ELECTRONIC DISCOVERY AND SANCTIONS FOR SPOILATION: PERSPECTIVES FROM THE CLASSROOM

TABLE OF CONTENTS

I. INTRODUCTION ............................................................................................................................. 1

II. CHOOSING THE CHAPTER ON SPOILATION AND SANCTIONS FOR CLASSROOM USE .......... 5
   A. The Classroom Setting ............................................................................................................... 5
   B. The Casebook and its Editors ................................................................................................. 6

III. THE CHALLENGES TO AMERICAN DISCOVERY IN A DIGITAL ERA ........................................ 11

IV. THE MAJOR DETERMINANTS OF THE SPOILATION OF ESI—CULPABILITY AND PREJUDICE .... 13

V. THE ADVERSE INERENCE INSTRUCTION .................................................................................. 17
   A. Two district court decisions granting an adverse inference instruction:
      Pension Committee and Rimkus .......................................................................................... 20
   B. The Casebook Example: Connor v. Sun Trust Bank .............................................................. 28
      1. The Trigger Date: When the Duty to Preserve Evidence Arises ....................................... 35
      2. Relevance and Prejudice .................................................................................................. 40
      3. Rule 37(e), a Safe Harbor from Spoliation ...................................................................... 43

VI. THE VALUE OF CONNOR FOR TEACHING PURPOSES ................................................................ 46

VII. CONCLUSION: WHERE DO WE GO FROM HERE? .................................................................... 48

I. INTRODUCTION

Professor Richard L. Marcus has said that “electronic discovery is the hottest topic in litigation today.”\textsuperscript{1} The spoliation of evidence\textsuperscript{2} subverts American discovery and the integrity of

\textsuperscript{1} SHIRA A. SCHEINDLIN & DANIEL J. CAPRA, THE SEDONA CONFERENCE, ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE 1 (2009). As Associate Reporter to the Advisory Committee on Civil Rules and the Discovery Subcommittee since 1996, Professor Marcus was a primary drafter of the 2006 Amended Federal Rules of Civil Procedure which specifically address the discovery of electronically stored information (ESI).

\textsuperscript{2} One court has explained that spoliation is:
   the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation. . . . The determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the trial judge, and is assessed on a case-by-case basis. . . . The authority to sanction litigants for spoliation arises jointly under the Federal Rules of Civil Procedure and the court’s inherent powers.

the judicial process. In the rapidly expanding universe of ESI (electronically stored information), some courts are concerned that the advent of e-discovery will lead to a flood of motions seeking sanctions for spoliation, adding cost and delay to litigation. Rule-makers are also concerned over whether circuit and district courts have been consistent in addressing a wide range of spoliation issues. The Advisory Committee on Civil Rules and its Discovery Subcommittee are presently considering whether new rules should be proposed to specifically address the preservation of ESI and sanctions for its spoliation in civil cases.

This essay on the spoliation of ESI begins with an overview of the factors that led in December 2006 to adoption of the amendments to the Federal Rules of Civil Procedure which focus on e-discovery. I refer to Advisory Committee Notes and to remarks by Professor Marcus who was the Special Reporter to the Committee. Next, I present the findings of a study conducted by Judge Shira A. Scheindlin and Kanchana Wangkeo of state and federal decisions

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3 Rinkus Consulting Grp. v. Cammarata, 688 F. Supp. 2d 598, 607, (S.D. Tex. 2010). But research by the Federal Judicial Center suggests that sanctions motions are relatively rare, and those about e-discovery even rarer. At the January 2, 2011 meeting of the Standing Committee on Civil Rules, Emery G. Lee III of the Federal Judicial Center presented the results of his empirical study of the court records in 131,992 civil cases in 19 federal district courts in the years 2007 and 2008. His research indicated that sanctions motions were filed in only 209 cases—or 0.15% of all cases. Of the sanctions motions ruled on in cases involving ESI, 34% were granted and 66% were denied. Of the sanctions granted, 45% resulted in adverse inference instructions, 48% in the preclusion of evidence or testimony, 23% in dismissal or default, and 3% in civil contempt. The study showed that cases with sanctions motions were more contentious and had longer disposition times—619 days on average—compared with 153 days for all cases. Although less than 1% of all cases studied were disposed of without trial, 17% of the spoliation cases went to trial. Emery G. Lee III, Motions for Sanctions Based Upon Spoliation in Civil Cases: Report to the Judicial Conference Advisory Committee on Civil Rules (Federal Judicial Center 2011), included in the agenda materials for the November 2011 Civil Rules meeting which can be accessed at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-11.pdf.

4 See infra notes 73 and ___.
granting or denying sanctions for the spoliation of ESI.\textsuperscript{5} Their findings show that the key determinants of spoliation are the level of culpability of the alleged spoliator and the degree of prejudice suffered by the innocent party. Then the paper examines the adverse inference instruction,\textsuperscript{6} an oft-used sanction for the spoliation of ESI that, though not the most punitive in a court’s arsenal,\textsuperscript{7} is nonetheless so severe that it can spell the end of a lawsuit. It is the only sanction for spoliation which involves decision-making shared by judge and jury.

Thereafter, I briefly review two 2010 spoliation decisions, one by Judge Shira A. Scheindlin, \textit{Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of America Secs., L.L.C.}, the other by Judge Lee H. Rosenthal, \textit{Rimkus Consulting Grp. v. Cammarata}.\textsuperscript{8} Both of these jurists are widely known to be experts in e-discovery. Their decisions reflect splits between the Second and Fifth (and other) Circuits on issues concerning the burden of proof on relevance and prejudice in spoliation cases and, second, on the level of culpability required for a sanction as severe as an adverse inference instruction. Their decisions also illustrate differing

\textsuperscript{5} In 2005, Judge Scheindlin and Kanchana Wangkeo completed a study of all judicial opinions written during the 5-year period 2000-2004 by state and federal courts granting or denying sanctions for the spoliation of ESI. Shira A. Scheindlin & Kanchana Wangkeo, \textit{Electronic Discovery Sanctions in the Twenty-First Century}, 11 \textit{Mich. Telecomm. & Tech. L. Rev.} 71, 75-89 (2004); see also infra note 37. They determined that during that period federal courts issued 45 such decisions (and state courts issued 21).

\textsuperscript{6} \textit{Scheindlin & Capra, supra} note 1, at 422. Scheindlin and Capra explain:

> Under the “adverse inference rule” when a party has relevant evidence within its control that it fails to produce, that failure may permit a court to instruct the jury that it may infer that the missing evidence is unfavorable to the party who could have produced the evidence and did not. No inference can be drawn from the failure to produce evidence not in a party’s control.

\textit{Id.}

\textsuperscript{7} The most severe sanctions are a default judgment or a dismissal of claims or defenses, effectively terminating the case. \textit{See Adam I. Cohen & David J. Lender, Electronic Discovery § 3.08[D][4] (Supp. 2011).}

\textsuperscript{8} \textit{See Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of America Secs., LLC, 685 F. Supp. 2d 456 (S.D.N.Y. 2010); Rimkus, 688 F. Supp. 2d at 607 (S.D. Tex. 2010).}
approaches to the relative functions of judge and jury in the administration of the inference instruction, and possibly to sanctions generally.

The above-described topics serve as a useful backdrop for the part of this essay that I consider the most important—an account of my classroom experience with a chapter in the first published casebook on electronic discovery. The two co-authors of ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE are Judge Shira A. Scheindlin and Daniel J. Capra, Philip Reed Professor of Law at Fordham Law School. I used Chapter VI, Spoliation and Sanctions, of their casebook as part of a course in Complex Litigation that I teach at the Texas Tech University School of Law. In particular, I relate comments by my students and myself on the teaching effectiveness of the first judicial opinion appearing in the chapter on spoliation, Connor v. Sun Trust Bank, a 2008 decision by a federal district court in the Eleventh Circuit. 9

In Connor, the court ordered an adverse inference instruction as a sanction for the defendant’s bad faith destruction of e-mail in an employment discrimination action brought under the Family and Medical Leave Act. 10 The editors present this decision under the chapter’s first subheading, “What Constitutes Spoliation?” Connor, though a relatively routine discrimination case, is useful pedagogically because it raises issues that often recur where a party alleges the spoliation of ESI—when a duty to preserve evidence arises; the degree of culpability required to support a violation; the standard of proof an innocent party must satisfy in order to establish relevance and prejudice; the discretion exercised by a court in finding spoliation and

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selecting an appropriate penalty; and the uncertain protection from sanctions afforded by the “Safe Harbor” provision of new Federal Rule of Civil Procedure 37(e).\textsuperscript{11}

II. CHOOSING THE CHAPTER ON SPOLIATION AND SANCTIONS FOR CLASSROOM USE

A. The Classroom Setting

In this initial venture into e-discovery, I chose the chapter on spoliation and sanctions for at least two reasons: As future lawyers and judges, law students envision themselves engaged in discovery. They want to know what conduct might constitute spoliation because they understand that the loss or destruction of evidence can have serious consequences for litigants and counsel. Second, although the spoliation of ESI can be a complicated subject, requiring practitioners to have at least a working knowledge of a party’s computer operations, a study of most judicial decisions in this area does not presume that one be expert in computer science. The chapter on spoliation and sanctions can be a reasonable entry point into the world of e-discovery.

In seven class periods, my class, consisting of nine very capable law students, discussed the nine principal cases and commentaries in Chapter VI. I had only a minor role in this phase of the course. Each day a different student was responsible for leading the discussion of one of the principal cases after preparing a memorandum outlining his or her preparation. For each of the chapter’s nine decisions, I asked every class member to send me an e-mail answering three open-

\textsuperscript{11} Rule 37(e)—adopted in the new Rules as 37(f)—states: 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. \textit{Fed. R. Civ. P. 37(e)}.
ended questions on how the case discussed that day helped them learn about spoliation and sanctions.\textsuperscript{12} This paper quotes some of those student comments regarding \textit{Connor}.

\section*{B. The Casebook and its Editors}

Professor Capra is the Reporter to the Advisory Committee on Evidence Rules and was the primary drafter of Rule 502 on waiver of privilege. He also is a co-author of a five-volume treatise and a leading casebook on Evidence. Judge Scheindlin served from 1998 to 2005 on the Advisory Committee on Civil Rules and the Discovery Subcommittee which drafted the 2006 Amended Federal Rules of Civil Procedure.\textsuperscript{13} The new Rules recognized the shift from paper to digital records and specifically addressed the discovery of ESI. Judge Scheindlin also wrote the series of landmark opinions in \textit{Zubulake v. UBS Warburg LLC} in which she took an approach to e-discovery broadly consistent with the approach later taken by the Advisory Committee in the amended Rules.\textsuperscript{14}

\begin{flushleft}
\textsuperscript{12} Class members responded by e-mail each day to three questions concerning the assigned case: (1) How helpful was the case in learning about the law governing sanctions for spoliation? (2) What aspects of the case did you find difficult? (3) What aspects of the case did you find helpful?
\textsuperscript{13} The Advisory Committee is comprised of two federal appellate judges, four district judges, one magistrate judge, one state court judge, one professor of law, and five practicing lawyers. Two distinguished professors of civil procedure serve as Reporter and Special Reporter to assist the Committee.
\textsuperscript{14} See \textit{Zubulake V}, 229 F.R.D. 422 (S.D.N.Y. 2004); \textit{Zubulake IV}, 220 F.R.D. 212 (S.D.N.Y. 2003); \textit{Zubulake III}, 216 F.R.D. 280 (S.D.N.Y. 2003); \textit{Zubulake I}, 217 F.R.D. 309 (S.D.N.Y. 2003). For example, in \textit{Zubulake IV}, Judge Scheindlin distinguished between two categories of ESI for purposes of determining whether ESI was subject to a “litigation hold” and needed to be preserved—ESI that is reasonably accessible and ESI that is not. In general, “accessible” data is stored in a readily usable format and does not need to be restored to be usable. Inaccessible data, on the other hand, is not readily usable. \textit{Zubulake IV}, 220 F.R.D. 212 at 218. The amended Rules adopted these two categories for the purpose of determining whether ESI was discoverable. Under Rule 26(b)(2), accessible ESI is presumptively discoverable, and ESI that is not reasonably accessible is presumptively not discoverable. In order to discover data that is identified as not reasonably accessible, the requesting party is required to make a showing of a specific need.
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Judge Scheindlin also authored the 2010 opinion in Pension Comm. In this opinion, which she subtitled “Zubulake Revisited: Six Years Later,” she summarized much of the law relating to the issuance and monitoring of “litigation holds” and sanctioned the plaintiffs with adverse inference instructions for their gross negligence in the collection and preservation of ESI. Her decision is significant because it provides a legal framework for determining the appropriateness of sanctions for unintentional acts of spoliation. Further, it furnishes a series of examples of discovery misconduct that, depending on the circumstances, may constitute either ordinary or gross negligence in a party’s implementation of a litigation hold.

