GIVE US A BREAK: THE (IN)EQUITY OF COURTS IMPOSING SEVERE SANCTIONS FOR SPOLIATION WITHOUT A FINDING OF BAD FAITH

I. INTRODUCTION: THE DUTY TO PRESERVE EVIDENCE, SPOLIATION, AND CURRENT COURTS OVER-SANCTIONING UNDER THEIR INHERENT POWER

A. *The Preservation of Evidence in Anticipation of Litigation and Spoliation When Evidence is Destroyed*

It is well established that parties in a court proceeding have the duty to preserve evidence relevant to that litigation.[1] This "obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."[2] Consequently, "'[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents.'"[3] It can be difficult to determine exactly when this duty to preserve is triggered and to define the scope of such duty once it is in place,[4] and courts have each set forth their own

1. *See, e.g.*, Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010) ("The common law duty to preserve evidence relevant to litigation is well-recognized." (footnote omitted)); Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614, 620 (D. Colo. 2007) ("[P]utative litigants have a duty to preserve documents that may be relevant to pending or imminent litigation." (citing Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003))).

2. Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2d Cir. 2001) (citing Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998)).

3. *Pension Comm.*, 685 F. Supp. 2d at 466 (quoting Treppel v. Biovail, 249 F.R.D. 111, 118 (S.D.N.Y. 2008)).

4. Maria Perez Crist, *Preserving the Duty to Preserve: The Increasing*

guidelines as to how these decisions should be made under their standards.[5] One of the only things courts seem to agree on—although not very helpful—is that the duty is extensive; however, "a party is not required to retain every document in its possession after a lawsuit commences."[6] Beyond this common acknowledgment, the standards for preservation of evidence vary significantly from one court to another.[7]

Spoliation occurs when a party breaches its duty to preserve evidence.[8] Specifically, courts will find spoliation if a party destroyed or materially altered evidence or failed to preserve evidence in pending or "reasonably foreseeable litigation."[9] Because courts need to preserve the

Vulnerability of Electronic Information, 58 S.C. L. REV. 7, 15 (2006) (The common law duty to preserve evidence for "pending and actual litigation is the most troublesome in determining when the duty to preserve is triggered and the scope of the duty. While the case law has developed general guidelines as to when the duty exists and the scope of the duty, these guidelines are more difficult to follow when electronic information is involved.").

5. *See* Victor Stanley, Inc. v. Creative Pipe, Inc., No. MJG-06-2662, 2010 U.S. Dist. LEXIS 93644, at *91 (D. Md. Sept. 9, 2010) ("Case law has developed guidelines for what the preservation duty entails. . . . [However,] case law is not considered consistent across the circuits . . . ."); *compare, e.g.*, Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001) (stating that in addition to having a duty to preserve their own evidence, parties have a duty to notify the opposing party of evidence in third parties' hands), *with* Bensel v. Allied Pilots Ass'n, 263 F.R.D. 150, 152 (D.N.J. 2009) (stating that the preservation duty applies only when the evidence is "'within the party's control'" (citations omitted)).

6. 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 37A.10[1] (3d ed. 2011) (footnote omitted) (citing Second, Seventh, and Ninth Circuit decisions that have followed this rule).

7. *See Victor Stanley*, 2010 U.S. Dist. LEXIS 93644, at *65–66 (discussing the concern generated due to the "lack of a uniform national standard governing when the duty to preserve potentially relevant evidence commences"); *compare, e.g.*, *Pension Comm.*, 685 F. Supp. 2d at 471 (stating that a failure to implement a written litigation hold is gross negligence *per se*), *with* Haynes v. Dart, No. 08-C-4834, 2010 U.S. Dist. LEXIS 1901, at *11 (N.D. Ill. Jan. 11, 2010) ("The failure to institute a document retention policy, in the form of a litigation hold, is relevant to the court's consideration, but it is not per se evidence of sanctionable conduct." (citation omitted)).

8. *See* Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 612 (S.D. Tex. 2010) ("Such deletions, alterations, and losses cannot be spoliation unless there is a duty to preserve the information, a culpable breach of that duty, and resulting prejudice."); *Pension Comm.*, 685 F. Supp. 2d at 465 ("Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.").

9. *Pension Comm.*, 685 F. Supp. 2d at 465; BLACK'S LAW DICTIONARY 1531 (9th ed. 2009).

integrity of the judicial system and control the judicial process, they have "[t]he right to impose sanctions for spoliation" under their inherent power.[10] Thus, if a party destroys evidence relevant to reasonably foreseeable litigation, the party can be sanctioned by the court.[11] Courts may choose from a wide variety of sanctions, from dismissal of the action or an adverse inference jury instruction, to monetary sanctions or attorneys' fees.[12] As is logical, the courts impose the most serious sanctions for the most egregious destructions of evidence.[13] These sanctions and the culpability that should be required for the court to grant the most severe sanctions are the topics of this Note.

B. *Developments in Technology and Their Impact on the Duty to Retain Electronically Stored Information*

The duty to preserve relevant evidence extends not only to traditional paper documents, but it also applies to electronically stored information (ESI).[14] ESI includes an extensive amount of material such as "databases, word-processing documents, spread-sheets, source codes, and email messages contained in various computer storage media, including backup tape systems that may be subject to a discovery request."[15] Because individuals and businesses use computers and data-processing systems for an increasing number of daily functions, the amount of information subject to discovery has skyrocketed.[16]

A litigant's duty to preserve evidence is challenged by this drastic increase in the amount of ESI a party possesses.[17] In most cases, it is

10. *Pension Comm.*, 685 F. Supp. 2d at 465.

11. *See id.*

12. *See* Crist, *supra* note 4, at 10–11 (footnotes omitted); *see also, e.g.*, United States v. Philip Morris USA, Inc., 327 F. Supp. 2d 21, 26 (D.D.C. 2004) (fining the defendant $2.75 million because eleven employees failed to preserve e-mails subject to a litigation hold); Daimler Chrysler Motors v. Bill Davis Racing, Inc., No. 03-72265, 2005 WL 3502172, at *3 (E.D. Mich. Dec. 22, 2005) (sanctioning with an adverse inference instruction based on the negligent destruction of e-mails after the complaint was filed).

13. *See* Crist, *supra* note 4, at 11; *see also, e.g.*, *In re* Texlon Corp. Sec. Litig., Nos. 5:98CV2876 & 1:01CV1078, 2004 WL 3192729, at *33 (N.D. Ohio July 16, 2004) (recommending default judgment upon finding significant discovery abuse).

14. MOORE ET AL., *supra* note 6.

15. *Id.*

16. Marjorie A. Shields, Annotation, *Electronic Spoliation of Evidence*, 3 A.L.R.6th 13, § 2 (2005).

17. *See* Crist, *supra* note 4, at 8 ("The explosive growth of electronically

almost impossible, even for a business with few employees and computers, to save every piece of relevant information they have. Now even a small business, which used to have one four-drawer file cabinet holding its records, has enough electronic information to fill two thousand of those cabinets.[18] This huge increase in the amount of information a small company has—let alone the amount of information a corporation with thousands of employees all across the globe has—makes it difficult, if not impossible, to ensure every piece of relevant information in occurring or foreseeable litigation is kept,[19] or producible.[20] What type of sanction should be imposed on a party, then, for losing information, and how much should the culpability of that party be considered in making the decision?

C. *Recent Cases Set a High Standard for Parties in the Preservation of Evidence*

Once a court determines spoliation has occurred, it must fashion a proper sanction for the party who caused it. Some courts have recently set forth standards to help decide what sanctions are appropriate.[21] Although some courts require a showing of bad faith before imposing harsh sanctions,[22] others require a much lower culpability standard, such as mere negligence.[23] For instance, in *Reilly v. Natwest Markets Group Inc.*, the

stored information and the unique character of electronic information challenge the time honored duty to preserve evidence."); George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 1, 9 (2006) ("Probably close to 100 billion e-mails are sent daily, with approximately 30 billion e-mails created or received by federal government agencies each year. The amount of stored information continues to grow exponentially." (footnotes omitted)).

18. Paul & Baron, *supra* note 17, at 10.

19. *See* Victor Stanley, Inc. v. Creative Pipe, Inc., No. MJG-06-2662, 2010 U.S. Dist. LEXIS 93644, at *24 (D. Md. Sept. 9, 2010); Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381, 386 (2008) (describing the "preservation dilemma" of determining what evidence meets the relevancy standard out of the potentially large volume of ESI).

20. *See* Paul & Baron, *supra* note 17, at 15 (stating that "the volume and forms" of ESI might create an "inability to process" and provide all relevant information during discovery).

21. *E.g.*, Reilly v. Natwest Mkts. Grp. Inc., 181 F.3d 253, 267 (2d Cir. 1999) (approving a more severe sanction than an adverse inference instruction based solely on gross negligence while continuing to decide sanctions on a "case-by-case" basis); *see also, e.g.*, *Victor Stanley*, 2010 U.S. Dist. LEXIS 93644, at *140 (stating something more than gross negligence is needed to impose an adverse inference jury instruction).

22. *Victor Stanley*, 2010 U.S. Dist. LEXIS 93644, at *72.

23. Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d

court acknowledged it had "previously approved more severe sanctions [than an adverse inference instruction] based solely on gross negligence."[24] In *Residential Funding Corp. v. DeGeorge Financial Corp.*, the court held an adverse inference jury instruction was appropriate in some cases with a showing of only negligence.[25]

The courts requiring something less than bad faith to impose harsh sanctions are holding parties to a standard that is too high. "[M]ore than 90% of all business records are digital, and many businesses never commit those records to paper."[26] With that in mind, along with the understanding that technology and information storage mechanisms advance at an unimaginable rate, imposing harsh sanctions on a party without a finding of bad faith is too strict. In addition to a party's inability to save and produce every piece of evidence, the cost of attempting to do so can be staggering.[27] As a result, "changes in the magnitude and structure of litigation costs . . .

Cir. 2002).

24. *Reilly*, 181 F.3d at 267 (citation omitted).

25. *Residential Funding Corp.*, 306 F.3d at 108.

26. Crist, *supra* note 4, at 8 (footnote omitted).

27. *See* Paul & Baron, *supra* note 17, at 3 (stating that a manual review of documents alone results in "costs often exceeding the amount in dispute"); *see also* JAMES N. DERTOUZOS ET AL., RAND INST. FOR CIVIL JUSTICE, THE LEGAL AND ECONOMIC IMPLICATIONS OF ELECTRONIC DISCOVERY: OPTIONS FOR FUTURE RESEARCH 2–4 (2008), *available at* http://www.rand.org/content/dam/rand/pubs/occasional_papers/2008/RAND_OP183.pdf ("[T]he most frequent issue raised . . . was the enormous costs—in time and money . . . ."):

> [M]any lawyers are unfamiliar with the modern and continuously evolving hardware, applications, and internal record-keeping practices of their clients. Lawyers risk significant sanctions for failing to properly carry out e-discovery duties that they may not be equipped to handle. Even technologically savvy attorneys voiced concerns that providing opposing parties with detailed IT 'roadmaps' as envisioned under the new rules would lead to discovery demands designed solely to drive up costs.

DERTOUZOS ET AL., *supra*, at 4. In addition to these increased costs of preservation and production,

> [c]orporate litigants also voiced concern over their inability to provide convincing documentation about the magnitude of costs associated with broad e-discovery requests. Some of these litigants asserted that many judges do not have an adequate grasp of the technical and cost issues raised by e-discovery and continue to apply paper-based thinking when ruling on discovery disputes.

Id. at 3. The increase in the cost, coupled with a lack of understanding of such costs by some courts, creates a poor litigation environment. *See id.* at 3–4.

will alter litigant incentives to file suits, settle cases, and go to trial."[28] Thus, rather than suits being decided on their merits, they will be decided based on discovery issues, including the fear of sanctions for spoliation.[29]

II. LIMITS ON THE COURT'S INHERENT POWER TO SANCTION

A. *The* Chambers *Court Acknowledged but Limited the Inherent Power of the Court*

In 1991, the Supreme Court decided *Chambers v. NASCO, Inc.*[30] In *Chambers*, the Court sought to resolve the issue of whether a federal district court sitting in diversity could sanction a party by assessing attorneys' fees under its inherent power.[31] In determining sanctions could appropriately be imposed under such circumstances, the Court acknowledged the tradition of all courts to possess implied powers.[32] Although Chambers argued "28 U.S.C. § 1927 and the various sanctioning provisions in the Federal Rules of Civil Procedure reflect a legislative intent to displace the inherent power," the Court disagreed.[33] Instead, the Court recognized "'certain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'"[34] The Court agreed with the Fifth Circuit, finding that the district court had not abused its discretion in invoking its inherent power because Chambers had repeatedly and severely abused the judicial system.[35] Under these circumstances—when judicial functioning is threatened—use of inherent powers is appropriate.[36]

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28. *Id.* at 3.

29. *See id.* at 3–4.

30. Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

31. *Id.* at 40.

32. *Id.* at 43.

33. *Id.* at 42–43 (footnote omitted). The Court held that 28 U.S.C. § 1927 and the provisions in the Federal Rules of Civil Procedure that allow for sanctions, such as Rules 11, 16(f), and 37, do not displace the court's inherent sanctioning power. *Id.* at 42 n.8, 46.

