Rule 37(e)

THE NEW LAW OF ELECTRONIC SPOLIATION

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EFFECTIVE DEC. 1, 2015, FEDERAL RULE OF CIVIL PROCEDURE 37(e) WILL CHANGE DRAMATICALLY THE LAW OF SPOLIATION.

Prior to the adoption of this rule, the Circuits had split on the question whether negligence in the destruction of relevant evidence was sufficient, in at least some circumstances, to support the sanction of an adverse inference. The First, Second, Sixth, Ninth, and, in at least one circumstance, the D.C. Circuits had all concluded that negligence could be sufficient.[1] As discussed below, Rule 37(e) changes this result when the evidence lost consists exclusively of electronically stored information ("ESI"), but does not change the law as to tangible evidence.

Moreover, all Circuits required a showing of prejudice before an adverse inference instruction could issue as a sanction for loss of evidence. Rule 37(e) also changes this result, requiring no showing of prejudice as a prerequisite to issuance of an adverse

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PRINCIPAL TAKEAWAYS

Electronic vs. Tangible Evidence. Rule 37(e) applies only to electronically stored information ("ESI"). It does not apply to tangible evidence. This distinction is critical. To the extent the rule changes the law of spoliation (as it does in several Circuits), different rules will apply to spoliation of electronic, as opposed to tangible, evidence. This has sometimes outcome-determinative impact.

Intent Requirement. Prior to Rule 37(e), five Circuits (First, Second, Sixth, Ninth, and sometimes D.C.) allowed an adverse inference instruction sanction absent an intent to spoliate. Rule 37(e) requires intent before an adverse inference or certain other specified sanctions may issue. But, while the Rule significantly restricts the availability of certain harsh sanctions absent intent, other severe sanctions remain at the court's disposal.

Rule vs. Inherent Power. The law of spoliation developed as an application of the inherent power of the court. Within its scope, this rule displaces inherent power. Therefore, to the extent that two branches of spoliation law apply to ESI vs. tangible evidence after Dec. 1, 2015, they derive from different sources of authority and in several Circuits have different requirements.

inference instruction if intent to deprive the adverse party of the lost evidence is established.

Following is a discussion of the principal aspects of the Rule 37(e).

INTRODUCTORY CLAUSE

ELECTRONIC VS. TANGIBLE EVIDENCE ("IF ELECTRONICALLY STORED INFORMATION")

Rule 37(e) applies only to ESI. It does not apply to tangible evidence. This distinction is critical. To the extent the rule changes the power of the court to remedy spoliation (as it does in several Circuits), different powers will apply to spoliation of electronic and tangible evidence — unless or until those Circuits change their spoliation law in light of the rule. This has potentially outcome-determinative impact.

There are some cases in which the loss of tangible evidence is devastating. The classic example is *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583 (4th Cir. 2001), in which the plaintiff destroyed the product at issue in a products liability action (a car), perhaps negligently, and thereby prevented the defendant from analyzing and testing the product and defending the claim. The Fourth Circuit concluded that, regardless of the spoliating party's intent, decimation of the defendant's inability to defend the claim warranted dismissal: "We agree . . . that dismissal is severe and constitutes the ultimate sanction for spoliation. It is usually justified only in circumstances of bad faith or other 'like action.' . . . But even when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case." *Id.* at 593. Rule 37(e) has no impact on this holding because only tangible evidence is involved.

The Intentional But Incompetent Spoliator. One interesting question is the impact of Rule 37(e) on the intentional destruction of evidence that is maintained in both electronic and tangible form, but only the tangible evidence is permanently lost. The case of the intentional but unsuccessful spoliator is instructive. If a party intentionally destroys electronic evidence but the evidence is obtained from a third party, then no sanctions or curative measures are awardable under Rule 37(e) because no evidence "is lost," a prerequisite to judicial action under the first sentence of the Rule. There may be sanctions available under other powers, such as Rule 37(b) if the misconduct violated a discovery order; Rule 26(g) if the spoliator served a false discovery response in the course of its attempted spoliation; 28 U.S.C. § 1927 if the misconduct unreasonably and vexatiously multiplied the proceedings (as by causing the issuance of a subpoena on the third party that would not otherwise have been necessary); and the inherent power of the court for the bad faith litigation misconduct in the course of the attempted spoliation. But these sanctions would presumably not include the sanctions listed in Rule 37(e)(2)(A)–(C).

