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Spare the Rod, Spoil the Litigator? The Varying Degrees of Culpability Required for an Adverse Inference Sanction Regarding Spoliation of Electronic Discovery

Lauren R. Nichols¹

INTRODUCTION

PARTIES in litigation have a legal duty to preserve evidence that they know is or will be relevant in a foreseeable lawsuit.² This duty exists before the commencement of a proceeding.³ A party that fails to preserve such evidence may face a variety of legal penalties pursuant to a concept called “spoliation.” Spoliation is the concealment, “destruction or significant alteration of evidence, or the failure to preserve property for another’s use . . . in pending or reasonably foreseeable litigation.”⁴ Such action is problematic because it “destroy[s] fairness and justice, for it increases the risk of an erroneous decision” and the expenses of litigation as the parties are left to “attempt to reconstruct the destroyed evidence or to develop other evidence.”⁵

Almost all jurisdictions agree on the general definition of spoliation,⁶ but the law pertaining to the spoliation of evidence is evolving, and

¹ Juris Doctor expected May 2011, University of Kentucky College of Law; Bachelor of Arts in Political Science, *magna cum laude*, December 2007, University of Kentucky. The author wishes to thank her husband, parents, and family for their continued patience, support, and encouragement.

² FED. R. CIV. P. 26(b); *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (“The duty to preserve evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.” (citing *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998))).

³ *Silvestri*, 271 F.3d at 591.

⁴ *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (citation omitted).

⁵ *Cedars-Sinai Med. Ctr. v. Superior Court (In re Interest of Bowyer)*, 954 P.2d 511, 515 (Cal. 1998).

⁶ *See, e.g.*, *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 449-50 (4th Cir. 2004); *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 334 (3d Cir. 1995); *Evans v. Robbins*, 897 F.2d 966, 970 (8th Cir. 1990); *Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 217 (1st Cir. 1982); *Gates Rubber Co. v. Bando Chem. Indus.*, 167 F.R.D. 90, 101 (D. Colo. 1996); *Foster v. Lawrence Mem’l Hosp.*, 809 F. Supp. 831, 836 (D. Kan. 1992); *Vesta Fire Ins. Corp. v. Milam & Co. Constr., Inc.*, 901 So. 2d 84, 93 (Ala. 2004); *Willard v. Caterpillar, Inc.*, 48 Cal. Rptr. 2d 607, 616 (Ct. App. 1995) *overruled by Cedars-Sinai*, 954 P.2d 511; *Baldrige v.*

variation exists between jurisdictions.⁷ Courts have developed a range of remedies to impose on parties guilty of spoliation.⁸ The least onerous of these remedies is a monetary sanction.⁹ For example, a judge may order the guilty party (often referred to as the “spoliating party”) to pay fees or fines or shift the cost for wasted discovery efforts.¹⁰ A more severe alternative is an evidentiary sanction: “[a] judge may order preclusion of evidence, find a waiver of privilege or work-product protection, or issue an adverse inference instruction to the jury at the conclusion of trial.”¹¹ The so-called spoliation inference commands a jury or trier of fact to presume that the missing evidence would have been harmful or adverse to the guilty party.¹² Finally, the most punitive sanction is a default judgment against the spoliating party and a finding that the party or party’s counsel is in contempt of court.¹³

Though limited by procedural constraints,¹⁴ courts inherently have broad power to impose these sanctions.¹⁵ Courts primarily consider two factors as most significant in determining whether sanctions are proper and, accordingly, which sanction is most appropriate.¹⁶ The first factor is the degree of culpability.¹⁷ Culpability is defined on the traditional “sliding scale” encompassing mere negligence, gross negligence, recklessness, bad faith, and intentional misconduct.¹⁸ The second factor is the amount of prejudice caused to the innocent party.¹⁹

As a purely conceptual matter, the doctrine of spoliation attaches to all levels of culpability²⁰ and all types of discovery. Recently, the discovery process has become more complex as many cases now involve discovery

Dir. of Revenue, 82 S.W.3d 212, 222 (Mo. Ct. App. 2002); *Viviano v. CBS, Inc.*, 597 A.2d 543, 550 (N.J. Super. Ct. App. Div. 1991); *Coleman v. Eddy Potash, Inc.*, 905 P.2d 185, 189 (N.M. 1995); *Smith v. Howard Johnson Co.*, 615 N.E.2d 1037, 1038 (Ohio 1993); see also BLACK’S LAW DICTIONARY 1531 (9th ed. 2009).

7 Eric M. Larsson, *Cause of Action for Spoliation of Evidence*, 40 CAUSES OF ACTION 2D 1, § 1 (2009).

8 Panel Discussion, *Sanctions in Electronic Discovery Cases: Views from the Judges*, 78 FORDHAM L. REV. 1, 5-6 (2009).

9 *Id.* at 5.

10 See FED. R. CIV. P. 37.

11 Panel Discussion, *supra* note 8, at 6 (citing FED. R. CIV. P. 37).

12 *Vesta Fire Ins. Corp. v. Milam & Co. Constr.*, 901 So. 2d 84, 93 (Ala. 2004).

13 See Panel Discussion, *supra* note 8, at 6 (citing FED. R. CIV. P. 37(b)(2)).

14 See, e.g., FED. R. CIV. P. 37(a).

15 Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 MICH. TELECOMM. TECH. L. REV. 71, 72 (2004).

16 *Id.* at 76-77.

17 See *id.* at 88.

18 See Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319, 325 (1996).

19 Scheindlin & Wangkeo, *supra* note 15, at 84.

20 *Mead v. Papa Razzi Rest.*, 840 A.2d 1103, 1108 (R.I. 2004).

of electronically stored information.²¹ There are fundamental differences between electronic discovery and its paper-based predecessor. These differences dictate that the culpability standards required for an adverse inference sanction should be altered for electronic discovery. Currently, jurisdictions are divided as to whether negligent destruction of electronic evidence should be sufficient to give rise to an inference of adverse spoliation.²² These positions should be reconciled and courts should issue an adverse jury instruction only against a party whose grossly negligent or intentional behavior caused spoliation of electronic evidence.

Part I of this Note provides a general overview of sanctions that are commonly associated with the spoliation of evidence. Part II consists of an in-depth analysis of the adverse inference jury instruction and the culpability requirements enlisted by each federal circuit. Part III examines how the advent of electronically stored information has complicated spoliation. Part IV outlines a more uniform approach to issuing an adverse inference jury instruction in regard to electronic spoliation. In conclusion, requiring a culpability level of gross negligence would reduce the excessive costs and burdens electronic discovery creates.

I. SPOILIATION OF EVIDENCE SANCTIONS

English courts have imposed sanctions for spoliation of evidence since at least the eighteenth century in order to punish litigants, deter them from engaging in undesirable conduct, or make the injured party whole.²³ In *Armory v. Delamirie*, a chimney sweep found a jewel that he left with a jeweler who subsequently refused to return it.²⁴ The judge accordingly allowed an inference that the jewel was “of the finest water” and instructed jurors that “unless the defendant did produce the jewel . . . they should presume the strongest against him, and make the value of the best jewels the measure of their damages.”²⁵ The jury instruction in *Armory v. Delamirie* has been subsequently cited as historical support for the notion that adverse inference sanctions are designed to be punitive against the guilty party.²⁶

²¹ See George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, RICH. J.L. & TECH., Spring 2007, at 1, 8-9.