In Rimkus, decided a month after Pension Comm., the Honorable Lee H. Rosenthal, United States District Judge for the Southern District of Texas, granted an adverse inference instruction against the defendants for their intentional and bad faith destruction of e-mail in a suit alleging their breach of non-compete and non-solicitation agreements. Judge Rosenthal served from 2003 to 2007 as Chair of the Advisory Committee that drafted the 2006 amended Federal

16 A litigation hold is a written communication by a party who has been determined to have a duty to preserve evidence. It is directed to those persons who are likely to have custody of paper records or ESI relevant to the claims, defenses, and key issues in litigation. It requires them to preserve and to immediately suspend the manual or programmed destruction of such data. The decision in Cache La Pudre Feeds LLC v. Land O’Lakes, Inc., 244 F.R.D. 614 (D. Colo. 2007), included in the casebook, makes the point that instituting a litigation hold is only a first step in the discovery process. To satisfy Rule 26(b)(2)(B), a party must also conduct a reasonable search for responsive documents. Id. at 629. In Cache La Pudre, the defendant had instituted a litigation hold but thereafter failed to suspend the recycling of backup tapes and failed to prevent its employees from wiping clean the hard drives of former employees. Id. The court imposed a monetary sanction, stating, “[a] ‘litigation hold,’ without more, will not suffice to satisfy the ‘reasonable inquiry’ requirement in Rule 26(g)(2). Counsel retains an on-going responsibility to take appropriate measures to ensure that the client has provided all available information and documents which are responsive to discovery requests.” Id.; see also THE SEDONA CONFERENCE COMMENTARY ON LEGAL HOLDS: THE TRIGGER & THE PROCESS (2007) [hereinafter SEDONA, LEGAL HOLDS].
Rules and from 2007 until September 30, 2012, as Chair of the Standing Committee. Because *Rimkus* and *Pension Committee* model different approaches to the adverse inference instruction, this paper discusses these cases even though both were decided after *Connor*.¹⁹

The casebook is so much the product of collaborative effort that the editors designate the Sedona Conference (Sedona) as a third co-author. Sedona is a law and policy institute comprised of leading judges, lawyers, academics, and technology consultants who are extremely knowledgeable of e-discovery. Through its development of a set of widely published “core principles” and “best practice guidelines” for addressing the production of ESI,²⁰ Sedona has been a primary source of guidance for judges, counsel, and clients facing novel issues in this area. The co-authors especially acknowledge the contributions to the casebook by Sedona’s Director of Judicial Education and Content, Kenneth J. Withers.²¹ They also credit fourteen experts in e-discovery affiliated with Sedona—one lawyers, professors, and technology consultants²²—who assisted in the preparation of the various chapters.

¹⁹ For an overview of the law in federal courts governing sanctions for the spoliation of ESI, see COHEN & LENDER, supra note 7, at § 3.08.

²⁰ The Sedona Conference Working Group on Electronic Document Retention & Production was formed in 2002 out of a concern over whether the rules and concepts related to paper discovery would be adequate to address issues posed by e-discovery. Sedona has produced the publications most frequently cited in the area of e-discovery, including: THE SEDONA CONFERENCE COMMENTARY ON LEGAL HOLDS: THE TRIGGER & THE PROCESS (2007); THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (2nd ed. 2007); THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT (2nd ed. 2007); THE SEDONA CONFERENCE GUIDELINES FOR MANAGING INFORMATION AND RECORDS IN THE ELECTRONIC AGE (2004); and THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION AND RECORDS IN THE ELECTRONIC AGE (2004).

²¹ Kenneth J. Withers was the Senior Judicial Education Attorney at the Federal Judicial Center when the 2006 amendments were drafted and was an important resource in the drafting process.

The casebook begins with a dazzling introduction by Professor Marcus, a primary drafter of the newly amended Federal Rules. In just fifteen pages, Professor Marcus provides an overview of the evolution of e-discovery. He describes the momentous changes in American discovery over the past quarter century, referring particularly to rulemaking efforts to contain overbroad discovery and, most recently, to explicitly address ESI. Explaining why e-discovery deserves separate attention, he sheds light on the new Rules and discusses many of the questions that recur under them. While the casebook focuses almost entirely on e-discovery rules that apply in federal court, Professor Marcus notes that ESI issues are not confined to federal court and that many states have adopted e-discovery rules modeled after the Federal Rules.\

Today’s law students, knowledgeable in the use of computers, will be buoyed by Professor Marcus’ remark that as “products of the first digital generation” they may be better equipped as future lawyers and judges to deal with ESI than present day lawyers. For those of us who may be less advantaged in technical computer knowledge or experience, Professor Marcus points to a cautionary Advisory Committee Note. It warns that while lawyers engaged in e-discovery need not be experts in computer science, they need to acquire at least a working


\[24\] FED. R. CIV. P. 26(f) advisory committee’s note.
knowledge of a client’s computer systems so that they might perform the duties now mandated by the Rules.\(^\text{25}\)

The new Rules, for example, require counsel at the Rule 26(f) conference to address questions relating to the preservation and form-of-production of ESI and, depending on the circumstances, to a range of other technical issues.\(^\text{26}\) Also, once e-discovery starts the lawyer must supervise and monitor the process, a task requiring no small amount of computer knowledge. To perform these duties, counsel will certainly need to consult with “key players” in the litigation to see how they stored e-data, the client’s information technology staff, and quite possibly outside computer experts. To assist lawyers and parties in meeting their obligations, a cottage industry of electronic consultants has emerged. The cost, complexity, and prevalence of e-discovery in American litigation is demonstrated by the billions of dollars of revenue generated by this industry each year.\(^\text{27}\)

\(^{25}\) Id.

\(^{26}\) Throughout the book the editors pose challenging questions in order to illuminate e-discovery issues. They ask, for example, what you might do if your opponent is not sufficiently prepared to discuss ESI problems at the pretrial conference:

If your adversary does not place a sufficient level of importance on electronic discovery, how might you nonetheless sufficiently prepare for the Rule 16 pretrial conference? Should you be prepared to discuss your client’s systems even though your adversary has not requested information about them? How might you document your efforts, and your adversary’s disinterest, to protect you and your client should electronic discovery problems arise in the future? . . . If parties fail to adequately address electronic discovery issues during the Rule 26(f) meet and confer, and as a result, fail to identify to the court during the Rule 16 pretrial conference any anticipated electronic discovery issues, should they be precluded from raising any later identified electronic discovery problems as the basis for a discovery motion?

III. THE CHALLENGES TO AMERICAN DISCOVERY IN A DIGITAL ERA

Why are law students eager to study e-discovery? The Advisory Committee explained why it was necessary to create new Rules governing the retrieval and production of ESI. Its rationale serves to explain why lawyers in a digital age will face greater challenges in conducting discovery than in an era of paper-based discovery. The Committee cited the sheer volume of ESI as the primary reason. Electronic information is now the dominant form of business information, and the costs of storing electronic data are far less than storing a comparable amount of paper records. Consequently, there potentially is a much greater mass of electronic data in storage and subject to discovery. Questions arise as to where—on which of a variety of media—this data should be stored, how long it should be retained, how it can be retrieved, which part of it is discoverable, and in what form it should be produced.

The Committee noted that electronic data has unique characteristics. Unlike paper documents, ESI by its nature is dynamic. Its content may change with or without human intervention. Just turning on a computer and opening a document can alter earlier information

_Adds e-Discovery to its Digital Division_,
http://www.ironmountain.com/company/EMA_IronMountain_Stratify_IB.pdf (last visited May 8, 2011) (A business estimate that “the global ediscovery market will be worth some $4 billion annually by 2010. . .”); Charles Skamser, $1.2 Billion e-Discovery Market by 2014, THE E-DISCOVERY PARADIGM SHIFT, (Oct. 11, 2010), http://ediscoveryconsulting.blogspot.com/2010/10/12-billion-ediscovery-market-by-2014.html (noting that the 2010 Socha & Gelbmann study found 2009 e-Discovery market size at $2.8 billion, while another study by the Radicati Group predicted $1.2 billion in sales by 2014—the Radicati Group’s lower estimate is accounted for because it only measures spending on technology and it is not inclusive of service costs surrounding the technology’s usage). However, an article, Armies of Expensive Lawyers Replaced by Cheaper Software, by John Markoff, in the March 5, 2011, New York edition of the New York Times (science section), page A1, suggests that e-discovery is at the frontier of technological progress in computer science and linguistics. It reports that advances in automation and artificial intelligence may have permitted software companies to develop programs that could reduce the cost of e-discovery in the future. See generally, E-Discovery Amendments and Committee Notes, Proposed Amendments to the Federal Rules of Civil Procedure (April 2006).
about the document. It is also difficult to delete ESI.\textsuperscript{29} Deletion does not physically remove the information from a hard drive. It frees up the space for other uses. That may lead to overwriting the deleted data which can make restoration almost impossible. On the other hand, if deleted data has not been overwritten, it may be retrievable but often at considerable expense. Also, deleted data may possibly be found on network backup tapes which preserve snapshots of otherwise destroyed material. But restoration of such tapes can also be difficult and costly. Further, backup tapes are recycled periodically, resulting in the loss of data.

The Committee emphasized the attorney review for privilege and relevance as a reason for new rules. The producing party in its review of ESI for privilege must be sure that privileged communications are not disclosed. Before adoption of Federal Rule of Evidence 502 in 2008, even inadvertent disclosure could result in a waiver of privilege. Rule 502 clarified the matter by providing a uniform national standard for adjudicating claims of waiver through inadvertent production: whether an accidental disclosure results in a waiver depends on the reasonableness of the holder’s actions to prevent inadvertent disclosure and to rectify the error.

But before a party can review ESI for privilege the data has to be located and retrieved from storage sites. Often ESI which is retrieved is in such condition as to require costly and time-consuming restoration. Lawyers can be assisted in these endeavors by consultants who are expert in gathering and managing large volumes of electronic data. Their services can be invaluable, indeed indispensable, but where huge amounts of discoverable ESI are in storage, the costs of retrieval, restoration and review can be enormous.

Kenneth J. Winters warns that e-discovery presents different challenges than paper-based discovery not only because of the greater volume of potentially relevant data, but also because of

\textsuperscript{29} \textsc{Rothstein, Hedges \\& Wiggins, Managing Discovery of Electronic Information}, Federal Judicial Center 22 (2007).
the great variety of media on which ESI can be stored—sites ranging from employee laptops, desktops, or home computers to network servers linking many PC’s, plus backup, archival, offline storage, and various hand-held devices.\(^{30}\) Multiple locations disperse the data and complicate the discovery process. Also, in electronic systems the records management practices of business organizations are often arcane, underutilized, or non-existent. ESI widely distributed over multiple sites is seldom purged even when it is outdated. Consequently, potentially discoverable ESI is difficult to locate and disentangle from irrelevant records.

IV. **The Major Determinants of the Spoliation of ESI—Culpability and Prejudice**

Courts agree that a party seeking sanctions for spoliation must establish the following elements: (1) the party having control over the evidence had an obligation to preserve it at the time it was destroyed;\(^{31}\) (2) the records were destroyed with a “culpable state of mind”; and (3) the destroyed evidence was “relevant” to the party’s claim or defense and that a reasonable trier of fact could find that it would support that claim or defense.\(^{32}\) “Other factors include the degree of interference with the judicial process, whether a lesser sanction will remedy the harm, whether sanctions are necessary to deter similar conduct, and whether sanctions will unfairly punish an innocent party for spoliation committed by an attorney.”\(^{33}\)

\(^{30}\) See Kenneth J. Withers, *Computer-Based Discovery in Federal Civil Litigation*, 2000 FED. CTS. L. REV. 2, 3-4 (2000). It may be observed how prescient Kenneth Withers was in 2000 when he worried about hand-held devices and the like which have caused a proliferation of “custodians” of ESI today.

\(^{31}\) I discuss this element of spoliation in the part of the paper that considers the “trigger date” in *Connor*—the question of when Sun Trust reasonably anticipated litigation, subjecting it to a duty to preserve evidence. See infra Part V.B.1.

\(^{32}\) *Zubulake IV*, 220 F.R.D. at 219-20 (citations omitted).

\(^{33}\) *Scheinlin & Capra*, supra note 1, at 387.
In selecting an appropriate sanction for litigants or counsel guilty of spoliation, a judge may choose from a variety of sanctions that range from the least to the most severe. Because of their preference that that cases be decided on the merits and their reluctance to penalize parties or lawyers, courts do not readily order sanctions. When they do, they tend to avoid, wherever possible, the most severe or outcome-affecting penalties.

In their study of state and federal judicial decisions involving sanctions for the spoliation of ESI, Judge Shira A. Scheindlin and Kanchana Wangkeo concluded that the two major factors considered by courts in resolving questions concerning spoliation and the choice of an appropriate sanction are the desire to avoid penalizing parties or their counsel and the need to ensure the parties have an opportunity to litigate on the merits.

34 The spectrum of sanctions varies in severity. The least severe, monetary damages, allow “[a] judge to order one party to pay the fees incurred by the party that moves for sanctions," [to] shift costs to a party responsible for wasted discovery efforts or for supplemental discovery, or simply [to] levy fines.” Remarks of Judge Scheindlin in a panel of federal district and magistrate judges at Fordham University School of Law [hereinafter Panel Discussion], February 24, 2009 (discussing sanctions for the spoliation of ESI) (transcription of audio recording of panel discussion on file with author). A step up from monetary sanctions are evidentiary sanctions—“preclusion of evidence, [] waiver of privilege or work product, or [issuance of] an adverse inference instruction to the jury at the conclusion of trial.” Id. Finally, “[t]he most punitive sanctions in the court’s arsenal are the declaration of a default judgment against the offending party and the finding that either the party or its attorney is in contempt of court.” Id.

