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INTRODUCTION

In 2018, an average breach-of-contract case turned into a "quagmire of adversarialism"—all because of the incompetence of one attorney.[1] When the opposing party submitted discovery requests, the attorney was obligated to communicate with IT personnel about what reasonable steps should be taken to preserve potentially relevant information.[2] Yet "[t]here was no timely notice given to the IT department."[3] When the attorney finally advised the client to preserve relevant documents, the advice was "halfhearted" and "wholly inadequate" because he gave "little or no guidance or direction" to the client.[4] According to the court, "[i]t is hard to imagine a circumstance in which [these] steps to preserve ESI would have been considered reasonable."[5] This seems like an obvious case for the imposition of sanctions or discipline, but the attorney got away with it. The court imposed monetary sanctions on the client but failed to discipline the attorney in any way.[6] Unfortunately, this is a circumstance that

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1 EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc., No. 12-cv-00463, 2018 WL 1542040, at *1 (M.D. Tenn. Mar. 29, 2018).

2 *Id.* at *7.

3 *Id.*

4 *Id.* at *18, *22.

5 *Id.* at *22.

6 *Id.* at *29. In the state public discipline search, the attorney has no record of public discipline and appears to have retired recently. *Attorney Details*, BD. PRO. RESP. SUP. CT. TENN., https://www.tbpr.org/attorneys/003778 [https://perma.cc/4M2S-H78D].

happens far too often, because courts do not have a reliable, uniform system authorizing them to impose sanctions on attorneys who violate their e-discovery obligations.

There are currently various sources of authority that federal courts can invoke to sanction attorneys who bungle their e-discovery obligations, but each is insufficient. All fifty states have their own rules authorizing courts within the state to refer misbehaving attorneys to the local disciplinary body, but each state's rule is different, leading to much inconsistency and lack of uniformity among the federal courts. The Federal Rules of Civil Procedure ("FRCP") address e-discovery abuse but do not authorize courts to impose sanctions on attorneys for their role in e-discovery abuse. This is a problem because attorneys have ethical and professional obligations to preserve evidence and advise clients on what information needs to be preserved and how. Many failures to properly preserve ESI can be traced back to the lawyer. This obligation is especially important today, where much evidence and information is found through various electronic forms. Something must be done to provide predictability, uniformity, and efficiency for courts when imposing sanctions for e-discovery violations. Because ESI is so important to discovery, and because attorneys play such a major role in the discovery process, the FRCP should add a Rule giving courts authority to impose sanctions against attorneys who act improperly in e-discovery.

Part I of this Note will discuss the history of discovery and the rise of e-discovery as technology gathered steam. Part II will explain the benefits and costs of technology and e-discovery, and the various ethical obligations and common law expectations that attorneys currently have when it comes to e-discovery. Part III will review several sources of authority that federal courts have used in the past to impose sanctions on attorneys for their role in e-discovery abuse. Part IV will propose a new Rule to be added to the FRCP, which would give federal courts a uniform, reliable system of imposing e-discovery sanctions on attorneys. Part IV will continue with a discussion of the shortcomings of other suggested solutions and potential concerns with a new FRCP Rule.

I. THE HISTORY OF DISCOVERY AND RISE OF E-DISCOVERY

Discovery originated in equity and was historically only available to litigants at common law after they obtained a writ of discovery from the Court of Chancery.[7] Few litigants took advantage of this practice,

7 *See* Patricia I. McMahon, *Rediscovering the Equitable Origins of Discovery: The 'Blending' of Law and Equity Prior to Fusion*, *in* EQUITY AND LAW: FUSION AND FISSION 280, 280 (John

however, and those who did were only allowed limited discovery tools.[8] Discovery was likely so rare because litigation was commonly seen as a process that was less "a rational quest for truth, but rather a method by which society could determine which side God took to be truthful or just."[9] Courts rejected the idea that parties should be rifling through each other's files to search for evidence related to the lawsuit.[10] There was no defined process to search for facts and organize evidence,[11] and only a handful of federal statutes entitled litigants to any discovery rights.[12] Otherwise, parties would appear in court, state the facts as they believed them to be, and hope the judge would decide that their story was more "truthful [and] just" than the opposing party.[13] By the mid-1800s, however, discovery became a much more popular practice in suits at common law due to the fusion of equity and law in several state courts.[14] "The idea of hiding relevant facts and documents from the other side and from the judge and/or jury ma[de] little sense, and there [were] numerous examples in which broad discovery [was] crucial to arriving at a just result."[15]

Then, in 1935, a committee was appointed to draft a uniform set of discovery rules "through which parties could 'obtain the fullest possible knowledge of the issues and facts before trial.'"[16] That

C.P. Goldberg, Henry E. Smith & P.G. Turner eds., 2019); Jay Tidmarsh, *Opting Out of Discovery*, 71 VAND. L. REV. 1801, 1807 (2018).

8 Tidmarsh, *supra* note 7, at 1807.

9 Scott M. O'Brien, Note, *Analog Solutions: E-Discovery Spoliation Sanctions and the Proposed Amendments to FRCP 37(E)*, 65 DUKE L.J. 151, 157 (2015) (quoting Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 695 (1998)).

10 Subrin, *supra* note 9, at 697 (referring to such searches as a "fishing expedition").

11 O'Brien, *supra* note 9, at 157 (explaining that parties couldn't submit interrogatories, depositions were to be conducted at trial before the judge, and only the opposing party could be deposed).

12 Subrin, *supra* note 9, at 698–701 (One statute permitted *de bene esse*, which were conditional depositions allowed when the witness was unable to attend trial. Another statute permitted *dedimus potestatem*, depositions permitted when justice demanded it. Additional rules permitted depositions and interrogatories in certain circumstances for cases in courts of equity.).

13 O'Brien, *supra* note 9, at 157.

14 Tidmarsh, *supra* note 7, at 1807. New York was the first state to adopt a code of civil procedure that fused law and equity. Thirty more states followed suit in the decades that followed. *See* Kellen Funk, *Equity Without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846–76*, 36 J. LEGAL HIST. 152, 152 (2015).

15 Subrin, *supra* note 9, at 740.

16 *Id.* at 710; O'Brien, *supra* note 9, at 157 (quoting Hickman v. Taylor, 329 U.S. 495, 501 (1947)). *See also Hickman*, 329 U.S. at 507 ("[D]iscovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper

uniform set of discovery rules became what is now known as the Federal Rules of Civil Procedure ("FRCP"). Finalized in 1938, the FRCP officially merged law and equity in the federal courts.[17] The FRCP included a Rule on discovery, designed "to narrow the issues for trial, to lead to the discovery of evidence, and to foster an exchange of information which may lead to an early settlement."[18]

At that time and for the next several decades, most business records were in paper format, so when litigation arose, attorneys and their clients would rummage "through the[ir] paper documents to find relevant [information]."[19] Then, in the 1990s, technology changed the way litigants approached discovery. "[T]he advent of email and desktop computers resulted in an explosion of electronic documents," and the increased volume of information revolutionized discovery.[20] The FRCP responded with amendments in 2006[21] and 2015[22] to address the many issues and questions that came with new technology and electronic evidence.[23] In particular, Rule 26 was amended to require discovery of electronically stored information

litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.").

17 Tidmarsh, *supra* note 7, at 1833 n.140.

18 Milberg LLP & Hausfeld LLP, *E-Discovery Today: The Fault Lies Not in Our Rules . . .* , 4 FED. CTS. L. REV. 131, 139 (2011) (quoting Westhemeco Ltd. v. N.H. Ins. Co., 82 F.R.D. 702, 710 (S.D.N.Y. 1979)).

19 Damian Vargas, *Electronic Discovery: 2006 Amendments to the Federal Rules of Civil Procedure*, 34 RUTGERS COMPUT. & TECH. L.J. 396, 397 (2008).

20 Paula Schaefer, *Attorneys, Document Discovery, and Discipline*, 30 GEO. J. LEGAL ETHICS 1, 8 (2017).

21 FED. R. CIV. P. 26 advisory committee's note to 2006 amendment. Additional changes addressed relevance, which party bears the costs, what happens to documents that are not reasonably accessible, and the requirement that e-discovery be discussed at the pretrial conference.

22 The 2015 amendments didn't make many changes beyond the 2006 e-discovery amendments. They addressed some over-arching discovery issues that had arisen over the past decade. Schaefer, *supra* note 20, at 8; FED. R. CIV. P. 26 advisory committee's note to 2015 amendment; FED. R. CIV. P. 34 advisory committee's note to 2015 amendment; FED. R. CIV. P. 37 advisory committee's note to 2015 amendment.

23 O'Brien, *supra* note 9, at 159–60. ("As computer systems became central to business operations . . . judges struggled to apply the discovery rules developed prior to the computer revolution . . . . It became clear that . . . existing discovery rules did not provide effective guidance for the courts and parties.").

(ESI)[24] because "discovery of [ESI] stands on equal footing with discovery of paper documents."[25]

Today, that statement still rings true. If anything, discovery of ESI ("e-discovery") is more important than discovery of paper documents. E-discovery "can be a game changer in any type of litigation"[26] and "has already proven to be an extremely effective tool for uncovering critical evidence that would otherwise be concealed, thus playing a vital role in the search for truth."[27] This "critical" evidence can be found in a variety of forms: emails, text messages, Google searches, social media posts and messages, and PDFs, to name a few.[28] The amount of potentially discoverable ESI is only growing. The number of people using the internet worldwide has increased from 2.6 billion in 2013 to 4.66 billion in early 2021.[29] In 2021, about 65% of the world's population—5.17 billion people—had access to the internet.[30] In 2010, about 294 billion emails were sent per day.[31] It is estimated that number will increase to 361 billion emails sent per day in 2024.[32] Every second of every day, the average person creates over 1.7 megabytes of data.[33] Each of these megabytes may be discoverable information in

24 FRCP 34 defines ESI as any information stored electronically, and the purpose of the broad definition is to include all types of computer-based information at that time, and to anticipate any future developments. FED. R. CIV. P. 34 advisory committee's note to 2006 amendment.

25 FED. R. CIV. P. 34 advisory committee's note to 2006 amendment; Milberg LLP & Hausfeld LLP, *supra* note 18, at 142 (citing FED. R. CIV. P. 34(a) advisory committee's note to 2006 amendment).

26 Thomas Roe Frazer II, *Social Media: From Discovery to Marketing—A Primer for Lawyers*, 36 AM. J. TRIAL ADVOC. 539, 541 (2013).

27 Milberg LLP & Hausfeld LLP, *supra* note 18, at 140.

28 Text messages have recently become more important sources of ESI. Many workers now use texting as their "preferred mode of communication." William Vogeler, *The Legal Cost of Deleted Text Messages*, FINDLAW (Aug. 1, 2017) https://www.findlaw.com/legalblogs/in-house/the-legal-cost-of-deleted-text-messages/ [https://perma.cc/XJL2-NP9M]; *Text Message Discovery: How to Correctly Handle Text Messages (and Avoid Spoliation Sanctions)*, TELIOS TEACHES, https://teliosteaches.com/blog/text-message-discovery-how-correctly-handle-text-messages-and-avoid-spoliation-sanctions [https://perma.cc/5X7S-98YU].