²² Compare *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 337-38 (D.N.J. 2004) (negligence is sufficient for an adverse inference), with *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004) (“[T]he inference requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction.”).

²³ See *Armory v. Delamirie*, (1721) 93 Eng. Rep. 664 (K.B.) 664; 1 Str. 505, 505 (one of the earliest known cases involving the issuance of a spoliation adverse inference jury instruction).

²⁴ *Id.*

²⁵ *Id.*

²⁶ See *Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 218 (1st Cir. 1982).

While it is accepted that judges historically have wide latitude to impose such punitive sanctions, the authority for the sanctions is unclear.²⁷ Some argue that an adverse inference sanction is a traditional discovery sanction, while others believe it is a rule of evidence.²⁸ Regardless, most note that “the distinction between the spoliation [inference] as evidence law and the imposition of discovery sanctions may be purely theoretical. . . . [R]ecent judicial opinions indicate there may be a trend towards merging or considering the two doctrines together.”²⁹ Furthermore, the effect of the distinction appears to be minimal as judges can impose punitive sanctions as they see fit.³⁰

When imposing sanctions, however, a court should consider that large fines, shifting costs of discovery, and holding a party in contempt of court may create a substantial financial burden and cause embarrassment for both the party and the attorney involved.³¹ Sanctions that exclude evidence may delay the start of trial or lead to a mistrial,³² and a default judgment sanction ends the litigation altogether.³³ Adverse inferences can also be case-dispositive as they “have a strong tendency to affect the outcome of the trial.”³⁴ As Judge Shira Scheindlin (United States District Court Judge for the Southern District of New York and author of the groundbreaking *Zubulake v. UBS Warburg LLC*³⁵ decisions pertaining to issues surrounding electronic discovery) pointed out, “it is important to note that before imposing any of these blockbuster sanctions, courts routinely give lesser sanctions.”³⁶

Courts attempt to ensure that the harshness of the sanction is in proportion to the severity of the spoliation.³⁷ In *Welsh v. United States*, the Sixth Circuit explained that sanctions should vary in accordance with the culpability of the party charged with spoliation.³⁸ Courts often consider

27 See Larsson, *supra* note 7.

28 JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE § 2.1, at 14 (2010).

29 *Id.* at 15.

30 See *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007); *Morris v. Union Pac. R.R.*, 373 F.3d 896, 901 (8th Cir. 2004).

31 Panel Discussion, *supra* note 8, at 6.

32 Robert D. Brownstone, *Preserve or Perish; Destroy or Drown—E-Discovery Morphs into Electronic Information Management*, 8 N.C. J. L. & TECH 1, 17 (2006).

33 FED. R. CIV. P. 55.

34 Panel Discussion, *supra* note 8, at 6.

35 *Zubulake v. UBS Warburg LLC (Zubulake I, II, III)*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422 (S.D.N.Y. 2004).

36 Panel Discussion, *supra* note 8, at 6.

37 See *Bonds v. District of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996) (When choosing a proper sanction, the court should consider the “‘proportionality’ between [the] offense and sanction.” (citations omitted)).

38 *Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir. 1988).

several factors to ensure this proportionality, including the culpable mindset of the party charged with spoliation, prejudice to the injured party, whether the action caused the evidence to be destroyed or lost, the degree of harm to justice, whether another sanction would be more appropriate, and whether the attorney or the party's misconduct led to the spoliation.³⁹ The trier of fact tends to weigh these factors as they see fit, and often gives the most weight to two factors: the guilty party's culpability and prejudice to the injured litigant.⁴⁰

Judges typically impose the harshest sanctions when the wronged party is greatly prejudiced or the party guilty of spoliation acted intentionally.⁴¹ Generally, courts reserve dismissal or default judgment for cases involving bad faith and willful misconduct.⁴² Jurisdictions are split as to whether negligence is sufficient for adverse inference sanctions even though they are generally outcome determinative. Regardless of the sanction imposed, courts are afforded wide discretion, and appellate courts frequently affirm the sanction as long as it falls "safely within the universe of suitable' alternatives."⁴³ Thus, there are no specific and clear culpability requirements for an adverse inference sanction across jurisdictions.

II. THE SANCTION OF AN ADVERSE INFERENCE JURY INSTRUCTION

The adverse inference jury instruction is a sanction founded on the "common sense" principle that a party is more likely to destroy evidence that is harmful to his or her position than evidence that is beneficial to his or her case.⁴⁴ Before issuing an adverse inference jury instruction, a court must make certain factual findings, including that the evidence at issue existed, the party charged with spoliation possessed or controlled it, the evidence is not available to the injured party, actual spoliation is evident, the need for discovery of the evidence was reasonably foreseeable, the evidence is relevant, and the loss prejudices the injured party.⁴⁵ While most courts also consider the culpability of the party charged with spoliation,

39 MARGARET M. KOESEL & TRACEY L. TURNBULL, *SPOILIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION* 59-60 (2d ed. 2006).

40 *See Shaffer v. RWP Grp., Inc.*, 169 F.R.D. 19, 25 (E.D.N.Y. 1996); *Gates Rubber Co. v. Bando Chem. Indus.*, 167 F.R.D. 90, 102 (D. Colo. 1996) (citation omitted).

41 Panel Discussion, *supra* note 8, at 6 (citation omitted).

42 *See id.* (citations omitted).

43 *Jackson v. Harvard Univ.*, 900 F.2d 464, 469 (1st Cir. 1990) (citation omitted); *see also Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976).

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

45 *See Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 334 (3d Cir. 1995); *Evans v. Robbins*, 897 F.2d 966, 970 (8th Cir. 1990); *Sarmiento v. Montclair State Univ.*, 513 F. Supp. 2d 72, 94 (D.N.J. 2007).

jurisdictions are divided as to the degree of culpability required to issue an adverse inference instruction.⁴⁶

A. Jurisdictions That Require a Culpability Level of Gross Negligence or Intent

Some jurisdictions require a showing that the spoliating party acted with a higher level of culpability than negligence before issuing an adverse inference jury instruction.⁴⁷ While these courts have applied this standard for many years, only recently have they attempted to define culpability that exceeds negligence in the context of sanctions.⁴⁸ Judge Scheindlin recently utilized the following definition of “willful, wanton, and reckless” in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*: conduct where “the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.”⁴⁹ With no consistent definition of willfulness in the past, courts tended to use a general tort definition of intent to judge a party’s behavior, which often led to variance among judges.⁵⁰

The rationale behind limiting the use of an adverse inference to only more culpable spoliation has been explained clearly:

Spoliation involves more than destruction of evidence. Application of the concept requires an intentional act of destruction. Only intentional destruction supports the rationale of the rule that the destruction amounts to an admission by conduct of the weakness of one’s case. The spoliation inference is also said to be an attempt by the courts to penalize acts of

⁴⁶ Compare *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 338 (D.N.J. 2004) (negligence is sufficient for an adverse inference), with *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004) (“[T]he inference requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction.”).

⁴⁷ As is evident in this Note, courts vary in the precise terminology they use when describing culpable conduct surpassing negligence (often using the terms “willfulness,” “intent,” or “bad faith”). The original language of the courts has been used in order to provide accuracy while discussing the cases, but all terms are used intermittently throughout this Note. See *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007) (“intentional”); *Condrey v. Suntrust Bank of Ga.*, 431 F.3d 191, 203 (5th Cir. 2005) (“bad faith or bad conduct”); *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 746 (8th Cir. 2004) (“intentional”); *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) (“bad faith”); *Coates v. Johnson & Johnson*, 756 F.2d 524, 551 (7th Cir. 1985) (“bad faith”); *United States v. Esposito*, 771 F.2d 283, 286 (7th Cir. 1985) (“intentional” and “bad faith”); *S.C. Johnson & Son, Inc. v. Louisville & Nashville R.R.*, 695 F.2d 253, 258 (7th Cir. 1982) (“bad faith”).

