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Spoliation in a Digital World: Proposing a New Standard of Culpability in Massachusetts for an Adverse Inference Instruction

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SPOLIATION IN A DIGITAL WORLD: PROPOSING A NEW STANDARD OF CULPABILITY IN MASSACHUSETTS FOR AN ADVERSE INFERENCE INSTRUCTION

I. INTRODUCTION

Since the advent of the computer, electronic discovery has been an integral part of litigation.[1] Only recently have the Federal Rules of Civil Procedure incorporated the use of "electronically stored information" ("ESI").[2] The courts, however, have addressed electronic discovery issues for many years, with the first comprehensive discussion in 2003.[3] The amendments to the Federal Rules of Civil Procedure (the "Rules") were a response to the comprehensive discussions of the issue in both the court cases and the guidelines developed by professional conferences.[4] Accordingly, the issues surrounding the growth of electronic discovery are continuously developing in the courts and are a source of increasing

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[1] *See* Marjorie A. Shields, Annotation, *Electronic Spoliation of Evidence*, 3 A.L.R. 6th 13, § 2 (2005) (discussing relationship between increased use of technology and scope of information potentially subject to discovery); Daniel Renwick Hodgman, Comment, *A Port in the Storm?: The Problematic and Shallow Safe Harbor for Electronic Discovery*, 101 NW. U. L. REV. 259, 259-60 (2007) (summarizing history and policy of discovery as it relates to development of technology).

[2] *See, e.g.*, FED. R. CIV. P. 16, FED. R. CIV. P. 26, FED. R. CIV. P. 34, FED. R. CIV. P. 45 (identifying types of electronically stored information that are subject to discovery by parties); *see also* Lloyd B. Chinn, *Federal Rules Leave More Questions than Answers: A Look Back at Court Decisions Shows New Legal Frontier Ripe for Exploration*, N.Y.L.J., Nov. 5, 2007, at 2 (describing amendments to Federal Rules of Civil Procedure relating to electronic discovery).

[3] *See* Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309 (S.D.N.Y. 2003); Zubulake v. UBS Warburg LLC (*Zubulake II*), 230 F.R.D. 290 (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 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). *Zubulake I* through *Zubulake V* were a series of opinions written by Judge Sheindlin that set out a series of guidelines and extensive analysis of the most critical issues in electronic discovery. *See* William R. Maguire & Derek J.T. Adler, *Setting Reasonable Limits in the Digital Era*, at 188 (P.L.I. Litigation and Administrative Practice Course Handbook Series No. 8511, 2006).

[4] *See* Louis R. Pepe & Jared Cohane, *Document Retention, Electronic Discovery, E-Discovery Cost Allocation and Spoliation of Evidence: The Four Horsemen of the Apocalypse in Litigation Today*, 80 CONN. B.J. 331, 342 (2006) (discussing proposed amendments to the Rules relating to electronic discovery).

controversy.[5]

An important discovery issue that is not exclusive to electronic discovery is spoliation of evidence and the appropriate sanctions that should be applied to spoliating parties.[6] Spoliation is defined as "the destruction, significant alteration, or non-preservation of evidence relevant to pending or reasonably foreseeable litigation."[7] The most used and controversial sanction for the spoliation of evidence is an adverse inference instruction to the jury, also known as a spoliation inference.[8] Throughout the country, the circuit courts and federal district courts remain split as to what level of culpability is required for a spoliation inference—mere negligence or bad faith.[9]

Part II of this Note will discuss the history and development of electronically stored information and digital databases, and its relation to the practice of litigation.[10] Part III will examine the circuit split regarding the requisite level of culpability for a spoliation inference, and will further

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[5] *See* Marjorie A. Shields, Annotation, *Discovery of Deleted E-mail and Other Deleted Electronic Records*, 27 A.L.R. 6th 565, §§ 4-5 (2007) (explaining discoverability of electronic documents and courts' rulings on the issue).

[6] *See* James T. Killelea, Note, *Spoliation of Evidence: Proposals for New York State*, 70 BROOK. L. REV. 1045, 1045-46 (2005) (describing spoliation of evidence and its emergence as issue in civil litigation). Spoliation is the destruction or intentional withholding of relevant evidence that a party has the duty to preserve and produce. *Id.* at 1049.

[7] JAY E. GRENIG & WILLIAM C. GLEISNER, 1 eDISCOVERY & DIGITAL EVIDENCE § 11:2 (2007) (defining spoliation of evidence).

[8] Killelea, *supra* note 6, at 1056 (discussing use of adverse inference instruction as sanction for spoliation of evidence).

[9] *Compare* Residential Funding Corp. v. DeGeorge Fin.Corp., 306 F.3d 99, 108 (2d Cir. 2002) (holding negligence sufficient for adverse inference instruction for failure to produce relevant e-mails), World Courier v. Barone, No. C 06-3072 TEH, 2007 WL 1119196, at *2 (N.D. Cal. Apr. 16, 2007) (holding negligence sufficient for adverse inference instruction for destruction of hard drive), Cortes v. Peter Pan Bus Lines, Inc., 455 F. Supp. 2d 100, 103 (D. Conn. 2006) (holding negligence sufficient for adverse inference instruction for destruction of incident report), Douglas v. Ingram Barge Co., No. Civ. A 3:04-0383, 2006 WL 1455695, at *3 (S.D. W. Va. Mar. 24, 2006) (holding negligence sufficient for adverse inference instruction for repainting and resurfacing dock where accident occurred), and Creative Res. Group of N.J., Inc. v. Creative Res. Group, Inc., 212 F.R.D. 94, 106-07 (E.D.N.Y. 2002) (holding negligence sufficient for adverse inference instruction for not producing vital documents), *with* Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1035 (8th Cir. 2007) (holding bad faith or gross negligence necessary for adverse inference instruction for electronic control module), King v. Ill. Cent. R.R., 337 F.3d 550, 556 (5th Cir. 2003) (holding plaintiff "must show that [the defendant] acted in 'bad faith' to establish that it was entitled to an adverse inference."), Minter v. Prime Equip. Co., No. CIV-02-132-KEW, 2007 WL 2703093, at *3-4 (E.D. Okla. Sept. 14, 2007) (holding bad faith or gross negligence necessary for instruction on non-production of inspection records), and Smith v. Am. Founders Fin., Corp., 365 B.R. 647, 681 (S.D. Tex. 2007) (holding bad faith or gross negligence necessary for instruction on destruction of documents held as trustee).