29 Jacquelyn Bulao, *How Much Data is Created Every Day in 2021?*, TECHJURY (Feb. 6, 2022), https://techjury.net/blog/how-much-data-is-created-every-day/#gref [https://perma.cc/7APF-CA8B].

30 *Data Never Sleeps 9.0*, DOMO, https://www.domo.com/learn/infographic/data-never-sleeps-9 [https://perma.cc/QN2H-DWTK] [hereinafter *Data Never Sleeps*].

31 Kathryn Kinnison Van Namen, Comment, *Facebook Facts and Twitter Tips—Prosecutors and Social Media: An Analysis of the Implications Associated with the Use of Social Media in the Prosecution Function*, 81 MISS. L.J. 549, 550 (2012).

32 Bulao, *supra* note 29.

33 *Id.* For reference, one megabyte is about one 100-page document or one minute of audio. Anthony Wagner, *A Very Quick Guide to Understanding File Sizes*, LIGHTNING TECH. (Apr. 7, 2019), https://lightningdetroit.com/a-very-quick-guide-to-understanding-file-sizes/ [https://perma.cc/4AKV-A7ZC].

future litigation, showing just how vast ESI has become. Electronic data has now become "commonplace in our professional and everyday lives,"[34] leaving a "digital trail" that grows "immeasurably" every day.[35]

Social media, too, is a growing source of ESI. Today, about one-third of the world's population uses some form of social media.[36] Over 2.5 billion people are active Facebook users.[37] Every minute, at least 65,000 photos are shared on Instagram; 2 million snaps are sent through Snapchat; 575,000 tweets are posted on Twitter; and 167 million TikTok videos are watched.[38] Social media use "has become the rule, rather than the exception."[39] It is "not a fad or frivolity, but a paradigm shift sweeping both the legal profession and society at large."[40] Social media produces "a treasure trove of discoverable information"[41] that is "unquestionably . . . [ESI] in the same sense as e-mail and electronic documents."[42]

II. THE DIFFICULTIES OF ESI AND ATTORNEY OBLIGATIONS IN E-DISCOVERY

A. The Benefits of Technology Come with Great Costs

Though e-discovery has taken a preeminent place in the discovery process, it is not without issues. Businesses benefit greatly from technology, because electronic storage is cheaper and more efficient than paper storage, and electronic data is overall easier to organize, access, and store.[43] But these benefits come with great costs. First, huge amounts of data are stored in various places and formats.[44]

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34 John E. Motylinski, *E-Discovery Realpolitik: Why Rule 37(E) Must Embrace Sanctions*, 2015 U. ILL. L. REV. 1605, 1610 (2015).

35 Frazer, *supra* note 26, at 541.

36 Brian A. Zemil, *Ethics and Social Media Discovery*, A.B.A. (Jan. 15, 2021), https://www.americanbar.org/groups/litigation/publications/litigation-news/civil-procedure/ethics-and-social-media-discovery/ [https://perma.cc/G2DB-4DS5].

37 *Id.*

38 *Data Never Sleeps*, *supra* note 30.

39 John G. Browning, "*You Tweeted What?" Ethics of Advising Your Clients About Their Social Media Posts*, *in* 13th Annual Advanced Business Law Course, ch. 5 at 1 (2015).

40 Kristen L. Mix, *Discovery of Social Media*, 40 COLO. LAW. 27, 27 (2011) (quoting Nicole Black & Carolyn Elefant, *Social Media for Solos and Small Firms: What It Is and Why It Matters*, N.Y. STATE BAR ASS'N J., Feb. 2011, at 18, 18).

41 Van Namen, *supra* note 31, at 560.

42 Frazer, *supra* note 26, at 546.

43 Patricia Groot, *Electronically Stored Information: Balancing Free Discovery with Limits on Abuse*, 8 DUKE L. & TECH. REV., no. 2, 2009, at ¶ 1, ¶ 5; Matthew M. Neumeier & Brian D. Hansen, *Avoiding the Pitfalls of Electronic Discovery*, 1 MEALEY'S LITIG. REP. 1, 1 (2003).

44 O'Brien, *supra* note 9, at 160; Paula Schaefer, *Attorney Negligence and Negligent Spoliation: The Need for New Tools to Prompt Attorney Competence in Preservation*, 51 AKRON L. REV. 607, 615–16 (2017) (ESI is found, for example, on hard drives, tablets, or in the cloud).

Electronic data is saved on desktop computers, company laptops, digital cameras, email accounts, and USB drives.[45] The data might be saved as a Word document, an Excel spreadsheet, a PowerPoint presentation, or a PDF file.[46] Discoverable data such as text messages, voicemail messages, and calendar entries are saved on mobile devices.[47] Additional sources of evidence include posts, comments, and messages on Twitter, Facebook, Instagram, YouTube, Pinterest, or even blogs or other online articles.[48] Google Maps and GPS's track location, and cell phone apps and games record various personal information.[49] The sheer volume of electronic data and the variety of places in which it can be found make it difficult for parties in litigation to know what electronic evidence they have.[50]

For businesses, e-discovery also constitutes a very costly and time-consuming process. Many businesses have electronic document retention policies, and when litigation is anticipated or begins, they are required to review those retention policies and either alter or completely halt those policies in order to ensure that all relevant data to litigation is preserved.[51] This can be a "time intensive" process.[52] Changing document retention policies and then filtering the discoverable ESI to determine what documents are relevant is also quite costly.[53] Discovery is a well-known cost-driver in litigation,[54] and

45 Andrew D. Goldsmith & Lori A. Hendrickson, *Investigations and Prosecutions Involving Electronically Stored Information*, 56 U.S. ATT'YS' BULL. 27, 29 (2008); *see also* Wendy R. Leibowitz, *Digital Discovery Starts to Work; Judges Are Getting Involved Early in the Process*, Nat'l L.J., Nov. 2002.

46 Lesley Friedman Rosenthal, *Electronic Discovery Can Unearth Treasure Trove of Information or Potential Land Mines*, N.Y. STATE BAR ASS'N J., Sept. 2003, at 32, 32, 34.

47 Frazer, *supra* note 26, at 542–44.

48 *Id.*

49 *Id.*; Rosenthal, *supra* note 46, at 32, 34.

50 Rosenthal, *supra* note 46, at 32.

51 Goldsmith & Hendrickson, *supra* note 45, at 29.

52 *Id.*

53 O'Brien, *supra* note 9, at 160–61.

54 *See* THOMAS E. WILLGING & EMERY G. LEE III, IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 14 (2010). Costs can be so high because the producing party is the one who usually bears the cost, so the requesting party has little incentive to limit the production request. Motylinski, *supra* note 34, at 1615. Further, parties tend to over-preserve and over-discover information that might be relevant in the case, for fear of sanctions if they destroy or fail to discover some relevant evidence. This over-preservation just adds more to costs. *See id.* at 1617–18; O'Brien, *supra* note 9, at 154. The FRCP requires discovery requests to be relevant, but since discovery often happens before the facts and claims are fully understood, relevance is often unclear at the time the discovery request is made. And for clients who lead the initial charge (supervised by their lawyer) in looking for relevant documents, they don't always fully understand the legal claims and don't know what's relevant. This uncertainty leads to more over-preservation and, therefore, more discovery costs. *See* Schaefer, *supra* note 44, at 617–18; John G.

production of e-discovery in particular pushes costs even higher.[55] In 2015, the average discovery cost for cases in federal courts was just over $4000,[56] but one 2018 study estimated that the average discovery cost per case for large corporations was at least $1 million.[57]

Finally, ESI is easily altered or deleted. The nature of electronic evidence makes it "transitory—easily lost, overwritten, or modified."[58] Text messages, social media posts and comments, and voicemails can be deleted with the tap of a few buttons. Documents saved on a computer can be deleted with just a click or two of the mouse.[59] Businesses also often have implemented automatic email deletion policies.[60] Sometimes ESI is deleted or altered "without the user's knowledge."[61]

Browning, *Burn After Reading: Preservation and Spoliation of Evidence in the Age of Facebook*, 16 SMU SCI. & TECH. L. REV. 273, 280, 290 (2013). Additionally, factors such as factual and procedural complexity, stakes of the case, size of the law firm, and wealth of the litigants can inflate litigation and discovery costs. *See* WILLGING & LEE, *supra* note 54, at 3, 6, 7, 11.

55 *See* WILLGING & LEE, *supra* note 54, at 14, 16 ("[P]laintiffs who requested ESI had 37% higher costs and plaintiffs who requested *and* produced ESI had 48% higher costs. . . . Defendants who requested *and* produced ESI had a 17% increase in costs. . . . For both plaintiffs and defendants, however, each dispute about ESI was associated with a 10–11% increase in costs.").

56 Robert Hilson, *How Much Does eDiscovery Cost the U.S Every Year?*, LOGIKCULL (July 20, 2015), https://www.logikcull.com/blog/estimating-the-total-cost-of-u-s-ediscovery [https://perma.cc/66FW-AC8Y].

57 Eleanor Brock, *eDiscovery Opportunity Costs: What Is the Most Efficient Approach?*, LOGIKCULL (Nov. 21, 2018), https://www.logikcull.com/blog/ediscovery-opportunity-costs-infographic.[https://perma.cc/S8DY-T4QE]. For a detailed summary of litigation and discovery costs for large corporations, see Lawyers for Civil Justice, Civil Justice Reform Group, U.S. Chamber Inst. for Legal Reform, Statement for Presentation to Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Litigation Cost Survey of Major Companies (May 10–11, 2010).

58 Arthur L. Smith, *Responding to the "E-Discovery Alarm": Planning Your Response to a Litigation Hold*, 17 BUS. L. TODAY 27, 27 (2007); *see also* Motylinski, *supra* note 34, at 1614 and Schaefer, *supra* note 44, at 615. But at the same time, anything posted on the internet or saved electronically can usually never be deleted forever. Any deleted or altered information is usually discoverable eventually. But this doesn't mitigate the fact that ESI is easily changed, leading to huge opportunities for intentional destruction of evidence. *See* Van Namen, *supra* note 31, at 562.

59 Neumeier & Hansen, *supra* note 43, at 1 ("In many instances, [electronic information] can be altered or deleted with a few simple keystrokes.").

60 In *VOOM HD Holdings v. EchoStar Satellite L.L.C.*, the defendant company had a computer system which permanently and automatically deleted all emails after seven days. VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 939 N.Y.S.2d 321, 326 (N.Y. App. Div. 2012). A similar situation happened in *Mosaid Techs. v. Samsung*, where the defendant company's computer system automatically deleted emails on a regular basis. Mosaid Techs. Inc. v. Samsung Elecs. Co., Ltd., 348 F. Supp. 2d 332, 333 (D.N.J. 2004).

61 Motylinski, *supra* note 34, at 1614. For example, in *NuVasive, Inc. v. Kormanis*, a party was unaware that her relevant and otherwise-discoverable text messages were being

"Spoliation" is the term used to broadly describe this "destruction, mutilation, alteration, or concealment of evidence" in discovery.[62] There are two types of spoliation: intentional spoliation (which occurs when a party intends to conceal evidence) and negligent spoliation (which occurs when a party doesn't act reasonably to preserve relevant evidence).[63] Both are equally deserving of sanctions, since, as discussed in the following paragraphs, an attorney has a duty to not only refrain from concealing evidence, but also to reasonably act to preserve all relevant evidence.[64] Ultimately, the transitory and ubiquitous nature of ESI leaves it rife with opportunities for misconduct.

