DEFINING CULPABILITY: THE SEARCH FOR A LIMITED SAFE HARBOR IN ELECTRONIC DISCOVERY

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"Reasonable steps do not always preserve everything. Things slip through. That is the point of the safe harbor."[1]

Abstract

Decisions on when and how to preserve electronically stored information for potential discovery are often challenged by spoliation sanction motions. Rule 37(f) will provide relief from rule-based sanctions for routine losses due to operations of information systems when a party has exercised "good faith" in planning for and executing preservation obligations. There will be cases where losses to e-discovery from the operation of information systems are not sanctionable even though preservation obligations have been triggered.. To this extent, Rule 37(f) can be seen as modifying and limiting the rule of *Residential Funding* in a narrow class of cases and as providing guidance to those who, acting in good faith, seek to develop and implement corporate policy. The same result should be reached in all cases whether a court is exercising rule-based or inherent sanctioning power, absent exceptional circumstances, since the Advisory Committee carefully balanced the competing interests in this area.

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1 Member, Advisory Committee, Minutes of the April 15-16, 2004 meeting in Washington, D.C., at 18, *available at* http://www.uscourts.gov/rules/Minutes/CRAC0404.pdf.

APPENDIX -The Evolution of Rule 37(f)

I. INTRODUCTION

Perhaps the most difficult task facing a producing party in today's electronic age is judging the timing and scope of preservation obligations which apply to electronically stored information ("ESI") potentially involved in pending or anticipated litigation. These important decisions are often made in a vacuum, without guidance from a detailed discovery request or court order. A failure to adequately anticipate the onset of, or to execute the resulting preservation obligations for, ESI can have serious consequences. Under decisions such as *Residential Funding*,[2] sanctions in the form of an adverse jury instruction are possible if a party had an obligation to preserve ESI at the time it was lost, if information relevant to a claim or defense was involved and if the party acted "with a culpable state of mind."[3]

This article addresses the impact of Rule 37(f)[4] of the proposed E-Discovery Amendments[5] to the Federal Rules of Civil Procedure in a narrow set of circumstances when the loss of ESI occurs during the routine use of information systems. The article contends that conditioning an exemption from rule-based sanctions on a "good faith" culpability standard acknowledges the important "truth-seeking" purpose in the preservation of potential discovery while also reflecting the realities of the routine use of electronic information systems in a productive environment. A legitimate and acceptable consequence of the use of information management policies is that relevant information is sometimes kept from adverse parties.[6] Spoliation sanctions should not imposed for a loss which results from the application of reasonable forms of those policies – even after a preservation obligation can be said (with hindsight) to have attached – absent a showing of culpability.[7]

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2 *See* Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2nd Cir. 2002) (noting that a "culpable state of mind" exists if "the evidence was destroyed 'knowingly, even if without intent to [breach a duty to preserve it], or *negligently*'" (emphasis and interlineations in original)).

3 *See, e.g.*, Zubulake v. UBS Warburg, LLC, 229 F.R.D. 422, 431 (S.D.N.Y. 2004) ("*Zubulake V*") (relying upon *Residential Funding* to authorize reading the adverse inference instruction to the jury).

4 Proposed Federal Rule of Civil Procedure 37(f) provides that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system." The Appendix contains a summary of the steps in the evolution of the language of Rule 37(f) as described in this article.

5 Amended Rules 16, 26, 33, 34, 37, 45 and Form 35 and the related Committee Notes [hereinafter Committee Note] can be found at http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf. *See also* Report of the Judicial Conference Committee on Rules of Practice and Procedure, September 2005 (including Advisory Committee Report of May 27, 2005, as revised July 25, 2005 as Appendix C and explaining the reasoning of the Standing Committee for its recommendations in favor of the proposed rules), *available at* http://www.uscourts.gov/rules/Reports/ST09-2005.pdf[hereinafter Standing Committee Report]. The Standing Committee Report is an indispensable and authoritative source of background and interpretive information regarding the e-discovery amendments.

6 *See* Arthur Andersen LLP v. United States, 554 U.S. 696, 704 (2005).

7 *See, e.g.*, Stevenson v. Union Pac R.R. Co., 354 F.3d 739, 747 (8th Cir. 2004) (stating that no adverse inference instruction should issue for negligent destruction pursuant to records retention policy without some "indication

II. EVOLUTION OF THE SAFE HARBOR RULE

After Rule 37(f) comes into effect on December 1, 2006,[8] ESI lost as a result of "routine, good faith" operation of information systems will be exempt from rule-based sanctions[9] in the absence of "exceptional" circumstances.[10] While technically confined to rule-based sanctions, Rule 37(f) may reasonably be expected to also guide courts exercising their inherent powers under similar circumstances.[11]

The "good faith" culpability standard was adopted by the Members of the Civil Rules Advisory Committee ("Advisory Committee") at their meeting in April 2005[12] after reviewing comments at the Public Hearings held in San Francisco, Dallas and Washington in January and February 2005.[13] Rule 37(f) can fairly be described as a guidepost for courts in resolving sanction motions involving ESI.[14] It should help point the way for producing parties seeking to rationally develop acceptable retention policies by encouraging appropriate and reasonable attention to managing preservation obligations.[15]

Before examining the application of Rule 37(f) in detail, however, it is useful to describe the complete context in which it will operate and the reasons for its enactment.

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of an intent to destroy the evidence for the purpose of obstruction or suppressing the truth").

8 Under the Rules Enabling Act, 28 U.S.C.§§ 2071-77 (2000), continued inaction by Congress will lead to the proposed Rules becoming effective on December 1, 2006. A number of States are already moving rapidly towards enacting part or all of the e-discovery amendments. For example, effective September 1, 2006, the New Jersey Rules of Court will contain a provision based on Rule 37(f). *See* Robert G. Seidenstein, *Get Ready for the E-discovery Regs*, Aug. 7, 2007, *at* http://www.njlnews.com/newsarticle.php?title=Get%20ready%20for%20the%20e-discovery%20regs.

9 Sanctions for spoliation of ESI can include adverse inference jury instructions, preclusion of witness testimony, dismissal of a complaint, or orders requiring that allegations be accepted as true. *See* William J. Robinson, *An Overview of Electronic Discovery*, 841 PLI/PAT 189, 204-207 (2005) (collecting cases). While the Committee Note does not define the sanctions which are referenced, certain types of case management adjustments are said not to be included. *See* Committee Note, *supra* note 6, Rule 37(f).

