NOTES

My Dog Ate My Email: Creating a Comprehensive Adverse Inference Instruction Standard for Spoliation of Electronic Evidence

[T]he law, in hatred of the spoiler, baffles the destroyer, and thwarts his iniquitous purpose, by indulging a presumption which supplies the lost proof, and thus defeats the wrong-doer by the very means he had so confidently employed to perpetrate the wrong.[1]

I. INTRODUCTION

When a party loses or destroys evidence, the standard of culpability courts require before they will instruct a jury that they may view the missing evidence as unfavorable to that party varies among the federal circuits.[2] In order to issue such an adverse inference instruction, some courts require a showing of bad faith or intentionality, while others require only negligence.[3] Although courts generally recognize a judge's wide discretion to impose some form of sanctions for negligent failure to maintain evidence, there are sharp differences of opinion over whether negligence merits jury speculation that the missing evidence would have been damaging to the negligent party's case.[4]

1. Pomeroy v. Benton, 1882 WL 9684, at *11 (U.S. Oct. Term 1882) (explaining necessity of adverse inference in spoliation cases).

2. *See* Jandreau v. Nicholson, 492 F.3d 1372, 1375-76 & n.3 (Fed. Cir. 2007) (recognizing disagreement among federal circuits over requisite level of culpability sufficient to create adverse inference).

3. *See* MARGARET M. KOESEL & TRACEY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 64-65 (Daniel F. Gourash ed., 2d ed. 2006) (explaining federal circuit division on whether adverse inference requires willfulness). Several courts require proof of intent to spoliate in order to issue an adverse inference instruction, arguing intent is logically necessary to draw an adverse inference. *Id.* at 64; *see also* Hodge v. Wal-Mart Stores, Inc., 360 F.3d 446, 450 (4th Cir. 2004) (reasoning courts cannot draw adverse inference from negligent destruction or loss of evidence).

4. *See* Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1035 (8th Cir. 2007) (noting trial courts receive "substantial deference" when imposing sanctions for spoliation); *see also* Morris v. Union Pac. R.R., 373 F.3d 896, 901 (8th Cir. 2004) (stating courts have "substantial leeway" to determine intent by circumstantial evidence); KOESEL & TURNBULL, *supra* note 3, at 64-65 (summarizing jurisdictional variations over whether negligence warrants adverse inference instruction).

Several of the federal circuits have held that only a showing of negligence is required for an adverse inference instruction against the party responsible for the missing evidence.[5] In these circuits, such an adverse inference is appropriate because the party responsible for the missing evidence should bear the risk that it would have been detrimental, regardless of any finding of culpability.[6] Other federal circuits have held that negligence is not enough.[7] Rather, they argue, the adverse inference requires showing that a party knew the relevance of a piece of evidence and willfully proceeded to either lose or destroy it.[8] In this view, without a showing of willful spoliation, there is no indication of consciousness of unfavorable evidence.[9] These courts argue that non-willful spoliation therefore cannot sustain an inference that a negligent spoliator destroyed evidence because it would have hurt the spoliator's case.[10]

The information age has transported evidence disputes into the electronic world, drastically impacting the legal field.[11] More and more cases now involve lengthy electronic discovery (e-discovery), often to the point that e-discovery disputes become more important than the case's actual merits.[12] In

5. *See, e.g.*, Henderson v. Walled Lake Consol. Sch., 469 F.3d 479, 495 (6th Cir. 2006) (reasoning absent intentionality jury "may be permitted" to draw adverse inference); Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 113 (2d Cir. 2002) (holding ordinary negligence sufficient to sustain adverse inference instruction); Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993) (explaining willfulness not required to issue adverse inference instruction).

6. *See Residential Funding Corp.*, 306 F.3d at 108 (stating any party responsible for negligent destruction of evidence bears "risk of its own negligence"). The court noted that it makes little difference to the other party whether the evidence was destroyed purposefully or negligently. *Id.* Further, the court highlighted that such a standard is necessary to maintain the remedial purpose of the sanction. *Id.*

7. *See, e.g.*, Condrey v. Suntrust Bank of Ga., 431 F.3d 191, 203 (5th Cir. 2005) (following Fifth Circuit precedent permitting adverse inference only for bad-faith destruction); *Morris*, 373 F.3d at 901 (noting Eighth Circuit approach requiring intentionality to issue adverse inference instruction); Blinzler v. Marriott Int'l, Inc., 81 F.3d 1148, 1159 (1st Cir. 1996) (stating intentionality or ulterior motive necessary to sustain adverse inference instruction).

8. *See Hodge*, 360 F.3d at 450 (articulating logical basis for intentionality requirement); KOESEL & TURNBULL, *supra* note 3, at 64 (explaining intentionality requirement "presupposes . . . consciousness of wrongdoing").

9. *See* Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995) (asserting adverse inference founded in fact evidence willfully lost or destroyed); Nation-Wide Check Corp. v. Forest Hills Distribs., Inc., 692 F.2d 214, 218 (1st Cir. 1982) (explaining "common sense observation" that willful destroyer of knowingly relevant evidence merits adverse inference).

10. *See Vodusek*, 71 F.3d at 156 (holding negligence insufficient to support inference of consciousness of weak case); *Nation-Wide Check Corp.*, 692 F.2d at 219 (requiring at least "knowing disregard" of evidence to sustain adverse inference).

11. *See* GEORGE L. PAUL & BRUCE H. NEARON, THE DISCOVERY REVOLUTION: E-DISCOVERY AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 7 (2006) (pointing out increasing problems related to information technology in law practice). Current cases involving only a single computer of relevant information are equivalent to "2,000 file cabinets full of information." *Id.* at 8-9. Moreover, in many businesses using servers, this information is not centralized but distributed through a system that "has emergent, self-organizing properties, like that of an ecosystem or economy." *Id.* at 5-6.

12. *See* Salvatore Joseph Bauccio, Comment, *E-Discovery: Why and How E-mail Is Changing the Way Trials Are Won and Lost*, 45 DUQ. L. REV. 269, 271 (2007) (stressing e-discovery compliance, rather than merits of litigation, forces settlements); Louis R. Pepe & Jared Cohane, *Document Retention, Electronic*

response to the arrival of the digital revolution, in December 2006, the Civil Rules Advisory Committee amended the Federal Rules of Civil Procedure to provide guidance to lawyers and judges in dealing with e-discovery.[13] Recognizing the often unpredictable nature of computerized file management, the committee added Rule 37(f) (now, Rule 37(e)), which provides that courts should not impose sanctions "for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."[14]

Notwithstanding the new standard offered by Rule 37(e), courts still use culpability-based tests when contemplating adverse inference instructions for failure to maintain electronic files.[15] Because of the increasing centrality of electronic information in disputes, non-production in discovery may increasingly occur as a result of the enormous costs of production and the limited resources of litigants.[16] Standards for imposing adverse inference instructions that are simply based on the spoliator's culpability fail to address such "facts of life" in the information age.[17]

In *Zubulake v. UBS Warburg L.L.C.*,[18] a federal district court laid out a broad-spectrum test for determining whether to shift the cost of e-discovery production to the requesting party.[19] Among the factors the court considered were the costs of production and the relative ability of each party to pay that

Discovery, E-Discovery Cost Allocation and Spoliation of Evidence: The Four Horsemen of the Apocalypse in Litigation Today, 80 CONN. B.J. 331, 365-66 (2006) (predicting most electronic-information savvy litigators will prevail in future cases).

13. *See* FED. R. CIV. P. 16, 26, 33, 34, 37, 45 (containing provisions amended in December 2006 addressing electronic discovery); *see also* PAUL & NEARON, *supra* note 11, at 10 (discussing concerns and intent of Civil Rules Advisory Committee in amending rules).

14. FED. R. CIV. P. 37(e) (barring imposition of sanctions for loss of evidence from good faith computer operation); *see also* PAUL & NEARON, *supra* note 11, at 163 (reporting rationale of Civil Rules Advisory Committee in adding Rule 37(e)).

15. *See* PAUL & NEARON, *supra* note 11, at 163 (explaining language of Rule 37(e)). The Civil Rules Advisory Committee intentionally omitted a culpability standard from the rule's language in order to give district court judges wide discretion in determining whether a party's actions are sanctionable. *Id.* at 162-63; *see also* Daniel Renwick Hodgman, Comment, *A Port in the Storm?: The Problematic and Shallow Safe Harbor for Electronic Discovery*, 101 NW. U. L. REV. 259, 292 (2007) (concluding safe harbor provision of Rule 37(f) offers thin protection from sanctions for spoliation).

16. *See* PAUL & NEARON, *supra* note 11, at 71 (pointing out importance of information technology expertise in navigating e-discovery production); Bauccio, *supra* note 12, at 277-78 (reporting corporations' difficulty in meeting preservation duty in information age); Rena Durrant, Note, *Developments in the Law: Electronic Discovery, VII. Spoliation of Discoverable Electronic Evidence*, 38 LOY. L.A. L. REV. 1803, 1811-12 (2005) (identifying concern of corporations in controlling e-discovery production costs).

17. *See* Thomas Y. Allman, *Defining Culpability: The Search for a Limited Safe Harbor in Electronic Discovery*, 2 FED. CTS. L. REV. 65, 72 (2007) (pointing out indefiniteness of culpability standards hinders development of "rational business policies").

18. 217 F.R.D. 309 (S.D.N.Y. 2003).

19. *See id.* at 322-23 (introducing novel test to determine appropriateness of cost shifting for electronic discovery); *see also* PAUL & NEARON, *supra* note 11, at 137 (noting other courts have followed *Zubulake*'s analysis).

cost.[20] By applying a more comprehensive approach such as this to the issuance of adverse inference instructions, courts may achieve greater fairness by taking into account a fuller scope of the circumstances involved in non-production.[21] As technology rapidly evolves, courts and litigators will increasingly require broad-based approaches to dealing with electronic evidence in order to achieve fairness as well as efficient judicial processes.[22]

This Note will first outline in Part II.A the nature of sanctions for spoliation.[23] Part II.B will then examine the disparate standards for "shifting blame" using adverse inference instructions in various federal circuits, as well as the policy rationales behind the various culpability standards they employ.[24] Parts III.A and III.B will describe the discovery of electronic evidence and how federal courts have addressed "shifting costs" of e-discovery.[25] Part IV will analyze the culpability tests for adverse inference instructions and argue that they are too narrowly focused to remain effective as evidence evolves into increasingly complex technological formats.[26] Finally, Part V will outline a new, more comprehensive approach to issuing adverse inference instructions in electronic spoliation disputes that is in the spirit of fairness and equity.[27]

II. APPROACHES TO REMEDYING SPOLIATION OF EVIDENCE

A. Sanctions and Remedies for Spoliation

1. Sources of Authority for Sanctions

Courts have imposed sanctions in response to the destruction of evidence since the eighteenth century or earlier.[28] Today, many courts still recognize

20. *See Zubulake*, 217 F.R.D. at 321 (adding two additional factors of amount in controversy and importance of litigation issues). The *Zubulake* court highlighted the importance of considering production costs in determining the appropriateness of cost shifting. *See id.* at 323.