[10] *See infra* Part II.

analyze the state of the law in Massachusetts.[11] Finally, Part IV will propose a new standard of negligence for a spoliation inference in Massachusetts courts.[12]

DISCOVERABILITY OF ELECTRONIC INFORMATION AND DIGITAL DATABASES

Courts have been forced to address electronic discovery issues since corporations and individuals began storing information on computers.[13] While the courts treat electronically stored information no differently than paper documents in terms of its discoverability, electronic discovery presents many issues that are fundamentally different than those associated with traditional discovery.[14]

A. A Brief Overview of Digital Databases

In today's increasingly electronic world, more than ninety percent of all business records are digital, and oftentimes are never committed to paper.[15] Almost all of those records are stored on digital databases, which are organized to facilitate the rapid search and retrieval of data.[16] These databases contain not only the business documents traditionally kept by companies, such as spreadsheets and reports, but also other forms of communication—most importantly, e-mails.[17] There are five traditional categories of data: (1)active, online data; (2) near-line data; (3) offline storage/archives; (4) backup tapes; and (5) erased, fragmented or damaged data.[18] With such an enormous amount of data stored in these databases

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[11] *See infra* Part III.

[12] *See infra* Part IV.

[13] *See* Timothy J. Chorvat, *E-Discovery and Electronic Evidence in the Courtroom*, BUS. L. TODAY, Sept./Oct. 2007, at 13; Jason Krause, *The Paperless Chase*, ABA JOURNAL MAGAZINE, Apr. 2005, *available at* http://www.abajournal.com/magazine/the_paperless_chase; GRENIG & GLEISNER, *supra* note 7, at § 7:18; *see also* Marjorie A. Shields, Annotation, *Discovery of Deleted E-mail and Other Deleted Electronic Records*, 27 A.L.R.6th 565, § 2 (2007) (discussing history of electronic databases pertaining to discovery issues).

[14] *See* Maria Perez Crist, *Preserving the Duty to Preserve: The Increasing Vulnerability of Electronic Information*, 58 S.C. L. REV. 7, 8, 11 (2006) (highlighting the "lack of accountability in the handling of electronic information" and its relationship to discovery issues).

[15] *See* Crist, *supra* note 14, at 8-9 (noting business information and communication stored electronically).

[16] *Id.* (describing basic structure of electronic databases).

[17] *Id.* (describing type of information stored on electronic databases).

[18] *See Zubulake I*, 217 F.R.D. 309, 318-20 (S.D.N.Y. 2003) (outlining and describing five categories of data storage); *see also* Crist, *supra* note 14, at 30-32 (describing five categories of

every day, companies must implement comprehensive retention policies so as not to run afoul of any legal obligation to retain documents.[19] Without

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data). The court in *Zubulake I* described the five categories as follows:

> 1. *Active, online data:* On-line storage is generally provided by magnetic disk. It is used in the very active stages of an electronic records [sic] life—when it is being created or received and processed, as well as when the access frequency is high and the required speed of access is very fast, *i.e.*, milliseconds. Examples of online data include hard drives.
> 2. *Near-line data:* This typically consists of a robotic storage device (robotic library) that houses removable media, uses robotic arms to access the media, and uses multiple read/write devices to store and retrieve records. Access speeds can range from as low as milliseconds if the media is already in a read device, up to 10-30 seconds for optical disk technology, and between 20-120 seconds for sequentially searched media, such as magnetic tape. Examples include optical disks.
> 3. *Offline storage/archives:* This is removable optical disk or magnetic tape media, which can be labeled and stored in a shelf or rack. Off-line storage of electronic records is traditionally used for making disaster copies of records and also for records considered "archival" in that their likelihood of retrieval is minimal. Accessibility to off-line media involves manual intervention and is much slower than on-line or near-line storage. Access speed may be minutes, hours, or even days, depending on the access-effectiveness of the storage facility. The principled difference between nearline data and offline data is that off-line data lacks the "coordinated control of an intelligent disk subsystem," and is, in the lingo, JBOD ("Just a Bunch of Disks").
> 4. *Backup Tapes:* A device, like a tape recorder, that reads data from and writes it onto a tape. Tape drives have data capacities of anywhere from a few hundred kilobytes to several gigabytes. Their transfer speeds also vary considerably . . . The disadvantage of tape drives is that they are sequential-access devices, which means that to read any particular block of data, you need to read all the preceding blocks. As a result, the data on a backup tape are not organized for retrieval of individual documents or files [because] . . . the organization of the data mirrors the computer's structure, not the human records management structure. Backup tapes also typically employ some sort of data compression, permitting more data to be stored on each tape, but also making restoration more time-consuming and expensive, especially given the lack of uniform standard governing data compression.
> 5. *Erased, fragmented or damaged data:* When a file is first created and saved, it is laid down on the [storage media] in contiguous clusters . . . As files are erased, their clusters are made available again as free space. Eventually, some newly created files become larger than the remaining contiguous free space. These files are then broken up and randomly placed throughout the disk. Such broken-up files are said to be "fragmented," and along with damaged and erased data can only be accessed after significant processing.

Zubulake I, 217 F.R.D. at 318-20 (internal citations omitted).

