THE ROBERTS COURT AND LOST ESI

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I. INTRODUCTION

On September 29, 2005, the U.S. Senate confirmed John G. Roberts, Jr. as Chief Justice of the U.S. Supreme Court.[1] Since then, there have been two major changes in the Federal Rules of Civil Procedure (FRCP) involving the loss of discoverable electronically stored information (ESI).[2] These changes primarily address the duties to preserve ESI for federal civil litigation, the potential procedural law sanctions that judges can assess against a litigant for preservation failures, and the role of state substantive spoliation laws in deterring and remedying lost ESI. FRCP 37(e) embodies both of these substantive changes.[3] The Rule 37(e) provisions have always been accompanied by other FRCP provisions on ESI.[4] Some of them predate Rule 37(e).[5] To date, Congress has remained quiet on lost ESI in federal civil actions.

This Article will review the current FRCP provisions on ESI and the history behind them, though focusing considerably on the Rule 37 changes that took effect in 2006 and 2015. In doing so, it will also review the proposed changes to FRCP 37(e) in 2013 that the Federal Civil Rules Committee did not adopt. These reviews will focus on how the FRCP has addressed lost, discoverable ESI.

Initially, the discussions of ESI will separately address the FRCP as well as state laws on pre-suit ESI losses and post-suit ESI losses. This Article also reviews state laws, as they may suggest potential FRCP reforms. A brief survey of state spoliation claims, whether in tort, contract, or otherwise, will follow as litigants can pursue such claims in

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1. *About the Court: Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Nov. 7, 2021).

2. *See* FED. R. CIV. P. 37(e) (2006); FED. R. CIV. P. 37(e) (2015).

3. FED. R. CIV. P. 37(e) (the role of state substantive law in federal court ESI issues is addressed in the Advisory Note to the rule).

4. FED. R. CIV. P. 37(a)(3)(A), (c); *infra* note 52.

5. *See infra* notes 48–52 and accompanying text.

federal courts for either pre-suit or post-suit ESI losses impacting pending civil actions.

This Article then uses those discussions as the basis for exploring some of the significant issues that remain regarding lost ESI in federal civil actions and for suggesting some new approaches. These issues include the uncertainties arising from the differences between ESI and non-ESI in the FRCP, as well as the differences between the varying forms of ESI; the challenges in pursuing and hearing state spoliation claims in related federal civil actions; and the special issues arising when nonparties lose discoverable ESI. The explorations will lead to some tentative thoughts on FRCP reforms involving lost ESI that would prompt greater justice, efficiency, and economy per the mandate of FRCP 1. Possible new approaches include FRCP amendments broadening the opportunities for pre-suit discovery of ESI and/or creating new avenues for pre-suit protective orders on behalf of those possessing or controlling ESI.

II. FEDERAL DISCOVERY LAWS ON LOST ESI

Undertaking affirmative pre-suit discovery and securing defensive pre-suit protective orders can prevent pre-suit ESI losses. Likewise, undertaking affirmative post-suit discovery and securing defensive post-suit protective orders can prevent post-suit ESI losses. When a potential party to a suit loses discoverable ESI that they should have maintained or preserved, the court may address the problem by administering discovery sanctions, regardless of whether the losses occurred pre-suit or post-suit. On far fewer occasions, it is possible to address ESI losses through discovery sanctions arising during affirmative pre-suit discovery or defensive pre-suit protective order proceedings.

Laws on ESI preservation duties can originate in varying sources, including court rules, statutes, and case precedents. In some cases, these laws can operate pre-suit and post-suit. In others they can operate solely in the context of anticipated civil litigation.

ESI preservation laws can be general or special. The FRCP on pre-suit testimony perpetuation accomplished through depositions of those likely to be unavailable later is an example of general laws.[6] The FRCP

6. *E.g.*, FED. R. CIV. P. 27(a).

on sanctions for only certain lost ESI provides an illustration of special laws.[7]

The following two sections will generally explore federal and state discovery laws on pre-suit and post-suit ESI losses. These sections also include a review of comparative state law, as they may suggest possible FRCP reforms. This exploration will then guide the later consideration of possible new FRCP approaches to lost ESI, as will the upcoming survey of state spoliation claims involving ESI losses.

A. Explicit Laws on Pre-suit ESI Losses

Greater opportunities for affirmative pre-suit discovery can mitigate ESI losses in advance of civil litigation that later prompts discovery problems in related civil actions. Pre-suit opportunities under the FRCP involving information maintenance, preservation, and production relevant to future civil actions, however, are quite limited. A few American states have more expansive pre-suit discovery opportunities.

FRCP 27(a) is the major explicit federal rule on affirmative pre-suit discovery. In one part it authorizes testimony perpetuation via deposition "about any matter cognizable in a United States court" where the petitioner "expects to be a party" to an action in a U.S. court, but "cannot presently" sue.[8] Under this rule, a court can only order a deposition to "prevent a failure or delay of justice."[9] In seeking a deposition, a petitioner can also request that the deponent produce documents and other tangible items at the deposition or submit to a physical or mental examination.[10] Thus, such a deposition can secure ESI for later related litigation. The court can also sanction a party in contempt proceedings if it fails to abide by FRCP 27(a).[11]

Many states have procedural laws permitting testimony and other evidence perpetuations through pre-suit depositions.[12] Failures to

7. FED. R. CIV. P. 37(e) (non-restorable and irreplaceable).

8. FED. R. CIV. P. 27(a)(1)(A). Beyond testimony perpetuation via deposition under FRCP 27, there is little else in the FRCP or the U.S. Judicial Code on pre-suit opportunities to preserve discoverable information, excepting the recognition under FRCP 27(c) of "a court's power to entertain an action to perpetuate testimony." FED. R. CIV. P. 27(c).

9. FED. R. CIV. P. 27(a)(3).

10. FED. R. CIV. P. 27(a)(3) (referencing FED. R. CIV. P. 34, 35).

11. FED. R. CIV. P. 45(g) (failure to obey a deposition subpoena or a related court order).

12. *See* ARK. R. CIV. P. 27(a)(1); MINN. R. CIV. P. 27.01; MISS. R. CIV. P. 27(a)(1); CONN. GEN. STAT. § 52-156(a)(1)(A) (2021); S.D. CODIFIED LAWS § 15-6-27(a)(1)(A) (2021); ARIZ. R. CIV. P. 27(a)(1)(A); ALASKA R. CIV. P. 27(a)(1)(1); NEB. SUP. CT. R. DISC. § 6-327(a)(1)(i); S.C. R. CIV. P. 27(a)(1)(1); W.VA. R. CIV. P. 27(a)(1)(1). *But see* ILL. SUP. CT. R. 217(a)(1) (no need to show petitioner cannot currently sue); MD. R. 2-404(a)(2); 9 R.I. GEN. LAWS § 9-18-12 (2021); WIS. STAT. § 804.02(1)(a) (2021). Special

comply with legitimate affirmative pre-suit discovery requests can prompt procedural law sanctions.[13]

The federal rule governing a pre-suit deposition to perpetuate testimony "does not limit a court's power to entertain an action to perpetuate testimony,"[14] a power substantially defined by "the former bill in equity to perpetuate testimony."[15] Use of such a bill predates the FRCP[16] and is recognized in FRCP 27(c).[17] Current usage of the bill in equity has been read to track the FRCP requirements on deposition testimony perpetuation,[18] but this usage is infrequent.[19] As with testimony perpetuation, there are comparable state laws that recognize independent pre-suit discovery opportunities,[20] and compliance failures can prompt procedural law sanctions.

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state laws can also operate, as with a Missouri statute on perpetuating testimony by deposition says that where "the object is to perpetuate the contents of any lost deed or other instrument of writing and the remembrance of any fact, matter or thing necessary to the recovery, security, or defense of any estate or property, real or personal, or any interest therein, or any other personal right." MO. REV. STAT. § 492.420 (2020); *see also* MONT. WATER RIGHT ADJUDICATION R. 28 (providing that testimony perpetuation via deposition "regarding the historical beneficial use of any water right claim" includes "a verified petition with the water court," with "notice to expected adverse parties . . . served by mail to the most recently updated address documented in the [water] department's centralized record system").

13. Sanctions will often flow from contempt proceedings under state laws, much like FRCP 45(g), which authorizes contempt holdings against those who "fail without adequate excuse" to obey deposition-related orders. FED. R. CIV. P. 45(g).

14. FED. R. CIV. P. 27(c).

15. *See, e.g.*, Shore v. Acands, Inc., 644 F.2d 386, 389 (5th Cir. 1981).

16. *See, e.g.*, Rindskopf v. Platto, 29 F. 130, 130 (E.D. Wis. 1886) (involving an equity discovery bill where a related-law action between the same parties was pending); Preston v. Equity Sav. Bank, 287 F. 1003, 1005 (D.C. Cir. 1923) (rejecting "the contention . . . that discovery can only be had" in a pending suit on the grounds that discovery is "an original and inherent power of a court of equity").

17. FED. R. CIV. P. 27(c).

18. *See, e.g.*, *Shore*, 644 F.2d at 389 (citing JAMES WM. MOORE ET AL., 4 MOORE'S FEDERAL PRACTICE ¶ 27.21 (2d ed. 1979)*; see also Rule 34(c) and Discovery of Non Party Land*, 85 YALE L.J. 112, 114 (1975); Lubrin v. Hess Oil Virgin Island Corp., 109 F.R.D. 403, 405 (D.V.I. 1986) (noting that most cases find that an "independent action to obtain discovery" of documents and other evidence from a nonparty is similar "to the antiquated instrument called an equitable bill of discovery").

19. A recent newsworthy state case illustrates an effective use of a bill. The case involved Dr. David Dao's petition seeking to preserve United Airlines' records shortly after Dr. Dao was involuntarily removed from a United flight. *See* Jeffrey A. Parness & Jessica Theodoratos, *Expanding Pre-suit Discovery, Production and Preservation Orders*, 2019 MICH. ST. L. REV. 651, 655 (bill regarding airline records granted per party agreement). For an older case see *Lubrin*, 109 F.R.D. at 405 (preservation of conditions at site of accident). Of course, private pre-suit agreements or unilateral assumptions of information preservation duties lessen the need for pre-suit equitable discovery bills. Such agreements and assumptions are promoted; whereas, petitions for pre-suit equitable discovery bills beyond testimony perpetuation via pre-suit discovery must be preceded by a "meet and confer." Parness & Theodoratos, *supra* note 19, at 681.

20. *See* ARK. R. CIV. P. 27(c); KAN. STAT. ANN. § 60-227(d) (2021); MISS. R. CIV. P. 27(a)(1); NEB. CT. R. DISC. § 6-327(c); S.C. R. CIV. P. 27(c); *see also* MINN. R. CIV. P. 34.03(b) (finding no preclusion of "an independent action against a person not a party for production of documents and things and permission to enter land"). *But see* MD. R. 2-404; CONN. GEN. STAT. § 52-156a (2021); S.D. CODIFIED

Some state civil procedure discovery laws permit greater opportunities for affirmative pre-suit discovery.[21] Here, too, a party may seek ESI. Federal laws allow depositions and related information productions and inspections of nonparties where pending civil actions involving others exist,[22] although they are pre-suit from the deponents' perspectives. An Illinois statute makes different pre-suit discovery from nonparties in pending civil actions available,[23] by authorizing discovery by a plaintiff from a nonparty respondent "believed by the plaintiff to have information essential to the determination of who should properly be named as additional defendants. . . ."[24]

Some state civil procedure discovery laws also reach beyond FRCP 27 by allowing pre-suit information maintenance, preservation, and production orders where the purpose is not testimony perpetuation.[25] Sometimes there is no pending related civil action. In Illinois, a court rule authorizes an "independent action" by a potential claimant for "the sole purpose of ascertaining the identity of one who may be responsible in damages."[26] In New York, a statute permits pre-suit discovery to assist with bringing an action.[27] In Ohio, a civil procedure rule allows pre-suit discovery "necessary to ascertain the identity of a potential adverse party."[28]

Related to these laws on identifying potential defendants, some states have pre-suit civil discovery laws aiding petitioners seeking to

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LAWS § 15-6-27(a) (2021); ALASKA R. CIV. P. 27 (court rules and statutes on perpetuating witness testimony via pre-suit depositions where there are no recognitions of "independent" actions).

21. *See* 735 ILL. COMP. STAT. 5/2-402(a) (2021); ILL. SUP. CT. R. 224(a)(1); N.Y. C.P.L.R. 3102(c) (MCKINNEY 2021); OHIO R. CIV. P. 34(D)(3)(a)–(b); OHIO REV. CODE ANN. § 2317.48 (West 2021); TEX. R. CIV. P. 176.2, 199.3, 202.1, 202.4(a), 202.5.

22. FED. R. CIV. P. 30(a)(1) (allowing deposition by oral questions of any person including a party); FED. R. CIV. P. 34(c) ("[A] nonparty may be compelled to produce documents and tangible things or to permit an inspection" per FED. R. CIV. P. 45.); FED. R. CIV. P. 45(c)(1), (2) (providing a subpoena commanding a person to attend a deposition may also command production of ESI, tangible things, or an inspection).

23. 735 ILL. COMP. STAT. 5/2-402(a) (2021). *See also* N.Y. C.P.L.R. 3102(c) (MCKINNEY 2021) (allowing pre-suit discovery "to aid in bringing an action").

24. 735 ILL. COMP. STAT. 5/2-402(a).

25. *See, e.g.*, *id.*; N.Y. C.P.L.R. 3102(c) (MCKINNEY 2021).

26. ILL. SUP. CT. R. 224(a)(1); *see, e.g.*, Dent v. Constellation New Energy, Inc., No. 1-9-1652, 2020 WL 6939551, at *11, *13 (Ill. App. Ct. Nov. 25, 2020).

