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J. Hadley Edgar Professor of Law, Texas Tech University School of Law. I thank Richard L. Marcus for reading and commenting on this Article. I also thank my colleagues Jennifer Bard and Jarod Gonzales for their comments and Benjamin G. Robertson, J.D., 2012, for his excellent assistance in research and citation.

ELECTRONIC DISCOVERY AND SANCTIONS FOR SPOLIATION: PERSPECTIVES FROM THE CLASSROOM

Robert A. Weninger[+]

In 2009, Professor Richard L. Marcus said, "electronic discovery is the hottest topic in litigation today."[1] The December 2006 amendments to the *Federal Rules of Civil Procedure* were the first to employ a "full package of E-Discovery rule[s]."[2] Although the increased usage and acceptance of e-discovery has brought benefits to the discovery process, the nature of

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1. Richard L. Marcus, *Introduction* to SHIRA A. SCHEINDLIN ET AL., ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE: CASES AND MATERIALS 1 (2009). Professor Marcus, serving as a special reporter to the Advisory Committee on Civil Rules, was a primary drafter of the 2006 amendments to the *Federal Rules of Civil Procedure*, which specifically address the discovery of electronically stored information (ESI). *Id.* at 1 n.1.

2. *See* Richard L. Marcus, *E-Discovery and Beyond: Toward* Brave New World *or* 1984*?*, 236 F.R.D. 598, 604–05 (2006) (describing, contemporaneously to their enactment, how the e-discovery rule amendments of 2006 "could be the first big step into the world of digital litigation").

digitized information has also increased the risk and occurrence of evidence spoliation.[3] The spoliation of evidence subverts the discovery process and the integrity of the courts.[4] In the rapidly expanding universe of electronically stored information (ESI), some courts are concerned that the advent of e-discovery will lead to a flood of motions seeking sanctions for spoliation of evidence, thereby increasing the costs and delays of litigation.[5] Additionally, rule makers are concerned with consistency among the federal circuits in addressing a wide range of spoliation issues.[6] The Advisory Committee on Civil Rules and its Discovery Subcommittee are presently considering new

3. Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 MICH. TELECOMM. & TECH. L. REV. 71, 71–72 (2004) (explaining how digitized information is often deleted or overwritten in the normal course of business and is therefore more likely to be destroyed than hardcopies of information). The Second Circuit has defined spoliation as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 430 (S.D.N.Y. 2004) (quoting West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999)). The trial judge has discretion to order sanctions and can determine the extent to which those sanctions are imposed. *Id.* (quoting Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2d Cir. 2001)). This authority is a product of the *Federal Rules of Civil Procedure* and the inherent powers of the court. *Id.*

4. SHIRA A. SCHEINDLIN ET AL., ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE IN A NUTSHELL 218, 236 (2009) (discussing the many opportunities for evidence to be destroyed and the associated sanctions).

5. *See, e.g.*, Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 607 (S.D. Tex. 2010). However, research by the Federal Judicial Center suggests that sanctions motions for spoliation are relatively rare. EMERY G. LEE, III, FED. JUDICIAL CTR., MOTIONS FOR SANCTIONS BASED UPON SPOLIATION IN CIVIL CASES: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 3–4 (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/leespoli.pdf/$file/leespoli.pdf. The scope of the study included court records in 131,992 civil cases from nineteen federal district courts between 2007 and 2008. *Id.* at 4. The study found that sanctions motions were filed in only 153 cases. *Id.* at 8. Of the sixty-five sanctions motions actually ruled on in cases involving ESI, thirty-four percent were granted and sixty-six percent were denied. *Id.* The most commonly imposed sanction was an adverse-inference instruction. *Id.* at 9. The study showed that cases with sanctions motions were more contentious and had longer disposition times, averaging 649 days compared with 253 for civil cases in general. *Id.* Moreover, 0.6% of civil cases in general were disposed of at trial, while a remarkable 16.5% of the spoliation cases went to trial. *Id.*

6. *See* Memorandum from the Judicial Conference Subcomm. on Discovery, Advisory Comm. on Civil Rules to Mini-Conference on Pres. & Sanctions 1 (Sept. 9, 2011), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Materials/Preservation-Sanction%20Issues.pdf [hereinafter Memo on Pres. & Sanction Issues] (noting the problems resulting from overly broad preservation obligations and inconsistent standards for imposing sanctions across the country); *see also Dallas Conference on Preservation/Sanctions (9/9/11)*, ADMIN. OFFICE U.S. CTS., http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011.aspx (last visited Apr. 13, 2012) [hereinafter *Dallas Conference*] (providing a general description of the Dallas Conference and research submitted).

rules to address the preservation of ESI and sanctions for its spoliation in civil cases.[7]

Currently, the trial judge has discretion to issue sanctions for spoliation.[8] However, a 2004 survey of federal and state court rulings regarding spoliation of ESI revealed that courts determined sanctions largely based on the alleged spoliator's level of culpability and the degree of prejudice suffered by the innocent party.[9] One of the more commonly issued sanctions for spoliation is an adverse-inference instruction.[10] Although it is not the harshest sanction in a court's arsenal, an adverse-inference instruction is nonetheless severe enough to end a lawsuit.[11]

Two 2010 spoliation decisions—*Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, LLC*[12] and *Rimkus Consulting Group, Inc. v. Cammarata*[13]—exemplify the split between the Second and Fifth Circuits, among others. The decisions highlight the circuits' differing opinions on two issues: (1) the allocation of the burden to prove relevance and prejudice in spoliation cases and (2) the level of culpability required for an adverse-inference instruction or sanctions of similar severity.[14] The decisions also illustrate the varying approaches to the respective roles of the judge and the jury in administering the adverse-inference instruction.[15]

These issues serve as an appropriate backdrop for a discussion on the usefulness of *Connor v. Sun Trust Bank*[16] as a pedagogical tool.[17] In *Connor*, the U.S. District Court for the Northern District of Georgia ordered an

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7. Memorandum on Report of Civil Rules Advisory Comm. from the Honorable David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to the Honorable Mark R. Kravitz, Chair, Standing Comm. on Rules of Practice & Procedure 2–6 (Dec. 2, 2011), *available at* http://ww.uscourts.gov/uscourts/RulesAndPolicies/rules/reports/CV12-2011.pdf [hereinafter Dec. 2 Memo] (discussing the Discovery Subcommittee's evaluation of possible rules regarding preservation).

8. *See supra* note 3.

9. Scheindlin & Wangkeo, *supra* note 3, at 80.

10. *See supra* note 5. A court imposing an adverse-inference instruction for a party's failure to produce relevant evidence within its control will "instruct the jury that it may infer that the missing evidence is unfavorable to the party who could have produced the evidence and did not." SCHEINDLIN ET AL., *supra* note 1, at 422.

11. *See infra* Part IV. The most severe sanction for spoliation is a default judgment for the plaintiff or, if the plaintiff is the spoliator, a dismissal of the plaintiff's claims. ADAM I. COHEN & DAVID J. LENDER, ELECTRONIC DISCOVERY: LAW AND PRACTICE § 3.08[D][4] (Supp. 2011).

12. 685 F. Supp. 2d 456, 463 (S.D.N.Y. 2010).

13. 688 F. Supp. 2d 598, 607 (S.D. Tex. 2010).

14. *See infra* Part IV.A. Judges Shira A. Scheindlin and Lee H. Rosenthal, who, respectively, decided *Pension Committee* and *Rimkus*, are widely known e-discovery experts. *See infra* Part I.

15. *See infra* Part IV.A.

16. 546 F. Supp. 2d 1360 (N.D. Ga. 2008). The Honorable Robert L. Vining, Jr., senior district judge, wrote the opinion. *Id.* at 1364.

17. *See infra* Part IV.B.

adverse-inference instruction as a sanction for the defendant's bad-faith destruction of e-mail in an employment-discrimination action brought under the Family and Medical Leave Act.[18] *Connor* is useful pedagogically because the facts raise several recurring issues regarding the alleged spoliations of ESI, including: (1) when a duty to preserve evidence arises, (2) the degree of culpability required to support a violation, (3) the standard of proof an innocent party must satisfy in order to establish relevance and prejudice, (4) the court's discretion in finding spoliation and selecting an appropriate penalty, and (5) the uncertain protection from sanctions afforded by the safe-harbor provision of Federal Rule of Civil Procedure 37(e).[19]

This Article discusses the unique issues involving ESI's spoliation and the sanctions that may be issued as a consequence, exemplified by the *Connor* opinion. Part I reviews the advent of evidentiary rules regarding ESI and goes on to explain this Article's chosen focus of examining e-discovery through the lens of a particular classroom experience with the casebook entitled *Electronic Discovery and Digital Evidence* (the Casebook).[20] In Part II, this Article highlights the challenges that arise when ESI is involved in the discovery process. Part III explores the primary factors that courts use when considering whether to issue sanctions for evidence spoliation. Part IV then discusses the adverse-inference instruction—a serious sanction that courts often impose. Next, the Article uses the *Pension Committee* and *Rimkus* decisions to examine the circuit split on certain spoliation issues and continues with an analysis of the pedagogical utility of *Connor*. Finally, in Part V, this Article summarizes the recent meetings of the Advisory Committee on Civil Rules, in which the Committee has proposed rules that would govern sanctions for ESI spoliation.

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18. *Connor*, 546 F. Supp. 2d at 1365–68, 1375–77; *see also* Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601–54 (2006 & Supp. IV 2010) and in scattered sections of 2 U.S.C. and 5 U.S.C.).

19. *See infra* Part IV.B.1–3. Rule 37(e) provides that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." FED. R. CIV. P. 37(e).

20. SCHEINDLIN ET AL., *supra* note 1. I taught Chapter IV of the Casebook, *Spoliation and Sanctions*, as part of a course in complex litigation at Texas Tech University School of Law. *See id.* at 362–442. In seven class periods, my class of nine very capable law students discussed the principal cases and commentaries in the chapter. Each student was responsible for leading discussion on one of the principal cases after drafting a memorandum outlining his or her preparation. Class members responded by e-mail each day to three questions concerning various aspects of the assigned case: (1) the effectiveness of the case in learning about the law governing sanctions for spoliation, (2) the difficult aspects of the case, and (3) the helpful aspects of the case.

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

Many law students, as future litigators, need to ensure they avoid spoliation and its serious consequences. The Casebook's chapter on spoliation and sanctions was chosen because it effectively introduces students to the world of e-discovery.[21] It also allows students to realize that, although one does not need to be a computer-science expert, practitioners should have a working knowledge of a party's computer operations in order to adequately address potential issues regarding ESI spoliation.