⁴⁸ *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of America Sec., LLC*, 685 F. Supp. 2d 456, 463 (S.D.N.Y. 2010).

⁴⁹ *Id.* at 464 (citation omitted) (internal quotation marks omitted).

⁵⁰ *Id.* at 463-64.

bad faith, or that it is based upon public policy, even though not fully supportable in logic. Spoliation of evidence implies a consciousness of guilt so that the presumptions to be drawn from such conduct are not limited to the particular evidence but may pervade the entire case.⁵¹

The jurisdictions following this rule reason that, unlike intentionally destroyed evidence, evidence that is unintentionally destroyed is just as likely to be favorable to the destroyer as it is to be harmful; inferring the evidence is unfavorable, thus, may not be appropriate.⁵² Consequently, the Fifth, Seventh, Eighth, and Tenth Circuits uniformly require intent before the issuance of an adverse inference sanction.⁵³

1. *The Eighth Circuit.*—The Eighth Circuit is the most often cited circuit requiring intentional destruction of evidence before issuing an adverse inference jury instruction.⁵⁴ In *Greyhound Lines, Inc. v. Wade*, a bus company brought an action against a truck driver following an accident in which the driver rear-ended a bus.⁵⁵ The bus was equipped with an electronic control module that stored information relating to regular functioning.⁵⁶ After the accident, but before the complaint was filed, Greyhound sent the module to the manufacturer who erased the stored information.⁵⁷ The court recognized that the “ultimate focus for imposing sanctions for spoliation of evidence is the intentional destruction of evidence indicating a desire to suppress the truth.”⁵⁸ Accordingly, the court refused to issue an adverse inference instruction because Greyhound did not intentionally destroy the evidence.⁵⁹

2. *The Fifth Circuit.*—The Fifth Circuit has expressly adopted the Eighth Circuit’s culpability requirement in issuing the adverse inference instruction against a spoliating party.⁶⁰ In *Vick v. Texas Employment*

51 9 BARRY A. LINDAHL, IOWA PRACTICE SERIES: CIVIL PRACTICE FORMS §16.9 (2010 ed.).

52 *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004).

53 The circuits were examined in the following order pursuant to the strengths of the opinions and the prevalence with which cases from that circuit have been cited.

54 See Panel Discussion, *supra* note 8, at 10 (“The most well-known case requiring a finding of bad faith before allowing an adverse inference instruction is *Stevenson v. Union Pacific Railroad Co.*,” 354 F.3d 739 (8th Cir. 2004)).

55 *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1034 (8th Cir. 2007).

56 *Id.* at 1034.

57 *Id.* at 1034-35.

58 *Id.* at 1035 (citation omitted).

59 *Id.*

60 Panel Discussion, *supra* note 8, at 10 (“Many courts, particularly in the Fifth Circuit, have joined the Eighth Circuit in requiring a finding of bad faith before the imposition of an adverse inference instruction.”); see *Condrey v. Suntrust Bank of Ga.*, 431 F.3d 191, 203 (5th Cir. 2005) (“The Fifth Circuit permits an adverse inference against the destroyer of evidence only upon a showing of ‘bad faith’ or ‘bad conduct.’” (citation omitted)).

Commission, a woman brought an action alleging sexual discrimination after the Texas Employment Commission denied her unemployment compensation benefits during the final stages of her pregnancy and for the six weeks after the delivery of her child.⁶¹ In accordance with the Texas Employment Commission's policy of disposing of inactive records, Vick's records were destroyed before the trial.⁶² The court ruled against Vick's argument for an adverse inference, stating that the "circumstances of the act must manifest bad faith. Mere negligence is not enough, for it does not sustain an inference of consciousness of a weak case."⁶³

3. *The Seventh Circuit.*—The Seventh Circuit also requires intent before granting the adverse inference sanction for spoliation.⁶⁴ In *S.C. Johnson & Son, Inc. v. Louisville & Nashville Railroad Co.*, a manufacturer brought a suit against the railroad company after its products allegedly froze during shipment and harmed the goods.⁶⁵ After inspecting the allegedly frozen products upon arrival and typing up a memorandum regarding the state of the frozen goods, an employee of the manufacturer destroyed his handwritten notes.⁶⁶ The court considered whether the lower court erred when it issued an adverse inference that the destruction of the handwritten notes should imply that the manufacturer's employee did not properly sample the goods.⁶⁷ The appeals court explained:

The [lower] court based this inference on the maxim *omnia praesumuntur contra spoliatorem*, application of which involves a two step process. First the court must be of the opinion from the fact that a party has destroyed evidence that the party did so in bad faith. Only then may the court infer from this state of mind that the contents of the evidence would be unfavorable to that party if introduced in court. The crucial element is not that the evidence was destroyed but rather the reason for the destruction.⁶⁸

The court found that the facts did not support the inference because the employee's actions did not constitute bad faith, indicating that mere negligence is not sufficient culpability for the sanction in the Seventh Circuit.⁶⁹

⁶¹ *Vick v. Tex. Emp't Comm'n*, 514 F.2d 734, 735 (5th Cir. 1975).

⁶² *Id.* at 737.

⁶³ *Id.* (citation omitted) (internal quotation marks omitted).

⁶⁴ See *United States v. Esposito*, 771 F.2d 283, 286 (7th Cir. 1985); *Coates v. Johnson & Johnson*, 756 F.2d 524, 551 (7th Cir. 1985); *S.C. Johnson & Son, Inc. v. Louisville & Nashville R.R.*, 695 F.2d 253, 258-59 (7th Cir. 1982).

⁶⁵ *S.C. Johnson & Son*, 695 F.2d at 255.

⁶⁶ *Id.* at 256.

⁶⁷ *Id.* at 258.

⁶⁸ *Id.*

⁶⁹ *Id.* at 259.

4. *The Tenth Circuit.*—The Tenth Circuit also requires bad faith destruction of evidence before it will issue an adverse inference sanction.⁷⁰ In *Aramburu v. Boeing Co.*, a man sued his employer for alleged discrimination stemming from both his Mexican-American heritage and his disability of carpal tunnel syndrome.⁷¹ The former employee alleged an adverse inference instruction was appropriate against the company because the employer was unable to produce his 1991 employment record.⁷² The Tenth Circuit, recognizing it was setting new precedent for the circuit, relied on the above Eighth, Fifth, and Seventh Circuit decisions to hold that bad faith is generally required for an adverse inference jury instruction.⁷³ The Tenth Circuit explained, “[w]hile this testimony shows that [Aramburu’s supervisor] lost certain of Aramburu’s attendance records for 1991, it does not show that he did so in bad faith”; thus, an adverse inference jury instruction was deemed inappropriate.⁷⁴

B. Jurisdictions That Require Nothing More Than Ordinary Negligence

Several jurisdictions allow adverse inference jury instructions to be imposed even when a party has breached his or her discovery duties through nothing more than ordinary negligence.⁷⁵ A definition of negligence used by Judge Scheindlin is

conduct “which falls below the standard established by law for the protection of others against unreasonable risk of harm.” [Negligence] is caused by heedlessness or inadvertence, by which the negligent party is unaware of the results which may follow from [its] act. But it may also arise where the negligent party has considered the possible consequences carefully, and has exercised [its] own best judgment.