27. N.Y. C.P.L.R. 3102(c) (MCKINNEY 2021).

28. OHIO R. CIV. P. 34(D)(3)(a)–(b); *see also* Bay EMM Vay Store, Inc., v. BMW Fin. Servs. N.A., 116 N.E.3d 858, 861 (Ohio Ct. App. 2018) (finding that petitioner must also be "otherwise unable to bring the contemplated action"); White v. Equity, Inc., 899 N.E.2d 205, 211 (Ohio Ct. App. 2008) (demonstrating the rule may be employed even where a later claim would be subject to contractual arbitration); Benner v. Walker Ambulance Co., 692 N.E.2d 1053, 1054 (Ohio Ct. App. 1997) (discussing how the new rule supplements a pre-suit discovery statute aimed at identifying potential causes of action and was promulgated in response to a case interpreting the statute.).

identify potential causes of actions.[29] Here, potential defendants may be known, but their roles—if any—in causing harm are unknown and may not become known without pre-suit discovery. A Texas rule illustrates this concept, allowing a petition seeking a deposition authorization in order "to investigate a potential claim or suit," as it recognizes judicial authority where there is only an "anticipated suit."[30] Under this rule, a petitioner must demonstrate that the deposition order "may prevent a failure or delay of justice" (like FRCP 27(a) requisite) or that "the likely benefit" of the deposition "outweighs the burden or expense of the procedure."[31] "[T]he rules applicable to depositions of nonparties in a pending suit" govern authorized depositions[32] so that litigants can seek ESI production.[33]

A New York statute is broader, as it authorizes varying pre-suit discovery devices, including depositions, interrogatories, physical and mental examinations, and requests for admission "to aid in bringing an action."[34] An Ohio statute allows "a person claiming to have a cause of action" who is "unable to file his complaint" without discovery "from the adverse party" to "bring an action for discovery . . . with any interrogatories . . . that are necessary to procure the discovery sought."[35]

As with pre-suit discovery failures under FRCP 27(a) and (c), sanctions may follow failures under these state pre-suit discovery laws. Sanctions can involve contempt orders, as when deposition failures occur when there is no pending related civil action under state laws that

29. *See* Scott Dodson, *Federal Pleading and State Pre-suit Discovery*, 14 LEWIS & CLARK L. REV. 43, 43 (2010) (advocating for greater pre-suit discovery in order to assist aspiring claimants to secure information needed under heightened pleading standards); Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Pre-Suit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 217 (2007) (advocating for expanding pre-suit discovery laws in order to promote greater access to justice for those with claims but limited resources).

30. *See* TEX. R. CIV. P. 202.1 (providing that conditions limiting post-lawsuit depositions can also limit pre-suit depositions). The potential availability of this rule in a federal district court is discussed in Jeffrey Liang, *Reverse Erie and Texas Rule 202: The Federal Implications of Texas Pre-Suit Discovery*, 89 TEXAS L. REV. 1491, 1491–92 (2011).

31. TEX. R. CIV. P. 202.4(a). *See also In re* Hewlett Packard, 212 S.W.3d 356, 361 (Tex. App. 2006) (discussing how benefits do not outweigh burdens, especially as trade secrets were involved).

32. TEX. R. CIV. P. 202.5.

33. *See* TEX. R. CIV. P. 176.2, 199.3. A subpoena for an oral deposition can include a command to "produce and permit inspection and copying of designated documents or tangible things." TEX. R. CIV. P. 176.2(b). The history behind the Texas pre-suit discovery rule is reviewed in *In re* Doe, 444 S.W.3d 603, 605–08 (Tex. 2014).

34. N.Y. C.P.L.R. 3102(a), (c) (MCKINNEY 2021).

35. OHIO REV. CODE ANN. § 2317.48 (2021). The statute "occupies a small niche between an unacceptable 'fishing expedition' and a short and plain statement of a complaint or a defense." Poulos v. Parker Sweeper Co., 541 N.E.2d 1031, 1034 (Ohio 1989).

are similar to FRCP 45(g).[36] Sanctions beyond contempt are available for failures occurring in pending civil actions under state laws like FRCP 37.

Beyond affirmative pre-suit discovery, the prevention of ESI (and other information) losses, in advance of related civil actions containing contested substantive civil claims for relief, can be obtained through protective orders which judicially set out information maintenance and preservation (though no current production) duties. Few laws authorize such pre-suit protective orders. One major law is Arizona Civil Procedure Rule 45.2, first effective in 2018.[37] The rule allows judicial resolutions of pre-suit disputes over the existence of any "duty to preserve" ESI.[38] A nonparty in a pending civil action who has received an ESI request for preservation related to that action may seek a "protective order" in that action in order to resolve disputes over the alleged duty prompting the request.[39] One who receives a preservation request where there is no pending action may also seek a protective order.[40]

B. Other Laws on Pre-Suit and Post-Suit ESI Losses

Special federal discovery laws, within FRCP 37(e), address sanctions for ESI losses relevant to pending civil actions, but these special discovery laws only cover certain ESI. Other FRCP provisions are more general in nature, covering both other lost ESI and lost non-ESI.[41] In all settings, sanctions can be founded on information losses occurring either pre-suit or during the pendency of a case.

Under the 2015 amendments to the FRCP, discovery sanctions are specifically available under Rule 37(e) where certain ESI "that should have been preserved in the anticipation . . . of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery."[42] Separate FRCP provisions authorize discovery sanctions involving pre-suit losses of other ESI (e.g., non-restorable and irreplaceable) and non-ESI.[43] These

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36. *See, e.g.*, OHIO R. CIV. P. 45(E).
37. ARIZ. R. CIV. P. 45.2.
38. ARIZ. R. CIV. P. 45.2(a).
39. ARIZ. R. CIV. P. 45.2(d)(2) (guidelines for such orders are in ARIZ. R. CIV. P. 26(e)); ARIZ. R. CIV. P. 7.1(h) (requiring attachment of a good faith consultation certificate indicating attempts to resolve the disputes when required by the rules).
40. ARIZ. R. CIV. P. 45.2(e)(1) (guidelines for such orders are in ARIZ. R. CIV. P.45.2(e)(1)(A)–(E)).
41. *See, e.g.*, FED. R. CIV. P. 37(a)(3)(A), (c).
42. FED. R. CIV. P. 37(e) (providing harsher sanctions available for intentional deprivations).
43. FED. R. CIV. P. 37(b)(2) (imposing sanctions for failing to obey a court order); FED. R. CIV. P. 37(c)(1) (imposing sanctions for failing to provide information in a required disclosure). To prevent unwarranted pre-suit information losses by lawyers, Professor Schaefer has proposed amendments to FRCP 26(a)(1) on initial disclosures that would require that "a party" provide to "other parties . . .

provisions are employed to sanction those responsible for pre-suit ESI losses, but they do not explicitly address pre-suit conduct like FRCP 27(a) and 27(c).[44]

Some current state civil procedure laws similarly differentiate between the preservation duties involving certain ESI and non-ESI, which are enforceable through sanctions in post-suit settings.[45] Other state discovery laws speak more generally by addressing information preservation duties for all forms of information, including all ESI and non-ESI.[46]

Beyond FRCP 37(e), other special FRCP sanction laws can operate on ESI losses in pending actions. For example, ESI losses that "unreasonably and vexatiously" multiply a federal civil action can prompt an attorney or other culprit to be assessed attorneys' fees.[47]

General federal civil procedure laws on sanctions involving lost discoverable information beyond FRCP 37(e) ESI are chiefly encompassed in FRCP 37 outside of Rule 37(e). Some general state discovery laws are comparable.[48]

The differentiation in FRCP 37 between some ESI and other ESI is relatively recent. Before 2006, unavailable ESI and non-ESI were addressed in a comparable manner.[49] Thus, since 1993 Rule 37(c) has said 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."[50] In situations where the jury

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a description of the steps taken to preserve discoverable information in the case." Paula Schaefer, *Attorney Negligence and Negligent Spoliation: The Need for New Tools to Prompt Attorney Competence in Preservation*, 51 AKRON L. REV. 607, 631 (2017) (focusing on incentivizing attorney competence regarding information preservation via amendments to compelled disclosure rules).

44. FED. R. CIV. P. 27.

45. *See, e.g.*, WYO. R. CIV. P. 37; D.C. SUPER. CT. R. CIV. P. 37; ALA. R. CIV. P. 37(g); MINN. R. CIV. P. 37.05. A call and rationale for Georgia to follow FRCP 37(e) is found in Matthew C. Daigle, *Georgia's Approach to Proportionality and Sanctions for the Spoliation of Electronically Stored Information*, 37 GA. ST. UNIV. L. REV. 603, 607 (2021). *But see* VT. R. CIV. P. 37(f) (the Vermont rule includes only the initial portion of FRCP 37(e), so it does not speak directly to intentional acts).

46. *See, e.g.*, ILL. SUP. CT. R. 219. The Advisory Committee Comments to Rule 219 say, "the rule is sufficient to cover sanction issues as they relate to electronic discovery." ILL. SUP. CT. R. 219 advisory committee's note to Rule 219.

47. 28 U.S.C. § 1927.

48. *See, e.g.*, VT. R. CIV. P. 37; ME. R. CIV. P. 37 (containing no provision like FRCP 37(f) on failing to participate in framing a discovery plan); D.C. SUP. CT. R. CIV. P. 37 (no discovery plan provision); ALA. R. CIV. P. 37 (no discovery plan provision); N.D. R. CIV. P. 37; OHIO R. CIV. P. 37 (no discovery plan provision). *But see* ILL. SUP. CT. R. 137, 219 (providing conduct prompting possible discovery sanctions governed by same standards governing pleading and motion sanctions, unlike FRCP 11(d)). Per Illinois Rule 219(c), there is no voluntary dismissal "to avoid compliance with discovery deadlines, orders or applicable rules." ILL SUP. CT. R. 219(c).

49. Jeffrey A. Parness, *Lost ESI Under the Federal Rules of Civil Procedure*, 20 SMU SCI. & TECH. L. REV. 25, 26 (2017).

50. *Id.*; FED. R. CIV. P. 37(c)(1).

learns of a "party's failure" or in cases where other sanctions are considered to be "more appropriate," a party could use this information.[51] Rule 37(a)(3)(A) dictates that a party who "fails to make a disclosure" required pursuant to FRCP 26(a) may be subject to "appropriate sanctions."[52] A failure to provide or to "make a disclosure" includes information losses occurring pre-suit.[53]

In 2006, a new FRCP 37(f) addressed certain unavailable ESI.[54] It lasted until 2015,[55] though some state civil procedure laws still follow its norms.[56] Under the 2006 version of the rule, when the court makes a "finding of 'exceptional circumstances,'" it can assess sanctions on a party for losing ESI, even if it was due to "the routine, good-faith

51. Parness, *supra* note 49, at 26*;* FED. R. CIV. P. 37(c)(1)(B), (C).

52. Parness, *supra* note 49, at 26*;* FED. R. CIV. P. 26(a), 37(a)(3)(A).

53. FED. R. CIV. P. 37(a)(3)(A), (c)(1). Inherent judicial powers are often employed to sanction pre-suit information losses. *See, e.g.*, Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590, 595 (4th Cir. 2001) (holding that involuntary dismissal of lawsuit was not an unduly harsh sanction arising from a discovery violation involving the pre-suit failure to preserve a car); *see also* Hartford Cas. Ins. Co. v. Winston Co., No. 09-cv-5088, 2011 WL 13382162, at *6 (N.D. Ill. May 18, 2011) ("[T]he analysis for imposing sanctions under our inherent powers and Rule 37 is essentially the same."). On the general inapplicability of FRCP 37 to pre-suit information losses, see Iain D. Johnston, *Federal Courts' Authority to Impose Sanctions for Prelitigation or Pre-Order Spoliation of Evidence*, 156 F.R.D. 313, 325 (1994) ("As a general principle, Rule 37, except when the precise terms of Rule 37(d) are applicable, does not appear to be up to the task of providing an efficient source of authority for prelitigation or pre-order spoliation of evidence."). Now District Judge Johnston found that "federal courts are divided as to the appropriate source" for remedying pre-suit and pre-order evidence spoliation. *Id.* at 315, 318 n.39, 322 n.69.

54. *See* ADVISORY COMM. ON FED. R. OF CIV. PRO., REPORT OF THE CIV. R. ADVISORY COMM., at 54 (2004) (Conf. Rep.) [hereinafter SEPTEMBER 2005 FRCP 37(F) SUMMARY] (indicating the Advisory Committee on Civil Procedure Rules presented to the Standing Committee on Rules of Practice and Procedure two alternative versions of a proposed new FRCP 37(f), neither of which was, in fact, what became 2006 FRCP 37(f)). Alternative 1 from the Advisory Committee did not contain the "absent exceptional circumstances" language that limited available sanctions nor the explicit requirement of the "good-faith" operation of an ESI system, though it recognized "reasonable steps to preserve" ESI were required when related litigation was reasonably foreseeable. *Id.* Alternative 2 limited sanctions for deleted or lost ESI to settings where there was "intentional or reckless" conduct, but it contained neither the "exceptional circumstances" nor the "good-faith" language. *Id.* at 57.

55. Effective December 1, 2007, FRCP 37(f) was renumbered to FRCP 37(e), remaining so until 2015. Herein, the provisions of FRCP 37(e) from 2007 to 2015 will be referenced as the 2006 FRCP 37(f) since there were no substantive changes to FRCP 37(e) in 2007. See FED. R. CIV. P. 37(e) advisory committee's note to 2007 amendment.