Two distinguished e-discovery experts authored the Casebook. Professor Daniel Capra is the reporter to the Advisory Committee on Evidence Rules and was the primary drafter of Rule 502 on waiver of privilege.[22] He is also the co-author of a five-volume treatise on evidence.[23]

Judge Scheindlin served from 1998 to 2005 on the Advisory Committee on Civil Rules and the Discovery Subcommittee that drafted the 2006 amendments to the *Federal Rules of Civil Procedure*, which focused on e-discovery.[24] The new rules recognized the shift from paper to digital records and specifically addressed ESI in the discovery process.[25] Judge Scheindlin also wrote the series of landmark opinions in *Zubulake v. UBS Warburg LLC*, in which she took an approach to e-discovery broadly consistent with the approach later taken by the Advisory Committee in the amended rules.[26]

In addition to the *Zubulake* opinions, Judge Scheindlin authored the 2010 opinion in *Pension Committee*, which she subtitled *Zubulake Revisited: Six Years Later*.[27] In it, she summarized much of the law relating to "litigation

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21. *Id.* at 362.

22. *Id.* at vi.

23. *See generally* STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL (10th ed. 2011).

24. SCHEINDLIN ET AL., *supra* note 1, at vi.

25. *See id.* at 5–8.

26. Zubulake v. UBS Warburg LLC (*Zubulake V*), 229 F.R.D. 422 (S.D.N.Y. 2004); Zubulake v. UBS Warburg LLC (*Zubulake IV*), 220 F.R.D. 212 (S.D.N.Y. 2003); Zubulake v. UBS Warburg LLC (*Zubulake III*), 216 F.R.D. 280 (S.D.N.Y. 2003); Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309 (S.D.N.Y. 2003). For example, in *Zubulake IV*, Judge Scheindlin maintained that determining whether a "litigation hold" on a party's routine document-destruction policy applies to certain ESI depends on the accessibility of that ESI. *Zubulake IV*, 220 F.R.D. at 218. In general, accessible data is stored in a readily usable format and does not require restoration, whereas inaccessible data is not readily usable. *Zubulake I*, 217 F.R.D. at 320. The amended rules applied the concept of accessibility when determining whether ESI is discoverable. *See* FED. R. CIV. P. 26(b)(2)(B). Under Rule 26(b), ESI is presumptively discoverable but a party can withhold ESI if it is not reasonably accessible because of undue burden and cost. *See id.* 26(b). To obtain data that is not reasonably accessible, the requesting party must show good cause. *Id.* 26(b)(2)(B).

27. Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC, 685 F. Supp. 2d 456, 461 (S.D.N.Y. 2010).

holds" and sanctioned several plaintiffs with an adverse-inference instruction for grossly negligent collection and preservation of ESI.[28] The decision is significant because it provides a legal framework for determining the appropriateness of sanctions for unintentional acts of spoliation.[29] Further, it furnishes a series of examples of discovery misconduct, which may constitute either ordinary or gross negligence in a party's implementation of a litigation hold.[30]

The Casebook was so much the product of collaborative effort that the editors designated the Sedona Conference (Sedona) as a third co-author.[31] Sedona is a law and policy institute comprised of leading judges, lawyers, academics, and technology consultants who are extremely knowledgeable on matters involving e-discovery.[32] Through its development of a set of widely cited e-discovery publications,[33] Sedona has been a primary source of guidance for judges, counsel, and clients facing novel issues in this area.

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28. *Id.* at 465–66, 496–97. The litigation hold, a communication suspending the routine policy for document maintenance and destruction when a duty to preserve evidence has arisen, applies to those persons likely to have relevant information. THE SEDONA CONFERENCE, THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT 30 (2d ed. 2007) [hereinafter SEDONA CONFERENCE GLOSSARY]; *see also* Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614, 629–30 (D. Colo. 2007) (describing the duty requirement accompanying litigation holds). The decision in *Cache La Poudre Feeds LLC v. Land O'Lakes, Inc.* noted that instituting a litigation hold is only the first step in the discovery process. 244 F.R.D. at 630. A party must also conduct a reasonable search for responsive documents. *Id.* at 630 (citing FED. R. CIV. P. 26(e)(2)). In *Cache La Poudre Feeds*, the defendant issued a litigation hold, but later failed to prevent its employees from erasing the hard drives of former employees. *Id.* at 629–30. The court imposed a monetary sanction, reasoning that "[a] 'litigation hold,' without more, will not suffice to satisfy the 'reasonable inquiry' requirement in Rule 26(g)(2). Counsel retains an on-going responsibility to take appropriate measures to ensure that the client has provided all available information and documents which are responsive to discovery requests." *Id.* at 630 (citing Sexton v. United States, No. 6:99CV102ORL3ABI22, 2001 WL 649445 (M.D. Fla. Apr. 12, 2001)).

29. *Pension Comm.*, 685 F. Supp. 2d at 463–72.

30. *See id.* at 479–96.

31. *See generally* SCHEINDLIN ET AL., *supra* note 1.

32. *Id.* at iv.

33. The Sedona Conference Working Group on Electronic Document Retention & Production was formed in 2002 to examine whether the rules and concepts related to paper discovery would be adequate to address issues posed by e-discovery. THE SEDONA CONFERENCE, SEDONA PRINCIPLES: BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION xi (2d ed. 2007) [hereinafter SEDONA BEST PRACTICES RECOMMENDATIONS]. Sedona has produced many publications that are frequently cited in the area of e-discovery, including: SEDONA BEST PRACTICES RECOMMENDATIONS, *supra*; SEDONA CONFERENCE GLOSSARY, *supra* note 28; THE SEDONA CONFERENCE, THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION AND RECORDS IN THE ELECTRONIC AGE (Public Comment Draft 2004); and Working Grp. I, The Sedona Conference, *The Sedona Conference Commentary on Legal Holds: The Trigger & The Process*, 11 SEDONA CONF. J. 265 (2010).

The Casebook begins with a dazzling introduction by Professor Marcus, a primary drafter of the newly amended *Federal Rules of Civil Procedure*.[34] Professor Marcus provides an overview of the evolution of e-discovery and describes the momentous changes in American discovery practices over the past quarter-century, referring particularly to rulemaking efforts to contain overbroad discovery and, most recently, to explicitly address ESI.[35] In doing so, he explains why e-discovery deserves separate attention in the rules.[36] Although the Casebook focuses almost entirely on federal e-discovery rules, Professor Marcus notes that ESI issues also arise in state courts, many of which have adopted e-discovery rules modeled after the federal rules.[37]

Today's law students, knowledgeable in the use of computers, will be buoyed by Professor Marcus's remark that, as "products of the first digital generation," they may be better equipped as future lawyers and judges to deal with ESI than present-day lawyers.[38] For those who are less technologically savvy, the Advisory Committee Note to Rule 26(f) provides an important cautionary message.[39] The Note warns that lawyers must develop an understanding of their clients' computer systems in order to effectively perform their duties under the new rules.[40]

For example, Rule 26(f) requires counsel to confer to address issues relating to the preservation of discoverable information and the form in which any ESI should be produced.[41] Additionally, a lawyer must monitor his or her client's

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34. Marcus, *supra* note 1, at 1 n.1.

35. *Id.* at 1–15.

36. *Id.* at 5–13.

37. *Id.* at 13. As of March 15, 2012, thirty states have adopted the federal approach in whole or in part. David Canfield, *An Overview of State E-Discovery Rules*, INSIDE COUNSEL (Mar. 15, 2012), http://www.insidecounsel.com/2012/03/15/an-overview-of -state-e-discovery-rules (citing Thomas Y. Allman, E-Discovery in Federal and State Courts after the 2006 Federal Amendments 3 (Feb. 9, 2012) (unpublished manuscript), *available at* http://www.krollontrack.com/publications/2012%20fed%20state%20ediscovery%20rules.pdf?utm_source=ED&utm_medium=Email&utm_campaign=ED-Rediscovered-2012-02-15-ExternalWebinarFup&utm_co-ntent=download).

38. Marcus, *supra* note 1, at 13.

39. FED. R. CIV. P. 26(f) advisory committee's note.

40. *Id.*

41. *Id.* 26(f). Throughout the Casebook, the authors pose challenging questions to illustrate various e-discovery issues. In particular, the authors pose a series of questions relating to what one might do if his or her opponent is not prepared to discuss ESI problems at the pretrial conference:

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

retention and production of electronic documents to ensure compliance with the rules.[42] To perform these duties, counsel must consult the "key players" with access to the ESI to learn how the client stores e-data, the client's information technology (IT) staff to understand the client's IT infrastructure and policies, and possibly outside computer experts for general assistance.[43] A cottage industry of electronic consultants has emerged to assist lawyers and parties in meeting their e-discovery obligations.[44] This industry generates billions of dollars annually, demonstrating the cost, complexity, and prevalence of e-discovery in American litigation.[45]

II. THE CHALLENGES TO AMERICAN DISCOVERY IN A DIGITAL ERA

Law students should be eager to study e-discovery. The Advisory Committee explained that the sheer volume of ESI required new rules to govern its preservation and production.[46] Electronic information is now the dominant form of business information, in part, because the costs of storing electronic data are far less than storing a comparable amount of paper records.[47] Questions arise about the appropriate storage media, length of retention, procedures for retrieval, extent of discoverability, and production format.[48]

The Committee noted that electronic data is dynamic, unlike paper documents, because its content may change with or without human intervention.[49] Simply opening a document can alter earlier information.[50]

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electronic discovery issues, should they be precluded from raising any later identified electronic discovery problems as the basis for a discovery motion?

SCHEINDLIN ET AL., *supra* note 1, at 199.

42. SCHEINDLIN ET AL., *supra* note 1, at 85.

43. *Zubulake V*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004).

44. *See* Lauren Katz, *A Balancing Act: Ethical Dilemmas in Retaining E-Discovery Consultants*, 22 GEO. J. LEGAL ETHICS 929, 929–30 (2009) (describing the rapid development of e-discovery services once courts began ruling on ESI issues).

45. Marcus, *supra* note 1, at 1. Law firms and other companies spent an estimated $2.7 billion on e-discovery services in 2007. Jonathan Hill, *The Lure of India*, L. TECH. NEWS, Oct. 1, 2008, at 26 (reporting in 2008 that industry revenues were expected to reach $4.6 billion in 2010). In March 2011, the *New York Times* reported that e-discovery software utilizing artificial intelligence can review documents more quickly and at lower costs than lawyers and paralegals. John Markhoff, *Armies of Expensive Lawyers, Replaced by Cheaper Software*, N.Y. TIMES, Mar. 5, 2011, at A1.

46. *See* FED. R. CIV. P. 26(f) advisory committee's note (noting that "[t]he volume and dynamic nature of electronically stored information may complicate preservation obligations").

47. *Zubulake I*, 217 F.R.D. 309, 311 nn.5–6 (S.D.N.Y. 2003).

48. Kenneth J. Withers, *Computer-Based Discovery in Federal Civil Litigation*, FED. CTS. L. REV., Oct. 2000, at 2.

49. FED. R. CIV. P. 26(f) advisory committee's note.

50. BARBARA J. ROTHSTEIN ET AL., MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES 23 (2007), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/$file/eldscpkt.pdf.