If the same party were to set out to destroy tangible evidence with the same malign intent but the evidence were to survive, the party's unsuccessful spoliation would be subject to sanction under the inherent power of the court — and perhaps other sanctions powers — without any limitation imposed by Rule 37(e). Just as attempted but unsuccessful subornation of perjury evidences consciousness of guilt or culpability, intentional but unsuccessful spoliation may evidence consciousness of guilt or culpability and in appropriate circumstances may legitimately give rise to an adverse inference instruction, dismissal, or entry of a default judgment.

Consider now the intentional but incompetent spoliator who sets out to destroy all tangible and electronic evidence, but the evidence is restored or replaced, as by service of a subpoena on a third party. No curative measures or sanctions are available for spoliation of the electronic evidence because no ESI "is lost," as required by the introductory language of Rule 37(e). For the attempted destruction of tangible evidence, however, the Rule does not preclude issuance of harsh sanctions under the inherent power of the court or other sanctions powers. This can be viewed as an incongruous result where the tangible evidence is merely a print-

out of the ESI. There is little reason, however, to protect the malevolent spoliator from sanctions that the court, in its discretion, deems appropriate in the circumstances.

"SHOULD HAVE BEEN PRESERVED"

Rule 37(e) does not set forth a standard for preservation. It does not alter existing federal law concerning whether evidence should have been preserved or when the duty to preserve attached. This is determined by the common law test: Was litigation pending or reasonably foreseeable?[2] In the words of the Advisory Committee Note, "Rule 37(e) is based on th[e] common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve attaches." Nor does the rule tell you when that duty arose.

Independent of the common-law obligation, statutes, rules, internal policies, or other standards may impose preservation obligations. Is disregard of an independent obligation to preserve enough to warrant a spoliation sanction? The Advisory Committee Note says this is to be determined on a case-by-case basis ("The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and . . . does not itself prove that its efforts to preserve were not reasonable with respect to a particular case.").

There are multiple ways that disregard of an independent obligation to preserve may be relevant to a spoliation decision under Rule 37(e).

First, disregard of the independent obligation may give rise to an inference of intentionality, if, for example, it can be shown that the spoliating party was aware of the obligation and customarily honored it.

Second, if a party fails to preserve evidence in disregard of an independent obligation and the adverse party harmed by the loss of evidence is within the class of persons protected by the statute, rule, or other standard imposing that obligation, that fact may lead the court to conclude that litigation by the injured person was reasonably foreseeable and spoliation sanctions are therefore appropriate.[3]

"IS LOST"

Rule 37(e) curative measures or sanctions are available only if ESI that should have been preserved "is lost." The Advisory Committee Note provides that: "Because electronically stored information often exists in multiple locations, loss from one source may be harmless when substitute information can be found elsewhere." This states the unremarkable proposition that loss from one location causes no prejudice if the ESI can be found elsewhere (prejudice is a prerequisite for curative measures under subdivision (e)(1)). But the more important point is that information that is "found elsewhere" is not "lost" at all — because this precludes any curative measures or sanctions under either subdivision (e)(1) or (e)(2). This accords both with common sense and with prior law. *See, e.g.*, *Carlson v. Fewins*, No. 13-2643, 2015 U.S. App. LEXIS 16149 (6th Cir. Sept. 11, 2015) (no spoliation where only backups of 911 recordings were destroyed and other copies remained).

As noted below, the rule also precludes any curative measures or sanctions if the ESI can "be restored or replaced through additional discovery." Given the rule's structure, ESI that can be restored would appear to be "lost," even if only temporarily lost. Once restored, it is no longer "lost." But "replaced" information remains "lost," as replacement describes substitution, not identity (Dictionary.com definition of "Replace: 1. to . . . substitute for (a person or thing); 2. to provide a substitute or equivalent in the place of.").