10 *See* Standing Committee Report, supra note 6 Rules App. C-85 ("The exceptional circumstances provision adds flexibility not included in the published drafts") and at Rules App. C-86 ("This provision recognizes that in some circumstances a court should provide remedies to protect an entirely innocent party requesting discovery against serious prejudice arising from the loss of potentially important information.").

11 *See* Section IV, Criticisms and Qualifications, *infra*.

12 Minutes, Advisory Committee Meeting, April 14-15, 2005, *available at* http://www.uscourt.gov/rules/Minutes/CCRAC0405.pdf.

13 The Testimony and filed Comments of almost 200 witnesses and organizations commenting on the e-discovery proposals are indexed at and accessible from the U.S. Courts Administrative office website [hereinafter Comments]. *See* http://www.uscourts.gov/rules/e-discovery.html. The Comments represent a valuable snapshot of e-discovery concerns and practices as of 2005 and contain many insightful observations.

14 *See* Kenneth J. Withers, *We've Moved the Two Tiers and Filled in the Safe Harbo*r, 52 FED. LAW 50, 54 (2005) (the phrase "safe harbor" is "no longer apt, if it ever was"). Withers prefers to call Rule 37(f) a "lighthouse," picking up on terminology suggested at a Sedona Conference discussion of the topic. *Id.*

15 *See* Thomas Y Allman, *The Impact of the Proposed Federal E-Discovery Rules*, 12 RICH. J.L. & TECH. 13, *16 (2006)(summarizing evolution of the amendments and suggesting steps which could be undertaken by producing parties).

A. The E-Discovery Amendments

The amendments are intended to provide uniform national standards for the resolution of disputes arising during e-discovery, in contrast to the existing pattern of reliance on isolated lower court opinions.[16] For example, in response to concerns about excessive burdens and costs associated with the search and retrieval of some types of ESI, a two-tiered approach to production will be in place. Under Rule 26(b)(2)(B), a producing party may initially produce ESI only from "reasonably accessible sources" as measured by the "burden or cost" required to search for, retrieve and produce the information.[17] This approach is consistent with current best practice in hard copy discovery, with the significant exception that a party producing ESI must also affirmatively "identify" the potential inaccessible sources of information not searched.[18]

The license to withhold production from inaccessible sources is not unlimited, however, as production can be ordered if the requesting party shows "good cause" or successfully challenges the designation of a source as not reasonably accessible.[19] The producing party has the burden of defending any such characterization if it is challenged. An order compelling production of inaccessible information – like any other order compelling production – is also subject to the proportionality standard of (renumbered) Rule 26(b)(2)(C). The Advisory Committee left the issue of access costs to individual cases, where cost-shifting can, if needed, be ordered as a condition of requiring production.

For our purposes, the key point about the proposed rules is what they do not include. The Advisory Committee decided *not* to attempt to articulate the nature or extent of preservation obligations which apply to potentially discoverable ESI either before or after the filing of a lawsuit.[20] Instead, while alluding to the topic in the Committee Notes,[21] the Advisory

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[16] The Standing Committee expressed concern that "[w]ithout national rules adequate to address the issues raised by electronic discovery, a patchwork of rules and requirements is likely to develop," resulting in unnecessary "uncertainty, expense, delays, and burdens." *See* Standing Committee Report, *supra* note 6, at 25.

[17] Typical examples of inaccessible sources from current technology include issues relating to magnetic backup tapes, collections of legacy data from obsolete systems, deleted data remaining in fragments on hard drives and dynamic databases that cannot readily create the specific information sought. *See* Standing Committee Report, *supra* note 6, Rules App. C-42.

[18] The identification requirement can be met by listing the "category or type" of the source. Committee Note, *supra* note 6, Rule 26(b)(2). For this purpose, a "source" is a repository of ESI which arguably contains relevant, non-privileged information falling within the scope of Rule 26(b)(1). *See* Comment, Johnson & Johnson, Jan. 20, 2005 (04-CV-096) in Comments, *supra* note 14 (stating that the duty should only be to identify sources known or believed to contain discoverable information).

[19] A court must consider whether the burdens and costs associated with production can be justified under the circumstances of the case. *See* Committee Note, *supra* note 6, Rule 26(b)(2)(B) (listing seven "appropriate considerations").

[20] The Committee avoided deciding the issue of its authority to enact pre-litigation preservation rules by refusing to enact any rules in that arena. *See* Advisory Committee Minutes, *supra* note 13, at 39 ("As much as many litigants would welcome an explicit preservation rule, the Committee has concluded that the difficulties of drafting a good rule would be so great that there is no occasion even to consider the question whether a preservation rule would be an authorized or wise exercise of Enabling Act authority.").

Committee instead mandated early discussion of "issues relating to preserving discoverable information" in Rule 26(f) as a technique to help reduce (or at least accelerate the identification of) disputes involving preservation issues. This should be quite effective in the majority of cases since requesting parties will ignore the opportunity for meaningful preservation discussions at their peril.[22] However, absent agreement or a court order, the duty to preserve either accessible or inaccessible sources of information will remain a judgment call for the producing party guided by evolving case law and "best practice" commentaries such as the Sedona Principles.[23] Rule 37(f) is intended to address motions for sanctions which may arise in that context in a limited class of cases.[24]

B. The Problem Addressed

Traditional spoliation doctrine assumes that an unexplained loss of potential evidence before trial indicates that a party acted with the intent to suppress unfavorable knowledge.[25] However, assumptions about how potential evidence is lost in the world of tangible things do not necessarily apply in an electronic environment.[26] There are several reasons for this.

First, it is often impossible to know when a preservation obligation is "triggered" with respect to any specific item of ESI on a source which is subject to dynamic change as part of normal business operations.[27] This has serious implications for sources of potential discovery which are not designed for ready access, such as backup tapes intended for disaster recovery

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21 *See* Committee Note to Rule 26(b)(2), *supra* note 6 ("Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case") and Committee Note to Rule 37(f), supra note 6, ("The 'good faith' requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve.").

22 *See* Treppel v. Biovail, 233 F.R.D. 363 (S.D.N.Y. 2006) (Francis, M.J.) (refusal by requesting party to agree was "a missed opportunity"); Aero Products v. Intex Recreation, 2004 WL 417193 (N.D. Ill. 2004) (refusing to award sanctions for failure to produce ESI where movant waited seven months to bring issue to attention of court).