... A failure to conform to this standard is negligent even if it results from a pure heart and an empty head.⁷⁶

An adverse inference instruction for merely negligent spoliation has been premised on the belief that it is “common sense . . . that a party . . . who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy

⁷⁰ See *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997).

⁷¹ *Id.* at 1401.

⁷² *Id.* at 1407.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002).

⁷⁶ *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of America Sec., LLC*, 685 F. Supp. 2d 456, 463-64 (S.D.N.Y. 2010) (alteration in original) (citation omitted).

the document.”⁷⁷ The Second and Ninth Circuits both apply this lesser standard.

1. *The Second Circuit.*—A mere negligence standard is sufficient for an adverse inference instruction in the Second Circuit.⁷⁸ This circuit has expressly held that courts “ha[ve] broad discretion in fashioning an appropriate sanction, including . . . an adverse inference instruction . . . [that] may be imposed where a party has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence.”⁷⁹ For example, in *Residential Funding Corp. v. DeGeorge Financial Corp.*, the court considered the issue of an adverse inference after a party breached its discovery obligation to produce specific emails in time for trial.⁸⁰ The court utilized a three-factor test to determine whether an adverse inference was appropriate: (1) whether “the party having control over the evidence had an obligation to . . . produce it”; (2) whether the lack of production was the result of a “culpable state of mind”; and (3) whether the evidence was “relevant.”⁸¹

The court stated, however, that the “‘culpable state of mind’ factor [can be] satisfied by a showing that the evidence was destroyed ‘knowingly, even if without intent to [breach a duty to preserve it], or negligently.’”⁸² The court rationalized that an adverse inference jury instruction may be appropriate when conduct was merely negligent because each party should “bear the risk” of its own negligent acts.⁸³ The court relied on the words of Magistrate Judge Francis:

[The] sanction [of an adverse inference] should be available even for the negligent destruction of documents if that is necessary to further the remedial purpose of the inference. It makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently. The adverse inference provides the necessary mechanism for restoring the evidentiary balance. The inference is adverse to the destroyer not because of any finding of moral culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss.⁸⁴

⁷⁷ *Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 218 (1st Cir. 1982).

⁷⁸ See, e.g., Panel Discussion, *supra* note 8, at 10.

⁷⁹ *Residential Funding*, 306 F.3d at 101.

⁸⁰ *Id.* at 101-02.

⁸¹ *Id.* at 107 (internal quotation marks omitted).

⁸² *Id.* at 108 (alteration in original) (citations omitted).

⁸³ *Id.*

⁸⁴ *Id.* (quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 75 (S.D.N.Y. 1991) (alteration in original)).

The Second Circuit's three-part test for deciding if negligent behavior should be punished with an adverse inference sanction is influential precedent that has since been adopted by federal district courts in at least two circuits.⁸⁵

2. *The Ninth Circuit.*—The Ninth Circuit joins the Second Circuit in allowing negligence to justify an adverse inference instruction.⁸⁶ In *Glover v. BIC Corp.*, a products liability case, the Ninth Circuit recognized courts' broad power to issue adverse sanctions that they deem appropriate, even without a finding of bad faith.⁸⁷ Numerous district courts in the Ninth Circuit have expressly adopted the Second Circuit's factors to determine whether an adverse inference sanction is appropriate.⁸⁸

C. Trend Towards Sanctioning Mere Negligent Destruction

It appears “[t]he current trend is to sanction even unintentional-but-negligent destruction or untimely productions.”⁸⁹ Despite previous appellate decisions within circuits that required intent or willfulness, several district courts are lowering the requisite level of culpability to negligence.⁹⁰

1. *The Third Circuit.*—The Third Circuit historically required intent on behalf of the party charged with spoliation before granting an adverse inference sanction.⁹¹ For example, in *Brewer v. Quaker State Oil Refining Corp.*, the plaintiff sued his former employer for allegedly violating the Age Discrimination in Employment Act, among other claims.⁹² The district

⁸⁵ *World Courier v. Barone*, No. C 06-3072 TEH, 2007 WL 1119196, at *1 (N.D. Cal. Apr. 16, 2007).

⁸⁶ See *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (granting adverse inference against a party who destroyed evidence that had “potential relevance to the litigation”); *World Courier*, 2007 WL 1119196, at *2 (citing Second Circuit precedent in approving a negligence standard).

⁸⁷ *Glover*, 6 F.3d at 1329.

⁸⁸ *World Courier*, 2007 WL 1119196, at *1.

⁸⁹ Brownstone, *supra* note 32, at 18; see also M. Bryan Schneider, *Annual Survey of Michigan Law*, 52 WAYNE L. REV. 661, 681 (2006) (“The more modern trend, however, is that ‘a finding of ‘bad faith’ or ‘evil motive’ is not a prerequisite to imposition of sanctions for destruction of evidence.”) (quoting *Baliotis v. McNeil*, 870 F. Supp. 1285, 1291 (M.D. Pa. 1994)).

⁹⁰ See *infra* Part II.D.

⁹¹ See *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 334 (3d Cir. 1995) (“The general principles concerning the inferences to be drawn from the loss or destruction of documents are well established.” An “inference arises . . . only when the spoliation or destruction [of evidence] was intentional, and indicates fraud and a desire to suppress the truth, and it does not arise where the destruction was a matter of routine with no fraudulent intent.” (second alteration in original) (citation omitted) (internal citations omitted)).

⁹² *Id.* at 329.

court granted summary judgment in favor of his employer, Quaker State Oil Refining Corp.⁹³ On appeal, the plaintiff argued that the district court erred when it refused to sanction Quaker State for its inability to produce the plaintiff's personnel file from previous years.⁹⁴ The Third Circuit upheld the lower court's decision and recognized "[s]uch a presumption or inference arises . . . only when the spoliation or destruction [of evidence] was intentional, and indicates fraud and a desire to suppress the truth, and it does not arise where the destruction was a matter of routine with no fraudulent intent."⁹⁵

Yet, recent district court decisions in the Third Circuit have held that negligence is sufficient to demonstrate the culpability requirement for an adverse inference sanction.⁹⁶ In *CentiMark Corp. v. Pegnato & Pegnato Roof Management*, the plaintiff requested the production of specific key documents that the defendant failed to produce.⁹⁷ The district court analyzed the requisite level of culpability and determined that although it is not clear whether the Third Circuit intended to require bad faith, "several courts within the Third Circuit have found that it does not, and have found that even negligent destruction of evidence is sufficient to give rise to the spoliation inference."⁹⁸

2. The Fourth Circuit.—The Fourth Circuit also appears to be wavering on which level of culpability is necessary to impose an adverse inference.⁹⁹ In *Vodusek v. Bayliner Marine Corp.*, the Fourth Circuit held that an adverse inference "cannot be drawn merely from . . . negligent loss or destruction of evidence; the inference requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction."¹⁰⁰

In *Hodge v. Wal-Mart Stores, Inc.*, a customer brought a negligence action against the retailer Wal-Mart for damages after mirrors fell off an upper shelf of a display and landed on the customer.¹⁰¹ The customer claimed Wal-Mart deliberately failed to question witnesses to the accident and requested an

93 *Id.*

94 *Id.* at 334.