34. *Id.* at 43 (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)).

35. *Id.* at 38–39, 55–58 (holding sanctions were appropriate in this case because Chambers deliberately abused the judicial process by, among other things, defying a preliminary injunction and filing a series of meritless motions, pleadings, and delaying actions).

36. *See id.* at 51 ("In circumstances such as these . . . requiring a court first to apply Rules and statutes containing sanctioning provisions . . . before invoking inherent

Thus, the *Chambers* Court held the inherent power of the court exists and is necessary in order to uphold judicial integrity.[37] This power, the Court stated, includes the "'power to impose silence, respect, and decorum, in [the court's] presence, and submission to [the court's] lawful mandates.'"[38] Because these inherent powers are not granted or governed by statute or rule, they are instead guided by "'the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'"[39] In other words, the inherent power of the court is meant to increase its efficiency and proper functioning.[40] Because the Court did not recognize or accept other purposes for courts' inherent power,[41] such power should be contained and limited and used only for increased efficiency and proper functioning of the courts.

In addition to the internal control vested in courts, which the *Chambers* Court meant to limit courts' use of implied power to threats to the court's functioning and efficiency,[42] the Court mentioned further restraints on the power.[43] In fact, the Court recognized the potency of the power and warned it "must be exercised with restraint and discretion."[44] Further, the Court, quoting *Ex parte Burr*, agreed the "power 'ought to be exercised with great caution.'"[45] The Court went to great lengths to quote cases from the 1800s in which the Court addressed the inherent power and its limitations,[46] showing the *Chambers* Court's hesitancy toward using the sanctioning power due to the possible effects of unchecked, extensive use

power . . . would serve only to foster extensive and needless satellite litigation . . . .").

37. *See id.* at 43.

38. *Id.* (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821)).

39. *Id.* (quoting Link v. Wabash R. Co., 370 U.S. 626, 630–31 (1962)).

40. *See id.* (stating that inherent powers are vested in courts as they are necessary to allow courts "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases"); *see also* Jones v. Bremen High Sch. Dist. 228, No. 08-C-3548, 2010 WL 2106640, at *5 (N.D. Ill. May 25, 2010) ("The purpose of sanctions is to prevent abuses of the judicial system and to promote the efficient administration of justice." (citing Barnhill v. United States, 11 F.3d 1360, 1367 (7th Cir. 1993))).

41. *See Chambers*, 501 U.S. at 43 (finding the scope of inherent powers to ensure proper court functioning and efficiency includes bar admission, contempt power, and ability to vacate orders if fraud has been committed on the court).

42. *See id.*

43. *Id.*

44. *Id.* at 44 (citing Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980)).

45. *Id.* at 43 (quoting *Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 530 (1824)).

46. *See id.* at 41–42 (citations omitted).

of the power.[47] With this realization, the Court expressed that the inherent power is not limitless in its reach, and it should always be used with restraint.[48]

In order to comply with the restraints placed on the inherent power, the *Chambers* Court stated that discretion should be used "to fashion an *appropriate* sanction for conduct which abuses the judicial process."[49] In determining which sanction is appropriate, a court must not only use caution and discretion, but also comply with due process.[50] The Court in *Chambers* was very clear when discussing the restraint that was needed when invoking the inherent power, and these restraints need to be taken seriously.[51] Using caution and discretion, and remembering the limits of due process, is essential to appropriately using the inherent power to sanction.[52] Without these restraints the Court expressly set forth, the power will go unchecked, being governed only by "the control necessarily vested in courts," and may be subject to abuse—as has recently been the case.[53]

B. *Application of* Chambers *to Courts Imposing Sanctions Other Than Attorneys' Fees*

1. *Some Courts Require Bad Faith to Impose Severe Sanctions*

At the time *Chambers* was decided, the inherent power of the court had been used to control bar admission and to discipline attorneys who threatened its respectability,[54] to punish for contempt of court,[55] and to vacate judgments upon proof of fraud.[56] *Chambers* itself dealt with whether a court could impose the sanction of attorneys' fees.[57] Although

47. *See id.*
48. *See id.* at 42–44.
49. *Id.* at 44–45 (emphasis added).
50. *Id.* at 50 (citing Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980)).
51. *See id.* at 42–45 ("[T]he inherent power 'is not a broad reservoir of power, ready at an imperial hand, but a limited source . . . .'" (quoting NASCO, Inc. v. Calcasieu Television & Radio, Inc., 894 F.2d 696, 702 (5th Cir. 1990))).
52. *Id.* at 44–45, 50 (holding that a court must exercise caution in using its inherent power and "comply with the mandates of due process").
53. Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962).
54. *Chambers*, 501 U.S. at 43 (citing *Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 530 (1824)).
55. *Id.* at 44 (citing *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1874)).
56. *Id.* (citations omitted).
57. *See id.* at 40–44.

the American Rule applies when any court assesses attorneys' fees[58] and restricts their use as sanctions only to situations in which bad faith or willful disobedience of the court's orders has occurred,[59] the overall meaning and approach of *Chambers* is applicable to other types of sanctions,[60] even if the holding of the case is somewhat limited.[61] The Court, in addition to requiring bad faith, recognized the need for judicial caution and restraint in imposing sanctions under this inherent power.[62] Courts must continue to exercise such restraint when imposing any sanctions under this power. Otherwise, the unchecked power will become abusive and will itself threaten the judicial system's ability to function.

Some courts have indeed adhered to the underlying rationale of the *Chambers* decision and require a showing of bad faith before imposing harsh sanctions for spoliation.[63] The Fifth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits all seem to require a showing of bad faith before harshly sanctioning a party under the court's inherent power.[64] For

58. Hardt v. Reliance Standard Life Ins. Co., 130 S. Ct. 2149, 2157 (2010) (citations omitted) (describing the "bedrock principle known as the 'American Rule': Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise").

59. *Chambers*, 501 U.S. at 42–50 ("[N]arrow exceptions to the American Rule effectively limit a court's inherent power to impose attorney's fees as a sanction to cases in which a litigant has engaged in bad-faith conduct or willful disobedience of a court's orders . . . .").

60. *See, e.g.*, Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 2 F.3d 1397, 1412 (5th Cir. 1993) (applying principles of *Chambers* to determine the propriety of novel and traditional sanctions such as monetary penalties, and finding such sanctions to be within the court's inherent power).

61. *See Chambers*, 501 U.S. at 42–50 (generally discussing the inherent power to sanction for bad faith conduct, although the sanctions directly at issue were only the assessment of attorneys' fees).

62. *See id.* at 50 ("A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists in assessing fees . . . ." (citation omitted)).

63. *See, e.g.*, Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1035 (8th Cir. 2007) ("A spoliation-of-evidence sanction requires 'a finding of intentional destruction indicating a desire to suppress the truth.'" (citation omitted)); Rimkus Consulting Grp. Inc. v. Cammarata, 688 F. Supp. 2d 598, 614 (S.D. Tex. 2010) ("As a general rule, in this circuit, the severe sanctions of granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of 'bad faith.'" (citations omitted)).

64. *See, e.g.*, Turner v. Pub. Serv. Co. of Colo., 563 F.3d 1136, 1149 (10th Cir. 2009) ("[I]f the aggrieved party seeks an adverse inference . . . it must also prove bad faith [because] '[m]ere negligence in losing or destroying records is not enough . . . .'"

example, the Fifth Circuit has held severe sanctions such as "granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of 'bad faith.'"[65] Likewise, the Tenth Circuit has held that evidence of intentional destruction or bad faith is necessary before a litigant is entitled to a spoliation instruction.[66] The court reasoned this requirement was necessary because "[m]ere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case."[67]

By requiring bad faith, the courts in these cases have followed the *Chambers* Court's reasoning and used caution in sanctioning under their inherent power. As the court in *Rimkus Consulting Group, Inc. v. Cammarata* stated, "[w]hen inherent power does apply, it is 'interpreted narrowly, and its reach is limited by its ultimate source—the court's need to orderly and expeditiously perform its duties.'"[68] Limits were meant to be placed on the inherent sanctioning power of courts, and cases requiring bad faith before imposing severe sanctions are abiding by that restriction.

(citation omitted)); 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 [the spoliating party], we must find that [the spoliating party] intentionally destroyed the documents in bad faith."); *Greyhound Lines*, 485 F.3d at 1035 ("A spoliation-of-evidence sanction requires 'a finding of intentional destruction indicating a desire to suppress the truth.'" (citation omitted)); 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' or 'bad conduct.'" (citation omitted)); Penalty Kick Mgmt. Ltd. v. Coca Cola Co., 318 F.3d 1284, 1294 (11th Cir. 2003) ("In this circuit 'an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith.'" (citation omitted)); Wyler v. Korean Air Lines Co., 928 F.2d 1167, 1174 (D.C. Cir. 1991) (stating that "[m]ere innuendo," rather than providing evidence supporting the conclusion that the spoliating party had actual knowledge of the existence of evidence needing preservation, was not enough to support an adverse inference jury instruction).

65. *Rimkus Consulting Grp.*, 688 F. Supp. 2d at 614 (citations omitted) (providing numerous Fifth Circuit cases).

66. Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997) (citations omitted) (finding bad faith on the part of the spoliating party to be a predicate for an adverse inference).

67. *Id.* (citing Vick v. Tex. Emp't Comm'n, 514 F.2d 734, 737 (5th Cir. 1975)).

68. *Rimkus Consulting Grp.*, 688 F. Supp. 2d at 611 (quoting Newby v. Enron Corp., 302 F.3d 295, 302 (5th Cir. 2002)).

2. *Other Courts Are Shying Away From Limitations and Imposing Harsh Sanctions Without a Showing of High Culpability*

There are also courts that do not seem to uphold the underlying *Chambers* rationale. Rather than requiring bad faith or willful misconduct before imposing the harshest sanctions on spoliating parties, they require a less culpable state of mind.[69] Sanctioning parties in ways that essentially prevent them from either bringing their claim or defending themselves in a lawsuit without a finding of intentional loss of evidence seems to go beyond the *Chambers* Court's holding.

Take, for instance, the adverse inference jury instruction.[70] Many courts regard the adverse instruction to be among the most severe sanctions.[71] In fact, the Eighth Circuit recognized:

> An adverse inference instruction is a powerful tool in a jury trial. When giving such an instruction, a federal judge brands one party as a bad actor, guilty of destroying evidence that it should have retained for use by the jury. It necessarily opens the door to a certain degree of speculation by the jury, which is admonished that it may infer the presence of damaging information in the unknown contents of [a lost

69. *See, e.g.*, Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002) (requiring only negligence before imposing an adverse inference jury instruction); Silvestri v. Gen. Motors Corp., 271 F.3d 583, 593 (4th Cir. 2001) (recognizing negligent spoliation can result in dismissal of an action where significant unfairness results).

70. An example of an adverse inference jury instruction in a spoliation case could read, in relevant part:

> I instruct you, as a matter of law, that each of these plaintiffs failed to preserve evidence after its duty to preserve arose. This failure resulted from their gross negligence in performing their discovery obligations. As a result, you may presume, if you so choose, that such lost evidence was relevant, and that it would have been favorable to the . . . [d]efendants. In deciding whether to adopt this presumption, you may also take into account the egregiousness of the plaintiffs' conduct in failing to preserve the evidence.

Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 496 (S.D.N.Y. 2010) (footnote omitted).

71. *See, e.g.*, Consol. Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335, 340 n.5 (M.D. La. 2006) ("Imposition of an adverse inference instruction has been recognized as a powerful tool in a jury trial since, when imposed, it basically 'brands one party as a bad actor, guilty of destroying evidence that it should have retained for use by the jury.'" (quoting Morris v. Union Pac. R.R., 373 F.3d 896, 900 (8th Cir. 2004))); Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 220 (S.D.N.Y. 2003) ("[T]he adverse inference instruction is an extreme sanction and should not be given lightly.").

piece of evidence].[72]

In spite of this recognition, other courts will impose the adverse inference instruction with a finding of culpability much less than bad faith.[73] The Second Circuit is such a court.[74] In 1999, the court in *Reilly v. Natwest Markets Group, Inc.* stated it had "previously approved more severe sanctions [than an adverse inference instruction] based solely on gross negligence."[75] The court went even further in 2002 when it approved the imposition of an adverse inference jury instruction with a showing of mere negligence.[76] In the *Residential Funding* case, the court held that a "sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence."[77]

These courts that require a low culpability, even when imposing severe sanctions, are abridging the *Chambers* limitations on the inherent power of the court. The Court in *Chambers* agreed with past Supreme Court cases that the inherent power must be exercised with extreme caution.[78] Courts that now apply severe sanctions, such as an adverse inference jury instruction, without a finding of intentional loss of evidence—sometimes requiring as little as *negligent* loss of evidence[79]—are not exercising caution. Instead, the courts are crippling a party's ability to

72. *Morris*, 373 F.3d at 900–01.