23 *See generally* THE SEDONA PRINCIPLES: BEST PRACTICE RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (2005 Version) (*available at* http://www.thesedonaconference.org. Sedona Principle 5 provides that it is unreasonable to expect a party to take "every conceivable step" to preserve all potentially relevant data..

24 This narrow focus has led some to dismiss Rule 37(f) as ineffective and of limited value to producing parties. *See* Michael R. Nelson and Mark H. Rosenberg, *A Duty Everlasting: The Perils of Applying Traditional Doctrines of Spoliation to Electronic Discovery*, 12 RICH. J.L. & TECH. 14 (2006) (stating that the only practical effect is to encourage general use of electronic document retention systems).

25 *See* Silvestri v. GM, 271 F.3d 583 (4th Cir. 2001) (discussing the failure to preserve damaged automobile).

26 *See* Martin H. Redish, *Electronic Discovery and the Discovery Matrix*, 51 DUKE L.J. 561, 621 (2001) (stating that routine electronic evidence destruction should not automatically give rise to an inference of knowledge of specific destruction much less an intent to destroy that information for litigation related reasons).

27 The suggestion for a targeted "safe harbor" in the Federal Rules was originally made by the author in reaction to the practical problems of compliance with preservation obligations.

purposes.[28] Media of that type contains an undifferentiated "snapshot" of material at a particular moment in time. The normal process is to retain the media only for the period needed to assure reconstruction in the event of a disaster and later recycle it for further use. Because information from that source is not intended for targeted retrieval or long term retention, it is not stored in a form which is readily accessible for use in discovery.[29] Suspending or interrupting these features can be prohibitively expensive and burdensome in ways that have no counterpart in managing hard copy information.[30]

Second, ESI can be easily lost, either by individual idiosyncratic decisions (made without any intent to interfere with litigation) or by automatic processes designed to encourage the efficient management of information systems such as email as a matter of policy.[31] The ability to utilize these features of information systems is often essential to sound management of the voluminous information involved.

Finally, most entities simultaneously manage multiple ongoing litigation with overlapping potential sources of discoverable ESI. The personnel charged with administering "litigation holds"[32] and the employees subjected to them often cannot focus uniformly on all individual pieces of litigation except for the rare and all consuming "bet the company case." Occasional oversights occur.[33]

Requesting parties have not been shy about asserting that a failure to preserve ESI constitutes spoliation.[34] Many courts facing spoliation motions have been restrained in their

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[28] Comments, Starbucks Coffee Company, Feb. 14, 2005 (04-CV-221) in Comments, *supra* note 14, at 2 (noting that daily backup tapes are made in order to have disaster recovery capabilities, that they are not accessed in the ordinary course of business, and that approximately 100 tapes are taken offsite daily at a cost of $9,500 a day which, if not recycled, would cost in excess of $3.5 million a year).

[29] While there is authority to the effect that corporations need not routinely preserve backup tapes, exceptions posited to that rule render it ineffective as a planning principle. *See* Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 217-218 (S.D.N.Y 2003) ("*Zubulake IV*") (while a general obligation to keep all backup tapes would "cripple" a corporation, tapes containing information about "key players" should be kept if the information is not otherwise available). *See* Eric Friedberg, *To Recycle or Not to Recycle, That Is the Hot Backup Tape Question*, 201 PLI/CRIM 205, 216 (stating that the exceptions in *Zubulake V* swallow much of the rule).

[30] *See* Standing Committee Report, *supra* note 6, Rules App. C-83.

[31] *See* John C. Goodchild and Stephanie A. Blair, *Focusing on Reasonableness and Cost Trends In E-Discovery and Records Retention*, 121 BANKING L.J. 308, 315 (2004) (automatic purging of unsaved messages after set period of time prevents inadvertent preservation of irrelevant messages and allows for creation of virtual filing systems to make it easier to search for responsive documents in litigation).

[32] A "litigation hold" is the type of process which can be used to implement decisions to meet preservation obligations. *See* Committee Note, *supra* note 6, Rule 37(f).

[33] A representative of The City of New York Law Department noted the unfairness of subjecting a party to sanctions for the conduct of a low level employee who may negligently delete electronic information despite reasonable preservation efforts by City attorneys and management personnel. *See* Comments, Lawrence S. Kahn, Chief Litigating Assistant, City of New York Law Department, Feb. 15, 2005, Public Hearings Docket O4-CV-220, at. 4-5 in Comments, *supra* note 14.

[34] Spoliation sanctions are very much on the mind of the trial bar. *See* Robert L. Pottrof, *Sanctions: Don't Leave Home Without 'Em*, 1 Anno. 2003 ATLA-CLE 1017 (2003) (stating that "no case should be litigated without at least investigating the possibility that evidence has been destroyed, hidden or tampered with by the opposing

approach and have typically required an affirmative showing of culpable conduct before imposing spoliation sanctions.[35] Nonetheless, some decisions suggest that the slightest failure to execute preservation obligations -- either in failing to anticipate a preservation "trigger" or in implementing the resulting "litigation hold" -- can lead to an adverse inference jury instruction if any information is lost which may have been relevant to the case.[36] While the numbers of *reported* decisions of this nature have been few, the fear of suffering that fate is substantial. Given the "ugly prospect of sanctions,"[37] producing parties may well consider themselves as having to choose between over-preservation of ESI at the outset of litigation or the possible compromise of legitimate claims or defenses later.[38] The uncertainty surrounding the culpability issue thus threatens to impede and prevent the adoption of rational business policies.[39]

C. Drafting the Rule

The drafting of Rule 37(f) was a complex process informed by experience and prompted by concerns over the practical problems of compliance with preservation obligations relating to ESI.[40] After an initial period[41] while the Advisory Committee and its Discovery Subcommittee

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party").

35 *See* Morris v. Union Pac. R.R., 373 F.3d 896, 901 (8th Cir. 2004) (holding that adverse instruction for a failure to preserve information for use at trial should issue only where there is "a finding of intentional destruction indicating a desire to suppress the truth") (citation omitted). *But ~~compare~~ see* Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99 (2d Cir. 2002) (reversing lower court which refused to issue an adverse instruction).