B. Attorneys' Expectations and Obligations to Clients in Discovery

With the technological boom and its attendant opportunities for discovery misconduct comes new expectations and professional obligations for attorneys that govern every aspect of their role as an advisor in the discovery process.[65] Any violation of the following duties and obligations can constitute misconduct punishable with discipline or sanctions. What follows are the baseline expectations for every attorney in the discovery process.

1. Attorneys have ethical obligations in discovery.

The first and "most fundamental" obligation is the obligation to preserve evidence.[66] This obligation is established in each court's code of professional conduct. Federal courts usually adopt the professional code of whatever state they are physically located, and most states have

deleted due to an automatic thirty-day deletion setting. NuVasive, Inc. v. Kormanis, No. 1:8CV282, 2019 WL 1171486, at *4 (M.D.N.C. Mar. 13, 2019).

62 *Spoliation*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* Graff v. Baja Marine Corp., 310 Fed. App'x 298, 301 (11th Cir. 2009) (quoting West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999)) ("Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."); *see also* Paul W. Grimm, *Ethical Issues Associated with Preserving, Accessing, Discovering, and Using Electronically Stored Information*, 56 U.S. ATT'YS' BULL. 1, 5 (2008) (quoting Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001)) ("Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.").

63 Schaefer, *supra* note 44, at 608, 608 n.3, 609.

64 Browning, *supra* note 54, at 282; Schaefer, *supra* note 20, at 14; Dan H. Willoughby, Jr., Rose Hunter Jones & Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 808 (2010) ("modification or destruction of data through automated and manual file deletions or physical tampering with computer system").

65 *See* Schaefer, *supra* note 20, at 6; Browning, *supra* note 54, at 274–75.

66 Browning, *supra* note 54, at 276.

modeled their professional conduct rules on the ABA Model Rules of Professional Conduct ("RPC").[67] Therefore, "most attorneys practicing in federal court are obligated to comply with some version of [the RPC]."[68]

RPC 3.4 specifically addresses attorney obligations in discovery: a lawyer cannot "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value;"[69] "knowingly disobey an obligation under the rules of a tribunal;"[70] "make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;"[71] or "request a person other than a client to refrain from voluntarily giving relevant information to another party."[72] These obligations are based on the goals of encouraging fair competition in litigation and maintaining the basic procedural right for both parties to obtain evidence through discovery.[73] Any lawyer whose actions prevent either of these goals from happening has violated their professional obligations and should expect some form of discipline or sanctions.

RPC 1.1 is also relevant in discovery, because it requires attorneys to "provide competent representation to a client," which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[74] "Competency" is a word that now encompasses an understanding of technology.[75] Because technology plays a large role in the average person's everyday life,[76] "[i]t seems too late in the day to argue that a lawyer's duty of fundamental competence does not encompass a level of expertise related to digital technology, especially the information technology systems used by the lawyer's client."[77] Of course, competency will vary depending on the facts and

67 Schaefer, *supra* note 20, at 17; MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2020). For a comparison of the states' professional codes to the ABA model rules, see *Jurisdiction Rules Comparison Charts*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/ [https://perma.cc/8AU7-QY9H].

68 Schaefer, *supra* note 20, at 17.

69 MODEL RULES OF PRO. CONDUCT r. 3.4(a) (AM. BAR ASS'N 2019).

70 MODEL RULES OF PRO. CONDUCT r. 3.4(c) (AM. BAR ASS'N 2019).

71 MODEL RULES OF PRO. CONDUCT r. 3.4(d) (AM. BAR ASS'N 2019).

72 MODEL RULES OF PRO. CONDUCT r. 3.4(f) (AM. BAR ASS'N 2019).

73 MODEL RULES OF PRO. CONDUCT r. 3.4 cmts. 1, 2 (AM. BAR ASS'N 2018).

74 MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2020).

75 MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2020) ("To maintain requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . .").

76 *See supra* Part I.

77 John Garaffa, *Ethics: Concerns About Lawyer Competency in the Brave New World of Electronic Discovery*, BUTLER WEIHMULLER KATZ CRAIG LLP (Aug. 1, 2007), https://

circumstances of each case and each client, but competency overall requires a basic comprehension of technological advances.[78] For example, attorneys should be proactive in informing themselves about their clients' IT systems so that they can ensure proper preservation in litigation, and they should also understand whatever technology will be used in an e-discovery process, and the burden and expense of e-discovery:[79]

> [A] party and her counsel must make certain that all sources of potentially relevant information are identified and placed "on hold" . . . . To do this, counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel . . . .[80]

This is a real obligation for attorneys, and courts have imposed sanctions in cases where a failure to understand the client's technology system led to destruction of evidence or a delay in discovery.[81] Attorneys should also know enough about evolving technology to know when they need to hire an expert or consultant for assistance with e-discovery.[82] Competency also includes knowing who has possession,

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www.butler.legal/ethics-concerns-about-lawyer-competency-in-the-brave-new-world-of-electronic-discovery/ [https://perma.cc/AVA8-DRC5].

78 *See, e.g.*, Philip Favro, *eDiscovery and Ethical Considerations for Social Media*, INNOVATIVE DRIVEN (Aug. 29, 2017), https://www.driven-inc.com/ediscovery-and-ethical-considerations-for-social-media-2/ [https://perma.cc/K5F8-5PR9].

79 Elizabeth E. McGinn & Kristopher Knabe, *Ethical Issues in the Digital Age: Navigating E-Discovery Challenges*, 16 CONSUMER LITIG. 7, 7–8 (2012); Tyler D. Trew, *Ethical Obligations in Electronic Discovery*, A.B.A. (June 5, 2018), https://www.americanbar.org/groups/litigation/committees/professional-liability/practice/2018/ethical-obligations-in-electronic-discovery/ [https://perma.cc/F9NM-3M4S]; Garaffa, *supra* note 77.

80 Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432 (S.D.N.Y. 2004).

81 The duty to preserve evidence "requires counsel to investigate how a client's computers store digital information, to review with the client potentially discoverable evidence . . . ." Mosaid Techs. Inc. v. Samsung Elecs. Co., 348 F. Supp. 2d 332, 339 (D.N.J. 2004). In *EPAC Technologies, Inc. v. HarperCollins Christian Publishing, Inc.*, the court reprimanded the defendant for "fail[ure] to take . . . preservation obligations seriously" when it allowed evidence to be lost that should've been preserved. EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc., No. 12-cv-00463, 2018 WL 1542040, at *18 (M.D. Tenn. Mar. 29, 2018) (quoting Stinson v. City of New York, No. 10 Civ. 4228, 2016 WL 54684, at *5 (S.D.N.Y. Jan. 5, 2016)). According to the court, counsel should "be expected to know that putting a legal hold in place requires [] notifying the IT department," yet "there was no timely notice give to the IT department." *Id.* at *7, *18. In another case, the attorney did not bother to ask the IT consultant about electronic documents and "was not involved in identifying records custodians, [and he] did nothing to familiarize himself with Play Visions' document retention and destruction policies." Play Visions, Inc. v. Dollar Tree Stores, Inc., No. C90-1769, 2011 WL 2292326, at *3 (W.D. Wash. June 8, 2011).

82 David H. Tennant & Michael G. McCartney, *Forensic Examination of Digital Devices in Civil Litigation: The Legal, Ethical and Technical Traps*, 24 PRO. LAW. 1, 8 (2016)

custody or control over ESI, and, considering the growing use of social media, competency includes familiarity with social media terminology.[83] At the end of the day, a "lawyer who [has agreed] to be retained to provide legal advice or perform other legal services has implied that he or she will use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake."[84] Today, that required skill and diligence means that a lawyer must be competent in technology in order to properly advise a client on e-discovery issues.

RPC 3.3, too, which requires attorneys to act with candor in court, imposes an obligation on attorneys to "avoid conduct that undermines the integrity of the adjudicative process" and refrain from "allow[ing] the [case] to be misled by false statements of law or fact or evidence that the lawyer knows to be false."[85] This Rule, along with Rules 3.4 and 1.1, imposes a specific ethical obligation on attorneys to act properly in all aspects of litigation, including the discovery process.

The RPC's effects are limited, however, because it doesn't give judges any authority to sanction or discipline an attorney who fails to follow them. There is no built-in enforcement mechanism, and any violation must be reported through the proper channels (usually, the local disciplinary body) and then must be proven in any disciplinary proceeding that follows.[86] The authority to impose any disciplinary action or sanction must come from some other source.[87]

2. There is a common law duty to preserve discoverable documents.

Beyond the professional rules of conduct, attorneys have a common-law duty to preserve discoverable documents. This obligation begins not with the commencement of the lawsuit, but when litigation is "probable" or reasonably anticipated.[88] Reasonable anticipation is an "objective standard, asking not whether the party in fact reasonably foresaw litigation, but whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation."[89] At the most basic level, this duty requires an attorney to work with the client

83 Zemil, *supra* note 36.

84 Garaffa, *supra* note 77.

85 MODEL RULES OF PRO. CONDUCT r. 3.3 cmt. 2 (AM. BAR ASS'N 2019); *Social Media Ethical Obligations for Lawyers*, EPIQ GLOBAL 1, 4 [hereinafter EPIQ].

86 Schaefer, *supra* note 20, at 18.

87 *See infra* Part III.

88 Grimm, *supra* note 62, at 1–2 (quoting A.B.A., CIVIL DISCOVERY STANDARDS, standard 10, at 20 (2004)).

89 O'Brien, *supra* note 9, at 165 n.91 (quoting Micron Tech., Inc. v. Rambus, Inc., 645 F.3d 1311, 1320 (Fed. Cir. 2011)).

to identify the location and method of retrieving all relevant[90] documents in the client's control.[91] It also requires an ability to preserve all such documents throughout the life of the lawsuit.[92] The client is the one who possesses all the relevant discovery, but the obligation to preserve that information falls squarely and primarily on the advising attorney. "[T]he obligation to protect evidence runs first to counsel, who then has a duty to advise and explain to the client its obligations to retain pertinent documents that may be relevant to the litigation."[93] A failure to adequately explain the duty to preserve relevant documents often leads to sanctions. For example, an attorney who "failed to act with reasonable diligence and promptness, failed to keep the client reasonably informed about the status of his legal matter, [and] intentionally failed to comply with proper discovery requests" was suspended indefinitely.[94] Another court imposed sanctions against a client who deleted some relevant evidence because he was unsure what his attorney meant when the attorney ordered him to retain "all relevant business records."[95] The client then "incorrectly determined that the evidence was irrelevant."[96] Courts also impose

90 Although relevance is not an important consideration for this Note, it's worthwhile to mention that the duty to preserve evidence does not apply to *all* documents, but just to *relevant* documents. "[T]he 'duty to preserve potentially discoverable information does not require a party to keep every scrap of paper' in its file." Grimm, *supra* note 62, at 4 (quoting *In re* Kmart Corp., 371 B.R. 823, 842 (Bankr. N.D. Ill. 2007)). Relevance is measured by whether a document is potentially helpful to the opposing party and ultimately rests on a choice based on "sound judgment and common sense." Grimm, *supra* note 62, at 5; *see also* Browning, *supra* note 54, at 290. The line of relevance is, admittedly, fuzzy, so attorneys like to err on the side of caution and preserve more evidence than is necessary. Further, attorneys should take the lead on determining what documents are relevant, since they will likely be more familiar with the opposing party's claims and defenses. Grimm, *supra* note 62, at 5; Schaefer, *supra* note 44, at 617–18.

