.E. 2d 657, 660 (Ohio 2001) (explaining that a spoliation claim may be presented against an earlier defendant in a second suit only where the evidence on spoliation was not discovered during the underlying suit); Stillwagon v. City of Delaware, 175 F. Supp. 3d 874, 912–13 (S.D. Ohio 2016) (showing that even when spoliation was discovered during underlying suit, a spoliation is not barred by res judicata where that claim could not have been joined in the underlying suit, like when the previous suit was a criminal action). Concurrent hearings on spoliation claims and the relevant underlying suits will certainly be far less likely when the claims are presented by parties against their own current or even one-time lawyers where lawyer evidence spoliation can, at times, be characterized as malpractice. See, e.g., Galenek v. Wismar, 68 Cal. App. 4th 1417, 1420 (Cal. Ct. App. 1999); Myers v. Robert Lewis Seigle, P.C., 751 A. 2d 1182 (Pa. Super. Ct. 2000).


99. FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment.
involves only a related federal law claim? With the former approach, there are already pending substantive nonfederal claims. The latter approach allows a state substantive law claim involving pre-suit investigation and lost ESI where the federal civil action was grounded on only a federal substantive law claim.100 If the latter approach is followed, seemingly federal judicial powers regarding discretionary subject matter jurisdiction are still available under ancillary jurisdiction precedents101 or the supplemental jurisdiction statute,102 so that certain related state spoliation claims can be left nevertheless to the state courts.

H. Impact on State Court Litigation

Obviously, FRCP Rule 37(e) impacts lawyers practicing exclusively in federal courts. But it will also impact lawyers who practice in state courts, as well as lawyers who do not litigate in court at all.

For all lawyers, wherever they may practice, the new Rule 37(e) will surely influence information gathering and preservation if the federal standard is adopted for state court civil actions. While the 2006 version of Rule 37(e) was not widely adopted by state civil procedure lawmakers,103 other recent FRCP innovations—like proportionality in discovery—have been more widely implemented.104

Many state civil procedure laws to date, unlike FRCP 37(e), have consistently lumped together ESI and non-ESI in discovery and spoliation tort settings. Separate federal ESI norms in 2015 were founded on not only “the continued exponential growth” in “the volume” of ESI, but also the “significantly different” federal court precedents on possible sanctions and curative measures for lost ESI which “have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.”105 For state civil procedure lawmakers to propound new special written laws on lost ESI, they may need to be shown troubling interstate variations that have prompted excessive efforts in information preservation. There may also be an exploration by state lawmakers

100. Perhaps the former approach is unavailable to a federal district court under the Rules Enabling Act since an inability to pursue a related state spoliation claim in a federal court, federal claim case does not really just regulate federal court procedure as it effectively abridges a state substantive right to sue. See, e.g., Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393, 407–08 (2010).

101. See, e.g., Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 379–80 (1994) (showing that one purpose of ancillary jurisdiction is to “enable a court to function successfully”).


103. But see supra note 10.

104. Compare, e.g., ILL. SUP. CT. R. 201(c)(3), with FED. R. CIV. P. 26(g)(1)(B)(iii).

105. FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment.
into whether significant problems with lost information relevant to civil litigation are limited to ESI or have also arisen in non-ESI settings—curiously an inquiry not addressed in the legislative history of the new FRCP 37(e).106

Assuming no new written state civil procedure laws on lost ESI, many state court lawyers will nevertheless need to consider the new federal ESI preservation rule. That rule governs lost information that should have been preserved “in the anticipation [of]” as well as in the “conduct of litigation[.]”107 Many pre-lawsuit inquiries are undertaken by state court lawyers without precise knowledge of where future litigation will occur.

Even where only future federal litigation is clearly foreseen, possible information preservation duties under state tort laws remain.108 The federal procedural “common-law duty” to “preserve relevant information when litigation is reasonably foreseeable,” utilized in FRCP 37(e) proceedings, “does not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim.”109 Federal practitioners will likely attempt to have state spoliation tort law applied to lost ESI and non-ESI information in their federal cases. Where supplemental or ancillary jurisdiction is denied,110 there may be two factually related cases proceeding simultaneously, with one in federal court and one in state court.