21. *See Zubulake*, 220 F.R.D. at 219-20 (noting extreme effect of adverse inference instruction on prospects for success in litigation). Adverse inference instructions have an "in terrorem" effect, such that litigants receiving the sanction may likely not succeed at trial as a result. *Id.* Because of this, "the adverse inference instruction is an extreme sanction and should not be given lightly." *Id.* at 220.

22. *See* PAUL & NEARON, *supra* note 11, at 7-9 (outlining myriad ways in which technology will increasingly impact legal profession).

23. *See infra* Part II.A (providing background on authority and discretionary factors for issuing spoliation sanctions).

24. *See infra* Part II.B (describing nature of and policies behind various culpability standards for adverse inference instructions).

25. *See infra* Parts III.A, III.B (explaining e-discovery rules and production cost-shifting determinations).

26. *See infra* Part IV (examining effectiveness of narrow culpability tests in light of evolving complexity of technology).

27. *See infra* Part V (offering suggestions of ways to resolve spoliation disputes fairly and efficiently).

28. *See* KOESEL & TURNBULL, *supra* note 3, at 62-63 (citing Armory v. Delamirie, 93 Eng. Rep. 664 (K.B. 1722)) (noting *Armory* earliest known issuance of adverse inference instruction for spoliation).

their inherent authority to impose spoliation sanctions, including adverse inference instructions.[29] In many cases, courts invoke this power to sanction spoliation as an exercise of the court's authority to redress conduct that abuses the judicial process.[30] On this basis, courts therefore reason that they have an inherent power to issue sanctions to aid in the administration of justice.[31]

Courts also derive authority for sanctions against spoliation in the Federal Rules of Civil Procedure.[32] Under both federal rules and state rules, the adverse inference instruction is one of several sanctions available to a court when a party violates a discovery obligation.[33] In response to the spoliation of evidence, courts enjoy wide discretion in employing such sanctions under the federal rules.[34] Unlike the power courts derive from their inherent authority, however, the broad authority offered by the federal rules is limited to spoliation

29. *See, e.g.*, Sacramona v. Bridgestone/Firestone, Inc., 106 F.3d 444, 446 (1st Cir. 1997) (acknowledging courts have inherent power to sanction for spoliation to prevent unfair prejudice); Harlan v. Lewis, 982 F.2d 1255, 1259 (8th Cir. 1993) (holding courts have inherent authority to issue sanctions for conduct that abuses judicial processes); Campbell Indus. v. M/V Gemini, 619 F.2d 24, 27 (9th Cir. 1980) (recognizing broad discretion to impose sanctions as part of courts' inherent power).

30. *See* Silvestri v. General Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) (stating power to sanction spoliation derived from inherent power to control litigation); *see also* Chambers v. NASCO, Inc., 501 U.S. 32, 44-45 (1991) (admonishing courts to exercise inherent power to impose sanctions with restraint and discretion). The *Chambers* Court noted that the inherent powers of courts include the authority to control admission to the bar, to discipline attorneys, to punish for contempt, and "to fashion an appropriate sanction for conduct which abuses the judicial process." 501 U.S. at 43-45; *see also* United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) (noting courts' inherent powers essential for "exercise of all others").

31. *See* Hodge v. Wal-Mart Stores, Inc., 360 F.3d 446, 449 (4th Cir. 2004) (reasoning sanction for spoliation inherent power of courts insofar as redresses abuse of judicial process); Durrant, *supra* note 16, at 1815 (noting courts' inherent power to sanction for discovery infractions).

32. *See* FED. R. CIV. P. 37(b) (stating courts' power to sanction for failure to comply with disclosure order). The rule includes a non-exhaustive list of sanctions available for courts to issue, limited only by a stipulation that such sanctions be "just." *Id.* Of course, courts' power under this rule is also limited by the stipulation that the court may only impose a sanction after a party fails to comply with a discovery order. *See In re* Williams, 156 F.3d 86, 89 n.1 (1st Cir. 1998) (noting Rule 37(b) sanction requires violation of Rule 37(a) order). Rules 37(c) and 37(d), however, do not require violation of a prior formal order for courts to issue sanctions. *See* FED. R. CIV. P. 37(c) (stating, inter alia, failure to conform to Rule 26 disclosure requirements creates authority to sanction); FED. R. CIV. P. 37(d) (providing, inter alia, failure to attend deposition or respond to inspection request creates authority to sanction).

33. *See, e.g.*, United States v. Fesler, 781 F.2d 384, 389 (5th Cir. 1986) (stating courts have broad discretion to allow juries to draw adverse inference instruction); Westover v. Leiserv, Inc., 831 N.E.2d 400, 404 (Mass. App. Ct. 2005) (highlighting trial judge's discretion to issue adverse inference instruction); Hirsch v. Gen. Motors Corp., 628 A.2d 1108, 1126 (N.J. Super. Ct. Law Div. 1993) (noting wide discretion of district courts in issuing sanctions); *see also* Ward v. Tex. Steak Ltd., No. Civ.7:03 CV 00596, 2004 WL 1280776, at *2 (W.D. Va. May 27, 2004) (addressing question of when federal courts must defer to state law on spoliation sanctions). The court concluded that if spoliation is not in the course of a pending federal case, a federal court exercising diversity jurisdiction must apply "spoliation principles the forum state would apply." *Id.*

34. *See* Marrocco v. Gen. Motors Corp., 966 F.2d 220, 223 (7th Cir. 1992) (explaining standard on appeal for reviewing district court's decision to issue spoliation sanctions). The court stated that to reverse a sanction, the appellant must show that "the district court abused its discretion in sanctioning them—a burden that is met only when it is clear that no reasonable person would agree [with] the trial court's assessment of what sanctions are appropriate." *Id.*

that occurs during pendency of a suit.[35]

2. Factors to Consider in Remedying Spoliation

a. Rationale for Imposing Sanctions

Discovery and evidentiary sanctions provide courts with an effective multi-purpose toolbox for managing litigation.[36] Under Rule 37 of the Federal Rules of Civil Procedure, sanctions serve the purely administrative function of ensuring compliance with discovery rules.[37] Based on the aforementioned inherent authority of the court, however, sanctions can also be used to punish litigants or deter them from engaging in certain conduct.[38]

Courts may also issue sanctions for unintentional spoliation in order to provide restitution to victims of spoliation and to maintain accurate fact-finding procedures.[39] While unintentional spoliation does not involve a level of culpability warranting punitive sanctions, it does result in the spoliating party securing an unfair advantage over the non-spoliating party.[40] To rectify this imbalance and preserve equity, many courts impose sanctions on unintentional spoliators.[41] Regardless of the purpose served, courts enjoy wide discretion in issuing spoliation sanctions.[42]

35. *See* J. Brian Slaughter, Note, *Spoliation of Evidence: A New Rule of Evidence Is the Better Solution*, 18 AM. J. TRIAL ADVOC. 449, 455 (1994) (pointing out Rule 37 sanctions inapplicable to pre-litigation spoliation absent exercise of inherent authority).

36. *See* Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) (highlighting importance of spoliation sanctions for managing litigation). The courts possess inherent authority to issue sanctions "to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth." *Id.*

37. *See* Brandt v. John S. Tilley Ladders Co., 495 N.E.2d 1269, 1271 (Ill. App. Ct. 1986) (clarifying discovery sanctions meant "not to punish but to coerce recalcitrant parties to cooperate"); *see also In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1237 (9th Cir. 2006) (noting function of Rule 37 in managing litigation involving non-compliance of discovery rules). *But see* Roadway Exp., Inc. v. Piper, 447 U.S. 752, 763-64 (1980) (describing courts' inherent power to penalize and deter offenders with Rule 37 sanctions).

38. *See generally* Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 642-43 (1976) (demonstrating punitive and deterrent functions of sanctions). Dismissal is available to courts as an extreme sanction not only "to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *Id.* at 643.

39. *See* Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 75 (S.D.N.Y. 1991) (recognizing remedial purpose of adverse inference instruction). Where spoliation is negligent, sanctioning is a "necessary mechanism for restoring the evidentiary balance." *Id.* Moreover, non-punitive sanctions against negligent conduct also serve to deter future negligent conduct. *Id.* at 75 n.3.

40. *See id.* at 75-76 (emphasizing unfairness to victim of negligent spoliation). *But see* Jordan F. Miller Corp. v. Mid-Continent Aircraft Serv., Inc., No. 97-5089, 1998 WL 68879, at *4 (10th Cir. Feb. 20, 1998) (suggesting unfairness to victim of negligent spoliation insufficient to support adverse inference).

41. *See* KOESEL & TURNBULL, *supra* note 3, at 59 (explaining rationale behind sanctioning of unintentional spoliators).

42. *See* Campbell Indus. v. M/V Gemini, 619 F.2d 24, 27 (9th Cir. 1980) (highlighting courts' broad

In exercising their sanctioning authority, however, courts strive to achieve proportionality in issuing sanctions for spoliation offenses.[43] In furtherance of this goal, courts consider several factors: culpability of the spoliator, prejudice to the non-spoliator, whether spoliation resulted in lost evidence, degree of harm to the administration of justice, whether alternative sanctions are more effective, and whether misconduct of the attorney rather than the represented party resulted in spoliation.[44] Yet, in analyzing these factors, courts do not employ a rigid test.[45] Many courts consider the two most determinative factors in this analysis to be culpability of the spoliator and prejudice to the non-spoliator.[46]

b. Degree of Culpability

When determining sanctions, courts examine a spoliator's mental state across a range of culpability.[47] Courts generally agree that a dispositive sanction is appropriate only where spoliation resulted from "willfulness, bad faith, or some fault of a party other than inability to comply."[48] Dispositive sanctions, however, are not required in all such instances.[49] Courts have broad latitude in imposing sanctions where spoliation resulted from unintentional conduct.[50] On appeal, courts will affirm the imposition of any sanction—

latitude to issue orders ensuring "fair and orderly trial"). Sanction power under Rule 37(b) has only two limitations: sanctions must be "just" and "specifically related to [claims at issue] in the order to provide discovery." Insur. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707 (1982).