35 See Rimkus Consulting Grp. v. Cammarata, 688 F. Supp. 2d 598, 598 (S.D. Tex. 2010). The chapter on spoliation includes the decision Metropolitan Opera Ass’n v. Local 100, Hotel Employees and Restaurant Employees Intern. Union, 212 F.R.D. 178 (S.D.N.Y.2003). The opinion in that case by United States District Judge Loretta Preska is regarded as having set the standard for determining whether to impose a default judgment, one of the most punitive sanctions. See id. In the Panel Discussion, supra note 34, Judge Preska explained that courts are generally disinclined to impose sanctions:

In determining whether or not to impose sanctions, most judges I know, including myself, are disinclined to sanctions. First of all, the judicial system prefers to resolve controversies on the merits. Secondly, most judges don’t like to sanction lawyers. Thirdly, and this is from a very selfish perspective, sanctions create a lot of extra work while not actually moving the ball toward the resolution of the case and, fourth, it is not unheard of for the Court of Appeals to reverse sanctions decisions.

36 SCHEINDLIN & CAPRA, supra note 1, at 387.
appropriate sanction are the degree of prejudice suffered by the victimized party and, second, the level of culpability of the alleged spoliator.\textsuperscript{37}

\textsuperscript{37} These researchers drew the following conclusions concerning prejudice and culpability as affecting judicial discretion in finding spoliation and selecting an appropriate sanction:

\begin{enumerate}
  \item \textbf{Prejudice}

  Appellate courts have made clear that a finding of bad faith is not required to impose discovery sanctions. Indeed, bad faith was not present in most of the cases in our sample, and courts often imposed discovery sanctions where there was a lesser degree of culpability by the offending party, or cognizable prejudice to the injured party.

  In cases where a party has been prejudiced by the spoliation of electronic documents, courts have imposed sanctions aimed at restoring the prejudiced party to the position she would have been in had the documents not been destroyed. Courts often sought to remedy the prejudice through an evidentiary sanction or an adverse inference instruction. . . .

  Where there is no effective way to cure the prejudice, however, a court may dismiss the claims or grant a default judgment in favor of the prejudiced party. . . . Conversely, some courts have denied sanctions where the requesting party did not demonstrate that it had been prejudiced by the other party’s e-discovery violations. . . .

  These cases demonstrate that prejudice is a significant factor in assessing whether parties should be sanctioned for e-discovery violations—even where the spoliating party acted willfully or in bad faith. To the party that cannot prosecute or defend its case, it does not matter if the producing party did not intend to delete relevant electronic data; the information is gone, and the party has been hurt by it. When weighing the level of fault against the extent of the harm, courts have exercised their discretion to protect the party seeking discovery when justice so required. . . .

  \item \textbf{Willfulness or Bad Faith}

  On the other hand, courts have been less concerned with proof of prejudice when faced with willful or bad faith conduct. In circumstances where the conduct is particularly egregious, courts have granted the ultimate sanction of dismissal or default judgment in order to deter obstructionist behavior. In those cases, however, the courts have sometimes noted that the party requesting the documents suffered prejudice as well. . . .
\end{enumerate}
In general, both culpability and prejudice exist on continua. Just as the wrongdoer’s conduct may range from merely negligent loss of evidence to intentional and bad faith destruction, the prejudice suffered by the innocent party can vary in degree and form over a wide spectrum of injury.\(^{38}\) Also, these variables operate in tandem with one another—the more

The results of our sample support the general principle that where there has been a high degree of willfulness or bad faith, a court is justified in sanctioning a party to maintain the integrity of the judicial process. The fact-finder cannot uncover the truth when parties flout their discovery obligations and demonstrate by their conduct that they have no intention of complying with those obligations. . . .

C. Mixed Cases: Willfulness and Prejudice

Although our earlier discussion categorizes cases by whether courts emphasized the state of mind of the wrongdoer or the prejudice to the party seeking discovery, sanctions seldom focus solely on one or the other. More often than not, both elements are involved, though one may dominate the court’s discussion. . . . In cases where one or the other of these elements is less pronounced, there appears to be a sliding scale between the two. That is, the more prejudice there is, the less willfulness courts require before sanctioning a party for e-discovery violations, and vice versa.

Scheindlin & Wangkeo, \textit{supra} note 5, at 75-89 (footnote citations omitted). The researchers summarized the data gleaned from their study:

Courts granted sanctions 65\% of the time with defendants being sanctioned four times (81\%) as often as plaintiffs (19\%). The sanctioned behavior most often involved the non-production, i.e., destruction of electronic documents (84\%), rather than a delay in production (16\%). . . .

When courts imposed sanctions, they referred to the willfulness or bad faith of the violator (49\%), prejudice to the party requesting production (35\%), and/or the gross negligence or recklessness of the spoliating party (9\%) as the reason(s) for imposing the sanction(s).

Attorney’s fees and costs were the most frequently granted sanction (60\%). Courts granted evidentiary sanctions, such as preclusion (30\%), adverse inference instructions (23\%) and dismissal or default judgments (23\%) with less frequency. \textit{Id.} The researchers qualified their findings by noting that the sample size was relatively small (45 federal and 21 state cases) and that only written decisions were studied, skewing the sample in favor of cases granting sanctions since courts are more likely to issue written opinions when granting than denying sanctions. \textit{Id.}

\(^{38}\) \textit{Rimkus} shows that the determination of prejudice can require a wide-ranging analysis of evidence. \textit{See Rimkus}, 688 F. Supp. 2d at 611. In that case, the destruction of e-mail had mixed
egregious the conduct, the less prejudice the innocent party must suffer for a sanction to issue, and *vice versa*\(^\text{39}\).

Sanctions decisions can be particularly difficult in the context of e-discovery for at least two reasons—first, the difficulty of determining whether the loss or destruction of ESI occurred in the routine operation of the computer system or at the direction of a specific individual. “The how, when, and why of spoliation of electronic evidence can be a complicated inquiry.”\(^\text{40}\) Second, lost or destroyed ESI is not always permanently unavailable. It may sometimes be retrieved and restored, but only at prohibitive cost, complicating the task of fashioning appropriate relief for victims of spoliation.\(^\text{41}\)

V. THE ADVERSE INference INSTRUCTION

Most decisions sanctioning a party for spoliation are made exclusively by judges who alone decide whether the party is guilty of spoliation and, if so, what the penalty should be. The decision to sanction with an adverse inference instruction is an exception. Once the judge has decided to impose this particular sanction, the inference instruction involves decision-making shared by judge and jury.\(^\text{42}\) Usually, the judge’s role, depending on the jurisdiction, is either to

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\(^{39}\) *Id.*

\(^{40}\) ADAM J. COHEN & DAVID J. LENDER, ELECTRONIC DISCOVERY: LAW AND PRACTICE §3.08[D] (2009).

\(^{41}\) *Id.*

\(^{42}\) Judge Scheindlin has commented on a possible consequence of the shared decision-making attending the adverse inference instruction:
make a final determination that the alleged wrongdoer has committed acts of spoliation or to make a preliminary finding that there is sufficient evidence upon which a reasonable jury could make that determination. Under either procedure, the alleged spoliator must be permitted at trial to introduce evidence to rebut the elements of spoliation.

As for the jury’s role, the inference instruction presumes a merits decision by a jury instructed on how it should weigh evidence in light of its loss or destruction by the alleged spoliator. In some jurisdictions, the jury will finally decide whether the alleged party has committed acts of spoliation. In all jurisdictions, where spoliation has been found—by either judge or jury—the jury decides whether to draw an inference or apply a presumption adverse to the wrongdoer.

There is no procedure for the jury to explicate its findings as to any of the matters committed to it for decision-making, including the ultimate question of whether to infer or

Unlike all the other sanctions, when a court issues an adverse inference instruction, the court’s finding of spoliation can be second-guessed by a jury. Although the court has already found that a party caused evidence to be lost and that a sanction is appropriate, the jury has to do it all over again. . . . That may influence [courts] to impose a sanction other than an adverse inference.

See Panel Discussion, supra note 34.

Mueller & Kirkpatrick write:

There is another kind of inference. It is the kind that the judge mentions to the jury in formal instructions—a conclusion permissible on the basis of the evidence, to which the judge openly draws the jury’s attention. . . . Inference instructions amount to judicial comment on the evidence, almost nudging or inviting the jury to draw a conclusion.


For an overview of the adverse inference instruction and an analysis of the Pension Committee and Rimkus decisions, see Charles Adams, Spoliation of Evidence: Sanctions versus Advocacy, University of Tulsa Legal Studies Research Paper No. 2011-06. Professor Adams argues that adverse inference instructions are undesirable sanctions because they are time-consuming, contentious, and grounded in the logical connection between spoliation and the merits of the case rather than the policies for sanctions. He argues that courts should handle most claims of spoliation by allowing parties to offer evidence of spoliation at trial and then argue adverse inferences from spoliation to the jury.
To presume that the missing evidence would have been unfavorable to the spoliating party. Any inference drawn or presumption applied by the jury is subsumed in its general verdict and not stated separately.

Also, unlike the very most punitive sanctions, like a default judgment or dismissal of claims or defenses, the adverse inference instruction is not a “terminating” sanction. It does not formally end litigation. Nevertheless, courts properly describe it as a severe or extreme sanction because of its practical effect on a lawsuit. A court order that the jury will be given an adverse inference instruction at the conclusion of trial can easily prompt the spoliating party to settle the case.

Further, although often referred to simply as an “adverse inference instruction,” this sanction may take the form, depending on the jurisdiction, of either an inference or a presumption of the existence of key elements of spoliation. In framing instructions, the choices made by judges between these two mechanisms—and in explaining them to the jury—can affect the harshness of the sanction and its impact on a lawsuit. An adverse inference instruction is itself a severe sanction, but instructions on presumptions of spoliation can have an even greater effect on the jury for two reasons: first, presumptions operate to shift to the alleged wrongdoer

45 In Zubulake IV, the court described the practical effect of the instruction:

[A]n adverse inference instruction often ends litigation—it is too difficult a hurdle for the spoliator to overcome. The in terrorem effect of an adverse inference is obvious. When a jury is instructed that it may “infer that the party who destroyed potentially relevant evidence did so “out of a realization that the [evidence was] unfavorable,” the party suffering the instruction will be hard-pressed to prevail on the merits. Accordingly, the adverse inference instruction is an extreme sanction and should not be given lightly.

Zubulake IV, 220 F.R.D. 219-20 (S.D.N.Y.2003) (citations omitted). The Rimkus court adds: Although adverse inference instructions can take varying forms that range in harshness, and although all such instructions are less harsh than so-called terminating sanctions, they are properly viewed as among the most severe sanctions a court can administer.”

the burden of producing evidence on such issues as relevance and prejudice; second, an
unopposed presumption, at least in theory, controls jury decision-making.\footnote{MUELLER \\
& KIRKPATRICK, supra note 43, at 443.}

Whichever form of instruction the judge chooses, the offending party must be permitted
at trial to introduce evidence to rebut the elements of spoliation so that the jury is apprised of
sufficient information with which it can apply the instruction.\footnote{See Rimkus. 688 F. Supp. 2d at 617; see also Stevenson v. Union Pac. R.R. Co., 354 F.3d 739, 750 (8th Cir. 2004).}

To prevent undue emphasis and unfair prejudice the court should give the adverse inference instruction at the conclusion of trial, not at the outset.\footnote{See Rimkus, 688 F. Supp. 2d at 620.}

\textit{A. Two district court decisions granting an adverse inference instruction: Pension Committee and Rimkus}

The conduct at issue in these cases occurred at opposite points on a continuum of
culpability—on one end, in \textit{Pension Committee}, the negligent implementation of a litigation
hold;\footnote{In Pension Comm., a group of 96 investors brought state and federal securities claims against
former directors, fund administrators, and auditors to recover losses from the liquidation of two
offshore hedge funds that were alleged to exceed 550 million dollars. Pension Comm. of the Univ. of
the start of discovery the defendants complained of gaps in the plaintiffs’ document responses and moved for
sanctions. \textit{Id.} at 463. In its opinion, the court examined the conduct of 13 plaintiffs and granted monetary sanctions against each for negligence in meeting their discovery obligations. \textit{See id.} at 497. It also found 6 plaintiffs to be grossly negligent and ordered an adverse inference instruction that required the jury to use a burden-shifting and presumption-rebutting method of analyzing the evidence. \textit{See id.} at 470.}
on the other, in \textit{Rimkus}, the intentional deletion of e-mail subject to a duty to preserve.
The two opinions illustrate varying approaches that courts take, first, to the level of culpability
required for a sanction as severe as an adverse inference instruction;\footnote{Pension Comm. and Rimkus reflect the sharp split of authority between the Second Circuit in which mere negligence may meet the culpability standard for granting an adverse inference} second, to whether the
innocent party, to secure such an instruction, must prove that it has been prejudiced by the absence of relevant evidence; and third, to the relative functions of judge and jury in administering the inference instruction.

