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Jung Won Jun

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Cover Page Footnote

Associate Professor in the College of Law at Kookmin University, Seoul, Korea. Member of Georgia, New York, and New Jersey state bars.

THE FEDERAL RULE OF CIVIL PROCEDURE 37(E) AND ACHIEVING UNIFORMITY OF CASE LAW ON SANCTIONS FOR ESI SPOLIATION: FOCUSING ON THE "INTENT TO DEPRIVE" CULPABILITY UNDER RULE 37(E)(2)

Jung Won Jun[+], *Rockyoun Ihm*[++]

In modern society, massive and ever-increasing quantities of data are being generated every day. Therefore, potential parties are under great pressure to

[+] Associate Professor in the College of Law at Kookmin University, Seoul, Korea. Member of Georgia, New York, and New Jersey state bars.

[++] Ph.D. candidate, Seoul National University School of Law.

spend extraordinary resources to store and maintain data that may be relevant in potential litigation. In light of the inconsistent case law among the federal circuit courts' imposition of sanctions for a loss of electronically stored information (hereinafter "ESI"), and in order to reduce the overwhelming economic burden for prospective litigants in their efforts to over-preserve potentially relevant ESI out of fear of sanctions, the new Rule 37(e) was adopted through the 2015 amendments to the Federal Rules of Civil Procedure, which became effective as of December 1, 2015.[1]

This Article examines whether the new Rule 37(e) has successfully achieved one of its primary goals, which is establishing a uniformity in federal case law on imposition of sanctions for the loss of ESI.[2] In particular, this Article limits its examination to the courts' imposition of the more severe sanctions available under Rule 37(e)(2). In doing so, Part I introduces the new Rule 37(e), as well as its intended goals, and Part II discusses the significantly inconsistent federal case law that developed post-2015 amendments with respect to courts' conclusions on whether to impose severe sanctions after applying the new Rule 37(e)(2). In particular, the lack of a consistent standard applied by the courts in determination of spoliators' "intent to deprive" under Rule 37(e)(2), and the unclear role that the courts' inherent authority plays in such determinations, are discussed in detail through case analyses. Then, in Part III, the authors propose establishing and consistently applying a clear, stringent "intent to deprive culpability" standard, which requires a heightened showing of an intentional action taken by the spoliator to destroy the relevant ESI, and supporting evidence shedding light on the spoliator's motivation to deprive another party of the use of the evidence. This standard would promote uniformity in case law on imposition of severe sanctions under Rule 37(e)(2). Part IV contains concluding remarks.

I. THE NEW RULE 37(E), ADOPTED BY THE 2015 AMENDMENTS, AND ITS INTENDED GOALS

"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."[3] The purposes underlying spoliation sanctions have been to "deter parties from engaging in spoliation, [to] place the risk of an erroneous judgment on the party who wrongfully created the risk, and

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

2. *Rep. to Standing Comm.*, Advisory Comm. on Civ. Rules 35 (May 2, 2014) ("Two goals have inspired [new Rule 37(e)] work. One has been to establish greater uniformity in the ways in which federal courts respond to a loss of ESI . . . . The other goal has been to relieve the pressures that have led many potential litigants to engage in what they describe as massive and costly over-preservation.").

3. West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999).

[to] restore the 'prejudiced party to the same position [it] would have been in absent the wrongful destruction of evidence by the [spoliator] party.'"[4]

Before any court applies Rule 37(e), "Failure to Preserve Electronically Stored Information," the following must be satisfied: 1) the ESI "that should have been preserved in the anticipation or conduct of litigation is lost [2)] because a party failed to take reasonable steps to preserve it, and [3)] it cannot be restored or replaced through additional discovery."[5] If all three elements are satisfied, then the court may determine whether sanctions pursuant to Rule 37(e)(1) and/or 37(e)(2) apply.[6] The Rule makes clear that sanctioning measures should be "no greater than necessary[,]" and therefore, "only upon [a] finding [of] intent to deprive" are the more severe sanctions—such as an adverse inference that either the court or the jury may "presume the lost information was unfavorable to the [spoliator] party" or dismissal of the case—allowed under Rule 37(e)(2).[7]

Prior to the 2015 amendments, there was a split of authority among the circuit courts on imposition of severe sanctions for spoliation. The Second Circuit granted adverse inference jury instructions based on the spoliator's negligence or gross negligence, while others, such as the Tenth Circuit, required a bad faith showing before granting adverse inference instructions.[8] Therefore, the amendments were intended to eliminate the circuit split and thereby promote uniformity of case law among the federal courts.[9] Another goal that the amendments sought to achieve was to relieve the excessive burden on potential litigants from over-preservation of documents and records out of fear of

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4. *Id.* at 779 (quoting Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998).

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

6. *Id.* The following is the full text of the new Rule 37(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.

Id.

7. *Id.* at (e)(1)–(2).

8. *Compare* Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002) *with Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997).

9. *Rep. to Standing Comm.*, Advisory Comm. on Civ. Rules 42 (May 2, 2014) ("A primary purpose of [the proposed 37(e)(2)] is to eliminate the circuit split on when a court may give an adverse inference jury instruction for the loss of ESI.").

spoliation sanctions.[10] Clear interpretations of and consistent applications of the new Rule 37(e) by the courts would enhance the predictability of case outcomes and promote uniformity in resulting case law. Consequently, litigants and potential parties may be able to have appropriate expectations regarding sanctionable spoliation conduct, as well as their duties to preserve relevant ESI.

According to the Advisory Committee Notes (hereinafter "Committee Notes") on the new Rule 37(e), because the Rule "authorizes and specifies measures a court may employ if information that should have been preserved is lost," the Rule "forecloses" courts' "reliance on inherent authority or state law to determine when certain measures should be used."[11] An intention to "foreclose [courts'] reliance on inherent authority or state law[,]" and adhere instead to the Rule in reaching their decisions to impose sanctions, is consistent with the goal of promoting uniformity of case law on courts' imposition of sanctions for spoliation.[12]

However, some commentators have been critical of the weight that has been given to the Committee Notes, as they are explanations to aid in interpretation of the Rule(s), and not part of the text of the Rule(s). Therefore, some critics have argued that the focus should be limited to the actual text of the Rule(s), as only those have been authoritatively adopted and not the explanatory comments on the Rule(s).[13] It is further contended that because the text of Rule 37(e) does not refer to courts' inherent power or authority at all, it "may be invoked to fill any remaining interstices where the statute or rule is not 'up to the task,'" and moreover, it "may be exercised even where it conflicts with a statute or rule, [if] necessary to protect a core judicial function."[14] This contention is in direct conflict with the Committee Notes on Rule 37(e).

Lastly, Rule 37(e)(2) aims to narrow the requisite level of culpability based on which of the more severe sanctions, like adverse inferences, may be granted.[15] However, the problem is that the "intent to deprive" standard in Rule 37(e)(2) is ambiguous because there is no clear definition or explanation as to what constitutes or satisfies such culpability. Additionally, many courts still rely on findings of bad faith, and/or lack thereof, without any supporting reasons or authority for this reliance, and despite the fact that bad faith does not appear anywhere in the text of Rule 37.[16] Furthermore, courts have not elaborated on

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10. *See* supra note 2.

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

12. *Id.*

13. Hon. James C. Francis IV & Eric P. Mandel, *Limits on Limiting Inherent Authority: Rule 37(e) and the Power to Sanction*, 17 SEDONA CONF. J. 613, 644–45 (2016).