91 In addition to the relevance limitation, parties are only permitted to discover documents that are within their control or possession, which means that the party has the legal authority or general ability to access the evidence. Margaret (Molly) DiBianca, *Discovery and Preservation of Social Media Evidence*, A.B.A. BUS. L. TODAY (Jan. 23, 2014), https://www.americanbar.org/groups/business_law/publications/blt/2014/01/02_dibianca/ [https://perma.cc/TPL6-2H36].

92 Milberg LLP & Hausfeld LLP, *supra* note 18, at 174. Failure to preserve evidence may lead to sanctions. *See* Willoughby et al., *supra* note 64, at 803.

93 Garaffa, *supra* note 77. *See also* Mule v. 3-D Bldg. & Constr. Mgmt. Corp., No. CV 18-1997, 2021 WL 2788432, at *3–4, *14 (E.D.N.Y. July 2, 2021) (discussing the duty of counsel to advise the client of information that must be preserved after the defendant discarded several physical and electronic files that made up the "majority of [the company's] business records").

94 Cleveland Metro. Bar Ass'n v. Moody, 113 N.E.3d 520, 522, 527 (Ohio 2018).

95 Best Payphones, Inc. v. City of New York, No. 1-CV-3924, 2016 WL 792396, at *8 (E.D.N.Y. Feb. 26, 2016).

96 *Id.* The court added that the "attorneys . . . should have advised [the client] not to destroy any records relating to his business, even if they were 'voluminous.'" *Id.*

sanctions for clients and lawyers who respond to discovery requests with unresponsive or irrelevant documents. In *Steward v. Steward*, the court suspended the attorneys because their "discovery responses were grossly insufficient."[97] Even an attorney whose negligence causes delay in discovery can result in sanctions.[98] In one case, a partner and associate were suspended from practice for one year for failure to promptly produce relevant documents.[99]

When this common-law duty is applied to e-discovery, courts have been clear on what is required for parties when preserving evidence. The *Zubulake* court set forth minimum ESI expectations for attorneys who reasonably anticipate litigation. First, attorneys must issue a "litigation hold" suspending the client's routine document retention and deletion policies to "ensure the preservation of relevant documents."[100] After issuing the litigation hold,

> [c]ounsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents. . . . [I]t is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.[101]

Courts are quite serious about the requirement to impose a litigation hold with specific enough information to direct the client and do not hesitate to impose sanctions for failure to implement a proper document retention policy.[102] In *DR Distributors, LLC v. 21 Century Smoking, Inc.*, the court imposed sanctions on both client and counsel for failure to issue a litigation hold, which resulted in the deletion of several online messages and emails.[103] And in *Nacco Materials Handling Group, Inc. v. The Lilly Company*, the court imposed sanctions on a client whose counsel issued a proper litigation hold letter but failed to

97 Steward v. Steward, 529 B.R. 903, 909 (Bankr. E.D. Mo. 2015).

98 Neumeier & Hansen, *supra* note 43, at 2.

99 *See In re* Filosa, 976 F. Supp. 2d 460, 468, 471 (S.D.N.Y. 2013); *In re* Gilly, 976 F. Supp. 2d 471, 478–80 (S.D.N.Y. 2013). It wasn't just because of their discovery misconduct that these attorneys were sanctioned. They were also guilty of suppressing evidence, dishonest and fraudulent behavior, false testimony, and "intentionally deceptive misconduct that interfered with the administration of justice." *Filosa*, 976 F. Supp. 2d at 465–69; *Gilly*, 976 F. Supp. 2d at 478–80.

100 Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 431 (S.D.N.Y. 2004) (quoting Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)); Garaffa, *supra* note 77; Grimm, *supra* note 62, at 4.

101 *Zubulake*, 229 F.R.D. at 432.

102 Rosenthal, *supra* note 46, at 32.

103 DR Distribs., LLC v. 21 Century Smoking, Inc., 513 F. Supp. 3d 839, 861, 863, 876, 884, 976–77 (N.D. Ill. 2021).

monitor the preservation of evidence, which led to a loss of relevant evidence.[104] A similar situation happened in *EPAC Technologies, Inc. v. HarperCollins Christian Publishing, Inc.*, where the defendant made "halfhearted attempts . . . to impose a litigation hold that was not implemented with sufficient guidance or monitor[ing] by counsel."[105] According to the court, "[i]t is hard to imagine a circumstance in which [counsel's] steps to preserve ESI would have been considered reasonable."[106]

Second, attorneys must communicate directly and clearly with the "key players" in the case who are likely to have relevant information and "to understand how they stored information."[107] Third, attorneys must instruct the client to produce copies of all relevant files and ensure that those files are backed up and stored safely.[108] "This rigorous standard for ESI preservation makes sense given that electronic files, unlike physical evidence, can be permanently destroyed."[109] Yet many organizations are still quite unprepared to meet these baseline expectations.[110]

The ethical and common-law duties to preserve evidence apply equally to ESI from social media.[111] Since more and more relevant

104 Nacco Materials Handling Grp., Inc. v. Lilly Co., 278 F.R.D. 395, 398, 404 (W.D. Tenn. 2011).

105 EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc., No. 12-cv-00463, 2018 WL 1542040, at *18 (M.D. Tenn. Mar. 29, 2018).

106 *Id.* at *22.

107 Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432 (S.D.N.Y. 2004); *see also* Garaffa, *supra* note 77; Grimm, *supra* note 62, at 4. One court imposed sanctions on a litigant whose attorney failed to collect cell phone data from key players in the litigation. *In re* Skanska USA Civ. Se. Inc., No. 20-CV-05980, 2021 WL 5226547, at *3, *10 (N.D. Fla. Aug. 23, 2021).

108 *Zubulake*, 229 F.R.D. at 434; Garaffa, *supra* note 77. *See also* Grimm, *supra* note 62, at 4; Shaffer v. Gaither, No. 14-cv-00106, 2016 WL 6594126, at *2 (W.D.N.C. Sept. 1, 2016) (The court sanctioned a client for failure to preserve text messages, even though there were many different ways to back up those texts. "[P]laintiff and her counsel failed to take reasonable steps to preserve those texts," which could've included "printing out the texts, making an electronic copy of [them,] cloning the phone, or even taking possession of the phone and instructing the client to simply get another one.").

109 O'Brien, *supra* note 9, at 165.

110 As of 2017, less than 60% of organizations felt prepared to produce emails older than six months upon commencement of litigation, and a much lower percent of organizations felt prepared to produce other types of e-discovery (only 39% were prepared to produce electronic files, 20% were prepared to produce information on mobile devices, and 7% were prepared to produce contents on home computers, for example). BARRACUDA, KEY ISSUES FOR E-DISCOVERY AND LEGAL COMPLIANCE: AN OSTERMAN RESEARCH WHITE PAPER 4 fig.3 (2017). Even though this study notes that organizations are the ones that themselves feel unprepared, this lack of preparation reflects poorly on attorneys who have an obligation to ensure proper preparation for ESI preservation.

111 Van Namen, *supra* note 31, at 576. *See also* Browning, *supra* note 54, at 274 ("With the inexorable spread of social media, and as these sites have become fertile ground for

evidence is now found on social media,[112] and considering the ease with which ESI can be deleted or altered, lawyers have an obligation to make sure clients preserve their social media posts—and that advice should be given as soon as possible.[113] "Lawyers uncomfortable with technology cannot afford to take a 'head in the sand' approach when it comes to their clients' activities on . . . social media sites."[114] They should regularly monitor the client's social media activities, with the understanding that people are getting increasingly "savvy" and more relaxed on social media, not thinking as much about the information they're putting online and the potential consequences of it.[115] And since social media evidence can be important in litigation,[116] lawyers must take appropriate measures to preserve that social media content as soon as they learn of it.[117] Furthermore, lawyers have a duty to inform their clients about the potential consequences of deleting or altering social media posts and how to preserve that social media evidence.[118] Just as lawyers are prohibited from advising a client to burn a diary or a letter, lawyers are also prohibited from advising a client to delete relevant social media content.[119] In one egregious case, an attorney advised his client "to 'clean up' his Facebook page" by deleting specific photos that would be embarrassing if published at

both formal and informal discovery, it is more vital than ever for attorneys, on both sides of the docket and every practice area, to be aware of their clients'—and their own—obligations regarding the preservation of such evidence and the consequences of spoliating this evidence.").

112 *See supra* Part I.

113 Frazer, *supra* note 26, at 552, 556; Tennant & McCartney, *supra* note 82.

114 Browning, *supra* note 39, at 1; *see also* Tennant & McCartney, *supra* note 82, at 9 ("[E]very litigator must be sufficiently equipped to know what information is contained on, or accessed through, mobile devices, and be able to evaluate whether those digital files may have evidentiary value.").

115 Pro. Liab. Prac. Grp., *Social Media and Spoliation—Can a Client Delete Her Facebook Posts?*, NAT'L L. REV. (Sept. 29, 2014), https://www.natlawreview.com/article/social-media-and-spoliation-can-client-delete-her-facebook-posts [https://perma.cc/ZS85-2N4S]; *see also* Browning, *supra* note 54, at 289; Browning, *supra* note 39, at 3.

116 *See supra* Part I.

117 Browning, *supra* note 54, at 293.

118 John Browning, *Can You Advise Clients to "Clean Up" Their Social Media Pages?*, FAM. LAW. MAG. (Nov. 15, 2019), https://familylawyermagazine.com/articles/advise-client-clean-up-social-media-pages/ [https://perma.cc/WGG4-HURQ]; Frazer, *supra* note 26, at 552; Brocker L. Firm, *To Delete or Not to Delete: Social Media and the Lawyer's Role*, CAMPBELL L. OBSERVER (Oct. 1, 2014), http://campbelllawobserver.com/to-delete-or-not-to-delete-social-media-and-the-lawyers-role/ [https://perma.cc/BSJ3-3JKL].