56. 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.*, MD. R. 2-433(b); N.C. R. CIV. P. 37(b)(1); MONT. R. CIV. P. 37(e); OHIO R. CIV. P. 37(E); VT. R. CIV. P. 37(f) (2009); MINN. R. CIV. P. 37.05; TENN. R. CIV. P. 37.06; KAN. STAT. ANN. § 60-237(e) (2021); HAW. R. CIV. P. 37(f); N.J. STAT. ANN. § 4:23-6 (2021); and ALASKA R. CIV. P. 37(g); *see also* UTAH R. CIV. P. 37(e) (adoption of 2006 FRCP 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); OHIO R. CIV. P. 37(F) (a 2008 rule that, in addition to adding 2006 FRCP 37(e), sets out five factors that courts may consider when determining whether to sanction). *But see* ARIZ. R. CIV. P. 37(g) (containing 2015 FRCP 37(e), but also articulating the parameters of the "duty to take reasonable steps to preserve" ESI and guidelines on what constitutes such steps).

operation of an electronic information system."[57] Such a system included "a distinctive feature of computer operations" that prompts "the routine alteration and deletion of information that attends ordinary use."[58] Routine operation embodied "the alteration and overwriting of information, often without the operator's specific direction or awareness," serving "the party's technical and business needs."[59] Good faith included a party's intervention to modify or suspend certain features of the "routine operation to prevent the loss of information . . . subject to a preservation obligation," which could arise from "common law, statutes, regulations, or a court order."[60]

Under the 2006 FRCP 37(f), some ESI is not subject to "routine alteration and deletion," attending "ordinary use."[61] Further, some ESI that is subject to a routine operation is unrelated to "technical and business needs."[62]

The 2006 FRCP 37(f) flowed from a 2004 Civil Rules Advisory Committee report that contained two alternative rule amendments, neither of which were fully adopted.[63] Each alternative had the 2006 FRCP 37(f) "exceptional circumstances" language.[64] One of the proposed rule amendments authorized sanctions for ESI "routine operation" losses only if the party did not take "reasonable steps to preserve."[65] The other authorized sanctions for ESI "routine operation" losses or deletions only if the party acted intentionally or recklessly.[66]

Between 2006–2015, FRCP 37(e) distinguished ESI from non-ESI, and some procedural laws since that time have made the same distinction.[67] Since 2006, FRCP 26(b)(2)(B) has read, "a party need not provide discovery of [ESI] from sources that the party identifies as not

57. Parness, *supra* note 49, at 26–27 (quoting FED. R. CIV. P. 37(f) (2006)).

58. FED. R. CIV. P. 37(e) advisory committee's note to 2006 amendment.

59. *Id.* Thus, the rule makers sought to protect those who "lose potentially discoverable information without culpable conduct." *Id.* Unlike document destruction, ESI loss was recognized as subject to system operation "without the operator's specific direction or awareness." *Id.* One alternative proposal to the 2006 FRCP 37(e) forbade sanctions for failing to provide in discovery "deleted or lost" ESI "unless the deletion or loss was intentional or reckless." SEPTEMBER 2005 FRCP 37(F) SUMMARY, *supra* note 53, at 57.

60. FED. R. CIV. P. 37(e), advisory committee's note to 2006 amendment. (explaining that a preservation duty could arise due to "pending or reasonably anticipated litigation").

61. *Id.*

62. *Id.*

63. SEPTEMBER 2005 FRCP 37(F) SUMMARY, *supra* note 53, at 54, 57.

64. *Id.*

65. *Id.* at 54.

66. *Id.* at 57. While all Committee members favored publishing Alternative 1, they were "closely divided" on whether to publish Alternative 2. *Id.* at 54. The history behind these and earlier ESI discovery reform efforts appears in Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1, 1–2 (2004).

67. Parness, *supra* note 49, at 27.

reasonably accessible because of undue burden or cost," a burden carried by that party, unless "the requesting party shows good cause."[68] FRCP 26(f) has said since 1993 that a "discovery plan," which is now mandatory, "must state . . . any issues about disclosure, discovery, or preservation of [ESI], including the form or forms in which it should be produced."[69] Additionally, FRCP 34(b)(2)(E) says, and has said since 2006, that a party may object to the form in which the opposing party requests that it produce ESI.[70]

Between 2006 and 2015, other federal discovery rules treated ESI and non-ESI in the same manner.[71] Thus, "[s]ince 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.'"[72]From 2006 until the present time, the rule for requests for production has similarly required that the party who receives the request produce "any designated documents or electronically stored information . . . from which information can be obtained."[73] Documents and ESI are treated similarly under this rule for a party responding to a production request.[74]

The federal judicial rule makers received concerns from "litigants and potential litigants" following the 2006 version of FRCP 37(e) regarding an increase in preservation problems.[75] "[T]he increasing burden of preserving information for litigation, particularly with regard to electronically stored information," was the subject of most of these concerns.[76] The federal rule makers noted confusion and uncertainty among "potential parties" as to what the preservation standard would require of them due to the "[s]ignificant divergences among federal courts across the country."[77]

The Committee proposed amendments to FRCP 37(e) as a solution to this problem.[78] These amendments "would establish 'a uniform set of

68. *Id.* (quoting FED. R. CIV. P. 26(b)(2)(B)).
69. *Id.*; FED. R. CIV. P. 26(f)(3).
70. FED. R. CIV. P. 34(b)(2)(D).
71. Parness, *supra* note 49, at 27.
72. *Id.* (quoting FED. R. CIV. P.26(a)(1)(A)(ii)).
73. *Id.* (quoting FED. R. CIV. P.34(a)(1)(A)).
74. *Id.*; *see* FED. R. CIV. P. 34(b)(2)(E).
75. Parness, *supra* note 49, at 27; ADVISORY COMM. ON FED. RULES OF CIV. PROC., REP. TO THE STANDING COMMITTEE, at 44 (2013) (Comm. Rep.) [hereinafter 2013 FRCP 37(E) PROPOSAL].
76. 2013 FRCP 37(E) PROPOSAL, *supra* note 75, at 44.
77. *Id.*; Parness, *supra* note 49, at 28.
78. Parness, *supra* note 49, at 28. Some of the rulemaking events leading to the 2015 FRCP 37(e) are described in a Memorandum to the Standing Committee on Rules of Practice and Procedure from the Advisory Committee on Federal Rules of Civil Procedure. Memorandum from

guidelines for . . . all discoverable information,' not just [ESI]," when a party breaches information preservation duties that many courts recognize.[79] The link between ESI and an "electronic information system" that once existed under the 2006 FRCP 37(f) no longer existed in the Federal Rules.[80]

"Upon breach of [FRCP] 37(e), the 2013 proposal envisioned possible 'additional discovery . . . curative measures, or . . . reasonable expenses, including attorney's fees, caused by the failure.'"[81] Other sanctions, or "adverse-inference" jury instructions, could follow a breach, but only where (1) "a party's actions 'caused substantial prejudice . . . and were willful or in bad faith,'"[82] or (2) "a breach 'irreparably deprived a party of any meaningful opportunity' to litigate."[83] The proponents suggested "factors" within a new Rule 37(e) on how judicial assessments would be made of "a party's conduct" causing a breach of the duty to preserve information.[84] The 2013 FRCP 37(e) proposal did not directly define the preservation duty.[85]

The Advisory Committee did not adopt the 2013 proposal.[86] The flurry of public comments in response to the call for comments on the May 2013 FRCP 37(e) proposal, sent out in August 2013, prompted some rethinking by the Committee; the Committee then set forth a report with a new suggested FRCP 37(e) on May 2, 2014.[87] The advisory committee

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Hon. David G. Campbell, Chair, Advisory Comm. on Fed. Rule of Civ. Pro., to Hon. Jeffery S. Sutton, Chair, Standing Comm. on Rules of Prac. & Proc. (Dec. 5, 2012) (noting at 4–5 that in September 2011, the committee presented "three general models of possible rule-amendment approaches" to the 2006 FRCP 37(e)) [hereinafter Federal Rule Advisory Committee Chair Memorandum].

79. Federal Rules Advisory Committee Chair Memorandum, *supra* note 78, at 45; 2013 FRCP 37(E) PROPOSAL, *supra* note 75, at 44–45.

80. Parness, supra note 49, at 28; SEPTEMBER 2005 FRCP 37(F) SUMMARY, *supra* note 53, at 55. As noted earlier, the 2006 FRCP 37(f) was renumbered, without substantive changes, to FRCP 37(e) in 2007*; see also* FED. R. CIV. P. 37(e) (2007).

81. Parness, *supra* note 49, at 28 (quoting 2013 FRCP 37(E) PROPOSAL, *supra* note 75, at 43).

82. *Id.* (quoting 2013 FRCP 37(E) PROPOSAL, *supra* note 75, at 43).

83. *Id.* (quoting 2013 FRCP 37(E) PROPOSAL, *supra* note 75, at 43). This was intended to be a "more demanding" test than the 2006 rule norm on "substantial prejudice." 2013 FRCP 37(E) PROPOSAL, *supra* note 75, at 48.

84. 2013 FRCP 37(E) PROPOSAL, *supra* note 75, at 43–44; Parness, *supra* note 49, at 28.

85. *See* 2013 FRCP 37(E) PROPOSAL, *supra* note 75, at 45 (noting that the "preservation obligation . . . has been recognized by many court decisions" and further explaining that proposed FRCP 37(e)(2), on factors relevant to "assessing a party's conduct," identifies "many of the factors that should be considered in determining, in the circumstances of a particular case, when a duty to preserve arose and what information should have been preserved"). *But see* A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 FORDHAM L. REV. 2005, 2022–24 (2011) (proposing amendments to FRCP 37(e) that would establish the preservation obligations).

86. Parness, *supra* note 49, at 28.

87. ADVISORY COMM. ON CIV. RULES, REPORT TO THE STANDING COMMITTEE, at 35–46 (2014) (Comm. Rep.) [hereinafter 2014 ADVISORY COMM. REPORT].

presented its report at the meeting of the Standing Committee on Rules of Practice and Procedure in Washington, D.C., on May 29–30, 2014, which led to the 2015 FRCP 37(e).[88]

2015 FRCP 37(e) speaks to a party's loss of ESI that "should have been preserved in the anticipation or conduct of litigation," and thus goes beyond the "routine operation" of an "electronic information system" under the 2006 FRCP 37(f).[89] The rule contemplates curative measures for lost ESI that is irreplaceable and non-restorable,[90] but it does not require "exceptional circumstances."[91] It does recognize broader curative measures for more culpable deprivations of ESI,[92] but it does not expressly authorize noncurative sanctions, even for

88. COMM. ON RULES OF PRAC. & PROC., MAY 29–30 JUDICIAL CONFERENCE AGENDA BOOK, at 306–17 (2014) (explaining the new thinking) [hereinafter MAY 2014 AGENDA BOOK]; *see also* 2014 ADVISORY COMM. REP., *supra* note 87. For the 2014 proposed rule, which became 2015 FRCP 37(e), see MAY 2014 AGENDA BOOK at 318–23. The 2013 proposed rule, published for comment in August 2013, is found at MAY 2014 AGENDA BOOK, *supra* note 86, at 324–30. 2015 FRCP 37(e) is generally reviewed in Parness, *supra* note 49, at 25–26.

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

90. FED. R. CIV. P. 37(e) (dealing with lost ESI that "cannot be restored or replaced through additional discovery"). The Committee Note indicates that restoration/replacement will not be expected if the required additional discovery is "not reasonably accessible because of undue burden or cost." MAY 2014 AGENDA BOOK, *supra* note 88, at 454 (referencing FRCP 26(b)(2)(B) which limits discovery of non-accessible ESI). In assessing burden and cost, the notes caution that any efforts to restore or replace ESI "should be proportional to the apparent importance of the lost information to claims or defenses in the litigation." *Id.* at 320 (citing FED. R. CIV. P. 26(c)(1)(B)). The 2013 Proposal on FRCP 37(e) did not distinguish between some and other ESI, or between ESI and non-ESI. 2013 FRCP 37(E) PROPOSAL, *supra* note 75, at 43. When the Advisory Committee solicited comments on whether Rule 37(e) should be "limited to sanctions for loss" of ESI, it observed that the "dividing line between [ESI] and other discoverable matter may be uncertain, and [it] may become more uncertain in the future." *Id.* at 50. It further observed that "loss of tangible things or documents important in litigation is a recurrent concern in litigation." *Id. But see* ALA. R. CIV. P. 26(b)(2)(a), (b) (providing a more elaborate description of relevant factors in and process for determining whether sources of ESI are "reasonably accessible").

91. These differences are not always recognized or deemed significant. *See, e.g.*, Gonzalez-Bermudez v. Abbott Labs PR Inc., 214 F. Supp. 3d 130, 161 n.10 (D.P.R. 2016) (explaining new FRCP 37(e) has "substantially similar" considerations on imposition of sanctions as did the former rule).

92. FED. R. CIV. P. 37(e)(2) (stating actions with "intent to deprive another party of information's use in litigation" may result in a court ordering curative measures).

intentional ESI losses.[93] It does not address ESI lost by a non-party from whom discovery is sought.[94]

A reason given for greater limits on judicial responses to lost ESI as opposed to lost non-ESI was "to reduce the costly over-preservation that had been emphasized by many," with the goal of reducing "the incentives for over-preservation."[95] Yet this rationale was accompanied by the recognition that "the savings to be achieved from reducing over-preservation are quite uncertain," with the result that "seriously limiting trial court discretion" was unjustified,[96] though foreclosing non-curative measures limited discretion for ESI losses by parties, if not nonparties.

The Advisory Notes Committee stated that the 2015 FRCP 37(e) on non-restorable and irreplaceable ESI foreclosed "reliance on inherent authority or state law" to determine when certain measures should be used[97] in addressing unavailable information, with the goal of reducing, if not eliminating, the "significantly different standards" within the circuits.[98] Curative measures addressing lost ESI depend on finding a breach of the federal "common-law duty" regarding the preservation of relevant information when litigation is reasonably foreseeable or pending,[99] a duty that applies comparably to federal question and nonfederal question claims, and for ESI and non-ESI.

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93. FED. R. CIV. P. 37(e)(1) (Upon finding prejudice arising from lost ESI, "the court may order measures no greater than necessary to cure the prejudice."); *see also* 2013 FRCP 37(E) PROPOSAL, *supra* note 75, at 43 (For failure to preserve, "the court may . . . permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure."). The limitation on sanctions under the 2015 FRCP 37(e) was intended to "reduce the costly over-preservation that had been emphasized by many" commentators on the proposed rule. MAY 2014 AGENDA BOOK, *supra* note 88, at 309. On assessing curative discovery measures addressing intentional deprivations of ESI use in litigation under FRCP 37(e)(2), see Thomas Y. Allman, *Informing Juries About Spoliation of Electronic Evidence After Amended Rule 37(e): An Assessment*, 13 FED. CTS. L. REV. 81, 82–83 (2021).

94. The Advisory Committee on Civil Rules did note that most ESI will be "stored somewhere in the 'cloud' . . . complicating the preservation task," presumedly because nonparties control this cloud. MAY 2014 AGENDA BOOK, *supra* note 88, at 309.

95. *Id.*

96. *Id.*

97. The Committee Note to the 2013 FRCP 37(e) Proposal pursued similar goals. *See* 2013 FRCP 37(E) PROPOSAL, *supra* note 75, at 45.