43. *See* Bonds v. Dist. of Columbia, 93 F.3d 801, 808 (D.C. Cir. 1996) (cautioning choice of sanctions requires consideration of "proportionality between offense and sanction"); Welsh v. United States, 844 F.2d 1239, 1246 (6th Cir. 1988) (explaining sanctions can vary according to culpability of spoliator). Determination of proportionality must include a consideration of the punitive and deterrent nature of any possible sanction. *See Nat'l Hockey League*, 427 U.S. at 643 (holding dismissal appropriate sanction upon consideration of punitive and deterrent rationales).

44. *See* KOESEL & TURNBULL, *supra* note 3, at 59-60 (listing factors courts consider prior to imposing sanctions for spoliation).

45. *See Welsh*, 844 F.2d at 1246-47 (showing fluidity of courts' approaches in determining sanctions); *see also* Vazquez-Corales v. Sea-Land Serv., Inc., 172 F.R.D. 10, 13-14 (D.P.R. 1997) (outlining various combinations of discretionary factors several federal circuits employ).

46. *See, e.g.*, Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 81 (3d Cir. 1994) (relying on "traditional" approach of considering extent of spoliator's fault and resulting prejudice to opponent); Shaffer v. RWP Group, Inc., 169 F.R.D. 19, 25 (E.D.N.Y. 1996) (noting culpability of offender and prejudice to non-spoliator most important factors in determining sanctions); Gates Rubber Co. v. Bando Chem. Indus., 167 F.R.D. 90, 102-05 (D. Colo. 1996) (discussing fault of spoliator and prejudice to opposing party as most important factors).

47. *See Welsh*, 844 F.2d at 1246 (noting courts consider spoliator's culpability along "continuum of fault"); *see also Gates Rubber Co.*, 167 F.R.D. at 102-04 (explaining divergent approaches of courts based on various levels of culpability).

48. *See Gates Rubber Co.*, 167 F.R.D. at 103 (noting unanimity of courts on when dispositive sanctions warranted). While judges may impose severe sanctions for intentional spoliation, they also have broad discretion in sanctioning negligence or recklessness. *Id.*

49. *See id.* (noting intentional spoliation does not always require dispositive sanction).

50. *See id.* at 103-04 (reporting negligence can result in dispositive sanction if court finds sufficient

whether for intentional, reckless, negligent, or inadvertent non-production—so long as the sanction was "safely within the universe of suitable alternatives."[51]

c. Degree of Prejudice

The degree of prejudice to the opposing party is another factor courts regularly consider in determining sanctions for spoliation.[52] The extent to which non-production of evidence prejudices a party depends upon the extent to which the missing evidence is relevant and material to that party's case.[53] Because evidence exists on a continuum of relevance and materiality, courts look to this discretionary factor to decide not only whether to impose a sanction but also the severity of the sanction.[54] Before any sanction is imposed, the injured party has the burden of proving the relevance and materiality of the missing evidence.[55]

B. Adverse Inference Instructions

Among the sanctions available for spoliation, the adverse inference instruction is based on the fundamental principle that destroyed evidence is more likely to have been harmful to the destroyer than the non-destroyer.[56] In some circumstances, courts are permitted to instruct juries on the adverse inference rule when there is an "unexplained failure or refusal of a party . . . to produce evidence that would tend to throw light on the issues."[57] Similar to

prejudice to victim).

51. *See* Jackson v. Harvard Univ., 900 F.2d 464, 469 (1st Cir. 1990) (delineating bounds of appellate review for spoliation sanctions); *see also* Nat'l Hockey League v. Metro. Hockey Club, 427 U.S. 639, 642 (1976) (asserting appellate review of sanctions excludes consideration of how appellate court itself would rule).

52. *See* Dillon v. Nissan Motor Co., 986 F.2d 263, 267 (8th Cir. 1993) (declaring finding of prejudice to non-spoliator necessary prerequisite to imposition sanction). Fairness dictates that a sanction is warranted to the degree a party is prejudiced by spoliation. *See* David Paul Horowitz, *Spoliation . . . Not Spoilation*, 78-APR N.Y. ST. B.J. 17, 17 (2006) (explaining effect of prejudice on spoliation sanction determination).

53. *See* Gates Rubber Co. v. Bando Chem. Indus., 167 F.R.D. 90, 105 (D. Colo. 1996) (emphasizing finding of "relevance and materiality" of spoliated materials precondition to issuance of sanction); Wm. T. Thompson Co. v. Gen. Nutrition Corp., 593 F. Supp. 1443, 1455 (D.C. Cal. 1984) (recognizing destruction of "key documents and records" as sufficiently prejudicial to warrant sanctions).

54. *See Wm. T. Thompson Co.*, 593 F. Supp. at 1456 (considering high importance of destroyed materials as sufficient basis for dispositive sanctions).

55. *See Gates Rubber Co.*, 167 F.R.D. at 104 (noting burden of proof rests on aggrieved party). Before a court issues a sanction, the aggrieved party must bring forth "some evidence tending to show that the document actually destroyed or withheld is the one as to whose contents it is desired to draw an inference." *Id.* (quoting 2 WIGMORE ON EVIDENCE § 291 (3d ed. 1940)).

56. *See* Nation-Wide Check Corp. v. Forest Hills Distrib., Inc., 692 F.2d 214, 218 (1st Cir. 1982) (explaining "common sense" basis for evidentiary rationale of adverse inference instructions); *see also* Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995) (pointing out wide discretion of trial court to allow jury to consider adverse inference).

57. *See* Gumbs v. Int'l Harvester, Inc., 718 F.2d 88, 96 (3d Cir. 1983) (stating circumstances in which

other sanctions for spoliation, courts invoke deterrent, remedial, and punitive rationales for issuing adverse inference instructions.[58] Before allowing the jury to draw an adverse inference, courts make several preliminary fact-findings: the missing evidence must have existed, the non-producing party must have possession or control of it, the evidence must only be available to the non-producing party, actual suppression of the evidence must be apparent, and the evidence must have been reasonably foreseeable as discoverable.[59] In addition, courts closely consider the culpability of the spoliator, but are divided over the question of whether intentionality is required to allow an adverse inference.[60]

1. Willfulness Jurisdictions

Some courts require a showing of intentional spoliation before issuing an adverse inference instruction.[61] In these jurisdictions, an adverse inference is

adverse inference instruction employed). *Cf. Vodusek*, 71 F.3d at 156 (explaining secondary evidence permitted to explain content of missing evidence and reason for non-production). *Zubulake* provides a typical example of an adverse inference instruction:

> If you find that [the defendant] could have produced this evidence, and that the evidence was within its control, and that the evidence would have been material in deciding facts in dispute in this case, you are permitted, but not required, to infer that the evidence would have been unfavorable to [the defendant].

Zubulake v. UBS Warburg L.L.C., 229 F.R.D. 422, 440 (S.D.N.Y. 2004).

58. *See supra* notes 37-41 and accompanying text (detailing various rationales behind spoliation sanctions); *see also Nation-Wide Check Corp.*, 692 F.2d at 218 (detailing "prophylactic and punitive" rationales behind adverse inference). In *Nation-Wide Check Corp.*, the court interpreted the landmark British case of *Armory v. Delamirie* to show that the adverse inference was meant to serve a "prophylactic and punitive purpose." *Nation-Wide Check Corp.*, 692 F.2d at 218 (citing Armory v. Delamirie, 93 Eng. Rep. 664 (K.B. 1722)). In *Armory*, the court instructed the jury to presume that missing jewels were of the "highest value," despite lack of evidence of their actual value. *Id.* The *Armory* court thus used an adverse inference instruction to increase damages for a "prophylactic and punitive purpose." *Id.*

59. *See, e.g.*, Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 334 (3d Cir. 1995) (analyzing adverse inference instruction using "well-established" principles); Evans v. Robbins, 897 F.2d 966, 970 (8th Cir. 1990) (outlining factors for allowing jury to draw adverse inference); Sarmiento v. Montclair State Univ., 513 F. Supp. 2d 72, 94 (D.N.J. 2007) (applying factor test). In *Sarmiento*, the plaintiff argued that the court should issue an adverse inference instruction against the defendant for willful spoliation of relevant meeting notes. 513 F. Supp. 2d at 93. In applying the factor test, the court found that the defendant destroyed the notes prior to the plaintiff filing suit. *Id.* at 94. Because the notes were therefore not yet "reasonably foreseeable" as "discoverable," the court held that an adverse inference instruction was not justifiable. *Id.*

60. *See* Lawrence B. Solum & Stephen J. Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1088 (1987) (reporting disagreement among commentators and courts over nature of intentionality requirement).

61. *See, e.g.*, Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1035 (8th Cir. 2007) (declaring spoliation inference requires "finding of intentional destruction" (citing Stevenson v. Union Pac. R.R. Co., 354 F.3d 739, 746 (8th Cir. 2004)); Mathis v. John Morden Buick, Inc., 136 F.3d 1153, 1155 (7th Cir. 1998) (requiring bad faith in addition to intentionality to support adverse inference); Shaffer v. RWP Group, Inc., 169 F.R.D. 19, 26 (E.D.N.Y. 1996) (granting adverse inference instruction for "conscious and reckless disregard" of disclosure obligation).

warranted only when consciousness of wrongdoing motivated the spoliation.[62] These courts reason that, unlike evidence *intentionally* destroyed, evidence *unintentionally* destroyed is just as likely to be favorable to the destroyer as it is to be unfavorable to her.[63] Thus, they hold that allowing a jury to adversely infer the value of such evidence against the destroyer makes no logical sense.[64] The various federal circuits invoking this principle, however, apply it in somewhat disparate ways.[65]

Although the Fourth Circuit recognizes the broad discretion to issue sanctions under federal law, it has not allowed adverse inference instructions for negligence.[66] In *Hodge v. Wal-Mart Stores, Inc.*,[67] a customer sued Wal-Mart Stores for negligence when she was injured by mirrors that fell from a store shelf.[68] At trial, the district court denied Hodge's motion for an adverse inference instruction for spoliation against the corporation for failure to interview an eyewitness after the incident.[69] The Fourth Circuit upheld the district court's disallowance of the jury instruction.[70] It reasoned that the defendant had not exhibited the requisite level of intent to support the adverse inference where there was no evidence that the store willfully failed to detain and question the eyewitness immediately after the injury.[71]

The Third Circuit also refuses to allow adverse inference instructions for unintentional spoliation.[72] For example, in *Parkinson v. Guidant Corp.*,[73] an angioplasty patient brought a products liability action against the manufacturer

62. *See* Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997) (holding negligence insufficient to sustain adverse inference instruction); *see also* Blinzler v. Marriott Int'l, Inc., 81 F.3d 1148, 1159 (1st Cir. 1996) (noting circumstantial evidence suffices to show ulterior reason for spoliation).