119 Frazer, *supra* note 26, at 552; Brocker L. Firm, *supra* note 118; *see also* Chapman v. Hiland Operating, LLC, No. 1:13-cv-052, 2014 WL 2434775, at *1–2 (D.N.D. May 29, 2014) (sanctioning a plaintiff who deactivated her Facebook account at the request of her attorney).

trial.[120] The court responded by imposing monetary sanctions and referring the attorney to the state disciplinary board.[121] Lawyers are also prohibited from advising clients to "friend request" the opposing party, a juror, or a witness.[122] Lawyers, may, however, advise clients to change their privacy settings or tell clients to use discretion when posting on social media.[123] Ultimately, "it is ethically permissible to advise . . . client[s] on the management of social media" as long as attorneys do not advise clients to "destroy evidence, introduce misleading evidence, or withhold evidence from discovery."[124]

III. CURRENT SOURCES OF AUTHORITY FOR IMPOSING SANCTIONS

There are several sources of authority that courts cite when deciding whether to impose sanctions or discipline on attorneys who abuse the discovery process. First, most federal courts adopt the local disciplinary rules of the state they're sitting in, which usually require them to report all disciplinary issues to the local disciplinary body. Second, courts can (but rarely do) use their statutory authority to impose sanctions. Third, although it's no longer a popular source of authority, courts in the past have invoked their inherent authority as a power to impose sanctions. Finally, the FRCP gives federal courts authority to impose sanctions on clients and attorneys for various misdeeds, and courts have used this authority to impose sanctions on attorneys for e-discovery misconduct.

A. Federal Courts Adopt Local Disciplinary Rules

Most federal courts have adopted the disciplinary rules of the state courts in which they reside.[125] These rules establish disciplinary proceedings for attorneys.[126] These rules explain, among other things, to whom a report of professional misconduct should be made,[127] the

120 Allied Concrete Co. v. Lester, 736 S.E.2d 699, 702 (Va. 2013).

121 *Id.* at 703. The attorney was eventually suspended for five years. *See* Agreed Disposition Memorandum Order, In the Matter of Matthew B. Murray, VBS Dockets Nos. 11-070-088405 and 11-070-088422 (2013).

122 EPIQ, *supra* note 85, at 4.

123 Pro. Liab. Prac. Grp., *supra* note 115; Browning, *supra* note 118.

124 Richard S. Kling, Khalid Hasan & Martin D. Gould, *Ethics and Social Media*, 105 ILL. BAR J. 30, 30 (2017) (quoting John Levin, *Social Media—Advising Your Client*, JOHN LEVIN (Jan. 2015), https://www.johnlevin.info/legalethics/article/social-media-advising-your-client [https://perma.cc/9TBB-5YW3]).

125 As of 2017, only a handful of federal district courts did not have an internal disciplinary system. *See* Schaefer, *supra* note 20, at 18–19 & n.118.

126 *Id.* at 18; Willoughby et al., *supra* note 64, at 817.

127 *See* Schaefer, *supra* note 20, at 22–24 (discussing the duty to report attorney misconduct).

process for investigating the misconduct, and the procedures for a fair hearing on the report.[128] Each state's supreme court also "authorizes a body to investigate complaints against attorneys, determine if disciplinary charges are warranted, and if so, file and prosecute disciplinary charges."[129]

There are many problems with these local rules and their disciplinary process, however. The first issue is that these state disciplinary systems depend completely on judges and other lawyers to report attorney misconduct. But reports of e-discovery misconduct and subsequent disciplinary procedures are "exceedingly rare" and are often only included "in the context of multiple other rule violations," so situations of e-discovery misconduct are often not addressed.[130] Then, once a court receives a report of misconduct, they must refer the issue to the appropriate disciplinary body.[131] An investigation and a hearing necessarily follow, leading to a string of satellite litigation, which takes time and money and is a strain on the legal system and its resources.[132] Second, many local disciplinary rules don't even mention sanctions for discovery abuse—much less e-discovery abuse; they just give the court broad powers to impose sanctions for general misconduct.[133] Additionally, the local rules among states are "inconsistent and conflicting" and cause "problems of uncertainty," especially for attorneys who practice in multiple states.[134] Each state has a different multi-factor test that its courts must apply when deciding whether to impose sanctions. Common factors include history of bad behavior, whether prejudice was caused, a comparison to similar past cases, past relationship between the client and attorney, extent of personal

128 *Id.* at 18 n.117; Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 J. LEGAL PRO. 209, 332 (2011). For examples of detailed federal district court attorney discipline procedures, see S.D.N.Y. LOC. R. 1.5 (2018); C.D. CAL. LOC. R. 83–3 (2021); N.D. ILL. LOC. R. 83.25–83.30 (2021).

129 Schaefer, *supra* note 20, at 19.

130 *Id.* at 20–21; *see id.* at 22–24 (speculating why discovery misconduct goes underreported).

131 *Id.* at 30–31.

132 *Id.* at 31 n.205. Disciplinary proceedings can happen anywhere from several months to several years after the misconduct occurred. *See In re* Gilly, 976 F. Supp. 2d 471, 471–72 (S.D.N.Y. 2013) and *In re* Filosa, 976 F. Supp. 2d 460, 460, 462 (S.D.N.Y. 2013) (disciplinary proceedings were finalized four years after the original misconduct); Allied Concrete Co. v. Lester, 736 S.E.2d 699, 699 (Va. 2013) and Agreed Disposition Memorandum Order, In the Matter of Matthew B. Murray, VBS Dockets Nos. 11-070-088405 and 11-070-088422 (2013) (proceedings happened seven months after the misconduct occurred); *In re* Gluck, 114 F. Supp. 3d 57, 58 (E.D.N.Y. 2015) (proceedings happened two years after the misconduct occurred).

133 *See supra* note 128 (providing examples of some of the largest district courts' local rules, which are silent on discovery sanctions).

134 Curtis, *supra* note 128, at 211.

responsibility, whether sanctions would be effective, and whether the misconduct could be justified in any way.[135] The lack of any document retention policy is also a factor courts might consider.[136] Serious sanctions have only ever been threatened for those who engage in extreme discovery abuse (taking intentional, affirmative steps to participate in misconduct that results in substantial prejudice).[137] These different factors and different tests have led to vastly different results in different courts for similar misconduct. For example, a lawyer who consistently failed to appear for scheduling order and pretrial conferences (citing various excuses) was suspended for sixty days and ordered to attend six hours of continuing legal education,[138] but a lawyer who failed to implement a litigation hold for one year did not receive any sanctions whatsoever.[139] Another attorney who similarly "failed to act with reasonable diligence and promptness [and] failed to keep the client reasonably informed about the status" of his case received the serious sanction of indefinite suspension from practicing law.[140] Another attorney was slapped with a one-year suspension and a referral to the lower court for more investigation for behaving unprofessionally and submitting "grossly insufficient" discovery responses.[141] In cases where an attorney advised the client to deactivate their Facebook account or delete some photos, sanctions ranged from an order to make a good faith effort to reactivate the account to a five-year suspension and monetary sanctions.[142] Attorney sanctions for e-discovery abuses vary widely across federal districts, likely because of the lack of a uniform system to guide courts.

135 Grimm, *supra* note 62, at 6, 9–10; Eleanor Brock, *Discovery Obstruction as Attorney Misconduct: Lawyer Suspended in Egregious Case*, LOGIKCULL (Oct. 25, 2018), https://www.logikcull.com/blog/discovery-obstruction-as-attorney-misconduct-attorney-suspended-in-egregious-case [https://perma.cc/46TY-PAS9].

136 Milberg LLP & Hausfeld LLP, *supra* note 18, at 176.

137 *Id.* at 180; Neumeier & Hansen, *supra* note 43, at 4; Tennant & McCartney, *supra* note 82, at 9.

138 *In re* Marshall, No. 15-MC-88, 2016 WL 81484, at *2, *4, *7, *8, *12 (M.D. La. Jan. 7, 2016).

139 VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 939 N.Y.S.2d 321, 326, 327 (N.Y. App. Div. 2012).

140 Cleveland Metro. Bar Ass'n v. Moody, 113 N.E.3d 520, 525, 527 (Ohio 2018).

141 Steward v. Steward, 529 B.R. 903, 907, 909, 913–14, 919 (Bankr. E.D. Mo. 2015).

142 *See* Chapman v. Hiland Operating, LLC, No. 13-cv-052, 2014 WL 2434775, at *1–2 (D.N.D. May 29, 2014); Allied Concrete Co. v. Lester, 736 S.E.2d 699, 702, 703 (Va. 2013); Agreed Disposition Memorandum Order, In the Matter of Matthew B. Murray, VBS Dockets Nos. 11-070-088405 and 11-070-088422 (2013).

B. Federal Courts Have Statutory Authority to Impose Sanctions

In addition to local rules, Congress has given federal courts statutory authority[143] to impose sanctions on attorneys who "multipl[y] the proceedings in any case unreasonably and vexatiously."[144] The court may require such an attorney to pay for any extra costs incurred as a result.[145] This authority, however, is very narrow and only applies to e-discovery abuse if that abuse led to an unnecessary extension of the discovery process. It's also not an authority that courts often invoke, because it would require some creative interpretation for a court to apply this federal statute to an e-discovery case.[146]

C. Courts Have Relied on Their Inherent Authority

Third, courts in the past have relied on their inherent authority to sanction attorneys for e-discovery misconduct.[147] This authority, used most frequently when courts want to impose sanctions against parties *and* attorneys, comes from the court's authority "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[148] This inherent power has been invoked in cases of bad faith and when no other local rule provides authority to impose sanctions (or prohibits using inherent power in this way).[149] Courts like to rely on their inherent power for sanctions because it removes

143 In addition to this civil authority to impose sanctions, destroying or altering evidence is also a federal crime. Anyone who "corruptly" or "knowingly" "alters, destroys, mutilates, conceals, covers up, [or] falsifies" any document or record in discovery "with the intent to "impair," "impede, obstruct, or influence" the discovery process can be punished with fines or imprisonment. 18 U.S.C. § 1512(c) (2018); § 1519. Since this Note focuses only on sanctions in civil cases, no further attention will be paid to this criminal statute or the punishments imposed under it.

144 28 U.S.C. § 1927 (2018); Schaefer, *supra* note 20, at 16. Notably, this appears to be one of the only sources of authority that allow discovery sanctions to be imposed only on attorneys, rather than only the litigant. *See* Willoughby et al., *supra* note 64, at 799 n.42.

145 28 U.S.C. § 1927 (2018).

146 In *DR Distributors*, plaintiffs argued that the court should invoke this statutory authority in order to impose sanctions, but the court refused to make use of this authority. DR Distribs., LLC v. 21 Century Smoking, Inc., 513 F. Supp. 3d 839, 951–52 (N.D. Ill. 2021).

147 *See* Neumeier & Hansen, *supra* note 43, at 3; Willoughby et al., *supra* note 64, at 799; Schaefer, *supra* note 20, at 16; Grimm, *supra* note 62, at 12. *See also* Hodge v. Wal-Mart Stores, Inc., 360 F.3d 446, 449 (4th Cir. 2004) ("The imposition of a sanction . . . for spoliation of evidence is an inherent power of federal courts . . . ."). For more examples of courts using their inherent authority to impose sanctions on attorneys, see Bruner v. City of Phoenix, No. CV-18-00664, 2020 WL 554387, at *6 (D. Ariz. Feb. 4, 2020); Brown v. SSA Atlantic, LLC, No. CV419-303, 2021 WL 1015891, at *2–4 (S.D. Ga. Mar. 16, 2021); Steward v. Steward, 529 B.R. 903, 913–14 (Bankr. E.D. Mo. 2015).