"A PARTY"

Rule 37(e) applies only to ESI "lost because *a party* failed to take reasonable steps to preserve it." Thus, the rule applies only to parties. The rule does not by its terms apply to spoliation by a relevant nonparty — or sanctions to be imposed on a party as a result of spoliation by a third party. If the third party is the agent or otherwise under ▸

THE TEXT OF RULE 37(e)

Effective Dec. 1, 2015, Federal Rule of Civil Procedure 37(e) provides:

(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.

the control of the party, logic dictates that the party is the actor within the meaning of Rule 37(e) and the rule therefore authorizes the imposition of curative measures or sanctions. This is consistent with prior spoliation case law, under which a party's responsibility for third-party spoliation is a function of the party's "control" over the spoliating third party. "Control" is often, but not always, determined by the breadth with which the phrase "possession, custody and control" in Rule 34 is construed.[4]

For example, the defendant in *Gordon Partners v. Blumenthal (In re NTL, Inc. Sec. Litig.)*, 244 F.R.D. 179 (S.D.N.Y. 2007), did not have physical custody of the ESI that was lost, but it was subjected to an adverse inference because that information had been in its control years earlier. It then entered bankruptcy and relinquished control over the ESI to a new entity formed in the bankruptcy process. This new entity — which had control of the documents but was not a defendant — failed to preserve the ESI. A securities fraud class action had been commenced before NTL, Inc., went into bankruptcy. Two entities emerged — the liability for the lawsuit was left with one of them (NTL Europe, the defendant), but all documents and ESI went to the other (New NTL, a nonparty), together with the operating business. New NTL did a computer upgrade which decimated a great deal of electronically stored information. The *NTL* Court found that defendant NTL Europe had "control" over the documents and ESI for three independent reasons: (1) it would be patently unfair to allow the post-bankruptcy structure that the defendants were involved in arranging to frustrate discovery; (2) a demerger agreement between the entities entitled defendant NTL Europe to access the documents and ESI, and (3) the duty to preserve was triggered prior to the separation of old NTL into the two new entities. In this setting, if defendant NTL Europe failed to preserve access to the documents under the demerger agreement, that would by definition constitute an inadequate litigation hold on the part of the defendant.

If a party has the contractual right to maintain or obtain responsive evidence from a third party, the party has control over the documents sufficiently to warrant sanctions for failure to preserve it. Sanctions have issued, for example, for a party's failure to make payments to a third party storing its ESI, resulting in its deletion.[5]

A party's personal or family relationship with the third party having custody over the ESI may give the party sufficient control over the information to trigger a duty to preserve it. A wife and her co-defendant business colleagues, for example, have been sanctioned for the failure to preserve ESI on a hard drive that was destroyed by the wife's husband because they did not take affirmative steps to preserve the data and because the court found it incredible that the husband acted unilaterally in destroying data relevant to his wife's pending case.[6]

"REASONABLE STEPS"

Curative measures or sanctions can be imposed under Rule 37(e)(1) or (2) only if a party "failed to take reasonable steps to preserve" the ESI that is lost. This is an objective test. Subjective states of mind such as good faith or intentionality (prevailing tests for adverse inference instructions under preexisting law) are not relevant as to this threshold determination.[7] Subdivision (e)(2) applies a subjective test — intentionality — as a prerequisite to imposing any of four specific sanctions (presuming the lost information was unfavorable to the spoliator; issuing an adverse inference instruction; or entering a default judgment or dismissal), but the subjective state of mind identified in subdivision (e)(2) is not reached unless, in the first instance, the party failed to satisfy the objective test of taking reasonable steps to preserve. There is no need to inquire into state of mind in conducting the objective test of determining whether "reasonable steps to preserve" were taken.

The Advisory Committee Note stresses that "perfection in preserving relevant electronically stored information is often impossible" and that the rule "does not call for perfection." The line between "reasonable steps" and "perfection" is a fact-based determination. *See, e.g.*, *Resendez v. Smith's Food & Drug Ctrs., Inc.*, No. 2:15-cv-00061-JAD-PAL, 2015 U.S. Dist. LEXIS 34037, *18–*19 (D. Nev. Mar. 16, 2015) (adverse inference instruction for destruction of video evidence in slip-and-fall case: "I . . . categorically reject [Defendant] Smith's arguments in its written opposition that spoliation sanctions are not required because this is not a perfect world and employees do not always follow policies. A failure to follow internal policies and procedures does not, in and of itself, amount to spoliation of evidence. However, . . . Smith's was on notice that Plaintiff had retained counsel to pursue a claim for damages resulting from personal injuries she sustained in the store . . . ten days after the accident. . . . Smith's arguments that this is not a perfect world and employees do not always follow policy represent a cavalier disregard of its legal preservation duties.").