36 *See* Daimler Chrysler Motors v. Bill Davis Racing, Civ. A. 03-72265, 2005 WL 3502172 (E.D. Mich. Dec. 22, 2005) (applying Michigan law and ordering spoliation inference instruction despite finding that failure to prevent automatic deletion of email was merely negligent and not willful).

37 Shira A. Scheindlin, *Electronic Discovery Takes Center Stage*, N.Y.L.J. 4, Sept 13, 2004, at 4 (discussing over-preservation as an irrational response to fear of sanctions).

38 The Standing Committee expressed concern about the "fairness" of requiring a party to interrupt its operations "to avoid any loss of information [only] because of the possibility that it might be sought in discovery or risk severe sanctions." Standing Committee Report, *supra* note 6, Rules App. C-83. Given the uncertainties over "triggering" events, an inflexible preservation standard broking no exceptions can often be met only by either saving information that is not required to be saved ("over-preservation") or by ignoring potential risks of sanctions and running the risk of having to settle cases if one "guesses wrong."

39 *See* Comments, Association of Corporate Counsel (ACC), delivered by Lawrence La Sala, Ass't General Counsel, Textron, February 11, 2005 (04-CV-095) in Comments, *supra* note 14 ("[B]usinesses create records retention policies for many business-related reasons, having nothing to do with litigation …. In many cases, the lack of any clear guidance, and the threat that implementing even a legitimate policy could subject a company to sanctions, has delayed or even scuttled the implementation of corporate electronic data retention policies.").

40 The Advisory Committee began review of e-discovery issues in 1999 and Mini-Conferences were held at Hastings Law School and Brooklyn Law School during 2000. The author initially suggested consideration of a form of safe harbor in a letter to the Chair of the Discovery Subcommittee in December 2000. *See* Letter, Thomas Y. Allman to John L. Carroll, Dec. 12, 2000, *available at* http://www.kenwithers.com/articles/index.html (go to Point Counterpoint, April 2001). *See also* Thomas Y. Allman, *The Need for Federal Standards for Electronic Discovery*, 68 DEF. COUNS. J. 206, 209 (2001).

41 *See* Advisory Committee Minutes, Oct. 3-4, 2002, *available at* http://www.uscourts.gov./rules/Minutes/CRAC

observed the evolution of the case law, the Discovery Subcommittee was authorized to proceed in May 2003[42] and by September 2003 presented certain "discussion proposals."[43] These proposals included a rule (incorporated into Rule 26 or as a new Rule 34.1) which would have obligated parties to preserve accessible information at the commencement of an action, but limited the obligation to suspend or alter disaster recovery systems provided that a party preserved a single day's full set of backup data. It also would have limited sanctions for any losses unless the party acted willfully or recklessly.

At its October 2003 Meeting, the Advisory Committee reviewed discussion drafts and debated the feasibility of incorporating preservation obligations into the Federal Rules.[44] The Committee reached no conclusions but set in motion a process to seek further comment from experienced practitioners and interested parties. The difficulties in providing meaningful pre-litigation preservation guidance, especially given the reluctance to treat pre-litigation issues in the Federal Rules, were highlighted in written submissions.[45] These topics were fully discussed at a comprehensive "Conference on Electronic Discovery" held at Fordham Law School in February 2004 and attended by members of the Standing Committee and the Advisory Committee.[46] A panel of proponents and supporters debated preservation and sanction issues and took questions from the audience on the merits of the draft proposals.[47]

Subsequently, at its April 2004 meeting, the Advisory Committee approved publication of a safe harbor proposal (but not an explicit code of preservation obligations) for public comment.[48] According to one of the participants, the heart of the debate was the appropriate

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42 *See* Advisory Committee Minutes, May 1-2, 2003, *available at* http://www.uscourts.gov./rules/Minutes/CRAC0503.pdf.

43 *See* Memo to Advisory Committee, Sept. 15, 2003, at 41-47 (describing proposals from Sept. 5, 2003 Working Session, including Rule 34.1 ("Duty to Preserve")), available at http://www.kenwithers.com/rulemaking/civilrules/marcus091503b.pdf.

44 *See* Advisory Committee Minutes, Oct. 2-3, 2003, at 36-38, *available at* http://www.uscourts.gov/rules?Minutes/CRAC1003.pdf.

45 Professor Martin H. Redish suggested that the difficulties in defining a *pre-litigation* preservation obligation with sufficient guidance were so substantial as to caution against that approach, as compared to defining the culpability required to apply a safe harbor after the fact, which he found to be viable. *See* Letter, Martin H. Redish to Hon. Lee Rosenthal, Chair, Advisory Committee, Dec. 8, 2003 (U.S. Courts Administrative Office Docket 02-ED-052), *available at* http://www.kenwithers.com/rulemaking/civilrules/ed52.pdf.

46 Participants were told that it might be useful to emphasize a party's general obligation to preserve material while also providing a "safe harbor" against sanctions for a party that lost discoverable information despite reasonable efforts to preserve. *See* Participant Memo, Conference on Electronic Discovery, Fordham Law School, Feb. 20-21, 2004, available at http://www.uscourts.gov/rules/EDiscovery_Conf_Agenda_Materials.pdf.

47 *See* Transcript (Annotated), *Panel Four: Rule 37 and/or a New Rule 34.1: Safe Harbors for E-Document Preservation and Sanctions*, 73 FORDHAM L. REV. 71 (2004). The Conference was attended by a wide cross-section of experts, academics, judges and practitioners from both sides of the litigation aisle and the discussions were widely reported in the legal press.

48 *See* Advisory Committee Minutes, April 15-16, 2004,at. 22, *available at* http://www.uscourts.gov/rules/Minutes/CRAC0404.pdf

definition of the "culpability or fault" which would preclude application of the safe harbor rule.[49] After further discussions, the Advisory Committee furnished the Standing Committee with two alternatives with differing culpability standards, one of which was designated as the primary recommendation. The Standing Committee ordered publication of the primary recommendation coupled with a request for public comment on the "applicable culpability standard."[50] The primary proposal provided that:

> Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:
> (1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and
> (2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system.[51]

The proposed rule was accompanied by a footnote requesting comments "on whether the culpability or fault that takes a party outside any safe harbor should be something higher than negligence."[52] An example was provided "to focus comment and suggestions":

> A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless: (1) the party intentionally or recklessly failed to preserve the information; or (2) the party violated an order issued in the action requiring the preservation of the information. [53]

The proposed rules and Committee Notes were published in advance of public hearings scheduled for San Francisco, Dallas and Washington in January and February 2005. The public was invited to submit comments before February 15, 2005. Lawyers, academics, judges and technical experts responded with alacrity.[54]

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[49] *See* Scheindlin, *supra* note 38 (stating that the Advisory Committee decided to publish only one proposal after a close vote).