148 Willoughby et al., *supra* note 64, at 799–800 (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991)).

149 Schaefer, *supra* note 44, at 16, 31.

the need to refer the misconduct to the state's disciplinary process, which would require satellite litigation.[150] This is a huge benefit, but the problem with courts using their inherent authority to impose sanctions is that the FRCP expressly prohibits it. According to the 2015 Amendment, Rule 37(e) "forecloses reliance on inherent authority or state law to determine when certain measures should be used."[151] Of course, as discussed below, Rule 37(e) only imposes sanctions against disobedient litigants, but it would be inconsistent for the FRCP to prohibit reliance on the court's inherent authority for *party* sanctions but permit reliance for *attorney* sanctions. Therefore, the recent trend is for courts to no longer turn to their inherent authority when they want to impose sanctions on attorneys.

D. Courts Have Relied on Other Sanction Rules in the FRCP

Instead, courts turn to the FRCP, which addresses e-discovery in several Rules. Rule 34 discusses document production in discovery, and the 2006 amendment clarified that a Rule 34 request for documents is "expansive" and "should be understood to encompass, and . . . should include [ESI]."[152] The Rule broadly includes ESI "stored in any medium," which is intentionally flexible to allow for future advances in technology.[153] Rule 37 is Rule 34's sibling rule[154] and identifies sanctions for parties who fail to comply with discovery requests.[155] Rule 37(a)(5) requires courts, upon granting a motion to compel discovery, to order the disobedient party (or that party's advising attorney) to pay reasonable expenses, including attorneys'

150 *Id.* at 30–31; *see also* Curtis, *supra* note 128, at 212; *supra* note 128 (listing examples of local district disciplinary rules that specify details for hearing processes).

151 FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment. *See also* NuVasive, Inc. v. Kormanis, No. 18CV282, 2019 WL 1171486, at *2 (M.D.N.C. Mar. 13, 2019) (stating that the court no longer has the ability to use its inherent authority when imposing sanctions).

152 FED. R. CIV. P. 34 advisory committee's note to 2006 amendment.

153 FED. R. CIV. P. 34; FED. R. CIV. P. 34 advisory committee's note to 2006 amendment.

154 Note that Rule 26(g)(3) also allows courts to impose sanctions for improperly certifying a document submitted to the court, Rule 11(c) permits sanctions for misrepresenting information to the court, and Rule 16(f) permits sanctions for failure to obey pretrial orders or other case management requirements. *See* FED. R. CIV. P. 26(g)(3); FED. R. CIV. P. 11(c); FED. R. CIV. P. 16(f). However, this Note will only focus on the FRCP sanctions in Rule 37, which specifically apply to discovery abuse.

155 Neumeier & Hansen, *supra* note 43, at 2. Rule 37 provides specific sanctions for specific discovery failures, but courts often take advantage of this power by using their broad discretion to impose other sanctions not explicitly mentioned in the FRCP, including adverse jury instructions, exclusion of evidence, or even a dismissal or default judgment. *Id.*

fees, incurred in making that motion to compel.[156] If a party fails to obey a court order compelling discovery, Rule 37(b)(2)(C) requires courts to order the disobedient party, the advising attorney, or both to pay reasonable expenses caused by the failure to obey.[157] Rules 37(d)(3) and 37(f) require similar sanctions for a party who fails to respond to depositions or answer interrogatories, or who refuses to participate in good faith in developing a discovery plan.[158] Rule 37(e), however, is the most important Rule, because it specifically addresses sanctions for e-discovery abuse, and it is also the authority that courts most often invoke when imposing sanctions.[159] It reads:

> (e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct 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, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.[160]

The 2015 amendment to Rule 37(e) clarifies that this Rule only applies when the "lost information should have been preserved in the anticipation . . . of litigation and the party failed to take reasonable steps to preserve it,"[161] but it doesn't apply to electronic information

156 FED. R. CIV. P. 37(a)(5).

157 FED. R. CIV. P. 37(b)(2)(C).

158 FED. R. CIV. P. 37(d)(3), 37(f).

159 *See, e.g.*, DR Distribs., LLC v. 21 Century Smoking, Inc. 513 F. Supp. 3d 839, 956 (N.D. Ill. 2021); *In re* Skanska USA Civ. Se. Inc., No. 20-CV-05980, 2021 WL 5226547, at *8 (N.D. Fla. Aug. 23, 2021); Mule v. 3-D Bldg. & Constr. Mgmt. Corp., No. CV 18-1997, 2021 WL 2788432, at *7–17 (E.D.N.Y. July 2, 2021); EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc., No. 12-cv-00463, 2018 WL 1542040, at *10–28 (M.D. Tenn. Mar. 29, 2018); NuVasive, Inc. v. Kormanis, No. 18CV282, 2019 WL 1171486, at *4 (M.D.N.C. Mar. 13, 2019); Black v. Costco Wholesale Corp., 542 F. Supp. 3d 750, 752–54 (M.D. Tenn. 2021).

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

161 FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment. *See supra* Part II (discussing the duty to preserve evidence).

that was destroyed but still can be found in a different location.[162] Subdivision (e)(2) specifically "authorizes courts to use specified and very severe measures to address . . . failures to preserve [ESI], but only on finding that the party . . . acted with the intent to deprive another party of the information[]."[163]

Notice several differences between the sanctions defined in Rule 37(e) and the sanctions in other sections of Rule 37. First, Rule 37(e) provides much more detailed information about what factors courts should consider when dealing with e-discovery spoliation. The Rule lays out a variety of sanctions that a court could impose, whereas the other subdivisions of Rule 37 only permit a court to order the payment of legal expenses and attorneys' fees. The detailed information of Rule 37(e), including the several pages of Advisory Committee Notes that follow, indicate that the drafters of the FRCP wanted to emphasize the importance of proper e-discovery conduct and warn parties, attorneys, and courts alike that e-discovery procedures were to be taken seriously.

Second, notice that the other subdivisions of Rule 37 require mandatory sanctions for the specified misconduct, but 37(e) uses the word "may," presumably granting the court more discretion in deciding whether to impose sanctions and what types of sanctions to impose. This is likely a sign that the drafters of the FRCP were trying to maintain flexibility in the ever-changing age of technology.

Finally, and mostly importantly, Rule 37(e) does not mention sanctions for attorneys; it only authorizes sanctions for the offending party. The other subdivisions of Rule 37 allow sanctions to be imposed on attorneys, the client, or both for specified misconduct, but 37(e) only imposes sanctions on clients. This seems to be an intentional omission. The directly adjacent subdivisions of Rule 37(e) include sanctions for attorneys, but this one subdivision doesn't mention it at all. Further, there isn't any explanation by the FRCP Advisory Committee for this omission, and it doesn't appear that any scholars have attempted to speculate as to why attorney sanctions are omitted

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

163 FED. R. CIV. P. 37(e)(2) advisory committee's note to 2015 amendment. The court's authority to impose such serious sanctions was slightly offset by what was previously Rule 37(f). The Rule prevented sanctions from being imposed "for loss of [ESI] resulting from the routine, good-faith operation of an electronic information system." FED. R. CIV. P. 37(f) advisory committee's note to 2006 amendment; FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment; *see also* Vargas, *supra* note 19, at 413. That "safe harbor" provision, as it was called, wasn't very effective, though, because it had a limited scope and therefore provided minimal protection for e-discovery losses. Willoughby et al., *supra* note 64, at 824. The Advisory Committee removed the Rule in the 2015 amendment, citing a failure to "adequately address[] the serious problems resulting from the continued exponential growth in the volume of such information." FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

in Rule 37(e). This omission likely explains why many courts only discuss *client* misconduct in cases of discovery abuse and suggest that the *client* is the one fully to blame for the spoliation. Courts often ignore the fact that the "primary cause of . . . spoliation . . . is the lawyer," who is in a much better position to understand the claims and defenses and know what steps to take to preserve pertinent information.[164] Yet lawyers rarely face liability for failing to preserve evidence, and the client is often penalized instead.[165] For example, in *Christou v. Beatport*, the defendant failed to take any action to preserve relevant text messages and later lost his mobile device.[166] The court mentioned counsel's incompetence by stating that "[a] commercial party represented by experienced and highly sophisticated counsel cannot disregard the duty to preserve potentially relevant documents when a case like this is filed," yet only imposed sanctions on the client.[167] The lead attorneys were never disciplined.[168] *In re Skanska*

164 Schaefer, *supra* note 44, at 620. *See also* NuVasive, Inc. v. Kormanis, No. 18CV282, 2019 WL 1171486, at *8, *16 (M.D.N.C. Mar. 13, 2019) (court focused on client's duty to preserve evidence and that the client "should have obtained appropriate advice" but completely ignored any discussion of the attorney's duty to proactively advise the client). Some courts do, though, raise eyebrows at egregious cases of intentional spoliation and wonder if the attorney may be at fault too. *See* Cedars-Sinai Med. Ctr. v. Superior Ct. of L.A. Cnty., 954 P.2d 511, 518 (Cal. 1998) ("The purposeful destruction of evidence by a client while represented by a lawyer may raise suspicions that the lawyer participated as well. Even if these suspicions are incorrect, a prudent lawyer will wish to avoid them and the burden of disciplinary proceedings to which they may give rise and will take affirmative steps to preserve and safeguard relevant evidence."); Browning, *supra* note 39, at 12 (when discussing the facts of *Crowe v. Marquette Transportation*, said, "While the record is silent as to any role played by [the plaintiff's] counsel, one would hope that the deactivation was instigated solely by the client himself. Even so, the case serves as a cautionary tale for lawyers who should visit with their clients and verify that independent 'clean-up' actions or account deactivation have not occurred.").

165 Schaefer, *supra* note 44, at 628. *See* Best Payphones, Inc. v. City of New York, No. 1-CV-3924, 2016 WL 792396, at *8 (E.D.N.Y. Feb. 26, 2016) (court blamed the attorney for failure to properly advise the client on what business records to keep, but only sanctioned the client); Mule v. 3-D Bldg. & Constr. Mgmt. Corp., No. CV 18-1997, 2021 WL 2788432, at *14, *17 (E.D.N.Y. July 2, 2021) (court mentioned the attorney's duty to inform the client about what information must be preserved and even imposed a monetary sanction on the attorney at the hearing to compel evidence, yet at the conclusion of the case only imposed sanctions only on the client and not on the attorney); Mosaid Techs. Inc. v. Samsung Elecs. Co., Ltd., 348 F. Supp. 2d 332, 339–40 (D.N.J. 2004) (the duty to preserve evidence "requires counsel to investigate . . . digital information, [and] to review with the client potentially discoverable evidence," yet the court only sanctioned the client and not the attorney).

166 Christou v. Beatport, LLC, No. 10-cv-02912, 2013 WL 248058, at *13 (D. Colo. Jan. 23, 2013).

167 *Id.* at *14.