The Advisory Committee urges courts to "be sensitive to the party's sophistication with respect to litigation in evaluating preservations efforts. . . . " A higher degree of awareness of preservation obligations is reasonably expected of sophisticated parties.

Because the rule requires only "reasonable steps to preserve," curative measures or sanctions may not be warranted, the Advisory Committee Note observes, if the ESI "is not in the party's control" or is "destroyed by events outside the party's control" (*e.g.*, a flood). The Note cautions, however, that the court may "need to assess the extent to which a party knew of and protected against" the risk of loss of the evidence.

As is always the case, what is "reasonable" is a fact-specific determination. The Advisory Committee Note emphasizes that "proportionality" should be considered in evaluating the reasonableness of preservation efforts, and that the "court should be sensitive to party resources. . . ."

"CANNOT BE RESTORED OR REPLACED"

No curative measures or sanctions may issue under Rule 37(e) if the ESI can be "restored or replaced through additional discovery."

"Restored" connotes replication of the original (Dictionary.com: "1. to bring back into existence, use, or the like"). The Advisory Committee Note refers to the possibility of the court's ordering production of otherwise inaccessible (e.g., backup) data.

"Replaced" suggests an alternative that produces equivalent information (Dictionary.com: "1. to . . . substitute for (a person or thing); 2. to provide a substitute or equivalent in the place of"). Preexisting case law recognizes that the existence of alternate equivalent evidence may overcome any prejudice or need for sanctions. *See, e.g.*, *Vistan Corp. v. Fadei USA, Inc.*, 547 F. App'x 986 (Fed. Cir. 2013) (destruction of one of many identical, allegedly infringing machines after adverse party examined it caused no prejudice and did not constitute actionable spoliation).

The Advisory Committee "emphasize[s] that efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information. . . . [S]ubstantial measures should not be employed to restore or replace information that is marginally relevant or duplicative." This is part and parcel of the proportionality emphasis of the 2015 discovery rules amendments, which added the concept of proportionality to the scope of discoverability in Rule 26(b)(1).

SUBDIVISION (e)(1)

PREJUDICE

Before any curative measures may be ordered under subdivision (e)(1), the court must find "prejudice to another party from loss of the [electronically stored] information." Prejudice has always been a factor in assessing whether spoliation sanctions are appropriate. *See, e.g.*, *McLeod v. Wal-Mart Stores, Inc.*, 515 F. App'x 806, 808 (11th Cir. 2013) ("In determining whether spoliation sanctions are warranted, courts consider five factors: (1) whether the party seeking sanctions was prejudiced as a result of the destruction of evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the spoliating party acted in good or bad faith; and (5) the potential for abuse if the evidence is not excluded.") (internal quotation marks and brackets deleted); *McCauley v. Bd. of Comm'rs for Bernalillo Cty.*, 603 F. App'x 730 (10th Cir. 2015) (no abuse of discretion in denying spoliation sanction absent demonstration of sufficient prejudice).

BURDEN OF PROOF ON THE ISSUE OF PREJUDICE

The degree of prejudice is a function in part of the importance of the lost information in the litigation. Determining the importance of the information may be difficult given that the information is by definition unavailable. Therefore, whether the burden of proof is placed on the proponent or opponent of sanctions is an important, potentially dispositive issue — and one that Rule 37(e) does not address. "The rule does not place a burden of proving or disproving prejudice on one party or the other," leaving "judges with discretion to determine how best to assess prejudice in particular cases" (Advisory Committee Note to Rule 37(e))).