In crafting the 2015 FRCP 37(e), the federal rule makers explicitly recognized there could be “an independent obligation to preserve information” that would not meet the federal procedural common law preservation duty applicable to discovery disputes under FRCP 37(e).111 This independent obligation could extend beyond spoliation torts, prompting simultaneous state and federal court proceedings.112 For example, in some states, beyond settings involving perpetuating testimony via pre-suit depositions, as also allowed by FRCP 27, there are procedural laws or precedents recognizing “independent” actions and equitable bills seeking to preserve information.113

106. See also Fed. R. Civ. P. 26(b)(2)(B) (showing that special protections from ESI discovery held by sources “not reasonably accessible” to a party “because of undue burden or cost”).
112. See id.
113. See Fed. R. Civ. P. 27; see, e.g., Ill. Sup. Ct. R. 214 (explaining that a plaintiff may designate as “respondent in discovery” one who is not a named defendant and who is believed to have information on who should be named as
Such initiatives on information gathering and preservation might be able to be pursued in state courts for materials, including both ESI and non-ESI, needed in anticipated or ongoing federal court actions.\textsuperscript{114}

V. CHALLENGES PRESENTED BY THE 2015 FRCP 37(E)

FRCP 37(e) now presents difficult challenges to Article III federal court judges and to the lawyers in and out of their courts.\textsuperscript{115} Challenges include issues relating to both the structure and the wording of the rule.\textsuperscript{116} The 2013 proposed amendments to this rule, with their Advisory Committee Notes, present little aid to those confronting these challenges, as do the 2015 Advisory Committee Notes.\textsuperscript{117}

Structurally, challenges are presented by the rule’s differentiation between lost ESI and non-ESI, a difference not contemplated within the 2013 proposal.\textsuperscript{118} There appears little reasoned justification or explanation to date for treating differently one who purposely erases electronic texts and one who purposely shreds documents.\textsuperscript{119} Further, Rule 37(e) now differentiates between replaceable and irreplaceable lost ESI, leaving other rule provisions to address possible curative measures and/or sanctions for replaceable lost ESI, thereby lumping together lost ESI and lost non-ESI for at least some purposes.\textsuperscript{120}

114. One obstacle to at least some such related state court initiatives might be lack of justiciability, as there is no foreseeable or pending state court lawsuit on the merits of any claim. Yet federal and state courts do facilitate depositions related to civil actions foreseeable or pending elsewhere.


116. \textit{See FED. R. CIV. P. 37(e)}.  \textit{See FED. R. CIV. P. 37} advisory committee’s note to 2015 amendment; \textit{FED. R. CIV. P. 37} advisory committee’s note to 2013 amendment.

118. \textit{FED. R. CIV. P. 37(e)}.  \textit{See, e.g.,} Best Payphones v. New York, No. 1-CV-3924, 2016 WL 792396, at *3 (E.D.N.Y. Feb. 26, 2016) (explaining that when both ESI and documents are lost by the same party, some courts will—for now—apply two different sanction norms).

120. \textit{FED. R. CIV. P. 37(e)}.  

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defendant); Walton v. Ill. Bell Tel. Co., 818 N.E.2d 1242, 1243 (Ill. App. Ct. 2d 2004) (showing an example where no independent equitable bill of discovery available to a party in a related worker’s compensation case where in that case such discovery was not recognized); Guertin v. Guertin, 561 N.E.2d 1339, 1341 (Ill. App. Ct. 3d 1990) (recognizing precedents allowing presuit discovery proceedings in “unusual” settings). \textit{See also TEX. R. CIV. P. 202.1(b)} (showing a petition for an order authorizing a deposition “to investigate a potential claim or suit”).
As to the wording of Rule 37(e), significant uncertainties loom regarding the interplay between the federal common law duty to preserve ESI for federal discovery purposes and state spoliation torts for lost ESI, which clearly still operate for lawyer, party, witness, and third party conduct both in anticipation of and during federal litigation.\textsuperscript{121}

Further, there are not only the challenging choice of law issues noted earlier, but also challenges arising when a party’s agents are differently defined under the federal common law information preservation duty and the applicable state spoliation law.\textsuperscript{122} While the new Rule 37(e) is based on the existing common law duty of “potential” (and actual) litigants to preserve relevant information when litigation is “reasonably foreseeable” (or pending?), this duty may vary in tort, as in the \textit{Boyd} case in Illinois, where the high court deemed that general tort law principles guided spoliation but then established some special guidelines.\textsuperscript{123}