Additionally, deleting ESI is more difficult than paper documents because deletion does not physically remove the information from a hard drive.[51] Rather, deletion frees up the space for other uses, but the deleted data may be retrievable if it has not been overwritten or otherwise wiped from the hard drive.[52] Deleted data could also be found on network backup tapes, which are used generally for disaster recovery.[53] Restoration of such tapes can be difficult and costly, however, because the information is often difficult to access and tapes are recycled periodically, resulting in loss of data.[54]

The Advisory Committee recognized the challenges attorneys faced under the old rules when reviewing ESI for privileged information.[55] When producing discovery, a party must ensure that privileged communications are not disclosed in order to avoid waiver of privilege.[56] Before the adoption of Federal Rule of Evidence 502 in 2008, an inadvertent disclosure of information could have resulted in a waiver of privilege even if the attorney took reasonable steps to prevent such a disclosure.[57] Rule 502 clarified the matter by providing a uniform federal test for adjudicating claims of waiver through inadvertent production: inadvertent disclosure will not waive privilege if the privilege holder took reasonable steps both to prevent disclosure and to rectify the error.[58]

Before a party can review ESI for privileged information, the data must be located and retrieved—a process often complicated by multiple storage locations, high volume, and unhelpful records-management policies.[59] After retrieval, the data may require restoration to be accessible, which can be a costly and time-consuming endeavor.[60] Lawyers could benefit by enlisting e-discovery consultants to assist in the retrieval, restoration, and review processes.[61] The associated costs can be enormous, however, when the matter involves vast amounts of ESI.[62]

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51. *See id.* at 23 (defining "deleted data" and "deletion").

52. *Id.*

53. *Id.* at 3.

54. *Id.* at 22 (defining "back up data" and "backup tape recycling").

55. FED R. CIV. P. 26(f) advisory committee's note.

56. *Id.* ("A failure to withhold even one such item may result in an argument that there has been a waiver of privileged materials on that subject matter.").

57. *See* FED. R. EVID. 502(b) advisory committee's note; *see also* Hopson v. Mayor & City Council of Balt., 232 F.R.D. 228, 235–36 (D. Md. 2005) (noting that "there is no uniform position taken by the courts on whether inadvertent production waives privilege/work product protection").

58. FED. R. EVID. 502(b).

59. Withers, *supra* note 48, at 3.

60. *Id.* at 5.

61. Katz, *supra* note 44, at 929–30.

62. *Id.* at 941.

In 2000, one commentator warned that e-discovery presents challenges distinct from paper-based discovery.[63] First, e-discovery can include a greater volume of data.[64] Second, ESI can be stored on a wide range of media, including employee laptops, desktops, home computers, network servers, and various hand-held devices.[65] Having these varied storage locations disperses the data and complicates the discovery process, increasing costs and the risk of spoliation.[66] Third, often outdated, underutilized, or nonexistent records-management practices of business organizations exacerbate discovery problems.[67] Fourth, ESI is not always destroyed as regularly as paper records once the data are unnecessary.[68] Consequently, the commingling of voluminous records often complicates the separation of potentially discoverable ESI from irrelevant records.[69]

III. THE MAJOR DETERMINANTS OF ESI SPOLIATION: CULPABILITY AND PREJUDICE

A party seeking sanctions for spoliation must establish the following elements:

> (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind" and (3) that the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.[70]

The Casebook authors distilled these elements into two primary factors—culpability and prejudicial effect—the degrees of which generally determine the type of sanctions imposed.[71] Other factors include the extent to which the spoliation interfered with the judicial process, what sanction, if any,

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63. Withers, *supra* note 48, at 2.

64. *Id.* at 2–3.

65. *Id.* at 3.

66. *Id.*

67. *See id.*; *see also* Steven C. Bennett, *Records Management: The Next Frontier in E-Discovery?*, 41 TEX. TECH. L. REV. 519, 521–22 (2009) (explaining that no major business has come close to reaching the "nirvana" of electronic-records management).

68. Withers, *supra* note 48, at 3.

69. *Id.*

70. *Zubulake IV*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003) (citing Bernie v. Town of Cromwell, 243 F.3d 93, 107–12 (2d Cir. 2001)).

71. SCHEINDLIN ET AL., *supra* note 1, at 387. Judge Scheindlin and her law clerk, Wangkeo, distilled these two factors from their study of state and federal sanctions decisions. *See* Scheindlin & Wangkeo, *supra* note 3, at 76–77 ("When courts imposed sanctions, they referred to the willfulness or bad faith of the violator (49%), prejudice to the party requesting production (35%), and/or the gross negligence or recklessness of the spoliating party (9%) as the reason(s) for imposing the sanction(s)." (footnotes omitted)).

will remedy the spoliation and deter similar conduct, and whether to impose sanctions on an innocent party for spoliation committed by an attorney.[72]

In selecting an appropriate sanction for litigants or counsel liable for spoliation, a judge may choose from a variety of sanctions—some more severe than others.[73] In spite of these penalties, judges are hesitant to impose sanctions because they prefer that cases be decided on the merits.[74] Further, when judges choose to order sanctions, they tend to avoid the most severe penalties.[75]

The extent of culpability and prejudice varies. Just as the wrongdoer's conduct may range from inadvertent loss of evidence to intentional and bad-faith destruction, the prejudice suffered by the innocent party might be negligible or, quite conversely, could be dispositive.[76] Additionally, courts will balance these factors against each other.[77] For example, even if a party acted with a high degree of culpability, a court would be unlikely to impose sanctions if the consequent prejudice was negligible.[78] Similarly, if a party suffered severe prejudice, but the destruction of evidence was completely inadvertent, the court would not likely impose sanctions because sanctioning requires at least some degree of culpability.[79]

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72. SCHEINDLIN ET AL., *supra* note 1, at 387.

73. The spectrum of sanctions varies in severity. The least severe, monetary damages, allow a judge to order one party to pay the other for unnecessary discovery or to assess fines. Panel Discussion, *Sanctions in Electronic Discovery Cases: Views from the Judges*, 78 FORDHAM L. REV. 1, 5–6 (2009) (remarks of the Honorable Shira A. Scheindlin, U.S. district judge). More severe sanctions are those involving evidence, including "preclusion of evidence, . . . waiver of privilege or work-product protection, or . . . an adverse inference instruction." *Id.* at 6. The most severe sanctions include entering default judgment and finding the attorney or party to be in contempt of court. *Id.*

74. *Id.* at 11 (remarks of the Honorable Loretta A. Preska, U.S. district judge) ("First of all, the judicial system prefers to resolve controversies on the merits. Secondly, most judges don't like to sanction lawyers. Thirdly—and this is from a very selfish perspective—sanctions create a lot of extra work while not actually moving the ball toward the resolution of the case and, fourth, it is not unheard of for the Court of Appeals to reverse sanctions decisions.").

75. SCHEINDLIN ET AL., *supra* note 1, at 387.

76. Rimkus Consulting Group, Inc. v. Cammarata, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010). In *Rimkus*, the destruction of e-mail had mixed effects for the wrongdoers (defendants) as well as the innocent party (plaintiff). *Id.* at 607–08. Although many of the e-mails that the defendants deleted were unrecoverable, some were retrieved from other sources. *Id.* at 608. Of those recovered, some were adverse to the defendants, but others were favorable to them. *Id.* According to the court, the plaintiff was still able to obtain "extensive evidence" to support its claims and defenses despite the loss of the e-mails. *Id.* Balancing these competing factors, the court concluded that the reduced prejudice to the plaintiff justified an adverse-inference instruction rather than a more severe sanction, such as entering default judgment or modifying pleadings. *Id.*

77. *See id.* at 613.

78. *Id.*

79. *Id.*

A decision to impose sanctions can be particularly difficult in the context of e-discovery for at least two reasons. First, whether the loss or destruction of ESI occurred during the routine management of records or at the direction of a specific individual can be difficult to determine.[80] Second, restoring lost or destroyed ESI is often prohibitively expensive, further complicating the process of fashioning appropriate relief for spoliation victims.[81]

IV. THE ADVERSE-INFERENCE INSTRUCTION

The judge alone decides whether to impose spoliation sanctions of almost every type, but the adverse-inference instruction is an exception.[82] Once the judge has decided to impose this particular sanction, the jury must decide whether a party is culpable for spoliation and whether the other party would have benefitted from the evidence so spoliated.[83] Adverse-inference instructions are also distinct from other sanctions because the alleged spoliator may introduce evidence at trial to re-argue the spoliation issue.[84] In some cases, the judge will determine culpability and permit the jury to presume prejudice, whereas in others, the judge will present both issues as questions of fact for the jury to decide.[85] Regardless of whether a legal presumption exists and whether the judge or the jury finds spoliation, the jury decides whether to presume the evidence was adverse to the wrongdoer.[86]

Unlike the most severe sanctions, such as default judgment and dismissal of claims or defenses, the adverse-inference instruction does not formally end litigation. Nonetheless, courts properly describe it as an extreme sanction

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80. COHEN & LENDER, *supra* note 11, § 3.08[D] ("The how, when, and why of spoliation of electronic evidence can be a complicated inquiry.").

81. *Id.*

82. *See* Panel Discussion, *supra* note 73, at 10 (remarks of the Honorable Shira A. Scheindlin, U.S. district judge) ("Unlike all the other sanctions, when a court issues an adverse inference instruction, the court's finding of spoliation can be second-guessed by the jury.").

83. *Id.* ("Although the court has already found that a party caused evidence to be lost and that a sanction is appropriate, the jury has to do it all over again.").

84. *See id.* (quoting Nucor Corp. v. Bell, 251 F.R.D. 191, 203 (D.S.C. 2008)).

85. *Compare* Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 620 (S.D. Tex. 2010) (presenting both factors for the jury to decide), *with* Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC, 685 F. Supp. 2d 456, 496–97 (S.D.N.Y. 2010) (finding grossly negligent culpability and allowing the jury to presume prejudice).

86. Charles W. Adams, *Spoliation of Electronic Evidence: Sanctions Versus Advocacy*, 18 MICH. TELECOMM. & TECH. L. REV. 1, 46–47 (2011) (providing an overview of the adverse-inference instruction and an analysis of *Pension Committee* and *Rimkus*). Professor Charles Adams argued that adverse-inference instructions are undesirable because they are costly, time consuming, contentious, and require redundant fact-finding by both the judge and jury. *Id.* at 47–48. He recommended that courts instead allow parties to offer evidence of spoliation at trial and then argue inferences that should be drawn. *Id.* at 48.

because in practice a decision to issue such an instruction often results in settlement before the jury is so instructed.[87]

Although often referred to simply as an adverse-inference instruction, this sanction may take the form, depending on the jurisdiction, of either an *inference* or a *presumption* of the existence of key elements of spoliation.[88] Consequently, how the judge frames the instruction can significantly influence the severity of the sanction. An adverse-*inference* instruction is itself a severe sanction, but instructions on *presumptions* of spoliation can have an even greater effect on the jury for two reasons. First, presumptions operate to shift the burden of producing evidence on such issues as relevance and prejudice to the wrongdoer.[89] Second, an unopposed presumption, at least in theory, controls the jury's decision.[90] Regardless of the instruction, the offending party may introduce evidence at trial to rebut the elements of spoliation so that the jury has adequate information on which to decide if an inference or presumption is ultimately appropriate.[91]

A. Two District Court Decisions Granting an Adverse-Inference Instruction

The opinions in *Pension Committee* and *Rimkus* illustrate varying approaches that courts might take when addressing the three issues surrounding an adverse-inference instruction.[92] First, the courts disagreed on the level of culpability required for an adverse-inference instruction.[93] Second,

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87. *See Zubulake IV*, 220 F.R.D. 212, 219–20 (S.D.N.Y. 2003) (noting that "an adverse inference instruction often ends litigation" and "the party suffering the instruction will be hard-pressed to prevail on the merits"); *see also Rimkus*, 688 F. Supp. 2d at 619–20 ("Although adverse inference instructions can take varying forms that range in harshness, and although all such instructions are less harsh than so-called terminating sanctions, they are properly viewed as among the most severe sanctions a court can administer.").