[19] *See* Pepe & Cohane, *supra* note 4, at 332-38 (explaining the importance of document retention policies). There are two important forces that should assist a company in formulating a retention policy: the internal operational structure of the company and legal obligations. *Id.* at 333; *see also* James R. Arnold et al., *E-Discovery and Records Management: A Risk-Based Approach*, THE METROPOLITAN CORP. COUNS., July 2007, at 38 (discussing records management with a view towards e-discovery); Jennifer A.L. Battle, *Litigation Hold Letters: Avoiding Destruction of Electronic Data*, THE LEGAL INTELLIGENCER, July 13, 2007, at 5 (outlining

such a policy, important electronic records could be in danger of being recycled or destroyed, leaving the company legally liable.[20]

B. *The Response to Electronic Discovery - 2006 Amendments to the Federal Rules of Civil Procedure and the Zubulake Decisions*

Despite the existence of ESI for many years, the Federal Rules of Civil Procedure have been slow to adapt to technological advancements.[21] The Rules have only been amended twice to reflect the development of electronic discovery, first in 1970 and, most recently in 2006.[22] In 1970, the term "data compilations" was added to the list of discoverable items.[23] In 2006, that term was replaced with the current wording, "electronically stored information."[24] The amendments to the Rules in 2006 also laid out procedures to follow during discovery regarding ESI.[25]

Zubulake v. UBS Warburg,[26] a series of five decisions by Judge Shiendeli, is the seminal case about discovery of electronically stored information.[27] This case concerned the discoverability of certain e-mails

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compliance with new Federal Rules of Civil Procedure); George E. Kostel & Richard D. Kelly, *What's in Your Electronic Filing Cabinet? Companies Must Set Up a Formal Document Retention Policy*, LEGAL TIMES, Apr. 16, 2007, at 41. According to the *Legal Times*, "nearly $2 billion was spent on the retrieval and review of electronic information in litigation. With no document retention policy to manage this information, companies could be forced to spend astronomical sums just to retrieve it, and face court-imposed sanctions to boot." *Id.* It is increasingly clear that implementing document retention policies is the most economically efficient method to deal with lawsuits and avoid litigation. *See id.*

[20] *See* sources cited *supra* note 19 (discussing the importance of retention policies).

[21] *See* Chorvat, *supra* note 13, at 13 (providing historical overview of electronic discovery); *see also* Chinn, *supra* note 2, at 2 (discussing history of amendments to the Rules relating to electronically stored information); Jonathan M. Hoff & Douglas I. Koff, *What Next in E-Discovery: New Amendments Offer Step Toward Uniformity But Questions Remain*, N.Y.L.J., Feb. 20, 2007 at S4 (discussing new amendments to Federal Rules of Civil Procedure); Sheri Qualters, *Getting Up to Speed: With New E-Discovery Rules Coming Online, Lawyers Wrestle with the Cost of Producing E-Stored Documents*, BROWARD DAILY BUS. REV., Oct. 15, 2007, at 12 (discussing history of amendments to Federal Rules of Civil Procedure relating to electronically stored information).

[22] *See* Chorvat, *supra* note 13, at 13 (noting history and development of electronic discovery).

[23] *See id.* (describing addition of terms to list of discoverable items).

[24] *See id.* (describing origin of phrase "electronically stored information").

[25] *See id.* (outlining 2006 amendments to the Rules).

[26] *Zubulake I*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Zubulake II*, 230 F.R.D. 290 (S.D.N.Y. 2003); *Zubulake III*, 216 F.R.D. 280 (S.D.N.Y. 2003); *Zubulake IV*, 220 F.R.D. 212, (S.D.N.Y. 2003); *Zubulake V*, 229 F.R.D. 422 (S.D.N.Y. 2004).

[27] *Zubulake I*, 217 F.R.D. at 324 (stating plaintiff was entitled to discovery of deleted e-mails only residing on back-up discs); *Zubulake II*, 230 F.R.D. at 293 (ruling on matter unrelated to electronic discovery); *Zubulake III*, 216 F.R.D. at 289 (holding shifting percentage of back-up

that were stored on UBS employees' computers or stored on back-up tapes in a gender discrimination suit.[28] In *Zubulake I*, UBS contended that producing the e-mails would be cost-prohibitive, and therefore not subject to discovery.[29] Judge Scheindlin first discussed the types of data that a back-up system contains, dividing them into five categories: (1) active, online data; (2) near-line data; (3) offline, storage/archives; (4) back-up tapes; and (5) erased, fragmented or damaged data.[30] The first three categories are considered "available" data, while the last two are considered "unavailable" data.[31] The court ruled that available data is automatically discoverable, and developed a seven-part test to determine whether certain unavailable data is discoverable.[32]

Zubulake III centered around the issue of who should pay for the restoration and production of electronic information stored on back-up tapes.[33] In *Zubulake I*, instead of making UBS produce all of the back-up tapes of emails, the court ordered the plaintiff to take a sample number of back-up tapes to determine whether the restoration would produce relevant evidence, and who should bear the cost of restoration for the rest of the tapes using the seven part test outlined in that decision.[34] After the sample

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tape restoration and search costs to employee appropriate, but not cost of producing emails from backup tapes); *Zubulake IV*, 220 F.R.D. at 222 (ruling defendant had duty to preserve backup tapes, but adverse inference instruction was not warranted for failure to do so); *Zubulake V*, 229 F.R.D. at 436-38 (holding adverse inference instruction warranted for willful destruction of e-mails, and shifting costs to defendant).

[28] *Zubulake I*, 217 F.R.D. at 312 (discussing facts and history of discovery dispute).

[29] *Id.* at 313.

[30] *Id.* at 318-320; *see also supra* note 18 and accompanying text (outlining and describing five categories of data storage).

[31] *Zubulake I*, 217 F.R.D. at 319-20 (describing categories of data).

[32] *Id.* at 322 (discussing the previous test for cost allocation and modifying it). The new "Seven Factor Test" is as follows:

> 1. The extent to which the request is specifically tailored to discover relevant information;
> 2. The availability of such information from other sources;
> 3. The total cost of production, compared to the amount in controversy;
> 4. The total cost of production, compared to the resources available to each party;
> 5. The relative availability of each party to control costs and its incentive to do so;
> 6. The importance of the issues at stake in the litigation; and
> 7. The relative benefits to the parties of obtaining the information.

Id. The court then went on to say these seven factors should not be weighted equally, nor should the test "be mechanically applied at the risk of losing sight of its purpose." *Id.* at 322-23. The first two factors are the most important, followed by the cost factors, and the last factor is the least important. *See id.* at 323.