The questions of burden of proof and how to determine whether the loss of evidence was prejudicial are not new. The courts have developed a number of approaches that assist in determining prejudice — including:

- the more intentional the destruction of the evidence, the more reliable the inference that the evidence would have been harmful to the spoliator's position;
- destruction of evidence during the pendency of litigation may alone suffice to support the inference that the evidence was destroyed because it was harmful; and
- the more central to the case the spoliated evidence is (e.g., the product at issue in a products liability action) — the more prejudicial its loss is often deemed to be.[8]

"MEASURES NO GREATER THAN NECESSARY TO CURE THE PREJUDICE"

Subdivision (e)(1) provides that, upon finding prejudice, the court "may order

"The Advisory Committee "emphasize[s] that efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information.

measures no greater than necessary to cure the prejudice." This is akin to the least-severe-sanction requirement of Rule 11(c)(4).[9]

There is one clear limitation on curative measures under subdivision (e)(1). They cannot include the four severe sanctions imposable only on a finding of intent under subdivision (e)(2) — namely, presuming that the lost information was unfavorable to the non-preserving party; issuing a mandatory or permissive adverse inference instruction; or dismissing the action or entering a default judgment.

That, however, does not mean that serious sanctions may not be imposed as curative measures under subdivision (e)(1), including, for example:

- directing that designated facts be taken as established for purposes of the action;
- prohibiting the nonpreserving party from supporting or opposing designated claims or defenses;
- barring the nonpreserving party from introducing designated matters in evidence;
- striking pleadings;

- allowing the introduction of evidence concerning the failure to preserve (*see, e.g.*, *Decker v. GE Healthcare Inc.*, 770 F.3d 378 (6th Cir. 2014) (declining to impose punitive sanctions or issue adverse inference instruction but permitting testimony from sanctions hearing to be introduced at trial); *Dalcour v. City of Lakewood,* 492 F. App'x 924 (10th Cir. 2012) (allowing witnesses to be questioned about missing evidence));
- allowing argument on the failure to preserve;
- giving jury instructions other than adverse inference instructions "to assist [the jury] in its evaluation of" testimony or argument concerning the failure to preserve (Advisory Committee Note to Rule 37(e)).

Most of these are identified in the Advisory Committee Note to Rule 37(e), which also cautions that "[c]are must be taken . . . to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2)."

SUBDIVISION (e)(2)

INTENT TO DEPRIVE ANOTHER PARTY OF THE INFORMATION'S USE

Four of the most severe sanctions — presuming that the lost information was unfavorable to the nonpreserving party; issuing a mandatory or permissive adverse inference instruction; dismissal of the action; or entering a default judgment — can be imposed only "upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation" (Rule 37(e)(2)).

Subdivision (e)(2) therefore changes the law in several Circuits that allowed the issuance of adverse inference instructions arising from the loss of ESI due to negligence (the First, Second, Sixth, Ninth and sometimes the D.C. Circuit — *see* note 1).

The law is changed in these Circuits only insofar as the failure to preserve ESI is concerned — Rule 37(e) has no effect on these Circuits' spoliation law as it pertains to tangible evidence.

JUDGE OR JURY ISSUE

A fundamental question under subdivision (e)(2) is whether the determination of intent is a question for the judge or jury. The Advisory Committee Note is opaque on this issue. It observes that intent will be a question for the court on a pretrial motion, at a bench trial, or when deciding whether to give an adverse inference instruction, but then adds: "*If a court were to conclude that the intent finding should be made by a jury*, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury finds that the party acted with the intent to deprive another party of the information's use in the litigation." Nowhere does the Advisory Committee indicate why or when the issue is appropriately left to the jury.

The issue of intent in Rule 37(e)(2) would appear to be a jury issue under Federal Rule of Evidence 104(b) if the court makes the preliminary determination under Rule 104(a) that a reasonable jury could find by a preponderance of the evidence that the nonpreserving party acted with the intent to deprive its adversary of the use of the evidence. Rule 104 provides:

a. *In General.* The court must decide any preliminary question about whether . . . evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
b. *Relevance That Depends on a Fact.* When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

A party's destruction of evidence is relevant if the party's intent is to deprive its opponent of access to the evidence — in criminal parlance, it is evidence of consciousness of guilt. That is the premise of the law of spoliation and the reason adverse inference instructions are given. This is explicitly acknowledged in the Advisory Committee Note to Rule 37(e)(2) ("Adverse-inference instructions were developed on the premise 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.").