[50] *See* Standing Committee Minutes, June 17-18, 2004, *available at* http://www.Uscourts.gov/rules/Minutes/june2004.pdf.

[51] Advisory Committee Report of May 17, 2004, as revised on August 3, 2004, *available at* http://www.uscourts.gov./rules/Reports/CV5-2004.pdf.

[52] Advisory Committee Report, *supra* note 52, at 32.

[53] Advisory Committee Report, *supra* note 52, at 32-33.

[54] *See, e.g.*, Ronald J. Hedges, *A View from the Bench and the Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure*, 227 F.R.D. 123 (2005). *See also* Henry S. Noyes, *Is E-Discovery So Different That It Requires New Discovery Rules? An Analysis of Proposed Amendments to the Federal Rules of Civil Procedure*, 71 TENN. L. REV. 585 (2004).

D. The Public Comments

The comments and testimony regarding proposed Rule 37(f) were spirited and enlightening. An excellent index (from which copies of written comments and transcripts of testimony can be downloaded) is available on the website of the U.S. Courts Administrative Office.[55]

Many witnesses favored the concept of a safe harbor and deferred to the Advisory Committee to best articulate the rule. Some opposed enactment on the grounds that it could encourage entities to delete and destroy information before a preservation obligation attached. Others argued that no need had been demonstrated for any form of safe harbor, based on reported spoliation decisions which all seemed to involve high degrees of culpability.[56] This point was countered by witnesses who asserted that the potential for such sanctions was the concern and that the lack of reported cases is not necessarily decisive on the extent of the issue.[57]

A substantial number of public and private entities addressed the nature of the culpability or fault required to take a party outside the safe harbor.[58] Many expressed concern that, as written, the primary proposal seemed to provide that sanctions could be based on a showing of mere negligence.[59] Most supported articulating a higher standard of culpability or fault, such as recklessness or gross negligence, as the excluding factor. Supporters also rebutted concerns about the negative impact of a safe harbor rule on policy by pointing out the lack of obligation to retain information indefinitely and the existence of ample criminal and civil sanctions for those who deliberately withhold information.[60]

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55 *See* http://www.uscourts.gov/rules/e-discovery.html.

56 *See* Shira A. Scheindlin & Kanchanka Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 MICH. TELECOMM. & TECH. L. REV 71 (2004); *accord* Kenneth J., *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH & INTELL. PROP. 171,*106 (2006) (citing Scheindlin and Wangkeo, *supra*, for the statement that "there was no evidence that 'case killer' sanctions (an adverse inference jury instruction, striking of a pleading or defense, dismissal or default) had ever been levied by a federal judge without a finding, express or implied, on culpability amounting to gross negligence or intentional misconduct").

57 The limits of the ability to infer underlying issues from a review of the case-by-case method of approaching e-discovery law are described in Robert Douglas Brownstone, *Collaborative Navigation of the Stormy E-Discovery Seas*, 10 RICH. J. L. & TECH. 53, at *29 (2004) ("As in other contexts, there are … reasons why we will get very old if we wait for the adjudicative process to finish that task [developing e-discovery principles] …. [M]ost reported discovery cases come from trial courts and have little precedential value [and] the reported decisions tend to involve obstructionist conduct at the most egregious end of the spectrum, thus arguably offering insufficient guidance to those acting in a mainstream manner.").

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

59 *See* Standing Committee Report, *supra* note 6, Rules App. C-84.

60 Congress has expanded the obstruction of justice statute to include actions undertaken "in relation to or contemplation of" any federal investigation or case. 18 U.S.C.A. §1519 (West Supp. 2005). *See* Note, *Anticipatory Obstruction of Justice: Pre-emptive Document Destruction under the Sarbanes-Oxley Anti-Shredding Statute, 18 U.S.C. § 1519*, 89 CORNELL L. REV. 1519, 1566 (2004) (discussing whether destruction of information pursuant to a records retention policy can be a criminal act).

E. Final Form: The "Good Faith" Standard

At its April 2005 meeting the Advisory Committee, including the Second Circuit Judge who had authored the *Residential Funding* decision,[61] acknowledged an "emerging consensus that the published proposal was too insipid"[62] and decided to adopt an intermediate culpability standard based on a "good faith" operation of the systems involved. Rule 37(f) was revised accordingly[63] and, after some further modifications,[64] submitted to and approved by the Standing Committee at its June 15-16, 2005 Meeting[65] in its final form: "[A]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system."[66]

The Committee Note accompanying Rule 37(f) was rewritten to reflect the changes[67]and clarifies that Rule 37(f) does not apply to "the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information."[68]

III. APPLYING RULE 37(F)

Rule 37(f) is narrow and specific. It applies only to ESI lost due to "routine" operations of information systems such as those that can be involved in email management processes, disaster recovery backup media, dynamic databases and the like.[69] A "routine" operation is defined as the way such a system is "designed, programmed and implemented" to accommodate technical or business requirements.[70] The mere fact that a human is involved in operation of the system does not make the feature causing the loss any less "routine."[71] A routine operation is

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61 *See* Residential Funding Corp. v. DeGeorge Fin. Corp, 306 F.3d 99 (2d Cir. 2002) The Hon. Jose A. Cabranes joined the Advisory Committee as a Member at its Fall Meeting (October 28-29, 2004) held in Santa Fe.

62 Advisory Committee Minutes, supra note 13 at 41.

63 *See id.* at 43.

64 *See* Advisory Committee Report, May 27, 2005,at 86, *available at* http://www.courts.gov.rules /CV5-2005. The phrase "absent exceptional circumstances" was substituted for the phrase "ordinarily;" the phrase "solely" was deleted; and the reference to "an" electronic information system was changed to "the party's" information system."

65 *See* Standing Committee Minutes, June 15-16, 2005 at . 26-29, *available at* http://www/uscourts.gov/MinutesST_June_2005.pdf.