168 The case mentions no sanctions or discipline for the attorneys. *Id.* Further, a search in the Colorado public discipline database indicated that the lead attorneys were

also discusses counsel's involvement in implementing a litigation hold and pointing out key players, yet the court ultimately only sanctions the client for its failure to suspend normal document retention practices that led to the destruction of cell phone data.[169] The *1100 West* court similarly imposed monetary sanctions on a party whose counsel failed to produce tens of thousands of responsive documents, but the attorneys themselves did not face any professional discipline.[170] In *Shaffer v. Gaither*, the court reprimanded both the plaintiff and her counsel for their "fail[ure] to take reasonable steps to preserve . . . texts," but the court didn't entertain any potential sanctions for the counsel's actions.[171] Further, there are very few instances where courts will sanction attorneys without also sanctioning clients.[172] And courts that do impose sanctions on attorneys usually only impose sanctions due to "a pattern of misconduct, not an isolated incident."[173]

IV. A NEW RULE ADDRESSING ATTORNEY SANCTIONS SHOULD BE ADDED TO THE FRCP

Given the ubiquity of electronic evidence, the many opportunities for e-discovery abuse, and the primary role of the lawyer in preserving that evidence, the lack of any uniform system to address attorney e-discovery misconduct is concerning.[174] Federal precedent indicates that there are so many ways for attorneys to abuse the discovery process, yet the current sources of authority for imposing sanctions don't appropriately address the problem. Each court has a different disciplinary procedure, most of which require another attorney or judge to first report misconduct, and then a hearing must follow, which is inefficient because it utilizes valuable court resources. The

never disciplined. *See Attorney Search and Disciplinary History*, COLO. SUP. CT. https://coloradosupremecourt.com/Search/AttSearch.asp [https://perma.cc/6EV6-8UXH].

169 *In re* Skanska USA Civ. Se. Inc., No. 20-CV-05980, 2021 WL 5226547, at *1, *3–4 (N.D. Fla. Aug. 23, 2021).

170 1100 West, LLC v. Red Spot Paint & Varnish Co., No. 05-cv-1670, 2009 WL 1605118, at *9, *11, *35 (S.D. Ind. June 5, 2009). *See also* Schaefer, *supra* note 20, at 6.

171 Shaffer v. Gaither, No. 14-cv-00106, 2016 WL 6594126, at *2 (W.D.N.C. Sept. 1, 2016).

172 Schaefer, *supra* note 44, at 628; Willoughby et al., *supra* note 64, at 818.

173 Willoughby et al., *supra* note 64, at 818. *See In re* Gilly, 976 F. Supp. 2d 471, 478–79 (S.D.N.Y. 2013) and *In re* Filosa, 976 F. Supp. 2d 460, 465–69 (S.D.N.Y. 2013) (an associate and partner were disciplined for their discovery misconduct, but also because they made fraudulent misrepresentations to the court, engaged in intentionally deceptive misconduct, and failed to correct false testimony).

174 Additionally, private lawsuits cannot solve the issue because attorneys generally cannot sue opposing counsel for discovery abuse, and clients rarely sue their own attorneys for malpractice based on e-discovery abuse. *See* Schaefer, *supra* note 20, at 27; Schaefer, *supra* note 44, at 628.

various state systems in place also lead to great inconsistencies across similar cases.[175] The FRCP does address sanctions for discovery in many Rules, but doesn't authorize courts to impose sanctions on attorneys under the specific ESI Rule. The same Rule also prevents courts from using their inherent authority to impose sanctions. The lack of a uniform system then leads to a lack of reporting and a lack of uniformity in the imposition of sanctions. Many lawyers get away with their misconduct as a result. It's also likely that courts aren't sanctioning attorneys because there is no framework with which to guide their sanctions and to remind them about attorneys' obligations in e-discovery. "Courts . . . are reluctant to sanction counsel . . . [b]ut when they abuse the system . . . it is unfair to complying parties not to sanction the violators."[176] Something must address this problem.

A new Rule should be adopted to give notice to all interested parties of an attorney's duties in e-discovery. A new Rule defining a framework for attorney sanctions would also provide predictability, uniformity, and efficiency. Predictability is needed so that courts, parties, and attorneys alike know what obligations they have in e-discovery and what sanctions to expect for various abuses. Uniformity will then serve the goal of predictability, because knowing that sanctions are similar across all federal districts will allow attorneys to know what sanctions might be imposed. Finally, efficiency is needed to prevent satellite litigation and disciplinary proceedings after the misconduct is reported that take up valuable court resources.

A. Proposing a New Rule to Add to the FRCP

Since the FRCP has successfully addressed the imposition of sanctions for clients who abuse the discovery process, it only makes sense for the FRCP to also address attorney sanctions for the same misconduct.[177] Because ESI is so important to discovery, and because attorneys play such a major role in the discovery process, the FRCP should add a Rule authorizing the court to impose sanctions on attorneys who act improperly in e-discovery. Adding a new Rule to the FRCP is the best solution because it allows for predictability, efficiency, and uniformity in federal courts. The following proposed Rule provides predictability because it specifies a test for federal courts to

175 *See supra* Part III (discussing state court disciplinary systems and their shortcomings).

176 DR Distribs., LLC v. 21 Century Smoking, LLC, 513 F. Supp. 3d 839, 862 (N.D. Ill. 2021).

177 *See supra* Part III.

use when deciding whether to impose sanctions.[178] Although the test is broad and leaves room for interpretation in its application, it is still narrow enough for judges to know what to look for when imposing sanctions, and it enables attorneys to know what process the judge will go through when deciding whether to impose sanctions. This proposed Rule also provides uniformity, because all federal courts will now be applying this same standard and analyzing the same factors, instead of following whatever disciplinary procedures the state courts have implemented. Finally, this proposed Rule provides for much more efficiency in imposing sanctions because it permits the court in the pending case to impose sanctions without referring the attorney to the state disciplinary body for further proceedings on the violation.

What follows is the new proposed Rule: FRCP 37(g).

> (g) Attorney's Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost
>
> (1) because an attorney failed to adequately advise the party to take reasonable steps to preserve it, the court may, after considering the prejudice to the moving party, willful intent to deprive, any history of misconduct, effectiveness of sanctions, and any other aggravating factors:
>
> (A) order the attorney to pay reasonable expenses, including attorneys' fees, no greater than necessary to cure the prejudice against the other party;
>
> (B) order the attorney to submit a new discovery plan to the court;
>
> (C) order the attorney to submit an affidavit to the court describing the attorney's discovery compliance efforts; or
>
> (D) impose any other sanction the court may deem appropriate;
>
> (2) because an attorney advised a client to alter or destroy relevant evidence with the intent to deprive another party of the information's use in the litigation, the court may:
>
> (A) hold the attorney in contempt;

178 Ideally, this Rule would be even more specific, but it's currently drafted with broad language to maintain flexibility for applicability to various facts and circumstances in future cases. It also uses broad language to remain consistent with Rule 37(e), which it is based on.

(B) refer the attorney to the proper state disciplinary body with a recommendation for temporary suspension;

(C) in the most egregious cases, refer the attorney to the state disciplinary body with a recommendation for disqualification and disbarment; or

(D) impose any other sanction the court may deem appropriate.

There are several things to note about this proposed Rule. First, the intent of this Rule is to be used in combination with 37(e), so that when an attorney is at fault for e-discovery spoliation, the court is authorized to impose sanctions on both the client and the attorney. Second, the Rule addresses both intentional and negligent spoliation and creates different factors to consider and different sanctions to impose for each type of spoliation, depending on the severity of the misconduct. Third, subsections 37(g)(2)(B) and (C) require federal judges to recommend suspension and disbarment to the appropriate disciplinary body, because disciplinary actions must still go through the state system for recordation and other administrative matters. A recommendation also allows the sanctioned attorney an opportunity to appeal the decision before the disciplinary body, and allows that disciplinary body to launch a new investigation if deemed necessary. This seems to present the same issue of too much satellite litigation, but this new Rule won't require a report of misconduct or a separate hearing on the misconduct. The court in the pending case will be able to immediately review evidence of misconduct, conduct a hearing, and make a recommendation to the appropriate disciplinary body. The state disciplinary board will choose whether to impose the sanction but can request a new hearing if appropriate.

Finally, this Rule will also make a statement about the principles of the legal profession, emphasizing the fact that it actually does take e-discovery misconduct seriously by imposing sanctions for those who act wrongly and dishonestly.[179] "The imposition of sanctions is a serious matter and should be approached with circumspection. An attorney's name and reputation are his [or her] stock in trade and thus any unfair or hasty sullying of that name strikes at the sanctioned attorney's livelihood."[180] Applying this Rule will allow courts to make careful, reasoned sanctioning decisions, considering all relevant factors—rather than unfair or hasty sanctions.

179 Schaefer, *supra* note 20, at 34.

180 DR Distribs., LLC v. 21 Century Smoking, LLC, 513 F. Supp. 3d 839, 862 (N.D. Ill. 2021) (quoting Hart v. Blanchette, No. 13-CV-6458, 2019 WL 1416632, at *28 (W.D.N.Y. Mar. 29, 2019)).

This proposed Rule may, admittedly, violate the Rules Enabling Act (REA), which authorizes the Supreme Court "to prescribe general rules of practice and procedure" so long as "[s]uch rules [do] not abridge, enlarge or modify any substantive right."[181] Although the Court has never invalidated a Federal Rule because it violated the REA, portions of proposed Rule 37(g) may be venturing into an abridgement of substantive rights, if they impose any enforceable obligations on attorneys beyond sanctions within a case.[182] However, any potential violation of the REA is easily avoided if Congress itself enacts 37(g), rather than leaving it to the Supreme Court to adopt an amendment to the FRCP.

B. Other Solutions Have Been Suggested, But They Are Inadequate

Another scholar, Paula Schaefer, has written several articles on attorney misconduct in discovery, and she has suggested several solutions to minimize such misconduct.[183] Those solutions include (1) discussing discovery expectations in the pretrial conference; (2) mandating a discovery training for judges and their staff; (3) requiring violating attorneys to attend a continuing legal education training on discovery; (4) amending local disciplinary rules; or (5) mandating disciplinary referrals.[184] However, each of these suggestions fall short of fully solving the problem.

1. Discovery expectations and potential sanctions should be discussed in the pretrial conference.

The first suggestion involves attorneys discussing discovery expectations and sanctions for violating those expectations in the pretrial conference. FRCP 16 governs case management and suggests that courts order attorneys to attend a pretrial conference to address miscellaneous matters.[185] Perhaps in these pretrial conferences, judges should discuss general expectations and obligations of attorneys throughout the discovery process and any sanctions that will be imposed for violating those obligations.[186] Any such discussions should

181 28 U.S.C. § 2072(a)–(b) (2018).

182 *See* A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. REV. 654, 657, 672–73 (2019). Since the Court has never invalidated a Rule on the basis of the REA, the Court has never had the opportunity to address exactly what the Act prohibits. *Id.* It is not desired that proposed Rule 37(g) give the Court such an opportunity.

183 *See* Schaefer, *supra* note 20; Schaefer, *supra* note 44; Paula Schaefer, *"Trust Me" Versus Transparency in Civil Document Discovery*, 50 U. TOL. L. REV. 491 (2019).