63. *See* Hodge v. Wal-Mart Stores, Inc., 360 F.3d 446, 450 (4th Cir. 2004) (disallowing adverse inference for negligent spoliation because inference requires willful conduct).

64. *See* KOESEL & TURNBULL, *supra* note 3, at 64 (describing rationale of jurisdictions requiring showing of willfulness); *see also Hodge*, 360 F.3d at 450 (implying negligent conduct cannot be basis for adverse inference).

65. *See* Solum & Marzen, *supra* note 60, at 1088-89 (explaining disagreement among courts regarding intentionality requirement for drawing spoliation inference).

66. *See Hodge*, 360 F.3d at 450 (pointing out Fourth Circuit requires intentional conduct to issue adverse inference instruction); Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995) (noting Fourth Circuit approach that negligence insufficient to fulfill intentionality requirement). While intentional conduct is required, bad faith does not necessarily ensure allowance of an adverse inference. *See Vodusek*, 71 F.3d at 156 (explaining flexibility of approach in Fourth Circuit).

67. 360 F.3d 446 (4th Cir. 2004).

68. *See id.* at 448 (stating Hodge filed complaint against corporation in federal district court).

69. *See id.* at 450 (explaining rationale for Hodge's request for adverse inference instruction).

70. *See id.* at 451 (affirming district court's denial of adverse inference instruction because of lack of intent).

71. *See Hodge*, 360 F.3d at 451 (reasoning circumstantial evidence of incident fails to show willful intent necessary for adverse inference). There was "no reasonable basis . . . to infer" the store acted in bad faith or to cause "willful loss of evidence." *Id.*

72. *See* Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 334 (3d Cir. 1995) (asserting unintentional destruction insufficient to support adverse inference).

73. 315 F. Supp. 2d 760 (W.D. Pa. 2004).

of an instrument that broke during surgery.[74] After the broken piece of the instrument went missing, Parkinson requested the court issue an adverse inference instruction against the manufacturer for spoliation.[75] Because of problematic gaps in the chain of custody for the evidence, however, the court held that there was insufficient evidence of the manufacturer's responsibility for the missing evidence to support an adverse inference instruction.[76]

In the Eighth Circuit, adverse inference instructions must be predicated on intentional destruction.[77] In *Greyhound Lines, Inc. v. Wade*,[78] a bus company sued a truck driver for negligence following a collision.[79] After the collision, the bus company sent a device that records the bus's speed to the device manufacturer, who subsequently erased the device's memory.[80] The court, however, held that an adverse inference instruction was not justified because even though the prospect of litigation was likely, the bus company did not intentionally destroy the evidence.[81]

Unlike other circuits, sanctions for spoliation in the Sixth Circuit are governed by state law, resulting in differing standards of culpability depending on the law of the state in which a court sits.[82] In Michigan, for example, state and federal courts do not prohibit sanctions for spoliation based on the fact that the destruction resulted from negligence instead of willfulness.[83] Conversely, in Ohio, adverse inference instructions are only permissible if the non-production was in bad faith or due to gross negligence.[84]

Several federal circuits require bad faith as well as willful destruction of evidence to support an adverse inference instruction.[85] Such courts reason that

74. *See id*. at 761 (stating suit stems from broken "guidewire" during angioplasty and stent operation).

75. *See id.* at 762 (explaining basis for motion requesting adverse inference instruction against manufacturer).

76. *See id.* at 762-63 (realizing irreconcilable dispute as to whether manufacturer responsible for non-production). Before a court can analyze whether a spoliator has the required "*degree* of culpability" to issue an adverse inference instruction, there must be a "showing of fault." *Id.* at 762 (emphasis in original); *see also Brewer*, 72 F.3d at 334 (noting "actual suppression or withholding" of evidence necessary to support adverse inference).

77. *See* Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1035 (8th Cir. 2007) (holding spoliation inference requires intentional destruction indicating desire to withhold truth).

78. 485 F.3d 1032 (8th Cir. 2007).

79. *See id*. at 1034 (stating suit involved negligence claim stemming from rear-end collision).

80. *See id*. at 1034-35 (explaining destruction of evidence from bus recording device).

81. *See id.* at 1035 (reasoning imposition of sanctions determined by intentional destruction and not likelihood of litigation); *see also* Stevenson v. Union Pac. R.R. Co., 354 F.3d 739, 746 (8th Cir. 2004) (deeming adverse inference instruction appropriate where based on intentional spoliation).

82. *See* Nationwide Mut. Fire Ins. Co. v. Ford Motor Co., 174 F.3d 801, 804 (6th Cir. 1999) (applying Ohio state law rules and sanctions in Sixth Circuit case); Roskam Baking Co. v. Lanham Mach. Co., 71 F. Supp. 2d 736, 748 (W.D. Mich. 1999) (pointing out state law governs spoliation sanctions in Sixth Circuit).

83. *See Roskam Baking Co.*, 71 F. Supp. 2d at 749 (recognizing Michigan law allows spoliation sanctions for both negligence and willfulness).

84. *See* Sullivan v. Gen. Motors Corp., 772 F. Supp. 358, 364 (N.D. Ohio 1991) (stating Ohio's requirements for adverse inference based on spoliation).

85. *See, e.g.*, 103 Investors I, L.P. v. Square D Co., 470 F.3d 985, 988-89 (10th Cir. 2006) (suggesting

the primary concern in issuing an adverse inference instruction should not be the destruction of evidence but the reason for such destruction.[86] Because one can infer consciousness of a weak case from bad faith spoliation—as "bad faith" implies a deceptive motive—these courts deem bad faith necessary to support the adverse inference.[87]

2. Negligence Jurisdictions

Other federal courts do not require a showing of intent to support an adverse inference.[88] According to this view, courts should not limit adverse inference instructions to intentional spoliation because negligent spoliators should also bear the burden of their destructive acts.[89] These courts reason that spoliation prejudices the non-spoliating party regardless of whether the spoliator acted willfully or unintentionally.[90] Thus, according to this remedial rationale, to cure prejudice to all victims of spoliation, courts should not bar adverse inference instructions simply because spoliation was unintentional.[91]

Although it has ostensibly adopted a case-by-case approach to the intentionality requirement, the Second Circuit has stated that it allows adverse

absence of bad faith precluded adverse inference instruction but not other spoliation sanctions); Caparotta v. Entergy Corp., 168 F.3d 754, 756 (5th Cir. 1999) (reasoning "spoliation doctrine did not apply" because no showing of bad faith); Mathis v. John Morden Buick, Inc., 136 F.3d 1153, 1155-56 (7th Cir. 1998) (explaining trial court erred by failing to discuss whether spoliation in bad faith); Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997) (disallowing adverse inference where no evidence non-production resulted from bad faith destruction); *see also* Maria A. Losavio, *Synthesis of Louisiana Law on Spoliation of Evidence—Compared to the Rest of the Country, Did We Handle It Correctly?*, 58 LA. L. REV. 837, 845 (1998) (observing many courts issuing adverse inference instructions require bad-faith spoliation).

86. *See* Park v. City of Chicago, 297 F.3d 606, 616-17 (7th Cir. 2002) (outlining rationale for requiring bad faith to allow adverse inference).

87. *See Mathis*, 136 F.3d at 1155 (defining "bad faith" as "destruction for the purpose of hiding adverse information"); *see also* Coates v. Johnson & Johnson, 756 F.2d 524, 551 (7th Cir. 1985) (noting bad-faith inference requires circumstances leading to conclusion bad faith existed).

88. *See* Robert D. Brownstone, *Preserve or Perish; Destroy or Drown—E Discovery Morphs into Electronic Information Management*, 8 N.C. J. L. & TECH. 1, 18 (2006) (reporting trend among courts to sanction negligent spoliation); *see also* KOESEL & TURNBULL, *supra* note 3, at 64-65 (explaining rationale behind sanctioning of negligent spoliators).

89. *See* Nation-Wide Check Corp. v. Forest Hills Distribs., Inc., 692 F.2d 214, 217-18 (1st Cir. 1982) (stating non-production itself sufficient to support adverse inference). The adverse inference instruction should serve "as a penalty, placing the risk of an erroneous judgment on the party that wrongfully created the risk." *Id.* at 218.

90. *See* KOESEL & TURNBULL, *supra* note 3, at 64-65 (explaining jurisdictions permitting adverse inferences for negligent spoliation seek, in part, to redress non-spoliator's damages). Moreover, these courts also consider that requiring the victim of spoliation to prove the intent of the spoliator creates too high a burden. *See id.* at 65.