88. *Compare Rimkus*, 688 F. Supp. 2d at 620 (stating that the jury may *infer* prejudice), *with Pension Comm.*, 685 F. Supp. 2d at 496–97 (instructing the jury that it may *presume* prejudice and then determine whether the presumption was sufficiently rebutted).

89. *Rimkus*, 688 F. Supp. 2d at 617 (citing *Pension Comm.*, 685 F. Supp. 2d at 467–68).

90. 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 3.6 (3d ed. 2007).

91. Stevenson v. Union Pac. R.R. Co., 354 F.3d 739, 750 (8th Cir. 2004); *cf. Rimkus*, 688 F. Supp. 2d at 617 (describing in both inference and presumption cases how the instruction could be rebutted).

92. *See supra* note 88.

93. *Pension Committee* and *Rimkus* reflect the sharp split of authority between the Second Circuit, in which negligence can warrant an adverse-inference instruction, and the Fifth Circuit and others, in which bad faith is required. *Compare Pension Comm.*, 685 F. Supp. 2d at 496–97 (granting an adverse-inference instruction when the offenders' conduct was grossly negligent), *with Rimkus*, 688 F. Supp. 2d at 614 (noting that severe sanctions such as an adverse-inference instruction will not be imposed in the Fifth Circuit without a showing of bad faith). Courts following *Pension Committee* in the Second Circuit reason that each party should bear the risk of its own carelessness. *See Rimkus*, 688 F. Supp. 2d at 615 (describing the *Pension Committee* opinion and its application of Second Circuit case law). Magistrate Judge James C. Francis, IV, explained that the rationale for this approach is not to punish the spoliator for carelessness but to

the courts have different views on whether the innocent party must prove that the missing evidence has prejudiced its claims or defenses.[94] Third, the courts view the functions of the judge and jury in administering the adverse-inference instruction differently.[95]

1. Pension Committee*: Presuming Relevance and Prejudice when a Party Is Grossly Negligent*

In *Pension Committee*, the U.S. District Court for the Southern District of New York found gross and ordinary negligence in the offenders' conduct during discovery, but found no intentional misconduct.[96] The court acknowledged that determining the level of culpability in hindsight is not an exact science and different judges could make different determinations.[97]

The court found that failing to issue a timely litigation hold in writing, failing to collect or reserve any ESI three years into litigation, continuing to delete ESI after the duty to preserve arose, failing to request documents from key players, failing to supervise search efforts, destroying potentially relevant backup data, and submitting misleading information all constituted gross negligence.[98] It also stressed that a party must institute a litigation hold to suspend routine document-destruction policies and to preserve relevant documentation once that party reasonably anticipates litigation.[99] The court further explained that failure to issue such a hold in writing is grossly negligent conduct because relevant information will likely be destroyed in its absence.[100]

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remedy the imbalance the loss of evidence has caused. Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 75 (S.D.N.Y. 1991) ("The inference is *adverse* to the destroyer not because of any finding of moral culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss." (emphasis in original)).

94. *Compare Pension Comm.*, 685 F. Supp. 2d at 467 (permitting the court to presume prejudice when the offender acted in bad faith or a grossly negligent manner), *with Rimkus*, 688 F. Supp. 2d at 617–18 (suggesting disagreement with *Pension Committee* and that the innocent party must make some showing of prejudice regardless of the offender's culpability).

95. *Compare Pension Comm.*, 685 F. Supp. 2d at 496 n.251 (explaining that although the jury is bound by the court's finding that the plaintiffs destroyed documents, the jury must determine "whether that evidence is relevant or whether its loss has caused any prejudice"), *with Rimkus*, 688 F. Supp. 2d at 653 (allowing the jury to hear evidence about the loss of e-mails, and instructing the jury that if it finds the defendants intentionally deleted e-mails for purposes of litigation, it may infer that the e-mails would have been adverse to defendants).

96. *Pension Comm.*, 685 F. Supp. 2d at 479, 488. A group of ninety-six investors brought state and federal securities claims against former directors, fund administrators, and auditors to recover losses from the liquidation of two offshore hedge funds that were alleged to exceed $550 million. *Id.* at 462 & n.3. After the start of discovery, the defendants complained of gaps in the plaintiffs' document responses and moved for sanctions. *Id.* at 462–63.

97. *Id.* at 463.

98. *Id.* at 479.

99. *Id.* at 466 (quoting Treppel v. Biovail Corp., 249 F.R.D. 111, 118 (S.D.N.Y. 2008)).

100. *Id.* at 465.

As a result of this gross negligence, the court gave the jury an adverse-inference instruction and permitted it to presume prejudice.[101]

The *Pension Committee* court offered examples of conduct that might constitute *ordinary* negligence, such as failing to take appropriate ESI preservation measures, failing to assess search terms for accuracy and validity, and failing to gather information from each employee relevant to the litigation.[102] The court did not impose an adverse-inference instruction on the parties that it found merely negligent.[103] Rather, it sanctioned those parties with lesser penalties such as costs and attorneys fees.[104]

According to the court, the severity of the adverse-inference instruction should depend on the spoliator's level of culpability.[105] Courts can set the level of security by controlling the jury's discretion with presumptions.[106] When the offender's conduct is most egregious through willful behavior or bad faith, the judge can instruct the jury that it *must* accept certain facts as true.[107] When the conduct is less egregious, but still willful or reckless, the judge can issue a mandatory presumption, which may be rebutted.[108] In the least egregious cases warranting an adverse-inference instruction, in which the offender acted negligently, the judge can instruct the jury that it *may* presume prejudice, which can then be rebutted.[109] These presumptions shift the burden to the offender to prove that the spoliated evidence is not relevant and that its loss does not prejudice the innocent party.[110] The court explained that excusing innocent parties entirely from the burden establishing evidentiary prejudice would incentivize parties to challenge even inadvertent errors, resulting in "a 'gotcha' game rather than a full and fair opportunity to air the merits of a dispute."[111]

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101. *Id.* at 496–97.

102. *Id.* at 465.

103. *Id.* at 497.

104. *Id.*

105. *Id.* at 470.

106. *See id.*

107. *Id.*

108. *Id.*

109. *Id.* The *Pension Committee* court distinguished between the judge's decision to impose an instruction and the jury's decision to apply the inference when the conduct was merely negligent. *Compare id.* at 467–68 (stating that the innocent party must prove relevance and prejudice for a judge to impose an adverse-inference instruction for merely negligent conduct), *with id.* at 470–71 (explaining that, after the judge decides to impose an instruction, the least harsh instruction involves a permissible presumption).

110. *Id.* at 468–89.

111. *Id.* at 468.

2. Rimkus*: An Adverse-Inference Instruction Requires a Showing of Relevance*

In *Rimkus*, Judge Lee Rosenthal ordered an adverse-inference instruction to remedy the spoliator's allegedly intentional destruction of ESI.[112] She noted that the circuit split on the required level of culpability limited the usefulness of *Pension Committee* in which Judge Scheindlin permitted an adverse-inference instruction for gross negligence.[113] For example, the Fifth Circuit has held that mere negligence is insufficient for an adverse-inference instruction because evidence of bad faith is required.[114] Additionally, Judge Rosenthal observed that the Seventh, Eighth, Tenth, and D.C. Circuits similarly have held that negligence alone is insufficient for the penalty.[115] Whereas Judge Scheindlin in *Pension Committee* permitted the court to presume relevance and prejudice when the offender acted with gross negligence or bad faith, Judge Rosenthal suggested in *Rimkus* that an adverse-inference instruction is not proper in the Fifth Circuit absent a showing that the spoliated evidence would at least be relevant.[116]

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112. Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 646 (S.D. Tex. 2010). Several forensic engineers left the Rimkus Consulting Group to start a competing company. *Id.* at 621–22. These former employees filed a preemptive suit against Rimkus in Louisiana state court seeking to nullify certain noncompetition agreements in their employment contracts. *Id.* at 641. In a responsive suit in a federal court in Texas, plaintiff Rimkus alleged that, in forming a new company, these departing employees violated the terms of their employment contracts and misappropriated confidential and proprietary information. *Id.* at 624, 628. Unlike the negligent conduct in *Pension Committee*, the spoliation in *Rimkus* allegedly consisted of willful misconduct. *Id.* at 611. While the suit was pending in state court, the offenders allegedly deleted e-mails and attachments to prevent them from being used in an anticipated lawsuit. *Id.* at 607–08.

113. *Id.* at 615.

114. *Id.* at 614 (citing Condrey v. SunTrust Bank of Ga., 431 F.3d 191, 203 (5th Cir. 2005); King v. Ill. Cent. R.R., 337 F.3d 550, 556 (5th Cir. 2003); United States v. Wise, 221 F.3d 140, 156 (5th Cir. 2000)).

115. *Id.* at 614 nn.10–11 (citing Turner v. Pub. Serv. Co. of Colo., 563 F.3d 1136, 1149 (10th Cir. 2009); Faas v. Sears, Roebuck & Co., 532 F.3d 633, 644 (7th Cir. 2008); Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1035 (8th Cir. 2007); Penalty Kick Mgmt. Ltd. v. Coca Cola Co., 318 F.3d 1284, 1294 (11th Cir. 2003); Wyler v. Korean Air Lines Co., 928 F.2d 1167, 1174 (D.C. Cir. 1991)). Judge Rosenthal also noted "[t]he First, Fourth, and Ninth Circuits hold that bad faith is not essential to imposing severe penalties if there is severe prejudice, although the cases often emphasize the presence of bad faith. In the Third Circuit, the courts balance the degree of fault and prejudice." *Id.* at 614–15 (footnotes omitted). The Casebook discusses these conflicting positions on the degree of culpability required to warrant sanctions for spoliation. SCHEINDLIN ET AL., *supra* note 1, at 387–88. For example, in the First Circuit, the spoliation finding is left to the finder of fact and no level of culpability is required to obtain an adverse-inference instruction. *Id.* at 388 (quoting Testa v. Wal-Mart Stores, Inc., 144 F.3d 173, 177 (1st Cir. 1998)).

116. *Rimkus*, 688 F. Supp. 2d at 617 (citing *Condrey*, 431 F.3d at 203 n.8; Escobar v. City of Hous., No. 04–1945, 2007 WL 2900581, at *17–18 (S.D. Tex. Sept. 29, 2007)). Judge Rosenthal further noted that the issue of whether there should be a presumption of relevance or prejudice was not before the court in *Rimkus* because the record contained evidence of the spoliated ESI's contents. *Id.* at 617–18.