Therefore, the question whether evidence was destroyed with the intent of rendering it unavailable to an adverse party is a question of conditional relevance for the jury under Rule 104(b). There is caselaw applying Rule 104 in the context of spoliation evidence, leaving to the jury the question whether the spoliating act occurred. *See, e.g.*, *United States v. Maddox*, 944 F.2d 1223, 1230 (6th Cir. 1991) ("Rule 104(b) addresses the question of 'conditional relevancy.' By its terms, the rule involves a situation in which 'the relevancy of evidence depends upon the fulfillment of a condition of fact . . . .' Fed. R. Evid. 104(b). We have previously held that spoliation evidence, including evidence that the defendant threatened a witness, is generally admissible because it is probative of consciousness of guilt"; holding it was appropriate to allow the jury to hear the spoliation-related testimony); *Paice LLC v. Hyundai Motor Co.*, No. MJG-12-499, 2015 U.S. Dist. LEXIS 108477 (D. Md. Aug. 18, 2015) (court held hearing under Rule 104 to ascertain whether, as a preliminary matter, the plaintiff offered sufficient evidence of spoliation to present the issue to the jury).

INTENT VS. BAD FAITH

Subdivision (e)(2) requires a showing of "intent to deprive another party of the information's use," not a showing that the party acted in "bad faith." It is difficult to conceive of a situation in which a party could in good faith take an intentional act to deprive another party of relevant evidence, but the distinction between intentionality and bad faith is one that the case law draws. There is a practical benefit to this: Once intent is proven, no further showing of state of mind is necessary. *See, e.g.*, *Moreno v. Taos Cty. Bd. of Comm'rs*, 587 F. App'x 442, 444 (10th Cir. 2014) ("to warrant

an adverse inference instruction, a party must submit evidence of intentional destruction or bad faith"); *Turner v. United States*, 736 F.3d 274, 282 (4th Cir. 2013) ("Although the conduct must be intentional, the party seeking sanctions need not prove bad faith.").

SEVERE SANCTIONS LISTED ARE DISCRETIONARY

Subdivision (e)(2) provides that, upon the showing of intent, the court "may" — not must — impose any of the four severe sanctions listed, specifically: presuming that the lost information was unfavorable to the nonpreserving party; issuing a mandatory or permissive adverse inference instruction; or dismissing the action or entering a default judgment. Use of the word "may" is permissive, not mandatory, vesting discretion in the court as to whether any of these sanctions is appropriate in the circumstances. *See* Advisory Committee Note to Rule 37(e)(2) ("The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) [*sic* — no measures are specified in subdivision (e)(1)] would be sufficient to redress the loss.").

NO PREJUDICE REQUIREMENT

Although the sanctions listed in subdivision (e)(2) are severe — indeed, potentially outcome-determinative — there is no requirement that the adverse party actually be prejudiced by the spoliating conduct, as there is in subdivision (e)(1). This is a change in the law. Under preexisting law, spoliation sanctions — especially the four most severe sanctions listed in subdivision (e)(2) — could issue only on a showing of prejudice. *See, e.g.*, *Rives v. LaHood,* 2015 U.S. App. LEXIS 4838 (11th Cir. Mar. 25, 2015 ("A party moving for spoliation] sanctions must establish, among other things, that the destroyed evidence was relevant to a claim or defense such that the destruction of that evidence resulted in prejudice") (internal quotation marks and brackets deleted); *McCauley v. Board of Comm'rs for Bernalillo Cnty.,* 2015 U.S. App. LEXIS 3361 (10th Cir. Mar. 2, 2015) (no abuse of discretion in denying spoliation sanction absent demonstration of sufficient prejudice); *Gutman v. Klein*, 2013 U.S. App. LEXIS 5438 (2d Cir. Mar. 20, 2013) ("A sanction for spoliation of evidence 'should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.'"); *Hallmark Cards, Inc. v. Murley,* 703 F.3d 456, 461 (8th Cir. 2013) ("a district court must issue explicit findings of bad faith and prejudice prior to delivering an adverse inference instruction.")