95 *Id.* (second alteration in original) (citation omitted) (internal quotation marks omitted).

96 *CentiMark Corp. v. Pegnato & Pegnato Roof Mgmt., Inc.*, No. 05-708, 2008 WL 1995305, at *10 (W.D. Pa. May 6, 2008); *Travelers Prop. Cas. Co. v. Cooper Crouse-Hinds, LLC*, No. 05-CV-6399, 2007 WL 2571450, at *7 n.35 (E.D. Pa. Aug. 31, 2007); *Mosaid Techs., Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 337-38 (D.N.J. 2004).

97 *CentiMark*, 2008 WL 1995305, at *4.

98 *Id.* at *10 (citing *Mosaid*, 348 F. Supp. 2d at 337-38).

99 See *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995).

100 *Vodusek*, 71 F.3d at 156.

101 *Hodge*, 360 F.3d at 448.

adverse inference for the spoliation of this evidence.¹⁰² “The district court granted summary judgment to Wal-Mart.”¹⁰³ The Fourth Circuit affirmed the district court’s decision, finding insufficient evidence of the intentional culpability necessary to permit a conclusion that the Wal-Mart employees’ “actions constituted a willful loss of evidence resulting in an abuse of the judicial process, such as would warrant a finding of spoliation.”¹⁰⁴

However, other decisions from the Fourth Circuit have upheld mere negligence as sufficient, even justifying the sanction of dismissal.¹⁰⁵ In *Silvestri v. General Motors Corp.*, a motorist sued the automobile giant General Motors, alleging that his airbag did not deploy as warranted and caused more severe injuries than otherwise would have been suffered during an accident.¹⁰⁶ After the accident, the motorist employed two accident investigators and then turned the wrecked vehicle over to his insurance company, which sold the vehicle to a third party.¹⁰⁷ Thus, the motorist no longer possessed the evidence and was unable to produce the car during discovery.¹⁰⁸ The court dismissed the motorist’s lawsuit as a result, holding that although the “conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case.”¹⁰⁹ A district court within the Fourth Circuit has also expressly relied on the Second Circuit to find that ordinary negligence is sufficient to demonstrate a culpable state of mind for an adverse inference jury instruction.¹¹⁰

3. *The Eleventh Circuit.*—Although the Eleventh Circuit initially adopted the approach taken in the Fifth and Eighth Circuits, requiring bad faith for the issuance of an adverse inference, district courts within the Eleventh Circuit have recently accepted mere negligence.¹¹¹ In *Bashir v. Amtrak*, the father of a pedestrian who was struck and killed by a train in a pedestrian crossing brought a claim for wrongful death against the railroad.¹¹² The railroad company failed to preserve the portion of speed recorder tape that

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 451.

¹⁰⁵ *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001); *Teague v. Target Corp.*, No. 3:06CV191, 2007 WL 1041191, at *2 (W.D.N.C. Apr. 4, 2007).

¹⁰⁶ *Silvestri*, 271 F.3d at 585.

¹⁰⁷ *Id.* at 586-87.

¹⁰⁸ *Id.* at 587.

¹⁰⁹ *Id.* at 593.

¹¹⁰ *Teague*, 2007 WL 1041191, at *2 (citing *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107-08 (2d Cir. 2002)).

¹¹¹ *See* *Brown v. Chertoff*, 563 F. Supp. 2d 1372, 1381 (S.D. Ga. 2008). *But see* *Slattery v. Precision Response Corp.*, 167 F. App’x 139, 141 (11th Cir. 2006); *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997).

¹¹² *Bashir*, 119 F.3d at 930.

would have documented the train's speed at the time of the accident.¹¹³ The Eleventh Circuit considered whether the loss of this tape warranted an adverse inference jury instruction.¹¹⁴ The court held that "under the 'adverse inference rule,' [the court would] not infer that the missing speed tape contained evidence unfavorable to appellees unless the circumstances surrounding the tape's absence indicate bad faith, e.g., that appellees tampered with the evidence."¹¹⁵

In *Slattery v. Precision Response Corp.*, a woman brought an action against her employer under the Equal Pay Act.¹¹⁶ After the employer's alleged failure to produce specific documents during discovery, the female employee filed a motion for an adverse inference jury instruction.¹¹⁷ The court held that an adverse inference for spoliation is permitted in the Eleventh Circuit only on a predication of bad faith, not mere negligence.¹¹⁸

Nevertheless, in *Brown v. Chertoff*, a District Court in the Southern District of Georgia held that mere negligence is sufficient to warrant an adverse inference instruction for spoliation.¹¹⁹ A former employee brought an action for employment discrimination against the Department of Homeland Security.¹²⁰ The employee sought sanctions after the defendant failed to produce notes because the entire file had been destroyed, along with all closed disciplinary case files, as a routine cost saving measure.¹²¹ The court recognized the defendant's actions were merely negligent and did not constitute bad faith but granted an adverse inference sanction because it concluded the level of culpability was only one factor to be weighed against prejudice.¹²²

D. The First Circuit's Approach

The First Circuit takes the most distinctive approach in that it does not expressly require the fact-finder to consider any particular degree of culpability when issuing sanctions.¹²³ Instead, the party requesting the adverse inference must only show the spoliating party "knew of (a)

¹¹³ *Id.* at 930-31.

¹¹⁴ *Id.* at 931.

¹¹⁵ *Id.*

¹¹⁶ *Slattery*, 167 F.App'x at 140.

¹¹⁷ *Id.* at 141.

¹¹⁸ *Id.* (citation omitted).

¹¹⁹ *Brown v. Chertoff*, 563 F. Supp. 2d 1372, 1381 (S.D. Ga. 2008).

¹²⁰ *Id.* at 1374.

¹²¹ *Id.* at 1377.

¹²² *Id.* at 1381.

¹²³ *Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173, 177 (1st Cir. 1998); *Blinzler v. Marriott Int'l, Inc.*, 81 F.3d 1148, 1158-59 (1st Cir. 1996); *Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 218 (1st Cir. 1982).

the claim . . . , and (b) the document’s potential relevance to that claim;” upon that showing, “a trier of fact may (but need not) infer from a party’s obliteration of a document relevant to a litigated issue that the contents of the document were unfavorable to that party.”¹²⁴

Thus, in the First Circuit, courts are free to impose a spoliation inference jury instruction based on the actions of the party charged with spoliation with no regard for the level of culpability.¹²⁵ In *Nation-Wide Check Corp. v. Forest Hills Distributors*, Forest Hill’s attorney allowed records that could have proven an important fact at trial to be destroyed despite being on notice of the pending litigation.¹²⁶ The First Circuit was reluctant to label the attorney’s actions as “bad faith.” But, it held “bad faith” should not be the test for whether adverse inference sanctions should be applied.¹²⁷ Rather, the court rejected a minimum culpability standard and held that “the trier of fact generally may receive the fact of the document’s nonproduction or destruction as evidence that the party which has prevented production did so out of the well-founded fear that the contents would harm him.”¹²⁸

The First Circuit reaffirmed the holding of *Nation-Wide Check Corp.* in *Sacramona v. Bridgestone/Firestone, Inc.* when the court rejected Sacramona’s defense that any destruction was not done in bad faith.¹²⁹ The court recognized that “bad faith is a proper and important consideration But bad faith is not essential. If such evidence is mishandled through carelessness, and the other side is prejudiced, we think that the district court is entitled to consider imposing sanctions”¹³⁰

E. The Sixth Circuit’s Approach

It is uncertain whether negligent actions are sufficient to justify an adverse inference sanction in the Sixth Circuit.¹³¹ In *Welsh v. United States*, the Sixth Circuit considered an action brought under the Federal Tort Claims Act after a man died of bacterial meningitis following brain surgery in a Veterans Administration hospital.¹³² Although claims brought under federal statutes generally are considered federal questions so that courts almost exclusively apply federal law, the Federal Tort Claims Act provides

124 *Testa*, 144 F.3d at 177 (citations omitted).