The *Rimkus* court instructed the jury that, as a matter of law, the defendants had a duty to preserve certain ESI, which, unlike *Pension Committee*, allowed the jury to decide culpability.[117] This instruction was less severe than in *Pension Committee* because the jury was free to decide whether in fact the alleged offenders deleted ESI to prevent its use in anticipated litigation.[118] Under the *Rimkus* approach, the court only decides whether the evidence is sufficient for a reasonable jury to find intentional destruction.[119] Thereafter, upon hearing all the evidence, the jury would be so instructed to decide whether the alleged offenders intentionally destroyed the evidence.[120] Further, the instruction directed that if the jury found intent, it could, but was not required to, infer that the missing ESI would have been detrimental to the offenders.[121] Judge Rosenthal noted that jury instructions based on presumptions and burden-shifting analyses (as in *Pension Committee*) are unnecessary and confusing.[122]

Judge Rosenthal suggested that the principle of *proportionality* endorsed by the Sedona Conference should guide courts considering sanctions. The Sedona Conference suggested that "[e]lectronic discovery burdens should be proportional to the amount in controversy and the nature of the case. Otherwise, transaction costs due to electronic discovery will overwhelm the ability to resolve disputes fairly in litigation."[123] Judge Rosenthal also noted that the reasonableness of discovery efforts in *Pension Committee*—a $550 million case—is different than the reasonableness of discovery efforts in *Rimkus*, which involved a dispute over noncompetition agreements.[124] In short, the reasonableness of discovery efforts turns on whether those efforts were proportional to the facts and circumstances of the case and whether they were consistent with applicable standards.[125]

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117. *Compare id.* at 646, *with* Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC, 685 F. Supp. 2d 456, 496 (S.D.N.Y. 2010).

118. *Rimkus*, 688 F. Supp. 2d at 646.

119. *Id.* at 644.

120. *Id.* at 646–47.

121. *Id.*

122. *Id.* at 620 & n.21 (quoting Kanida v. Gulf Coast Med. Pers. LP, 363 F.3d 568, 576 (5th Cir. 2004); Olitsky v. Spencer Gifts, Inc., 964 F2d 1471, 1478 (5th Cir. 1992)).

123. *Id.* at 613 & n.8 (quoting SEDONA BEST PRACTICES RECOMMENDATIONS, *supra* note 33, at 17).

124. *Id.* at 613 n.9.

125. *Id.* at 613. In *Chambers v. NASCO, Inc.*, the Supreme Court explained that federal courts have inherent power to punish bad-faith conduct. 501 U.S. 32, 49–50 (1991). Judge Rosenthal concluded that the alleged spoliation in *Rimkus* implicated the court's inherent authority. *Rimkus*, 688 F. Supp. 2d at 612. She consequently cautioned that the Supreme Court's decision in *Chambers* might require the courts to find more than negligent culpability in order to issue sanctions based on their inherent power. *Id.* at 615.

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

In *Connor v. Sun Trust Bank*, Maria Connor, a former communications manager of defendant Sun Trust Bank, alleged that the bank violated the Family and Medical Leave Act (FMLA) by firing her for taking two months of FMLA leave after she adopted a child.[126] Before taking leave, the bank reassigned two of the eight employees that she managed.[127] Although she was based in Atlanta, three of the employees she managed worked in the Enterprise Publication Services (EPS) group in Orlando.[128] While Connor was on leave, one of the three in Orlando (the EPS on-site supervisor) resigned unexpectedly.[129] Connor's supervisor, Leslie Weigel, then initiated discussions with senior management, which led the bank to reassign the two remaining EPS employees to another Sun Trust department in Orlando.[130] Consequently, when the plaintiff returned in 2007, she supervised only three employees based on Atlanta.[131]

Less than a month after returning, Weigel informed the plaintiff that her employment was being terminated.[132] About two weeks later, on February 12, 2007, Weigel sent an e-mail to the bank's senior management team explaining that the decision to fire the plaintiff was based on the reduction in employees that she managed.[133]

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126. 546 F. Supp. 2d 1360, 1364–65 (N.D. Ga. 2008). This Article's discussion of the facts in *Connor* is based on events described in the court's opinion—not on a reading of the underlying record.

127. *Id.* at 1365.

128. *Id.*

129. *Id.*

130. *Id.* Connor alleged that her former employer's interference with her FMLA rights and retaliation for engaging in protected activity violated the FMLA. *Id.* at 1364. She asserted that the resignation of the on-site EPS supervisor in Orlando created a "supervision gap," which she would have filled had she not been on leave. *Id.* at 1366. She alleged that by reducing her job responsibilities and removing all but three of her direct subordinates, Sun Trust failed to restore her to the same position or an equivalent upon her return. *Id.* at 1369–70; *see also* 29 U.S.C. § 2614(a)(1) (2006) (requiring employers to restore employees to the same or an equivalent position). Sun Trust argued that it was not obligated to restore Connor to her former position because it had eliminated the position as a result of a legitimate reorganization and terminated her for reasons unrelated to her FMLA leave. *Connor*, 546 F. Supp. 2d at 1366; *see also, e.g.*, O'Connor v. PCA Family Health Plan, Inc., 200 F.3d 1349, 1353–54 (11th Cir. 2000) (affirming the district court's finding that the defendant was justified in firing the plaintiff because defendant proved that plaintiff would have been discharged regardless of her FMLA leave); Rice v. Sunrise Express, Inc., 209 F.3d 1008, 1010 (7th Cir. 2000) (noting that the employee retains the burden of proving that he or she is entitled to his or her prior employment position); Sylvester v. Dead River Co., 260 F. Supp. 2d 181, 187 (D. Me. 2003) (finding for the employer because the employee failed to counter the employer's evidence that he would have been in the same position had he not been on leave).

131. *Connor*, 546 F. Supp. 2d at 1365–66.

132. *Id.* at 1365.

133. *Id.* at 1366.

Connor then employed an attorney who, before filing suit, sent Sun Trust a letter on February 21, 2007, informing the bank of the potential for litigation and requesting that the bank preserve documents relevant to Connor's termination.[134] On February 22, the bank's in-house counsel issued preservation instructions to several employees, including Weigel, who were likely to possess potentially relevant information.[135] These employees gave the plaintiff responsive documents, but did not provide the February 12 e-mail.[136] In September of 2007, Connor obtained a copy of the e-mail by undisclosed means.[137] She contended that the e-mail supported her theory of an FMLA violation and moved, before trial, to sanction the bank for not producing it.[138] The court found that the bank's failure constituted bad-faith spoliation of evidence and sanctioned the bank with an "appropriate" inference instruction because the spoliation prejudiced the plaintiff.[139] Unfortunately, the *Connor* court did not discuss the form or content of its intended inference instruction.[140]

Sun Trust's e-mail retention system required employees to take overt action to preserve e-mails.[141] The bank's server retained an e-mail for thirty days, after which it would be deleted automatically unless the employee had archived or deleted it previously.[142] Additionally, the bank backed up all e-mails on a daily basis for disaster-recovery purposes, but these backups were recycled every seven to ten days.[143] Thus, on February 21, when the bank received notice of potential litigation, the February 12 e-mail would have remained on the server for about twenty more days and an additional seven to ten days thereafter on the backup tapes, unless someone affirmatively deleted it beforehand.[144]

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134. *Id.*

135. *Id.* at 1367.

136. *Id.* at 1368.

137. *See id.*

138. *Id.* at 1364, 1366.

139. *Id.* at 1366–67.

140. *See id.* at 1377. *Connor* was disposed of without trial. Stipulation of Dismissal with Prejudice at 1, Connor, 546 F. Supp. 2d 1360 (No. 1:07-CV-0650-RLV). Several of my class members said that they were somewhat confused when the opinion referred at one point to instructing on a "presumption" of spoliation and at another to instructing on an "inference" of spoliation. *See Connor*, 546 F. Supp. 2d at 1377. This reaction to the court's unexplained reference to both terms in its opinion is understandable. Law students know the differences between inferences and presumptions, but they likely are unfamiliar with cases like *Pension Committee* or *Rimkus* which show that inference instructions can take various forms and may refer to either or both of these evidentiary devices.

141. *Connor*, 546 F. Supp. 2d at 1367.

142. *Id.*

143. *Id.*

144. *Id.*

Weigel customarily archived her inbox and outbox on a weekly basis.[145] After she was instructed on February 22 to preserve relevant documents, she searched her archives and produced some e-mails, not including the e-mail from February 12.[146] In September 2007, after Connor obtained this particular e-mail and moved for sanctions, Weigel checked her archives again to see if she had previously missed it.[147] She discovered that she had not archived any e-mails between January 1 and February 18, 2007.[148] Consequently, all her e-mails during that period were deleted automatically after thirty days on the server (unless Weigel had deleted it earlier).[149] Sun Trust explained that Weigel's departure from her usual practice was due to the press of business.[150]

As one of the most frequent means of business communication, e-mail is a rich source of discoverable information.[151] E-discovery experts have identified several qualities of e-mail communication that distinguish it from other forms of communication.[152] Oftentimes, e-mails are not edited, proofread, or reviewed.[153] Additionally, the sender may fail to understand that his or her statements are not private or secure and that his workplace statements may be attributed to his employer.[154] Thus, a sender potentially may treat a subject less thoughtfully, more casually, and make statements in an e-mail that he or she would not in letters or memoranda.[155] These generalizations, however, do not apply in every case. For example, Weigel's February 12 e-mail appears to be a business communication made with an appropriate and normal degree of care.[156]

The *Connor* court, applying the five-factor test adopted in the Eleventh Circuit, found that Sun Trust acted in bad faith and spoliated evidence when its employee, Weigel, failed to preserve the February 12 e-mail.[157] The first and

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145. *See id.* at 1366–67.

146. *Id.* at 1367.

147. *Id.* at 1367–68.

148. *Id.* at 1368.

149. *Id.*

150. *See id.* at 1367.

151. *See* BRENT KIDWELL ET AL., ELECTRONIC DISCOVERY § 7.01 (2010).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *See* Connor v. Sun Trust Bank, 546 F. Supp. 2d 1360, 1366 (N.D. Ga. 2008) (quoting Weigel's e-mail to Connor).

157. *Id.* at 1375–77. The court considered the five factors set forth in *Flury v. Daimler Chrysler Corp.*:

> (1) whether the plaintiff was prejudiced as a result of the destruction of evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the defendant acted in good or bad faith; and (5) the potential for abuse if the evidence was not excluded.