14. *Id.* at 643.

15. *Rep. to Standing Comm.*, Advisory Comm. on Civ. Rules 42 (May 2, 2014) ("Subdivision (e)(2) resolves the circuit split by permitting adverse inference instructions only on a finding that the party 'acted with the intent to deprive another party of the information's use in the litigation.' This intent requirement is akin to bad faith, but is defined even more precisely.").

16. *See* discussion *infra* Section II.B.

the significance of bad faith findings (or lack thereof) in determinations of the spoliator's intent to deprive another party of the use of the evidence in litigation. Therefore, Part II will examine in detail the inconsistent case law established by the federal courts in their application of Rule 37(e)(2).

II. THE INCONSISTENT FEDERAL CASE LAW ESTABLISHED THROUGH COURTS' APPLICATION OF THE NEW RULE 37(E)(2)

A. The Lack of a Consistent Standard Applied by the Courts in a Finding of "Intent to Deprive" Under Rule 37(e)(2)

An examination of case law produced by courts' application of the new Rule 37(e) demonstrates that they have established neither a clear standard nor a consistent way of determining the spoliators' "intent to deprive" under Rule 37(e)(2). Commentators note that, while the culpability required under Rule 37(e)(2) is "akin to bad faith, but is defined even more precisely,"[17] it remains unclear whether a showing of recklessness is sufficient to satisfy this requirement.[18] For instance, within the state of New York alone, case law has not revealed consistent direction on courts' imposition of sanctions for spoliation because courts have applied different standards to find the spoliator's intent to deprive another party of the use of the evidence.[19] Some courts have adhered to a relatively narrow standard that if a party had failed to take reasonable steps to preserve relevant ESI despite its duty to do so, then the court would find that the party had an intent to deprive another party of such ESI, either from direct or circumstantial evidence.[20] Applying this narrow standard, some courts have held "a party's conscious dereliction of a known duty to preserve electronic data is both necessary and *sufficient* to find that the party 'acted with the intent to deprive another party of the information's use.'"[21] Similarly, courts have found

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17. *Rep. to Standing Comm.*, Advisory Comm. on Civ. Rules 42 (May 2, 2014) ("[A]dverse inference instructions . . . historically have been based on a logical conclusion—when a party destroys evidence for the purpose of preventing another party from using it in litigation, one reasonably can infer that the evidence was unfavorable to the destroying party.").

18. Robert Keeling, *Sometimes, Old Rules Know Best: Returning to Common Law Conceptions of the Duty to Preserve in the Digital Information Age*, 67 CATH. U. L. REV. 67, 100–01 (2018) ("In articulating this [intent to deprive] standard, the Advisory Committee believed the requirement of 'bad faith' adopted in numerous circuits to be 'too restrictive.' The Committee also rejected the Second Circuit's position that 'negligence' or 'gross negligence' was enough for severe sanctions. Between the two standards, the Advisory Committee's notes leave some ambiguity as to what will count as enough. For example, despite numerous comments questioning whether recklessness would be sufficient under the rule, the Committee remained silent.").

19. *See, e.g.*, Ungar v. City of New York, 329 F.R.D. 8 (E.D.N.Y. 2018); Moody v. CSX Transp., Inc., 271 F. Supp. 3d 410 (W.D.N.Y. 2017); CAT3, LLC v. Black Lineage, Inc., 164 F. Supp. 3d 488 (S.D.N.Y. 2016); Karsch v. Blink Health Ltd., No. 17-CV-3880 (VM) (BCM), 2019 U.S. Dist. LEXIS 106971 (S.D.N.Y. Jun. 20, 2019); Hsueh v. N.Y. State Dep't of Fin. Servs., No. 15 Civ. 3401, 2017 U.S. Dist. LEXIS 49568, (S.D.N.Y. Mar. 31, 2017).

20. Ungar v. City of New York, 329 F.R.D. 8, 13 (E.D.N.Y. 2018).

21. *Id.* (emphasis added).

it irrelevant "[w]hether the spoliator *affirmatively* destroy[ed] the data or *passively* allow[ed] it to be lost" in determining whether the spoliator had an intent to deprive under Rule 37(e)(2).[22] The court applied this narrow and specific culpability standard in *Moody v. CSX Transportation, Inc.*, where the defendant knew of the duty to preserve relevant ESI and still allowed "the original data on the event recorder to be overwritten, and destroyed or recycled [the crashed] laptop" that likely contained relevant information.[23] The court inferred that defendants had an intent to deprive because, in the period of four years, they failed to confirm whether "the data had been preserved in another repository."[24] This holding overreaches because, while one party acting unreasonably generally amounts to negligence or gross negligence, the *Moody* court inferred from the defendants' unreasonableness an intent to deprive another party of the use of the evidence; consequently, the court held that an

22. *Id. See also* Moody v. CSX Transp., Inc., 271 F. Supp. 3d 410, 428–29 (W.D.N.Y. 2017) ("[D]efendants allowed the original data on the event recorder to be overwritten and destroyed without ensuring that it had been appropriately preserved. Just as it would be unreasonable for a party preserving a paper file to copy it blindly, put it in a drawer without ever looking at it, and then destroy the original, so too was it unreasonable for defendants to upload the event recorder data to the Vault and not even look at the files to confirm that the appropriate data had been uploaded and was accessible. This failure is especially remarkable in view of the important and irreplaceable nature of the data at issue."). As a result, the court found an intent to deprive pursuant to Rule 37(e)(2). *Id.* at 429.

23. *Moody*, 271 F. Supp. 3d at 422–23, 431.

24. *Id.* at 431. The *Moody* court, in reaching its conclusion that an adverse inference was proper, cited to *Alabama Aircraft Industries, Inc. v. Boeing Co.*, in which a northern Alabama district court said that the spoliator party's "unexplained, blatantly irresponsible behavior [led] the court to conclude that [the defendant] acted with the intent to deprive [another party] of the use of [the evidence]." *Id.*; Ala. Aircraft Indus., Inc. v. Boeing Co., 319 F.R.D. 730, 746 (N.D. Ala. 2017). But in that case, the court inferred an intent to deprive from circumstantial evidence of bad faith of the spoliator, noting that Rule 37(e)(2) intent to deprive is "harmonious with the 'bad-faith' standard previously established by the Eleventh Circuit" on spoliation. *Ala. Aircraft Indus., Inc.*, 319 F.R.D. at 746 (citing Living Color Enters. Inc. v. Essent Healthcare, Inc., No. 14-cv-62216-MARRA/MATTHEWMAN, 2016 U.S Dist. LEXIS, at *6 (S.D. Fla. 2010)). In particular, because the ESI at issue had been intentionally destroyed by an affirmative act without credible justification, which is a deviation from the standard protocol, the court considered this a "type of unexplained, blatantly irresponsible behavior" and held that it was sufficient to conclude an intent to deprive the other party from using such information. *Id.* In addition, and of critical importance, there had been an agreement between the parties to extract the proprietary information at issue and to deliver it to the law department for proper preservation, but the spoliator party had violated this agreement by deliberately deleting such information without just explanations. *Id.* Based on this, the plaintiff alleged that the spoliator party used that proprietary information in revising its bid to reduce the price by $15 million without justification for the reduction. *Id.* at 744. The court likely found bad faith of the spoliator in *Alabama Aircraft Industries, Inc.* especially in light of this particular fact and consequently concluded that an adverse inference jury instruction was proper. *Id.* at 446. In other words, this analysis goes beyond the narrow standard of finding an intent to deprive based on the party's mere failure to take reasonable steps to preserve relevant ESI. However, the court in *Moody* did not conduct an analysis reaching beyond the narrow standard. *Moody*, 271 F. Supp. 3d at 431.