125 *See Nation-Wide Check Corp.*, 692 F.2d at 218.

126 *Id.* at 219.

127 *Id.*

128 *Id.* at 217.

129 *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 447 (1st Cir. 1997).

130 *Id.* at 447 (citations omitted).

131 *See Adkins v. Wolever*, 554 F.3d 650, 651 (6th Cir. 2009) (en banc) (overruling *Beck v. Haik*, 377 F.3d 624, 641 (6th Cir. 2004), *Nationwide Mut. Fire Ins. Co. v. Ford Motor Co.*, 174 F.3d 801, 804 (6th Cir. 1999), and *Welsh v. United States*, 844 F.2d 1239, 1245 (6th Cir. 1988)).

132 *Welsh*, 844 F.2d at 1239.

that liability should be “determined in accordance with the law of the state where the event giving rise to liability occurred.”¹³³ The court in *Welsh* recognized, therefore, that liability was to be determined under Kentucky law.¹³⁴

The *Welsh* court did not, however, limit its application of state law merely to liability. Instead, the court also applied Kentucky law to the issue of imposing an adverse inference sanction, explaining only that “in this Tort Claims Act case our task, as in diversity [jurisdiction cases],” is to determine and apply the relevant state law.¹³⁵ The court did not explain why it was expanding the congressional command that state law govern liability issues to the issue of sanctions.¹³⁶

The application of state law to determine whether an adverse inference sanction was appropriate became the standard within the Sixth Circuit after *Welsh*. This standard failed to receive further analysis, including examination through the *Erie Railroad Co. v. Tompkins* paradigm which asks whether the law being analyzed is procedural or substantive. Such an analysis is traditionally done in cases brought in federal courts under diversity of citizenship.¹³⁷ For example, in the diversity case of *Nationwide Mutual Fire Insurance Co. v. Ford Motor Co.*, the Sixth Circuit merely cited to *Welsh* in holding that “rules that apply to the spoiling of evidence and the range of appropriate sanctions are defined by state law.”¹³⁸ In the federal question case of *Beck v. Haik*, the Sixth Circuit cited *Nationwide Mutual Fire Insurance* and utilized Michigan state law in determining whether an adverse inference sanction was appropriate.¹³⁹ Thus, the *Welsh* line of cases led to differing results within the Sixth Circuit depending on the state in which the court was located.¹⁴⁰ For instance, Ohio state law requires bad faith, or at least gross negligence, to permit a spoliation inference,¹⁴¹ while

133 *Young v. United States*, 71 F.3d 1238 (6th Cir. 1995) (citing 28 U.S.C. §§ 1346(b), 2674 (1988) and *Friedman v. United States*, 927 F.2d 259, 261 (6th Cir. 1991)).

134 *Welsh*, 844 F.2d at 1243.

135 *Id.* at 1245.

136 *Id.*

137 See generally *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). *Erie* sets forth that cases arising under diversity jurisdiction (those in which the citizen of one state sues the citizen of another seeking damages that exceed a prescribed amount), federal courts are to apply the substantive state law of the state in which the court is sitting. Under this analysis, courts hearing diversity of citizenship cases will first determine whether an issue is a matter of substantive or procedural law. If the matter is determined to be substantive, the court is required to apply the law of the state in which it is sitting, as if it is a state court of that state. If the matter is determined to be a procedural matter, then the court will apply the appropriate federal law.

138 *Nationwide Mut. Fire Ins. Co. v. Ford Motor Co.*, 174 F.3d 801, 804 (6th Cir. 1999).

139 *Beck v. Haik*, 377 F.3d 624, 641 (6th Cir. 2004).

140 Compare *Sullivan v. Gen. Motors Corp.*, 772 F. Supp. 358, 364 (N.D. Ohio 1991), with *Roskam Baking Co. v. Lanham Mach. Co.*, 71 F. Supp. 2d 736, 749 (W.D. Mich. 1999).

141 *Sullivan*, 772 F. Supp. at 364.

in Michigan, mere negligence is sufficient to allow an adverse inference jury instruction.¹⁴²

In *Adkins v. Wolever*, the Sixth Circuit revisited the law created in *Welsh*.¹⁴³ In *Adkins*, a Michigan prisoner sued a prison corrections officer for alleged assault under 42 U.S.C. § 1983.¹⁴⁴ Video footage was made relating to the incident, and shortly after the assault, prison officials took color photographs of the prisoner's injuries.¹⁴⁵ Prison officials, however, were unable to produce either the footage or the original colored photographs during discovery, claiming they had been lost or destroyed.¹⁴⁶ The prisoner asked the court to instruct the jury on adverse inference because the documents could not be produced.¹⁴⁷ The district court applied Michigan state law and refused to give the adverse inference instruction.¹⁴⁸ The plaintiff prisoner appealed to the Sixth Circuit.¹⁴⁹

During the Sixth Circuit's en banc review, the court was cognizant of the fact that it was the only circuit to apply state law to federal cases brought under either diversity or federal question claims and reversed the *Welsh* line of cases.¹⁵⁰ The en banc court recognized that a federal court is not bound by state laws when imposing sanctions for the spoliation of evidence.¹⁵¹ The court explained it was making this change for two reasons: "First, the authority to impose sanctions for spoliated evidence arises . . . 'from a court's inherent power to control the judicial process.' Second, a spoliation ruling is evidentiary in nature and federal courts generally apply their own evidentiary rules in both federal question and diversity matters."¹⁵² While the court created a new standard within the Sixth Circuit that is more in line with the other circuits, it failed to define the level of culpability it will require for an adverse inference instruction.¹⁵³ Instead, the court merely hinted that the severity of the spoliation sanction may correspond to the level of culpability and "the party's fault."¹⁵⁴

¹⁴² *Roskam Baking Co.*, 71 F. Supp. 2d at 749.

¹⁴³ *Adkins v. Wolever*, 554 F.3d 650, 651 (6th Cir. 2009).

¹⁴⁴ *Id.* at 651-52.

¹⁴⁵ *Id.* at 652.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *See Adkins v. Wolever*, 520 F.3d 585, 587-88 (6th Cir. 2008), *vacated*, 554 F.3d 650 (6th Cir. 2009).

¹⁵⁰ *Adkins*, 554 F.3d at 652 ("In contrast to our persistent application of state law in this area, other circuits apply federal law for spoliation sanctions." (citations omitted)).

¹⁵¹ *See id.* at 651.

¹⁵² *Id.* at 652 (citations omitted).

¹⁵³ *Id.* at 652-53.