[33] *See Zubulake III*, 216 F.R.D. at 281.

[34] *See Zubulake I*, 217 F.R.D. at 324 (discussing the conclusion and order to the parties).

e-mails were analyzed, the court in *Zubulake III* then allocated the cost of producing the remaining e-mails using the seven part test.[35] *Zubulake IV* and *V*, however, discussed what happens when those e-mails are not produced either by intentional destruction or as part of normal maintenance of files, known as spoliation.[36]

III. SPOLIATION OF ELECTRONIC EVIDENCE

Despite the vast amount of information stored in electronic databases, a company still has a duty to preserve any and all electronic evidence when that company either knows or should know that the evidence may be relevant to future litigation.[37] Once a future litigant is on notice that the evidence could be relevant, it is her duty to put a "litigation hold" on all of the relevant documents and preserve them.[38] This does not necessarily mean that these "held" documents must be produced, but only that they must be preserved during discovery.[39] When documents are not preserved, either by intentional destruction or through routine maintenance, the result is spoliation.[40]

The final order by the court was that the responding party should bear the cost of producing relevant available data. *Id.* Because the cost-shifting analysis is fact-sensitive, the court must determine what data may be found on the inaccessible media; thus, the responding party must provide a small sample of that media to determine whether it contains any relevant information. *Id.*

[35] *See Zubulake III*, 216 F.R.D. at 284-89 (analyzing the cost-shifting factors). After going through the seven part test, the court concluded that the cost should be split between the two parties; UBS was ordered to pay seventy-five percent and the plaintiff was ordered to pay twenty-five percent. *Id.* at 291.

[36] *See Zubulake IV*, 220 F.R.D. at 219 (ruling defendant had duty to preserve backup tapes). Despite this ruling, the court held an adverse inference instruction was not warranted at this stage for failure to preserve. *Id.*; *see also Zubulake V*, 229 F.R.D. at 439-40 (determining adverse inference instruction warranted for willful destruction of e-mails).

[37] *See* Crist, *supra* note 14, at 8-9 (discussing the risks and duties of electronically stored information as it relates to litigation); *see also, e.g.*, David A. Bell et al., *Let's Level the Playing Field: A New Proposal for Analysis of Spoliation of Evidence Claims in Pending Litigation*, 29 ARIZ. ST. L.J. 769, 772-73 (1997) (discussing the definition of spoliation); Killelea, *supra* note 6, at 1046 (defining spoliation of evidence); Drew D. Dropkin, Note, *Linking the Culpability and Circumstantial Evidence Requirements for the Spoliation Inference*, 51 DUKE L.J. 1803, 1806-07 (2002) (discussing the prevalence of spoliation of evidence in litigation).

[38] *See* Crist, *supra* note 14, at 34-38; *see also* Bell, *supra* note 37, at 774-75; Dropkin, *supra* note 37, at 1807-10 (discussing why litigation holds are important in document retention and discovery).

[39] *See* Crist, *supra* note 14, at 34-38; *see also* Bell, *supra* note 37, at 774-75; Dropkin, *supra* note 37, at 1807-1810 (discussing duty to preserve potentially relevant evidence in pending litigation).

[40] *See* Crist, *supra* note 14, at 34-38; *see also* Bell, *supra* note 37, at 774-75; Dropkin, *supra* note 37, at 1807-1810 (describing consequences of not preserving potentially relevant

A. *Spoliation and Remedies Available to the Non-Spoliating Party*

Spoliation is defined 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."[41] The elements of spoliation include an act of destruction, the intent of the party to destroy the evidence, the destruction of the evidence after the party was on notice to preserve it, and the relevance of the evidence destroyed.[42] Once these elements are satisfied, it is within the court's discretion to choose the appropriate remedy for the non-spoliating party.[43] Each jurisdiction applies its own unique method of determining the appropriate remedy, considering fairness to the parties and the seriousness of harm to the innocent party.[44] These remedies run the gamut from an adverse judgment against the spoliating party, to an adverse inference instruction, to a mere shifting of the burden of cost of discovery, and to other sanctions.[45] Some jurisdictions have chosen to develop criminal penalties for particularly serious instances of spoliation and a separate cause of action for the tort of spoliation.[46] The choice of remedy is often determined by the culpability of the spoliator—the more culpable the spoliator, the harsher the penalty.[47]

B. *Circuit Split Regarding Level of Culpability for Adverse Inference*

One of the most common and devastating remedies for spoliation is an adverse inference instruction.[48] This is a judicial instruction informing the jury that a piece of evidence was destroyed, and, as a result, the jury is allowed to infer that the evidence would have been adverse to the

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documents).

[41] *Zubulake IV*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (quoting West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999)).

[42] *See* Chorvat, *supra* note 13, at 15 (outlining the elements of spoliation).

[43] *See id.* (describing court's role in providing remedy for spoliation).

[44] *See* Killelea, *supra* note 6, at 1056-70 (comparing remedies available to innocent parties for spoliation).

[45] *See id.* at 1055-64 (describing options available to remedy spoliation).

[46] *See id.* at 1064-65 (noting a few jurisdictions recognizing a separate cause of action for spoliation).

[47] *See supra* note 37 and accompanying text (relating culpability of spoliator to appropriate remedy).