The absence of a prejudice requirement may at first seem somewhat counterintuitive since both of these are requirements for the presumably less severe sanctions of subdivision (e)(1). But it is consonant with the case law enforcing the inherent power of the court to sanction abusive litigation practices undertaken in bad faith, which is the power pursuant to which spoliation was historically sanctioned. The fact that the abusive litigation conduct did not succeed in disrupting the litigation does not preclude the imposition of an inherent power appropriate sanction if the conduct was intended to do so. *See, e.g., Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 145 (2d Cir. 2012) ("We read *Chambers* [*v. NASCO, Inc.*, 501 U.S. 32 (1991)] to mean that sanctions may be warranted even where bad-faith conduct does not disrupt the litigation before the sanctioning court. This accords with our sanctions jurisprudence, which counsels district courts to focus on the purpose rather than the effect of the sanctioned attorney's activities."). The court is vested with broad discretion to fashion an appropriate inherent power sanction to redress litigation abuse. In all events, the absence of prejudice is clearly an important factor in the court's determination whether any sanction is appropriate and, if so, which one.

CHECKLIST

Did a duty to preserve exist at the time the ESI was lost?

- Prior to the commencement of suit, this is determined under the preexisting common-law test: Was litigation reasonably foreseeable?

Were reasonable steps taken to preserve the lost ESI?

- This is an objective test.

Did a party fail to take those steps?

- The rule applies only to "a party."

Can the lost information be (a) restored or (b) replaced? If the lost information cannot be restored or replaced:

- Did its loss prejudice another party (subdivision (e)(1))?
- What measures are the minimum necessary to cure the prejudice (subdivision (e)(1))?
  1. This is akin to the least-severe-sanction requirement codified in Rule 11(c)(4).
  2. None of the four sanctions set forth in subdivision (e)(2) (presuming that the lost information was unfavorable to the non-preserving party; issuing a mandatory or permissive adverse inference instruction; or dismissing the action or entering a default judgment) may be imposed.
  3. Nor may any sanction having the effect of a subdivision (e)(2) sanction be imposed.
- Did the party that lost the ESI act with the intent to spoliate (subdivision (e)(2))?
  1. If intent is established, no prejudice need be shown for a sanction to be imposed, including the four severe sanctions listed in subdivision (e)(2).

LEAST SEVERE SANCTION NOT REQUIRED

Unlike subdivision (e)(1), there is no requirement in subdivision (e)(2) that the court impose the least severe sanction. That does not mean that the court will or should impose a sanction more severe than necessary. Were it to do so, the sanction would by definition be unfair and unlikely to be sustained on appeal. The Advisory Committee Note to Rule 37(e)(2) counsels that "the remedy should fit the wrong," and this is precisely what was required under preexisting inherent power sanctions case law. *See, e.g.*, *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311 (Fed. Cir. 2011) (in imposing a sanction for spoliation, the court "must select the least onerous sanction corresponding to the willfulness of the destructive act and the prejudice suffered by the victim."); *Jackson v. Murphy*, 468 F. App'x 616, 619 (7th Cir. 2012) ("The severity of a sanction should be proportional to the gravity of the offense."); *Ross v. Am. Red Cross*, 2014 U.S. App. LEXIS 1827 (6th Cir. Jan. 27, 2014) ("Because failures to produce relevant evidence fall along a continuum of fault — ranging from innocence through the degrees of negligence to intentionality, the severity of a sanction may, depending on the circumstances of the case, correspond to the party's fault" (internal quotations and citations omitted)); *Yoder & Frey Auctioneers, Inc. v. EquipmentFacts, LLC*, 774 F.3d 1065 (6th Cir. 2014) ("The severity of sanction issued is determined on a case-by-case basis, depending in part on the spoliating party's level of culpability.").

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[1] *See, e.g., United States v. Laurent*, 607 F.3d 895, 902–903 (1st Cir. 2010) (negligence may suffice to support adverse inference instruction, although "ordinarily" it does not); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002) (negligence may suffice to support adverse inference instruction (this is the leading case for this view)); *Automated Solutions Corp. v. Paragon Data Sys.*, 756 F.3d 504 (6th Cir. 2014) (negligence may suffice to support adverse inference instruction); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) ("a finding of 'bad faith' is not a prerequisite to" an adverse inference instruction); *Grosdidier v. Broad. Bd. of Governors*, 709 F.3d 19 (D.C. Cir. 2013) (bad faith not required where spoliator destroys documents it is required by regulation to maintain, and injured party is within the class of persons protected by the regulation) (Title VII context).