¹⁵⁴ *Id.*

After *Adkins v. Wolever*, the district courts in the Sixth Circuit are left to speculate as to the level of culpability the Sixth Circuit will adopt.¹⁵⁵ In *Dilts v. Maxim Crane Works*, the Eastern District of Kentucky recognized a current split among the districts within the Sixth Circuit with regard to the level of culpability required.¹⁵⁶ For example, it appears as though the Eastern and Western Districts of Tennessee and the Eastern District of Michigan align more with the reasoning of the Second Circuit in allowing an adverse inference for merely negligent conduct.¹⁵⁷ Meanwhile, the Southern District of Ohio requires bad faith before imposing an adverse inference sanction.¹⁵⁸

III. THE CIRCUIT STANDARDS ON CULPABILITY IN RELATION TO THE DIGITAL WORLD

As evidenced, there is a sharp divide among circuits regarding the level of culpability required for an adverse inference jury instruction. To complicate matters further, the nature of discovery has changed in light of technological development.¹⁵⁹ The phenomenon of electronic discovery has entirely altered the practice: “While 20 years ago [personal computers] were a novelty and email did not exist, [in 2002,] by some estimates more than 90 percent of all information is created in an electronic format.”¹⁶⁰ Discovery issues have become more complex because of the “significant differences between paper and electronic information in terms of structure, content and volume.”¹⁶¹

The most significant difference between traditional and electronic discovery (also called e-discovery) is the sheer quantity of electronically

¹⁵⁵ *Dilts v. Maxim Crane Works, L.P.*, No. 07-38, 2009 WL 3161362, at *3 (E.D. Ky. Sept. 28, 2009).

¹⁵⁶ *Dilts*, 2009 WL 3161362, at *3. In *Dilts*, the court did not resolve which level of culpability the Eastern District of Kentucky will apply. Instead, the court considered first the threshold question of whether “*Dilts* has produced sufficient evidence that *Maxim’s* conduct allegedly leading to the spoliation of the evidence at issue was at least negligent.” *Id.* The court held that *Maxim’s* actions were not negligent and thus did not meet any threshold requirement for culpability to grant an adverse inference sanction. *Id.* at *3-4.

¹⁵⁷ See *Smith v. USF Holland, Inc.*, No. 3:07-CV-150, 2009 WL 2170136, at *6 (E.D. Tenn. July 20, 2009); *BancorpSouth Bank v. Herter*, 643 F. Supp. 2d 1041, 1059-60 (W.D. Tenn. 2009); *Forest Labs., Inc. v. Caraco Pharm. Labs., Ltd.*, No. 06-CV-13143, 2009 WL 998402, at *5-6 (E.D. Mich. Apr. 14, 2009).

¹⁵⁸ *In re Nat’l Century Fin. Enters., Inc.*, No. 2:03-md-1565, 2009 WL 2169174, at *3 (S.D. Ohio July 16, 2009).

¹⁵⁹ THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 4 (2005).

¹⁶⁰ *Id.* at 1.

¹⁶¹ *Id.* at iii.

stored information and the difficulty of deleting it.¹⁶² Because of the vast storage capacity of electronic systems, more records may be saved, and retrieving those records can be expensive when new technology renders the prior system obsolete.¹⁶³ To place the volume into perspective, a single corporation could possess more than 10,000 backup tapes of potentially relevant information.¹⁶⁴ Each tape can hold as much as one trillion bytes (one terabyte), which, if converted to paper format, means each tape would be equivalent to a stack of paper that is 200 miles high.¹⁶⁵ Furthermore, the difficulty of retrieving documents that are stored in a variety of locations and are complicated to access increases the cost of discovery.¹⁶⁶ Because of the sheer volume of electronic data, the traditional method of manual searching is almost impossible.¹⁶⁷ The change in storage format from paper to electronic data forces most parties to rely on statistical searches of their data using keyword and language searches to locate relevant documents.¹⁶⁸

Another major difference between traditional and electronic discovery is that the manner and content of the electronic data is constantly changing, leading to the inadvertent storage of multiple drafts or to metadata disputes, which are uncommon with tangible discovery.¹⁶⁹ Additionally, the location of the data can be on a variety of electronic media, including a traditional office desktop computer, a home computer, personal digital assistants (PDAs), laptops, flash drives, “telephone calls placed over the internet through voice over Internet Protocol (VoIP), smart cards,” email, outside or internet data store facilities, and cell phones.¹⁷⁰

These differences between paper and electronic data cause concern when courts treat electronic discovery and traditional discovery similarly in terms of sanctions. For example, “traditional spoliation doctrine assumes” that the failure to produce, or the destruction of, evidence is indicative of intent to withhold adverse information.¹⁷¹ However, this assumption is not necessarily true of electronic discovery given that it is stored differently

¹⁶² *Id.* at 3.

¹⁶³ *Id.* at 4.

¹⁶⁴ JAMES N. DERTOUZOS ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, THE LEGAL AND ECONOMIC IMPLICATIONS OF ELECTRONIC DISCOVERY: OPTIONS FOR FUTURE RESEARCH 1-2 (2008), available at http://www.rand.org/pubs/occasional_papers/OP183.

¹⁶⁵ *Id.*

¹⁶⁶ THE SEDONA CONFERENCE, *supra* note 159, at 4-5.

¹⁶⁷ See Paul & Baron, *supra* note 21, at 48.

¹⁶⁸ See *id.* at 47.

¹⁶⁹ Metadata is “information about the document or file that is recorded by the computer to assist the computer and often the user in storing and retrieving the document or file at a later date. . . . Much metadata is not normally accessible by the computer user.” THE SEDONA CONFERENCE, *supra* note 159, at 5.

¹⁷⁰ DERTOUZOS ET AL., *supra* note 164, at 1-2.

¹⁷¹ Thomas Y. Allman, *Defining Culpability: The Search for a Limited Safe Harbor in Electronic Discovery*, 2 FED. CTS. L. REV. 65, 70 (2007).

and is easily lost as a matter of efficient recycling of data or an uninformed user's oversight.¹⁷² Because of these differences and the significant potential problems they pose for spoliation in electronic discovery, resolving this issue has become important.¹⁷³ In 2002, individuals throughout the legal profession came together at a meeting, known as the Sedona Conference, to discuss these differences and attempt to resolve the problems posed by electronic discovery.¹⁷⁴ The Sedona Conference recommendation pertaining to sanctions was that

[s]anctions, including spoliation findings, should only be considered by the court if, upon a showing of a clear duty to preserve, the court finds that there was an intentional or reckless failure to preserve and produce relevant electronic data and that there is a reasonable probability that the loss of the evidence has materially prejudiced the adverse party.¹⁷⁵

In response, the Civil Rules Advisory Committee amended the Federal Rules of Civil Procedure in 2006 and added what is now Rule 37(e), which provides that courts should not impose sanctions "for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."¹⁷⁶ Although earlier drafts expressly included a negligence standard and then, in an alternative version, a reckless or intentional culpability standard, the final version omitted this language to allow the courts "flexibility" in issuing sanctions when the injured party is severely prejudiced.¹⁷⁷ The drafters included a "good faith" standard because it was their belief that "[g]ood faith lies at a point intermediate between negligence and recklessness."¹⁷⁸ Although good faith is not defined by the text of the rule or in the official comments, one drafter summarized the concept: good faith "assumes [the party] did not deliberately use the system's routine destruction functions. 'If you know it will disappear and do nothing, that is not good faith.' . . . 'The line is conscious awareness the system will destroy information.'"¹⁷⁹ While this language is an attempt to provide guidance, the use of a "good faith" standard is problematic because the "flexible" language has only created

¹⁷² *Id.* at 70-71 (2007).

¹⁷³ *See id.* at 71-72.

¹⁷⁴ *See* THE SEDONA CONFERENCE, *supra* note 159, at ii.