91. *See* Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998) (stating adverse inference intended to "restor[e]" victim to pre-spoliation condition); Virginia L. H. Nesbitt, *A Thoughtless Act of a Single Day: Should Tennessee Recognize Spoliation of Evidence as an Independent Tort?*, 37 U. MEM. L. REV. 555, 565 (2007) (arguing negligent spoliation no less prejudicial to innocent party than intentional spoliation).

inference instructions for negligence.[92] One of the progenitors of this approach in the Second Circuit is *Residential Funding Corp. v. DeGeorge Finance Corp.*[93] In a breach of contract action, Residential Funding failed to produce thousands of discoverable emails in time for trial because a discovery management company it hired was unable to retrieve them quickly enough from back-up tapes.[94] DeGeorge argued that the district court erred in denying its request for an adverse inference instruction solely because Residential Funding only negligently failed to produce evidence.[95] In reversing the district court, the Second Circuit held that negligence can be sufficient to warrant an adverse inference instruction.[96] It reasoned that such an inference is adverse because the party responsible for the missing evidence should bear the risk that the missing evidence would have been detrimental, regardless of any finding of culpability.[97] The Second Circuit has also invoked this rationale in cases involving unintentional spoliation from regular operation of recordkeeping systems.[98]

In the First Circuit, courts also may impose adverse inference instructions predicated only on ordinary negligence.[99] In choosing the appropriate sanction for spoliation in this circuit, fairness to the victim is the primary concern.[100] In

92. *See* Byrnie v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 109 (2d Cir. 2001) (pointing out Second Circuit permits adverse inference for negligent spoliation); Reilly v. Natwest Mkts. Group Inc., 181 F.3d 253, 267 (2d Cir. 1999) (noting Second Circuit's case-by-case approach to the fault requirement). Gross negligence without bad faith does not necessarily preclude adverse inference. *See Reilly*, 181 F.3d at 267 (explaining flexibility of approach in Second Circuit).

93. *See* Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 113 (2d Cir. 2002) (holding ordinary negligence sufficient to sustain adverse inference instruction); *see also* PAUL & NEARON, *supra* note 11, at 49 (highlighting *Residential Funding Corp.* as case allowing adverse inference for mere negligence).

94. *See Residential Funding Corp.*, 306 F.3d at 104-05 (providing background facts related to non-production of evidence).

95. *See id.* at 106 (outlining defendant's argument supporting its request to vacate district court's judgment).

96. *See id.* at 101, 108 (holding negligence sufficient for adverse inference). The court noted that failures to produce evidence should be examined case-by-case, according to the discretion of the judge. *Id.* at 108. The court also justified the sanction of an adverse inference instruction for negligent failure to produce evidence. *Id.*

97. *See id.* at 108 (reasoning negligence sufficient for adverse inference because negligent party responsible for its negligence). The court highlighted that such a standard is necessary to maintain the remedial purpose of the sanction. *Id.*

98. *See* Byrnie v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 109-10 (2d Cir. 2001) (affirming adverse inference instruction for failure to retain hiring committee documents destroyed per recordkeeping policy). In *Byrne*, the court held that the defendant school board's admission of its destruction policy and its failure to show that the destruction of records was not "merely accidental" was sufficient to constitute intentional destruction. *Id.* at 109.

99. *See* Sacramona v. Bridgestone/Firestone, Inc., 106 F.3d 444, 447 (1st Cir. 1997) (asserting carelessness and prejudice to victim sufficient to impose spoliation sanctions).

100. *See* KOESEL & TURNBULL, *supra* note 3, at 257-58 (describing rationale of circuit in imposing spoliation sanctions); *see also* Blinzler v. Marriott Int'l, Inc., 81 F.3d 1148, 1159 (1st Cir. 1996) (outlining necessary foundation to support adverse inference). Before allowing the jury to draw an adverse inference from spoliation, the court must find "that the party who destroyed the document had notice both of the potential

Kelley v. United Airlines, Inc.,[101] a handicapped airplane passenger sued the airline for negligence after she was injured while being transported to her seat during boarding.[102] The passenger requested an adverse inference instruction against the airline for destruction of documentation concerning the incident due to its recordkeeping system.[103] The court held that an adverse inference instruction was appropriate because even though the airline did not intentionally destroy the documents, it negligently failed to prevent their destruction in the normal course of recordkeeping.[104]

In *Glover v. BIC Corp.*,[105] the Ninth Circuit also addressed the question of whether issuance of an adverse inference instruction requires a showing of intent.[106] In a product liability action, BIC, a lighter manufacturer, argued on appeal that the trial court erred in including a bad faith requirement in an adverse inference instruction related to the spoliation of the defective lighter at issue.[107] The Ninth Circuit reasoned that although trial courts have wide discretion to give a jury an adverse inference instruction, only "simple notice of 'potential relevance to the litigation'" is necessary as a basis for allowing such an instruction.[108] The court therefore held that the trial court should not have included a bad faith requirement in the adverse inference instruction.[109]

III. THE IMPACT OF THE DIGITAL REVOLUTION ON EVIDENTIARY PROCEDURES

A. The E-Discovery Challenge

In the twenty-first century, spoliation disputes more and more involve electronically-stored information (ESI).[110] Lawyers and judges increasingly

claim and of the document's potential relevance." Kelley v. United Airlines, Inc., 176 F.R.D. 422, 427 (D. Mass. 1997). Even then, however, the jury is free to refuse to make the inference. *Id.*

101. 176 F.R.D. 422 (D. Mass. 1997).

102. *See id.* at 423-24 (discussing facts from records).

103. *See id.* at 426-27 (recounting airline's explanation for document destruction). The airline had a one-year retention policy for all types of flight records relevant to this case. *Id.*

104. *See id.* at 428 (holding negligent destruction of relevant documents sufficient to support adverse inference). *Cf.* Byrnie v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 108-09 (2d Cir. 2001) (holding school policy contrary to federal law document retention duty sufficient to support adverse inference).

105. 6 F.3d 1318 (9th Cir. 1993).

106. *See id.* at 1329 (suggesting broad power to allow jury to draw adverse inference from witness's state of mind).

107. *See id.* (noting lighter manufacturer's grounds for appeal). The alleged spoliation of the lighter resulted from examination of it by the plaintiff's expert. *Id.*

108. *See id.* (quoting Akiona v. United States, 938 F.2d 158, 161 (9th Cir. 1991)) (explaining Ninth Circuit requires only relevance to support adverse inference).

109. *See Glover*, 6 F.3d at 1330 (instructing trial court to clarify that bad faith only one requirement for adverse inference instruction).

110. *See* PAUL & NEARON, *supra* note 11, at 3-6 (outlining nature of trend toward increasing digitalization

face a greater volume of information in litigation and thus an ever-increasing struggle to review it.[111] Moreover, spoliation of ESI will more frequently involve complex problems, such as automatic destruction by information systems and negligent deletion by corporate employees.[112] Normal business practices also often alter or eliminate ESI because indefinite retention would result in overly burdensome amounts of outdated information.[113] In response to these problems, many lawyers consider it necessary to hire specialists to manage and organize discovery.[114] Despite this necessity, lawyers find that the cost of meeting their duty to preserve and discover ESI in litigation is increasingly expensive.[115]

In 2002, a group of "lawyers, consultants, academics and jurists" came together in an attempt to explore solutions to electronic discovery problems.[116] The result of their work—the Sedona Principles—outlined several reasons why electronic evidence is "qualitatively and quantitatively different" than paper-based evidence.[117] The drafters recognized six primary differences: electronic

in legal profession); *see also* Mia Mazza et al., *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. 11, 47 (2007) (acknowledging growing trend toward more ESI and greater risk for spoliation sanctions). Companies are seeking more efficient approaches than simply attempting to retain all ESI. *See* Mazza et al., *supra*, at 46 (stating attempts to preserve all ESI result in mismanagement); *see also* Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 MICH. TELECOMM. & TECH. L. REV. 71, 73-80 (2004) (reporting percentage of electronic discovery cases involving different sanctions since 2000).

111. *See* George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, *11 (2007) (explaining growth of information shows not only increased quantity but new "dynamic of innovation"). In 2002, information growth created the equivalent of "37,000 new libraries the size of the Library of Congress book collections," "[n]inety-two percent" of which existed "primarily [on] hard disks." *See* PETER LYMAN & HAL R. VARIAN, HOW MUCH INFORMATION? 2003, *available at* http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/ (last visited Apr. 24, 2009) (reporting extent and nature of yearly rate of information creation). Moreover, the average person created the equivalent of "30 feet of books" if stored on paper. *Id.*

112. *See* PAUL & NEARON, *supra* note 11, at 8 (recognizing computer users unable to effectively control ESI because of quantity).

113. *See* Paul & Baron, *supra* note 111, at *23 (explaining corporations need to change retention practices to avoid risk of sanction).

114. *See* PAUL & NEARON, *supra* note 11, at 7 (acknowledging transformation of law practice wherein specialists carry out discovery tasks); Robert Milburn, *EDiscovery: Are You at Risk?*, 124 BANKING L.J. 810, 811 (2007) (cautioning e-discovery vendor litigation costs millions of dollars for parties).

115. *See* Kemper Mortgage, Inc. v. Russell, No. 3:06-CV-042, 2006 WL 2319858, at *2 (S.D. Ohio Apr. 18, 2006) (explaining benefits and burdens of technological changes in litigation). Lawyers are learning that one of the results of the computerization of evidence "is that it may become costly to abide by one's duty to preserve evidence." *Id.*

116. *See The Sedona Principles: Best Practices Recommendations & Principles For Addressing Electronic Document Production*, SK071 ALI-ABA 363, 366-67 (2004) (describing origins of and creative process behind *The Sedona Principles*). The litigation and legislation surrounding "Enron and Arthur Anderson" sparked new concerns about electronic discovery. *See id.* at 367.

117. *See id.* at 375 (introducing six categories of differences between electronic and paper-based discovery). The court noted that some litigants erroneously attempt to gloss over these differences in arguments to compel production of electronic documents from opposing parties. *See id.* at 374-75 (quoting Byers v. Ill. State Police, No. 99 C 8105, 2002 WL 1264004, at *10 (N.D. Ill. May 31, 2002)) (describing

evidence is more voluminous and easier to duplicate, is more difficult to delete, constantly changes formats, contains hidden metadata, can be dependent on a particular computer system, and is dispersed across different file formats and storage devices.[118] These differences create new challenges for litigants to meet their duty to preserve and discover ESI for trial.[119] In recognition of these technological obstacles, the Sedona Principles recommended that

> [s]anctions, including spoliation findings, should only be considered by the court if, upon a showing of a clear duty to preserve, the court finds that there was an intentional or reckless failure to preserve and produce relevant electronic data and that there is a reasonable probability that the loss of the evidence has materially prejudiced the adverse party.[120]

In response to concerns about problems related to e-discovery, the Civil Rules Advisory Committee amended the Federal Rules of Civil Procedure in 2006.[121] To provide direction to lawyers and judges concerning spoliation, the committee specifically added Rule 37(e) (originally, Rule 37(f)) to bar courts from issuing sanctions to a party who took reasonable steps to retain information after it knew or should have known the information was discoverable but failed to produce the information "as a result of the routine, good-faith operation of an electronic information system," "[a]bsent exceptional circumstances."[122] The committee intended that this rule would

unsuccessful argument rejecting differences between electronic and paper-based discovery).