adverse inference instruction was warranted under Rule 37(e)(2).[25] But the Committee Notes make clear that Rule 37(e)(2) rejects the issuance of adverse inference instructions based on a finding of negligence or gross negligence by explicitly rejecting cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*,[26] decided by the Second Circuit.[27] Thus, the court's inference of the intent to deprive another party of the evidence, based solely on the party's failure to reasonably preserve the relevant ESI, raises serious questions as to the requirements needed in order to satisfy the "intent to deprive" culpability of Rule 37(e)(2). Where a court infers that the spoliator party had an intent to deprive another party of the use of the evidence in litigation by "passively allow[ing the ESI] to be lost" without an affirmative destruction of the relevant ESI,[28] the requisite state of mind of the spoliator appears to be closer to that of negligence, or at most, gross negligence, which should fall significantly short of an "intent to deprive" under Rule 37(e)(2).[29]

Similarly, in *O'Berry v. Turner*, which courts often cite to, a district court in Georgia found that the defendants had acted with an intent to deprive the plaintiffs of the ESI at issue based on what it determined was the defendants' "irresponsible and shiftless behavior."[30] Consequently, the court issued a mandatory adverse jury instruction.[31] Because the particular facts of each case are important when examining how courts have treated spoliators' conduct, the

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25. *Moody*, 271 F. Supp. 3d at 431.

26. Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002) (holding that "a party seeking an adverse inference instruction based on the destruction of [ESI] must establish (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed 'with a culpable state of mind'; and (3) that the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.") (quoting Byrnie v. Town of Cromwell, 243 F.3d 93, 107–12 (2d Cir. 2001)).

27. *See Rep. to Standing Comm.*, Advisory Comm. on Civ. Rules 39 (May 2, 2014).

28. Ungar v. City of New York, 329 F.R.D. 8, 13 (E.D.N.Y. 2018) ("Whether the spoliator *affirmatively* destroys the data, or *passively* allows it to be lost, is irrelevant; it is the spoliator's *state of mind* that logically supports the adverse inference.").

29. The Committee Notes clearly state

> that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have. The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.

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

30. O'Berry v. Turner, 7:15-CV-00075-HL, 2016 U.S. Dist. LEXIS 55714, at *13 (M.D. Ga. Apr. 27, 2016).

31. *Id.*

following is a factual summary. In *O'Berry*, the defendant employee, who was the former loss control manager of the defendant company, testified that

> when an accident occurred, his job was to print copies of the driver's log and any information collected on PeopleNet . . . . These documents were then kept in a manila folder, along with any additional documents related to the incident. Printing the driver's log and PeopleNet data did not require [the employee] to download any documents to his computer's storage—this information was printed straight from a website.[32]

He testified further that he was "not aware of any [company] policies that govern the collection process or storage of these accident files—it was simply a part of his job to print and store a single paper copy of these documents."[33]

With this particular accident on June 21, 2013, involving defendant Turner, the loss control manager printed Defendant Turner's driver log and PeopleNet data, placing it into a folder on his desk.[34] It stayed there until he "receive[d] additional documentation, including the accident report and any photographs taken at the scene. After a period of time, the folder was moved to a cabinet in his office, where it had been filed alongside manila folders documenting other incidents."[35] When the loss control manager received the spoliation letter of August 18, 2013, he "took no additional action to preserve . . . the information."[36] In preparation for an office move in November 2013, the loss control manager packed the contents of his office.[37] He soon took medical leave however, and the maintenance crew moved "the boxes containing the contents of his office to his new office . . . ."[38] After returning in January 2014, the loss control manager "unloaded the boxes, placing the manila folders into filing cabinets in his new office."[39] When, in January 2016, he "received a request for the manila folder containing information about [Turner's accident, he] became aware that he no longer had the manila folder. He then contacted PeopleNet to retrieve the lost information; however, PeopleNet had already deleted the relevant data pursuant to their document retention policy."[40]

The *O'Berry* court noted that "[a]t no point between August 2013 and January 2016 did [the loss control manager] receive any correspondence inquiring about or requesting information regarding this [particular] accident."[41] While the loss control manager testified that while "he had done everything in his power to

32. *Id.* at *5–6.
33. *Id.* at *5.
34. *Id.*
35. *Id.*
36. *Id.* at *5–6.
37. *Id.* at *6.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*

preserve the evidence [, he had] no explanation as to why the [relevant] manila folder [was] missing."[42] The court applied Rule 37(e) to this case and held that it was "simply irresponsible to print a single paper copy of the information which one has a duty to preserve . . . . At the very least, [the loss control manager] should have made additional efforts to ensure the preservation of these materials once the spoliation letter was received on August 18, 2013."[43] Because the defendant company "had no written policy on the proper procedure for preserving information that may be relevant in foreseeable litigation, at least not that [the loss control manager] was aware [of,]" the court held that the defendant company had "failed to ensure that these documents were maintained while in [its] sole possession."[44]

The court also noted that no one from the defendant company or defense counsel had contacted the loss control manager "about these documents or requested copies of documents until January 2016, despite numerous requests" from the plaintiff's counsel.[45] Consequently, the court held that, considering all the facts, "the loss of the at-issue ESI was beyond the result of mere negligence. Such "irresponsible and shiftless behavior" can only lead to one conclusion—that [the defendant company] acted with the intent to deprive [the plaintiff] of the use of [such] information at trial."[46] As a result, the court held that a mandatory adverse inference jury instruction was warranted, charging "the jury that it *must* presume that the lost information" had been unfavorable to the defendants.[47]

Here, the *O'Berry* court's finding of an intent to deprive seems to have been overreaching. It is unreasonable to require the loss control manager to undertake

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42. *Id.* at *7.

43. *Id.* at *12.

44. *Id.* at *13.

45. *Id.*

46. *Id.*

47. *Id.* at *14. This holding of a mandatory adverse inference jury instruction appears to be unnecessarily harsh given the facts, especially since the court's conclusion of finding intent to deprive may have been overreaching. While the decision to impose and choose appropriate sanctions are properly within the court's discretion, a *permissive* adverse inference jury instruction may have been more fitting under the circumstances. *See* Borum v. Brentwood Vill., LLC, 332 F.R.D. 38, 48–49 (D.D.C. 2019) (distinguishing *O'Berry* because the defendant company's rather weak retention policy did not rise to the level of "irresponsible and shiftless behavior" that the *O'Berry* court found). In declining to follow *O'Berry*, the *Borum* court held that—while it agreed the defendant company had "significantly inadequate record-keeping practices" and noted that the company "had some data restoration features in place for deleted e-mails, albeit with an unreasonably short recovery period[,]" these practices "alone [did] not satisfy the stringent standard [of the intent to deprive requirement] of Rule 37(e)(2)." *Id.* It should also be noted that in *Borum*, the defendant company had been late in issuing a litigation hold as well—the plaintiff filed suit on August 25, 2016, but the written litigation hold was not issued until May 30, 2018, so "[p]rior to this date, employees could delete company emails with only a limited 25-day recovery window[.]" *Id.* at 41, 46 (citations omitted). The court concluded that it was proper to treat these practices as "unreasonable," but that such practices fell short of manifesting an intent to deprive the other party of information in litigation. *Id.* at 46, 49.

additional steps to ensure that all relevant materials were still well-maintained in their respective manila folders and cabinets during an office move and absence from work.[48] While the absence of an adequate document preservation policy and the failure to contact the loss control manager for the ESI at issue, especially despite opposing counsel's numerous requests, may constitute negligence—and perhaps even gross negligence—such actions do not necessarily indicate that the defendants intended to deprive the other party of the information. Additionally, the record indicated that the loss control manager "contacted PeopleNet to retrieve the lost information" once he realized it was missing.[49] While the court made clear that it considered all the facts in concluding that the defendants "acted with an intent to deprive the other party of the information," perhaps the fact that no one reached out to the loss control manager regarding the information, especially in spite of numerous requests from plaintiffs' counsel, played a critical role in its conclusion.[50] All other actions, including the lack of additional efforts to ensure proper preservation of relevant ESI, amount to "irresponsible and shiftless behavior," which is generally considered negligent or grossly negligent conduct—falling short of the level of culpability required to satisfy Rule 37(e)(2).