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

99. *Id.* As the 2015 rule "does not attempt to create a new duty to preserve," seemingly, as under the 2006 rule, a preservation duty can arise from statutes, regulations, or court orders. *Id.*; *see, e.g.*, Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590, 590 (4th Cir. 2001) (noting federal, not New York, spoliation principles apply during a discovery dispute in a products-liability case arising from a New York accident). As to when a pre-lawsuit duty to preserve arises, one court has gone so far (and too far) as to say, "any time a party receives notification that litigation is likely to commence." Marten Transp., Ltd. v. Platform Advert., Inc., No. 14-cv-02464, 2016 WL 492743, at *5 (D. Kan. 2016) (involving a cease-and-desist letter which was acknowledged and acted upon within a few days). A worthy suggestion for codifying the pre-suit information preservation duty (within FRCP 37) appears in Spencer, *supra* note 85, at 2023–24. *But see* Joshua M. Koppel, *Federal Common*

While state laws on curative measures or other sanctions within a federal civil action against a party who loses FRCP 37(e) ESI are not to be employed, an "independent tort claim for spoliation" may be used.[100] FRCP 37(e) explicitly covers ESI that "should have been preserved in the anticipation or conduct of litigation."[101] One often can pursue a state spoliation claim for lost ESI before or during federal civil litigation. A state spoliation claim may operate where there are no available Rule 37(e) sanctions, as when a spoliation tort does not require—as does a FRCP 37(e) sanction—a failure "to take reasonable steps to preserve"[102] or when lost ESI triggers strict liability under a state information preservation statute.[103]

The employment of the FRCP on curative measures or other sanctions for lost discoverable information, including all ESI and non-ESI then unavailable in a pending civil case, should be guided not only by the FRCP on pre-suit and post-suit discovery, but also by the opportunities for other information gathering— for example, Freedom of Information Act[104] requests, information preservation demand letters, and informal information requests that would have been honored. So, sanctions involving then unavailable information should be less available, if available at all, where lost information could have been secured easily under FRCP discovery norms or under informal discovery.

III. STATE SUBSTANTIVE SPOLIATION LAWS FOR ESI LOSSES IN FEDERAL CIVIL LITIGATION

Beyond discovery sanctions for pre-suit or post-suit ESI losses, federal district courts can hear claims on state substantive spoliation laws involving lost ESI. These laws typically recognize damage claims for harms caused by pre-suit and post-suit information losses. Harms can involve diminished or eliminated opportunities to present civil claims or

Law and the Courts' Regulation of Pre-Litigation Preservation, 1 STAN. J. OF COMPLEX LITIG. 102, 102–03 (2012) (suggesting that with both federal question and state law claims, federal courts employ state pre-suit preservation laws and advocating for a model state law to move states toward uniformity).

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

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

102. *Id.*

103. *See, e.g.*, 210 ILL. COMP. STAT. 90/1 (2021) (hospital duty to keep certain X-rays). *Compare* Rodgers v. St. Mary's Hosp. of Decatur, 149 Ill. 2d 302, 309 (1992) (implied cause of action arises from statute, to be governed by principles of negligence (per se) or strict liability), *with* Howard Reg'l Health Sys. v. Gordon, 952 N.E.2d 182, 182 (Ind. 2011) (no implied cause of action arising from violation of the statute on maintenance of health care records).

104. 5 U.S.C. § 552.

defenses.[105] They may arise from general or special laws.[106] These laws complement, but may impact the use of, the federal ESI discovery sanction laws. Spoliation laws are often used in the very civil actions where lost ESI caused harm to a party or parties. Thus, these laws are important in assessing current federal civil procedure practices regarding lost ESI.

Because state spoliation laws for lost ESI now vary widely, the interplay between these laws and federal procedural laws on lost ESI will vary from district to district. Significant interstate variations include such matters as who owes an information preservation duty; the manner in which such a duty is breached; and the available remedy upon breach.[107] These variations cause special difficulties where there occur multistate activities involving lost ESI impacting federal litigation. The following sections generally review state substantive spoliation laws.[108] These laws usually do not differentiate between spoliation of ESI and non-ESI.

Federal district courts can hear state spoliation claims because there are no significant substantive federal spoliation laws.[109] The Committee Note accompanying the amendments to 2015 FRCP 37(e)

105. There may also be implied causes of action available to those criminally accused against criminal prosecutors for information spoliation. *See, e.g.*, Arizona v. Youngblood, 488 U.S. 51, 58 (1988) ("[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."); State v. DeJesus, 395 P.3d 111, 124 (Utah 2017) (reaffirming precedent on state constitutional due process obligation of prosecutors to preserve evidence, which requires "a reasonable probability that the lost evidence would have been exculpatory" and, if so found, a balancing of the culpability of the State and the prejudice to the defendant in order to determine an appropriate remedy). *Compare* Hibbits v. Sides, 34 P.3d 327, 330 (Alaska 2001) (recognizing intentional third-party spoliation as a tort that could be pursued against a state trooper by motorcycle riders hurt by a pickup truck driver who collided with them, where the trooper, the first on the scene, removed the driver for about two hours after the collision because the trooper knew the driver was under the influence of marijuana), *with* Ortega v. City of New York, 876 N.E.2d 1189, 1197 (N.Y. 2007) (finding no intentional spoliation tort claim against city that sold a vehicle it was ordered to preserve so that future claimants could use it in a later suit against the vehicle manufacturer).

106. *Compare* Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 270 (Ill. 1995) (spoliation claim "under existing negligence law"), *with* Hecter v. Hannah, 584 S.E.2d 560, 568 (W. Va. 2003) (Spoliation is a "stand-alone tort.").

107. *Spoilation of Evidence Laws*, MATHIESEN, WICKERT & LEHRER, S.C., https://www.mwl-law.com/wp-content/uploads/2018/02/SPOLIATION-OF-EVIDENCE-CHART.pdf (last updated June 30, 2021). While there are interstate differences, at least for corporations, there are a useful set of guiding principles on organizational practices regarding record disposition. *See* Sedona Conf., *Commentary on Defensible Disposition*, 20 SEDONA. CONF. J. 179, 185–86 (2019).

108. Substantive state law claims for pre-suit spoliations are surveyed in more detail in Steven Plitt & Jordan R. Plitt, *A Jurisprudential Survey of the Tort of Spoliation of Evidence: Resolving Third-Party Insurance Company Automobile Spoliation Claims*, 24 CONN. INS. L.J. 63, 63 (2017).

109. *See, e.g.*, Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001); Lombard v. MCI Telecomm. Corp., 13 F. Supp. 2d 621, 627–28 (N.D. Ohio 1998) (finding no federal claim though there was a violation of federal regulation on record retention).

recognized that the new discovery sanction rule was not intended to affect "the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim."[110] There is no reason why a state spoliation claim would not be available for information losses outside of FRCP 37(e), that is, for losses of irreplaceable and non-restorable ESI (as well as for non-ESI).

The following sections survey the varying forms of state spoliation laws by utilizing the following Illinois Supreme Court analysis of pre-suit information preservation duties in the *Boyd* case:

> 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 another 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.[111]

Other states recognize similar duties.[112] Courts have extended these pre-suit duties to both parties and nonparties in the future civil actions impacted by lost ESI. Spoliation laws are only somewhat akin to the duties under state civil procedure laws to have information available when requested via formal discovery, including duties to preserve

110. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment. There is room for some substantive federal spoliation law, as when a government official intentionally destroys, or fails to maintain or preserve, information important in a later civil action. *See generally* 42 U.S.C. § 1983 (providing for liability for those acting contrary to the federal Constitution or federal laws under color of state law); Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics, 403 U.S. 388, 395–97 (1971) (finding liability for those acting unconstitutionally under color of federal law). On Due Process claims involving information lost during criminal cases which may prompt federal civil actions, see, for example, Jutrowski v. Township of Riverdale, 904 F.3d 280, 294–95 (3d Cir. 2018) (stating a civil rights claim can be founded on "a 'conspiracy of silence among [] [police] officers'" regarding earlier excessive force).

111. *Boyd*, 652 N.E.2d at 271. Such pre-suit tort duties stand in stark contrast to more limited evidence preservation duties recognized for state officials investigating crimes. *See, e.g.*, Arizona v. Youngblood, 488 U.S. 51, 58 (1988) ("[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence [(semen samples)] does not constitute a denial of due process of law."); State v. DeJesus, 395 P.3d 111, 119 (Utah 2017) (possible due process denial under the Utah Constitution where there is shown "a reasonable probability that the lost evidence [would be] exculpatory"; finding of denial requires an assessment of the degree of prosecutorial culpability and the prejudice to the defendant).

112. *See, e.g.*, Oliver v. Stimson Lumber Co., 993 P. 2d 11, 19 (Mont. 1999) (citing *Boyd*, 652 N.E.2d at 269–70) (recognizing both a negligent and intentional tort claim for evidence spoliation); Hannah v. Heeter, 584 S.E.2d 560, 569–70 (W. Va. 2003) (citing *Boyd* 652 N.E.2d at 267, 270–71) (adopting both a negligent and intentional tort claim for evidence spoliation by a non-party, but only an intentional tort claim for evidence spoliation by an adverse party).

before and during civil litigation.[113] As with the civil procedure discovery duties, information preservation duties prompting spoliation claims can also cover information preservation failures occurring during civil litigation.

A. Special Circumstance and Voluntary Assumption Claims

Common law torts, as per *Boyd*, involving information spoliation[114] can arise through a "special circumstance" or through a voluntary assumption of a preservation duty "by affirmative conduct."[115] A special circumstance may involve a fiduciary or otherwise special relationship between parties where future civil litigation is reasonably anticipated.[116] Relevant relationships, where there may be no explicit agreements or contracts on information preservation, can include insurer-insured, attorney-client, and doctor-patient relationships. In these relationships, information germane to a future case may not be preserved by an

113. *See, e.g.*, Shimanovsky v. Gen. Motor Corp., 692 N.E.2d 286, 290 (Ill. 1998) (explaining that if a trial court could not "sanction a party for pre-suit destruction of evidence, a potential litigant could circumvent discovery rules or escape liability simply by destroying the proof"). Remedies for breaches of information preservation duties vary depending upon whether the duties arose under tort law, civil procedure rules, or laws on discovery. For example, sanctions involving adverse jury instructions may only be rendered post-suit and arise solely under civil procedure rules or discovery laws. Pre-suit information preservation duties (keep records already made) differ from pre-suit information maintenance duties (make records). *See, e.g.*, Dittman v. U.P.M.C., 196 A.3d 1036, 1056 (Pa. 2018) (finding duties owed by employer to employees "to use reasonable care to safeguard its employees' sensitive personal information [] [when stored] on an internet-accessible computer system").

114. *Boyd*, 652 N.E.2d at 270 ("[W]e today hold that an action for negligent spoliation can be stated under existing negligence law.").

115. *Boyd* placed the evidence preservation duties "under existing negligence law." 652 N.E.2d at 720. Alternatively, breaches may prompt applications of contract or special statutory duties. *See, e.g.*, *infra* notes 125, 131–32.

116. *See, e.g.*, Cooper v. State Farm Mut. Auto. Ins. Co., 99 Cal. Rptr. 3d 870, 879–81 (Ct. App. 2009) (insured sued insurer for promissory estoppel or voluntary assumption of duty when insurer destroyed tire it examined that was needed by insured for its later product liability suit, where a promise to safeguard was made by the insurer); *Oliver*, 993 P.2d at 20 (citing Johnson v. United Servs. Auto Ass'n., 67 Cal. Rptr. 2d 234, 239–41 (Ct. App. 1998)) (explaining that a duty to preserve evidence may arise against a third-party spoliator "based upon a contract . . . or some other special circumstance/relationship"). Determinations of such special circumstances can be challenging. *See, e.g.*, Reynolds v. Lyman, 903 F.3d 693, 696 (7th Cir. 2018) (finding that a lawyer who represented an owner of the LLC did not owe the owner a duty of care, so long as owner was not "a direct and intended beneficiary" of the legal representation). Comparably, a "special relationship of trust and confidence" in an otherwise "ordinary business" relationship can prompt a duty to disclose "material information." BAS Broad., Inc. v. Fifth Third Bank, 110 N.E.3d 171, 175 (Ohio Ct. App. 2018).

insurer or an attorney[117] or a doctor[118] resulting in harm to an insured or a client or a patient in a later anticipated case. Additionally, a special circumstance may arise when an expert, retained by a future litigant without an explicit agreement on information preservation, loses information passed to the expert for analysis. Yet for insurers, attorneys, doctors, and experts, seemingly fewer spoliation tort claims will arise where related claims are founded on implicit or explicit duties involving contracts, like duties to defend, represent, treat, or test only in reasonable fashions.

Affirmative conduct prompting a preservation duty may involve the assumption of control over information that is reasonably foreseeable as (quite) important to later or current litigation. Such a duty might be extended to those who are not in a fiduciary or otherwise special relationship with the litigant harmed by information spoliation.[119]

Consider, for example, an expert retained by a future or present litigant to conduct device testing, who destroys or significantly alters the device during testing so that the consulting litigant's adversary has no opportunity to test independently or to observe the expert's testing.[120] The now-current adversary involved in litigation with the party who retained the expert may have an information spoliation claim against the expert.

Consider also a future litigant's insurance adjuster who takes possession of, and then negligently loses or intentionally destroys, important information so that the litigant's future adversary has no access later. The one-time future adversary, who is now in litigation with

117. On attorney spoliation and its deterrence, see, for example, Schaefer, *supra* note 43, at 631–32 (suggesting new procedural rules on mandated disclosures of attorney information preservation efforts).

118. *See, e.g.*, Foster v. Lawrence Mem. Hosp., 809 F. Supp. 831, 838 (D. Kan. 1992) (finding a spoliation claim against treating physician founded on a regulatory duty to maintain medical records pursuant to KAN. ADMIN. REGS. § 100-24-1 (2021)). *But see* Longwell v. Jefferson Parish Hosp. Serv. Dist. No. 1, 970 So. 2d 1100, 1106 (La. Ct. App. 2007) (requiring evidence of deliberate spoliation to support a tort claim founded on a breach of the statutory duty to preserve medical records).

119. *See, e.g.*, Gribben v. Wal-Mart Stores, Inc., 824 N.E.2d 349, 352, 355 (Ind. 2005) (noting such an extension may be made even though there is no substantive law preservation duty owed by one in a fiduciary or otherwise special relationship). In one case, there was no such duty recognized for a lawyer to the opposing party, at least where the lawyer concealed the evidence but did not destroy it. Elliot-Thomas v. Smith, 110 N.E.3d 1231, 1234–35 (Ohio 2018).