118. *See id.* at 375-77 (listing meaningful differences between electronic and paper-based discovery). The drafters noted that in 2003 emails constituted more daily volume than the U.S. Postal Service handles in one year. *Id.* at 375. Moreover, such electronic activity creates duplication of ESI in systems. *Id.* Also, unlike shredding a paper document, deleting an electronic file does not destroy all remnants of the ESI. *Id.* at 376. Even without human action, however, ESI changes form and location over time. *Id.* Unlike paper documents, ESI also contains metadata—information about who has viewed a document at what time and how he or she altered the content. *Id.* at 376-77. ESI may even be incomprehensible if removed from its original system, creating a serious problem when software or hardware becomes obsolete. *Id.* at 377. Lastly, unlike paper, ESI is located across a computer system rather than in one physical point in space. *Id.*

119. *See id.* at 378 (acknowledging electronic discovery can create "unfair burdens" for litigants).

120. *See The Sedona Principles*, *supra* note 116, at 365 (listing recommendations for alleviating electronic discovery problems).

121. *See* FED. R. CIV. P. 16, 26, 33, 34, 37, & 45 (containing rules amended in December 2006 to resolve several electronic discovery issues); *see also* PAUL & NEARON, *supra* note 11, at 9-11 (discussing concerns and intent of Civil Rules Advisory Committee in amending rules). In a short time, ESI significantly increased in volume and became harder to access. PAUL & NEARON, *supra* note 11, at 9-10. Indeed, since 1998, lawyers had been pleading with the committee to quickly amend the rules to accommodate ESI. PAUL & NEARON, *supra* note 11, at 12.

122. *See* FED. R. CIV. P. 37(e) (providing "safe harbor" to spoliators of ESI in some circumstances); PAUL & NEARON, *supra* note 11, at 49 (noting cases involving sanctioning of ESI non-production as one reason Advisory Committee included Rule 37(e)). The Chair of the Civil Rules Advisory Committee has commented that the committee adopted Rule 37(e) due in part to the problematic reasoning in *Residential Funding Corp. v. DeGeorge Fin. Corp*. PAUL & NEARON, *supra* note 11, at 49; *see also* Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002) (discussing court's rationale in issuing adverse inference instruction

provide guidance not only to courts and lawyers, but also to corporations seeking ways to avoid spoliation sanctions.[123] Elimination of the risk of unfair sanctions based on technological problems rather than on spoliators' culpability was an important factor in the rule's adoption.[124]

During the process of drafting the rule, the committee initially considered adding a requisite measure of culpability in allowing courts to issue spoliation sanctions.[125] The draft included a footnote in the rule requesting comments on a possible recklessness or intentionality standard.[126] In the end, the committee decided to adopt an "intermediate standard," shielding litigants only from sanctions for spoliation occurring during the "good faith, routine operation" of an "electronic information system."[127] In a further limitation to the power of Rule 37(e), the committee added a caveat allowing judges to issue sanctions for good-faith spoliation in "exceptional circumstances."[128] The committee adopted this language to provide courts with sufficient leeway to sanction good-faith spoliation if they find that it causes serious prejudice to the innocent party.[129] As a result of the final language of Rule 37(e), district court judges have broad discretion to issue spoliation sanctions for non-production of ESI.[130]

B. The E-Discovery Cost-Shifting Determination

Because e-discovery can be such an exorbitant expense, court-ordered cost-shifting can have a substantial impact on one's ability to succeed in

for unintentional spoliation of ESI).

123. *See* Bauccio, *supra* note 12, at 285 (explaining aid to businesses dealing with ESI as one rationale for new rule of electronic discovery).

124. *See* Memorandum from Honorable Lee H. Rosenthal, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Honorable David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure 18 (May 27, 2005) (revised July 25, 2007) *available at* http://www.uscourts.gov/rules/Reports/CV5-2005.pdf [hereinafter Memorandum] (acknowledging lofty goal of making rules in context of virtually limitless information).

125. *See id*. at 88-89 (providing background history on adoption of rule).

126. *See id*. (noting committee's solicitation of public comment on appropriateness of including culpability requirement).

127. *See id.* (reporting committee's final decision on culpability language in rule). The original draft of the rule also stated no protection would be offered to a litigant who violated an order by the court to preserve information. *Id.* at 89. While the committee deleted this language from the final version, however, it observed that violation of a preservation order would be a consideration in a good-faith determination. *Id.*

128. *See* Memorandum, *supra* note 124, at 89 (stating caveat to rule and underlying reasons for including it); *see also* PAUL & NEARON, *supra* note 11, at 163 (pointing out "exceptional circumstances" caveat could allow adverse inference instruction for unintentional spoliation).

129. *See* Memorandum, *supra* note 124, at 89 (providing rationale for allowing contravention of rule's limitations on court's sanctioning power). In its note, the committee simply advised that culpability should nevertheless be a factor in a spoliation determination. *Id*. at 88.

130. *See* PAUL & NEARON, *supra* note 11, at 162-63 (acknowledging judges' wide discretion to consider array of circumstances in determination of sanctions); *see also* Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991) (pointing out interplay between inherent power to sanction spoliation and power under federal rules). Courts may sanction bad-faith conduct under both their inherent power to do so and the federal rules. *Chambers*, 501 U.S. at 50. When the rules apply, courts should generally invoke the power they provide to sanction, rather than the inherent power of the court. *Id.*

litigation.[131] Depending on the expense of proceeding with discovery and the prospect of success in the case, an order to bear the burden of the opposing party's production costs can be the deciding factor in settlement.[132] In *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*,[133] the court held that federal courts may order a requesting party to pay the expense for the ESI production if the court deems the request to be unduly costly or burdensome.[134] In exercising this discretion, *Rowe Entertainment* employed a balancing test that considered several factors: the request's specificity, the "likelihood of discovering critical information," the existence of other sources, the reasons for which the producing party retains the information, the benefits of the information to each party, the production cost, the ability and incentive of each party to restrain costs, and "the resources available to each party."[135] By relegating consideration of the relative resources of each party to one of several factors, the court downplayed the significance of resource availability in ESI production.[136] The court, however, noted that this factor can be significant when one party is more capable than the other of paying production costs.[137]

Zubulake v. UBS Warburg L.L.C.[138] represents an application of the *Rowe Entertainment* factor test, but with greater emphasis on balancing the costs of production and each party's resources.[139] Here, the *Zubulake* court modified the balancing test to include two additional factors: total production cost compared to amount in controversy, as well as total production cost compared to each party's resources.[140] Unlike *Rowe Entertainment*, moreover, *Zubulake*

131. *See* Sonia Salinas, Note, *Electronic Discovery and Cost Shifting: Who Foots the Bill?* 38 LOY. L.A. L. REV. 1639, 1640-42 (2005) (recognizing problems related to costs of e-discovery). Although shifting costs in discovery is a relatively new concept, courts have been inconsistent in its use, imposing production costs on parties without fully considering the extent of the burden. *See id.* at 1680-81 (concluding case law on e-discovery cost-shifting inconsistent).

132. *See* Lloyd S. van Oostenrijk, Comment, *Paper or Plastic?: Electronic Discovery and Spoliation in the Digital Age*, 42 HOUS. L. REV. 1163, 1167 (2005) (positing cost of ESI production may force settlement).

133. 205 F.R.D. 421 (S.D.N.Y. 2002).

134. *See id.* at 428-29. (analyzing problem of which party should bear cost of production of ESI). The court recognized that the retention of ESI by companies is normally for convenience or emergency back up purposes. *Id.* at 429. Thus, producing parties do not expect the challenges and costs of electronic discovery. *Id.* The court also acknowledged that requesting parties should not always bear the burden of ESI production because it is a "well-established legal principle" that the producer bears the cost, and because litigants too poor to pay for such production may need to forfeit well-founded claims. *Id.*

135. *See id.* at 429 (listing factors in cost-shifting determination).

136. *See id.* at 432 (noting parties' resources as sometimes relevant factor).

137. *See Rowe Ent'mt*, 205 F.R.D. at 432 (mentioning significance of factor as exercise in measuring relative financial strength of parties). The court explained that when costs of production far exceed each party's ability to pay, courts may require each party to pay a portion of the cost. *Id.*

138. 217 F.R.D. 309 (S.D.N.Y. 2003).

139. *See id.* at 322-23 (demonstrating application of novel balancing test to determine cost shifting for electronic discovery); *see also* Salinas, *supra* note 131, at 1649-52 (describing *Zubulake*'s refinement of factor test from *Rowe Entertainment*).

140. *See Zubulake*, 217 F.R.D. at 321 (adding two additional factors related to cost of production). Also note that the court further refined the factor test. *See id.* at 321-22 (editing factor test so more effective analytic

noted that courts should not weigh all factors in the cost-shifting analysis the same way.[141] It reasoned that specificity and likelihood—known together as the "marginal utility test"—should carry the most weight.[142] Using this test, courts should first consider that the "more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the [producing party] search at its own expense."[143] Courts should next consider factors related to cost of production and the relative ability of each party to bear that cost.[144] Finally, the importance of the litigation and the relative benefits of production to each party constitute a court's third and fourth most important considerations respectively.[145]

IV. THE NARROW LENS OF EXISTING ADVERSE INFERENCE STANDARDS

Although standards for issuing adverse inference instructions significantly differ across the federal circuits, they all share the same flaw: an analytical failure to consider all relevant perspectives.[146] In issuing adverse inference instructions, courts may invoke a deterrent, remedial, or punitive rationale.[147] Because an adverse inference instruction may involve several different underlying principles, courts necessarily have a variety of perspectives on the nature of the instruction.[148] Whether invoking the culpability of the spoliator or

tool). The court combined the two factors from *Rowe Entertainment* related to specificity of request and relevance of requested information. *Id.* at 321. The court also eliminated the factor related to the reasons for which the producing party retains the requested information, reasoning that such consideration is unrelated to the central concerns of expense and accessibility. *Id.* at 321-22.

141. *See id.* at 322-23 (enhancing effectiveness of test by placing different weight on each factor). The court cautioned that in employing the test, courts should always keep in mind its central inquiry: does production inflict "an undue burden or expense" on the producing party? *Id.* (citing FED. R. CIV. P. 26(b)(iii)).