Some courts in New York, as well as other states, have continued to rely on finding(s) of whether the spoliator acted in bad faith in their determinations of the spoliator(s)' intent to deprive another party of the evidence, despite the fact that the text of the Rule 37(e) does not require a bad-faith finding or even mention bad faith.[51] For instance, in *Resnik v. Coulson*, the court found that the defendant's conduct in "'actively download[ing' a] data-wiping software" on his computer just one day after the seizure of his devices had been ordered was intentional in the sense that it was a "purposeful attempt to destroy all evidence . . . ."[52] The court thus concluded that the defendant had acted with an "intent to deprive" the plaintiff of use of the evidence in terms of Rule 37(e)(2).[53] The court, however, did not go into any further analysis regarding the level of

48. *O'Berry*, 2016 U.S. Dist. LEXIS 55714, at *6.

49. *Id.* Even assuming the loss control manager took additional steps to preserve the information at issue—such as taking the particular manila folder out of the cabinet and separating it from all other accident reports—there is still no guarantee that it would have been better preserved in the midst of both the office move and his medical leave. Nonetheless, failure to take additional steps to preserve documents should amount to negligence or gross negligence at worst. Therefore, especially since the loss control manager most likely dealt with multiple incidents over a period of two to three years, the court's limitation of adverse inferences to the responsible defendant companies, and not against the other defendants, was reasonable. *See id.* at *14 (applying the adverse jury instruction to specified companies and "not to the other [d]efendants involved in [the] lawsuit").

50. *Id.* at *6.

51. *See* FED. R. CIV. P. 37.

52. Resnik v. Coulson, No. 17-CV-676 (PKC) (SMG), 2019 U.S. Dist. LEXIS 55199, at *11, *35–36 (E.D.N.Y. Mar. 30, 2019).

53. *Id.* at *35–36.

culpability beyond the defendant's affirmative and intentional destruction of evidence, but instead found that the destruction had been done in bad faith.[54] It subsequently held that the defendant had acted "with the intent to deprive [the plaintiff] of [the evidence's] use in litigation[,]" warranting more severe sanctions under Rule 37(e)(2).[55]

Finally, there has been yet another approach—which seems the most appropriate—by which the court requires the existence of a more particular and specific intent on behalf of the spoliator: "the intent to actually deprive another party of the evidence."[56] Hence, a mere intention "to perform an act that destroys [ESI]" is insufficient.[57] Accordingly, the court in *Karsch v. Blink Health Ltd.* rejected the defendants' contention that the intent to deprive should be inferred from the fact that the destruction of the server containing the relevant ESI took place weeks after the demand letter, and instead held that, while "Karsch failed to take reasonable steps to preserve [relevant] ESI" on the server, the court could not conclude that "he did so for the specific purpose of gaining an advantage in [the] litigation . . . ."[58] Moreover, the court noted that the law firm's status itself, without more, did not necessarily lead the court to conclude that its failure to preserve the ESI at issue was intentional in terms of Rule 37(e)(2).[59] Consequently, the court held that the law firm's "actual loss of the [devices]," coupled with its efforts to cover-up—including its false representations—demonstrated gross negligence but not a specific intent to deprive.[60] This court's reasoning—and holding—is significantly different from other federal courts in New York, discussed previously, which simply found an intent to deprive under Rule 37(e)(2) based on the spoliator party's failure to uphold its duty to reasonably preserve relevant ESI.[61]

Therefore, while such a narrow standard can produce more consistent case law, and a more specifically defined standard would not require the courts to exercise discretion in their findings, it is an inappropriate standard for courts to apply in finding an intent to deprive, given that severe sanctions may result. Thus, additional factors need to be considered to determine a party's negligence or gross negligence in satisfying the intent to deprive under Rule 37(e)(2), and a clear standard should be provided with sufficient details as to the necessary

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54. *Id.* at *7, *25–30.

55. *Id.* at *19, *35.

56. Karsch v. Blink Health Ltd., No. 17-CV-3880 (VM) (BCM), 2019 U.S. Dist. LEXIS 106971, at *59 (S.D.N.Y. Jun. 20, 2019). *Compare* CAT3, LLC v. Black Lineage, Inc., 164 F. Supp. 3d 488, 501 (S.D.N.Y. 2016) (drawing a reasonable inference that the plaintiffs "acted with the intent to deprive" based only on the intentional spoliation of emails and circumstantial evidence supporting the presumed benefit derived by manipulating the emails).

57. *Karsch*, 2019 U.S. Dist. LEXIS 106971, at *59.

58. *Id.* at *60, *62.

59. *Id.* at *72.

60. *Id.*

61. Even case law developed within the same geographical district (i.e., S.D.N.Y.) does not present a consistent line of reasoning or conclusions.

elements. Consistent applications of clear standards by the courts would result in more predictable and uniform case law.

B. The Courts' Unclear and Inconsistent Reliance on Their Inherent Authority to Sanction

While it may be appropriate and desirable for all courts to follow the Committee Notes, and thereby foreclose their reliance on inherent power in order to promote uniformity in case law as the court in *Borum v. Brentwood Village, LLC* explicitly did,[62] an examination of federal court cases across the nation has not revealed such a coherent or uniform finding. Some courts still rely on their inherent authority, concurrent with Rule 37(e), to sanction parties for their spoliation of ESI, while other courts insist on finding the spoliators' bad faith before imposing sanctions, albeit without explicitly invoking their inherent authority. All the while, at least one court has specifically rejected applying Rule 37(e) when addressing the issue of sanctioning spoliation of ESI.[63] The following subsections examine some of the notable cases that fall into each of these categories.

1. Cases in Which Courts have Applied Rule 37(e)(2) as Well as Their Inherent Authority to Address the Issue of Imposition of Sanctions for Spoliation of ESI

In *CAT3, LLC v. Black Lineage, Inc.*, the court held that while the new Rule 37(e) applied regarding the plaintiffs' intentional alteration of the emails at issue, the court could still exercise its inherent authority to remedy spoliation under the circumstances, even if the Rule did not apply.[64] The court stated that "[a] 'particularized showing of bad faith' is necessary to justify exercising [the court's inherent power,]" and that "[s]poliation designed to deprive an adversary of the use of evidence in litigation qualifies as bad faith conduct."[65] In holding so, the court discounted the Committee Notes' advice to "foreclose[] reliance on inherent authority" when it analyzed the applicability of its inherent power after

62. Borum v. Brentwood Vill., LLC, 332 F.R.D. 38, 42, 44 (D.D.C. 2019) (considering whether to impose sanctions under both the court's inherent power and Rule 37(e) and concluding that, because "the loss of electronic evidence stored on emails [fell] squarely within the scope of Rule 37(e)[,]" it should apply the Rule rather than its inherent power in the case of an employee who deleted her emails before leaving her employment about two months prior to the issuance of a written litigation hold).