[48] *See* Killelea, *supra* note 6, at 1056 (discussing the adverse inference instruction). In an adverse inference instruction, "the court instructs the jury to presume that destroyed evidence, if produced, would have been adverse to the party that destroyed it." *Id.* A plaintiff, however, cannot rely on an adverse inference as an essential element of its case. *Id.* at 1057.

spoliating party.[49] Often, when an adverse inference instruction is given, litigation ceases because it is very difficult to recover from such an instruction.[50] In recent years, a circuit split has developed as to the level of culpability required by the spoliating party to warrant an adverse inference instruction.[51]

In 2002, the Second Circuit decided the case of *Residential Funding Corp. v. DeGeorge Financial Corp.*[52] This was a breach of contract case in which the defendant, DeGeorge Financial Corp. ("DeGeorge"), sought an adverse inference instruction from the district court because the plaintiff, Residential Funding Corp. ("RFC"), failed to produce relevant emails in a timely manner.[53] The district court denied the motion because the delay in producing the emails was not the result of bad faith or gross negligence on the part of RFC.[54] The Second Circuit

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[49] *See Zubulake V*, 229 F.R.D. 422, 436-38 (S.D.N.Y. 2004) (discussing remedy available for the non-spoliating party). The instruction that the court awarded was as follows:

> You have heard that UBS failed to produce some of the e-mails sent or received by UBS personnel in August and September 2001. Plaintiff has argued that this evidence was in defendants' control and would have proven facts material to the matter in controversy.
> If you find that UBS could have produced this evidence, and that the evidence was within its control, and that the evidence would have been material in deciding facts in dispute in this case, you are permitted, but not required, to infer that the evidence would have been unfavorable to UBS.
> In deciding whether to draw this inference, you should consider whether the evidence not produced would merely have duplicated other evidence already before you. You may also consider whether you are satisfied that UBS's failure to produce this information was reasonable. Again, any inference you decide to draw should be based on all of the facts and circumstances in this case.

Id. at 439-40.

[50] *See* Killelea, *supra* note 6, at 1056-57 (discussing adverse inference instruction and its effect on litigation).

[51] *See* cases cited *supra* note 9 and accompanying text (illustrating circuit split).

[52] 306 F.3d 99 (2d Cir. 2002).

[53] *Id.* at 102 (discussing case history). The defendant, DeGeorge Financial Corp. ("DeGeorge"), made its first request for any relevant e-mails in April 2001. *Id.* at 102. Residential Funding Corp. ("RFC") agreed to produce the e-mails with a vendor's assistance after being unable to retrieve any of the e-mails from the backup tapes. *Id.* at 102-03. After numerous delays and technical problems, RFC agreed to produce the backup tapes themselves so that DeGeorge could retrieve the data using its own vendor. *Id.* at 104. However, RFC refused to give any information to help the vendor retrieve the documents, claiming it had fulfilled its obligation, and thus, DeGeorge should "just try to figure it out." *Id.* Consequently, no e-mails from the requested time period were produced due to physical damage or absence from the tapes. *Id.* at 104. A few days later, DeGeorge moved for sanctions. *Id.*

[54] *Id.* at 105 (discussing lower court's decision). The district court cited *Reilly v. Natwest Markets Group, Inc.*, 181 F.3d 253, 267-68 (2d Cir. 1999), in ruling that DeGeorge was not entitled to an adverse inference instruction because he had not established that RFC acted with

reversed, holding that mere negligence is sufficient for discovery sanctions, including an adverse inference instruction.[55] In subsequent cases, many district courts followed the Second Circuit in ruling that negligence is sufficient for an adverse inference instruction.[56]

The Eighth Circuit, in *Greyhound Lines, Inc. v. Wade*,[57] disagreed with the Second Circuit's decision, and found that more than negligence was needed for an adverse inference instruction.[58] *Greyhound Lines* involved a negligence claim against a truck driver after an accident with a bus.[59] The bus in question had an electronic control module ("ECM") that stored information such as speed and mechanical failures.[60] The ECM showed that a mechanical failure caused the bus to slow its speed.[61] Greyhound subsequently sent the ECM to the engine manufacturer, who erased the data before the lawsuit was filed.[62] The defendant filed a motion for sanctions based upon the spoliation of the evidence, which was denied by the district court.[63] The Eighth Circuit upheld the district court's denial of sanctions, ruling that mere negligence is not sufficient to warrant sanctions for spoliation; instead, a certain level of bad faith is required.[64]

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bad faith or gross negligence. *Residential Funding Corp.*, 306 F.3d at 105. The court also ruled that DeGeorge did not adequately prove the e-mails could have been beneficial to the case, which is a necessary element of spoliation. *Id.* at 106. The Second Circuit reversed the first ruling but retained the requirement that the requesting party prove that the e-mails would have been beneficial when the spoliating party was negligent. *Id.* at 112.

[55] *Residential Funding Corp.*, 306 F.3d at 108-09 (reversing lower court's ruling denying sanctions). The court also ruled that in instances where bad faith is shown by the spoliating party, there is a presumption that the evidence would have been harmful. *Id.* at 109. Where negligence is shown, the innocent party must prove that the evidence would have been relevant and harmful. *Id.*

[56] *See, e.g.*, World Courier v. Barone, No. C 06-3072 TEH, 2007 WL 1119196, at *1-2 (N.D. Cal. Apr. 16, 2007); Cortes v. Peter Pan Bus Lines, Inc., 455 F. Supp. 2d 100, 102-03 (D. Conn. 2006); Douglas v. Ingram Barge Co., No. Civ.A 3:04-0383, 2006 WL 1455695, at *3 (S.D.W. Va. Mar. 24, 2006); Creative Res. Group of N.J., Inc. v. Creative Res. Group, Inc., 212 F.R.D. 94 at 106-07 (E.D.N.Y. 2002) (holding mere negligence by spoliating party sufficient to issue adverse inference instruction).

[57] 485 F.3d 1032 (8th Cir. 2007).

[58] *See id.* at 1037 (holding no error in denying sanction). The court required a level of bad faith on the part of the spoliator in order to award an adverse inference instruction. *Id.*

[59] *See id.* at 1034 (explaining facts).

[60] *See id.*

[61] *See id.* (describing underlying incident).

[62] *See* Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1034 (8th Cir. 2007) (describing destruction of electronic evidence).