120. Once civil litigation is pending, there are some written laws on the need to notify—and perhaps include—an adversary when expert testing of relevant evidence is planned. *See, e.g.*, TENN. R. CIV. P. 34 A.01.

the litigant, may have an information spoliation claim against the litigant's insurer.[121]

Finally, consider a governmental officer or agency that takes information and then loses it to the detriment of another involved in later or current litigation with the information supplier. A torts claim statute[122] or comparable law[123] might place the government officer or agency in a position similar to that of a private party who loses information.[124]

Where a common law duty to preserve is established, and does not depend upon an agreement/contract, whether through a "special circumstance" or "affirmative conduct," an information spoliation tort might require proof of culpability going beyond mere negligence.[125] The requisite degree of proof can depend on whether the duty was owed by

121. *Compare, e.g.*, Dardeen v. Kuehling, 821 N.E. 2d 227, 233 (Ill. 2004) (holding that an insurer, who told its insured homeowner she could remove bricks in an allegedly hazardous sidewalk had no liability to pedestrian who had earlier fallen), *with* Jones v. O'Brien Tire & Battery Serv. Ctr., Inc., 871 N.E.2d 98, 99, 108 (Ill. App. Ct. 2007) (discussing the potentially liability of driver's insurer to the insured's joint tortfeasor for failure to preserve wheels from driver's car after driver's insurer settled with a tort victim who later sued the insured's joint tortfeasor; driver's insurer had voluntarily undertaken control of wheels for its own benefit and should have anticipated possibility of future litigation), *and* Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 272 (Ill. 1995) (finding employer's workers' compensation insurer owed duty to preserve space heater that it took possession of and that was involved in a workplace accident where employee pursued product liability claim against manufacturer of heater).

122. *But see, e.g.*, 28 U.S.C. § 2680(h) (stating the Federal Tort Claims Act does not apply to claims of "malicious prosecution, abuse of process . . . deceit, or interference with contract rights.").

123. *See, e.g.*, Hazen v. Mun. of Anchorage, 718 P.2d 456, 463 (Alaska 1986) (holding that one who is arrested has a common law claim in tort for intentional interference with prospective civil action caused by the spoliation of evidence, here the alteration of an arrest tape); Nichols v. State Farm Fire & Cas. Ins. Co., 6 P. 3d 300, 303–04 (Alaska 2000) (finding no first party or third-party evidence spoliation claim founded on negligence, where first party alleged spoliators were defined as the parties to the original action). A statute, court rule, or inherent power precedent on civil procedure sanctions often does not distinguish between private and public officer conduct, or between private and public entity conduct. *See, e.g.*, FED. R. CIV. P. 11, 16(f), 37 (containing no reference to any distinction between private entities and public entities in varying sanction settings).

124. An attorney's spoliation of information harmful to a non-client might be shielded from liability under an attorney immunity doctrine. *See, e.g.*, Haynes & Boone, LLP v. NFTD, LLC, No. 20-0066, 2021 WL 2021453, at *1 (Tex. May 21, 2021).

125. *See, e.g.*, Willis v. Cost Plus, Inc., No. 16-639, 2018 WL 1319194, at *3–4 (W.D. La. Mar. 12, 2018) (noting that while the Louisiana Supreme Court has held there is no cause of action for negligent spoliation, lower Louisiana state courts have recognized a Louisiana claim for spoliation based on intentional conduct). *But see* Richardson v. Sara Lee Corp., 847 So. 2d 821, 822 (Miss. 2003) (finding no negligence or intentional tort claim for spoliation of evidence). Similarly, a civil procedure law sanction for pre-suit evidence spoliation may only be available if intentional misconduct is shown. *See, e.g.*, Tatham v. Bridgestone Am. Holding, Inc., 473 S.W. 3d 734, 746 (Tenn. 2015) (altering earlier laws declaring that "intentional misconduct is not a prerequisite" for spoliation sanctions any longer); Mont. St. Univ. Bozeman v. Mont. First Jud. Dist. Ct., 426 P.3d 541, 553–54 (Mont. 2018) (holding that an intentional evidence spoliation prompts a rebuttable presumption that evidence was materially unfavorable to spoliating party, while negligent spoliation does not).

one who is or could have been an adverse party in the civil litigation wherein the lost information would have been employed.[126]

Additionally, even where a party establishes the necessary degree of culpability, liability may vary depending upon whether the opposing party intentionally destroyed the information or only intentionally concealed it.[127] Lastly, liability may vary for those personally responsible for spoliating evidence and those responsible for aiding and abetting spoliation by others.[128]

B. Agreement/Contract Claims

Agreement/contract duties operate differently than tort duties do in spoliation cases. The intentions of the agreeing/contracting parties, rather than the hypothesized actions of reasonable persons or the intentional acts of people, are key. Seemingly, there can be instances where there are both tort and agreement or contract claims involving the same spoliated information.[129]

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126. *See, e.g.*, Hannah v. Heeter, 584 S.E.2d 560, 573–74 (W. Va. 2003) (finding no negligent spoliation claim against adverse party, but finding a negligent spoliation claim against a third party who could not otherwise be an adverse party, because only the former can be sanctioned under discovery laws; and finding intentional evidence spoliation is a stand-alone tort available against both an adverse party and a third party). *Compare, e.g.*, Oliver v. Stimson Lumber Co., 993 P.2d 11, 20 (Mont. 1999) (recognizing possible negligent spoliation of evidence tort by employee against employer who could not otherwise be sued due to Workers' Compensation Act for employment injuries, yet equipment manufacturer could be sued; request to preserve may have been made and, if it was, it did not need to offer to pay reasonable costs of preservation); MetLife Auto & Home v. Joe Basil Chevrolet, Inc., 807 N.E.2d 865, 868 (N.Y. 2004) (explaining that homeowner might be able to sue car owner's insurer for spoliation, but seemingly would need to submit a written (not just oral) preservation request and to volunteer to cover the costs associated with preservation); *Nichols*, 6 P.3d at 305 (involving an intentional spoliation claim by neighbor against tortfeasor's insurer and against homeowner), *with* Fletcher v. Dorchester Mut. Ins. Co., 773 N.E.2d 420, 427–28 (Mass. 2002) (finding no negligent evidence spoliation tort by tenant against a landlord's insurer or against an expert retained by that insurer).

127. *See, e.g.*, Elliot-Thomas v. Smith, 110 N.E.3d 1231, 1235 (Ohio 2018) (concluding that tort of intentional evidence spoliation extends to destroyed, but not concealed, evidence).

128. On aiding and abetting responsibilities, see, for example, Meridian Med. Sys., LLC v. Epix Therapeutics, Inc., 250 A.3d 122, 128 (Me. 2021). On the liability of government officials for the unconstitutional actions of their subordinates due to supervisory/failure to intervene conduct, see, for example, McCoy v. Vallejo, No. 2:19-cv-01191, 2021 WL 2661757, at *3–4 (E.D. Cal. June 29, 2021) and Rice v. City of Roy, No. 20-5223, 2021 WL 2823227, *6, 8 (W.D. Wash. July 7, 2021).

129. For example, a contractual duty of an insurer to preserve evidence reasonably necessary in an insured's later defense of an action seeking damages beyond policy limits may arise in settings where there are also independent preservation duties in tort owed by the insurer to the insured, or to one harmed by the insured. *See, e.g.*, Silhan v. Allstate Ins. Co., 236 F. Supp. 2d 1303, 1307–11 (N.D. Fla. 2002) (discussing circumstances allowing recognitions of tort or contract claims by insureds against insurers due to spoliation of evidence by insurers that is needed in insureds' products-liability claims against third parties). Consider an employee's duty, as a condition of employment, to provide confidential information to an employer. *See, e.g.*, Dittman v. UPMC, 196 A.3d 1036, 1057 (Saylor, C.J, concurring and dissenting) (finding information maintenance claims against employers can sound in both tort and contract, presenting a hybrid scenario).

The *Boyd* court did not elaborate on what, if any, differences arise between spoliation claims founded on agreements and on contracts; perhaps the two are synonymous. Or perhaps only the spoliation claim founded on an agreement encompasses an explicit pact on information preservation that is made in anticipation of a possible lawsuit or during a lawsuit. Such pacts would be similar to pacts on matters like forum selection, choice of law, and jury trial waiver.

A spoliation claim founded on contract may also encompass a pact on information preservation which, at the time made, was unrelated to any anticipated or pending litigation, but rather was related to a desire to have maintained or to access certain current or future materials, like tax preparation, medical, educational, or test records. Substantive contract laws may likely guide such pacts (uninfluenced by civil procedure laws) though preservation failures could prompt later civil litigation sanctions or spoliation claims.

Agreements, as opposed to contracts, under *Boyd* might encompass failures involving unilateral promises of information preservation on which there was recognized detrimental reliance prompting harm for those who reasonably relied. These agreements are akin to, but differ from, voluntary assumptions of preservation duties through non-promissory "affirmative conduct." Agreements might also encompass bilateral promises outside of technical contract requirements like statutes of fraud.

Be they agreements or contracts, third parties may have spoliation claims arising from the contracts or agreements between others. As with spoliation torts involving a special circumstance or voluntary assumption, here the third parties may have no avenues of redress through discovery sanctions.[130] These third parties may or may not need to be intended beneficiaries of the promises.

C. Statutory and Regulatory Claims

Beyond tort and agreement/contract claims, under *Boyd*, spoliation claims may arise from violations of written laws on information maintenance, preservation, or production. Statutes might expressly

130. Be they agreements or contracts, third parties may have spoliation claims. *See, e.g.*, Jallali v. Nat'l. Bd. of Osteopathic Med. Exam'r, Inc. 518 F. App'x. 863, 865–67 (11th Cir. 2013) (involving a claim by state exam test taker against private testing service and state that testing service failed to maintain test taker's exam sheets and other test materials in contravention of five-year retention policy spelled out in services contract with state). The spoliation claim in *Jallali* would not prompt discovery sanctions against the testing service if there was no procedural common law duty to preserve.

recognize a civil claim for harm resulting from certain information losses. Further, statutory duties, as well as perhaps regulatory duties tied to enabling statutes,[131] might support implied causes of action.[132] Without express legislative intent, spoliation claims may be implied from the written prohibitions where:

> (1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) the plaintiff's injury is one the statute was designed to prevent; (3) a private right of action is consistent with the underlying purpose of the statute; and (4) implying a private right of action is necessary to provide an adequate remedy for violations of the statute.[133]

The guiding principles on implied causes of action arising from regulatory duties, however, should differ from the principles applied to causes arising solely from statutes.[134]

A medical records retention statute in Illinois illustrates a written law from which an information spoliation claim might be implied. There, a hospital must retain an x-ray for at least five years, and for up to twelve years if notified within five years of any pending litigation wherein the x-ray is "possible evidence."[135] Here, information preservation duties

131. Sometimes enabling statutes expressly recognize claims for regulatory violations, making analyses of the precedents on implied claims unnecessary. *See, e.g.*, 15 U.S.C. § 2072(a) (allowing suit for injury resulting from "violation of a consumer product safety rule . . . issued by the Commission").

132. Dean Spencer has suggested statutory/regulatory duties on information preservation should prompt federal civil procedure law duties on information production in discovery, urging an amendment to FRCP 37(e). Spencer, *supra* note 85, at 2023 (advocating for sanctions on failure to produce information that was "subject to a statutory or regulatory duty to preserve").

133. Metzger v. DaRosa, 805 N.E.2d 1165, 1168 (Ill. 2004). The Supreme Court established comparable guidelines for implied federal claims in Cort v. Ash, 422 U.S. 66, 78 (1975), as construed in Cannon v. Univ. of Chi., 441 U.S. 677, 689–709 (1979). Other state courts have employed these guidelines. *See, e.g.*, Seeman v. Liberty Mut. Ins. Co., 322 N.W.2d 35, 40 (Iowa 1982) ("We believe the basic analytical approach of the Supreme Court is correct."); Yedidag v. Roswell Clinic Corp., 346 P.3d 1136, 1146 (N.M. 2015) (decision "influenced by three of four factors set out in *Cort*"); Bennett v. Hardy, 784 P.2d 1258, 1261 (Wash. 1990) ("borrowing from the test" in *Cort*). For differing views on applying these (and other) guidelines on implied causes of action, see the varying opinions in Gonzaga Univ. v. Doe, 536 U.S. 273, 273 (2002).

134. Only elected legislators generally have authority to recognize substantive civil claims. Any precedents implying causes of action from regulations underlying statutes necessarily would entail considerations of the language and legislative intentions behind the enabling statutes. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 292–93 (2001) (resulting in a five-justice opinion rejecting to imply a private cause of action for violations of a Department of Transportation regulation but indicating there may be a different outcome where the enabling statute contained language on creating private rights rather than on government enforcement).

135. 210 ILL. COMP. STAT. 90/1 (2021)*; see also* LA. STAT. ANN. § 40:2144 (F)(1) (2021) ("Hospital records shall be retained by hospitals . . . for a minimum period of ten years from the date a patient is discharged."); Longwell v. Jefferson Parish Hosp. Serv. Dist. No. 1, 970 So. 2d 1100, 1106 (La. Ct. App. 2007) (need deliberate spoliation to support tort claim); KAN. ADMIN. REGS. § 100-24-1 (2021)

exist both pre-suit and post-suit. Such duties are only sometimes explicitly tied to civil litigation. Seemingly, the *Boyd* precedent could support a substantive law claim under this statute on behalf of one harmed in civil litigation by a hospital's pre-suit failure to retain covered records, as well as a comparable failure post-suit by a hospital.

Similar to the Illinois statute, the California Government Code contains a provision on employment record retention. It says:

> It shall be an unlawful practice for employers, labor organizations, and employment agencies . . . to fail to maintain and preserve any and all applications, personnel, membership, or employment referral records and files for a minimum period of four years after the records and files are initially created or received, or for employers to fail to retain personnel files of applicants or terminated employees for a minimum period of four years after the date of the employment action taken. . . . Upon notice that a verified complaint against it has been filed . . . any such employer, labor organization, or employment agency shall maintain and preserve any and all records and files until the complaint is fully and finally disposed of and all appeals or related proceedings terminated. . . .[136]

Further, a federal regulation on public contract recordkeeping says, "any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of two years."[137] It goes on:

> [w]here the contractor has received notice that a complaint of discrimination has been filed . . . the contractor shall preserve all personnel records relevant . . . until final disposition. . . . The term personnel records . . . would include, for example, personnel or employment records relating to the aggrieved person and to all other

(recognizing licensee's duty to "maintain an adequate record for each patient for whom the licensee performs a professional service"), employed in Foster v. Lawrence Mem. Hosp., 809 F. Supp. 831, 838 (D. Kan. 1992) (involving a spoliation claim against doctor for breach of regulatory duty).