73. *See, e.g.*, *Residential Funding*, 306 F.3d at 108 ("The sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence . . . . '[The] sanction [of an adverse inference] should be available even for the negligent destruction of documents if that is necessary to further the remedial purpose of the inference.'" (alteration in original) (citation omitted)); Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993) (holding that a "finding of 'bad faith' is not a prerequisite" to an adverse inference jury instruction).

74. *See, e.g.*, *Residential Funding*, 306 F.3d at 108.

75. Reilly v. Natwest Mkts. Grp. Inc., 181 F.3d 253, 267 (2d Cir. 1999) (citations omitted).

76. *See Residential Funding*, 306 F.3d at 108.

77. *Id.*

78. Chambers v. NASCO, Inc., 501 U.S. 32, 43, 50 (1991) ("[T]his power 'ought to be exercised with great caution . . . .'" (quoting *Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 531 (1824))); Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980) (stating a court must exercise caution when invoking its inherent power to sanction).

79. *See, e.g.*, *Residential Funding*, 306 F.3d at 108 (finding that an adverse inference jury instruction may be appropriate for negligence); Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993) (holding that a "finding of 'bad faith' is not a prerequisite" for an adverse inference jury instruction).

make a claim or defense based solely on the court's desire to have every individual piece of evidence in the case. In setting forth limitations on the inherent power, the *Chambers* Court attempted to avoid abuse of this self-controlled power.[80] Unfortunately, recent courts have not heeded to this call and are, instead, sanctioning parties without the necessary control.

III. RULE 26(B) REQUIRES CONSIDERATION OF REASONABLENESS AND PROPORTIONALITY IN ASSESSING SANCTIONS; RULE 37(E) REQUIRES BAD FAITH

A. *Amended Rule 26 and Its Discovery Requirements*

The Federal Rules of Civil Procedure ensure that the discovery process during litigation is expansive and meaningful.[81] As office automation and use of the Internet grew during the late 1990s and early 2000s, discovery requests changed drastically to account for the technological shift.[82] Each employee at a company had an increasingly large amount of information in his possession that was subject to these discovery requests, including a "desktop computer, plus disks or other removable data storage media, a laptop computer, a home computer, and a hand-held personal organizer."[83] To deal with these new technological challenges, the Federal Rules of Civil Procedure were amended in 2006.[84]

The amended Rule 26(b)(2)(B) states, in relevant part: "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost."[85] Also pertinent is amended Rule 26(b)(2)(C), which states:

> On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

80. *See Chambers*, 501 U.S. at 43–44, 50 (discussing the caution and limitations necessary to the inherent sanctioning power of the court).

81. SHIRA A. SCHEINDLIN ET AL., ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE 43 (2009) (citing Jones v. Goord, No. 95 Civ. 8026, 2002 WL 1007614, at *1 (S.D.N.Y. May 16, 2002)).

82. *See id.*

83. Kenneth J. Withers, *Computer-Based Discovery in Federal Civil Litigation*, FED. CTS. L. REV., Oct. 2000, at 3.

84. FED. R. CIV. P. 26 advisory committee's notes (2006), subdiv. (b)(2).

85. FED. R. CIV. P. 26(b)(2)(B).

> the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.[86]

These rules allow parties in litigation to consider the costs and benefits of evidence preservation; parties are not required to preserve every piece of evidence regardless of its importance or price.[87] The court in *Victor Stanley, Inc. v. Creative Pipe, Inc.* discussed the application of these rules to electronic discovery and acknowledged "the permissible scope of discovery as set forth in *Rule 26(b)* includes a proportionality component of sorts with respect to discovery of ESI, because *Rule 26(b)(2)(B)* permits a party to refuse to produce ESI if it is not reasonably accessible without undue burden or expense."[88]

Other courts have also recognized the proportionality limits Rule 26(b) places on discovery of ESI.[89] The court in *Major Tours, Inc. v. Colorel* decided whether it could grant a protective order under Rule 26(b)(2)(B) if the party seeking the order no longer had access to the evidence due to its own spoliation.[90] In making its determination, the court discussed the meaning of "undue" in Rule 26(b)(2)(B) and decided the natural reading of the word was whether "the burden or cost outweighs the

86. *Id.* at 26(b)(2)(C).

87. *See* Victor Stanley, Inc. v. Creative Pipe, Inc., No. MJG-06-2662, 2010 U.S. Dist. LEXIS 93644, at *89 (D. Md. Sept. 9, 2010) (citations omitted); FED. R. CIV. P. 26(b)(2)(B) (stating that a party "need not" provide ESI that is not reasonably accessible); *id.* at 26(b)(2)(C) ("[T]he court *must* limit the frequency or extent of discovery . . . if it determines . . . the burden or expense of the proposed discovery outweighs its likely benefit . . . ." (emphasis added)).

88. *Victor Stanley*, 2010 U.S. Dist. LEXIS 93644, at *90.

89. *See, e.g.*, Major Tours, Inc., v. Colorel, 720 F. Supp. 2d 587, 619 (D.N.J. 2010); Rimkus Consulting Grp., Inc., v. Cammarata, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (finding that reasonableness turns on "whether what was done—or not done—was *proportional*").

90. *Major Tours*, 720 F. Supp. 2d at 619.

potential benefit."[91] The court held the Rule "compel[s] exactly this discretionary balancing of costs and benefits of discovery."[92] The court also recognized "a bright line requirement of production, no matter how burdensome, how likely to succeed, or how necessary to the litigation" was not in line with the amended Rule 26(b).[93]

It is clear, then, that Rule 26(b) prevents courts from requiring parties to "preserve every byte of previously accessible data" without first considering whether the cost of preserving and turning over the evidence would outweigh the benefit.[94] As the court in *Victor Stanley* warned, Rule 26(b)(2)(C) "cautions that all permissible discovery must be measured against the yardstick of proportionality."[95]

B. *Effect of Rule 26(b) on Sanctioning Under the Court's Inherent Power*

As discussed above, Rules 26(b)(2)(B*)* and 26(b)(2)(C) limit the amount of information a party is required to produce during litigation.[96] Therefore, these amended rules should be applied, or at the very least considered, by each court imposing sanctions for spoliation.[97] If the rules are not taken into account, a court would be able to sanction a party for spoliation of evidence, even if that evidence was never subject to discovery in the first place under amended Rule 26(b).[98]

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91. *Id.*

92. *Id.* at 620 (holding that the proper approach to determining whether a party should be granted a protective order under Rule 26(b)(2)(B) is to balance the party's culpability among other factors in a seven-factor analysis).

93. *Id.*

94. *Id.*

95. Victor Stanley, Inc. v. Creative Pipe, Inc., No. MJG-06-2662, 2010 U.S. Dist. LEXIS 93644, at *90 (D. Md. Sept. 9, 2010) (citing Procter & Gamble Co. v. Haugen, 427 F.3d 727, 739 n.8 (10th Cir. 2005)); *see* FED. R. CIV. P. 26(b)(2)(C) (stating that discovery must be the result of a weighing of the burden and expense of the action and its likely benefit).

96. *See supra* notes 84–95 and accompanying text.

97. *See, e.g.*, *Victor Stanley*, 2010 U.S. Dist. LEXIS 93644, at *90 (considering application of the Rules when determining the scope of discovery).

98. *See id.* at *90–91 ("[T]he permissible scope of discovery as set forth in *Rule 26(b)* includes a proportionality component of sorts with respect to discovery of ESI, because *Rule 26(b)(2)(B)* permits a party to refuse to produce ESI if it is not reasonably accessible without undue burden and expense. Similarly, *Rule 26(g)(1)(B)(iii)* requires all parties seeking discovery to certify that the request is 'neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, the amount in controversy, and the importance of the issues at stake in the action.' Thus, assessment of reasonableness and proportionality should be at the

Although in recent years courts have invoked their inherent power to sanction parties for loss of evidence much more regularly, very few courts have considered the impact amended Rule 26(b) has on their analysis.[99] In fact, the court in *Victor Stanley* expressed its recognition of this oversight by the courts when it stated: "[W]ith few exceptions . . . courts have tended to overlook the importance of proportionality in determining whether a party has complied with its duty to preserve evidence in a particular case, this should not be the case because" Rule 26(b)(2)(C) applies.[100] The court agreed with the *Jones v. Bremen High Sch. Dist. 228* court, which held "'[r]easonableness is the key to determining whether or not a party breached its duty to preserve evidence.'"[101]

The *Rimkus Consulting Group, Inc. v. Cammarata* court is another exception to the general rule.[102] Although the court did not expressly cite to Rule 26(b), it held "[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards."[103] The "clearly established applicable standards" referenced by the court were the guidelines set forth by *The Sedona Principles*, which state: "'Electronic discovery burdens should be proportional to the amount in controversy and the nature of the case. Otherwise, transaction costs due to electronic discovery will overwhelm the ability to resolve disputes fairly in litigation.'"[104]

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forefront of all inquiries into whether a party has fulfilled its duty to preserve relevant evidence." (citation omitted)).

99. *See id.* at *89–90 ("Although, with few exceptions, such as the recent and highly instructive *Rimkus* decision, courts have tended to overlook the importance of proportionality in determining whether a party has complied with its duty to preserve evidence . . . ." (footnote omitted)).

100. *Id.*

101. *Id.* at *91 (quoting Jones v. Bremen High Sch. Dist. 228, No. 08-C-3548, 2010 WL 2106640, at *6–7 (N.D. Ill. May 25, 2010)).

102. *See* Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598 (S.D. Tex. 2010).

103. *Id.* at 613 (footnote omitted).

104. *Id.* at 613 n.8 (quoting THE SEDONA PRINCIPLES: SECOND EDITION, BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 17 cmt. 2.b (2007) [hereinafter THE SEDONA PRINCIPLES]). *The Sedona Principles* are extremely informative on this topic, especially regarding e-discovery. In discussing the scope of a "reasonable inquiry" under Rule 26(b)(2)(C), the *Principles* state:

As few courts have correctly acknowledged, the proportionality concept of Rule 26(b), as amended,[105] should affect the determination of a breach of preservation duty and appropriate sanctions for spoliation.[106] It does not seem strange, then, that courts that take the proportionality principles of Rules 26(b)(2)(B) and 26(b)(2)(C) into account when sanctioning decide that severe sanctions are not appropriate without a finding of bad faith. In other words, the courts that consider Rule 26(b)'s proportionality standard when assessing sanctions are also courts that hold harsh sanctions should only be given upon a finding of bad faith or intentional misconduct.[107] This result seems rational. The Federal Rules of

> The traditional approach to preserving and producing paper documents has been to *undertake a good faith effort* to identify sources and locations that are reasonably likely to contain relevant information and to advise custodians to preserve potentially relevant information. This is followed by employing reasonable steps to gather and produce documents, after reviewing them for privilege, trade secrets, confidential information or other appropriate bases for non-production. A similar approach applies to efforts to identify, preserve, and produce relevant information in electronic format.

THE SEDONA PRINCIPLES, *supra*, 17 cmt. 2.a (emphasis added). Thus, *The Sedona Principles* also seem to support the proposition that a showing of bad faith must be made before imposing a duty of preservation and granting sanctions for breach of that duty. *See id.*

105. FED. R. CIV. P. 26(b).

106. *See* Jones v. Bremen High Sch. Dist. 228, No. 08-C-3548, 2010 WL 2106640, at *5–6 (N.D. Ill. May 25, 2010) (considering reasonableness and proportionality when determining the scope of the preservation duty and in applying sanctions for breach of the preservation duty); *Victor Stanley*, 2010 U.S. Dist. LEXIS 93644, at *89–90 (stating that the "proportionality component" must be considered in determining a party's proper conduct with respect to its duty to preserve evidence); *Rimkus Consulting Grp.*, 688 F. Supp. 2d at 613 (noting the importance of proportionality and reasonableness in a spoliation analysis).

107. *See, e.g.*, *Jones*, 2010 WL 2106640, at *6 ("[A] court may only grant an adverse inference sanction upon a showing of bad faith." (footnote omitted)); *Rimkus Consulting Grp.*, 688 F. Supp. 2d at 614 ("As a general rule, in this circuit, the severe sanctions of granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of 'bad faith.'" (citations omitted)). Although *Victor Stanley* came out of a district court in the Fourth Circuit—a circuit that does not require bad faith prior to the imposition of harsh sanctions—the magistrate judge writing the opinion extensively discussed the need for restraint in using the inherent power and cited *Chambers*, without qualification, for the proposition that "the court's inherent authority only may be exercised to sanction 'bad faith conduct.'" *Victor Stanley*, 2010 U.S. Dist. LEXIS 93644, at *71–72. The judge also continuously relied upon *Rimkus Consulting Group*—a case decided in a district court from the Fifth Circuit that does require bad faith before sanctioning severely. *See, e.g.*,

Civil Procedure were amended to deal with the exorbitant amount of information subject to discovery following the development of digital communication and documentation.[108] If these amendments are considered—as they should be—by courts invoking their inherent power to sanction, it makes sense to have a high culpability requirement before imposing sanctions in ways that inhibit a party's ability to either bring a lawsuit or raise a defense in litigation. The purpose of the amendments is to consider the *cost and burden* as well as the benefit of evidence before requiring parties to access and hand over the information.[109] If this balancing is done, courts will realize that bad faith should be required before crippling a party's ability to engage in litigation.