66 *See* Standing Committee Report, supra note 6 Rules App.C-86-88 The Standing Committee Report includes as Appendix C the Advisory Committee Report of May 27, 2005, revised July 25, 2005 which includes the final form of the Committee Note to Rule 37(f), which was changed slightly after the Standing Committee meeting.

67 *See* Committee Note, *supra* note 6, Rule 37(f).

68 Committee Note, *supra* note 6, Rule 37(f) (citing as examples the production of an additional deposition witness, requiring an additional response to interrogatories, etc.).

69 *See* Standing Committee Report, *supra* note 6, Rules App. C-83. The examples given are from existing technology and are thus not repeated in the Committee Note, which is intended to leave open the issue of changes in the future.

70 *See* Committee Note, *supra* note 6, Rule 37(f).

71 For example, the act of manually recycling backup tapes or activating a delete key involves human volition,

normal[72] to the operation without particular reference to the type or sophistication of the technology involved.[73]

In assessing conduct under Rule 37(f), the courts should presume the *prima facie* existence of "good faith" from proof of adherence to reasonable policies under all the circumstances.[74] Establishing such a presumption invokes the elements established for review of corporate policy, where a court looks both to the reasons for the policy in general and its application to the specific facts involved.[75] It is clear that a party who acts with willful ignorance of preservation obligations is not acting in good faith.[76] However, it is equally clear that a party who acts through mere negligence or inadvertence may well be acting in good faith if all the circumstances are considered. As succinctly put by a member of the Advisory Committee during its April 2005 meeting:

> [G]ood faith lies at a point intermediate between negligence and recklessness. It assumes the party has a reasonable litigation hold, and did not deliberately use the system's routine destruction functions. 'If you know it will disappear and do nothing, that is not good faith' … '[t]he line is conscious awareness the system will destroy information.'[77]

The fact-specific focus of any inquiry[78] should be on the reasonableness and consistency

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pursuant to policy. Both trigger a "routine" function of that information system. *See* Concord Boat Corporation v. Brunswick, No. LR-C-95-781, 1997 WL 33352759 (E.D. Ark. Aug. 29, 1997) (fact that employees decide whether or not to delete email is not indicative of bad faith in management of litigation hold even where some email is lost).

72 WEBSTER'S II NEW RIVERSIDE DICTIONARY (Rev. ed. 1996) ("routine - *adj*. 1. According to a standard procedure. 2. Ordinary."). *See, e.g.*, Lewy v. Remington Arms Co., 836 F.2d 1104, 112 (8th Cir. 1988) (imposing no sanctions for destruction of information pursuant to a document retention policy which occurs "[as] a matter of *routine* with no fraudulent intent").

73 *Compare* Nathan Drew Larsen, *Evaluating The Proposed Changes to Federal Rules of Civil Procedure 37: Spoliation, Routine Operation and the Rules Enabling Act* 4 NW. J. TECH. & INTELL. PROP. 212, *45 (2006) (asserting that a "routine" operation is judged by comparison with others and thus creates an incentive for an industry to collude "either explicitly or tacitly" to configure systems in a manner destructive of data).

74 Implementation of a reasonable "litigation hold" process is a reason to shift the burden of proof to a party seeking sanctions. See Anita Ramasastry, *The Proposed Federal E-Discovery Rules: While Trying to Add Clarity, the Rules Still Leave Uncertainty* (2004), *available at* http://writ.news.findlaw.com/scripts/printerfriendly.pl?page=/ramasastry/20040915.html/ ("If a party took reasonable steps to notify the custodian of electronic information at the company of the need to preserve certain information, it should be deemed to have made out a prima facie – that is, an initial, though rebuttable – case that it fits within the safe harbor.").

75 *Compare* Hynix Semiconductor v. Rambus, No. C-00-20905 RMW, 2006 WL 565893, at *20 (N.D. Cal. Jan. 5, 2006) *and* Samsung Electronics v. Rambus, No. Civ. A. 3:05CV406, 2006 WL 2038417 (E.D. Va. July 18, 2006) (involving same course of conduct but with differing interpretations of the corporate motives involved).

76 *See* Committee Note, *supra* note 6, Rule 37(f). The Committee Note points out that good faith may require active intervention in such systems to modify or suspend certain routine features under some circumstances.

77 Advisory Committee Minutes, *supra* note 13 at 42 .

78 For a list of some of the factors which a court could consider, see Stephen G. Morrison, quoted in Transcript,

of the process followed in managing the operation, including any practices and procedures prescribed to meet known preservation obligations, while taking into account the needs of the business and the alternatives available for securing the information from accessible sources.[79] If a party reasonably believed that information on inaccessible sources was not likely to be discoverable or was available from other more accessible sources, intervention in the routine operations of those sources is not required.[80]

Courts acting under Rule 37(f) will have a wide range of discretion to be realistic about losses due to routine operations. There are occasions when a party who could otherwise be seen as acting negligently will not be sanctioned.[81] For example, despite a reasonable and responsible policy-based effort to implement a "litigation hold," a court may subsequently conclude that earlier events, seen in hindsight, such as ambiguous notice to a lower level employee in a branch office, should have instead triggered the "litigation hold."[82] Another example may involve an inadequate compliance, such as where an individual "dragging and dropping" information to designated location pursuant to a "litigation hold" inadvertently omits a potentially relevant email before it is deleted by an automatic process. In both examples, a court, reviewing the conduct involved, might apply a presumption of good faith and refuse to issue sanctions in reliance on Rule 37(f) because no "exceptional circumstances" were involved and no intent to interfere with the litigation process was indicated. The loss of potentially discoverable information in those instances is an acceptable limitation on the truth-seeking process, given that it occurred in the absence of intent to interfere with the process and furthers other societal goals.[83] The only real alternative, requiring total retention of all electronic information

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supra note 48, at 74 (including whether the conduct was "rational in the industry" and "consistent with other conduct in that particular business in terms of what is saved and what is not saved" etc.)

79 A review of the reasonableness of the broad process is preferable to one which simply focuses on "whether anything could have been done to prevent the deletion of a particular document or type of information," which is the "wrong inquiry." *See* Comment, Department of Justice, in Comments, *supra* note 14, at 7. *See also* Hynix Semiconductor v. Rambus, No. C-00-20905 RMW, 2006 WL 565893, at *20 (N.D. Cal. Jan 5, 2006) (stating that the inquiry should focus on whether a particular policy was adopted and implemented for the purpose of destroying relevant information or whether the loss is merely the legitimate consequence of pursuing other objectives).