The Pension Committee court found no instances of willful or intentional misconduct in the context of discovery, but it found that some of the parties’ failures constituted either gross negligence or ordinary negligence. It acknowledged that identifying these levels of culpability is a task performed with hindsight and one which cannot be done “with exactitude and [which] might be called differently by a different judge.”

The court said that in the case at hand “the destruction of e-mail or certain backup tapes after the duty to preserve has attached” was grossly negligent. It stressed that “once a party reasonably anticipates litigation it must suspend its routine document retention/destruction policy

instruction and the Fifth Circuit and others in which a showing of bad faith or bad conduct is required for this sanction. Compare Pension Comm., 685 F. Supp. 2d at 467-70 (granting an adverse inference instruction on negligence and without requiring bad faith), with Rimkus, 688 F. Supp. 2d at 614 (noting that severe sanctions cannot be imposed without a showing of bad faith). Courts following the Second Circuit reason that each party should bear the risk of its own carelessness. Magistrate Judge James C. Francis, IV, explained that the rationale for this approach is not to punish the spoliator for carelessness but to remedy the imbalance caused by loss of the evidence:

[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. It makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently. The adverse inference provides the necessary mechanism for restoring the evidentiary balance. The inference is adverse to the destroyer not because of any finding of moral culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss.


51 See discussion infra Part V.B.2.
52 Pension Comm., 685 F. Supp. 2d at 463.
53 Id.
54 Id. at 465. Other examples of gross negligence: the “failure to collect information from the files of former employees that remain in a party’s possession, custody or control” and “the failure to collect records—either paper or electronic—from key players if the relevant information maintained by those players is not obtainable from readily available sources.” Id.
and put in place a litigation hold.”  

It said that “the failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.” Significantly, the court imposed adverse inference instructions on the parties it found to be grossly negligent.

The Pension Committee court also offered examples of a lower level of discovery misconduct that might constitute ordinary negligence: “the failure to take all appropriate measures to preserve ESI;” “the failure to assess the accuracy and validity of selected search terms;” and “the failure to obtain records from all those employees who had any involvement with the issues in the litigation) as opposed to just the key players.” The court sanctioned parties guilty of ordinary negligence with lesser penalties, such as costs and attorneys fees, rather than an inference instruction. But it warned that if the underlying acts were more culpable, the same failures could constitute gross negligence or willful misconduct.

Judge Scheindlin said that in her jurisdiction courts can chose among alternative forms of inference instructions which vary in their severity and that courts should make choices based on the spoliator’s level of culpability. She also explained that when judges impose this particular penalty they instruct juries to apply a burden-shifting and presumption-rebutting method of analyzing the evidence:

In its most harsh form, when a spoliating party has acted willfully or in bad faith, a jury can be instructed that certain facts are deemed admitted and must be accepted as true. At

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55 Id. at 466.
56 Id. at 465.
57 Id.
58 Id.
59 Id.
60 Id. at 496-97.
61 Id. at 464.
62 Id. at 470 (“The harshness of the instruction should be determined based on the nature of the spoliating party’s conduct—the more egregious the conduct, the more harsh the instruction.”).
the next level, when a spoliating party has acted willfully or recklessly, a court may impose a mandatory presumption. Even a mandatory presumption, however is considered to be rebuttable.

The least harsh instruction permits (but does not require) a jury to presume that the lost evidence is both relevant and favorable to the innocent party. If it makes this presumption, the spoliating party’s rebuttal evidence must then be considered by the jury, which must then decide whether to draw an adverse inference against the spoliating party. 63

The court explained that in the Second Circuit when an adverse inference instruction is imposed, the degree of culpability also affects allocation of the burden of proof on issues of relevance and prejudice. 64 At the highest level of wrongdoing, “[w]here a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party.” 65

In such cases, the burden of producing evidence on issues of relevance and prejudice shifts from the innocent party to the alleged bad-faith wrongdoer. 66 At the intermediate level, where the

63 Id. Judge Scheindlin further explains:

This sanction still benefits the innocent party in that it allows the jury to consider both the misconduct of the spoliating party as well as proof of prejudice to the innocent party. Such a charge should be termed a “spoliation charge” to distinguish it from a charge where the jury is directed to presume, albeit still subject to rebuttal, that the missing evidence would have been favorable to the innocent party, and from a charge where the jury is directed to deem certain facts admitted.

Id. at 470-71.

64 Id. at 467. The court said that relevance for these purposes means “something more than sufficiently probative to satisfy Fed. R. Evid. 401,” and something more than that “the evidence would have been responsive to a document request” under Fed.R.Civ.P. 26(b)(1). Id. (citations omitted). It explained, “[t]he innocent party must also show that the evidence would have been helpful in proving its claims or defenses—i.e., that the innocent party is prejudiced without that evidence. Proof of relevance does not necessarily equal proof of prejudice.” Id.


66 Id. at 468-69 (“When the spoliating party’s conduct is sufficiently egregious to justify a court’s imposition of a presumption of relevance and prejudice, or when the spoliating party’s conduct warrants permitting the jury to make such a presumption, the burden then shifts to the spoliating party to rebut that presumption. . . . If the spoliating party demonstrates to a court’s satisfaction
guilty party was grossly negligent, relevance and prejudice may also be presumed, but the presumption is not mandatory. 67

At the lowest level, where “the spoliating party was merely negligent, there is no presumption and the innocent party must prove both relevance and prejudice.” 68 Judge Scheindlin explained that if innocent parties were excused from those burdens simply because they were victims of negligence, “the incentive to find…error and capitalize on it would be overwhelming “and “litigation [could] become a ‘gotcha’ game rather than a full and fair opportunity to air the merits of a dispute.” 69

In Rimkus, Judge Rosenthal took a contrasting approach, also ordering an inference instruction even though the destruction of e-mails in the case before her was alleged to be intentional and thus more culpable than the grossly negligent misconduct in Pension Committee. 70 She stated that “circuit differences in the level of culpability necessary for an

that there could not have been any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required.”).

67 Treppel v. Biovail, 249 F.R.D. at 121-22 (S.D.N.Y.2008). The Pension Comm. court provided the text of the charge it would give the jury for the grossly negligent plaintiffs. Pension Comm., 685 F. Supp. 2d at 496-97. The Rimkus court summarized the Pension Comm. charge as follows:

In Pension Committee, the court stated that it would give a jury charge for the grossly negligent plaintiffs that: (1) laid out the elements of spoliation; (2) instructed the jury that these plaintiffs were grossly negligent in performing discovery obligations and failed to preserve evidence after a preservation duty arose; (3) told the jury that it could presume that the lost evidence was relevant and would have been favorable to the defendant; (4) told the jury that if they declined to presume that the lost evidence was relevant or favorable, the jury’s inquiry into spoliation was over; (5) explained that if the jury did presume relevance or prejudice, it then had to decide if any of the six plaintiffs had rebutted the presumption; and (6) explained the consequences of a rebutted and an unrebutted presumption.


68 Pension Comm., 685 F. Supp. 2d at 468.

69 Id. at 469.

70 Several forensic engineers left Rimkus to start a competing consulting company. These former employees filed a pre-emptive suit against Rimkus in a Louisiana state court seeking to
adverse inference instruction limit the applicability of the Pension Committee approach.\textsuperscript{71} She cited decisions by the Fifth Circuit holding that negligence in collecting and preserving information is insufficient for an adverse inference instruction and that evidence of bad faith, intentional destruction is required.\textsuperscript{72} She also noted decisions in the Seventh, Eighth, Tenth, and D.C. Circuits similarly holding negligence insufficient for this penalty.\textsuperscript{73} As for the burden of nullify certain non-compete agreements in their employment contracts. In a responsive suit in a federal court in Texas, plaintiff Rimkus alleged that in forming a new company these departing employees (defendants here) had violated the terms of their employment contracts and had misappropriated confidential and proprietary information. Unlike Pension Comm., the alleged spoliation in Rimkus consisted of willful misconduct by the defendants who, while suit was pending in state court, had intentionally deleted e-mails and attachments in order to prevent their use in the litigation anticipated or pending in federal court.\textsuperscript{71} Id. at 615.

\textsuperscript{72} See, e.g., Condrey v. Sun Trust Bank of Ga., 431 F.3d 191, 203 (5th Cir. 2005); King v. Ill. Cent. R.R., 337 F.3d 550, 556 (5th Cir. 2003).

\textsuperscript{73} Rimkus, 688 F. Supp. 2d at 615 n.10-11 (citing Penalty Kick Mgmt. Ltd. v. Coca Cola Co., 318 F.3d 1284, 1294 (11th Cir. 2003) (quoting Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir.1997)); Turner v. Pub. Serv. Co. of Colo., 563 F.3d 1136, 1149 (10th Cir. 2009) (quoting Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997)); Faas v. Sears, Roebuck & Co., 532 F.3d 633, 644 (7th Cir. 2008); Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1035 (8th Cir. 2007) (quoting Stevenson v. Union Pac. R.R. Co., 354 F.3d 739, 746 (8th Cir. 2004)); Wyler v. Korean Air Lines Co., 928 F.2d 1167, 1174 (D.C. Cir. 1991)). However, “[t]he First, Fourth, and Ninth Circuits hold that bad faith is not essential to imposing severe penalties 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.” Rimkus, 688 F. Supp. 2d at 614-15 (footnote citations omitted). In Scheindlin & Capra’s discussion of culpability in ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE, the authors discuss the conflicting positions taken by circuit and district courts on the degree of culpability that is required to warrant sanctions for spoliation. They state:

Perhaps the most distinctive approach to culpability is that of the First Circuit, which leaves the entire question of a spoliation finding to the factfinder with no required finding of any particular degree of culpability. Rather, the proponent of an adverse inference need only show that its opponent “knew of (a) the claim (that is, the litigation or the potential for litigation), and (b) the document’s potential relevance to that claim,” and “a trier of fact may (but need not) infer from a party’s obliteration of a document relevant to a litigated issue that the contents of the document were unfavorable to that party.

Scheindlin & Capra, supra note 1, at 388. Following the May 2010 Conference on Civil Litigation, the Discovery Subcommittee of the Civil Rules Advisory Committee determined that it would be useful to have information on how federal courts have handled various preservation and spoliation issues. Accordingly, it requested Andrea Kuperman, Chief Counsel to the Rules
proof on relevance, the *Rimkus* court cited Fifth Circuit decisions indicating that even where the destruction was in bad faith, an adverse inference instruction requires a showing that the missing evidence would have been relevant.\(^74\)

The instruction in *Rimkus* was less severe than in *Pension Committee* because it told the jury, not that the defendants had intentionally destroyed e-mails subject to a preservation duty, but only that, as a matter of law, the defendants had such a duty. Under this approach, the court would decide only the preliminary question of whether there was sufficient evidence upon which a jury could reasonably find intentional destruction by the defendants. The jury, upon hearing all the evidence and being instructed that it was to decide that question, would make the final determination.\(^75\)

Committee, then a law clerk to Judge Rosenthal, to research a broad range of issues considered by courts in evaluating such matters. Searching a Westlaw database that included all federal court decisions, including appellate, district, and bankruptcy cases, she examined a representative sample of cases having the most significant discussions of key spoliation issues. While her memorandum does not purport to be an exhaustive summary of all of the case law in every circuit, it provides the reader with a clear idea of the key issues on which courts differ in spoliation cases. Ms. Kuperman’s memorandum of 104 pages is included in the agenda materials for the November 2010 Civil Rules meeting. In a similar effort to summarize differences taken by federal courts on key issues in the law of spoliation, Magistrate Judge Paul W. Grimm provided an appendix to his recent sanctions decision, Victor Stanley v Creative Pipe, ECF 377-1 Case 8:06-cv-02662 MJG (2010 Md), which in 12 pages charted some of the different positions taken by federal appellate courts on spoliation issues; a second such chart by Judge Grimm is included in the agenda materials for the November 2011 Civil Rules meeting. See also note 93 infra.

\(^74\) *Rimkus*, 688 F. Supp. 2d at 617 (citing Condrey, 431 F.3d at 203 & n.8 (5th Cir. 2005) (holding that an adverse inference was not appropriate because there was no evidence of bad faith but also noting that even if bad faith had been shown, an adverse inference would have been improper because relevance was not shown)). However, the *Rimkus* court said that because the innocent party had presented evidence of the contents of the destroyed e-mails in the case before it there was no need or basis to presume relevance or prejudice. *Id.* at 618.

\(^75\) *Rimkus*, 688 F. Supp. 2d at 646-47.