Id. (citing Flury v. Daimler Chrysler Corp., 427 F.3d 939, 945 (11th Cir. 2005)).

fourth factors are the primary concerns for spoliation issues, as set forth in the Casebook.[158] The first factor—prejudice—occurs when an innocent party would have relied on relevant evidence to prove its case but for the absence of that evidence due to its destruction.[159] The court compared the direct, irrevocable prejudice in *Flury* with the more speculative prejudice at issue in *Connor* because the evidence in question was obtained eventually.[160] Although the court described the harm to Connor as "attenuated," it still found that she was prejudiced because the defendant's failure to produce or preserve the February 12 e-mail raised the concern that other relevant e-mails existed at the time, which similarly were not produced.[161]

The court focused primarily on the fourth factor regarding the degree of culpability—whether Sun Trust acted in good or bad faith.[162] For this determination, the court balanced the bank's culpability against the prejudice to Connor, which are the primary factors of spoliation.[163] Although there was

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158. *See* SCHEINDLIN ET AL., *supra* note 1, at 387 (explaining that the primary factors are prejudice and culpability). With regard to the three remaining factors, the court found that the second and third factors pulled in opposite directions and the fifth factor's potential for abuse was only slight. *See Connor*, 546 F. Supp. 2d at 1376–77. The contents of the February 12 e-mail had practical importance because it bore directly on the reasons for the plaintiff's termination. *Id.* The court found that the prejudice could be cured, but did not explain how. *Id.* In assessing the fifth factor, the court focused on whether the plaintiff had an adequate opportunity to discover the most reliable and relevant evidence in support of her claims. *Id.* at 1377. It found a slight potential for abuse because of the possibility that the defendant withheld other e-mails relating to the reasons for Connor's discharge. *Id.* Specifically, the court explained that the lack of other e-mails pertaining to Connor's termination could support the bank's case, and Connor did not have the ability to present conflicting evidence. *Id.*

159. *Connor*, 546 F. Supp. 2d at 1376.

160. *Id.* In *Flury*, a products-liability suit arising from the failure of an airbag to deploy, the plaintiff allowed the vehicle to be destroyed before the defendant could examine it. *Flury*, 427 F.3d at 940, 943. As a result, the defendant was irreversibly prejudiced because the most critical physical evidence was unavailable. *Id.* at 947.

161. *Connor*, 546 F. Supp. 2d at 1376.

162. *Id.* at 1376–77. The Eleventh Circuit requires bad-faith conduct to support an adverse-inference instruction. Mann v. Taser Int'l, Inc., 588 F.3d 1291, 1310 (11th Cir. 2009) ("[A]n adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith." (quoting Bashir v. Amtrack, 119 F.3d 929, 931 (11th Cir. 1997) (per curiam))). Although malice is not required, mere negligence will not rise to the level of bad faith. *Id.* (citing *Bashir*, 119 F.3d at 931). In the Eleventh Circuit, the requisite culpability warranting an adverse-inference instruction involves some element of consciousness. *Bashir*, 119 F.3d at 931. The Casebook authors report that recent district court decisions in the Fourth, Ninth, Eleventh, and D.C. Circuits share or lean toward the Second Circuit's position that negligent conduct might warrant an adverse-inference instruction for spoliation. SCHEINDLIN ET AL., *supra* note 1, at 386–88. For example, a 2008 district court decision in the Eleventh Circuit issued an adverse-inference instruction for negligent spoliation in the absence of bad faith. Brown v. Chertoff, 563 F. Supp. 2d 1372, 1381 (S.D. Ga. 2008) (reasoning that bad faith is only one factor and courts, since *Flury*, now balance the degree of culpability with the degree of prejudice).

163. *Connor*, 546 F. Supp. 2d at 1376–77.

no direct evidence of Weigel's intent, the court nevertheless found that she acted in bad faith because she knew the e-mail was relevant and either allowed it to be deleted automatically or affirmatively deleted it.[164] The court concluded that the bank was at least "minimally culpable," and combined with the prejudicial effect, rendered the bank sufficiently blameworthy to warrant imposition of an adverse-inference instruction.[165]

1. The Trigger Date: When the Duty to Preserve Arises

When should Sun Trust have reasonably anticipated litigation, thus triggering the duty to preserve the February 12 e-mail? At the latest, a firm-wide duty to preserve evidence attached on February 21, 2007, when Connor's attorney advised Sun Trust of the likelihood of litigation and requested that relevant documents be preserved.[166] The more difficult question is whether Sun Trust was subject to a duty to preserve the e-mail at the time it was sent or any time before receiving the demand letter.[167] The court did not address this question explicitly. Arguably, the bank's duty to preserve evidence triggered only upon Connor's attorney threatening suit on February 21.[168] The facts do not show that Connor indicated a potential suit before the demand letter.[169]

Courts agree that the duty is triggered when litigation is reasonably anticipated, which may be before an action has commenced.[170] The Sedona

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164. *Id.* Even if Weigel did not affirmatively delete the e-mail, it would have remained in her outbox for another twenty days from the day she was instructed to preserve information. *Id.*

165. *Id.* at 1377. The court also considered the actions of another employee, Sue Johnson, head of human resources, who received the February 12 e-mail but similarly did not produce it. *Id.* at 1368. The court did not focus on Johnson's actions in its spoliation analysis because of her custom to delete messages that did not require any further action on her part. *Id.* Assuming the e-mail required no response, had Johnson followed her usual practice, she would have deleted the e-mail immediately and it would not have been producible because the backup tapes would have been overwritten by the time of the preservation order. *Id.* The court may have found Johnson's actions less culpable than Weigel's because she was only a recipient of the e-mail, rather than its author, who supervised and decided to fire Connor. *Id.*

166. *Id.* at 1366; *see also* Cache La Poudre Foods, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614, 623 (D. Colo. 2007) (explaining that a duty to preserve evidence before litigation occurs with an explicit and unequivocal demand letter); SCHEINDLIN ET AL., *supra* note 1, at 107 ("Properly crafted pre-litigation preservation letters can impose the duty of preservation.").

167. The *Connor* court was unable determine the exact date that the February 12 e-mail was destroyed. *See Connor*, 546 F. Supp. 2d at 1367–68. The court speculated that Weigel may have deleted the e-mail before the end of the thirty-day retention period. *Id.* at 1377.

168. W. Lawrence Westcott II, *The Duty to Preserve Electronic Evidence:* Connor v. Sun Trust Bank, LEXISNEXIS EMERGING ISSUES ANALYSIS, Nov. 2009, at 8 ("This holding disregards precedent requiring some action by Connor indicating likelihood of suit before the duty to preserve can arise.").

169. *See id.* at 3 ("[I]n virtually every case which has considered the issue, there has been at least some indication from the plaintiff that a suit was contemplated.").

170. *See, e.g.*, Silvestri v. Gen. Motors Corp., 271. F.3d 583, 591 (4th Cir. 2001) ("The duty to preserve evidence . . . extends to that period before the litigation when a party reasonably

Conference stated that "[r]easonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation or seriously contemplates initiating litigation."[171] Determining when this duty arises depends on particular facts and circumstances.[172]

Admittedly, expecting every terminated employee to sue his or her former employer is unreasonable. Nonetheless, the discharge of employees soon after

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should know that the evidence may be relevant to anticipated litigation."); Lewy v. Remington Arms Co., 836 F.2d 1104, 1112 (8th Cir. 1988) (dictum) (noting that a company is required to preserve documents it knows or should have known would become material in the future); Doe v. Norwalk Cmty. Coll., 248 F.R.D. 372, 377 (D. Conn. 2007) (stating that a duty to preserve arises "when a party should have known that the evidence may be relevant to future litigation." (quoting Byrnie v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 107 (2d Cir. 2001))). The Federal Circuit recently issued opinions in companion cases to reconcile inconsistent spoliation decisions in the District of Delaware and the Northern District of California. *Compare* Micron Tech., Inc. v. Rambus Inc., 645 F.3d 1311, 1319–26 (Fed. Cir. 2011), *with* Hynix Semiconductor Inc. v. Rambus Inc., 645 F.3d 1336, 1341, 1344–47 (Fed. Cir. 2011). Rambus, a patent owner, had created a document-retention policy as part of its litigation strategy. Micron Tech., Inc. v. Rambus Inc., 255 F.R.D. 135, 139–41 (D. Del. 2009), *aff'd in part, vacated in part*, 645 F.3d at 1332. Pursuant to the policy, Rambus destroyed numerous documents on two "shred" days. *Id.* at 142, 145. The U.S. District Court for the District of Delaware found intentional spoliation and declared several of Rambus's patents unenforceable because the duty to preserve arose when the offender decided to implement a litigation strategy. *Id.* at 150–51. On substantially similar facts, the U.S. District Court for the Northern District of California denied Hynix declaratory relief, ruling that Rambus had not spoliated evidence because the destruction occurred before a duty to preserve arose. *Hynix*, 645 F.3d at 1342–45. In *Micron*, the Federal Circuit reversed the district court's ruling as to the relief granted but affirmed its spoliation finding. *Micron*, 645 F.3d at 1332. It stated that a trigger date depends on an "objective standard, asking not whether the party in fact reasonably foresaw litigation, but whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation." *Id.* In *Hynix*, the Federal Circuit reversed the district court's spoliation finding, concluding that the lower court improperly required a finding of certain immediate litigation to trigger the preservation duty. *Hynix*, 645 F.3d at 1347. The Federal Circuit expressly rejected any requirement of imminency before a duty to preserve arises. *Id.* at 1345–46 ("It would be inequitable to allow a party to destroy documents it expects will be relevant in an expected future litigation, solely because contingencies exist, where the party destroying documents fully expects those contingencies to be resolved.").

171. Working Grp. I, *supra* note 33, at 269.

172. SCHEINDLIN ET AL., *supra* note 1, at 104. In its guidelines, Sedona described circumstances when the duty to preserve does not arise:

> For example, a vague rumor or indefinite threat of litigation does not trigger the duty; nor does a threat of litigation that is not deemed to be reasonable or made in good faith. A lack of credibility may arise from the nature of the threat itself or from past experience regarding the type of threat, the person who made the threat, the legal basis upon which the threat is purportedly founded, or any of a number of similar facts. In addition, the trigger point for a small dispute, where the stakes are minor, might occur at a later point than for a dispute that is significant in terms of business risk or financial consequences. A reasoned analysis of all of the available facts and circumstances is necessary to conclude whether litigation or a government inquiry is or is not "reasonably anticipated." That determination is and should be made by an experienced person who can make a reasoned judgment.

Working Grp. I, *supra* note 33, at 272 (footnote omitted).

they return from engaging in protected activity involves a significantly greater risk of litigation than terminating employees who have not engaged in such activity.[173] The risk of litigation is further heightened when the employee's claims are supported by credible evidence.[174] Although the court denied Connor's motion for summary judgment, it found that she had established a prima facie case of discriminatory retaliation and had presented evidence that Sun Trust's asserted reasons for her termination may have been pretextual.[175]

2. Relevance and Prejudice

The *Connor* court expressed its concerns that the defendant's failure to produce the February 12 e-mail could mean *other relevant e-mails* existed.[176] Because Connor eventually obtained the e-mail, the court could determine its relevance.[177] Unfortunately, other potentially relevant e-mails that may have existed when the duty to preserve arose would have been long deleted at that time—either automatically or by human hand.[178] Therefore, neither the parties nor the court had any way to determine whether other pertinent e-mails existed.[179] Instead, their existence and relevance is mere speculation.[180]

One can reasonably infer the existence of other e-mails only after accepting the proposition that the existence of one relevant e-mail makes the existence of others probable. The strength of this proposition is not immediately obvious. This determination requires further detailed study to answer questions such as, "How often is the discharge of an employee or the elimination of a position the subject of multiple messages within a business organization?"