The difference between replaceable and irreplaceable ESI remains unclear. Is ESI irreplaceable if the cost of replacement is very high, perhaps measured by a proportionality test as is employed in other federal discovery settings?\textsuperscript{124} The new rule is also unclear on the relevance of reckless conduct in assessing intent to deprive, as well as the burden of proof on prejudice arising from lost irreplaceable ESI.\textsuperscript{125}

Further, FRCP 37(e) now contemplates some real difference between the presumed unfavorability of lost irreplaceable ESI when there is intent to deprive and the need for evidence on the likely favoritism of lost irreplaceable ESI when no such intent exists.\textsuperscript{126} Yet, it is uncertain how differently juries will approach presumptive and non-presumptive disfavor.

As to who is a “party” subject to curative measures or sanctions due to lost irreplaceable ESI, FRCP 37(e) again is vague.\textsuperscript{127} In “party” settings for other procedural norms applicable to entities, like privilege and ex parte contacts, a “party” is differently defined.\textsuperscript{128} And even for individuals, their agents for whom they are responsible can vary, as in negligent driving and

\begin{enumerate}
\item Mulligan & Staszewski, \textit{supra} note 115.
\item Jeffrey A. Parness, \textit{Lost ESI: The New FRCP 37(e) and All Illinois Lawyers}, \textit{KANE CTY. ILL. BAR BRIEFS} 43, 44–45 (2016).
\item \textit{FED. R. CIV. P.} 37(e); \textit{Boyd v. Travelers Ins. Co.}, 652 N.E.2d 267, 272 (Ill. 1995).
\item See \textit{FED. R. CIV. P.} 37(e).
\item See id.
\item See id.
\item Parness, \textit{supra} note 122, at 44.
\end{enumerate}
sexual harassment settings. How should agents be defined under the new rule?

Finally, FRCP 37(e) presents challenges regarding the interplay of its norms and the very different state civil practice norms that can operate pre-suit for ESI that will be germane to later foreseeable federal or state court civil litigation. Clearly state spoliation tort norms will operate in at least some later federal cases. Yet, might state civil discovery, professional responsibility, and special statutory preservation duties be used in assessing culpability for lost irreplaceable ESI under Rule 37(e), especially when state law claims are in dispute and when these preservation duties may be deemed substantive for Erie doctrine purposes?

VI. CONCLUSION

In the last decade, FRCP 37(e) has been altered twice to deal specially with lost ESI due to “the continued exponential growth in the volume” of ESI. To date, many state civil procedure laws have not followed as they continue to lump together lost ESI and non-ESI in discovery settings. Further, while state spoliation tort laws, recognized in Rule 37(e), have expanded, they too comparably address lost ESI and non-ESI.

The impact of the current FRCP 37(e) on civil litigation practices generally remains unclear. But what is clear is that the federal district courts will struggle for some time with issues under the new rule in such areas as choice of law, necessary culpability, burden of proof, agency, and the role of state spoliation torts and other state information preservation duties in federal litigation.

129. See id.; see, e.g., Silvestri v. General Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001).
130. See FED. R. CIV. P. 37(e).
131. See Parness, supra note 122, at 46.
132. Consider the ongoing disagreement in the federal courts over the applicability of special state medical malpractice pleading laws. Lewis v. Ctr. for Counseling and Health Res., No. C08-1086, 2009 WL 2342459, at *2 (W.D. Wash. July 28, 2009) (saying “federal courts are not in agreement on this issue”), as well as special ex parte contact laws governing interactions between the treating physicians of personal injury claimants and the adversaries of those claimants, see Horner v. Rowan Cos., Inc., 153 F.R.D. 597, 599 (S.D. Tex. 1994) (saying “there is no consensus”).
133. FED. R. CIV. P. 37 advisory committee’s note to 2015 amendment; see FED. R. CIV. P. 37.
134. See, e.g., ILL. SUP. CT. R. 201(c)(3), 214(a), 219.
135. Parness, supra note 122, at 46; see FED. R. CIV. P. 37(e).