[63] *See id.* at 1035 (discussing procedural history). The sanctions requested were for the non-production of the e-mails, as well as for non-responsive answers to the inquiries. *Id.*

[64] *See id.* (discussing requirements for sanctions). The court ruled that there was no spoliation and stated, "the ultimate focus for imposing sanctions for spoliation of evidence is the intentional destruction of evidence indicating a desire to suppress the truth, not the prospect of

District courts across the country have followed the Eighth Circuit's ruling.[65]

The Supreme Judicial Court of Massachusetts ("SJC") has ruled on the issue of sanctions for spoliation during discovery, but not specifically on the adverse inference instruction.[66] The jurisprudence of the SJC regarding spoliation is instructive in crafting a proposal for adopting a level of culpability required for an adverse inference instruction based upon the spoliation of evidence.[67]

C. *Current State of Massachusetts Law*

In Massachusetts, the SJC has a fairly nebulous approach to imposing sanctions for spoliation of evidence during discovery.[68] Admittedly, this approach has surpassed every other jurisdiction in its imposition of sanctions for spoliation.[69] The sanction most often administered by Massachusetts courts is the exclusion of integral evidence for the spoliating party that relies on the spoliated evidence.[70] When

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litigation." *Id.* The court also ruled that the discovery responses were responsive and that the non-spoliating party was not prejudiced by untimely disclosure. *Id.*

[65] *See, e.g.*, Escobar v. City of Houston, No. 04-1945, 2007 WL 2900581, at *17-19 (S.D. Tex. Sept. 29, 2007) (maintaining bad faith or gross negligence required for adverse inference instruction for destruction of electronic control module); Minter v. Prime Equip. Co., No. CIV-02-132-KEW, 2007 WL 2703093, at *3 (E.D. Okla. Sept. 14, 2007) (requiring bad faith required for an adverse inference instruction for non-production of inspection records); Smith v. Am. Founders Fin., Corp., 365 B.R. 647, 681-82 (S.D. Tex. 2007) (finding bad faith or gross negligence required for instruction on destruction of documents held as trustee).

[66] *See, e.g.*, Keene v. Brigham & Women's Hosp., Inc., 786 N.E.2d 824, 833-34 (Mass. 2003) (detailing appropriate sanctions and default judgment requirements for lost medical records in a medical malpractice case); Fletcher v. Dorchester Mutual Ins. Co., 773 N.E.2d 420, 424-25 (Mass. 2002) (discussing whether to recognize separate cause of action for spoliation); Kippenhan v. Chaulk Servs., Inc., 697 N.E.2d 527, 529-30 (Mass. 1998) (discussing appropriate sanction for losing physical evidence in negligence claim).

[67] *See* cases cited *supra* note 66 and accompanying text (summarizing spoliation jurisprudence in Massachusetts).

[68] *See* cases cited *supra* note 66 and accompanying text (listing Massachusetts precedent). The court in *Fletcher* summed up the approach to spoliation: "[S]anctions for spoliation are carefully tailored to remedy the precise unfairness occasioned by that spoliation. . . . As such, the remedies to which a victim of spoliation is entitled will be conclusively determined in the underlying action." *Fletcher*, 773 N.E.2d at 426.

[69] *See Fletcher*, 773 N.E.2d at 426 (discussing development of exclusion rule). The court stated, "we have gone further than other jurisdictions, many of which address spoliation merely by permitting an adverse inference against the party responsible for the spoliation." *Id.*

[70] *See Kippenhan*, 697 N.E.2d at 530-31 (describing exclusion remedy for spoliation); *see also Fletcher*, 773 N.E.2d at 425 (recounting lower court's previous rulings on exclusion of evidence as sanction for spoliation). The rule was developed in the context of expert witnesses using spoliated evidence to form opinions. *Id.* at 426 (citing Nally v. Volkswagen of Am., Inc.,

addressing more serious instances of spoliation, the court may direct a verdict on an entire claim that relied on the spoliated evidence.[71] This ambiguous approach has imparted more discretion to the courts to impose a sanction that is commensurate with the level of culpability of the spoliator and the importance of the evidence to the non-spoliator.[72]

The first sanction adopted by the SJC, and the most favored, goes beyond the adverse inference instruction.[73] If a party destroys or alters evidence resulting in the prejudice or unfairness to the opposing party, a judge has the power to exclude evidence to fix the unfairness.[74] This remedy only applies to parties who have a duty to preserve the evidence.[75] Excluding evidence is, in many ways, harsher than an adverse inference instruction.[76] By excluding evidence that could change the outcome of a case, the judge is unilaterally declaring the spoliated evidence as adverse to the spoliating party.[77] When an adverse inference instruction is given, the jury must decide whether the spoliated evidence would have been adverse to the spoliating party.[78] The SJC believes, however, that the exclusion of

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539 N.E.2d 1017, 1021 (Mass. 1989)). The court based this rule "on both the unfair prejudice that would otherwise result and the fact of a negligent or intentional destruction of physical evidence." *Fletcher*, 773 N.E.2d at 426.

[71] *See Fletcher*, 773 N.E.2d at 427 (explaining burden of proof requirement for spoliation claims). The court justified this expansive approach by describing the destruction of relevant evidence as, "'an unqualified wrong,' that has a pernicious effect on the truth-finding functions of our courts." *Id.* (citations omitted).

[72] *See id.* at 426. The SJC's approach to sanctions for spoliation considers the specific facts and circumstances of the underlying case, and "carefully tailor[s]" sanctions to remedy the unfairness caused by the spoliation. *Id.* at 427-28.

[73] *See* cases cited *supra* note 70 and accompanying text.

[74] *See Fletcher*, 773 N.E.2d at 425-26 (listing examples of spoliation and remedies). The *Fletcher* court stated the general rule:

> Where evidence has been destroyed or altered by persons who are parties to the litigation, or by persons affiliated with a party (in particular, their expert witnesses), and another party's ability to prosecute or defend the claim has been prejudiced as a result, we have held that a judge may exclude evidence to remedy that unfairness.

Id. at 425 (citing *Kippenham*, 697 N.E.2d at 530).

[75] *See Fletcher*, 773 N.E.2d at 426 (upholding duty to preserve relevant evidence); *see also Kippenhan*, 697 N.E.2d at 530 (stating duty to preserve relevant evidence relied upon by expert witness); Keene v. Brigham & Women's Hosp., Inc., 786 N.E.2d 824, 833 (Mass. 2003) (reiterating rule for preserving relevant evidence under the spoliation doctrine). The court in *Keene* also discussed the defendant's statutory duty to preserve medical records. *Id.*

[76] *See Kippenhan*, 697 N.E.2d at 531 (explaining Massachusetts approach to adverse inference sanctions for spoliation). The SJC calls its approach a "minority position" and describes the adverse inference as a "less severe rule." *Id.*

[77] *See Fletcher*, 773 N.E.2d at 425-26 (debating exclusion remedy for spoliation).