C. *Amended Rule 37 and Its Effect on Sanctioning Under the Court's Inherent Power*

Amended Rule 37 also provides guidance for determining which sanctions are appropriate when spoliation is found.[110] The rule grants courts statutory power to sanction a party for failing to preserve and produce evidence in anticipation of litigation.[111] This power is separate from the inherent power courts possess to sanction for spoliation, but many courts conduct the analysis for imposing such sanctions the same way, regardless of which power is used.[112] Thus, the standards used under Rule

id. at 72.; *see also Rimkus Consulting Grp.*, 688 F. Supp. 2d at 614 (establishing that the Fifth Circuit requires bad faith). Additionally, the court distinguished itself and its standards from those of the Second Circuit—a circuit that will impose harsh sanctions without a finding of bad faith. *See Victor Stanley*, 2010 U.S. Dist. LEXIS 93644, at *126. Thus, even though the *Victor Stanley* court is in the Fourth Circuit, it seems to agree with the courts that require bad faith before imposing harsh sanctions.

108. FED. R. CIV. P. 26 advisory committee's notes (2006), subdiv. (b)(2).

109. *See id.* at 26(b)(2)(C) (considering the balance between the burden or expense of the proposed discovery and its likely benefit).

110. Northington v. H&M Int'l, No. 08-CV-6297, 2011 U.S. Dist. LEXIS 14366, at *37 (N.D. Ill. Jan. 12, 2011) (considering Rule 37(e) in its application of spoliation sanctions); *see* FED. R. CIV. P. 37 (allowing sanctions for failure to disclose evidence or comply with discovery).

111. FED. R. CIV. P. 37; *see also Northington*, 2011 U.S. Dist. LEXIS 14366, at *34 (citing FED. R. CIV. P. 37).

112. *See, e.g.*, Gates Rubber Co. v. Bando Chem. Indus., Ltd., 167 F.R.D. 90, 107 (D. Colo. 1996) ("Rule 37 and the inherent powers of the court may be different routes by which to reach a result, but the analysis of the criteria along the way can be exactly the same."); Telectron, Inc., v. Overhead Door Corp., 116 F.R.D. 107, 128 (S.D. Fla. 1987) ("The analysis under Rule 37 . . . is essentially the same . . . ."); *Northington*, 2011 U.S. Dist. LEXIS 14366, at *34–35 (citations omitted) ("[W]hether or not [a] defendant's conduct is sanctionable under any subdivision of *Rule 37* is an academic

37 are directly applicable to the analysis courts conduct when imposing sanctions under their inherent power.

Rule 37 generally allows for sanctions when a party fails to comply with discovery standards, including spoliation.[113] However, Rule 37(e)—sometimes referred to as the "safe harbor provision"—guards against sanctions for spoliation of ESI when the culpable party acts in good faith.[114] Rule 37 provides, in relevant part: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."[115] Thus, if a party loses ESI, but does so in "good faith," it will not be sanctioned under Rule 37 for spoliation.[116]

Courts have read Rule 37(e) to require bad faith in order to impose sanctions under it.[117] One such court is the District Court for the Northern District of Illinois.[118] In *Viramontes v. U.S. Bancorp*, which was heard before the district court, the defendant had destroyed e-mails in a routine manner pursuant to corporate policy.[119] The plaintiff moved for sanctions

issue, as the analysis for imposing sanctions under that Rule or our inherent power is 'essentially the same.'" (citations omitted)).

113. *See* FED. R. CIV. P. 37(b)–(c) ("If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. . . . If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.").

114. *See id.* at 37(e) ("[A] court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."); *see also* Coburn v. PN II, Inc., No. 2:07-cv-00662-KJD-LRL, 2010 U.S. Dist. LEXIS 110613, at *9 (D. Nev. Sept. 30, 2010) ("*Rule 37(e)* provides a 'safe harbor' from sanctions to a party who fails to provide electronically stored information.").

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

116. *See id.*

117. *See, e.g.*, Viramontes v. U.S. Bancorp, No. 10-C-761, 2011 U.S. Dist. LEXIS 7850, at *12 (N.D. Ill. Jan. 27, 2011) (refusing to reward sanctions under Rule 37 because there was no evidence the ESI was destroyed in bad faith); Olson v. Sax, No. 09-C-823, 2010 U.S. Dist. LEXIS 76981, at *4–5 (E.D. Wisc. June 25, 2010) ("In making a determination regarding spoliation sanctions [pursuant to Rule 37], the Court looks to whether the destruction of evidence was done in bad faith." (citing Trask-Morton v. Motel 6 Operating L.P., 534 F.3d 672, 681 (7th Cir. 2008))).

118. *See Viramontes*, 2011 U.S. Dist. LEXIS 7850.

119. *Id.* at *5.

under Rule 37 for the loss, and the court denied it.[120] In doing so, the court held that "[n]o bad faith can be attributed to [the defendant] because the duty to preserve had not been triggered when the emails were deleted."[121] In other words, the court was looking for bad faith, and in absence of such culpability, the court would not impose sanctions on the spoliating party.

The Eastern District of Wisconsin is another court that required bad faith before sanctioning under Rule 37.[122] In *Olson v. Sax*, the defendants had recorded over a video tape recording that documented the alleged theft at issue in the case.[123] The court denied the plaintiff's motion for sanctions because it found the defendant had not "engaged in the 'bad faith' destruction of evidence for the purpose of hiding adverse evidence."[124]

These decisions make it clear that Rule 37 requires a high standard of culpability—bad faith—before applying *any sanctions at all*.[125] Although this is a different source of power than the inherent power, as stated previously, the analysis for imposing sanctions is generally the same for both Rule 37 and the court's inherent power to sanction.[126] Obviously courts can, and should, still sanction under their inherent power without a finding of bad faith. However, Rule 37 and its base requirement of bad faith in subsection (e) provide great guidance for determining what types of sanctions should be imposed without a finding of bad faith. If courts would keep this rule in mind when determining what kinds of sanctions to impose under their inherent power, they would realize a culpability of bad faith should be a base requirement before imposing harsh sanctions. In other words, since Rule 37 avoids sanctions altogether unless bad faith is found,[127] courts sanctioning under their inherent power should also avoid sanctioning severely unless the requisite culpability is found.

IV. IMPOSING SEVERE SANCTIONS WITHOUT A FINDING OF BAD FAITH

120. *See id.* at *6, *12.

121. *Id.* at *12–13.

122. *See Olson*, 2010 U.S. Dist. LEXIS 76981.

123. *Id.* at *2.

124. *Id.* at *6–7 (citing Trask-Morton v. Motel 6 Operating L.P., 534 F.3d 672, 681 (7th Cir. 2008)).

125. *See id.*; *Viramontes,* 2011 U.S. Dist. LEXIS 7850, at *12–13.

126. *See, e.g.*, Northington v. H&M Int'l, No. 08-CV-6297, 2011 U.S. Dist. LEXIS 14366, at *34 (N.D. Ill. Jan. 12, 2011) (finding the analysis under the inherent power and Rule 37 are "'essentially the same'" (citations omitted)).

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

GOES BEYOND THE PURPOSE OF THE SANCTIONS

A. *Purpose of the Sanctions*

As was discussed previously,[128] a court's inherent power to sanction parties results, first and foremost, from the court's *need* for it.[129] The Court in *Chambers* acknowledged that "'implied powers must necessarily result to our Courts . . . from the nature of their institution,'" and courts must remember this concept today.[130] Such recognition is stated by few courts, however.[131] One court that has acknowledged the impact of *Chambers* on imposing sanctions is the Fifth Circuit.[132] In *Conner v. Travis County*, when deciding whether the district court properly imposed sanctions on the defendants for a meritless appeal, the court remembered that "[t]he purpose of a court's sanctioning power is to enable it to ensure its own proper functioning" when deciding whether the district court properly imposed sanctions on the defendants for a meritless appeal.[133] Because the court read *Chambers* narrowly—as it should be read—it concluded the sanctions were inappropriate, as there were other means to manage its docket than sanctioning for meritless appeals.[134]

The court in *Rimkus Consulting Group* also discussed the limits on courts' inherent power when applying Fifth Circuit standards.[135] This court understood a court's proper functioning controlled the use of its sanctioning powers and held that the power "'is limited by its ultimate source—the court's need to orderly and expeditiously perform its

128. *See supra* Part II.A.

129. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) ("'Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.'" (quoting Anderson v. Dunn, 19 U.S. (6. Wheat.) 204, 227 (1821))).

130. *Id.* (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)).

131. *See, e.g.*, Conner v. Travis Cnty., 209 F.3d 794, 799 (5th Cir. 2000) (citing *Chambers*, 501 U.S. at 43); Victor Stanley, Inc. v. Creative Pipe, Inc., No. MJG-06-2662, 2010 U.S. Dist. LEXIS 93644, at *70 (D. Md. Sept. 9, 2010) (discussing inherent power caselaw, including *Chambers*); E.I. Du Pont de Nemours & Co. v. Kolon Indus., Inc., 803 F. Supp. 2d 469, 499 (E.D. Va. 2011) (considering *Chambers* and inherent power as source for sanctions).

132. *Conner*, 209 F.3d at 799.

133. *Id.* at 800 (citing *Chambers*, 501 U.S. at 43).

134. *Id.*

135. *See* Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 611 (S.D. Tex. 2010) (stating that it is preferable to apply Rules with "attendant limits," and that the inherent power, when applied, is narrow and limited).

duties.'"[136] Further, the court acknowledged the degree of culpability was important in determining sanctions and admitted something greater than negligence may be required to even invoke the inherent power.[137] Thus, the *Rimkus Consulting Group* court correctly recognized the purpose of the inherent sanctioning power should also be the power's limitation.

A district court within the Fourth Circuit in *Victor Stanley* also recognized the purpose of the inherent power—the court's efficient functioning—limits the use of the power.[138] The court accepted the limitation on the use of its power as discussed in *Chambers* and its progeny, and stated: "[U]ndergirding this authority 'is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth.'"[139] It realized its inherent authority was meant to "preserve the integrity of the judicial process"[140] and was not a source of unlimited sanctioning power.[141]

More recently, however, courts began using their inherent power for three other purposes.[142] These other purposes somewhat stem from the above-mentioned efficient judicial functioning purpose and are called the power's "prophylactic, punitive, and remedial" purposes.[143]

Faithfully keeping these other purposes in mind may also be helpful to courts when fashioning appropriate sanctions for parties that spoliate

136. *Id.* (quoting Newby v. Enron Corp., 302 F.3d 295, 302 (5th Cir. 2002)).

137. *Id.* ("If inherent power, rather than a specific rule or statute, provides the source of the sanctioning authority, under *Chambers*, it may be limited to a degree of culpability greater than negligence.").

138. Victor Stanley, Inc. v. Creative Pipe, Inc., No. MJG-06-2662, 2010 U.S. Dist. LEXIS 93644, at *73 (D. Md. Sept. 9, 2010) (citing *Rimkus Consulting Grp.*, 688 F. Supp. 2d at 611).

139. *Id.* at *72 (quoting Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010)).

140. *Id.* at *100 (quoting Silvestri v. Gen. Motors Corp., 271 F.3d 583, 592 (4th Cir. 2001)).

141. *See id.* at *72 (stating generally that a court's inherent power must be exercised with discretion and limited by its purpose).

142. *See, e.g.*, *Silvestri*, 271 F.3d at 590 (describing the application of purposes to sanctioning); West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) (explaining that sanctions must be invoked to serve "prophylactic, punitive, and remedial" purposes).

143. *See West*, 167 F.3d at 779 ("[W]e have explained that the applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine." (citing Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998))).

evidence, as long as the purposes are not overstated. For instance, courts like the Second Circuit seem to acknowledge *only* these three rationales—prophylactic, punitive, and remedial—underlying the power to sanction, as opposed to simply admitting the main, functional purpose of efficiency.[144] In *West v. Goodyear Tire & Rubber Co.*, the Second Circuit mentioned only these purposes—prophylactic, putitive, and remedial—and determined sanctions had three main goals: "(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.'"[145] By keeping only these interests in mind, courts severely breach the purpose of the sanctions, which created their inherent power in the first place. The efficient functioning purpose, as well as the culpability of the actor, should have some bearing on the severity of the sanctions imposed.[146]

Without an appreciation for the purpose of the power, courts will, and do, incorrectly use it. The few courts that accept the functional limitation on their use of the sanctioning power are the only courts appropriately sanctioning parties.[147] Otherwise, courts are going beyond the power they possess and may be harming, rather than enhancing, the trust laypeople have in the judiciary process. One way to place a check on the inherent power—and prevent sanctions from increasing to this harmful level—is to require bad faith before allowing courts to impose severe sanctions. Many courts have already enabled this check and have avoided sanctioning without first considering the purpose for which that power was originally created.[148]

144. *See id.* ("[W]e have explained that the applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine." (citing *Kronisch*, 150 F.3d at 126)).

145. *Id.* (quoting *Kronisch*, 150 F.3d at 126).