63. Hsueh v. N.Y. State Dep't of Fin. Servs., No. 15 Civ. 3401, 2017 U.S. Dist. LEXIS 49568, at *10–11 (S.D.N.Y. Mar. 31, 2017).

64. CAT3, LLC v. Black Lineage, Inc., 164 F. Supp. 3d 488, 497–501 (S.D.N.Y. 2016) ("Thus, sanctions would be available under the court's inherent authority even if Rule 37(e) did not apply.").

65. *Id.* at 501. While the court held that it was reasonable to infer from the intentional spoliation of the emails that the intention was to manipulate the digital information for purposes of this litigation, and thereby found that the prerequisites of Rule 37(e)(2) were satisfied, it decided against imposing the more severe sanctions pursuant to Rule 37(e)(2). *Id.* at 502.

the court had already found that the Rule was applicable, and each of the threshold requirements of Rule 37(e) was satisfied.[66] Additionally, in *Yoe v. Crescent Sock Co.*, a United States District Court in Tennessee relied on *CAT3* for the proposition that "[s]anction[ing] authority for the loss of ESI may also derive from other sections of Rule 37 and possibly from the inherent power of a court."[67]

2. Cases in Which Courts have Relied on Findings of Bad Faith in Determining Spoliator's "Intent to Deprive" Under Rule 37(e)(2) Without Invoking Inherent Authority

As previously mentioned, in *Resnik v. Coulson* the court found that the defendant, who actively downloaded a data-wiping software on his computer just one day after the seizure of his devices was ordered, acted intentionally in the sense of a "purposeful attempt to destroy all evidence . . . ."[68] The court thus concluded that the defendant acted with an intent to deprive the plaintiff of use of the evidence under Rule 37(e)(2).[69] The court, however, confined its analysis of the defendant's culpability to his willful, intentional act in destroying the evidence to reach the conclusion that he acted with an intent to deprive the plaintiffs of its use in litigation.[70] At the same time, the court found that spoliation by the defendant had been in bad faith, and therefore the more severe sanctions pursuant to Rule 37(e)(2) were warranted.[71]

By the same token, other courts have relied on the lack of a spoliator's bad faith to decide against imposing sanctions available under Rule 37(e)(2). In particular, in *Virtual Studios, Inc. v. Stanton Carpet Corp.*, the court found that there was no question that the emails at issue had been lost for purposes of Rule 37(e), and that, if they had been available, it "would be helpful in evaluating the merits of the [p]arties' positions."[72] While the court held that "the loss of emails certainly [was] prejudicial" to the non-spoliator party, it "decline[d] to impose sanctions under Rule 37(e)(2), because Stanton [had] not shown that Virtual Studios acted in bad faith or with intent to deprive Stanton of the use of the

66. *Id.* at 497–98, 500 ("The emails are plainly 'electronically stored information.' There is no dispute that the plaintiffs were obligated to preserve them in connection with this litigation. As discussed above, information was 'lost' and cannot adequately be 'restored or replaced.' And the plaintiffs' manipulation of the email addresses is not consistent with taking 'reasonable steps' to preserve the evidence.").

67. Yoe v. Crescent Sock Co., No. 1:15-cv-3-SKL, 2017 U.S. Dist. LEXIS 187900, at *21 (E.D. Tenn. Nov. 14, 2017).

68. Resnik v. Coulson, No. 17-CV-676 (PKC) (SMG), 2019 U.S. Dist. LEXIS 55199, at *11, *21 (E.D.N.Y. Mar. 30, 2019).

69. *Id.* at *21, *27–30.

70. *Id.* at *11.

71. *Id.* at *14.

72. Virtual Studios, Inc. v. Stanton Carpet Corp., No. 4:15-CV-0070-HLM, 2016 U.S. LEXIS 195196, at *31 (N.D. Ga. Jun. 23, 2016).

information in this litigation."[73] The court did not elaborate as to why it was necessary to undertake a bad faith analysis to reach its conclusion, or articulate the grounds for finding a violation of Rule 37(e)(2) with actions taken either in bad faith or with an intent to deprive.[74] The court provided that "Virtual Studios could have taken greater care to preserve the information[,]" but such "evidence [only] indicate[d] that Virtual Studios was negligent or careless."[75] Consequently, as negligence does not rise to the requisite culpability to warrant severe sanctions under Rule 37(e)(2), the court declined to impose them.[76]

In addition, in *Schmalz v. Village of North Riverside*, the court noted that further evidence was required to find an "intent to deprive" under Rule 37(e)(2)—in addition to the defendants' testimony admitting that they had failed to preserve the ESI at issue while possessing a duty to preserve—because the testimony only rose to the culpability of gross negligence, which falls short of an intent to deprive.[77] This court also required a showing that spoliation was done in bad faith.[78] Nonetheless, the court was "disturbed that Defendants admit[ed] to failing to take *any* steps to identify and preserve the text messages in question despite having [had] a duty to preserve [them.]"[79] Moreover, the court found it more troublesome that one of the defendants was a lawyer, who should have known about "the significance of a litigation hold letter."[80]

Nevertheless, the court held that "absent additional evidence of deliberate intent to deprive Plaintiff of the use of the text messages [the] Defendants' behavior, while certainly constituting gross negligence, does not rise to the level of bad faith."[81] After concluding that the plaintiff failed to "present[ ] sufficient evidence to make a finding of willfulness or bad faith required to find intent," no adverse inference instruction pursuant to Rule 37(e)(2) was imposed.[82] The court distinguished other cases in which courts found that spoliators engaged in bad faith.[83] For instance, the court distinguished this situation from a "defendant's 'double' deletion of emails and '[instruction to] others to delete emails[,]'" as well as from the conduct the *O'Berry* court considered "irresponsible and shiftless."[84] The court further distinguished the defendants' actions from a "deliberate deletion and destruction of evidence and lack of

73. *Id.* at *31–32.
74. *Id.*
75. *Id.* at *32.
76. *Id.* at *32–33.
77. Schmalz v. Vill. of N. Riverside, No. 13 C 8012, 2018 U.S. Dist. LEXIS 216011, at *18 (N.D. Ill. Mar. 23, 2018).
78. *Id.* at *13.
79. *Id.* at *17–18.
80. *Id.* at *18.
81. *Id.*
82. *Id.* at *18–19.
83. *Id.*
84. *Id.* at 14–15. *See also* discussion *supra* Section II.A.

candor concerning [such] actions [which] constitute[d] bad-faith litigation conduct . . . ."[85] The *Schmalz* court made it clear that without these extraordinary measures, sanctions under Rule 37(e)(2) would not be imposed.[86]

As demonstrated, courts have inconsistently relied on their analyses of bad faith of spoliators, or lack thereof, which have long been an integral part of courts' decisions to impose sanctions pursuant to their inherent authority. However, these courts have not expressly invoked their inherent power—and often have failed to provide reasons for its invocation—or properly discussed the significance that such bad faith findings, or lack thereof, have on the courts' ultimate conclusion in finding intent to deprive. Furthermore, some courts have placed bad faith conduct on equal footing with "intent to deprive" conduct by applying an either/or standard, making each seem independently sufficient and seemingly interchangeable, without any supporting reasons or authority for doing so.