[78] *See supra* note 49 and accompanying text (discussing adverse inference jury instruction

evidence is an appropriate remedy, going beyond the adverse inference instruction.[79]

In *Keene v. Brigham and Women's Hospital, Inc.*,[80] the SJC went even further to uphold a default judgment of liability as a sanction for the spoliation of medical records in a medical malpractice case.[81] In *Keene*, the court ruled that because the lost medical records were so vitally important to the plaintiff's case, the only equitable remedy was a default judgment of liability.[82] The trial judge, rather than the jury, decided the issue of whether the medical records were adverse to the defendant.[83] This case is the farthest the SJC has gone; however, the court repeatedly has declined to recognize a separate cause of action for spoliation.[84]

IV. ANALYSIS

Both the exclusion of evidence and the default judgment remedies offered for spoliation of evidence indicate an underlying theme to the Massachusetts courts' approach.[85] A remedy for spoliation should be given with an eye towards fairness and leveling the playing field for the innocent, non-spoliating party.[86] The SJC, however, has placed an emphasis on the exclusion of evidence and default judgments, moving beyond the adverse inference instruction.[87] The adverse inference instruction gives the jury, which is the cornerstone of the American judicial system, the choice to believe whether or not the withheld evidence is adverse to the spoliating

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given in a case).

[79] *See, e.g., Keene*, 786 N.E.2d at 833-34 (detailing appropriate sanctions and default judgment requirements for lost medical records in medical malpractice cases); *Fletcher*, 773 N.E.2d at 424-25 (discussing whether to recognize separate cause of action for spoliation); *Kippenhan*, 697 N.E.2d at 529-30 (discussing appropriate sanction for losing physical evidence in negligence claim).

[80] 786 N.E.2d 824 (Mass. 2003).

[81] *Id.* at 835 (ruling default judgment on issue of liability appropriate sanction for spoliation).

[82] *Id.*

[83] *Id.*

[84] *See Fletcher*, 773 N.E.2d at 426-28 (denying separate cause of action for spoliation). The court followed other jurisdictions in finding that "allowing a separate cause of action for spoliation would recognize a claim that, by definition, could not be proved without resort to multiple levels of speculation." *Id.* at 426.

[85] *See supra* notes 66, 69-72 and accompanying text (outlining current state of spoliation jurisprudence in Massachusetts).

[86] *See Fletcher*, 773 N.E.2d at 427 (discussing importance of fairness in crafting a remedy for discovery violations such as spoliation).

[87] *See supra* note 70 and accompanying text (describing exclusion remedy for spoliation).

party.[88] The Massachusetts rule, however, prevents the jury from making the decision and gives the trial judge sole discretion.[89] For this reason, the adverse inference instruction should be the preferred remedy for spoliation.[90] Despite this flaw in jurisprudence, an increasing emphasis on fairness provides support for adopting the proper level of culpability necessary for an adverse inference instruction.[91]

To properly consider and account for fairness, the appropriate level of culpability for an adverse inference instruction should be negligence.[92] This will encourage parties with extensive digital databases and electronically stored information to implement comprehensive retention policies.[93] Comprehensive retention policies are an important element in streamlining litigation and making it more efficient.[94] Additionally, requiring bad faith on the part of the spoliating party is unfair to the innocent non-spoliating party.[95] Often, the missing or destroyed evidence is essential to the innocent party's case and denies that party a defense or claim in the litigation.[96]

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[88] *See* Killelea, *supra* note 6, at 1056 (discussing jury's role in administering adverse inference instruction).

[89] *See Fletcher*, 773 N.E.2d at 427 (introducing exclusion remedy for spoliation of evidence during discovery).

[90] *See infra* notes 92-101 and accompanying text (discussing advantage of adverse inference instruction as remedy for spoliation).

[91] *See* Killelea, *supra* note 6, at 1056; *see also Zubulake V*, 229 F.R.D. 422, 436-38 (S.D.N.Y. 2004) (recounting application of adverse inference instruction as remedy for spoliation).

[92] *See* Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108-09 (2d Cir. 2002) (discussing court's reasoning for ruling negligence sufficient for adverse inference instruction as remedy for spoliation).

[93] *See* Kostel & Kelly, *supra* note 19, at 41 (emphasizing importance of comprehensive document retention policies to litigation process). "Nearly $2 billion was spent on the retrieval and review of electronic information in litigation. With no document retention policy to manage this information, companies could be forced to spend astronomical sums just to retrieve it, and face court-imposed sanctions to boot." *Id.* at 41. It is increasingly clear that implementing document retention policies is the most economically efficient method to deal with lawsuits and avoid litigation. *See id.*

[94] *See* Arnold, *supra* note 19, at 38 (discussing importance of records management with a view towards electronic discovery).

[95] *See Residential Funding Corp.*, 306 F.3d at 108-09 (discussing court's reasoning for ruling negligence sufficient for adverse inference instruction as remedy for spoliation). The court in this case reversed the lower court and awarded an adverse inference instruction. *Id.* As long as the evidence was relevant and possibly beneficial to the innocent party, the adverse inference was only fair. *See id.*

[96] *See id.* at 108 (discussing spoliation in context of litigation and importance of withheld information). The court stated:

> The adverse inference provides the necessary mechanism for restoring the evidentiary

The purpose of sanctions for spoliation of evidence is more than simply punishing the wrong-doer.[97] A primary purpose of sanctions during discovery should be to level the judicial playing field.[98] Requiring bad faith on the part of the spoliating party would shift the focus of sanctions to punishment of the culpable party.[99] By shifting the focus to punishment, the innocent non-spoliating party is forgotten, and fairness to the innocent party is no longer important.[100] Because of this, bad faith is an inappropriate standard for an adverse inference instruction against the spoliating party.[101]

Requiring bad faith would also be unduly harsh on the innocent non-spoliating party.[102] Spoliation by its very nature puts the innocent party at a disadvantage, particularly when the destroyed or missing evidence is essential to a defense or claim.[103] If a party has a duty to preserve evidence and that party negligently destroys or withholds that evidence, it is only fair that the innocent party has recourse.[104] The most common and effective recourse for the innocent party is an adverse inference instruction.[105] By requiring the innocent party to prove bad faith

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> 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.