146. *But see* Field Day, LLC v. Cnty. of Suffolk, No. 04-2202, 2010 WL 1286622, at *3 (E.D.N.Y. Mar. 25, 2010) (citing De Espana v. Am. Bureau of Shipping, No. 03-Civ.-3573-LTS-RLE, 2007 WL 1686327, at *3 (S.D.N.Y. June 6, 2007)) (holding that once a duty to preserve evidence attaches, the sole question to ask is "whether evidence was destroyed with a culpable state of mind").

147. *See, e.g.*, Conner v. Travis Cnty., 209 F.3d 794, 799 (5th Cir. 2000); Victor Stanley, Inc. v. Creative Pipe, Inc., No. 06-2662, 2010 U.S. Dist. LEXIS 93644, at *70 (D. Md. Sept. 9, 2010); Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 615 (S.D. Tex. 2010); E.I. Du Pont de Nemours & Co. v. Kolon Indus., Inc., 803 F. Supp. 2d 469, 499 (E.D. Va. 2011).

148. *See, e.g.*, *Rimkus Consulting Grp.*, 688 F. Supp. 2d at 615 (discussing the purpose of implied power to administrating court functions and restricting sanctions to

B. *Courts Going Beyond Purpose in Sanctioning*

1. *Courts Applying Sanctions for Spoliation*

After an honest appreciation for the restraint imposed by the original purpose of their inherent powers, courts must decide which sanctions are appropriate in any given case. This decision may be a challenge because it must be "assessed on a case-by-case basis."[149] The case-by-case method, however, will ensure courts impose the most appropriate sanction, rather than the easiest or most harmful sanctions.

Consolidated Aluminum Corp. v. Alcoa, Inc. is one example of a court intelligently defining the considerations which should drive the determination and imposition of sanctions.[150] Even without previous standards on which to base its decision, the district court in this case stated and used a rational rule for guiding its exercise of inherent power.[151] This court held the severity of the sanctions imposed by a court "depends upon: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party."[152]

The court in *Victor Stanley* also recognized that courts needed guidance in their journey toward proper assessment of sanctions in spoliation cases.[153] Accepting that the duty to preserve evidence could not be pinned down to absolute terms and required "nuance," the court nonetheless offered an analysis encompassing different guidelines that may be developed to help in these circumstances.[154] The court agreed with the Sedona Principles and held that "[p]roper analysis requires the Court to

bad faith conduct); *Conner*, 209 F.3d at 799 (limiting inherent power sanctions to bad faith conduct under *Chambers*).

149. Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2d Cir. 2001) (citing United States v. Grammatikos, 633 F.2d 1013, 1019–20 (2d Cir. 1980)).

150. Consol. Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335 (M.D. La. 2006).

151. *See id.* at 339 ("Neither the Fifth Circuit Court of Appeal nor any district court within the Fifth Circuit has had the opportunity to directly address the standards for preservation of electronic evidence and applicable sanctions where such evidence has been spoliated.").

152. *Id.* at 340 (citing Menges v. Cliffs Drilling Co., No. 99-2159, 2000 WL 765082, at *6 (E.D. La. June 12, 2000)).

153. Victor Stanley, Inc. v. Creative Pipe, Inc., No. MJG-06-2662, 2010 U.S. Dist. LEXIS 93644, at *87–88 (D. Md. Sept. 9, 2010).

154. *Id.* at *88.

determine reasonableness under the circumstances—'reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation.'"[155] In other words, intent and reasonableness are both acceptable variables to consider when imposing sanctions.[156]

Other courts, however, either completely ignore the purpose for which their inherent power was created or acknowledge only the more recently identified purposes of the inherent power—the prophylactic, punitive, and remedial rationales.[157] The court in *Residential Funding Corp. v. DeGeorge Financial Corp.* was such a case.[158] Here, the court set forth a ruling that placed a very high standard on parties to a litigation proceeding, and it did so with the use of its inherent power to sanction but without regard to the limits on that power.[159] Ultimately, the court held that "discovery sanctions, including an adverse inference instruction, may be imposed upon a party that has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence."[160] Thus, a party who has lost or destroyed evidence not just unintentionally, but *merely negligently*, can receive an adverse inference jury instruction, basically ruining their case.[161]

This irrational and inappropriate approach to imposing sanctions is not accepted by all courts. In fact, the court in *Victor Stanley* expressly denied agreement with the standard providing for adverse instructions.[162] The *Victor Stanley* court reached its conclusion by considering

155. *Id.* at *88–90 (quoting THE SEDONA PRINCIPLES, *supra* note 104, at ii).

156. *See id.* at *87–88.

157. *See, e.g.*, Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99 (2d Cir. 2002) (utilizing inherent power without acknowledging limitations); West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) (applying sanctions without addressing the purpose of inherent power, but instead explaining that sanctions should "be molded to serve the prophylactic, punitive, and remedial" functions underlying spoliation).

158. *See Residential Funding*, 306 F.3d at 107.

159. *See id.* (granting the court "broad discretion in fashioning an appropriate sanction").

160. *Id.* at 113.

161. *See id.*

162. Victor Stanley, Inc. v. Creative Pipe, Inc., No. MJG-06-2662, 2010 U.S. Dist. LEXIS 93644, at *103–04 (D. Md. Sept. 9, 2010) (proposing that an adverse inference jury instruction makes no sense when the duty to preserve was breached only negligently because the "more logical inference is that the party was disorganized, or distracted, or technically challenged, or overextended, not that it failed to preserve evidence because of an awareness that it was harmful").

circumstances in which severe sanctions could be misapplied under the rule:

> [A]n adverse inference instruction makes little logical sense if given as a sanction for negligent breach of the duty to preserve, because the inference that a party failed to preserve evidence because it believed that the evidence was harmful to its case does not flow from mere negligence—particularly if the destruction was of ESI and was caused by the automatic deletion function of a program that the party negligently failed to disable once the duty to preserve was triggered.[163]

Thus, the rule set forth by the court in *Residential Funding*,[164] in addition to abusing the inherent power of the court, makes no logical sense. The courts that make no attempt to comply with the purposes and limits of the power they have, like the court in *Residential Funding*, are imposing sanctions inappropriately and irrationally.[165]

Although this lack of control alone is harmful enough to pose a threat to the validity of and trust in the judicial system, the disregard for limited inherent power has been taken even further. As has been recognized, some circuits require a showing of three factors to prove spoliation by a party to justify the imposition of a court sanction: 1) the party had control over the evidence while an obligation to preserve it was present; 2) the party had a culpable state of mind regarding the loss, destruction, or

163. *Id.* at *103–05. *But see* Orbit One Commc'ns v. Numerex Corp., 271 F.R.D. 429, 438 n.12 (S.D.N.Y. 2010) ("The logical link suggested by *Victor Stanley*—that the spoliator destroyed evidence *because* it was harmful to his case—is simply unnecessary." (quoting *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 526 (2010))). Although the court in *Orbit One* concluded a logical link between the spoliator's state of mind and the adverse inference does not exist, it is clear that a link between the adverse inference and the prejudice the spoliation caused is present. *See id.* ("An adverse inference is imposed to ameliorate any prejudice to the innocent party . . . ."); Zimmerman v. Assocs. First Cap. Corp., 251 F.3d 376, 383 (2d Cir. 2001) (upholding an adverse inference jury instruction that permitted parties to present spoliation evidence to the jury and instructed the jury that it was "permitted, but not required, to infer that [the destroyed] evidence would have been unfavorable to the" spoliating party). This link between prejudice and adverse inference is arguably more difficult for the spoliator to overcome than a link between state of mind and adverse inference.

164. *Residential Funding*, 306 F.3d at 108 (holding that an adverse inference instruction may be used when evidence is destroyed negligently because "'[i]t makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently'" (quoting Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 75 (S.D.N.Y. 1991))).

165. *See id.*

alteration of the evidence; and 3) the evidence lost, destroyed, or altered was "relevant" to the claims or defenses of the opposing party.[166] Lost or destroyed evidence is considered "relevant" under the third element if a reasonable fact-finder "'could conclude that the lost evidence would have supported claims or defenses of the party that sought it.'"[167] The relevance factor also includes a determination of whether the "non-destroying party" suffered prejudice as a result of the loss or destruction of evidence.[168] Therefore, the determination of whether spoliated evidence is "relevant" is generally a two-prong test.

At first glance this test seems fair. As applied by courts, however, the result is different because some courts allow a *presumption* of prejudice under certain circumstances.[169] The Second Circuit is one such court.[170] In *Residential Funding*, the court held "a showing of gross negligence in the destruction or untimely production of evidence will in some circumstances suffice, standing alone, to support a finding that the evidence was unfavorable to the grossly negligent party."[171] This was restated by the court in *Pension Committee* when it referenced the language of *Residential Funding* and held: "[r]elevance and prejudice may be presumed when the spoliating party acted in bad faith *or in a grossly negligent manner.*"[172]

166. Melendres v. Arpaio, No. 07-2513, 2010 U.S. Dist. LEXIS 20311, at *4 (D. Ariz. Feb. 11, 2010); *Victor Stanley*, 2010 U.S. Dist. LEXIS 93644, at *81–82 ("[The Fourth Circuit and district] courts in the Second, Fifth, Sixth, Seventh, and Ninth Circuits have identified the same factors for sanction-worthy spoliation." (citing Jones v. Bremen High Sch. Dist. 228, No. 08-C-3548, 2010 Dist. LEXIS 51312, 2010 WL 2106640, at *5 (N.D. Ill. May 25, 2010))); *In re* Global Technovations, Inc., 431 B.R. 739, 778 (Bankr. E.D. Mich. 2010); Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 467 (S.D.N.Y. 2010); Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 615–16 (S.D. Tex. 2010). "The same factors can be culled from the case law in most other circuits" as well. *Victor Stanley*, 2010 U.S. Dist. LEXIS 93644, at *83 n.31.

167. *Victor Stanley*, 2010 U.S. Dist. LEXIS 93644, at *123 (quoting Thompson v. U.S. Dep't of Hous. & Urban Dev., 219 F.R.D. 93, 101 (D. Md. 2003)).

168. Consol. Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335, 346 (M.D. La. 2006).

169. *See, e.g.*, *Residential Funding*, 306 F.3d at 113 (concluding that a party who acted with "gross negligence or in bad faith . . . is ordinarily sufficient" for a presumption); Sampson v. City of Cambridge, 251 F.R.D. 172, 179 (D. Md. 2008) (allowing willful or bad faith destruction of documents to result in a presumption of relevance).

170. *See Residential Funding*, 306 F.3d at 109.

171. *Id.* (citation omitted).

172. Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 467 (S.D.N.Y. 2010) (emphasis added).

Thus, a finding of gross negligence in the Second Circuit, which is taken into consideration as the second factor in the test, is all that is needed for a finding of the third factor, as well.[173]

This result has been criticized by at least two courts. In *Victor Stanley*, the district court noted that negligence or gross negligence is not enough to receive the presumption of relevance in the Fourth Circuit.[174] The *Victor Stanley* court went further than this, though, in its disapproval of the rule when it stated: "If, for example, a court adopts the position *of Pension Committee* . . . that a failure to institute a written litigation hold is gross negligence *per se*, and therefore presumes relevance and prejudice, it is inexorably poised to give an adverse jury instruction without further analysis."[175] The court explained the Fourth Circuit did not follow this approach, and for good reason.[176] This approach does not seem to take the purpose of the inherent powers into consideration at all.

The Southern District of New York has also stated its disagreement with this approach.[177] Magistrate Judge Francis found difficulty in understanding "why even a party who destroys information purposefully or is grossly negligent should be sanctioned where there has been no showing that the information was at least minimally relevant."[178] Judge Francis recognized that the consequences of omitting this relevancy requirement "could be significant."[179] Indeed, he stated under such a standard, to avoid sanctions, parties must either document any deletion of data to prove it was

173. *See id.* (holding that the third element of spoliation—the relevance of the missing evidence—may be presumed when a spoliating party acts with bad faith or gross negligence). The second element of spoliation—the spoliating party acting with a culpable state of mind—thus ends up swallowing the third requirement of spoliation as a finding of gross negligence will satisfy the relevance requirement. *See id.* at 467 (recognizing the three separate elements exist).

174. Victor Stanley, Inc. v. Creative Pipe, Inc., No. MJG-06-2662, 2010 U.S. Dist. LEXIS 93644, at *124 (D. Md. Sept. 9, 2010) (alteration in original) ("[I]n the absence of intentional loss or destruction of evidence, the party 'must establish that the lost documents were relevant to her case.'" (citations omitted)).

175. *Id.* at *140–41 n.37.

176. *Id.* at *140–41 (stating that a negligent or grossly negligent breach of a preservation duty is not sufficient to impose an adverse inference instruction in the Fourth Circuit).

177. *See* Orbit One Commc'ns. v. Numerex Corp., 271 F.R.D. 429, 440 (S.D.N.Y. 2010).

178. *Id.* at 441.