80 *See* Committee Note, *supra* note 6, Rule 37(f) (whether "good faith" requires steps to prevent the loss on sources believed to be inaccessible under Rule 26(b)(2) depends on the circumstances of each case).

81 Rule 37(f) can plausibly be seen as a further articulation of what was meant in this narrow field by Residential Funding Corp. v. DeGeorge Fin. Corp, 306 F.3d 99, 108 (2d Cir. 2002) (stating that sanctions must be based on a "culpable state of mind").

82 *See* DOJ Comments in Comments, *supra* note 14, at 8 ("[M]any federal agencies have large quantities of electronic data and are involved frequently in litigation. Government data systems are complex and highly diverse, and it can be very difficult to disseminate discovery-related retention requirements to all relevant persons within an agency, particularly if multiple offices in various geographic locations are involved.").

83 *See* Martin H. Redish, *Electronic Discovery and the Litigation Matrix,*, 51 DUKE L. J. 561, 597 (2001) (discussing how competing "internal" and "external" costs incurred in administering legal systems can lead to exceptions to discovery such as in the use of evidentiary testimonial privileges despite their impact on the truth-finding process). An inflexible approach to productive use of information systems threatens to negate the beneficial aspects to society as a whole without resolving the serious practical consequences for parties seeking

regardless of the impact, is hardly a viable alternative.[84]

By reserving the decision for an individual court assessing "good faith," Rule 37(f) joins other instances where that standard is applied to strike a balance in complex situations.[85] Rule 37(f) will operate to distinguish acceptable culpability from "bad faith" in the classic way the good faith standard has often been put in other contexts.[86] To paraphrase Justice Stewart, the advantage of "good faith" is that courts will know it when they see it. Moreover, because it is applied after the fact, its application cannot be "gamed" in advance and Rule 37(f) will thus provide no incentive for misconduct.

IV. CRITICISMS AND QUALIFICATIONS

Some commentators have suggested that Rule 37(f) is problematic since it only applies to sanctions based on the Federal Rules.[87] They argue that since many spoliation sanctions are sought regarding losses in the absence of discovery orders, an effort to define when rule-based sanctions do not apply is somewhat irrelevant.[88] Others criticize Rule 37(f) because it provides no bright lines upon which a producing party can rely in planning its preservation compliance policies.[89]

It may be a premature conclusion to marginalize Rule 37(f) as ineffective for any of these reasons. In the first place, Rule 37(f) does not work in a vacuum, but only applies when other parts of the amendments -- requiring early and effective discussion of preservation issues – does not resolve the issues. Arguably, Rule 37(f) will not be invoked very often. More to the point, however, Rule 37(f) should prove to have influence beyond its technical rule-based focus. Judges have long exercised "inherent" authority to sanction preservation lapses when they lack

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to meet preservation obligations.

84 While there are policy and technological fixes, such as withdrawing all discretion from users and implementing automatic long-term archiving, these solutions are expensive and complex to implement and are not necessarily optimal solutions from a business management perspective.

85 The "good faith" test is used to assess the conduct of corporate directors in hindsight when challenging their decisions which did not turn out as might have been optimal. *See* Eric J. Freidman, *Changing Currents for Directors Duties*, 1467 PLI/Corp 11 (2005) (business judgment rule provides exculpation from personal liability for bad business decisions). "Good faith" also serves as a differentiator in other provisions of the Federal Rules, appears in the Bankruptcy Code and the Uniform Commercial Code, and even provides the rule of decision in cases challenging prosecutorial mishandling of potential evidence in criminal cases.

86 Under this approach, "good faith" has no inherent meaning, but serves to exclude many forms of bad faith, which are developed on an *ad hoc* basis over time by the case methodology. *See* Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

87 *See* David K. Isom, *Electronic Discovery Primer for Judges*, 2005 FED. CTS. L. REV. 1, 19 (2005) ("[Absent] a document preservation order, no rules-based sanctions are available to be inoculated against by Rule 37(f)."). *See, e.g.* Home Health Services v. IBM, 158 F.R.D. 180, 182 (S.D. Ga. 1994) (no power to issue sanctions under Rule 37 for discovery abuse that occurs before commencement of litigation).

88 Isom notes that "[the initial form of] Rule 37(f) did not apply to sanctions for "statute-based or regulation-based penalties for spoliation" nor for "tort liability" for spoliation." Isom, *supra* note 88, at ~~n.150-151~~. II R 8 & 9.

89 Lloyd V. Van Oostenrijk, *Paper or Plastic?: Electronic Discovery and Spoliation in the Digital Age*, 42 HOUS. L. REV. 1163 (2005) (only protects against sanctions where the loss was due to mere negligence).

express authority to do so under the Federal Rules.[90] The Standing Committee members were quite conscious of this practice but were loath to assert a power to directly regulate the exercise of inherent authority in that situation. However, Rule 37(f) is carefully drafted to provide a neutral standard sensitive to the narrow issue involved when good faith implementation of preservation obligations has not prevented the loss of potentially discoverable information. A court exercising its inherent power in that context may very well turn to the underlying principles embodied in Rule 37(f) to help guide its decision when motions for sanctions involve good faith conduct and losses from routine operations.[91] This would be consistent with the Supreme Court admonition that courts should exercise inherent powers with restraint and discretion especially in an instance where, as here, the policy issues and potential impact of the losses are the same regardless of the authority involved.[92] Indeed, one Magistrate Judge has already refused to apply sanctions in reliance on proposed Rule 37(f).[93]

V. CONCLUSION

Rule 37(f) is probably miscast as a traditional form of "safe harbor," given that it no longer carves out, as the author had originally suggested,[94] a specific zone of conduct exempt from spoliation sanctions because of its importance to the productive operation of public and private business systems.[95] In its final version, however, it provides something that may ultimately prove to be more enduring: a practical culpability standard required for preservation obligations involved when utilizing a wide variety of information systems. If the "good faith" standard is fairly applied,[96]regardless of the particular source of sanctioning authority involved,

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90 *See* Mosaid Technologies, Inc. v. Samsung Electronics Co., 348 F. Supp. 2d 332, 335-39 (D.N.J. 2004) (sanctioning "willful" failure to institute any form of litigation hold at the outset of litigation).