142. *See id.* at 323 (listing factors constituting "marginal utility test" as most important).

143. *See id.* (quoting McPeek v. Ashcroft, 202 F.R.D. 31, 34 (D.D.C. 2001)) (reaffirming *McPeek* relevance test in cost-shifting analysis and noting as most important determination); *see also* Salinas, *supra* note 131, at 1646 (reporting "marginal utility test" in *McPeek* represented first departure from rule producing party always pays).

144. *See* Zubulake v. UBS Warburg L.L.C., 217 F.R.D. 309, 323 (S.D.N.Y. 2003) (maintaining cost-related factors second most important consideration).

145. *See id.* (noting factors as least important because least determinative and seldom pertinent); *see also* Salinas, *supra* note 131, at 1651-52 (delineating *Zubulake* rationale in considering least important factors). While rarely germane as a factor, the importance of the litigation becomes a more relevant consideration in cases involving public policy. Salinas, *supra* note 131, at 1651-52. Moreover, because it is rare that production benefits the producing party, the last factor listed is seldom pertinent. *Id.* at 1652.

146. *See, e.g.*, Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1035 (8th Cir. 2007) (reasoning adverse inference requires intentional destruction); Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002) (holding purpose of adverse inference to remedy prejudice to victim); Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997) (limiting adverse inference to bad faith non-production).

147. *See supra* notes 37-41 and accompanying text (outlining courts' possible rationales in issuing spoliation sanctions).

148. *See* KOESEL & TURNBULL, *supra* note 3, at 64-65 (reporting circuit split on requisite level of culpability to allow adverse inference).

the prejudice to the victim, courts adhere to particular standards for issuing the instruction according to what perspective they hold on the instruction's rationale.[149] As a multipurpose tool, however, a comprehensive approach to the adverse inference instruction would require a multiperspectival standard.[150]

Federal circuits that require a showing of willfulness to issue an adverse inference instruction drastically limit the effectiveness of the instruction.[151] For spoliation to occur, missing evidence must have been under the spoliator's control and unavailable to the innocent party.[152] Because only spoliators have the ability to oversee such evidence, in many instances of non-production, innocent parties are unable to prove that spoliators intentionally failed to produce the evidence.[153] As a result, even though non-production prejudices innocent parties, absent a showing of willfulness these courts do not remedy such prejudice with an adverse inference instruction.[154] Reserving the adverse inference instruction for only willful spoliation unnecessarily limits the instruction's remedial advantages to innocent parties who are fortunate enough to be able to prove intentionality.[155]

Courts that issue adverse inference instructions upon only a showing of negligence recognize the importance of remedying prejudice to innocent parties.[156] Contrary to the theory that willfulness is logically necessary to draw an adverse inference, the failure to produce evidence alone is sufficient to logically support an adverse inference because the spoliator's failure itself tends to show her blameworthiness.[157] Unlike willfulness jurisdictions, courts

149. *See, e.g.*, Hodge v. Wal-Mart Stores, Inc., 360 F.3d 446, 449 (4th Cir. 2004) (noting redress of judicial process abuse as rationale for imposing instruction for intentional destruction); *Residential Funding Corp.*, 306 F.3d at 108 (adhering to remedial rationale in issuing instruction for negligent destruction); *Bashir*, 119 F.3d at 931 (suggesting adherence to punitive rationale by requiring bad faith for instruction).

150. *See generally* KOESEL & TURNBULL, *supra* note 3, 257-96 (charting various federal circuit approaches to and potential rationales for adverse inference instruction).

151. *See Residential Funding Corp.*, 306 F.3d at 109 (cautioning high culpability standard for adverse inference instruction undermines its remedial purpose); Kronisch v. United States, 150 F.3d 112, 128 (2d Cir. 1998) (noting high culpability standard also undermines "prophylactic and punitive purposes" of adverse inference).

152. *See supra* note 59 and accompanying text (outlining spoliator's control of missing evidence as one of several factors for adverse inference).

153. *See* Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 109 (2d Cir. 2002) (suggesting intentionality standard too high because innocent party lacks control over evidence); *see also* Solum & Marzen, *supra* note 60, at 1091-92 (reporting practical problems for innocent parties in determining nature of potentially spoliated evidence).

154. *See supra* notes 61-87 and accompanying text (charting case law denying issuance of adverse inference instruction absent willfulness).

155. *See* KOESEL & TURNBULL, *supra* note 3, at 64-65 (outlining criticisms of willfulness requirement).

156. *See supra* notes 88-91 and accompanying text (highlighting centrality of prejudice to innocent parties in negligence jurisdictions).

157. *See supra* note 89 and accompanying text (recognizing non-production alone sufficient to support adverse inference). Simple non-production is sufficient to sustain an adverse inference based on two rationales: (1) a non-producing party is more likely than a producing party to have been jeopardized by the missing evidence, and (2) the adverse inference serves as a deterrent against and punishment for non-production.

requiring only negligence properly do not predicate the adverse inference on a "logical necessity" requirement for intentionality.[158] Where one party negligently fails to produce evidence, these courts hold that the risk that the missing evidence would be harmful to one's case should fall on the negligent party.[159] Consequently, they provide a fairer approach that focuses on remedying prejudice to innocent parties rather than sanctioning based on willful culpability.[160] With the advent of the age of e-discovery, however, fairness requires that even though negligence is sufficient to support the adverse inference, courts take into account more than the blameworthiness of the spoliator or the prejudice to the victim before issuing an instruction to the jury.[161]

V. A COMPREHENSIVE APPROACH FOR THE DIGITAL AGE

A. The Rule Makers' Incomplete Work

The digital transformation of information requires courts to rethink the way they manage discovery.[162] The high costs and practical unmanageability of ESI has changed the nature of litigation.[163] As these costs continue to rise, litigants with limited resources will be increasingly unlikely to meet their production obligations.[164] Courts therefore should base the determination of whether to allow an adverse inference on not only culpability of the spoliator or prejudice to the victim, but also on the extent to which unavoidable ESI challenges played a role in non-production.[165] In navigating the new playing field of e-discovery, litigants require new game rules.[166]

Nation-Wide Check Corp., Inc. v. Forest Hills Distribs., Inc., 692 F.2d 214, 218 (1st Cir. 1982).

158. *See supra* notes 92-109 and accompanying text (outlining case law showing negligence jurisdictions do not recognize willfulness requirement).

159. *See supra* note 89 and accompanying text (noting rationale of negligence jurisdiction that spoliator should bear risk that missing evidence harmful).

160. *See supra* notes 39-41 (pointing out fairness of negligent jurisdiction approach in rectifying "evidentiary balance").

161. *See* Reilly v. Natwest Mkts. Group Inc., 181 F.3d 253, 267 (2d Cir. 1999) (reasoning courts should have substantial discretion in issuing adverse inference instructions based on case circumstances).

162. *See supra* notes 110-11 and accompanying text (describing electronic transformation of discovery and challenges it poses for litigants).

163. *See supra* note 115 and accompanying text (noting great expense of e-discovery relative to traditional paper-based discovery).

164. *See* PAUL & NEARON, *supra* note 11, at 7-9 (detailing disparate impact of e-discovery on practice of law); Paul & Baron, *supra* note 111, at *23 (pointing out increased volume of ESI leads to increased risk of sanction for non-production).

165. *See generally* Memorandum, *supra* note 124 (revising discovery rules based on general proposition current law inadequate).

166. *See* PAUL & NEARON, *supra* note 11, at 13-26 (explaining Civil Rules Advisory Committee recognition of need for new e-discovery rules).

In an admirable attempt to provide such rules, the Civil Rules Advisory Committee introduced Rule 37(e) to forgive spoliation that results from routine, good-faith operation of an electronic information system, absent extraordinary circumstances.[167] Despite the committee's good intentions, however, the "safe harbor" that this rule offers fails to completely eliminate the risk of unfair sanctions.[168] The rule does effectively eliminate liability for destruction of ESI resulting from a computer system's scheduled automatic deletion operations.[169] Yet, the rule fails to address non-production of ESI resulting from litigants' practical inability to expend enough resources in time to meet their discovery obligations.[170]

B. Zubulake*'s Creative Approach*

Federal courts have offered their own creative solutions to e-discovery challenges.[171] The test that *Zubulake* introduced to determine the appropriateness of shifting the e-discovery cost from one party to another provides an effective approach to solving e-discovery problems.[172] The *Zubulake* court recognized that the transition from paper-based information to ESI required a change to the traditional rule that each party bears the burden of its own production.[173] To ensure effective resolution of cases, the court realized that in some circumstances, the party requesting production should pay the producer's costs.[174] By crafting a factor test comprising a consideration of relevance, production costs, available resources of each party, production importance, and benefits to each party, the court created a novel, comprehensive method for dealing with the exorbitant costs of e-discovery.[175]

167. *See supra* note 122 and accompanying text (detailing rationale behind adoption of Rule 37(e)).

168. *See supra* note 124 and accompanying text (reporting Civil Rules Advisory Committee goal to eliminate risk of unfair sanctions).

169. *See supra* note 122-23 and accompanying text (explaining Rule 37(e)'s forgiveness of spoliation resulting from good faith computer operations).

170. *See* FED. R. CIV. P. 37(e) (excluding reference to unmanageable costs of e-discovery as factor in non-production).

171. *See, e.g.*, Zubulake v. UBS Warburg L.L.C., 217 F.R.D. 309, 321-23 (S.D.N.Y. 2003) (refining *Rowe Entertainment* factor test for e-discovery cost-shifting determination); Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (crafting factor test to determine appropriateness of shifting e-discovery costs); McPeek v. Ashcroft, 202 F.R.D. 31, 34 (D.D.C. 2001) (representing first departure from rule that producing party pays for production).

172. *See supra* notes 138-45 and accompanying text (outlining court's novel approach to navigating exorbitant costs of e-discovery).

173. *See Zubulake*, 217 F.R.D. at 318 (reasoning e-discovery necessitates departure from rule that producing party bears production costs). *Zubulake*, however, cautioned that courts should require cost shifting only when necessary because of the risk that cases will not resolve on the merits. *Id.* at 317-18.

174. *See id.* (holding courts should consider cost shifting when e-discovery results in unwarranted trouble or costs).

175. *See supra* notes 141-145 and accompanying text (detailing factors in *Zubulake* test and weight accorded to each factor).