Fortunately, courts recognize the unseemliness of insisting that a victim of spoliation show prejudice when the wrongdoer has deprived that victim of the

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173. *See, e.g.*, *supra* note 130 (discussing several cases involving suits against employers for alleged FMLA violations).

174. *See* Working Group I, *supra* note 33, at 269.

175. Connor v. Sun Trust Bank, 546 F. Supp. 2d 1360, 1373–75 (N.D. Ga. 2008). Connor relied on three key facts to support her claim of pretext. First, Connor cited the temporal proximity between her discharge and her return from FMLA leave. *Id.* at 1374. Second, she noted that she was discharged while the division she was working in was expanding. *Id.* Third, she argued that Sun Trust did not follow its internal policies governing position elimination. *Id.* at 1374–75. Sun Trust disputed each of these points and the court ruled that the fact issues precluded summary judgment. *Id.*

176. *Id.* at 1376.

177. *See id.* at 1366.

178. *Id.* at 1376.

179. *Id.*

180. Most class members thought it possible or almost probable that other e-mails concerning Connor's discharge may have existed and may have been destroyed. One student, however, expressed reservations about the court's theory of prejudice and noted that Connor may not have been concerned about other potential e-mails because she was able to obtain the February 12 e-mail through undisclosed means. *See supra* note 137.

ability to make such a showing.[181] Under certain circumstances, where the likely content of unavailable information cannot be determined, courts may presume its helpfulness to the innocent party or at least lower the bar for a finding of prejudice.[182] Although the court did not explicitly address presumptions in *Connor*, it appears to have presumed prejudice because the potentially relevant e-mails no longer existed.[183] The court's observation that other e-mails may have existed (and that those hypothetical e-mails may have been relevant) reduced the plaintiff's burden in showing prejudice.[184]

The evidence also justifies the court's inference concerning the existence and the relevance of other e-mails. First, the plaintiff's supervisor sent the February 12 e-mail to members of the bank's senior management team.[185] Therefore, the critical e-mail would have been stored on several e-mail accounts—the supervisor's account and the account of each additional recipient.[186] Sun Trust Bank's failure to produce a copy of the e-mail from any source suggests at least gross negligence and, potentially, an actual conspiracy.[187] A conspiracy would implicate bad faith or willful behavior, as well as provide strong support for proving relevance because conspirators would not cover up irrelevant information.

Second, Weigel departed from her practice of archiving her e-mails during the period of time surrounding Connor's discharge.[188] A sharp departure from routine is naturally suspect, giving rise to an argument that documents lost during the aberrant period were relevant. Although not one of these factors alone provides sufficient evidence of bad faith or intent, they combine to support the trial court's finding that the potential loss of other relevant e-mails prejudiced Connor.[189]

Notably, the court did not focus on the potential harm that could have resulted from the bank's failure to produce the February 12 e-mail if Connor had not come into possession of it through other means. A court could justify sanctioning discovery misconduct to punish and deter the behavior even though no injury resulted; however, courts generally agree that the specific sanction of an adverse-inference instruction must be justified by the impact of

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181. *See, e.g.*, Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 616 (S.D. Tex. 2010).

182. In cases of bad faith or willful spoliation, some courts presume prejudice. *See supra* notes 105–07 and accompanying text.

183. *See Connor*, 546 F. Supp. 2d at 1376.

184. *See id.*

185. *Id.* at 1365–66.

186. *See id.* at 1367 (noting that the e-mail undisputedly was on Weigel's and Johnson's computers at a minimum).

187. *See id.*

188. *Id.* at 1367–68.

189. *See id.* at 1377.

the culpable behavior on discovery and the innocent party's ability to prove his or her claim at trial.[190]

3. Rule 37(e): A Safe Harbor from Spoliation

Although the *Connor* court did not discuss the possible application of Rule 37(e) of the *Federal Rules of Civil Procedure*, whether the rule's safe-harbor provision, which provides an exception to sanctions if the ESI was deleted in good faith, could have protected the defendant from sanctions presents an interesting issue.[191] Rule 37(e) would have afforded no protection to Sun Trust from sanctions if the plaintiff's supervisor intentionally deleted e-mails to avoid discovery.[192] The rule aims to protect parties unable to produce ESI lost as a result of the "routine, good-faith operation" of a computer system—not a loss caused by the act of an individual pursuing a litigation strategy.[193] The Advisory Committee noted that ESI may be deleted for legitimate reasons "that have nothing to do with how that information might relate to litigation," which creates a risk of losing relevant information through no fault of that party.[194]

Could Sun Trust avail itself of Rule 37(e) if the critical e-mail were destroyed automatically after thirty days and not by an employee acting intentionally? The Advisory Committee note states that the safe-harbor provision applies to information that was deleted or altered because of the routine "good-faith" operation of the system that maintained that information.[195] Rule 37(e) does not define "good faith," but the Advisory Committee note states that good faith may require a party to intervene in the routine operation of an information system to preserve information subject to a preservation obligation.[196] The note clarifies that a party does not act in good faith if it "exploit[s] the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve."[197]

February 22 was the latest possible date that a preservation duty could have arisen in *Connor*.[198] Sun Trust issued preservation instructions at that time, but

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190. *See* Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998) (stating that an adverse-inference instruction serves the remedial purpose "of restoring the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party").

191. *Compare* FED. R. CIV. P. 37(e) (providing that a court may not impose sanctions on a party that fails to provide ESI that was maintained by the "good-faith" operation of an ESI system), *with Connor*, 546 F. Supp. 2d at 1376 (concluding that Sun Trust acted in bad faith).

192. *See* FED. R. CIV. P. 37(e).

193. *Id.* 37(f) advisory committee's note.

194. *Id.*

195. *Id.*

196. *See id.*

197. *Id.*

198. *See* Connor v. Sun Trust Bank, 546 F. Supp. 2d 1360, 1366–67 (N.D. Ga. 2008) (noting that counsel for Sun Trust Bank issued a preservation order on February 22).

the opinion does not explain if the bank altered or suspended its policy of automatically deleting all e-mails from the server after thirty days.[199] Thus, even if destruction of the critical e-mail occurred due to routine system operations, the safe-harbor exception would be unavailing.[200] Sun Trust had failed to act affirmatively to prevent the system from destroying discoverable information after a duty to preserve had attached.[201]

Similarly, nothing in the opinion suggests that Sun Trust made any effort after February 22 to preserve the daily disaster-recovery backup tapes, which may have contained discoverable data.[202] Under the bank's policy, these tapes were retained for seven to ten days and then overwritten.[203] Ordinarily, backup tapes are considered to be not "reasonably accessible" because the process of restoring them is costly.[204] As such, the backup tapes might not be subject to a litigation hold.[205] But, if they were also used for information retrieval, they could be considered sources reasonably accessible that must be preserved.[206]

Rule 37(e) does not address the preservation of sources that are not reasonably accessible and the Advisory Committee notes provide little guidance.[207] However, the notes also suggest that the party making the preservation decision on inaccessible sources ought to consider whether the information will likely be discoverable and whether it is otherwise available from reasonably accessible sources.[208] Such decisions are left to the parties, with little guidance from the *Federal Rules of Civil Procedure*.

V. WHERE DO WE GO FROM HERE?

In early 2000, the Advisory Committee on Civil Rules began a process that resulted in the adoption in 2006 of new rules that specifically address the discovery of ESI.[209] The new discovery rules, however, do not focus on issues

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199. *Id.* at 1367.

200. *See* FED. R. CIV. P. 37(e).

201. In *Stevenson v. Union Pacific Railroad Co.*, the railroad had destroyed a relevant voice tape through its routine procedure of recording over voice tapes after ninety days. 354 F.3d 739, 747 (8th Cir. 2004). However, the Eighth Circuit upheld the trial court's determination that the railroad acted in bad faith even though it destroyed the tape under its routine procedure. *Id.*

202. *Connor*, 546 F. Supp. 2d at 1367–68. In *Doe v. Norwalk Community College*, the court found that the defendants' conduct, which included a failure to stop the routine destruction of backup tapes, constituted gross negligence. 248 F.R.D. 372, 380 (D. Conn. 2007).

203. *Connor*, 546 F. Supp. 2d at 1367.

204. *Zubulake I*, 217 F.R.D. 309, 319–20 (S.D.N.Y. 2003).

205. *See id.* ("A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.").

206. FED. R. CIV. P. 37(f) advisory committee's note (stating that whether sources not readily accessible should be preserved "depends on the circumstances of each case").

207. *Id.*

208. *Connor*, 546 F. Supp. 2d at 1366–68.

209. *See supra* notes 24–25 and accompanying text.

concerning the preservation of electronic data or sanctions for its spoliation.[210] Courts continue to be the primary source for the law in these areas.[211]

The Advisory Committee on Civil Rules is now considering whether it should propose new rules governing preservation and sanctions for the spoliation of ESI[212] and recently directed its Discovery Subcommittee to evaluate the merits of a rule-based approach.[213] The Subcommittee thereafter met repeatedly to examine varying rule-based approaches and potential rule amendments.[214] In December 2011, the Advisory Committee requested that the Subcommittee recommend a course of action at the Advisory Committee meeting in March 2012.[215]

After receiving the Committee's directive, the Subcommittee engaged the Federal Judicial Center to study motions in federal court for sanctions based on spoliation; the study found that such motions were relatively rare—especially in cases involving ESI.[216] It also commissioned Chief Counsel Andrea Kuperman's 104-page study on preservation and spoliation issues.[217] Further, the Subcommittee sought to educate itself on a rule-based approach to preservation and sanctions by obtaining insights from individuals and

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210. A leading casebook on civil procedure states:

> The problem of evidence preservation is particularly acute in the case of electronic information because the information is often widely dispersed (an employee may have data not only at work, but on her Blackberry, cell-phone, laptop or home computer) and is constantly changing on account of routine back-up and deletion programs, as well as the day to day manipulation of data in the course of the company's business.

GEOFFREY C. HAZARD ET AL., PLEADING AND PROCEDURE: STATE AND FEDERAL CASES AND MATERIALS 973 (10th ed. 2009).

211. *Id.* at 905.

212. Dec. 2 Memo, *supra* note 7, at 2–6.

213. *Id.*

214. *Id.* at 2–3, 6.

215. Letter from Mark R. Kravitz, Chair, Comm. on Rules of Practice and Procedure, & David G. Campbell, Chair, Advisory Comm. on Civil Rules, to the Honorable Trent Franks, Chairman, Subcomm. on the Constitution, Comm. on the Judiciary (Dec. 9, 2011), *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, PHOENIX, AZ, JAN. 5–6, 2012, at 175, 179 (2012), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2012-01.pdf#pagemode=bookmarks.