179. *Id.*

not relevant or preserve all data.[180] Because Judge Francis realized such intensive litigation holds would lead to unnecessary and even counterproductive results in some cases, noted that failing to "abide by such [preservation] standards does not necessarily constitute negligence, and certainly does not warrant sanctions."[181]

An additional problem with not taking into account the ultimate purpose and source of the inherent power is obvious in some court opinions and is negatively affecting the way courts impose sanctions. With the exception of jurisdictions in which spoliation is a cause of action on its own,[182] a party's duty to preserve evidence relevant to litigation is a duty owed not to the opposing party but to the court.[183] The court in *Victor Stanley* pointed out "[b]ecause . . . the duty to preserve evidence is owed to the court, it is . . . appropriate for a court to consider whether the sanctions it imposes will 'prevent abuses of the judicial system' and 'promote the

180. *Id.*; *see also* Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 468 (S.D.N.Y. 2010) (finding that since the likelihood some data will be lost in any case is high, "litigation [would] become a 'gotcha' game rather than a full and fair opportunity to air the merits of the dispute"). Despite the *Pension Committee* court's statement that it wanted to avoid a litigation "gotcha game," it nonetheless went on to apply the presumption of relevance standard after imposing only some burden-shifting. *Pension Comm.*, 685 F. Supp. 2d at 496.

181. *Orbit One*, 271 F.R.D. at 441. ("[I]n a small enterprise, issuing a written litigation hold may not only be unnecessary, but it could be counterproductive, since such a hold would likely be more general and less tailored to individual records custodians than oral directives could be. Indeed, under some circumstances, a formal litigation hold may not be necessary at all.").

182. There are few jurisdictions that have an independent cause of action for spoliation, including: Alaska, Illinois, Kansas, New Jersey, and North Carolina. *See, e.g.*, Foster v. Lawrence Mem'l Hosp., 809 F. Supp. 831, 836 (D. Kan. 1992), *abrogated on other grounds by* Cload ex. rel Cload v. West, 767 N.E.2d 486, 490 (2002); Hazen v. Municipality of Anchorage, 718 P.2d 456, 463 (Alaska 1986); Rodgers v. St. Mary's Hosp., 597 N.E.2d 616, 620 (Ill. 1992); Hirsch v. Gen. Motors Corp., 628 A.2d 1108, 1115 (N.J. Super. Ct. Law Div. 1993); Henry v. Deen, 310 S.E.2d 326, 334–35 (N.C. 1984).

183. Victor Stanley, Inc. v. Creative Pipe, Inc., No. MJG-06-2662, 2010 U.S. Dist. LEXIS 93644, at *98–99 (D. Md. Sept. 9, 2010) (citations omitted); *see also* Nat'l Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 556, 559 (N.D. Cal. 1987) (ordering a payment of $15,000 to the clerk of court for the "unnecessary consumption of the court's time and resources" due to the "profound disrespect [the defendant showed] for its responsibilities in the litigation"); Krumwiede v. Brighton Assocs., L.L.C., 2006 U.S. Dist. LEXIS 31669, at *11 (N.D. Ill. May 8, 2006) (granting a default judgment on the defendant's counterclaims based on the plaintiff's spoliation and perjury, which showed "blatant contempt for th[e] Court and a fundamental disregard for the judicial process").

efficient administration of justice.'"[184] However, many courts do not address the existence of this requirement or its implication on the sanctions it imposes; the problem this creates is larger than it may seem at first.

Courts that do not acknowledge the court, rather than the opposing party, as the entity to which the duty of preservation is owed incorrectly determine appropriate sanctions. For example, while deciding what standard should be set to determine relevance of spoliated evidence, the court in *Residential Funding* stated that "[c]ourts must take care not to 'hold[] the prejudiced party to too strict a standard of proof regarding the likely content of the destroyed [or unavailable] evidence.'"[185] Thus, courts that forget, or never recognize in the first place, the duty to preserve evidence for litigation is one owed *to the court* are applying the wrong standards in deciding appropriate sanctions.

This problem was also evident in *Allstate Insurance Co. v. Gonyo*.[186] There, the court held "[w]hen pursuing sanctions, our primary task, at this juncture, is to restore the innocent party to the same position he would have had if the evidence had not been destroyed."[187] Although concern for the party opposing the spoliating party must be kept in mind while considering sanctions, it should not be the primary concern. Instead, the purpose and primary goal of sanctions should be to ensure efficient functioning of the court.[188] The resulting sanctions would likely come out drastically different if courts first considered these purposes in their analysis of sanctions.

When a court primarily considers the opposing party, the sanctions will automatically be harsh.[189] Whenever evidence is lost, there is always a

184. *Victor Stanley*, 2010 U.S. Dist. LEXIS 93644, at *130 (quoting Jones v. Bremen High Sch. Dist. 228, No. 08-C-3548, 2010 U.S. Dist. LEXIS 51312, 2010 WL 2106640, at *5 (N.D. Ill. May 25, 2010)).

185. Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 109 (2d Cir. 2002) (alterations in original) (quoting Kronisch v. United States, 150 F.3d 112, 128 (2d Cir. 1998)).

186. Allstate Ins. Co. v. Gonyo, No. 8:07-CV-1011(RFT), 2009 WL 1924769, at *3–4 (N.D.N.Y. July 1, 2009).

187. *Id.* at *3 (citing *Kronisch*, 150 F.3d at 126).

188. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (stating implied powers are "'vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases'" (quoting Link v. Wabash R. Co., 370 U.S. 626, 630–31 (1962)).

189. *See, e.g.*, *Residential Funding*, 306 F.3d at 109 (holding negligence on the part of the spoliating party is enough to grant an adverse inference jury instruction, and "[c]ourts must take care not to 'hold[] the prejudiced party to too strict a standard of

chance, however small, the evidence may have been beneficial to the opposing party. If a court views sanctions primarily in light of the opposing party, then this possibility becomes overstated. Of course, an opposing party will always argue the evidence was relevant to the proceeding and its loss was, therefore, prejudicial to them. Therefore, if a court views the duty to preserve as one owed to the innocent party rather than to the court, the rationale behind the sanctions is lost, and sanctions are incorrectly analyzed and imposed.

2. *Severe Sanctions That Align With Their Purpose Require Bad Faith; Alternative Sanctions Are Available for Lesser Culpability*

The best way for courts to keep the true purpose and source of their inherent powers in mind is to have a set, easily applicable standard: bad faith is a requirement for severe sanctions. This standard adheres to the primary goal of the sanctioning power—the court's efficient functioning[190]—and to the secondary goals, including "prophylactic, punitive, and remedial measures."[191] With a bad faith standard, courts ensure efficient functioning by alerting all possible litigants to the potential consequences in cases of willful misconduct. The rule also creates a baseline for all courts to work from. Courts will not waste time deciding what sanctions are on the table and which are out of the question in a particular case.[192] Instead, courts will function expeditiously in assigning sanctions to parties in cases of spoliation.

This standard also fulfills the "prophylactic, punitive, and remedial" purposes of sanctions.[193] By allowing severe sanctions in cases of bad faith

proof regarding the likely contents of the destroyed [or unavailable] evidence'" (alterations in original) (quoting *Kronisch*, 150 F.3d at 128)).

190. *See Chambers*, 501 U.S. at 43 (requiring implied powers to be exercised for efficient court functioning).

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

192. *See, e.g.*, Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 471 & n.56 (S.D.N.Y. 2010) (noting that "[s]anctions motions . . . are very, very time consuming, distracting, and expensive for the parties and the court" and estimating that the judge and two law clerks "spent close to three hundred hours resolving" the motion at issue).

193. *See West*, 167 F.3d at 779 (providing these three additional purposes—"prophylactic, punitive, and remedial"). Although these purposes are far less important than the court's inherent functioning, as stated previously, they may be helpful in determining appropriate sanctions. *See supra* notes 142–45 and accompanying text.

loss or destruction of evidence, courts can prevent both parties from being in that situation and punish the parties who are. At the same time, courts are able to remedy situations correctly. In cases where evidence is willfully lost or destroyed, it is more likely the evidence was prejudicial and, therefore, would harm the opposing party's case.[194] In those situations, courts are able to impose severe sanctions, such as an adverse inference jury instruction or even dismissal of the claim if the party to blame is the plaintiff. On the other hand, in cases where the evidence was lost only negligently, the probability that the evidence is harmful is lower, so a lesser sanction is needed to remedy the loss. Thus, the bad faith standard is an appropriate way to obey the primary and secondary purposes of the court's inherent sanctioning power.

Courts in the First, Second, Fourth, and Ninth Circuits hold that bad faith is not required to impose severe sanctions on the spoliating party.[195] These courts are not guided or restricted by any of the purposes of the sanctioning power.[196] With no rule as to which sanctions are available for specific culpabilities, courts in those jurisdictions are left to choose from a huge list of possible sanctions, ranging from dismissal to payment for the sanctions motion.[197] Although common sense will somewhat guide these courts, time will be wasted determining the most appropriate sanction. Additionally, the primary purpose of the sanctions set forth by the *Chambers* Court as the source of the court's power in this regard[198] is not a

194. Victor Stanley, Inc. v. Creative Pipe, Inc., No. MJG-06-2662, 2010 U.S. Dist. LEXIS 93644, at *125 (D. Md. Sept. 9, 2010) (finding a presumption of prejudice is more appropriate in the case of intentionally destroyed evidence).

195. *See, e.g.*, Hodge v. Wal-Mart Stores, Inc., 360 F.3d 446, 450–51 (4th Cir. 2004) (allowing adverse instruction for spoliation "not necessarily in bad faith"); Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 113 (2d Cir. 2002) (holding an adverse instruction can be given for "ordinary negligence"); Sacramona v. Bridgestone/Firestone, Inc., 106 F.3d 444, 447 (1st Cir. 1997) (stating "bad faith is not essential"); Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993) (stating that a finding of bad faith is not a "prerequisite" to an adverse instruction).

196. Although such cases may address *Chambers* and its caution to limit inherent power by not requiring bad faith, these courts do not adhere to *Chambers*' requirement that restrictions be placed on that power. *See, e.g.*, *Hodge*, 360 F.3d at 449–50 (referencing *Chambers* but still requiring less than bad faith).

197. *See Victor Stanley*, 2010 U.S. Dist. LEXIS 93644, at *129–31 ("Sanctions that a federal court may impose for spoliation include assessing attorney's fees and costs, giving the jury an adverse inference instruction, precluding evidence, or imposing the harsh, case-dispositive sanctions of dismissal or judgment by default." (citations omitted)).

198. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (stating implied

guidepost at all.

Further, these courts are not adhering to the "prophylactic, punitive, and remedial" purposes of sanctions.[199] Although the courts have a vast number of sanctions at their disposal to punish a spoliating party, nothing stops them from using sanctions far beyond what is necessary to ensure prevention and remedy.[200] Placing a limit on courts' abilities to heavily sanction parties for negligent or even grossly negligent conduct will ensure they will not go too far in imposing sanctions.

Consequently, the appropriate standard for imposing severe sanctions for spoliation should be "bad faith." The Fifth Circuit is among the courts requiring this level of culpability, as the court has stated many times the threshold for imposing sanctions against attorneys is high.[201] Thus, when bad faith is present on the part of the spoliating party, severe sanctions can, and in most cases should, be imposed.

On the other hand, if bad faith is not found, lesser sanctions are available to the court to ensure its efficient functioning is not at risk.[202] For instance, courts can sanction spoliating parties by awarding attorneys' fees against them, deeming certain facts admitted, or requiring payment of expenses, including expenses incurred by motioning for sanctions.[203] In determining which sanctions to apply, courts should analyze the possible

powers are necessary for courts "'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases'" (quoting Link v. Wabash R. Co., 370 U.S. 626, 630–31 (1962))).

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

200. *See* Reilly v. Natwest Mkts. Grp. Inc., 181 F.3d 253, 267 (2d Cir. 1999) (finding that the district court has "wide discretion" in applying sanctions for spoliation, including harsh sanctions for gross negligence).

201. Kipps v. Caillier, 197 F.3d 765, 770 (5th Cir. 1999) ("In order to impose sanctions against an attorney under its inherent power, a court must make a specific finding that the attorney acted in 'bad faith.'" (citing Chaves v. M/V Medina Star, 47 F.3d 153, 156 (5th Cir. 1995))).

202. *See, e.g.*, *Victor Stanley*, 2010 U.S. Dist. LEXIS 93644, at *142 (stating that "[l]ess severe sanctions" such as attorneys' fees or fines can both compensate and punish).

203. *See* Nycomed US Inc. v. Glenmark Generics Ltd., No. 08-CV-5023, 2010 U.S. Dist. LEXIS 82014, at *11–12 (E.D.N.Y. Aug. 11, 2010) ("A court may . . . levy monetary sanctions against a violating party" or "'order payment of the reasonable expenses, including attorney's fees caused by the failure'" to produce (quoting FED. R. CIV. P. 37(c))); Ashton v. Knight Transp., Inc., 772 F. Supp. 2d 772, 801 (N.D. Tex. 2011) (listing the possible sanctions, including the assessment of attorneys' fees or deeming facts admitted).

prejudice to the opposing party and the degree of culpability of the spoliating party.[204] At the same time, courts must also keep in mind the "analysis depends heavily on the facts and circumstances of each case and cannot be reduced to a generalized checklist of what is acceptable or unacceptable."[205] Although the determination may be difficult, with the bad faith standard courts are provided with a little guidance. Once it is evident that severe sanctions are not permitted, courts can make their determinations based on the facts of the specific cases and apply one (or more) of the various lesser sanctions available.