¹⁷⁵ *Id.* at 13.

¹⁷⁶ FED. R. CIV. P. 37(e).

¹⁷⁷ *See* Memorandum from Honorable Lee H. Rosenthal, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Honorable David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure 85 (May 27, 2005), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf>.

¹⁷⁸ CIVIL RULES ADVISORY COMM., MINUTES OF THE APRIL MEETING 42 (D.C. Meeting Apr. 14-15, 2005), *available at* www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRACo405.pdf; *see also* Memorandum, *supra* note 177, at 18.

¹⁷⁹ CIVIL RULES ADVISORY COMM., *supra* note 178, at 42.

discovery disputes over what constitutes “routine, good-faith operation,” and courts are forced to spend a great deal of time sorting out the definition of good faith.¹⁸⁰

This failure to define a clear level of culpability within Federal Rule 37(e) appears to be at odds with the purpose of the amendments to the Federal Rules of Civil Procedure, which were designed to provide national uniformity in the civil rules regarding electronic discovery and prevent “uncertainty, expense, delays, and burdens.”¹⁸¹ Further, the issue becomes more muddled for the courts because Federal Rule 37(e) provides an additional exception to this “good faith routine operation” standard if there are “exceptional circumstances,” but the rule does not provide any explanation or example of what constitutes an exceptional circumstance.¹⁸² Finally, there is evidence that the courts have “imposed sanctions for considerably less-culpable conduct than [Federal Rule 37] was meant to target.”¹⁸³ Thus, while Federal Rule 37(e) attempts to address the problems associated with the destruction of electronic evidence, it is clear that Federal Rule 37(e) fails to eliminate the different levels of scienter various circuits require before imposing an adverse inference sanction.

IV. A MORE UNIFORM APPROACH IS NECESSARY

Discovery is a fundamental cornerstone of the civil judicial process in the United States,¹⁸⁴ and with the advent of electronic communications and storage, the way in which attorney and clients conduct discovery appears to be forever changed.¹⁸⁵ Despite appeals to alter the spoliation standard for electronic discovery, circuits continue to apply the same standard as that applicable to paper discovery.¹⁸⁶ Even the legislative attempt to achieve a national approach for electronic discovery, as discussed above, failed to create a uniform approach, among *all* circuits, regarding the level of culpability required for the imposition of sanctions.¹⁸⁷

180 Ryan J. Reaves, *The Dangers of E-Discovery and the New Federal Rules of Civil Procedure*, 3 Okla. J. L. & Tech. 32, 38-39 (2007).

181 COMM. ON RULES OF PRACTICE & PROCEDURE, SUMMARY REPORT OF THE JUDICIAL CONFERENCE 83 (September 2005), available at www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2005.pdf.

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

183 Andrew Hebi, *Spoliation of Electronically Stored Information, Good Faith, and Rule 37(e)*, 29 N. ILL. U. L. REV. 79, 85 (2008).

184 DERTOUZOS, *supra* note 164, at 1.

185 *See id.* at 1-2.

186 THE SEDONA CONFERENCE, *supra* note 159, at 1.

187 *See id.* at 7.

An adverse inference sanction has a strong influence on the outcome of the case.¹⁸⁸ Considered one of the most severe sanctions, “most judges are keenly aware . . . that the adverse inference instruction can have a devastating impact on the party” accused of spoliation.¹⁸⁹ Because these sanctions have a serious impact on the determination of the case, courts should consider that the nature of discovery has drastically changed.¹⁹⁰ A strict application of *stare decisis* ignores the truth that “assumptions about how potential evidence is lost in the world of tangible things do not necessarily apply in an electronic environment.”¹⁹¹

Because of the wide range of standards used to issue an adverse inference sanction, litigants feel forced to decide between needlessly preserving excessive amounts of electronically stored information at great burden and expense or later having to compromise lawful claims or defenses.¹⁹² This dilemma and “the uncertainty surrounding the culpability issue threaten[] to impede and prevent the adoption of rational business policies.”¹⁹³

As the intent of Federal Rule 37(e) and the Sedona Principles suggest, all courts should alter the culpability standard for an adverse inference jury instruction to require at least grossly negligent conduct in the context of electronic discovery. Judge Scheindlin recently utilized the following definition of gross negligence: “a failure to exercise even that care which a careless person would use. . . . [G]ross negligence is something more than negligence and differs from ordinary negligence only in degree, and not in kind.”¹⁹⁴

In addition to achieving uniformity and balance among courts, the requirement of gross negligence would alleviate some pressure on parties to spend an inordinate amount of resources in an attempt to avoid sanctions.¹⁹⁵ The vast amount of electronic data, the possible difficulty of recovery, various storage locations, and the recycling nature of the data storage all increase the potential for loss, destruction, or overlooking of electronic discovery that is not as prevalent with traditional discovery.¹⁹⁶ Because of this, many advocate for a willful or intentional level of culpability to alleviate the fear of inadvertently destroying evidence.¹⁹⁷ They believe

188 See *Zubulake v. UBS Warburg, LLC (Zubulake IV)*, 220 F.R.D. 212, 219-20 (S.D.N.Y. 2003).

189 Panel Discussion, *supra* note 8, at 7-8.

190 See THE SEDONA CONFERENCE, *supra* note 159, at 1-3.

191 See Allman, *supra* note 171, at 70 (citation omitted).

192 *Id.* at 72.

193 *Id.* (citation omitted).

194 *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of America Sec., LLC*, 685 F. Supp. 2d 456, 464 (S.D.N.Y. 2010) (citations omitted) (internal quotation marks omitted).

195 See Allman, *supra* note 171, at 72.

196 See THE SEDONA CONFERENCE, *supra* note 159, at 7.

197 See Memorandum, *supra* note 177, at 83-89.

that because an adverse inference sanction is often determinative of the outcome of a lawsuit, such a strong sanction should be reserved for truly culpable actions.¹⁹⁸ However, a requirement of gross negligence achieves the same goal because the heightened level of culpability would prevent a party from losing her case merely because of thoughtless conduct.

Furthermore, a gross negligence standard is more practical. As proponents of a negligence standard point out, requiring the moving party to establish willful destruction is not always feasible in the digital world.¹⁹⁹ In regards to electronic data, a gross negligence standard is more in line with the current application of the law. Even jurisdictions who require willful or intentional misconduct recognize that “[i]ntent is rarely proved by direct evidence, and a district court has substantial leeway to determine intent through consideration of circumstantial evidence, witness credibility, motives of the witnesses in a particular case, and other factors.”²⁰⁰ A gross negligence standard is consistent with the notion that courts should have considerable latitude to determine whether a party acted with the required level of culpability, and it does not limit courts’ inherent discretion as much as an intentional or willful standard. A gross negligence standard strikes the balance between the varying degrees of culpability.

CONCLUSION

Despite the Sedona Conference findings and the reasoning behind Rule 37(e), courts continue to apply traditional standards from tangible discovery to the world of electronic discovery.²⁰¹ Imposing a gross negligence standard of culpability would help alleviate the excessive cost and unique burdens that electronic discovery often creates and would provide uniformity among the courts. All circuits should adopt this approach with regard to electronic discovery.

198 See Panel Discussion, *supra* note 8, at 7-8.

199 See Memorandum, *supra* note 177, at 83-89.

200 *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007) (quoting *Morris v. Union Pac. R.R.*, 373 F.3d 896, 902 (8th Cir. 2004)).

201 See *supra* Part II.