184 Schaefer, *supra* note 20, at 34.

185 FED. R. CIV. P. 16(a).

186 Schaefer, *supra* note 20, at 35–37.

then be memorialized in the mandatory scheduling order that courts must issue at the beginning of the case.[187] Although this suggestion addresses sanctions before discovery has commenced, which provides predictability for all involved parties, it still leaves a huge gray area because it's a solution that lacks uniformity. Courts still have no guidance on what sanctions should be imposed and for what types of misconduct. It's likely that each scheduling order discussing attorney sanctions would define different sanctions for similar misconduct. Further, it shouldn't be left to judges to inform attorneys of ethical obligations in discovery. At the very least, attorneys should already know that they shouldn't be abusing the e-discovery process, and judges shouldn't be expected to discuss such obvious baseline expectations during case management.

2. Judges and their staff should take a continuing legal education program on discipline.

Another suggestion requires judges, their clerks, and their support staff to attend a continuing legal education program to learn about discipline for discovery misconduct.[188] A program like this would "include the basics regarding applicable professional conduct rules, reporting rules applicable to judges, and the court's discipline system."[189] However, this solution poses the same concern as the previous suggested solution: judges and their staff should not be the ones to turn to for e-discovery misconduct. The focus should be on attorneys and their bad behavior. If anything, attorneys should be the ones to take a continuing legal education program on discipline, not judges and their staff. Further, this solution lacks predictability, efficiency, and uniformity. It would still lead to satellite litigation, and it still doesn't provide any guidance to judges on what sanctions may be imposed for different types of misconduct. Once guidance is provided (such as, for example, by a new FRCP Rule), then perhaps an educational program like this would be helpful. But until a uniform system is adopted, mere education won't adequately address the problem.[190]

187 *Id.* at 37.

188 *Id.* at 38.

189 *Id.*

190 Beyond skirting the actual problem of lawyer misconduct, this suggested solution could face constitutional barriers. In general, federal judges value their independence and fear that additional requirements violate separation of powers. *See* James V. Grimaldi, Joe Palazzolo & Coulter Jones, *Judges Held Off Congress's Efforts to Impose Ethics Rules—Until Now*, WALL ST. J. (Dec. 23, 2021, 11:03 AM), https://www.wsj.com/articles/judges-held-off-congresss-efforts-to-impose-ethics-rulesuntil-now-11640275421 [https://perma.cc/GVU9-

3. Attorneys who violate e-discovery rules should attend a continuing legal education program.

A third suggestion proposes that attorneys who violate discovery rules should attend some sort of education program about discovery.[191] This program would be a "form of discipline" that would "provid[e] . . . opportunities to correct the types of mistakes that landed them [there]."[192] This is a strange suggestion, though, because it applies after the fact, after the bad deed has already been done. Any education program like this should instead be attended before the discovery abuse happens, to prevent it from happening, rather than after the fact. Further, this suggestion still lacks the uniformity, predictability, and efficiency that a good solution should provide. Once a framework for sanctions is adopted, though, education can perhaps be a type of sanction imposed under those defined guidelines.[193]

Further, a mere education program would simply not be as effective as defined discipline and sanctions would be.

> [T]he real, imminent prospect of discipline would impact a lawyer's personal interests, thus influencing how the lawyer interprets information and makes decisions about discovery conduct. It may only take the imposition of discipline in a case or two in the judge's court for the word to spread and attorneys to adjust their conduct.[194]

A system imposing discipline and sanctions, rather than one imposing an education program, would serve to remind attorneys that it is their responsibility to take the lead on discovery and do it correctly.[195]

4. Local disciplinary rules should be amended.

Perhaps each state's disciplinary procedures should be amended or re-written whole cloth to provide a simpler and clearer disciplinary process with fewer procedural barriers.[196] New procedures could even allow the court to address the misconduct "as part of a pending case rather than referring the case to the court's disciplinary system."[197]

KU8M] ("Separation-of-powers principles constrain lawmakers from enacting legislation that would affect how courts rule or undermine their lifetime appointments.").

191 Schaefer, *supra* note 20, at 39.

192 *Id.*

193 On a practical level, too, mandating a continuing legal education program would be challenging to enforce.

194 Schaefer, *supra* note 20, at 30.

195 *Id.* at 31.

196 *Id.* at 39.

197 *Id.*

This is not a bad suggestion, because it would provide more predictability for judges and attorneys. Amended rules that allow misconduct to be addressed in the pending case would also serve the goal of efficiency and would drastically decrease satellite litigations. However, merely amending state rules doesn't provide any uniformity. Unless all states adopt the same new disciplinary rules, it's likely that states that amend their disciplinary rules will all adopt different standards, which will continue to lead to different outcomes for similar cases across districts. Imposing sanctions that could impact an attorney's life and "livelihood" by threatening real-life consequences will hopefully incentivize attorneys to conduct themselves appropriately in the discovery process.[198]

5. Disciplinary referrals for attorney misconduct should be mandated.

A final solution suggests that judges must refer attorneys to the state disciplinary authorities whenever an attorney abuses the discovery process, or when an attorney is actually sanctioned.[199] The issue with this solution is "deciding what conduct should trigger mandatory reporting under an amended rule."[200] States could specify exactly what conduct would trigger reporting, but this again leads to disuniformity and a likelihood that each state defines triggering conduct in a different way. Further, it necessarily leads to satellite litigation, which contradicts the goal of efficiency.

C. Addressing Arguments Against Imposing a Uniform System of Attorney Sanctions

Some scholars have voiced concerns about imposing a system to sanction attorneys for misconduct. They argue that too much discipline will cause attorneys to be cautious—to the detriment of their client. Or, discipline will increase discovery costs. And if electronic information can often be recovered, why is a disciplinary system necessary at all? Others believe e-discovery spoliation happens so infrequently that it's not worth adopting a new standard addressing it. These objections, however, ignore the seriousness of attorney involvement in e-discovery spoliation.

198 *Id.* at 32.

199 *Id.* at 41–42; *see supra* Part III (listing the authorities that courts have used in the past to impose sanctions on attorneys).

200 Schaefer, *supra* note 20, at 41.

1. Discipline will cause attorneys to be more cautious in their work.

"Some may be concerned that discipline for discovery misconduct could cause some attorneys to be overly cautious in their advocacy, to the detriment of their clients."[201] This concern, however, is meritless because any attorney engaging in e-discovery misconduct is certainly not being a good advocate, and any misconduct is certainly a detriment to their clients. "Such conduct has never been recognized as appropriate advocacy."[202] If anything, sanctions should have the opposite effect of deterrence and spurring attorneys to be more careful in their work to be better advocates for their clients.

2. There is no point in addressing spoliation of ESI when the information is recoverable.

Since it is difficult to truly delete electronic evidence forever, much destroyed or altered evidence can still be recovered.[203] However, even if evidence can be recovered, the point is not the recoverability of the evidence; the point is that the evidence was destroyed or altered in the first place. The ultimate issue is attorney involvement in the spoliation of evidence, and that needs to be addressed, regardless of whether the original evidence can be recovered. It is therefore important to ensure that attorneys are properly sanctioned and deterred from abusing the discovery process in the next case. A uniform system granting courts clear authority to sanction attorneys for e-discovery abuse would easily address this issue.

3. A new rule authorizing sanctions will increase discovery costs.

A new federal Rule authorizing sanctions may scare parties into over-preserving information, leading to skyrocketing discovery costs. Admittedly, this is a real concern.[204] However, the hope is that a new Rule authorizing attorney sanctions will remind attorneys of their obligation to stay up-to-date on technological developments and understand their clients' IT systems so that they properly are preserving evidence and therefore avoiding sanctions. Any sanctions beyond the failure to preserve evidence, such as aiding in the destruction or altering of ESI, are certainly deserved and do not cause

201 *Id.* at 27.

202 *Id.* at 28.

203 Van Namen, *supra* note 31, at 562.

204 The best way to address increased discovery costs probably involves arguing for more specific discovery requirements in FRCP 26 or requiring courts and attorneys to discuss discovery more clearly in the pretrial conference and the scheduling order. Such a discussion, however, is beyond the scope of this Note.

increased discovery costs. The only potential for increased discovery costs comes with the failure to properly preserve evidence, which will hopefully not be a problem if attorneys are reminded in this Rule of their obligation to fully understand clients' IT systems.

4. Attorney e-discovery misconduct is so rare that it is not worth creating a new rule to address it.

This argument is a misconception. Examples of attorney misconduct are many.[205] The examples only grow if one considers the fact that attorneys are ultimately responsible for all aspects of e-discovery and preservation of evidence, so almost any e-discovery misconduct by the client will also mean that there was misconduct by the attorney.[206] Almost any failure to properly preserve evidence, even if directly traceable to the client's conduct, is still the lawyer's responsibility, so the client should not be the only one bearing any sanctions for such misconduct.[207] Further, understanding the recent growth of technology and the prevalence of ESI means greater opportunities for misconduct that will create a big problem if not addressed. Maybe this means that the system should be more lenient on attorneys because ESI is too changeable and too easy to mishandle. This is not a convincing argument, though, when argued in light of the obligation attorneys have to understand technology and competently handle ESI.[208]

Even though there is plenty of caselaw illustrating e-discovery abuse, there are likely many more examples of attorney misconduct that are not made public. This may be because under the current regime, other attorneys and judges are relied on to report any misconduct, but attorneys are hesitant to file such reports.[209] Additionally, attorney discipline is a rather private matter, and any complaints that are made are often made confidentially, so it's

205 *See supra* Part II.

206 *See id.*

207 This is not to say, however, that there are no cases where it's appropriate to sanction only the client for an e-discovery violation that had nothing to do with the lawyer. A lawyer should not automatically be sanctioned for every instance of e-discovery abuse; a court must still go through the framework defined by 37(g) to determine whether sanctions for attorneys are appropriate in each case. *See, e.g.*, Resnik v. Coulson, No. 17-CV-676, 2019 WL 1434051, at *3 (E.D.N.Y. Mar. 30, 2019) (In this case, a lawyer wasn't sanctioned because it was the client alone who chose to download several data wiping programs, which resulted in a deletion of evidence. Under the 37(g) framework, the lawyer also would not have been sanctioned, since he played no part in the spoliation of evidence.).

208 *See supra* Part II (discussing attorney obligations in ESI).

209 *See supra* Part III.

impossible to see the full picture of all disciplinary actions.[210] Ultimately, because there's no uniform system available to handle misconduct, it's not hard to imagine that some misconduct goes unreported.

CONCLUSION

At the end of the day, "electronic discovery, and the facts it brings to light, is worth protecting."[211] With new technology comes new discoverable evidence and new opportunities for e-discovery misconduct. An attorney must respond to these changes by being proactive in preserving relevant data when litigation is reasonably anticipated, and any failure to properly preserve data or to properly counsel the client about how to preserve ESI falls squarely on the lawyer. However, courts have been reluctant to impose sanctions for attorneys because they do not have any reliable source of authority to base those sanctions on. The local rules are inconsistent, the FRCP does not authorize courts to impose sanctions on attorneys for e-discovery misconduct, and courts can no longer use their inherent authority. The best solution that would provide notice, predictability, efficiency, and uniformity to the federal court system is to add a Rule to the FRCP, the system all federal courts have followed since the 1930s.

210 Schaefer, *supra* note 20, at 19–20.

211 Milberg LLP & Hausfeld LLP, *supra* note 18, at 135.