3. An Odd Case in Which the Court Explicitly Rejected Application of Rule 37(e) and Instead Relied on its Inherent Power to Sanction the Spoliator's Intentional Destruction of ESI

In *Hsueh v. New York State Department of Financial Services*, a United States District Court in New York held that an adverse inference instruction was appropriate where the plaintiff "admitted at her deposition that she had recorded a relevant conversation," regarding the alleged sexual harassment "but had since deleted it."[87] Here, however, the court explicitly rejected application of Rule 37(e), after accepting the defendant's argument that "Rule 37(e) applies only to situations where 'a party failed to take reasonable steps to preserve' [the] ESI [and] not to situations where, as here, a party intentionally deleted" the ESI at issue.[88] Furthermore, the court referred to the Committee Notes in commenting that Rule 37 was amended "to address 'the serious problems resulting from the continued exponential growth in the volume of ESI as well as "excessive effort and money" that litigants have had to expend to avoid potential sanctions for failure to preserve ESI.'"[89] The court ruled that such "considerations [were] not applicable" because the issue was not that the plaintiff "had improper systems in place to prevent the loss of the recording," but rather that the recording itself "no longer existed . . . because [the plaintiff] took specific action to delete it."[90]

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85. Brown Jordan Int'l, Inc. v. Carmicle, Nos. 0:14-CV-60629, 0:14-CV-61415, 2016 U.S. Dist. LEXIS 25879, at *118 (S.D. Fla. Mar. 2. 2016), *aff'd*, 846 F.3d 1167 (11th Cir. 2017). *See also Schmalz*, 2018 U.S. Dist. LEXIS 216011, at *14 (quoting *Brown*, 2016 U.S. Dist. LEXIS 25879, at *118).

86. *Schmalz*, 2018 U.S. Dist. LEXIS 216011, at *18.

87. Hsueh v. N.Y. State Dep't of Fin. Servs., No. 15 Civ. 3401, 2017 U.S. Dist. LEXIS 49568, at *1 (S.D.N.Y. Mar. 31, 2017).

88. *Id.* at *11.

89. *Id.*

90. *Id.*

After holding that Rule 37(e) was not applicable, the court relied on its inherent power to impose spoliation sanctions.[91] Based on the spoliator's inconsistent and unconvincing testimony as to why she deleted the relevant recordings, the court found that the spoliator "acted in bad faith in deleting the recording[,]" and thereby concluded that "[u]nder either Rule 37(e) and the Court's inherent authority, an adverse inference is the appropriate remedy in light of the Court's findings."[92] Such a conclusion seems to suggest that even if the court had applied the Rule, an adverse inference would have been appropriate; however, the purpose underlying the adoption of the new Rule 37(e) was to foreclose courts' reliance on their inherent authority.

In any event, the *Hsueh* court appears to have erred by rejecting application of Rule 37(e), as it did not have to determine whether the spoliator had acted in bad faith. In other words, the court's decision appears to suggest that a spoliator's bad faith actions are sufficient to satisfy the "intent to deprive" culpability under Rule 37(e)(2). Furthermore, this holding makes clear that the spoliator's deletion of the recordings would have been sanctionable under either the inherent power of the court or Rule 37(e). But, if the court was certain that Rule 37(e) should not apply to this case, then it should not have felt the need to address its application in the relief section of its decision, after rejecting its applicability in the prior discussion.[93]

As demonstrated, courts have inconsistently relied on inherent authority—explicitly or implicitly—as well as findings of bad faith, or lack thereof, in reaching conclusions on whether to impose sanctions for spoliation of relevant ESI. While the adoption of Rule 37(e) was intended to achieve uniformity in case law for the imposition of spoliation sanctions, courts have not only failed to apply the Rule consistently, but at least one court has erroneously disregarded the application of the Rule. Others have continued to rely on their inherent powers, thereby thwarting the underlying purpose of Rule 37(e), which was to foreclose reliance on inherent authority of the courts.[94]

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91. *Id.* at *11–12.

92. *Id.* at *16 (elaborating that the plaintiff "acted in bad faith, and with an intent to deprive [the defendant] of the use of the recording, in deleting it").

93. *Id.* If the court was correct that Rule 37(e) is not applicable here, then it was right to rely on its inherent authority and, therefore, to analyze whether the plaintiff acted in bad faith because such a finding is necessary to sanction under inherent authority. That analysis itself should have been sufficient for the court to grant an adverse inference against the plaintiff.

94. *See supra* Sections II.B.1–2.

III. A PROPOSAL FOR ACHIEVING UNIFORMITY OF CASE LAW IN COURTS' IMPOSITION OF SEVERE SANCTIONS FOR SPOLIATION OF ESI UNDER RULE 37(E)(2)

A. A Stringent "Intent to Deprive" Culpability Standard Must be Established

First and foremost, a standard clearly defining the "intent to deprive" culpability required by Rule 37(e)(2) must be established in order to achieve uniformity of case law in courts' imposition of severe sanctions for ESI spoliation. Without a clear standard identifying what constitutes intent to deprive another party of the use of such evidence, courts will continue to treat similar misconduct differently, issuing sanctions that may not necessarily fit the misconduct or that undermine the underlying goals of sanctions.

The intent to deprive culpability standard of Rule 37(e)(2) must be a heightened one that is difficult to satisfy: only upon a showing of intentional and willing act by the spoliator to destroy the relevant ESI, *in addition to other fact(s)* shedding light on the spoliator's state of mind or motivation, should it be found that the spoliator intended to deprive another party of the use of such evidence at the time of the destruction. In the rare case in which direct evidence of the spoliator's state of mind at the time of spoliation is available—demonstrating that the intention was to deprive another party from using such evidence in litigation—additional factors shedding light on the spoliator's intent would be unnecessary. However, direct evidence manifesting one's subjective intent is not always readily available, and, therefore, courts often rely on circumstantial evidence in order to infer whether the spoliator acted with such intent.

Additional facts that may shed light on the spoliator's state of mind may include, but certainly are not limited to, the following: facts showing the spoliator's "double deletion" of relevant ESI by destroying or deleting the relevant ESI and then ordering and/or instructing others with access to the same ESI to destroy it.[95] "Double deletion" can also be accomplished by somehow going a step further from the initial destruction—such as installing a certain program or software, thereby manifesting a motive to destroy the ESI, and/or having a selective data preservation system in place that evinces the kind of deliberate behavior the sanctions are designed to prevent.[96]

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95. *See* GN Netcom, Inc. v. Plantronics, Inc., No. CV-12-1318-LPS, 2016 U.S. Dist. LEXIS 93299, at *5, *25, *29 (D. Del. July 12, 2016). Double-deletion may also "mean [an] operator hit[ting] the delete key both to move the email into the trash folder and then hit[ting] the delete key on the same email once in the trash folder." DVComm, LLC v. Hotwire Commc'n., LLC, No. CV-14-5543, 2016 U.S. Dist. LEXIS 13661, at *7 n.13 (E.D. Pa. Feb. 3, 2016).

96. See Resnik v. Coulson, 17-CV-676 (PKC) (SMG), 2019 U.S. Dist. LEXIS 92159, at *40–41 (E.D.N.Y. Jan. 4, 2019) ("[D]efendent conceded before the state court that he was given advance notice that the sheriff would be coming to seize his devises. . . . These facts support a strong inference that defendant acted intentionally, and with urgency, when he employed data-wiping software just one day after the seizure of his devices was ordered. Defendant, of course, offers no evidence indicating that any wiping of data that occurred was innocent or merely negligent or grossly negligent.").