Given this record, it is appropriate to allow the jury to hear the evidence about the deletion of emails and attachments and about discovery responses that concealed and delayed revealing the deletions. The jury will receive an instruction that in and after November 2006, the defendants had a duty to preserve emails and
Further, the jury in *Rimkus*, if it found intentional deletion by the defendants, would then be presented with the ultimate issue: It would be told that upon hearing all the evidence it was permitted but not required to infer that the missing e-mails would have been unfavorable to the defendants.\(^76\) Judge Rosenthal explained, “Rather than instruct the jury on the rebuttable presumption steps, it is sufficient to present the ultimate issue.” She noted Fifth Circuit decisions that approved this approach and that described jury instructions based on presumption-rebutting and burden-shifting analyses (as in *Pension Committee*) as unnecessary and confusing.\(^77\)

Judge Rosenthal suggested that in considering sanctions courts should be guided by the principle of *proportionality* endorsed by the Sedona Conference: "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."\(^78\) She said, "For example, the reasonableness of discovery burdens in a $550 million case arising out of the liquidation of hedge funds, as in *Pension Committee*, will be different than the reasonableness of discovery burdens in a suit to enforce noncompetition

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other information they knew to be relevant to anticipated and pending litigation. If the jury finds that the defendants deleted emails to prevent their use in litigation with *Rimkus*, the jury will be instructed that it may, but is not required to infer that the content of the deleted lost emails would have been unfavorable to the defendants.

In making this determination, the jury is to consider the evidence about the conduct of the defendants in deleting emails after the duty to preserve had arisen and the evidence about the content of the deleted emails that cannot be recovered.

*Id.*

\(^{76}\) *Id.*

\(^{77}\) *Id.* at 620 n.21 (citing Kanida v. Gulf Coast Med. Personnel LP, 363 F.3d 568, 576 (5th Cir. 2004); Olitsky v. Spencer Gifts, Inc., 964 F2d 1471, 1478 (5th Cir. 1992)).

\(^{78}\) See THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, *supra* note 20, at cmt.2b.
agreements and related issues, as in the present case.” “Whether 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.”

B. The Casebook Example: Connor v. Sun Trust Bank

Plaintiff, Maria Connor, a former communications manager of defendant Sun Trust Bank, alleged that the bank violated the Family and Medical Leave Act (FMLA) by firing her after she took two months of FMLA leave following her adoption of a child. The plaintiff managed eight employees upon her hiring in 2005, but only six when her leave started on November 8, 2006. Although she was based in Atlanta, three of the six she managed worked in the Enterprise Publication Services (“EPS”) group in Orlando. While Connor was on leave, one of the three in Orlando (the EPS on-site supervisor) resigned unexpectedly and the plaintiff’s supervisor, Leslie Weigel, initiated discussions with senior management which led to re-assigning the two remaining EPS employees to another Sun Trust department in Orlando. Consequently, upon

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79 Rimkus, 688 F. Supp. 2d at 613.
80 Id. In Chambers v. NASCO, Inc., 501 U.S. 32 (1991), the Supreme Court ruled that where rules or statutes do not adequately address a party’s bad faith conduct that abuses the judicial process, federal courts have an “inherent power” to punish such behavior. Judge Rosenthal concluded that alleged spoliation in Rimkus implicated the court’s inherent authority in part because the alleged spoliation occurred before the case was filed. Rimkus, 688 F. Supp. 2d at 612. She cautioned that “to the extent sanctions are based on inherent power, the Supreme Court’s decision in Chambers may also require a degree of culpability greater than negligence.” Id. at 615.
81 Connor v. Sun Trust Bank, 546 F. Supp. 2d 1360, 1364-65 (N.D. Ga. 2008). This paper’s discussion of the facts in Connor is based on events described in the court’s opinion, not on a reading of the underlying record.
82 Connor alleged that her former employer violated the FMLA by interfering with her substantive rights and retaliating against her for engaging in protected activity. See, e.g., Stricland v. Water Works and Sewer Bd., 239 F.3d 1199, 1206 (11th Cir. 2001). She asserted that the resignation of the on-site EPS supervisor in Orlando created a “supervision gap” that she
her return from leave on January 2, 2007, Connor supervised only the three employees based in Atlanta.

On or about January 13, 2007, Weigel decided to terminate the plaintiff and on January 27 she so informed her. Later, on February 12, 2007, she sent the following e-mail to the bank’s senior management team (which did not include Connor who was not a senior manager) stating her reasons for eliminating the plaintiff’s position:

All,
I wanted to let you know that all of my team has received the information about my decision to eliminate the [plaintiff’s] Comms manager position as of the end of March. Maria has talked with her team as well. You are free to discuss it with your team as you see fit.

A couple of talking points--
1. My decision was based on the changes to the make-up of the team that resulted in a reduction from 8 to 3 people being managed by this position[.]
2. The remaining 3 people . . . will begin reporting directly to me.

Let me know if you have other questions. Thanks, Leslie

Connor employed an attorney who, before filing suit, advised Sun Trust by letter on February 21, 2007, of the potential for litigation and requested preservation of documents relevant to the termination. On February 22, the bank’s in-house counsel identified several employees, including Weigel, who were likely to possess such information. In early March would have filled had she not been on FMLA leave. *Connor*, 546 F. Supp. 2d at 1366. She alleged that Sun Trust by its changes in her job responsibilities and its removal of all but three of her direct reports had failed to restore her to the same or “an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.” 29 U.S.C. § 2614(a)(1). Sun Trust’s defense was that it was not obligated to restore Connor to her former position because it was eliminated as a result of a legitimate reorganization and she was terminated for reasons wholly unrelated to her taking FMLA leave. *Connor*, 546 F. Supp. 2d at 1366; see also, e.g., O’Connor v. PCA Family Health Plan, Inc., 200 F.3d 1349, 1353-54 (11th Cir. 2000); Sylvester v. Dead River Co., 260 F. Supp. 2d 181 (D. Me. 2003); Rice v. Sunrise Express, Inc., 209 F.3d 1008 (7th Cir. 2000), *cert. denied*, 531 U.S. 1012 (2000) (employee retains ultimate burden of proving she would have been restored to her employment but for her protected leave).
2007, these employees furnished counsel with responsive documents, but no one provided the February 12 e-mail (or any other e-mail relating to plaintiff’s discharge). However, on September 10, 2007, following discovery, Connor obtained a copy of the February 12 e-mail by undisclosed means. She contended that it supported her theory of an FMLA violation and moved before trial to sanction the bank for having failed to produce it during discovery. Upon a hearing, the court ordered that it would give the jury an adverse inference instruction.

The Connor court did not discuss the form or quote the text of the adverse inference instruction that it would give the jury. Some class members said that they were somewhat confused when the opinion referred at one point to instructing on a “presumption” of spoliation and at another to instructing on an “inference” of spoliation. This reaction to the court’s unexplained reference to both terms in its opinion is understandable. Law students know the differences between inferences and presumptions. But they likely are unfamiliar with cases like Pension Committee or Rimkus which show that inference instructions can take various forms and may refer to either or both of these evidentiary devices. Prior to discussing Connor, the

83 The plaintiff contended that the February 12 e-mail confirmed her claim that the defendant’s actions substantially diminished her job since it said that her position was eliminated because of the changes to her teams and the removal of all but three of her direct reports. Connor, 546 F. Supp. 2d at 1366. The court said that the e-mail by itself could not prove the interference claim since the plaintiff did not have an absolute right to return to an undiminished position. Id. at 1370. As for the retaliation claim, the court reasoned that the e-mail was only circumstantial evidence because it could not prove the existence of discrimination without inference or presumption. Id. at 1373. But the court also said that the e-mail was important to the plaintiff’s case because it went “directly to Sun Trust’s reasons for terminating her employment,” id. at 1376, and could be considered by the fact-finder under the burden-shifting framework of McConnell Douglas Corp. v Green, 411 U.S. 792 (1973).

84 Sun Trust generally fits the profile of the typical party sanctioned for the spoliation of ESI—a defendant who suffers an adverse inference instruction because its intentional or willful destruction of e-mail prejudiced the plaintiff. Scheindlin & Wangkeo, supra note 37, at 79.

85 Connor was disposed of without trial.

86 Connor, 546 F. Supp. 2d at 1375, 1377.
instructor may choose to explain how, depending on the jurisdiction, either or both of these terms may appear in any discussion of an adverse inference instruction.\textsuperscript{87}

Sun Trust’s e-mail system had several preservation mechanisms.\textsuperscript{88} The bank’s server retained e-mails for thirty days after which they were automatically deleted unless they had been previously archived or deleted by the user. Second, deleted e-mail was backed up daily for disaster recovery purposes, but these tapes were recycled every seven to ten days following their creation. Third, an employee could preserve an e-mail indefinitely by archiving it. Thus, on February 21, when the bank received notice of potential litigation, the February 12 e-mail—unless it already had been affirmatively deleted—would have remained on the server for about twenty more days and on the backup tapes for seven to ten days thereafter.

Weigel’s custom had been to archive her inbox and sent e-mails on a weekly basis. After she was instructed on February 22 to preserve relevant documents, she searched her archives and produced some e-mails but not that of February 12. However, in September 2007, after Connor obtained this particular e-mail and moved for sanctions, Weigel checked her archives again to see if she had previously overlooked it. She discovered that she had departed from her routine and actually had archived no e-mail between January 1 and February 18, 2007. Consequently, all her e-mail during that period was automatically deleted after thirty days on the server (unless it had earlier been deleted by Weigel herself). Sun Trust explained that Weigel’s departure from her usual practice was due to the press of business.

\textit{Connor} is about the discovery of e-mail. As one of the most frequent means of business communication, e-mail is a rich source of information. Experts in e-discovery have identified

\textsuperscript{87} In the Eleventh Circuit, spoliation creates a rebuttable presumption that the evidence not preserved was unfavorable to the party responsible for the spoliation.

\textsuperscript{88} \textit{Connor}, 546 F. Supp. 2d at 1367.
the special qualities of e-mail that may distinguish it from other forms of communication: They report that e-mail is often not edited, proofread, or reviewed. The sender may fail to understand that his statements are not private or secure and that his workplace statements may be attributed to his employer. Thus it is possible that a sender may treat a subject less thoughtfully, more casually, and say things in e-mail that he wouldn’t in letters or memoranda. But these generalizations do not apply in every case. It does not appear, for example, that Weigel’s February 12 e-mail was other than a business communication made with an appropriate and normal degree of care. It possibly was a message crafted very purposefully.

The discovery of e-mail may be affected by an organization’s deletion and retention policies. Although e-mail may be deleted by the user or pursuant to automatic destruction programs, it often is recoverable from backup tapes or by use of specialized forensic techniques. Sometimes, as in Connor, an e-mail that was not previously known to exist surfaces fortuitously, possibly through a sympathetic employee. Students commented that the e-mail issues in Connor may be typical of those that they might encounter as future lawyers: One student said: “E-mail is something that we all deal with everyday, so the case is a good real-world example of how deletion and retention e-mail policies may affect the court’s decision in determining whether a party has acted in good faith.”

The Connor court applied a five-factor test used in the Eleventh Circuit and found that Sun Trust had acted in bad faith and spoliated evidence by its intentional destruction of the February 12 e-mail. The first factor—prejudice—refers to the damage caused to the innocent

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89 See BRENT KIDWELL, MATTHEW NEUMEIER & BRIAN HANSEN, ELECTRONIC DISCOVERY § 7.01 (2010).
90 The district court utilized the Flury test: (1) whether the plaintiff was prejudiced as a result of the destruction of evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the defendant acted in good or bad faith; and (5) the
party by the absence of evidence that would have helped its case. The court compared the direct, irrevocable prejudice in *Flury* with the more speculative prejudice in *Connor* where the plaintiff eventually obtained the evidence in question. 91 Although the court described the harm to the plaintiff as “attenuated,” it still found that she was prejudiced. The court said that the defendant’s failure to produce or preserve the February 12 e-mail raised the concern that other relevant e-mails existed but had been withheld from her (emphasis added). 92

The court’s primary focus was on whether Sun Trust had acted in good or bad faith. 93 It balanced the bank’s culpability against the prejudice to Connor—the major determinants of

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91 In *Flury*, a products liability suit arising from the failure of an airbag to deploy, the plaintiff allowed the vehicle to be destroyed before the defendant could examine it. See *Flury*, 427 F.3d at 947. As a result, the defendant was irreversibly prejudiced because the most critical physical evidence was destroyed. *Id.*

92 The court conceded that the prejudice to Connor was more attenuated than if Sun Trust, like the plaintiff in *Flury*, had destroyed physical evidence crucial to her case. *Connor*, 546 F. Supp. 2d at 1376. But it still found sufficient prejudice in the defendant’s non-production of the February 12 e-mail and the possibility that other e-mails existed that might have helped plaintiff’s case. *Id.*

93 The Eleventh Circuit requires a culpability threshold higher than negligence to support an adverse inference instruction. “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.” Mann v. Taser International, Inc., 588 F.3d 1291 (11th Cir. 2009) (quoting *Bashir* v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997) (per curiam)). In *Bashir*, the Eleventh Circuit said that “negligence in losing or destroying records is not enough for an adverse inference instruction as ‘it does not sustain an inference of consciousness of a weak case.’” *Id.* (citations omitted). However, the
spoliation. Lacking direct evidence of Weigel’s intent or conduct as to non-disclosure of the February 12 e-mail, the court relied on circumstantial evidence and concluded that she had acted in bad faith: As Connor’s supervisor, she did the firing, sent the e-mail, knew of its importance, and failed to produce it upon request. The court said that even if she had not archived it, unless she affirmatively deleted the e-mail, it would have been in her sent items file for about twenty days after preservation instructions issued on February 22.\textsuperscript{94} The court concluded that Weigel and thus the defendant were at least “minimally culpable”—that is, sufficiently blameworthy to warrant imposition of a sanction as severe as an adverse inference instruction.\textsuperscript{95}

Class members said that the district court took pains to discuss its application of a multifactored balancing test to the facts. One student remarked, “This case is most helpful in showing step-by-step the analysis the court should take in determining whether spoliation has occurred. The court did not simply state each factor and couple it with a conclusory statement. Instead, the court applied each factor to the facts.”