For instance, in *Rimkus Consulting Group*, the court was in the position to make preliminary findings of bad faith destruction of evidence.[206] However, the record also indicated that some of the reasons the spoliating party had for destroying the evidence were legitimate, and the court questioned their truthfulness because some of the recovered evidence was unfavorable to the defendants.[207] Although bad faith seemed likely on the part of the spoliating party, the court declined to give the normal adverse inference jury instruction.[208] Instead, the court decided to present the question of whether bad faith existed to the jury.[209] Thus, just as in *Rimikus*, alternatives to the most severe sanctions exist, even for situations which almost amount to the culpability of bad faith.

Why, then, are some courts willing to impose severe sanctions, such as an adverse inference instruction, in cases with lower culpability than bad faith? Judge Scheindlin[210] seemed to justify such an imposition by noting

204. *Victor Stanley*, 2010 U.S. Dist. LEXIS 93644, at *129 (citations omitted).

205. Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 615 (S.D. Tex. 2010) (footnote omitted).

206. *Id.* at 620.

207. *Id.* at 608, 643 (reporting that the defendants "deleted emails for 'space concerns,'" and because they "got a lot of emails" that filled up their e-mail inboxes).

208. *Id.* at 620.

209. *Id.* ("Rather than instruct the jury on the rebuttable presumption steps, it is sufficient to present the ultimate issue: whether, *if the jury has found bad-faith destruction*, the jury will then decide to draw the inference that the lost information would have been unfavorable to [the spoliating party]." (emphasis added) (footnote omitted)).

210. Judge Scheindlin is one of the leading judicial authorities on the topic of spoliation and spoliation sanctions, and, as such, many courts look to her for guidance on this topic and follow her opinions accordingly. *See, e.g.*, Johnson v. Waterford Hotel Grp., Inc., No. 3:09-cv-800, 2011 U.S. Dist. LEXIS 2328, at *4–10 (D. Conn. Jan. 11, 2011) (citing extensively Judge Scheindlin's *Zubulake v. UBC Warburg LLC* and *Pension Committee* opinions); Harkabi v. Sandisk Corp., No. 08-Civ.-8203(WHP), 2010

the "discovery duty is well established," and parties who do not comply with their duty fail "to adhere to contemporary standards."[211] This rationale makes sense. As the amount of litigation involving the duty to preserve and the increase in existing electronic records indicates, the duty to preserve evidence in anticipation of litigation has become an increasingly more important part of a litigator's job in the past ten years.[212] However, it does not follow that adverse inference instructions, or other, possibly more severe sanctions, are necessary to deal with all situations of non-adherence. As will be discussed subsequently,[213] it is nearly impossible for some parties to preserve all evidence.

Further, allowing a per se rule of gross negligence in certain circumstances restricts parties from defending their spoliating actions in any way.[214] For instance, the *Pension Committee* court held that the failure to institute a timely litigation hold per se constituted gross negligence.[215] In such instances, a party will not have the ability to explain why it did not put

U.S. Dist. LEXIS 87483 (S.D.N.Y. Aug. 23, 2010) (citing extensively Judge Scheindlin's *Pension Committee* opinion); *Rimkus Consulting Grp.*, Inc., 688 F. Supp. 2d at 611 ("Judge Scheindlin has again done the courts a great service by laying out a careful analysis of spoliation and sanctions issues in electronic discovery." (footnote omitted)). This Note does not question her expertise on the issue of spoliation; rather, it is an argument that the standard used by many courts, including the Second Circuit, in which her district court resides, is too harsh.

211. Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 471 (S.D.N.Y. 2010).

212. *See* Silvestri v. Gen. Motors, 271 F.3d 583, 591 (4th Cir. 2001) (recognizing importance of the duty to preserve evidence both before and during litigation); Victor Stanley, Inc. v. Creative Pipe, Inc., No. MJG-06-2662, 2010 U.S. Dist. LEXIS 93644, at *78 (D. Md. Sept. 9, 2010) (discussing the common law duty to preserve evidence); *Rimkus Consulting Grp.*, 688 F. Supp. 2d at 620 (concerning breach of duty to preserve); FED. R. CIV. P. 26 advisory committee's notes (2006), subdiv. (b)(2) (describing increase and difficulty of record preservation and discovery in recent decades).

213. *See infra* Part V.

214. *Pension Comm.*, 685 F. Supp. 2d at 471.

215. *Id.* The court went on to mention many other failures that constitute gross negligence after a duty to preserve evidence attaches, including the failure to

> identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.

Id.

a litigation hold in place, even if such a reason is valid. Thus, allowing an adverse inference instruction to be imposed in cases where the court considers a party per se grossly negligent without permitting the party to explain or defend themselves seems inequitable. Using alternative, lesser sanctions in those cases would be more fair than imposing a severe sanction where it may not be justified.

V. IMPOSSIBILITY OF COMPLETE DOCUMENT RETENTION IN THIS AGE OF TECHNOLOGY

A. Changing Technology and the Duty to Preserve

Technology is changing and advancing at an almost alarming rate, and those changes affect the way businesses, especially large ones, conduct their work.[216] Changing technology also alters the way businesses conduct their litigation.[217] Although this may seem obvious and nonproblematic at first glance, the difficulty technology brings to a business's litigation strategy is serious and threatens the civil justice system.[218]

There is no doubt about it, technology has changed business. Organizations that previously maintained documents and information in paper form now maintain the majority of their information—over ninety percent—in electronic form.[219] In many cases, businesses never commit those electronic records to paper.[220] Computer technology also has the ability to "stor[e], search, and exchange" information in a very cost-effective way.[221] Although these storage and communication mechanisms are generally helpful, they now hold information that would have never been written down or saved in the past.[222] Thus, businesses and individuals now possess much more information that may be relevant to litigation than ever before.[223]

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216. *See* DERTOUZOS ET AL., *supra* note 27, at 1 (describing the exponential increase of electronic data, e-mail, and electronic storage being used today).

217. *See id.* at 2.

218. *See* John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 FED. CTS. L. REV. 19, 22 (2010) ("[D]iscovery with regards to electronic information and privilege has grown increasingly burdensome.").

219. Crist, *supra* note 4, at 8.

220. *Id.*

221. DERTOUZOS ET AL., *supra* note 27, at 2.

222. *Id.* at 2–3.

223. *Id.* at 1 ("If converted to hard copies, information contained on a single

This drastic increase in the amount of information available for litigation affects a party's strategy in the process because discovery is significantly more difficult.[224] "Discovery is at the very heart of the civil process in America," so lawyers and their clients are currently struggling to cope with these legal changes.[225] Courts recognize the obligation to retain and produce electronic information "mandates that [the responding party and its attorneys] work together 'to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review and produce responsive documents.'"[226]

Although this may seem straightforward, the reality is that even after a court's mandate, many companies will lose or destroy evidence. A party is "obligated to preserve . . . information if the party 'believes that the information . . . is likely to be discoverable and not available from reasonably accessible sources.'"[227] Thus, litigation now requires parties to preserve enormous amounts of primarily electronic information.[228] However, as the court in *Rimkus Consulting Group* pointed out, "[e]lectronically stored information is routinely deleted or altered and affirmative steps are often required to preserve it."[229]

These "affirmative steps" are called "litigation holds," and once a litigation hold is in place, "a party and [its] counsel must make certain that all sources of potentially relevant information are identified and placed 'on

[backup] tape would be the equivalent of a 200-mile-high stack of paper.").

224. *Id.* at 2–3 (reporting corporate litigants' major concerns including "the enormous costs—in time and money—to review information that is produced" and noting that "because the sheer volume of records that are identifiable and producible is greater with electronic processes, potentially relevant information that might never have been recorded previously is now being routinely retained, and . . . attorneys are aggressive in seeking out such information").

225. *Id.* at 1.

226. Nycomed US Inc. v. Glenmark Generics Ltd., No. 08-CV-5023(CBA)(RLM), 2010 U.S. Dist. LEXIS 82014, at *9 (E.D.N.Y. Aug. 11, 2010) (quoting Richard Green (Fine Paintings) v. McClendon, 262 F.R.D. 284, 290 (S.D.N.Y. 2009)); *see also In re* NTL, Inc. Secs. Litig., 244 F.R.D. 179, 197–98 (S.D.N.Y. 2007) ("The preservation obligation runs first to counsel, who has 'a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction.'" (citations omitted)).

227. MOORE ET AL., *supra* note 6 (footnote omitted).

228. *See* Crist, *supra* note 4 (stating that ninety percent or more of current business records are electronic).

229. Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 612 (S.D. Tex. 2010).

hold.'"[230] Then counsel must affirmatively monitor compliance with the litigation hold throughout litigation so that all sources of litigation information are searched.[231] Consequently, even if attorneys and their clients work together to save all relevant information in anticipation of litigation, the amount of information that may be required by the court is often too high for them to catch everything.[232]

Large organizations are especially affected by this switch to an electronic environment.[233] In many instances, the cost of litigation may be so high that companies are unwilling to try the case on the merits.[234] Thus, smaller parties have the ability to use such cost considerations in driving

230. Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432 (S.D.N.Y. 2004); *see also* Orbit One Commc'ns. v. Numerex Corp., 271 F.R.D. 429, 437 (S.D.N.Y. 2010) (citations omitted) (finding a litigant's first obligation is to "'suspend its routine document retention/destruction policy'" and create a "'litigation hold'" (quoting *Zubulake*, 229 F.R.D. at 431)).

231. *See Zubulake*, 229 F.R.D. at 432 (finding litigation holds then require counsel to become "fully familiar with . . . retention policies" and supervise).

232. *See, e.g.*, *id.* at 434–35 (stating that although counsel issued a litigation hold, "repeated that instruction several times," and met with "key players," relevant e-mails were nonetheless "unquestionably deleted"). This is especially true because "the duty to preserve extends to any documents or tangible things made by individuals 'likely to have discoverable information that the disclosing party may use to support its claims or defenses.'" Consol. Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335, 339 (M.D. La. 2006) (quoting Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)). The duty to preserve evidence

> also extends to documents prepared *for* those individuals and to information that is relevant to the claims and defenses of *any* party, or which is 'relevant to the subject matter involved in the action.' Thus, the duty to preserve extends to those employees likely to have relevant information, *i.e.* the 'key players' in the litigation.

Id. (quoting *Zubulake*, 220 F.R.D. at 218). Courts seem to assume locating key players and requesting certain documents is a simple task, however, finding them can be quite difficult due to factors often beyond the employer or counsel's control. *See Zubulake*, 229 F.R.D. at 435–36 (finding the "failure [to preserve] falls on counsel and client alike" even when clear attempts were made to retain relevant documents). Regardless of any lack of fault, any evidence that should have been kept by the key players in anticipation of litigation will be considered spoliated. *See id.*

233. *See* DERTOUZOS ET AL., *supra* note 27, at 3 (explaining the inability to preserve and review all potentially relevant documents is likely going to increase exponentially depending on "the size, complexity and scope of the business enterprise" at issue).

234. *Id.* at 1–2.

negotiated resolutions of disputes.[235] Imposing harsh sanctions on parties that have lost or destroyed evidence without bad faith further decreases their desire to litigate an issue on its merits. Therefore, by severely sanctioning parties for non-bad faith spoliation, the civil justice system in this country is actually reducing the justice that takes place.

B. The Impossibility of Preserving All Evidence and the Crippling Effect Harsh Sanctions Have on Large Businesses

It has been admitted by courts in the last few years that determining "whether a party properly preserved relevant ESI and, if not, what spoliation sanctions are appropriate [has] proven to be one of the most challenging tasks for judges, lawyers, and clients."[236] Although commentators have stated the duty to preserve "is neither absolute, nor intended to cripple organizations,"[237] the effect of the sanctions that go along with the duty to preserve have done just that. The duty to preserve evidence, particularly ESI, is one of the greatest contributors to high litigation costs incurred by parties.[238] On top of such an expensive duty, courts are imposing severe sanctions for parties that do not meet the preservation standard.[239] Significant concern has been voiced about this

235. *See* Rodney A. Satterwhite & Matthew J. Quatrara, *Asymmetrical Warfare: The Cost of Electronic Discovery in Employment Litigation*, 14 RICH. J.L. & TECH. 8–9 (2008) (noting that in employment litigation, the risks of one party having unfair leverage over another "are magnified because electronic discovery costs may quickly dwarf the value of the litigation itself, as measured by potential damages," and asserting a study that found "one in five corporate respondents have settled litigation in order to avoid the costs of electronic discovery" (footnote omitted)).

236. Victor Stanley, Inc. v. Creative Pipe, Inc., No. MJG-06-2662, 2010 U.S. Dist. LEXIS 93644, at *65–66 (D. Md. Sept. 9, 2010); *see* Robert E. Shapiro, *Conclusion Assumed*, 36 LITIG. 59 (2010) ("Spoliation, in case you haven't heard, is the newest battleground of contemporary litigation, now a continuing sideshow, if not the main event, in courtrooms across the country.").