136. Cal. Legis. Serv. Ch. 278 § 12946 (S.B. 807) (West 2021) (existing within a title on state government addressing prohibited discrimination). This Code provision, unlike the Illinois statute, does not have the preservation duty set to expire at a fixed date. The lengthier duty to preserve in California, unlike in Illinois, only falls, however, to one who is a defendant in a civil case. Another comparable California statute is Cal. Bus. & Prof'l Code § 5097 (existing within a statutory division on professions and vocations, the chapter on accountants addresses the maintenance of "audit documentation").

137. 41 C.F.R. § 60-300.80(a) (2021)*; see also* 7 C.F.R. § 81.13 (2021) (requiring accurate records be maintained and preserved regarding prune/plum tree removals).

> employees holding positions similar to that held or sought by the aggrieved person.[138]

There may be some statutory information preservation duties tied to criminal cases that support civil spoliation claims. In South Carolina, a statute addresses the duty of a "custodian" to "preserve all physical evidence and biological material related to the conviction or adjudication of a person" for certain offenses.[139] While this statute expressly operates only after a conviction or an adjudication,[140] it can be reasonably construed to cover pre-suit information preservation, especially for exculpatory information.[141] Thus, the statute may prompt a spoliation claim on behalf of a person who is exonerated where the exoneration was (long) delayed by a statutory violation.[142]

IV. NEW APPROACHES TO ESI LOSSES IN FEDERAL CIVIL ACTIONS

As demonstrated, there are significant procedural and substantive law consequences for both parties and nonparties who fail to maintain, preserve, or produce discoverable ESI, where failures may occur before or during civil litigation. Often, failures occur even though there were ESI preservation demands. Are there better ways to address such ESI losses? If so, what new approaches are most appropriate and what issues arise when considering reforms?

The following sections discuss several important questions when considering new approaches to lost discoverable ESI in federal civil actions. The questions include:

- Should the FRCP maintain varied responses to different ESI losses?
- Should the FRCP maintain varied responses to ESI and non-ESI losses?

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138. 41 C.F.R. § 60-300.80(a) (including application forms and test papers in recordkeeping requirements).

139. S.C. CODE ANN.§ 17-28-320(a)(1), (10), (14), (19) (2021) (offenses include murder and arson in the first degree resulting in death).

140. An adjudication without a conviction of certain covered offenses, like a finding that a person is a "sexually violent predator," can be made, for example, in an involuntary civil commitment proceeding. S.C. CODE ANN. § 44-48-100 (2021).

141. *See*, *e.g.*, Gibson v. State, 514 S.E.2d 320, 324 (S.C. 1999) (recognizing prosecutorial preservation and production duties, under Brady v. Maryland, 373 U.S. 83, 83 (1963), for exculpatory information)*; see also* MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR ASS'N 2021) (identifying prosecutor's duty to disclose to defense all evidence or information tending to negate the guilt of the accused).

142. Such a civil suit for harm caused by evidence loss may require proof of willful and malicious conduct leading to information loss, as this *mens rea* is needed for a criminal misdemeanor conviction. S.C. CODE ANN. § 17-28-350.

- What federal interests impact enforcement of state spoliation claims?
- Are new laws needed on pre-suit ESI preservation and protective orders?

A. Maintain Varied Judicial Responses to Different ESI Losses?

As noted, FRCP 37(e) speaks to judicial measures addressing failures to preserve discoverable ESI "in the anticipation or conduct of litigation," but only if the lost ESI "cannot be restored or replaced through additional discovery." Assuming FRCP 37(e) excludes restorable or replaceable ESI, regardless of cost/benefit analysis, other FRCP provisions contemplate a party's failure to preserve certain discoverable ESI. Two such examples are FRCP 37(a)(3), which concerns a party's failure to make a FRCP 26(a) disclosure, and FRCP 34, which concerns a party's failure to produce requested materials.

Party failures to preserve FRCP 37(e) ESI, whatever it embodies, seemingly can only prompt "measures no greater than necessary to cure the prejudice,"[143] as FRCP 37 is the only rule that can address these failures.[144] Possible party failures to preserve other ESI (again assuming some ESI lies outside of Rule 37(e)), and all nonparty failures to preserve ESI can prompt noncurative measures, like contempt,[145] under rules outside of FRCP 37(e).

143. FED. R. CIV. P. 37(e)(1) (containing measures addressing a party's failure "to take reasonable steps" to preserve non-restorable and irreplaceable ESI). Under FRCP 37(e)(2), where ESI preservation failures involved a party acting "with the intent to deprive another party of the information's use in the litigation," there are explicitly recognized curative measures in place, such as evidentiary presumptions, adverse inference jury instructions, involuntary dismissals, and default judgments. FED. R. CIV. P. 37(e)(2).

144. The Comment to the 2006 Rule 37(e) recognized its provisions on sanctions did not "affect other sources of authority to impose sanctions or rules of professional responsibility." 2006 FED. R. CIV. P. 37(f) advisory committee's note to the 2006 amendment. The Comment to the 2015 FRCP 37(e) recognized it "forecloses reliance on inherent authority or state law to determine when certain measures should be used," upon observing that federal circuits had "established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve" ESI. FED. R. CIV. P. 37(e) advisory committee's note to the 2015 amendment.

145. *See*, *e.g.*, FED. R. CIV. P. 37(d)(3) (imposing sanctions against a party for failing to serve an adequate interrogatory answer or to respond adequately to a request for inspection, including an award of "reasonable expenses" against a "party failing to act, the attorney advising that party, or both"). For a nonparty who fails to produce ESI pursuant to a deposition order in violation of the procedural common-law preservation duty, if there is indeed such a duty, that nonparty can be subject to contempt. FED R. CIV. P. 45(g); *see also* FED. R. CIV. P. 45(a)(1)(A)(iii) (providing that a subpoena can compel a person to "produce . . . electronically stored information"). On non-party preservation duties, consider the facts in Silvestri v. Gen. Motors Corp., 271 F.3d 583, 592 (2001) (finding it "readily apparent" that the plaintiff, "his attorneys, and his expert witnesses" anticipated litigation, though the failure to preserve a vehicle involved in an accident was only found as to the plaintiff). *See also* Joseph A. Nicholson, *Plus Ultra: Third-Party Preservation in a Cloud Computing*

The original Advisory Committee on Civil Rules (Committee) circulated what became the 2015 (and current) FRCP 37(e) for public comment in August 2013.[146] It contained no distinction involving restorable/replaceable ESI, and no distinction between ESI and non-ESI, as it spoke to sanctions for failures to "preserve discoverable information."[147] The Committee altered the 2013 proposal in April 2014 in response to 2,345 written comments, together with three public hearings with more than 120 witnesses speaking.[148] The invitation for comment by the Committee asked, inter alia, "whether the rule should be limited to ESI."[149] The Committee said that the limitation in the 2015 FRCP 37(e) to (certain) ESI closed the "door to avoiding the limits" otherwise imposed on "sanctions,"[150] while noting both the "practical distinctions between ESI and other kinds of evidence" and the continuing "explosion" and acceleration of ESI.[151] FRCP 37(e) seemingly excluded the non-curative sanction of contempt and other non-curative sanctions in part because ESI preservation failures do not trigger violations of court orders (or rules).[152] Yet contempt proceedings need not involve alleged violations of court orders (or written rules).[153]

While these curative measures/sanction guidelines may differ in language, if not in operation, the federal "common-law duty," that is the "common-law obligation," of potential litigants to preserve relevant information encompasses materials in and outside of FRCP 37(e).[154]

The varied FRCP authorities for addressing lost, non-restorable, and irreplaceable ESI and for lost, restorable, and replaceable ESI may cause no true operational differences if these authorities generally lead

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Paradigm, 8 HASTINGS BUS. L .J. 191, 217–18 (2012) (after noting ESI custodians "are frequently nonparties for whom the duty to preserve as currently conceived does not effectively attach," urging lawmakers to "consider whether the business of storing data should include an obligation to preserve evidence for litigation").

146. Thought Leadership Team, *FRCP Amendments: The Long and Winding Road*, KL DISCOVERY (Apr. 21, 2014), https://www.kldiscovery.com/blog/frcp-amendments-long-winding-road (The "active public comment period . . . ran from August 2013 through February 2014.").

147. MAY 2014 AGENDA BOOK, *supra* note 88, at 324.

148. *Id.* at 306.

149. *Id.* at 307.

150. *Id.* at 311.

151. *Id.* at 309, 311.

152. *Id.* at 309.

153. *See, e.g.*, 18 U.S.C. § 401(1), (2) (providing that criminal contempt can involve "misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice" or "misbehavior" of any officer of a court in an "official" transaction); Hayes v. SkyWest Airlines, Inc., 789 F. App'x. 701, 702–03 (10th Cir. 2019) (finding contempt when legal secretary for defendant's attorney gestured to a testifying witness not to answer a certain question). *See generally* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 379–80 (1994) (defining ancillary jurisdiction to include orders that "enable a court to function successfully").

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

to the same results when any nonprivileged ESI is lost. But the results will sometimes differ as the relevant guidelines vary. Under FRCP 37(e), courts must only levy these measures where there is "prejudice" to another party, and even then, only when it is "necessary to cure the prejudice."[155] Even when there was an "intent to deprive another party of the information's use in the litigation," measures must be curative in that they address fair resolutions of pending claims. This ensures there are no measures promoting deterrence and/or punishment as through fines or disciplinary referrals.[156]

Outside of FRCP 37(e), discovery sanction hearings will often address how a sanctioned party should restore or replace lost ESI.[157] Here, one issue is who should pay to recover lost ESI when the court orders a party to recover it. Another issue is when recoverable ESI will not be ordered to be recovered due to cost.[158] For lost ESI that falls outside of the purview of Rule 37(e), assuming Rule 37(e) only encompasses ESI that can never be restored or replaced, there are express recognitions of non-curative measures, including contempt proceedings.[159] The question arises whether the distinction between some and other lost ESI by a party (again, assuming FRCP 37(e) only encompasses ESI unavailable at any cost) on curative/non-curative measures is sound, because only intentional (and perhaps other) destructions of ESI which is recoverable and restorable can prompt non-curative measures. Of course, the availability of noncurative measures against non-parties who lose ESI makes sense, as they are not subject to jury instructions.

Given these differences in addressing some and other ESI losses, why was FRCP 37(e) amended in 2015 to reflect these differences? The Note for the 2015 FRCP 37(e) provides little help. The Note does

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

156. FED. R. CIV. P. 37(e)(2). Whether litigation expense recoveries are curative under FRCP 37(e) is unclear. *See* Letter from District Judge Iain D. Johnston to District Judge Robert Dow, Jr., (Feb. 8, 2021), suggesting that the Advisory Committee on Civil Rules consider amendments to FRCP 37(e) that expressly authorize the sanction of "the payment of reasonable expenses, including attorney's fees," since authorization under the current rule is unclear, although authority is recognized by Thomas Y. Allman in *Dealing with Prejudice: How Amended Rule 37(e) Has Refocused ESI Spoliation Measures*, 26 RICH. J.L. & TECH. 1, 64–66 (2020). The letter appears in the Rule Suggestions section on federal judicial rulemaking that appears on the website of the Administrative Office of the U.S. Courts.

157. *See, e.g.*, FED. R. CIV. P. 37(a)(3)(iv) (compelling the restoration or replacement of ESI that was not produced as it was then lost).

158. *See, e.g.*, FED. R. CIV. P. 26(g) (requiring every discovery request be reasonable, and not prompt undue expense, considering case needs, earlier discovery, and the importance of the issues at stake); FED. R. CIV. P. 26(b)(2)(B) (not requiring ESI discovery where sources are "not reasonably accessible because of undue burden or cost").

159. *See, e.g.*, FED. R. CIV. P. 37(b)(2)(vii), (d)(3).

recognize that certain lost ESI that can be restored or replaced need not be subject to discovery through a restoration or replacement court order when such discovery is not "proportional to the apparent importance of the lost information to the claims or defenses in the litigation."[160] Perhaps lost ESI that will not be restored/replaced by court order due to cost/proportionality, though it could be, falls within FRCP 37(e). Yet Rule 37(e) still distinguishes as it only speaks to a party's failure; a non-party can have a procedural common law duty to preserve, perhaps inferred or derived from a statutory duty, as with medical employment recordkeeping.[161]

The aforenoted 2018 Arizona civil procedure rule on pre-suit judicial dispute resolutions involving information preservation duties speaks to all ESI, making no distinction between ESI forms as it exists in FRCP 37(e).[162]

Whatever the earlier rationales for distinguishing between forms of ESI, federal rule makers should now further inquire into any distinctions by seeking (e.g., through the Federal Judicial Center) empirical data on how the federal district courts now approach all ESI losses and how FRCP 37(e) measures for some lost ESI differ, if at all, from FRCP 37(a) sanctions for other lost ESI. Here, explorations of state practices which

160. FED. R. CIV. P. 37(e) advisory committee's note to the 2015 amendment. ("[S]ubstantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.").

161. In promulgating 2006 FRCP 37(f), in considering 2013 Proposed FRCP 37(e), and in promulgating 2015 FRCP 37(f), federal judicial rule makers rejected suggestions to embody a procedural law discovery preservation duty within the FRCP, opting to continue with a common law approach. *See* MAY 2014 AGENDA BOOK, *supra* note 88, at 319. ("Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve."). This approach prompts judicial policymaking on procedural information preservation duties outside, but complimentary of, the FRCP. *See* Iain D. Johnston, *Federal Courts' Authority to Impose Sanctions for Prelitigation or Pre-Order Spoliation of Evidence*, 156 F.R.D. 313 (1994) (an early survey of federal court precedents on procedural law information preservation duties which can prompt sanctions/curative measures when the duties are breached); Robert Keeling, *Sometimes, Old Rules Know Best: Returning to Common Law Conceptions of the Duty to Preserve in the Digital Information Age*, 67 CATH. UNIV. L. REV. 67, 102 (2018) (survey of more recent cases; concluding laws should return to a time when preservation duty arises with actual filing of a lawsuit, or, at most, "when litigation is imminent"). Such policymaking can also embody judicial precedents that are tethered to a statute/regulation on information maintenance/preservation/production. *See, e.g.*, MAY 2014 AGENDA BOOK, *supra* note 88, at 319 (providing that rulings on procedural common law preservation duty should take account of, but need not mimic, "statutes, administrative regulations, an order in another case, or a party's own information-retention protocols"). As well, a statute/regulation accounted for in common law preservation rulings can also prompt substantive law policymaking, as by implied causes of action on behalf of intended beneficiaries that run against those subject to the statutory/regulatory duty. *See, e.g.*, *supra* notes 131–33 (including statues on maintaining employment and medical records).