For instance, in *First Financial Security, Inc. v. Freedom Equity Group, LLC*, while the spoliator party argued that the deletion of pertinent text messages was an "innocent mistake[ ]," the court disagreed and concluded that the spoliator parties' "agreement to avoid communicating electronically suggest[ed] a shared intent to keep incriminating facts out of evidence."[97] This court did not explicitly hold that such additional evidence, from which it inferred the shared intent among the spoliator parties, was necessary for the court's conclusion that the spoliator parties acted with the intent to deprive another party of pertinent evidence.[98] But, in establishing the heightened standard to satisfy the intent to deprive culpability, this sort of supporting evidence should be made explicitly necessary—in addition to the spoliator's willful, intentional destruction of relevant ESI—before any court issues the severe sanctions available under Rule 37(e)(2).

In contrast, the court in *Orchestrate HR, Inc. v. Trombetta* declined to find an intent to deprive of the spoliator who had deleted relevant emails because according to the court, it was presented with "*only* equivocal evidence about [the spoliator's] state of mind at the time that he deleted the emails."[99] The court was presented with the following evidence regarding the spoliator's deletion of relevant emails: the spoliator admitted in his deposition "that he deleted [the] emails and he 'may' have done so to 'cover his tracks[,]'"; however, in his later-created declaration, he stated that he had deleted the emails "in the ordinary course of business only," and those emails that he had admittedly forwarded to his personal email account were provided to the other party.[100]

Based on this conflicting evidence, which the court itself found "troubling," the court held that even with "equivocal testimony . . . [the plaintiffs] failed to show that [the spoliator] destroyed any emails in bad faith or with the requisite intent to deprive" the plaintiffs.[101] While evidence established that the spoliator "was aware of potential litigation at the time that he deleted the emails and that he knew or should have known that emails on certain subjects . . . might be relevant to the litigation," the court found that the requisite intent was not satisfied "[c]onsidering the totality of circumstances."[102]

However, if the stringent intent to deprive standard had been established and applied at the time of this court's decision, the outcome under Rule 37(e)(2) may have differed because the spoliator intentionally deleted the emails at issue, despite his knowledge that there may be potential litigation and so the emails may be of relevance. The "troubling" conflicting evidence regarding his state

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97. First Fin. Sec., Inc. v. Freedom Equity Grp., LLC, No. 15-CV-1893-HRL, 2016 U.S. Dist. LEXIS 140087, at *10 (N.D. Cal. Oct. 7, 2016).

98. *Id.* at *10–12.

99. Orchestrate HR, Inc. v. Trombetta, 178 F. Supp. 3d 476, 493 (N.D. Tex. 2016) (emphasis added).

100. *Id.*

101. *Id.*

102. *Id.* at 492–93.

of mind at the time of spoliation may have been sufficient circumstantial evidence—shedding light on his motivation to delete the emails—to support a finding of the intent to deprive required under Rule 37(e)(2). As a result, the court may have been willing to hold that the spoliator's conflicting testimony weighed in favor of a finding that he actually intended to deprive the plaintiffs of the use of the destroyed evidence.

By requiring a showing of intent to actually deprive another party of the use of relevant ESI, which is not necessarily satisfied by an intent to perform an act that destroys the ESI, courts would properly reserve the more severe sanctions for egregious conduct done with a state of mind beyond negligence or gross negligence. Such a heightened standard, making it more difficult to satisfy the culpability requirement under Rule 37(e)(2), is not only appropriate but necessary because adverse inferences and/or dismissals of actions are detrimental to the disputing parties, as allowing severe sanctions for unreasonable preservation of relevant ESI in, for example, the instance where a party passively allows destruction of relevant ESI, is unnecessarily harsh and drifts away from the underlying goal of deterrence towards pure punishment. Furthermore, although the Committee Notes are not rules themselves, they are intended to help all involved parties interpret and apply the Rules. Thus, where the Committee Notes explicitly reject allowing severe sanctions based on negligence or gross negligence, this commentary should be taken seriously and not dismissed merely because it is not integrated into the text of the Rules.

B. There Should be No Room for Bad Faith Findings or Inherent Authority of Courts in Application of the Proposed Standard

As discussed above, even where courts have explicitly recognized that the new Rule 37(e) is applicable under relevant circumstances, they have often relied on findings of bad faith to reach their ultimate decision to impose sanctions under Rule 37(e)(2), without any specific discussion or reasoning as to which facts led to such conclusions.[103] Other courts have analyzed the same issue of imposition of sanctions for ESI spoliation based on findings of whether the spoliator *acted in bad faith or with intent to deprive*, which leads to a misconception that acting in bad faith and acting with intent to deprive are interchangeable standards.[104]

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103. *See* Brown Jordan Int'l, Inc. v. Carmicle, Nos. 0:14-CV-60629, 0:14-CV-61415, 2016 U.S. Dist. LEXIS 25879, at *110–12 (S.D. Flo. Mar. 1, 2016), *aff'd* 846 F.3d 1167 (11th Cir. 2017).

104. Ala. Aircraft Indus., Inc. v. Boeing, Co., 319 F.R.D. 730, 744–47 (N.D. Ala. 2017) (finding the intent to deprive required under Rule 37(e)(2) and holding that permissive adverse inferences were warranted based on bad faith spoliation case law). While the Eleventh Circuit spoliation elements overlap with those of Rule 37(e) to a certain degree, the court did not undergo any analysis of Rule 37(e) prerequisites. *Id*. *See also* Orchestrate HR, Inc., 178 F. Supp. 3d at 490, 493 (stating that Rule 37(e) application was "just and practicable" under the circumstances, then relying upon a finding of either bad faith or intent to deprive, together, as if applying an either/or prong test and treating either as sufficient).

However, the proposed heightened standard, requiring a showing of intent to deprive, does not mean that a showing of bad faith is necessary or sufficient. Courts should not feel any need to determine whether the spoliator acted in bad faith or not because Rule 37(e) neither requires nor even mentions bad faith. Bad faith findings have long been part of courts' spoliation analyses because courts have traditionally imposed sanctions pursuant to their inherent authority—for which the existence of bad faith was a prerequisite. The Supreme Court has held of a court's inherent power, "certain implied powers must necessarily result to our Courts of justice from the nature of their institution . . . which cannot be dispensed with in a Court, because they are necessary to the exercise of all others."[105] The Supreme Court also held that a federal court may exercise its inherent power to sanction, even if existing procedural rules address the same misconduct,[106] a concept dissenting justices criticized heavily because they reasoned that it exempts courts from relying on express sanctioning provisions provided by Congress.[107]

While there is no binding authority forbidding courts from resorting to their inherent power to sanction, courts should rely on the express sanctioning provisions, where applicable, in an effort to enhance consistency and predictability of resulting case law on ESI spoliation sanctions. Furthermore, the Supreme Court has also held that "[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion" to fashion an appropriate sanction for conduct which abuses the judicial process.[108] Particularly with respect to sanctioning ESI spoliation, which Rule 37(e) was specifically adopted to address—and also taking into consideration the Committee Notes' statement that the underlying intention of such adoption was to foreclose courts' reliance on their inherent authority—courts should, first and foremost, rely on Rule 37(e) in deciding whether to impose sanctions. Consequently, courts should no longer resort to their inherent authority to sanction whether such reliance is made explicit or implicit in their decisions.[109]

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105. Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (quoting United States v. Hudson, 11 U.S. 32, 34 (1812)).