In attempting to construct an effective adverse inference standard to remedy spoliation of ESI, courts should look to *Zubulake* not only as an example of an integral approach to solving e-discovery problems, but also as a source of analytical substance.[176]

Because problems surrounding ESI are central to both the *Zubulake* cost-shifting analysis and the task of fashioning an adverse inference standard for ESI spoliation, much of the *Zubulake* analysis is pertinent to the adverse inference analysis.[177] For instance, just as relevance was the most important determinative factor in the cost-shifting analysis, courts recognize that it is also the most central factor in deciding whether to issue an adverse inference instruction.[178] *Zubulake* recognized the next most important factors to be the total cost of production and each party's relative ability to pay that cost.[179] Courts should also realize the need to consider these factors in determining whether to allow an adverse inference for ESI non-production.[180] Specifically, just as *Zubulake* considered that the higher the total cost of production and the lower the ability of the producing party to afford it, the fairer it is to shift production costs to the requesting party, courts should also acknowledge that the higher the total production cost and the lower the ability of the spoliating party to meet its production obligations, the fairer it is to decline to issue an adverse inference instruction.[181] Addition of these factors in an adverse inference standard would allow courts to acknowledge the substantial challenge that ESI presents to producing parties as a potential reason why non-production occurs.[182]

176. *See supra* notes 140-45 and accompanying text (examining relevance and cost issues pertinent to adverse inference determination).

177. *See* PAUL & NEARON, *supra* note 11, at 167-69 (describing e-discovery challenges influencing determinations of both cost-shifting and spoliation sanctions).

178. *See* Zubulake v. UBS Warburg L.L.C., 217 F.R.D. 309, 323 (S.D.N.Y. 2003) (outlining relevance factors as most important in cost-shifting determination). *Zubulake* recognized that the more relevant production is to the litigation, the fairer it is for the producing party to bear the burden of the cost. *Id.* Similarly, the more relevant the missing evidence, the fairer it is for the non-producing party to bear the burden of an adverse inference. *See* Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 334 (3d Cir. 1995) (noting finding of missing evidence's relevance as precondition to adverse inference).

179. *See Zubulake*, 217 F.R.D. at 323 (introducing cost-related factors as second most important consideration).

180. *See supra* notes 110-15 and accompanying text (detailing e-discovery cost and manageability problems that affect spoliation issues).

181. *See* PAUL & NEARON, *supra* note 11, at 167-69 (implying e-discovery challenges create difficulties for litigants to meet ESI production obligations).

182. *See* Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107-08 (2d Cir. 2002) (excluding consideration of production costs in adverse inference determination using less-than-comprehensive standard).

C. A Comprehensive Adverse Inference Instruction Standard for ESI Spoliation

In an attempt to offer courts a more comprehensive approach to determining the appropriateness of an adverse inference instruction for spoliation of ESI, this Note proposes the following five-factor test: the relevance of the missing evidence to the litigation, the prejudice to the innocent party, the total cost of production, the resources available to the non-producing party to meet its production obligation, and whether the non-producing party acted willfully.[183] Courts should employ this test in exercising their discretion to issue adverse inference instructions for ESI spoliation under both the federal rules and their inherent authority.[184] Similar to the multi-factor test in *Zubulake*, courts should not weigh all factors in this proposed test equally.[185]

The purpose of this five-factor test is simply to aid courts in analyzing whether it is appropriate to issue an adverse inference instruction for ESI spoliation.[186] The first two factors are interrelated: the more relevant missing evidence is to the litigation, the more its absence prejudices the innocent party and the more weight courts should give this factor in the analysis.[187] If the first two factors weigh in favor of issuing the instruction, courts should then consider whether the third and fourth factor weigh against issuing the instruction.[188] To the extent that non-production resulted from the non-producing party's inability to afford and manage extraordinarily high e-discovery obligations, fairness requires that these factors weigh against issuing the instruction.[189] Finally, if the non-producing party willfully failed to produce the ESI, then courts should weigh such culpability heavily in favor of issuing an instruction.[190] Courts, however, should not accord any weight in favor of not issuing an instruction to a showing that the non-producing party acted less than willfully.[191] This five-factor test can be illustrated as follows:

183. *See supra* Parts IV, V.B (determining essential elements of adverse inference standard from existing standards and *Zubulake* cost-shifting analysis).

184. *See supra* Part II.A.1 (explaining various sources of courts' authority in issuing spoliation sanctions).

185. *See supra* note 140 and accompanying text (noting *Zubulake* improved existing cost-shifting test by weighing each factor per its analytical importance).

186. *See supra* notes 34-35 and accompanying text (asserting courts have broad discretion in issuing sanctions for spoliation under federal rules).

187. *See supra* Part II.B.2 (charting case law demonstrating relevance as interrelated with prejudice to innocent party).

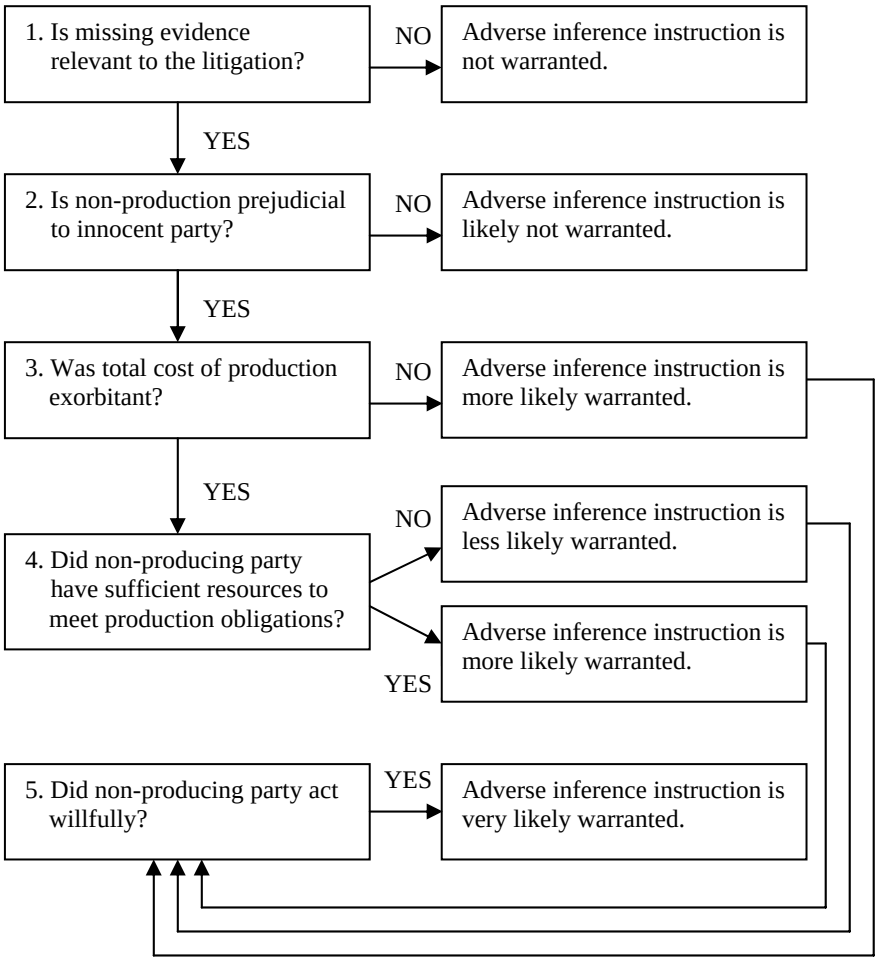
188. *See supra* note 144 and accompanying text (providing *Zubulake* model for analytical chronology of factors in adverse inference standard).

189. *See supra* Parts IV-V.A (arguing high costs of e-discovery should be mitigating factor in adverse inference determination).

190. *See supra* Part II.B.1 (explaining classic rationale of adverse inference that willfulness shows consciousness of guilt).

191. *See supra* notes 152-56 and accompanying text (contending willfulness requirement creates unreasonably high standard undermining courts' ability to remedy prejudice to victim).

A Comprehensive Adverse Inference Instruction Standard for ESI Spoliation



VI. CONCLUSION

Today, the federal circuits continue to debate whether courts should issue adverse inference instructions for spoliation based on the willfulness of the spoliator or the prejudice to the victim. Willfulness jurisdictions adamantly hold that the instruction logically requires willful culpability, while negligence jurisdictions steadfastly argue that such a culpability requirement unnecessarily limits the remedial power of the instruction. Courts should recognize that the

willfulness requirement bars many victims of spoliation from the remedial benefit of the instruction because of the difficulty of proving such a high level of culpability. Moreover, not only does fairness require courts remediate spoliation regardless of a showing of willfulness, but logic also allows issuance of the instruction based on the simple showing of non-production. However, even though the approach of the negligence jurisdiction is more appropriate than the willfulness doctrine, it is still too narrowly focused to be effective in addressing the increasing challenges of the digital age.

In recent years, the legal profession has begun to acknowledge the many practical problems related to ESI. The Civil Rules Advisory Committee introduced, inter alia, Rule 37(e) in a noble attempt to aid litigants faced with overwhelming ESI production. Despite this bold step forward, however, the committee fell short of fully recognizing the difficulty litigants often face in producing ESI. Where the committee failed, courts must succeed in ensuring that the test they employ in determining whether to issue an adverse inference instruction for spoliation of ESI addresses these challenges.

As technology continues to evolve into ever smaller forms that can hold increasingly vast amounts of electronic information, the legal profession must continue to adapt. In the face of such a daunting future, not only must litigants continue to develop more effective ways to meet their production obligations, but courts also must recognize that a litigant's practical inability to meet such production obligations is a relevant consideration in determining whether to issue sanctions. Such recognition of the difficulties inherent in ESI production would not excuse incompetent litigants for failing to have effective systems in place to manage ESI, but would simply allow courts to consider extenuating circumstances in which such failure was unavoidable. Just as courts have considered the cost and manageability of production in the e-discovery cost-shifting analysis, they should also integrate such considerations into the adverse inference instruction analysis. Although courts should strive to remedy prejudice to victims of spoliation, fairness requires they also acknowledge that the often unmanageable nature of ESI prejudices both the victim of spoliation and the spoliator. In integrating considerations of the spoliator's culpability, the prejudice to the victim, and the cost and manageability of production, courts would create a fairer approach to the adverse inference instruction for spoliation of ESI that could more effectively navigate the many challenges of the digital age.

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