237. Grimm et al., *supra* note 19, at 385.

238. *See Victor Stanley*, 2010 U.S. Dist. LEXIS 93644, at *66–67 (stating that commentators are unsure whether costs of "complete preservation would be disproportionately great when compared to what is at issue in the case"). In addition to the cost of ESI preservation, extensive costs are associated with e-discovery. *See* Charles W. Adams, *Spoliation of Electronic Evidence: Sanctions Versus Advocacy*, 18 MICH. TELECOMM. & TECH. L. REV. 1, 2 (2011) ("Attorneys required to produce electronically stored information may need to hire information technology experts to retrieve it and then spend hours reviewing it for privilege and responsiveness. Opposing counsel then must spend hours reviewing the electronically stored information for relevance and usefulness." (footnote omitted)).

239. *See, e.g.*, Silvestri v. Gen. Motors Corp., 271 F.3d 583, 593 (4th Cir. 2001)

problem:

> Corporate litigants also voiced concern over their inability to provide convincing documentation about the magnitude of costs associated with broad e-discovery requests. Some of these litigants asserted that many judges do not have an adequate grasp of the technical and cost issues raised by e-discovery and continue to apply paper-based thinking when ruling on discovery disputes. In their view, the potential relevance of requested information was generally outweighed by the imposed burdens.[240]

The court in *Victor Stanley* also recognized this concern as it discussed the difficulty in determining appropriate sanctions:

> Moreover, concern has been expressed by some commentators that court decisions finding spoliation and imposing sanctions have, in some instances, imposed standards approaching strict liability for loss of evidence, without adequately taking into account the difficulty—if not impossibility—of preserving all ESI that may be relevant to a lawsuit, the reasonableness of the measures that were taken to try to preserve relevant ESI, or whether the costs that would be incurred by more complete preservation would be disproportionately great when compared to what is at issue in the case.[241]

These are valid concerns made by attorneys and their business and governmental clients. It seems "'[w]hen spoliation issues are litigated, "more attention is focused on e-discovery than on the merits, with a motion for sanctions an increasingly common filing."'"[242] This is obviously not the

(noting that dismissal could be an appropriate sanction upon a merely negligent failure to preserve); Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494, 525 (D. Md. 2009) (providing for an adverse jury instruction upon a failure to preserve); Rimkus Consulting Grp., Inc., v. Cammarata, 688 F. Supp. 2d 598, 679 (S.D. Tex. 2010) (recognizing an adverse inference jury instruction as a possible sanction for failing to preserve evidence).

240. DERTOUZOS ET AL., *supra* note 27, at 3; *see also* Thomas Y. Allman, *Preservation Rulemaking After the 2010 Litigation Conference*, 11 SEDONA CONF. J. 217, 220 (2010) (citing a survey of major corporations and noting a "substantial majority of defense and mixed practice lawyers surveyed by the [American Bar Association] agreed that 'the costs of litigation have risen disproportionately due to e-discovery'" (footnote omitted)).

241. *Victor Stanley*, 2010 U.S. Dist. LEXIS 93644, at *66 (citing Shapiro, *supra* note 236, at 59).

242. *Id.* at *104 (quoting Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 795 (2010)); *see also* Willoughby, Jr. et al., *supra* (showing graphs that indicate a rapid increase in the

way the justice system in our country was meant to work. Rather than encouraging resolution of disputes based on their merits, the court system is forcing parties to settle based on their fear of unreasonable and expensive electronic discovery, in addition to sanctions if any information is lost.[243] In the rare event that parties do not settle, motions for sanctions interfere with the "cooperation and trust necessary for the efficient handling of electronic discovery."[244] Consequently, the widespread availability of harsh sanctions negatively affects litigation that is already difficult and costly in this age of technology.

Although courts imposing severe sanctions on parties in the absence of bad faith do so in an attempt to increase the justice in the court system,[245] they are going about it the wrong way. In fact, as mentioned, they may be creating the opposite effect. Obviously, the court system must punish parties for spoliation; without repercussions, parties would take advantage of the system and more and more relevant and prejudicial evidence would be "lost" if sanctions were not available to the courts.[246] However, there must still be some limitations on the availability and use of those sanctions. Severely sanctioning parties for loss or destruction of evidence absent a finding of bad faith decreases, rather than increases, the justice granted by the court. Although it seems the opposing party should have some recourse—something they can have even without severe sanctions—it must be remembered the duty to preserve evidence is one owed to the court.[247] Imposing severe sanctions when a party is only grossly negligent makes little sense when it is viewed in this way. Unless

number of filings of motions and awards for sanctions involving e-discovery).

243. DERTOUZOS ET AL., *supra* note 27, at 3 (explaining that "[i]n small-value cases, these [increased] costs could dominate the underlying stakes in dispute" and "plaintiffs may have a higher probability of suing and defendants may be more likely to settle in some types of litigation").

244. Adams, *supra* note 238, at 4 (citing William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 136 (S.D.N.Y. 2009) ("Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI.")).

245. *See, e.g.*, Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 471 (S.D.N.Y. 2010) (describing justifications for imposing sanctions for gross negligence—the "discovery duty is well established" and considered a "contemporary" standard).

246. *Victor Stanley*, 2010 U.S. Dist. LEXIS 93644, at *102 (stating the importance of the duty to preserve and finding an injury to the "civil justice system" without such preservation).

247. *See id.* (stating that the duty to preserve evidence is a duty to the court and not to the adverse party—"a subtle, but consequential, distinction").

the court has been wronged in some bigger way, such as when a party intentionally destroys evidence, severe sanctions are overpunishing parties for their conduct. Although such severe sanctions may act as a deterrent for other parties, it also deters parties from litigating disputes altogether out of fear.[248] Setting a minimum standard for the imposition of harsh sanctions will alleviate at least some of the fear parties now have about being oversanctioned by the court.

VI. NATIONWIDE CONSISTENCY, INCLUDING A BAD FAITH STANDARD, MAY BE THE SOLUTION TO THE SPOLIATION CONCERNS OF THE DAY

As was discussed, many commentators, lawyers, and litigants are concerned about the severity of the sanctions being imposed for spoliation.[249] An equal concern, it seems, is the lack of uniform standards governing spoliation and sanctions.[250] The court in *Victor Stanley* extensively addressed this issue in its opinion issued late in 2010:

> Recent decisions . . . have generated concern throughout the country among lawyers and institutional clients regarding the lack of a uniform national standard governing when the duty to preserve potentially relevant evidence commences, the level of culpability required to justify sanctions, the nature and severity of appropriate sanctions, and the scope of the duty to preserve evidence . . . .[251]

As this quote explains, courts throughout the country hold parties to varying standards when it comes to the duty to preserve evidence.[252] Additionally, courts lack uniformity in the standards required for imposing certain sanctions.[253] This puts all potential litigants in a problematic

248. *See* Adams, *supra* note 238, at 4 (discussing the incentives not to litigate caused by e-discovery).

249. *See supra* Part V.B.

250. *See* Ashton v. Knight Transp., Inc., 772 F. Supp. 2d 772, 800 (N.D. Tex. 2011) ("Courts have not been uniform in defining the level of culpability—be it negligence, gross negligence, willfulness, or bad faith—that is required before sanctions are appropriate for evidence destruction." (citations omitted)).

251. *Victor Stanley*, 2010 U.S. Dist. LEXIS 93644, at *66.

252. *Id.*

253. *See id.* at *129 ("The different approaches among the Circuits regarding the level of culpability that must be shown to warrant imposition of severe sanctions for spoliation is another reason why commentators have expressed such concern about the lack of a consensus standard and the uncertainty it causes."); *see also* Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 614–15 (S.D. Tex. 2010) ("The First, Fourth, and Ninth Circuits hold that bad faith is not essential to imposing

situation that the court in *Victor Stanley* was concerned about and discussed further, stating:

> Unfortunately, in terms of what a party must do to preserve potentially relevant evidence, case law is not consistent across the circuits, or even within individual districts. This is what causes such concern and anxiety, particularly to institutional clients such as corporations, businesses or governments, because their activities—and vulnerability to being sued—often extend to multiple jurisdictions . . . .[254]

The only "safe" way to preserve evidence is to design a policy that complies with the most demanding and most expensive court.[255]

As the court in *Victor Stanley* pointed out, uniform standards are needed to ensure potential litigants are not stuck in this trap.[256] As has been discussed throughout this Note, requiring bad faith culpability for severe sanctions should be one of those uniform standards. In order for this standard to be helpful to courts, however, "bad faith" needs to be defined more clearly.

The Seventh Circuit has acknowledged bad faith means something more than intentional.[257] In *Trask-Morton*, the court held bad faith means destroying evidence "'for the purpose of hiding adverse information.'"[258] The Ninth Circuit has also held "'delaying or disrupting the litigation or hampering enforcement of a court order'" constitutes bad faith.[259] The Fifth Circuit has held bad faith means intentionally destroying important evidence because the contents are unfavorable to the party.[260] The most appropriate definition, however, is one that characterizes bad faith as "conduct which is either done intentionally, for the purpose of hiding adverse information, or in reckless disregard of a party's obligations to

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severe sanctions if there is severe prejudice, although the cases often emphasize the presence of bad faith. In the Third Circuit, the courts balance the degree of fault and prejudice." (footnotes omitted)).

254. *Victor Stanley*, 2010 U.S. Dist. LEXIS 93644, at *91–92.

255. *Id.*

256. *See id.*

257. *See* Trask–Morton v. Motel 6 Operating L.P., 534 F.3d 672, 681 (7th Cir. 2008).

258. *Id.* (quoting Mathis v. John Morden Buick, Inc., 136 F.3d 1153, 1155 (7th Cir. 1998)).

259. Leon v. IDX Sys. Corp., 464 F.3d 951, 961 (9th Cir. 2006) (quoting Primus Auto Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 648 (9th Cir. 1997)).

260. Whitt v. Stephens Cnty., 529 F.3d 278, 284 (5th Cir. 2008) (quoting Russell v. Univ. of Tex., 234 F. App'x 195, 207 (5th Cir. 2007)).

comply with a court order."[261]

This definition is an expansive reading of bad faith, but it is likely the most proper definition for spoliation purposes. With this definition, courts will be able to impose severe sanctions if a party intentionally loses evidence or destroys evidence covered by a court order. Additionally, it allows courts to harshly sanction if a party destroys evidence with the intention of hiding adverse information. Thus, the standard is broad enough to ensure courts can control their efficiency and functioning—the purposes for which the inherent power was granted in the first place.[262] At the same time, the definition is narrow enough to allow for a straightforward application by the courts and greater predictability for litigation attorneys.

The bad faith requirement will reduce at least some fears that litigants have of high sanctions if they lack bad faith in loss of evidence. In addition to this bad faith standard, other standards should also be unified, including the extent of the preservation duty. For example, courts must create a uniform rule regarding when evidence will not be required to be kept or handed over during discovery due to outweighing costs.[263] In determining this standard, courts must consider whether justice will be increased or decreased based on their decision. If the standard is set too high—forcing litigants to preserve and hand over even extremely expensive information—litigants will be far more likely to settle cases than test them on their merits.[264] A standard should be set which ensures litigants save all relevant and relatively accessible (and even in some cases, not so accessible) evidence without discouraging parties from trying their cases in a court of law. Although this rule creation may be difficult, it will be beneficial to the courts, parties, and attorneys for years to come.

VII. CONCLUSION

The issue of sanctions for spoliation has come to the forefront of litigation concerns in recent years. One major concern is the severity of sanctions imposed without a showing of bad faith conduct on the part of

261. Northington v. H&M Int'l, No. 08-CV-6297, 2011 U.S. Dist. LEXIS 14366, at *36 (N.D. Ill. Jan. 12, 2011) (citations omitted).

262. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991); *see also supra* Part II.A (discussing *Chambers* and the scope of the court's inherent power).

263. *See supra* Part V.B (commenting on the detrimental impact document preservation has on litigants).

264. *See* DERTOUZOS ET AL., *supra* note 27, at 3.

the spoliating party. Courts granting severe sanctions for spoliation when a finding of bad faith is lacking are not only breaching the purpose for the sanctions themselves, they are also disregarding the Supreme Court decision in *Chambers* and the 2006 amendments to Rule 26 and Rule 37. More importantly, these courts are preventing parties from litigating disputes on their merits for fear of harsh sanctions, even if they lost evidence unintentionally.

A bad faith standard places a check on courts' inherent power and prevents them from abusing it. Further, this standard guarantees courts will not use sanctions strictly as punishment, but rather, to ensure the court itself is functioning efficiently.

A bad faith standard adopted by all courts would also alleviate some of the concern commentators and litigants currently have regarding the lack of a uniform standard with spoliation and sanctions. If all courts required bad faith before imposing severe sanctions on a spoliating party, not only would the purpose of the sanctions be fulfilled, but the expectations of parties would be fulfilled as well. A court's job, first and foremost, is to uphold justice. Such a goal should be in mind when imposing spoliation sanctions. As the court in *Anderson v. Beatrice Food Co.* stated: "[T]he judge [imposing sanctions] should take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms. Whether deterrence or compensation is the goal, the punishment should be reasonably suited to the crime."[265]

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265. Anderson v. Beatrice Foods Co., 900 F.2d 388, 395 (1st Cir. 1990).

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