162. ARIZ R. CIV. P. 45.2(a).

follow the 2015 FRCP 37(e) and which follow the 2006 FRCP 37(e) could be useful.

B. Maintain Varied Judicial Responses to ESI and non-ESI Losses?

In looking anew at how measures are assessed for lost, non-restorable, and irreplaceable ESI and for lost, restorable, and replaceable ESI, federal rule makers should also explore again whether the varied responses to ESI and non-ESI are still warranted. A simple question could be asked: what consequences may likely follow—given empirical research—if a failure to preserve the very same information, albeit in different forms, is found, as with lost ESI and a lost document containing what was in that lost ESI?

If the failure to preserve the information described above in non-restorable and irreplaceable ESI involved an "intent to deprive another party of the information's use in . . . litigation."[163] FRCP 37(e)(2) allows—but does not require the employment of—the measures of an adverse presumption, an adverse jury instruction, or an involuntary dismissal or default judgment. When a similar intent lies behind a document loss resulting in a discovery failure,[164] the FRCP authorize discretionary orders that may include directing that "designated facts be taken as established," not unlike an adverse presumption order;[165] that the jury be informed of the preservation failure, not unlike an adverse jury instruction;[166] and that a claim be dismissed or a default judgment be rendered, not unlike the FRCP 37(e) dismissal or default order.[167] But outside of FRCP 37(e), with perhaps some ESI (restorable/replaceable ESI and/or nonparty ESI) and non-ESI, FRCP 37 also authorizes contempt proceedings (i.e., noncurative measure).[168]

As to why the 2015 FRCP 37(e) established differences between sanctions for some lost ESI and for other lost ESI and lost non-ESI,[169] the

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

164. FED. R. CIV. P. 37(b)(2)(A) (failure to obey a court order to permit discovery); FED. R. CIV. P. 37(c) (failure in mandatory disclosure or supplemental discovery).

165. FED. R. CIV. P. 37(b)(2)(A)(i) (court order disobeyed); FED. R. CIV. P. 37(c)(1)(C) (referencing FRCP 37(b)(2)(A)(i) for disclosure/supplemental discovery failures).

166. FED. R. CIV. P. 37(c)(1)(B) (for discovery/supplemental discovery failures).

167. FED. R. CIV. P. 37(b)(2)(A)(v), (vi) (court order disobeyed); FED. R. CIV. P. 37(c)(1)(C) (referencing Rule 37(b)(2)(A) for disclosure/supplemental discovery failure).

168. *See, e.g.*, FED. R. CIV. P. 37(b)(2)(vii) (contempt). *Compare* FED. R. CIV. P. 37(e) (sanctions must seek "to cure the prejudice"), *with* FED. R. CIV. P. 37 (b)(2) (sanction to be embodied in "just orders," which "may" include curative measures).

169. The 2015 Rule 37(e) continued to recognize that for all information (i.e., ESI and non-ESI) there is a comparable common-law preservation duty or obligation "in the anticipation or conduct of litigation." FED. R. CIV. P. 37(e); FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

Committee Note simply expresses concerns with "the serious problems resulting from the continued exponential growth in the volume of such information."[170] It then observed:

> Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.[171]

In 2006 when FRCP 37(e) still distinguished the sanctions for ESI and non-ESI losses, the Committee Note indicated a concern about sanctioning one who lost information through the "routine operation" of a computer system without "specific direction or awareness, a feature with no direct counterpart in hard-copy documents."[172]

Did the 2015 FRCP 37(e) rule makers implicitly find no "exponential growth" in documents?[173] And did they find more uniform sanctions followed document losses? Finally, did they find no "excessive effort and money" accompanied document preservation?[174]

The aforenoted 2018 Arizona civil rule on pre-suit disputes over information preservation duties also distinguishes between ESI and non-ESI as it only applies to disagreements over ESI.[175] Unlike FRCP 37(e), the 2018 Arizona rule does not distinguish between varying forms of ESI.[176] Its legislative history justified the ESI and non-ESI distinction by focusing on "the explosion in ESI" which "has created a corresponding explosion in discovery costs for parties and nonparties alike," including "demands that parties and nonparties preserve massive amounts of information."[177] The Arizona rule applies to a pre-suit dispute raised by

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The 2015 FRCP 37(e), but not the 2006 FRCP 37(e), distinguished between lost, irreplaceable, and non-restorable ESI and other lost ESI. The 2015 FRCP 37(e) Advisory Committee Notes do not offer a justification for this difference. They do observe that the 2015 rule "replaces the 2006 rule," and applies only to ESI that is "also the focus of the 2006 rule." FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

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

171. *Id.*

172. FED. R. CIV. P. 37(e) advisory committee's note to 2006 amendment.

173. Recall that in 2013, federal civil procedure rule makers did consider "a uniform set of guidelines for . . . all discoverable information." 2013 FRCP 37(E) PROPOSAL, *supra* note 75, at 44.

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

175. ARIZ. R. CIV. P. 45.2.

176. ARIZ. R. CIV. P. 45.2(a).

177. *See, e.g.*, *A Call to Reform*, COMM. ON CIV. JUST. REFORM'S REPORT TO THE ARIZ. JUD. COUNCIL (Oct. 2016), at 14; *see also id.* at 15 (The new rule allows a petition for a court order declaring a "preservation demand" is "unreasonably burdensome" or declaring "the demanding party must pay for some or all of what it has demanded.").

a nonparty in receipt of a "preservation request" where the nonparty may or may not be a party if a later related civil action is presented.[178]

C. Limits on State Spoliation Claims for ESI Losses?

As noted, FRCP 37(e) "does not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim."[179] There is little reason to think that FRCP 37(e) does affect substantive state spoliation claims for certain ESI losses outside of tort. Further, nothing suggests that the remainder of FRCP 37 affects substantive state spoliation claims (in and outside of tort) for ESI losses outside of Rule 37(e) (and for non-ESI losses). Perhaps there is little reason to think that federal procedural laws outside of FRCP 37 affect substantive state spoliation claims for lost information (both ESI and non-ESI) relevant to civil cases, as with federal procedural common law precedents on the duty to preserve information in anticipation of foreseeable civil litigation.

As recognized in the 2015 FRCP 37(e) Advisory Committee Notes, there is a federal procedural "common-law duty" to preserve Rule 37(e) ESI (and other information) that federal procedural law rulings can address when a party breaches its preservation duties, including pre-suit breaches. Before 2006, between 2006 and 2015, and since 2015, varying types of state substantive spoliation claims, involving varying forms of information lost at varying times, have been presented in related federal civil actions.[180] The Committee Note to the 2015 FRCP 37(e) did observe that state substantive spoliation laws, with "independent preservation requirements," would not necessarily

178. ARIZ. R. CIV. P. 45.2 (defining a nonparty as "a person who receives a preservation request . . . and is not a party to a pending action in which the request is made"); ARIZ. R. CIV. P. 45.2(e) (providing that a nonparty may seek determination on "the existence or scope of any duty to preserve" ESI where there is "no pending action").

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

180. *See, e.g.*, Phillips v. City of Albuquerque, No. 97-1324, 1998 WL 36030893, at *3 (D.N.M. Mar. 24, 1998) (involving evidence tampering and spoliation by police at the scene of an alleged homicide); Doe v. Village of Lombard, No. 06C7048, 2007 WL 2788838, at *1 (N.D. Ill. Sept. 21, 2007) (involving failure by police officer and village to preserve fingernail clippings taken from suspected criminal); Jallali v. Nat'l. Bd. of Osteopathic Med. Exam'r, Inc., 518 F. App'x 863, 867 (11th Cir. 2013) (involving a third-party failure to preserve exam sheets and other test materials); Teague v. Armstead, 82 F. Supp. 3d 817, 820 (N.D. Ill. 2015) (involving negligent failure to preserve video recordings); Jou v. Adalian, No. 15-00155, 2018 WL 1955415, at *5–7 (D. Haw. Apr. 25, 2018) (regarding notes between two people, and limited partnership records); Willis v. Cost Plus, Inc., No. 16-639, 2018 WL 1319194, at *1 (W.D. La. Mar. 12, 2018) (involving failure to preserve a store's surveillance footage).

prompt federal procedural common law information preservation duties.[181]

In contemplating new and continued approaches to state substantive spoliation claims for ESI losses in related federal cases, certain limitations must be recognized. Explorations of some of these limits follow.

1. Pre-suit and Post-suit ESI Losses

The limits on spoliation claims in federal courts should distinguish between pre-suit and post-suit ESI losses. The pre-suit setting requires such a distinction because there are far fewer reasonable anticipations of the future need of ESI in federal civil litigation. Of course, there are times when future parties and witnesses anticipate later federal cases, as when ESI is relevant to foreseeable claims, exemplified by patent disputes, that can only be presented in federal district courts. Other than purely jurisdictional disputes, foreseeable federal cases are apparent from pre-suit information preservation demand letters.

Even when pre-suit ESI maintenance and preservation are not reasonably foreseeable by the actual or potential ESI holder as relevant to later federal litigation, spoliation claims should sometimes still be proper in a later, related federal civil action. Jurisdiction and venue issues aside, presentation is more appropriate where the spoliation claims do not depend upon reasonably foreseeable litigation. Recall the illustrative contractual and statutory information preservation duties.[182] Then, consider the somewhat analogous scenario where it would sometimes serve both public and private interests to have a disputed legal malpractice claim involving pre-suit conduct before the same judge who is also hearing the civil action wherein that very malpractice is alleged to have made it far more difficult, if not impossible, for a former client claimant or defendant to prevail.[183] Consider, as well, the scenario where an insurance coverage dispute between an insured and an insurer involving pre-suit conduct is

181. MAY 2014 AGENDA BOOK, *supra* note 88, at 319, 329 (State "preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation," and unreasonableness (or other culpability) under state norms does not necessarily mean unreasonable "with respect to a particular case" in a federal litigation).

182. *See supra*, pts. III.B., III.C.

183. *See, e.g.*, Hardy v. McCorkle, 765 S.W.2d 910, 912 (Tex. App. 1989) (In a divorce case, trial judge could also hear claims for attorney's fees against one of the parties as well as that party's counterclaim for attorney malpractice.). *But see* Olds v. Donnelly, 696 A.2d 633, 643 (N.J. 1997) (no similar compelled joinder required).

presented in the same civil action wherein the insured has demanded coverage on a claim that the opposing party pursues against it and where settlement talks could then lead to settlements of all claims, though the claims would likely need separate trials should settlement talks fail.[184]

2. Jurisdictional, Venue and Joinder Issues

In the *Boyd* case survey of the varying forms of state spoliation claims, the court encouraged joinder of those claims with the related claims wherein spoiled information was lacking.[185] It reasoned:

> We also agree with plaintiffs that a single trier of fact may be allowed to hear an action for negligent spoliation concurrently with the underlying suit on which it is based . . . A single trier of fact would be in the best position to resolve all the claims fairly and consistently. If a plaintiff loses the underlying suit, only the trier of fact who heard the case would know the real reason why. This factor is important because a spoliator may be held liable in a negligence action only if its loss or destruction of the evidence caused a plaintiff to be unable to prove the underlying suit. We therefore encourage plaintiffs and the trial court to employ joinder in this case.[186]

But such consolidation may not be as easy in a federal court as in an Illinois court due to different jurisdictional, venue, and joinder laws.

As to jurisdiction, there are significant barriers to joinder involving both subject matter and personal jurisdiction. Subject matter jurisdiction would likely require general diversity of citizenship jurisdiction, supplemental jurisdiction, or ancillary jurisdiction.[187] In the absence of one of these forms of statutory subject matter jurisdiction, some federal courts may still exercise their power over state spoliation claims. For example, federal courts have ancillary jurisdiction authority not only over "claims that are, in varying respects and degrees, factually interdependent"[188] with already pending claims (often supplemental jurisdiction claims), but also over matters that "enable a court to

184. *See, e.g.*, Kelly v. Yannotti, 153 N.E.2d 69, 71–72 (N.Y. 1958) (holding that, though joined, the tort claim against insured and insured's claim against insurer would have to be tried separately if there were no settlements).

185. Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 272 (Ill. 1995).

186. *Id.*

187. 28 U.S.C. § 1332(a) (general diversity jurisdiction); 28 U.S.C. § 1367 (supplemental jurisdiction); Butt v. United Brotherhood of Carpenters & Joiners of Am., 999 F.3d 882, 886 (3d Cir. 2021) (ancillary jurisdiction over attorney fee disputes).

188. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 379 (1994).

function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees."[189]

Should a spoliation claim fall within diversity jurisdiction, it is difficult for a federal court to decline to exercise its adjudicatory authority.[190] If a spoliation claim falls within supplemental jurisdiction, federal courts exercise broad discretion in declining to exercise adjudicatory authority, even if the court previously recognized jurisdiction.[191] Ancillary jurisdiction precedents enabling a court to function successfully also recognize discretion. For example, a federal court can sometimes exercise settlement authority, that is, the court can attempt to bring a related spoliation claim to an amicable end, even if the court could not adjudicate the claim on the merits without a settlement.[192] Further, as with attorney fee disputes,[193] federal courts can hear spoliation claims after they resolves all related litigation claims on the merits, especially if it is a third-party claim.[194]

Personal jurisdiction barriers to joining spoliation claims in related federal civil actions most frequently will appear with third-party spoliation claims,[195] that is, claims against those otherwise not named as parties, as when expert witnesses, insurers, or lawyers are sued for causing ESI losses.[196] Under federal procedural due process principles, a prospective third-party spoliation defendant will need minimum ties to the forum in the absence of forum residency, forum service of process, consent, or attachable forum property.[197]

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189. *Id.* at 380.