\textsuperscript{94} Connor, 546 F. Supp. 2d at 1376-77.

\textsuperscript{95} The court also considered the actions of another employee, Sue Johnson, head of human resources, who received the February 12 e-mail but did not produce it. The court found that her actions did not constitute spoliation, primarily because it was her custom to delete received messages that required no follow-up on her part. Had Johnson followed her usual practice, she would have deleted the e-mail immediately and it would not have been producible when the defendant issued preservation orders on February 22 because by then the backup tapes would have been overwritten. The court seemed to find Johnson’s actions less culpable than Weigel’s since she was only a recipient of the e-mail, not its author and the person who supervised and decided to fire Connor. \textit{Id.} at 1368.
1. The Trigger Date: When the Duty to Preserve Evidence Arises

Could Sun Trust have reasonably anticipated litigation when it destroyed the February 12 e-mail? It is almost certain that a firm-wide duty to preserve evidence attached at the latest on February 21, 2007, when Connor’s attorney advised Sun Trust of the likelihood of litigation and requested that relevant documents be preserved.96 But if Weigel destroyed the February 12 e-mail immediately after its creation was Sun Trust subject to a duty to preserve at that earlier time?97 The court did not address this question explicitly. But the student who led the discussion of Connor raised this issue by presenting an internet commentator’s view98 that the defendant’s duty to preserve evidence wasn’t triggered until Connor’s attorney threatened suit on February 21.99 Before then, it doesn’t appear that Connor herself had threatened to sue.

However, this paper argues that even if Weigel destroyed the e-mail right after sending it on February 12, circumstances combine to permit the conclusion that Sun Trust reasonably anticipated litigation at the moment of destruction.

A party cannot be faulted if it destroyed evidence before a duty to preserve arises. A litigation hold is a costly undertaking and a business organization has a legitimate interest in observing its normal document retention and disposal policies until a clear need—and a legal duty—arises to alter existing procedures and preserve relevant evidence. Courts agree that the

96 See Cache La Poudre Foods, LLC v. Land O’Lakes, Inc., 244 F.R.D. 614, 623 (D. Colo. 2007); see also SCHEINDLIN & CAPRA, supra note 1, at 107 (“Properly drafted pre-litigation letters can impose the duty of preservation.”).
97 The Connor court didn’t determine the exact date that the February 12 e-mail was destroyed. It seems to have assumed that it was destroyed almost immediately after its creation.
98 Yes, law students sometimes Google to enhance their level of preparation for class.
duty is triggered when litigation is reasonably anticipated even if notice occurs before an action is commenced. The Sedona Conference states that “[r]easonable anticipation of litigation arises when an organization is on notice of a credible threat it will become involved in litigation or anticipates taking action to initiate litigation.” The determination of when this duty arises is

100 See, e.g., Silvestri v. General Motors Corp., 271. F.3d 583, 591 (4th Cir. 2001) (“The duty to preserve evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.”); Lewy v. Remington Arms Co., Inc., 836 F.2d 1104, 1112 (8th Cir. 1988) (holding that a company is required to preserve documents it knows or should have known would become material in the future); see also Stevenson v. Union Pacific RR Co., 354 F.3d 739 (8th Cir. 2004); Doe v. Norwalk Cmty. Coll., 248 F.R.D. 372 (D. Conn. 2007). The Federal Circuit recently issued two opinions reconciling inconsistent spoliation decisions by courts in the District of Delaware and the Northern District of California. See Micron Tech., Inc. v. Rambus Inc., 2011 WL 1815975 (Fed. Cir. May 13, 2011); Hynix Semiconductor Inc. v. Rambus Inc., 2011 WL 1815978 (Fed. Cir. May 13, 2011). Rambus, a patent owner, had created a document retention policy as part of its litigation strategy against infringers. Pursuant to the policy, Rambus destroyed substantial numbers of documents and backup tapes on several “shred” days. Micron, 2011 WL 1815975, at *3-4. Ruling on Micron’s request for declaratory relief, the Delaware court found intentional spoliation and declared several of Rambus’s patents unenforceable. On substantially the same facts, the California court denied Hynix declaratory relief, ruling that Rambus had not spoliated evidence because the destruction occurred before a duty to preserve arose. Hynix, 2011 WL 1815978, at *6. The appellate court reversed the Delaware court as to the relief granted but affirmed its spoliation finding. It ruled that a trigger date is to be determined by an “objective standard, asking not whether the party in fact reasonably foresaw litigation, but whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation.” Micron, 2011 WL 1815975, at *6. The appellate court reversed the California court as to the spoliation finding, holding that, in finding that litigation was not imminent when the destruction occurred, it had relied on the uncertainty of events that allegedly needed to occur before suit could be commenced, such as the creation of claim charts and the authorization of litigation by Rambus’s directors. The Federal Circuit expressly rejected a standard that litigation be “imminent, or probable without significant contingencies” before a duty to preserve arose. “It would be inequitable to allow a party to destroy documents it expects will be relevant in an expected future litigation, solely because contingencies exist, where the party destroying documents fully expects those contingencies to be resolved.” Id. at *7.

101 SEDONA, LEGAL HOLDS, supra note 20, at 6.
“inherently fact specific.” In its guidelines, Sedona describes circumstances when, for the lack of a credible threat, the duty to preserve does not arise.

It would be wholly unrealistic, for example, to expect that the termination of every employee would be followed by litigation. But it is fair to say that discharges of employees, like Connor, who are exercising their rights under the FMLA (or other laws regulating employment) involve significantly more risk of litigation than terminations of employees not engaged in protected activity. This should be especially true when the claims of those protected employees are supported by credible evidence. Although the court denied Connor’s motion for summary judgment, it found that she had established a prima facie case of discriminatory retaliation and had presented evidence that Sun Trust’s asserted reasons for her termination were pre-textual. As the plaintiff’s immediate supervisor, Weigel had at least constructive knowledge of this evidence on February 12.

102 Scheindlin & Capra, supra note 1, at 104.
103 Sedona, Legal Holds, supra note 20, at 5.

For example, a vague rumor or indefinite threat of litigation does not trigger the duty; nor does a threat of litigation that is not deemed to be reasonable or made in good faith. A lack of credibility may arise from the nature of the threat itself or from past experience regarding the type of threat, the person who made the threat, the legal basis upon which the threat is founded or any of a number of similar facts. For example, the trigger point for a small dispute where the risk of litigation is minor might occur at a later point than for a dispute that is significant in terms of business risk or financial consequences. A reasoned analysis of all of the available facts and circumstances should precede a conclusion that litigation or a government inquiry is or is not “reasonably anticipated.” That determination is, in the first instance, a fact-intensive evaluation that should be made by an experienced person in a position to make a reasoned judgment.

Id.

The court found that Connor’s claim of pretext was supported by, first, the close temporal proximity (eleven days) between her discharge and her return from FMLA leave; second, the fact that she was discharged while her job responsibilities were increasing; third, Sun Trust’s failure in Connor’s case to have followed its internal policies governing position elimination. Connor v. Sun Trust Bank, 546 F. Supp. 2d 1360, 1374-75 (N.D. Ga. 2008). Sun Trust, however, disputed each of these points and the court ruled that fact issues precluded summary judgment. Id.
Further, in the e-mail stating her reasons for the discharge, Weigel’s use of the term *talking points*—defined in Webster’s as “something that lends support to an argument”—and her stating these points in the message suggests her belief that the termination might be contested and in need of justification. Her e-mail wasn’t sent simply to give notice of the elimination of Connor’s position. Weigel had already told senior management of her decision to discharge the plaintiff. She had decided four weeks earlier (on January 2, 2007) to terminate her and two weeks later (on January 16, 2007) she did so. This e-mail was all about the supervisor’s need to justify her past actions. Arguably, Weigel, anticipating the filing of a lawsuit, created the February 12 e-mail to furnish information that recipients could use to respond with one voice to questions that might be asked, possibly in depositions, about the reasons for Connor’s discharge. Talking points would help everyone “keep their stories straight” (this writer’s words).

Weigel’s departure from her regular, weekly practice of archiving sent e-mail also raises a red flag. She archived no e-mail at all between January 1 and February 18, 2007. This was almost exactly the time frame in which she considered and planned Connor’s termination, executed that plan, sent the February 12 e-mail, and could have sent (and deleted) other e-mails about the discharge.

Finally, if upon an honest search of her computer on February 22, Weigel did not find the February 12 e-mail, she must have deleted it within ten days of its creation. She would thereby have short-circuited its automatic deletion after thirty days on the server—a relatively

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105 Sun Trust asserted that before receiving the February 12 e-mail, Sue Johnson, Sun Trust’s director of human resources, “was already aware of Weigel’s decision to terminate the plaintiff.” *Id.* at 1368.

106 *Id.* at 1376 (“In this case, the prejudice resulting raises a concern that . . . there were other relevant emails in existence at that time but which were also not produced . . . and there is no satisfactory answer because all emails not archived by the email users had since been automatically deleted from the server.”).
brief period in and of itself. The promptness with which she preempted programmed destruction suggests her belief that the message, if it remained accessible on the server, could be discovered and used as evidence in the litigation that she expected to follow.

All these circumstances, though not explicitly considered in the opinion, reasonably suggest that a duty to preserve had been triggered by the time Weigel destroyed the e-mail. Further, case law supports this conclusion. In *Stevenson v. Union Pacific RR Co.* (a principal case in the spoliation chapter), the Eighth Circuit, in broadly analogous circumstances, held, that the defendant reasonably anticipated litigation when it destroyed evidence months before suit was filed.

In *Stevenson*, a train struck the plaintiff’s vehicle at a railroad crossing, seriously injuring him and killing his wife. At trial the district court imposed an adverse inference instruction because the railroad destroyed a voice tape recording of conversations between the engineer and dispatcher made at the time of the accident. Pursuant to its procedure to retain voice tapes for ninety days, the railroad retained the tape for that period but then destroyed it. Destruction occurred seven months before plaintiff filed suit. The trial court noted that the railroad had taken immediate steps to preserve other evidence of the accident and that it had preserved voice tape recordings in other accident cases where it was benefitted by doing so. The Eighth Circuit

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107 In *Zubulake IV* the court held that a duty to preserve arose before the EEOC complaint was filed based on the deposition testimony of the plaintiff’s supervisor that he feared she would sue from as early as April 2001 and, second, on evidence that certain UBS employees titled e-mails pertaining to plaintiff “UBS Attorney Client Privilege” where no lawyer was copied on the e-mail. *Zubulake IV*, 220 F.R.D. 212, 217 (S.D.N.Y.2003). However, the court noted that “[m]erely because one or two employees contemplate the possibility that a fellow employee might sue does not generally impose a firm-wide duty to preserve.” *Id.*

108 *Stevenson v. Union Pacific R.R. Co.*, 354 F.3d 739 (8th Cir. 2004).

109 *Id.* at 748. The editors also present, as a principal case, *Doe v. Norwalk Cmty. Coll.*, 248 F.R.D. 372 (D. Conn. 2007). Jane Doe, a student, sued Professor Ronald Masi and the college that employed him for violations of state and federal law arising out of an alleged sexual assault
upheld the trial court’s finding that the railroad acted in bad faith, reasoning that it must have
known that contemporaneous recordings of conversations at the time of an accident that resulted
in death or serious injury would be highly relevant in any potential litigation.

2. Relevance and Prejudice

The Eleventh Circuit requires that the innocent party show that it was prejudiced by the absence of spoliated evidence. The Connor court found that the defendant’s failure to produce the February 12 e-mail raised the concern that other relevant e-mails existed but had been withheld from her. Because Connor in September 2007 had obtained the February 12 e-mail, the court, when it considered sanctions, was able to determine its relevance. But by then any other e-mails relating to the termination that might have existed would have been long deleted, either automatically or by human hand. Not having these other e-mails, Connor would be unable to show how they would have helped her case.

110 Supra notes 90, 93 and accompanying text.
Most class members thought it possible or almost probable that other e-mails concerning Connor’s discharge may have existed and may have been destroyed. One student, however, expressed reservations about this aspect of the court’s theory of prejudice:

The most difficult portion of Connor is to understand the prejudice inflicted on the plaintiff. Because the plaintiff was actually able to obtain the e-mail at issue, it is somewhat unclear that the plaintiff is in actuality concerned about other e-mails not produced, which may or may not even have existed, or if they did exist, if they would be helpful to the plaintiff (emphasis added).