216. LEE, *supra* note 5, at 1.

217. Searching a Westlaw database that included all federal court decisions, including appellate, district, and bankruptcy cases, Kuperman examined a representative sample of cases having the most significant discussions of key spoliation issues. Memorandum from Andrea Kuperman to the Discovery Subcomm. 1 & 2 n.1 (Sept. 23, 2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Materials/Case%20Law%20on%20Elements%20of%20a%20Potential%20Preservation%20Rule.pdf. Although the memorandum does not purport to be an exhaustive summary of all the case law in every circuit, it provides the reader with a clear idea of the key issues on which courts differ in spoliation cases. *Id.* at 2 n.1.

organizations knowledgeable in electronic discovery.[218] To that end, the Subcommittee conducted a "mini-conference" in Dallas in September 2011 attended by Subcommittee members, some members of the full Committee, and about twenty-five invited participants—including academics, technology experts, and representatives from the Department of Justice.[219]

To foster discussion, the Subcommittee prepared and supplied attendees with a memorandum, which outlined three general categories of rule-based approaches to preservation and sanction.[220] The memorandum emphasized that the Subcommittee had not decided which of these three approaches it favored—or whether it favored a rule-based approach at all.[221] The memorandum expressed concerns with a rule-based approach to preservation.[222] First, it said that a rule purporting to regulate only pre-litigation *preservation*—a "front end" rule—might raise questions concerning the scope of rulemaking authority under the Rules Enabling Act,

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218. *See, e.g.*, Memorandum from the Honorable David Campbell, Chair, Advisory Comm. on Civil Rules, & Professor Richard Marcus, Assoc. Reporter, Advisory Comm., to Participants in Sept. 9 Mini-Conference on Pres. & Sanctions (June 29, 2011) [hereinafter Agenda], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Materials/Proposed%20Agenda.pdf.

219. Notes from Discovery Subcomm. Mini-Conference (Sept. 9, 2011), *in* ADVISORY COMM. ON CIVIL RULES, WASHINGTON, D.C., NOVEMBER 7–8, 2011, at 127, 129 (2011) [hereinafter Subcomm. Mini-Conference], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-1.pdf.

220. Memo on Pres. & Sanction Issues, *supra* note 6, at 1–2. The draft rules for categories 1 and 2 addressed the preservation of ESI and included three common provisions: (1) a "general duty to preserve" provision requiring persons who "reasonably expect" to be a party to a federal action to preserve "discoverable" information if they become aware of certain facts or circumstances; (2) a provision that would excuse a compliant party from sanctions; and (3) a provision that would authorize courts to "employ" any Rule 37(b) sanction and to inform a jury of a failure to preserve information. *Id.* at 3–4, 14–16, 18, 20–21. The specificity of terms used in the draft rules distinguishes category 1 from category 2. *Id.* at 1. The draft category 1 rule identifies the specific digital data that ordinarily would need to be preserved. *Id.* at 3. Based on the idea that precise rules would provide bright-line guidance, the draft category 1 rule would also (1) identify the acts or events that triggered a duty to preserve; (2) list the kinds of information which, absent agreement or court order, could be "presumptively excluded from the preservation duty"; (3) limit the retroactivity of the duty; and (4) specify the number of custodians whose information must be included if they became aware of certain facts or circumstances. *Id.* at 4–11. The draft category 2 rule addresses preservation more generally. *Id.* at 18. It only lists the alternative acts or events that would trigger a duty to preserve. *Id.* at 18–20. It neither identifies the ESI required to be preserved, nor does it specify how long discoverable evidence should be preserved. *Id.* at 18–19. The Subcommittee also proposed a category 3 rule, which it referred to as a "back end" rule because it does not have any specific preservation provisions and would authorize sanctions only when a party did not "reasonably preserve." *Id.* at 22. The category 3 draft rule listed various factors for a court to consider—such as anticipation of litigation, use of a litigation hold, proportionality concerns, and whether a party sought timely guidance from the court. *Id.* at 22–24.

221. *Id.* at 2.

222. *Id.* at 1.

but that a "back end" *sanctions* rule might not.[223] Second, although the memorandum acknowledged that some preservation obligations might be costly or burdensome, it questioned whether rulemaking would solve those problems.[224]

The mini-conference was highly successful. The views expressed were diverse and controversial.[225] The Advisory Committee's *Report to the Standing Committee*, dated December 2, 2011, summarized the overall discussion of various topics at the mini-conference.[226] For example, participants discussed the potential economic and reputational costs associated with the over-preservation of potentially discoverable information.[227]

After the mini-conference, Subcommittee members discussed the event in two conference calls.[228] One participant argued that further development of case law would prove more effective at dealing with new situations than a rules-based approach.[229] Another participant offered the contrary view that in order to avoid sanctions, many corporations will engage in over-preservation—a problem that can only be solved by crafting a responsive rule.[230] The Subcommittee concluded the conference calls by agreeing to focus on developing a rule to regulate *sanctions*.[231]

The Subcommittee expressed its preference for the category 3 approach following the mini-conference.[232] The Subcommittee agreed that a preservation rule would not be useful considering how difficult developing such a rule would be.[233] At the November 2011 meeting of the Advisory Committee, the Subcommittee sought direction from the full Committee,[234] ordered the Subcommittee to continue pursing all approaches and to report again in March 2012.[235]

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223. *Id.* The Subcommittee considered that even a "back end" sanctions rule, if it impinged too much on pre-litigation decision making regarding preservation, might raise questions concerning rulemaking authority. *Id.*

224. *Id.* (noting that some rules might be too general to be effective, while others would be so specific that they would be inapplicable with changes in technology).

225. Written submissions and materials can be found on the U.S. Courts website. *Dallas Conference*, *supra* note 6.

226. Dec. 2 Memo, *supra* note 7, at 1–6.

227. *Id.* at 3–4.

228. Notes from Sept. 20, 2011 Discovery Subcommittee Call, *in* ADVISORY COMM. ON CIVIL RULES, *supra* note 219, at 111, 111; Notes from Sept. 13, 2011 Discovery Subcommittee Call, *in* ADVISORY COMM. ON CIVIL RULES, *supra* note 219, at 117, 119.

229. Notes from Sept. 20, 2011 Discovery Subcommittee Call, *supra* note 228, at 111.

230. *Id.*

231. *Id.* at 116.

232. Agenda Memorandum for the Sept. 9, 2011 Discovery Subcommittee, *in* ADVISORY COMM. ON CIVIL RULES, *supra* note 219, at 53. 56.

233. *Id.* at 66.

234. *See* Dec. 2 Memo, *supra* 7 note, at 6.

235. *Id.*

Any rulemaking proposal that the Advisory Committee might make will be processed under the Rules Enabling Act, which requires review by the Judicial Conference, the Supreme Court, and Congress.[236] The issues under consideration are controversial and the issuance of new rules could take years.

VI. CONCLUSION

For a host of reasons, *Connor* proved to be useful pedagogically because the spoliation of ESI, even in a garden-variety FMLA lawsuit, raised novel issues of fact, law, and policy.[237] First, the fact issues require complicated inquiries—not only of a party's computer-operations and document-management policies, but also whether, and to what degree, the human behavior that resulted in the destruction of ESI was culpable. Usually, as in *Connor*, the evidence of who did what, when, and why is only circumstantial; inferences must be drawn concerning the intentions or conduct of key players.[238] Second, the decision shows how spoliation can undermine litigation intended to vindicate public policies, such as those embodied in legislation regulating employment.

Third, *Connor* piqued student interest and stimulated classroom discussion because questions raised by the court's rulings and the underlying facts allowed differing perspectives. Class members disagreed, for example, over the level of Sun Trust's culpability, particularly concerning whether Weigel may have concealed the February 12 e-mail to harm Connor's case.[239]

The class was also divided on the court's choice of a proper sanction. Students commented that a judge should select a sanction commensurate with the varying degrees of culpability and prejudice. Because class members generally agreed that the prejudice to the plaintiff was attenuated, no student suggested that the court grant the plaintiff summary judgment because of the spoliation. Although an adverse-inference instruction is itself a harsh sanction, most agreed that it was appropriate because they believed that Weigel intentionally deleted the e-mail, which deserves a deterrent. However, a few

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236. 28 U.S.C. §§ 2072–74 (2006).

237. *See* Connor v. Sun Trust Bank, 546 F. Supp. 2d 1360, 1366–68 (N.D. Ga. 2008).

238. *Id.* at 1366–68, 1376.

239. The *Connor* court concluded that its finding of bad-faith conduct did not require malice—a separate category, which implies an intent to harm the opponent. *Id.* at 1376. In fact, courts are split over what actually constitutes bad faith. *Compare* Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614, 635 (D. Colo. 2007) (defining bad faith as a "dishonest purpose" including "wrongdoing or some motive of self-interest" (quoting Attorneys Title Guaranty Fund v. Goodman, 179 F. Supp. 2d 1268, 1277 (D. Utah 2001))), *with* Stevenson v. Union Pac. R.R. Co., 354 F.3d 739, 747 (8th Cir. 2004) (requiring an indication of a bad-faith intent to obstruct or suppress the truth before issuing an adverse-inference instruction), *and* Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995) (distinguishing bad faith from merely willful conduct), *and* Gumbs v. Int'l Harvester, Inc., 718 F.2d 88, 96 (3rd Cir. 1983) (requiring only actual suppression or withholding of evidence for an adverse-inference instruction).

saw the instruction as draconian and said that the court should have imposed a lesser penalty, such as a small fine.

Fourth, *Connor* illustrates the tremendous choice that trial courts have in their fact-specific approach to questions concerning spoliation and sanctions. The determinations made in that indefinite, highly subjective process are committed to the trial judge's sound discretion and reversed on appeal only for a clear abuse of discretion.[240]

Finally, the case demonstrates who fashions much of the law of spoliation. Discovery rulings are usually not final judgments and thus are not immediately appealable.[241] Because most cases later settle or are disposed of on grounds other than a discovery ruling, few such rulings remain appealable.[242] As a direct consequence, trial courts and magistrate judges make much of the law on discovery.[243] Prime examples are the important discovery rulings by Judge Scheindlin in *Zubulake* and *Pension Committee* and Judge Rosenthal in *Rimkus*.[244] No appellate court had occasion to review the discovery orders in those landmark trial court decisions.

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

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240. Appellate rulings on spoliation may be based on a trial court's findings of fact, or its determinations concerning the applicable legal standard. *See, e.g.*, Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107, 110 (2d Cir. 2002) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." (quoting Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990))); *see also* Flury v. Daimler Chrysler Corp., 427 F.3d 939, 945, 947 (11th Cir. 2005) (reversing and remanding with instructions to enter judgment for defendant after finding the district court's factual assessment to be clearly erroneous).

241. HAZARD ET AL., *supra* note 210, at 905.

242. *Id.*

243. *Id.*

244. *See generally* Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598 (S.D. Tex. 2010); Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC, 685 F. Supp. 2d 456 (S.D.N.Y. 2010); *Zubulake V*, 229 F.R.D. 422 (S.D.N.Y. 2004).