[2] *See, e.g., Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc.*, 473 F.3d 450, 457 (2d Cir. 2007) ("'Spoliation is the destruction or significant alteration of evidence, or failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.'").

[3] *See Grosdidier*, 709 F.3d at 28 (Title VII employment action; negligent destruction of notes despite EEOC regulation requiring preservation for one year: "As a Title VII litigant, [Plaintiff] is within the class protected by the EEOC regulation, and the destroyed notes are likely to have had information regarding her responses and those of the other applicants during the interview as well as the types of questions asked of her and other applicants, all of which could be relevant to her contention that the [Defendant] is hiding the real reason for its selection decision. [Plaintiff] is therefore entitled to an adverse inference. . . . ").

[4] *See, e.g., United States v. Stein*, 488 F. Supp. 2d 350 (S.D.N.Y. 2007) (Party A serves a document demand on Party B. Party B has the unconditional right, by contract, to obtain responsive documents held by Party C. Held, the documents in the possession of Party C are in Party B's "possession, custody or control" within the meaning of Fed. R. Civ. P. 34).

[5] *See Cyntegra, Inc. v. Idexx Labs., Inc.*, No. CV 06-4170 PSG (CTx), 2007 U.S. Dist. LEXIS 97417, at *14–*15 (C.D. Cal. Sept. 21, 2007) ("courts have extended the affirmative duty to preserve evidence to instances when that evidence is not directly within the party's custody or control so long as the party has access to, or indirect control over, such evidence").

[6] *See, e.g., World Courier v. Barone*, No. C 06-3072 TEH, 2007 U.S. Dist. LEXIS 31714 (N.D. Cal. Apr. 16, 2007) (defendant wife and two co-defendants downloaded plaintiff's databases prior to leaving plaintiff's employ; wife's husband destroyed the hard drive that contained relevant evidence; court rejected all defendants' argument that they could not be sanctioned because the spoliator was a nonparty on three grounds: (1) "it overlooks a party's affirmative duty to preserve relevant evidence both prior to and during trial;" (2) "courts have extended the affirmative duty to preserve evidence to instances when that evidence is not directly within the party's custody or control so long as the party has access to or indirect control over such evidence;" and (3) "it is difficult to imagine a scenario in which a husband would secretly create a copy of, and subsequently destroy, a hard drive relating to his spouse's pending legal matters and professional career without any knowledge, support or involvement of his wife." Adverse inference instruction and monetary sanctions imposed.)

[7] Under preexisting case law, most Circuits that rejected the negligence standard of *Residential Funding* applied a bad faith test. *See, e.g., Bull v. United Parcel Serv., Inc.*, 665 F.3d 68, 79 (3d Cir. 2012) ("a finding of bad faith is pivotal to a spoliation determination"); *Condrey v. SunTrust Bank of Ga.*, 431 F.3d 191, 203 (5th Cir. 2005) ("The Fifth Circuit permits an adverse inference against the destroyer of evidence only upon a showing of 'bad faith.'"), quoted with approval in *Clayton v. Columbia Cas. Co.*, 547 F. App'x 645 (5th Cir. 2013); *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008) ("In order to draw an inference that the [destroyed documents] contained information adverse to [defendant], we must find that [defendant] intentionally destroyed the documents in bad faith."); *Hallmark Cards, Inc. v. Murley*, 703 F.3d 456, 461 (8th Cir. 2013) ("[A] district court must issue explicit findings of bad faith and prejudice prior to delivering an adverse inference instruction."); *Rutledge v. NCL (Bahamas), Ltd.*, 464 F. App'x 825 (11th Cir. 2012) (unpublished) ("'[A]n adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith.'") (quoting *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997)); *Silver v. Countrywide Home Loans, Inc.*, 483 F. App'x 568, 572 (11th Cir. 2012).

[8] *See generally* Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse § 52(A) (5th ed. 2013).

[9] *Id.* at § 16(C)(1).