106. *Id.* at 50.

107. *Id.* at 61 (Kennedy, J., dissenting) ("With all respect, I submit the Court commits two fundamental errors. First, it permits the exercise of inherent sanctioning powers without prior recourse to controlling Rules and statutes . . . .").

108. Roadway Express, Inc. v. Piper, 447 U.S. 752, 764–65 (1980).

109. Because bad faith and inherent authority are not found anywhere in the text of Rule 37(e), bad faith analysis should not be necessary or sufficient to answer the question of whether the spoliator party had acted with "an intent to deprive another party of the [relevant ESI] in litigation." *See* FED. R. CIV. P. 37(e)(2). Nevertheless, in a case where a court is compelled to analyze bad faith in its discussion, it should make the reasons for such analysis abundantly clear, as well as the nexus between its finding of bad faith (or lack thereof) and its ultimate finding of intent to deprive under Rule 37(e)(2). By providing clear explanations as to the impact of the bad faith finding on the ultimate imposition of sanctions under Rule 37(e)(2), any ambiguity as to the court's reliance

C. The Permissive Language of Rule 37(e), Allowing Discretionary Sanctions, Should be Removed

A critical view of the new Rule 37(e) contends that it fails to resolve any uncertainty among the district courts in sanctioning spoliation because the "permissive nature" of Rule 37(e) undermines the original purpose of sanctions, while increasing the unpredictability of courts' decisions on imposition of sanctions "because parties do not know when, if ever, an adverse inference instruction will be imposed even after a finding" that the non-spoliator party sufficiently demonstrated the requirements of Rule 37(e)(2).[110] Critics argue that because Rule 37(e) allows courts to exercise their discretion in its use of the word "may," rather than "must" or "shall," the predictability of outcomes on the question of actual imposition of sanctions remains uncertain.[111]

Furthermore, should a court decide that an adverse inference jury instruction is the appropriate sanction, judges enjoy "substantial flexibility" in drafting the actual language of the instruction.[112] Thus, the charge to the jury may vary significantly, depending on the circumstances, which may also lead to diverging outcomes in different courts.[113] Therefore, it is contended that merely permitting imposition of sanctions, rather than mandating them under Rule 37(e), takes away the authoritative sanctioning power that the Rule once had.[114]

Advocates of mandatory jury instructions have argued that "[b]ecause a central purpose of an evidentiary rule is to provide guidance and consistency, the [jury] instruction should be mandatory instead of discretionary" because the optional nature of the Rule would thwart its effectiveness.[115] If sanctions were mandatory, they would be issued as long as the prerequisites were satisfied, making the Rule more effective in deterring spoliation and establishing uniform case law. Hence, it may be argued that even if courts adopted and consistently applied the proposed standard of intent to deprive, and thereby treated similar

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on bad faith would be reduced. As a result, the validity of sanctions following courts' well-reasoned conclusions would not be subject to questions.

110. Alexandra Marie Reynolds, Note, *Spoliating the Adverse Inference Instruction: The Impact of the 2015 Amendment to Federal Rule of Civil Procedure 37(e)*, 51 GA. L. REV. 917, 935 (2017).

111. *See id.* at 931 ("Judge Scheindlin went on to predict that if the rule only dictated that a judge 'may' impose the permissive adverse inference instruction upon a showing of all requisite elements, 'the optional nature of the rule would gut its effectiveness.'").

112. Hon. Shira A. Scheindlin & Natalie M. Orr, *The Adverse Inference Instruction After Revised Rule 37(e): An Evidence-Based Proposal*, 83 FORDHAM L. REV. 1299, 1303 (2014).

113. *See id.* ("Even the permissive inference can take multiple forms, prompting one commentator to opine that 'nearly fifty shades of adverse inference instructions have emerged.' Some courts inform the jury that spoliation has occurred but allow the jury to infer the likely contents of the evidence and decide what weight to accord that inference. Others allow the jury to determine whether spoliation has occurred in the first place.").

114. Reynolds, *supra* note 111, at 942.

115. Scheindlin & Orr, *supra* note 113, at 1313.

spoliation conduct similarly, the permissive nature of Rule 37(e) sanctions would still produce inconsistent results.

However, courts enjoy substantial discretion in choosing the appropriate remedy for spoliation, and sanctioning power is also properly within that discretion.[116] Courts are in the best position to exercise discretion to impose severe sanctions—upon satisfying the proposed strict standard of Rule 37(e)(2) because they have access to the evidence, and are able to make appropriate judgments based on that evidence. Additionally, the Rule's text clearly provides for courts' discretion in the imposition of sanctions by using the word "may," instead of "should" or "shall."[117] Unless and until the Rule is revised to explicitly remove such discretion, courts' discretionary conclusions should be respected. As discussed above, courts' consistent application of the proposed heightened standard for the intent to deprive would result in more consistent and uniform case law.

IV. CONCLUSION

Although a primary goal underlying the adoption of the new Rule 37(e) in 2015 was to resolve the circuit split and promote uniformity of case law on ESI spoliation sanctions, an examination of relevant case law under the new Rule 37(e) has revealed that courts treat similar spoliation conduct differently due to the lack of a clear standard for finding the spoliator's intent to deprive another party of the use of the destroyed ESI at issue. Such inconsistency was exacerbated by the courts' inconsistent reliance on their inherent authority to sanction based on a bad faith analysis.

This Article proposes establishing a clear and strict standard for courts across the nation to apply in determining whether the spoliator acted with the intent to deprive another party of the use of the relevant ESI under Rule 37(e)(2). Such a standard requires demonstration of the spoliator's willful, intentional act that destroyed the relevant ESI in addition to supporting evidence that sheds light on the spoliator's actual state of mind and intent to deprive another party of the use of the destroyed ESI in litigation. In courts' determination of whether the non-spoliator sufficiently showed the spoliator's intent under Rule 37(e)(2), based on the proposed standard, neither courts' inherent authority to sanction nor findings of bad faith should have bearing. Once courts begin to exclusively apply the proposed heightened standard for Rule 37(e)(2), and no longer rely on their inherent authority or bad faith findings, the inconsistency in case law that has resulted from courts' reliance on inherent authority and bad faith analyses to date will no longer result.

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116. *See* Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (3d Cir. 2001) ("The determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the trial judge and is assessed on a case-by-case basis.") (citation omitted).

117. FED. R. CIV. P. 32(e)(2).

Because courts should exercise caution in the imposition of severe sanctions under Rule 37(e)(2), such as adverse inference presumptions, it is reasonable and proper to heighten the standard to satisfy the requisite level of culpability. This would ensure that courts consistently impose severe sanctions only for egregious spoliation conduct which warrants such sanctions. This is why courts should no longer impose Rule 37(e)(2) sanctions for merely negligent or grossly negligent destruction of ESI. Less severe measures to redress ESI spoliation, resulting from a party's mere failure to take reasonable steps to preserve the ESI, should be imposed pursuant to Rule 37(e)(1). Only upon satisfaction of the proposed stringent culpability standard should the severe sanctions under Rule 37(e)(2) be granted. Furthermore, despite the discretionary nature of sanctions, due to the permissive language in Rule 37(e), as courts begin to consistently apply the proposed stringent culpability standard for severe sanctions, the resulting decisions will be far more consistent—and, therefore, significantly closer to achieving uniformity in case law on ESI spoliation sanctions.