190. 28 U.S.C. § 1332(a) ("[D]istrict courts shall have original jurisdiction."); Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992) (quoting Colorado River Conservation Water Dist. v. United States, 424 U.S. 800, 817 (1976)) (stating that federal district courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them"). *But see, e.g.*, Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 282 (2005) (explaining comity or abstention doctrines may "permit" or "require" a federal district court to stay an action "in favor of state-court litigation").

191. 28 U.S.C. § 1367(c).

192. *See, e.g.*, Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 369 (1996) (holding that state court approval of a release of a federal law claim over which the federal district courts have exclusive subject matter jurisdiction must be honored when that same federal claim is later presented in a federal court).

193. *See, e.g.*, Butt v. United Brotherhood of Carpenters & Joiners of Am., 999 F.3d 882, 888 (3d Cir. 2021).

194. With third-party spoliation, the effects of unavailable information due to third party conduct (i.e., acts by one not involved in the other litigation claims, as with experts, insurers, or lawyers) can be assessed; that is, the impact on the spoliation claimant's earlier claim loss(es) can be determined.

195. For first-party spoliation claims (i.e., claims between existing parties who already have other disputed claims in the pending action), "pendent personal jurisdiction" would often operate. *See, e.g.*, Charles Schwab Corp. v. Bank of Am. Corp., 883 F.3d 68, 88 (2d Cir. 2018); Action Embroidery Corp. v. Atl. Embroidery, Inc., 368 F.3d 1174, 1180–81 (9th Cir. 2004).

196. *Supra* notes 120–24.

197. *See, e.g.*, Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945).

Venue barriers to joining spoliation claims arise chiefly from *forum non conveniens* analyses,[198] in that the "pendent venue" doctrine can obviate the need for independent bases for venue over any spoliation claims.[199] As with supplemental jurisdiction, discretionary decisions not to hear spoliation claims can be made under *forum non conveniens* analyses sometime after the commencement of litigation, though there were no earlier venue concerns recognized.[200]

3. Federal Interests in State Substantive Spoliation Policies

Beyond the foregoing procedural laws on ESI losses pertinent to federal civil actions, there seemingly are some federal substantive laws. One involves ESI losses that prompt federal substantive spoliation claims which preempt state spoliation claims. While federal claims likely cannot be founded simply on breaches of the federal procedural common law duty to preserve information, which can also serve as a basis for sanctions (curative and noncurative),[201] there can be imagined federal substantive spoliation claims arising (directly or implicitly) from written federal laws (statutes or agency rules) on information preservation.[202]

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198. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 238 (1981).

199. *See, e.g.*, CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3808 (West 4th Ed. 2021) (sometimes called ancillary venue)*; see also* Beattie v. United States, 756 F.2d 91, 101–04 (D.C. Cir. 1984) (noting that pendent venue often prompts consideration of same factors as pendent jurisdiction, including "judicial economy, convenience, avoidance of piecemeal litigation and fairness to the litigants"); Bredberg v. Long, 778 F.2d 1285, 1288 (8th Cir. 1985) (recognizing limits on employing pendent venue).

200. *See, e.g.*, Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947) (recognizing that the factors utilized in assessing a *forum non conveniens* dismissal include matters that may only appear once the lawsuit has progressed for a while, including "relative ease of access to sources of proof," costs associated with witness attendance, and "possibility of view of premises if view would be appropriate").

201. I argued earlier for some comparable federal question claims for harms caused by federal pleading abuses. Jeffrey A. Parness, *Groundless Pleadings and Certifying Attorneys in the Federal Courts*, 1985 UTAH L. REV. 325, 342–44 (1985). But such implied claims generally have gone unrecognized in both federal and state courts. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (failing to recognize an implied claim arising from regulatory violation); Davis v. Findley, 422 S.E.2d 859, 861 (Ga. 1992) (failing to recognize an implied claim arising from a professional conduct rule violation); Stender v. Blessum, 897 N.W.2d 491, 502 (Iowa 2017) (failing to recognize an implied claim arising from professional conduct rule violation).

202. On implying federal law claims for federal statutory violations, see, for example, Cannon v. Univ. of Chi., 441 U.S. 676, 680 (1979). One such written law may be 18 U.S.C. § 2703(f), where a person or entity alleges harm that is caused by an internet provider's failure to preserve ESI as requested by "a governmental entity." The law has been described as follows:

> The law states that Internet providers, "upon the request of a governmental entity, shall take necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process," about an Internet account. The provider must then preserve the records for 90 days, extended to 180 days if the government renews its request. Since its enactment in 1996, this authority has been routinely used by investigators

Federal question claims could also arise from contracts guided by federal laws, as with agreements between private parties to preserve ESI for future federal civil actions wherein federal court has exclusive jurisdiction. Similarly, federal question spoliation claims could arise from information preservation contracts between federal agents and entities and private parties. In both settings, contracts might include choice of federal law provisions.

D. New Laws on ESI Preservation and Protective Orders?

Should new approaches to ESI losses in federal civil actions include new federal procedural laws on the availability of more pre-suit preservation and protective orders?

Herein, pre-suit preservation orders include pre-suit orders directed at potential civil case parties or witnesses on the creation or maintenance of ESI that would otherwise not be made and kept; on the continuing maintenance of existing ESI that would or might otherwise be eliminated; or on the production to others of ESI that would otherwise not be produced upon informal request. Pre-suit protective orders include pre-suit orders directed on behalf of potential civil case parties or witnesses on the absence, or on the breadth, of any procedural and/or substantive law duties to create, maintain, or produce (i.e., to preserve) ESI.

1. ESI Preservation Orders

New federal laws on pre-suit information creation, maintenance, preservation, and production could draw from the aforenoted state pre-suit discovery laws. Such state laws extend to orders beyond orders under FRCP 27(a) and (c). While state goals in pre-suit discovery laws at times go beyond information preservation (as with discovery aimed at identifying potential civil litigants or potential causes of action), this article only urges the need for ESI information preservation orders.

New federal procedural laws authorizing ESI information creation, maintenance, preservation, and production orders by federal district judges should be available both pre-suit and post-suit.[203] Pre-suit

to preserve the contents of e-mails, private messages, stored photos, and other online contents.

Orin S. Kerr, *The Fourth Amendment Limits of Internet Content Preservation*, 65 ST. LOUIS UNIV. L.J. 753, 754– 55 (2021).

203. Elsewhere, I argued, with Jessica Theodoratos, for greater authorizations of pre-suit preservation orders. Parness & Theodoratos, *supra* note 19, at 685 ("New civil procedure laws

preservation orders should go beyond FRCP 27(a). Post-suit preservation orders should go beyond FRCP 26.[204] New explicit rules on ESI preservation would promote the goal of the 2015 FRCP 37(e) Advisory Committee to reduce the "significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information."[205] New rules would also diminish the incentives to undertake "self-help" ESI collection in violation of federal and state laws.[206]

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should, at the least, authorize pre-suit court orders involving evidence preservation when the evidence, relevant to possible civil litigation, will likely spoil otherwise and is subject to a preservation duty under substantive law."). This led to my proposed FRCP 27 amendment on such orders. Jeffrey A. Parness, *Proposed Amendment to Federal Civil Procedure Rule 27(c): Federal Pre-suit Information Preservation Orders*, SSRN 3745893 (Dec. 9, 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3745893 (presented to the FRCP Advisory Committee on November 13, 2020; proposing that FRCP 27(c) explicitly recognize a court's power to entertain an action "involving pre-suit information preservation when necessary to secure the just, speedy, and inexpensive resolution of a possible later federal civil action").

204. FRCP 26(c)(1), on post-suit protective orders, is limited to requests from "a party or any person from whom discovery is sought." FED. R. CIV. P. 26(c)(1). Such requests may only be available long after a civil action was commenced since discovery usually may only be pursued after "the parties have conferred as required by Rule 26(f)," with such conferences occurring "as soon as practicable," but "in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)," where such an order, absent "good cause," must issue, per Rule 16(b)(2), "within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared." FED. R. CIV. P. 26(a)(1), (f)(1).

For now, there is FRCP 26(d)(1) which allows preservation "orders" before any FRCP 26(f) conference in very limited cases, including cases exempted from initial required disclosures under FRCP 26(a). Rule 26(d)(1) supplies no guidelines. See also FED. R. CIV. P. 26(d)(2), which allows preconference FRCP 34 document and ESI requests, but only more than twenty-one days after summons and complaint are served. Perhaps, as well, FRCP 65 on temporary restraining orders is available to secure post-suit ESI preservation orders. FED. R. CIV. P. 65. Yet, even if available, such orders require a showing of "immediate and irreparable injury, loss, or damage." *Id.* at (b)(1)(A).

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

206. *See, e.g.*, Xyngular v. Schenkel, 890 F.3d 868, 872, 875 (10th Cir. 2018) (dismissing a corporate shareholder's claims due to pre-suit, bad faith evidence gathering). In state domestic relations cases, one experienced attorney (and licensed private attorney and certified computer forensic specialist) lamented about the prevalence of illegal ESI inquiries, noting:

> This much is certain: matrimonial litigants often convince themselves that the key to a successful outcome is getting their hands on their spouse's data, particularly emails, texts, and other electronic communications. In an alarming number of cases . . . parties utilize a wide range of methods from hacking of email accounts, setting up auto-forward rules, or accessing the spouse's iCloud through a separate (sometimes a child's) device, to the installation of spyware programs on devices used by their spouse. Although there are certain *limited circumstances* in which the exercise of "self-help" to collect Electronically Stored Information ("ESI") outside of formal discovery by a spouse in a matrimonial case may be legal, much of the conduct described above . . . violates state and federal criminal statutes, gives rise to statutory claims for civil damages, results in evidence that is inadmissible by statute or case law, and can also result in direct and serious sanctions against the offending spouse in the matrimonial action itself.

Nicholas G. Himonidis, *Digital Espionage in Matrimonial Cases: Drawing the Line Between Legitimate Self-Help and Unlawful Interception of Electronic Communications*, 33 J. AM. ACAD. MATRIMONIAL LAW. 393, 393–94 (2021).

2. ESI Protective Orders

Both compliance and noncompliance with pre-suit ESI demands carry heavy costs, leaving recipients with difficult choices. Similar problems face those receiving post-suit ESI demands before beginning ESI discovery where the recipients wish to be rid of the ESI. Currently, there are far fewer federal procedural law mechanisms authorizing pre-suit judicial clarifications on ESI duties than authorizing post-suit judicial clarifications.[207]

New laws authorizing pre-suit and post-suit protective orders are needed for those facing actual or potential pre-suit, or actual or potential post-suit, ESI maintenance, preservation, and production requests. New laws should, at least, allow potential civil litigants presented with pre-suit demands for ESI preservation, in anticipation of future (and perhaps imminent) civil litigation, to seek federal district court assistance to clarify their information obligations. New laws would lessen the need for later discovery spoliation sanctions and state spoliation claims; prompt more informed pre-suit and post-suit settlements; and, over time, foster greater certainties about ESI information preservation obligations.

New federal pre-suit protective order laws could draw from the aforenoted 2018 Arizona court rule on pre-suit avenues to resolving ESI "duty to preserve" issues.[208] The rule allows a pre-suit verified petition "asking the court to determine the existence or scope of any duty to preserve" ESI, where the petition, *inter alia*, is accompanied by a "good faith consultation certificate": an identification of those the petitioner anticipates may oppose the petition and of disputed issues following the consultation; and, a description of any undue burden or expense on the petitioner, including "an estimate of the expenses likely to be incurred."[209] Yet any new federal laws on pre-suit protective orders should be integrated with existing FRCP, like Rule 26(c). Further, any new federal laws may require variations from the Arizona norms on pre-suit ESI duties should the FRCP 37(e) distinctions between ESI forms (e.g., irreplaceable and replaceable) continue.

New federal post-suit protective order laws should be embodied within an amended FRCP 26(c). Again, federal rule makers could draw from the Arizona court rule on resolving ESI disputes related to pending

207. *But see* FED. R. CIV. P. 26(b)(1) (providing early post-suit "discovery" may be obtained by court order). Further, consider possible post-suit interlocutory injunctions or orders under FRCP 65. FED. R. CIV. P. 65.

208. ARIZ. R. CIV. P 45.2(d), (e).

209. ARIZ. R. CIV. P. 45.2(e)(1).

civil actions.[210] That rule allows parties and nonparties to seek judicial determinations of any disputes regarding ESI preservation where earlier private dispute resolution attempts were unsuccessful.[211] Further, there are instances where new post-suit protective order laws can be statutory.[212]

V. CONCLUSION

There have been two major changes in the FRCP involving ESI discovery during the John Roberts era. These changes primarily address the duties to preserve ESI for federal civil litigation, the procedural law sanctions that can be assessed for preservation failures, and the role of substantive state spoliation laws in deterring and remedying lost ESI. While these changes were embodied in FRCP 37(e), its provisions have always been accompanied by other FRCP provisions on ESI, some predating Rule 37(e).

This Article reviewed the history behind, and all the current, FRCP provisions on ESI. Its primary focus was the Rule 37(e) changes which took effect in 2006 and 2015, with a nod to the unadopted proposed ESI changes of 2013.

The Article began by reviewing the FRCP as well as state substantive laws applicable in federal courts to pre-suit and post-suit ESI losses. State spoliation laws were reviewed as they might suggest potential FRCP reforms, whether those state laws originate in tort, contract, or elsewhere.

These reviews facilitated the exploration of several significant issues regarding lost ESI pertinent to federal civil actions. These issues include the uncertainties arising from the FRCP distinctions between ESI and non-ESI, as well as between the varying forms of ESI; the challenges in pursuing state spoliation claims in related federal civil actions; and the possible need for new pre-suit and post-suit ESI discovery rules.

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210. ARIZ. R. CIV. P 45.2(d), (e).

211. ARIZ. R. CIV. P. 45.2(d) (referencing for parties ARCP 26(d), and for nonparties ARCP 7.1(h)); *see also* ARIZ. R. CIV. P. 26(e) (instructing courts on how to determine whether ESI is "reasonably accessible").

212. Consider, for example, statutory authority on protective orders against those subject to preservation duties under 15 U.S.C. § 77z-1(b)(2) (While discovery is stayed in certain private securities litigation, "unless otherwise ordered by the court, any party . . . shall treat all documents . . . and tangible objects . . . that are relevant . . . as if they were subject of a continuing request for production . . . from an opposing party.") where statutory violations very harmful to petitioners are otherwise reasonably likely. 15 U.S.C. § 77z-1(b)(2) (1998).