91 This is particularly relevant since the only difference between requests for sanctions is the time that they occurred, not their nature, quality or impact on the potential discovery process. *See* Iain D. Johnston, *Federal Courts' Authority to Impose Sanctions for PreLitigation or PreOrder Spoliation of Evidence*, 156 F.R.D. 313, 324 (1994) (use of inherent power is more effective since it avoids the procedural hurdles of the Federal Rules).

92 The Supreme Court has held that the inherent power of the court to sanction conduct can co-exist with rulemaking on the same topic but has cautioned that "inherent powers must be exercised with restraint and discretion." Chambers v. NASCO, 501 U.S. 32, 44 (1991).

93 *See* Convolve, Inc. v. Compaq Computer and Seagate Tech., 223 F.R.D 162 (S.D. N.Y. 2004) (Francis, M.J) (no sanctions for failure to interrupt and print out copies of intermediate wave forms on oscilloscope after preservation obligation triggered because constant change in data is routine and no business purpose mandated their preservation).

94 *See* Thomas Y. Allman, *The Case for an E-Discovery Safe Harbor*, 70 DEF. COUNS. J. 417 (2003).

95 In this regard, the original proposals were more akin to the "bright line" provisions of part of the Private Securities Litigation Reform Act of 1995 (the "Reform Act") safe harbor which provides (as one alternative) exemption from civil liability for forward-looking statements accompanied by appropriate cautionary language. *See* 15 U.S.C. §§ 77z-2(c)(1)(A) & 78u-5(c)(1)(A) (2000). *See* In Re Theragenics Corp. Sec. Litig., 105 F. Supp. 1342, 1352-59 (N.D. Ga. 2000) (enacted because "sizeable bipartisan majorities of both houses of Congress became persuaded that the private securities litigation system was seriously out of balance").

96 Seen in this respect, Rule 37(f) is analogous to the alternative version of the safe harbor under the Private Securities Act (and the equivalent SEC Rule) which provides exemption from liability for forward-looking

it will provide the flexibility needed by courts to adjust to new fact patterns and technology while limiting the occasions when case resolutions are based on factors that have nothing to do with the merits of cases. Moreover, by assuring public and private entities, both large and small, that common sense will be applied to review of their preservation decisions, it should help break the logjam for those that have desired, but hesitated, to implement realistic and balanced policies and procedures to meet their business and litigation needs.

APPENDIX - The Evolution of Rule 37(f)

DATE	EVENT
2003 May 1-2	Advisory Committee Meeting (Discovery Subcommittee authorized to develop e-discovery proposals) http://www.uscourts.gov/rules/Minutes/CRAC0503.pdf
Sept 15	Discovery Subcommittee Report (Initial suggestions for consideration by Advisory Committee) http://www.kenwithers.com/rulemaking/civilrules/marcus091503b.pdf
Oct 2-3	Advisory Committee Meeting (discussing suggestions and role of upcoming Conference) http://www.uscourts.gov/rules/Minutes/CRAC1003.pdf
2004 Feb 20-21	Fordham Law School "Conference on Electronic Discovery" (New York City) http://www.uscourts.gov/rules/EDiscovery_Conf_Agenda_Materials.pdf (*See* "Panel Four: Rule 37 and/or A new Rule 34.1: Safe Harbors for E-Document Preservation and Sanctions," 73 Fordham L. Rev. 71 (2004) (Transcript).
April 5	Discovery Subcommittee Report constains revised suggestions for proposed rules reflecting input from Fordham Conference) http://www.kenwithers.com/rulemaking/civilrules/marcus040604.pdf
April 15-16	Advisory Committee Meeting(agreeing upon initial Rule proposals for public comment) http://www.uscourts.gov/rules/Minutes/CRAC0404.pdf
May 17	Advisory Committee Report (contains drafts of Proposed rules and Committee Notes for review by Standing Committee) http://www.uscourts.gov/rules/Reports/CV5-2004.pdf
June 17-18	Standing Committee Meeting (approving proposals for publication for public comment) http://www.uscourts.gov/rules/Minutes/june2004.pdf
August 3	Advisory Committee Report (May 17, revised August 3) (contains final draft of initial proposal for Rule 37(f) and alternative as published with footnote re "culpability")

statements that are made in "good faith" on the basis of reasonable assumptions. *See* 17 CFR § 240.3b-6 (2005) (identical to Rule 175 of the Securities Act of 1933, 17 CFR § 230.175 (2005)).

	http://www.uscourts.gov/rules/comment 2005/CVAug04.pdf.
Oct 28-29	Advisory Committee Meeting http://www.uscourts.gov/rules/Minutes /CRAC1004.pdf
2005 Jan/Feb	Public Hearings (San Francisco, Dallas and Washington) http://www.uscourts.gov/rules/e-discovery.html(index to comments and transcripts)
April 14-15	Advisory Committee Meeting (revisions of rules reflecting public comments, including "good faith" culpability standard in Rule 37(f)) http://www.uscourts.gov/rules/Minutes/CRACO405.pdf.
May 27	Advisory Committee Report (contains revised Rule 37(f) and interim draft of revised Committee Note, pending Standing Committee review) http://www.uscourts.gov/rules/CV5-2005.pdf
June 15-16	Standing Committee Meeting (approving Rule 37(f) but requesting changes in draft Committee Note) http://www.uscourts.gov/rules/MinutesST_June_2005.pdf.
July 25	Advisory Committee Report May 27, revised July 27 (contains Rule 37(f) and final Committee Note after inclusion of Standing Committee suggestions) [Included as Appendix C in September, 2005 Standing Committee Report]
Sept 2005	Standing Committee Report to Judicial Conference (contains Advisory Committee Report of May 27, 2005, revised July 25, 2005 as Appendix C, together with and Appendix F summarizing pros and cons) http://www.uscourts.gov/rules/Reports/ST09-2005.pdf
Sept 20	Judicial Conference Meeting (approves rules and notes and forwards to Supreme Court)
Sept 30	Judicial Conference Report to Chief Justice (summary of intent of proposed rules) http://www.uscourts.gov/rules/Supct1105/Summary_Proposed_Amendments.pdf
2006 April 12	Supreme Court Order approves Final Rules and Committee Notes and transmits to Congress. http://www.uscourts.gov/rules/Letters_Orders.pdf. For full text of Rules and Committee Notes, see http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf
Dec 1	Effective Date of Amendments (assuming no prior Congressional Action)