This remark is perceptive because it recognizes that the existence of e-mails other than that of February 12 is only hypothetical and that the relevance of those other e-mails is probably incapable of proof. Their existence can be reasonably inferred only by accepting the proposition that since there was one e-mail about Connor’s employment, there probably were others. But the strength of this proposition is not immediately obvious. How often is the discharge of an employee or the elimination of a position the subject of multiple messages within a business organization? Often? Sometimes? Rarely? It’s difficult to know without having more evidence.

However, courts recognize the unseemliness of insisting that a victim show prejudice from spoliation when the wrongdoer has deprived that party of the ability to make that showing. Under certain circumstances, where the likely content of unavailable information cannot be determined, courts may presume its helpfulness to the innocent party or at least lower the bar for a finding of prejudice.112 This seems to have occurred in Connor. The court’s assumption that other e-mails existed—or may have existed—and that those hypothetical e-mails may have been relevant very much lightened the plaintiff’s burden to show that she had been prejudiced.

112 In cases of bad faith or willful spoliation, some courts presume prejudice. See supra notes 63-66 and accompanying text.
However, the evidence justifies the court’s assumption concerning the existence and the relevance of these other e-mails. First, as indicated earlier, the February 12 e-mail which was ultimately recovered was sent by the plaintiff’s supervisor and received by members of the senior management team. Although the opinion does not disclose the exact number of individuals who received this e-mail, the judge found that only the deletion by the recipient Sue Johnson was proper.\textsuperscript{113} Thus, we can logically infer that at least two persons received Weigel’s e-mail. Since sent e-mails are saved automatically, the critical e-mail was stored at one time on at least three separate computers. That none of the users of these computers produced an e-mail that simultaneously existed in multiple places suggests at least gross negligence and at most an actual conspiracy. While the existence of a conspiracy signifies bad faith or intentionality, it also demonstrates relevance as there is no need to conspire to hide information that is not relevant.

Second, Weigel had departed from her regular practice of archiving her e-mail in the particular time frame that she sent this e-mail. A sharp departure from routine is naturally suspect, giving rise to an argument that documents lost during the aberrant period were relevant. Also, it is reasonable to infer relevance when the deletion occurred in a period of time when, arguably, litigation was anticipated. While no one of these factors may alone suffice, they combine to provide sufficient support for the trial court’s assumption that other e-mails existed, that they were relevant, and that their absence prejudiced the plaintiff.

The student who had expressed reservations regarding prejudice also commented:

[T]here is no discussion by the court of the consequences of spoliation by the defendant had the plaintiff never come into possession of the e-mail. I think that if the court had discussed that possibility as the evil that is hopefully being deterred when sanctions are imposed, it would be clearer why the court took this case so seriously, in light of the fact that plaintiff did actually possess the e-mail in question.

\textsuperscript{113} See supra note 95.
These remarks are provocative. The writer seems to suggest that the court should have focused more on the potential for harming the plaintiff through non-production of the February 12 e-mail than on the prejudice that she actually suffered. The writer looks to the wrongfulness of the spoliator’s conduct and its possible consequences—Connor’s predicament had she never obtained the e-mail. Her view appears to be that discovery misconduct should be sanctioned because of its capacity to harm apart from its actually doing so—that sanctions can be justified without remedying an injury. True, sanctions for the destruction of evidence may be justified to deter or punish. But courts generally agree that they must also be justified by the impact that the culpable behavior has had on discovery and the innocent party’s ability to go to trial.\textsuperscript{114}

3. Rule 37(e), a Safe Harbor from Spoliation

Although the \textit{Connor} court didn’t discuss the possible application of new Rule 37(e), the student who presented this case raised the question of whether the Rule’s Safe Harbor provision could have protected the defendant from sanctions.\textsuperscript{115} \textit{Connor} proved to be an effective vehicle for introducing the “good faith exception” during the first class period on spoliation.

Clearly, Rule 37(e) affords no protection to Sun Trust from sanctions if the plaintiff’s supervisor intentionally deleted e-mail in order to avoid discovery. The Rule was intended to apply to the alteration and deletion of ESI as a result of a “routine operation” of a computer system, not a loss caused by the act of an individual pursuing a litigation strategy. The Advisory Committee noted:

\begin{quote}
\begin{itemize}
\item[\textsuperscript{114}] \textit{See generally} Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998) (stating that an adverse inference instruction serves the remedial purpose, “insofar as possible, of restoring the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party”).
\item[\textsuperscript{115}] The editors illustrate Rule 37(e) with \textit{Doe v. Norwalk Cmty. Coll.}, 248 F.R.D. 372 (D. Conn. 2007) later in the chapter.
\end{itemize}
\end{quote}
Many steps essential to computer operation may alter or destroy information, *for reasons that have nothing to do with how that information might relate to litigation*. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part (emphasis added).  

*Connor* permits discussion of a related question: Could Sun Trust avail itself of Rule 37(e) if the critical e-mail were destroyed automatically after thirty days on the server and not by an employee acting intentionally? The Advisory Committee Note states that the Safe Harbor provision “applies to information lost due to the routine operation of an information system only if the operation was in good faith.”  

Rule 37(e) does not define “good faith,” but the Note states that good faith may require a party to intervene in the routine operation of an information system “to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation.”  

The Note recognizes that a party does not act in good faith if it “exploits[s] the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve.”

February 22 was the latest possible date that a preservation duty could have arisen. Sun Trust issued preservation instructions at that time but apparently took no steps to alter or suspend its policy of automatically deleting all e-mails from the server after thirty days. Thus, even if destruction of the critical e-mail occurred automatically and arguably would have been “due to the routine operation of an information system,” the Safe Harbor exception would be unavailing.

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116 FED. R. CIV. P. 37(f) advisory committee’s note.
117 Id.
118 See id.
119 See id.
Sun Trust had failed to act affirmatively to prevent the system from destroying discoverable information after a duty to preserve had attached.\textsuperscript{120}

Similarly, it appears that Sun Trust made no effort after February 22 to preserve the daily disaster recovery backup tapes which may have contained discoverable e-data.\textsuperscript{121} These tapes were retained for seven to ten days but were then overwritten and recycled. It would be helpful to know if the bank made use of backup tapes for more than just disaster recovery purposes. Ordinarily, backup tapes used solely for discovery recovery are considered to be sources not reasonably accessible because the process of restoring them is costly and lengthy. As such, the backup tapes might not be subject to a litigation hold. But if they were also used for information retrieval they could be considered to be sources reasonably accessible which must be preserved.

Rule 37(e) doesn’t speak to the preservation of sources not reasonably accessible, but the Note states that whether such sources should be preserved “depends on the circumstances of each case,” language which provides little guidance. However, the Note also suggests that the party making the preservation decision on inaccessible sources ought to consider whether it “reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources.” The matter is thus left to decision by the party with possible review by the court, but with relatively little help in the first instance.

\textsuperscript{120} In Stevenson, the railroad had destroyed the voice tape under its routine procedure of recording over voice tapes after ninety days and re-using them. Stevenson v. Union Pacific R.R. Co., 354 F.3d 739, 747 (8th Cir. 2004). The Eighth Circuit upheld the trial court’s determination that the railroad acted in bad faith even though it destroyed the tape under its routine procedure. \textit{Id.}

\textsuperscript{121} In Doe, the court found gross negligence where there was “no evidence that the defendants did anything to stop the routine destruction of the backup tapes after [their] obligation to preserve arose.” Doe v. Norwalk Cmty. Coll., 248 F.R.D. 372, 380 (D. Conn. 2007).
VI. THE VALUE OF CONNOR FOR TEACHING PURPOSES

For a host of reasons Connor proved to be useful pedagogically: The decision teaches that the spoliation of ESI in even a garden-variety FMLA lawsuit can raise novel issues of fact, law, or policy. The fact issues may require complicated inquiries, not only of a party’s computer operations and document management policies, but also whether, and to what degree, the human behavior that resulted in the destruction of ESI was culpable. Usually, as in Connor, the evidence of who did what, when, and why is only circumstantial; inferences must be drawn concerning key players’ intentions or conduct.

Second, the decision shows how spoliation can undermine litigation intended to vindicate public policies such as those embodied in legislation regulating employment. Despite the breadth of discovery in American litigation, a plaintiff like Connor cannot effectively refute defenses assigned to her firing unless her attorney has access to relevant internal communications generated deep within a large business organization.\footnote{See Fleming James, Jr., Geoffrey C. Hazard, Jr. & John Leubsdorf, Civil Procedure 268 (2005) ("[A]n employee suing an employer for employment discrimination ordinarily will have much poorer access to information concerning the employer’s general employment pattern and practice. It is settled that the parties must have fair opportunity to use discovery procedure to obtain such information before determining whether there are genuine issues to be tried.").}

Third, Connor piqued student interest and stimulated classroom discussion because questions raised by the court’s rulings and the underlying facts allowed differing perspectives. Class members disagreed, for example, over the level of Sun Trust’s culpability, particularly over whether Weigel deleted the February 12 e-mail for the purpose of harming Connor’s ability to make her case or whether she deliberately deleted it without such intent.\footnote{The Connor court concluded that its determination that Sun Trust acted in bad faith did not require a finding of malice—a separate category which implies an intent to harm the opponent. Connor v. Sun Trust Bank, 546 F. Supp. 2d 1360, 1376 (N.D. Ga. 2008).} One commented, “[T]he facts in this case open the door for a great discussion of what constitutes bad faith. Our
class was divided on the culpability of the plaintiff’s supervisor, and it shows how reasonable minds can differ.”124

The class was also divided on the court’s choice of a proper sanction. Students commented that this determination—like the question of whether Sun Trust was even guilty of spoliation—should be determined by the balance struck between culpability and prejudice. Because class members generally agreed that the prejudice to the plaintiff was attenuated, no one suggested that an outright judgment in her favor was warranted. While an adverse inference instruction is itself a harsh sanction, most agreed that it was an appropriate one because they viewed Weigel’s willfulness as deserving of a conduct-deterring measure. A few, however, saw the instruction as draconian and said that the court should have imposed a lesser penalty, perhaps a fine which could have been calibrated in amount so as not to affect outcome.

Fourth, Connor illustrates the tremendous choice that trial courts have in their fact-specific approach to questions concerning spoliation and sanctions. The determinations made in that indefinite, highly subjective process are committed to the trial judge’s sound discretion and, if reviewed on appeal, are reversed only for a clear abuse of discretion.125 Appellate review is relatively infrequent and the standard of review is deferential.126

124 In fact, courts are split over what actually constitutes bad faith. Compare Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc., 244 F.R.D. 614, 635 (D. Colo. 2007) (defining bad faith as a “dishonest purpose” including “wrongdoing or some motive of self-interest” and refusing an adverse inference instruction when routine retention procedures were followed), with Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995) (distinguishing bad faith from merely willful conduct), and Stevenson v. Union Pacific R.R. Co., 354 F.3d 739 (8th Cir. 2004) (clarifying prior caselaw by holding there must be an indication of a bad faith intent to obstruct or suppress the truth, but also finding that a district court did not abuse its discretion when it found conduct amounted to bad faith when defendant followed routine erasure policies), and Gumbs v. International Harvester, Inc., 718 F.2d 88 (3rd Cir. 1983) (requiring only actual suppression or withholding of evidence).

125 Appellate rulings on spoliation may be based either on a trial court’s findings of fact or its determinations concerning the proper legal standard to be applied to the facts, or both. “A
Finally, the case teaches about *who* fashions much of the law of spoliation. Often, as in *Connor*, a trial court’s decisions are not reviewed on appeal. Discovery rulings are usually not final judgments and thus are not immediately appealable. Since most cases later settle or are disposed of on grounds other than a discovery ruling, few such rulings remain to be appealable. “One important consequence of non-appealability is that most of the law of discovery is made by trial courts and magistrates rather than appellate courts.”

Prime examples are the important discovery rulings by Judge Scheindlin in *Zubulake* and *Pension Committee* and Judge Rosenthal in *Rimkus*. No appellate court had occasion to review the discovery orders in those landmark trial court decisions.

**VII. CONCLUSION: WHERE DO WE GO FROM HERE?**

In early 2000, the Advisory Committee on Civil Rules began a process that in 2006 resulted in the adoption of new rules that specifically address the discovery of ESI. The new discovery rules, however, did not focus on issues concerning the preservation of electronic data or sanctions for its spoliation. Courts continued to be primarily responsible for such
district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.” Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99 (2d Cir. 2002) (vacating the District Court’s order denying sanctions and remanding upon a finding that the District Court applied the wrong legal standard and thus abused its discretion); *see also* Flury v. Daimler Chrysler Corp., 427 F.3d 939, 945 (11th Cir. 2005) (vacating the District Court’s order denying sanctions with instructions to enter judgment for defendant upon ruling that the District Court committed clear error by finding that the defendant was partly responsible for the spoliation).

126 Though relatively infrequent, appellate reversals of spoliation orders do occur. That possibility is not lost on trial judges. As one district judge commented, “[I]t is not unheard of for the Court of Appeals to reverse sanctions decisions.” *See Panel Discussion, supra* note 34 (comment by Judge Preska).

127 *See Geoffrey C. Hazard, Jr., Colin C. Tate, William A. Fletcher & Stephen McG. Bundy, Pleading and Procedure 905 (2009).*

128 A leading casebook on civil procedure states:

The problem of evidence preservation is particularly acute in the case of electronic information because the information is often widely dispersed (an employee may have
matters through the development of common law. However, the Advisory Committee is now considering whether it should propose new rules governing preservation and sanctions for the spoliation of ESI.

After the E-Discovery Panel presented the elements of a rule on preservation and sanctions at the Advisory Committee’s Civil Litigation Conference at Duke University in May 2010, the Committee directed its Discovery Subcommittee to evaluate the merits of a rule-based approach in this area. The Subcommittee thereafter met repeatedly to examine varying rule-based approaches and potential rule amendments. In December 2011, the Advisory Committee requested the Subcommittee to recommend a course of action at the Advisory Committee meeting in March 2012.129

Any rulemaking proposal that the Advisory Committee might eventually make will be processed under the Rules Enabling Act, requiring publication for public comment and review by the Standing Rules Committee, the Judicial Conference, the Supreme Court, and Congress. Close scrutiny will ensure thorough consideration of any proposal affecting preservation or sanctions, but the issues are highly controversial and the process is lengthy, uncertain, and could

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span years. This section of this paper will briefly describe the steps taken and the issues addressed at the inception of that process.

After receiving the Committee’s directive following the Duke conference, the Subcommittee requested the Federal Judicial Center to empirically investigate motions in federal court for sanctions based on spoliation, resulting in findings that such motions were relatively rare, especially in cases involving ESI.\textsuperscript{130} It also commissioned legal research into how federal courts have handled preservation and spoliation issues, leading to Andrea Kuperman’s 104-page memorandum on the widely variant positions taken by federal courts on key preservation and sanctions issues.\textsuperscript{131}

Further, the Subcommittee sought to educate itself on a rule-based approach to preservation and sanctions by obtaining insights from individuals and organizations knowledgeable in electronic discovery. To that end, the Subcommittee conducted a “mini-conference” in Dallas in September 2011 attended by Subcommittee members, some members of the full Committee, and about twenty-five invited participants—academics, technology experts, DOJ, in-house counsel, and plaintiff and corporate defense lawyers. In advance of the mini-conference, in order to foster discussion, the Subcommittee prepared and supplied attendees with a Subcommittee memorandum\textsuperscript{132} which outlined three general categories of rule-based

\textsuperscript{130} See supra note 3.
\textsuperscript{131} See supra note 73.
\textsuperscript{132} The Subcommittee issued two memoranda entitled Preservation/Sanctions Issues—the first before the mini-conference (included in the agenda materials for the Dallas mini-conference, supra note 132); the second was issued in advance of the November 2011 Advisory Committee meeting (included in the agenda materials for that meeting, supra note 3). Unless otherwise indicated, references in this paper to the Subcommittee memoranda will be to the second memorandum.
approaches to preservation and sanction. The memorandum emphasized that the Subcommittee had not decided which of these three approaches it favored—or whether it favored a rule-based approach at all. The Subcommittee would later reach a consensus on this matter.

**Category 1:** Preservation proposals incorporating considerable specificity, including specifics regarding digital data that ordinarily need not be preserved, elaborated with great precision. Submissions the Committee has received from various interested parties provide a starting point in drafting some such specifics. A basic question is whether a single rule with very specific preservation provisions could reasonably apply to the wide variety of civil cases filed in federal court. A related issue is whether changing technology would render such a rule obsolete by the time it became effective, or soon thereafter. Even worse, it might be counter-productive. For example, a rule that triggers

133 For a tentative draft of a rule for each category, see initial Subcommittee Memorandum at 1. The draft rules for Categories 1 and 2 addressed the preservation of ESI and included certain common provisions: (1) a “general duty to preserve” provision which would require persons who “reasonably expect” to be a party to a federal action to preserve “discoverable” information if they became aware of certain facts or circumstances; (2) a provision that would excuse a compliant party from sanctions; (3) a provision that would authorize courts to “employ” any Rule 37(b) sanction and to inform a jury of a failure to preserve information. However, the specificity of terms used in the draft rules would distinguish Category 1 from Category 2. The Category 1 rule would be very specific in identifying the digital data that ordinarily needed to be preserved and that which did not. Based on the idea that precise rules would provide bright-line guidance, it would also (1) identify the acts or events that triggered a duty to preserve; (2) list the kinds of information which, absent agreement or court order, could be “presumptively excluded from the duty;” (3) limit the retroactivity of the duty; and (4) specify the number of custodians whose information must be included if they became aware of certain facts or circumstances. The Category 2 rule would address preservation more generally. It would only list the alternative acts or events that triggered a duty to preserve. It would neither identify ESI required to be preserved nor specify the duration of preservation. The Subcommittee also proposed a Category 3 rule which it referred to as a “back end” rule since it had no specific preservation provisions and would authorize sanctions only when a party did not “reasonably preserve.” The Category 3 draft rule listed various factors for a court to consider as pertinent to that determination, such as anticipation of litigation, use of a litigation hold, proportionality concerns, and whether a party sought timely guidance from the court.
a duty to preserve when a prospective party demands that another prospective party begin preservation measures (among the triggers suggested) could lead to overreaching demands, counter-demands, and produce an impasse that could not be resolved by a court because no action had yet been filed.

Category 2: A more general preservation rule could address a variety of specific concerns, but only in more general terms. It would, nonetheless, be a “front end” proposal that would attempt to establish reasonableness and proportionality as touchstones for assessing preservation obligations. Compared to Category 1 rules, then, the question would be whether something along these lines would really provide value at all. Are they too general to be helpful?

Category 3: This approach would address only sanctions, and would in that sense be a “back end” rule. It would likely focus on preservation decisions, making the most serious sanctions unavailable if the party who lost information acted reasonably. In form, however, this approach would not contain any specific directives about when a preservation obligation arises or the scope of the obligation. By articulating what would be “reasonable,” it might cast a long shadow over preservation without purporting directly to regulate it. It could also be seen as offering “carrots” to those who act reasonably, rather than relying mainly on “sticks,” as a sanctions regime might be seen to do.

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134 Subcommittee Memorandum at 2-3 (53 of pdf file). The Category 3 approach was further described in the Advisory Committee’s Report to the Standing Committee:
The third draft did not directly impose a duty to preserve. Instead, it defined the limits on sanctions for failure to preserve discoverable information that reasonably should be preserved. It also sought to recognize a difference between “sanctions” and remedial measures designed to cure the consequences of a failure to preserve. The discovery sanctions listed in Rule 37(b) or adverse-inference instructions would be treated as
The Subcommittee memorandum expressed concerns with a rule-based approach to preservation. First, it said that a rule purporting to regulate only pre-litigation preservation—a “front end” rule—might raise questions concerning the scope of rulemaking authority under the Rules Enabling Act, but that a “back end” sanctions rule probably would not. Second, while the memorandum acknowledged that some preservation obligations might be costly or burdensome, it questioned whether rule-making would solve those problems: “At least some preservation-rule ideas seem initially to be quite general, and perhaps they would not provide the solace sought. Others may be so specific that they would be superseded by technological change or would be inapplicable in broad categories of cases.”

The mini-conference was highly successful. The views expressed were diverse and controversial. Written submissions and materials related to the conference can found on the internet. Researchers will find a detailed summary of each participant’s comments at the mini-conference in the Subcommittee’s Notes from the Mini-conference. Another source for

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sanctions. Allowing extra time for discovery, requiring the party who failed to preserve the costs of seeking substitutes for the vanished information, and like steps would be treated as remedies rather than sanctions. The theory underlying this approach is that it speaks directly to the subject of greatest concern and greatest disagreement among federal cases—sanctions—and will indirectly relieve much uncertainty about the trigger and scope of the duty to preserve.

Report of the Civil Rules Committee at 3, December 2, 2011, included in the agenda materials for the January 2012 Standing Committee meeting, supra note (at 215 of the pdf file). The Subcommittee considered that even a “back end” sanctions rule, if it impinged too much on pre-litigation decision-making regarding preservation, might raise questions concerning rule-making authority. Initial Subcommittee Memorandum at 1.

Id at 1. Included in the agenda materials for the November 2011 Civil Rules meeting are the initial Subcommittee Memorandum; Subcommittee notes on the mini-conference and on two Subcommittee conference calls; and written submissions by mini-conference participants and other interested parties.


Subcommittee members, following the mini-conference, discussed the event in two conference calls. A detailed summarization of their comments can be found in the Notes on Conference Calls, September 13 and 20, 2011.
research, the Advisory Committee’s Report to the Standing Committee, December 2, 2011, summarized the overall discussion of various topics at the mini-conference without synopsizing each participant’s comments. For example, a paragraph of the Report summarizing the discussion on one topic reads:

Many of the problems described at the mini-conference involve costly over-preservation of potentially discoverable information. The participants recognize that the duty to preserve is triggered by a reasonable expectation of litigation. But they are very uncertain as to what it is they must preserve. They also described a great aversion to the risk of sanctions in whatever litigation might actually ensue. The risks feared go beyond the direct impact of sanctions in a particular action. There is great concern about the reputational effect of sanctions—reputable businesses do not want to be branded as destroyers. One result is to preserve information for litigation that is never brought. One anecdote described spending $5,000,000 to preserve information, with costs increasing by $100,000 a month, for litigation that had not yet been filed. Others, multiplied in different directions, described preserving far greater volumes of information than were ever sought in litigation that actually ensued. Part of the problem is that before an action is brought, there often is no opponent with whom to discuss the claims that may be made, what information should reasonably be preserved, and so on. Another part of the problem is that there is no court available to resolve pre-filing disputes: a letter demanding preservation, for example, may demand far more than is reasonable, and may not lead to an opportunity to work toward reasonable restrictions. It became clear that
many highly responsible, sensible, and able lawyers believe that current uncertainties about the duty to preserve elicit costly and wasteful over-preservation.\textsuperscript{139}

Following the mini-conference, Subcommittee members discussed the event in two conference calls. The Subcommittee’s Notes on Conference Calls summarize each member’s comments during the calls, providing further insight into the mini-conference. Some examples:

The first participant was not violently opposed to a sanctions-only rule. Many of the speakers at the Dallas conference were passionate about the need to take action to solve a serious problem of over preservation. But given the multifarious factual contexts in which these problems arise, it seemed likely that developing case law would do a better job of handling these various situations than a rule, and that promulgating a rule might hobble the development of case law.\textsuperscript{140}

Another participant offered a contrasting view. This participant had a change of mind during the Dallas conference. Although previously some effort to develop a preservation rule seemed sensible, the discussion disclosed such a variety of difficulties that would result from doing that as to make that course unwise. But with sanctions it is different. Reputable corporations won’t run the risk of sanctions; the potential downside is so enormous that they will engage in what may seem senseless over preservation due to uncertainty about what some judge may later rule. Case law will not solve this problem,

\textsuperscript{139} Report of the Civil Rules Advisory Committee to the Standing Committee on Rules of Practice and Procedure at 3-4, December 2, 2011 (at pdf 215 of the agenda materials for the November 2011 Civil Rules Committee meeting).

\textsuperscript{140} Notes on Conference Call, Discovery Subcommittee, Sept. 20, 2011, at 111 of the agenda materials for November 2011 Civil Rules Committee meeting.
and the practical way to respond is to craft a rule that can provide assurance that reasonable behavior will not be sanctioned.141

The conference calls concluded with a discussion of what the Subcommittee should present to the Advisory Committee at its November 2011 meeting:

The Subcommittee needs the benefit of the full Committee’s thinking, but the full Committee has not had the education that the Subcommittee has received over the past year. * * * The ultimate decision on how to proceed should be for the full Committee, but the Subcommittee’s present thinking is that the rulemaking focus should be limited to sanctions regulation. If the full Committee agrees, the Subcommittee should try between the November and March meetings to develop a specific proposal. All agreed with this plan.142

Following the mini-conference, the Subcommittee, in its memorandum, expressed its preference for pursuing the Category 3 approach “rather than a rule explicitly addressing the specifics of preservation obligations.”143 It said that it had “reached a consensus that the difficulties that would attend trying to devise a preservation rule outweigh its likely usefulness.”144 At the November 2011 meeting of the Advisory Committee, the Subcommittee sought direction from the full Committee. The Advisory Committee’s Report to the Standing Committee states:

The Subcommittee…described to the full Committee the three major alternative it had been considering, and presented a draft of Rule 37 sanctions and remedial-measure provisions for consideration as a possible approach to developing a recommended rule for

141 Id.
142 Id.
143 Subcommittee Memorandum at 4.
144 Id. at 1.
publication. Lengthy discussion by the Committee led to the conclusion that the
Subcommittee should continue to consider all approaches. “This is a very important task.
There is much yet to learn.” It may be that approaching the problems through a sanctions
rule is the best answer available, but the Subcommittee should assume that all issues
remain open and report to the Committee again in March.¹⁴⁵

It is a near certainty that advances in technology will profoundly affect the tasks that
tomorrow’s lawyers may perform in dealing with the preservation, discovery, and spoliation of
ESI. But at this point in time—when rule-making is in its earliest stages—there is no certainty
about the law that will eventually guide them.