Id.

[97] *See id.* (outlining purpose behind adverse inference instruction as remedy for spoliation). The court stated, "[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." *Id.*

[98] *See id.*; Fletcher v. Dorchester Mut. Ins. Co., 773 N.E.2d 420, 425-26 (Mass. 2002) (emphasizing fairness in crafting remedy for spoliation of evidence during discovery).

[99] *See supra* note 96 and accompanying text (noting importance of fairness in crafting a remedy for spoliation).

[100] *See supra* note 96 and accompanying text (noting purpose of sanctions is not to punish moral culpability).

[101] *See supra* Part III(A).

[102] *See* Dropkin, *supra* note 37, at 1825-26 (discussing level of culpability for spoliation inference). The purpose of the spoliation inference is remedial, attempting "to restore the adversarial balance that was disrupted when the spoliating party innocently, negligently, reckless, or intentionally . . . permitted relevant evidence to be destroyed." *Id. But see* Killelea, *supra* note 6, at 1060 (advising against using the adverse inference instruction as remedy for spoliation). Killelea writes, "[the] risk of unduly prejudicing the position of the spoliatior is a valid reason for not using the adverse inference instruction." *Id.*

[103] *See* Killelea, *supra* note 6, at 1060 (describing effect of spoliation on parties to a lawsuit).

[104] *See id.* (describing purpose of sanctions for discovery violations, particularly spoliation).

[105] *See id.* at 1056 (describing adverse inference instruction as the most common and controversial remedy for spoliation).

by the spoliating party, this recourse often would not be available.[106] Therefore, bad faith is unduly harsh on the innocent party.[107]

Negligence should be the proper level of culpability for an adverse inference instruction because requiring bad faith is contrary to the purpose of discovery sanctions and is unduly harsh to the innocent party.[108] In order to satisfy the level of sanctions for spoliation, a party must have breached a duty to preserve important evidence to the litigation.[109] It should not matter whether this duty was breached in bad faith or negligence.[110] If an innocent party is able to prove willfulness or bad faith, the sanctions should exceed a mere adverse inference instruction, which may be ignored by the jury.[111]

Requiring negligence, rather than bad faith, for an adverse inference instruction will also encourage parties to implement better retention policies, and to enforce litigation holds more conscientiously.[112] When parties to litigation have effective retention and litigation hold policies, discovery is more efficient, and spoliation is less problematic.[113] Currently, spoliation is a major problem in litigation.[114] The courts can reduce this problem by creating an incentive to make electronic document retention more efficient, and litigation holds more effective.[115] The development of digital databases and electronically stored information has

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[106] *See* Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1035 (8th Cir. 2007) (denying innocent party remedy for spoliation of evidence). The court required bad faith because, "the ultimate focus for imposing sanctions for spoliation of evidence is the intentional destruction of evidence indicating a desire to suppress the truth, not the prospect of litigation." *Id.*

[107] *See supra* note 102 and accompanying text.

[108] *See* Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002) (outlining reasons why negligence should be standard for adverse inference instruction).

[109] *See supra* Part III(A) (discussing elements of spoliation).

[110] *See Residential Funding Corp.*, 306 F.3d at 108 (describing reasoning behind court's ruling).

[111] *See* Killelea *supra* note 6, at 1060 (outlining mechanics of adverse inference jury instruction). It is clear that jury instructions are not dispositive actions by the court that bind the jury. *See id.* The jury would first have to determine whether spoliation occurred, then determine whether to give weight to the spoliated evidence. *See id.*

[112] *See* Pepe & Cohane, *supra* note 4, at 332-38 (explaining importance of document retention policies); *see also* Killelea, *supra* note 6, at 1056 (describing obligations of potential litigants in preserving documents).

[113] *See* Kostel & Kelly, *supra* note 19, at 41 (describing vast sums spent in retrieving documents). In order to cut costs in litigation, comprehensive document retention policies are needed. *See id.*

[114] *See supra* Part III(A) (describing spoliation in general, and its prevalence in litigation).

[115] *See Residential Funding Corp.*, 306 F.3d at 108 (describing reasoning behind court's ruling); *see also* Killelea, *supra* note 6, at 1060 (outlining implementation of adverse inference instruction).

eased the process.[116] Consequently, negligence is the appropriate level of culpability for an adverse inference instruction for spoliation of evidence.[117]

V. CONCLUSION

The days of traditional paper discovery are over. Evidence that used to fill countless cartons of paper can now fit onto one optical disk. Technological advances have made it easier for large companies to retain and store documents, and they have also made it easier for litigants to access that information through discovery. With this in mind, these large companies should, if they have not done so already, implement comprehensive retention policies for this information. When litigation is probable, these companies should also implement and enforce litigation holds on the information to protect it from being destroyed.

The adversarial system of litigation depends on the basic concept of fairness. Where each party is obligated to turn over relevant evidence to the opposing party, discovery serves a key role in ensuring fairness for all parties. When relevant documents are destroyed, the fairness of litigation is lost. In order to preserve the integrity of discovery and the litigation process as a whole, the judicial system should take affirmative steps to prevent spoliation of electronic information. One method of ensuring compliance with discovery rules is the imposition of sanctions on the spoliating party, which is commonly the adverse inference instruction. For the adverse inference instruction to be most effective in ensuring discovery compliance, the innocent party should only have to prove negligence on the part of the spoliator, not bad faith. With this lower level of culpability, potential litigants will guarantee their own compliance by implementing and enforcing comprehensive retention policies and litigation holds. For this reason, negligence should be the level of culpability required for an adverse inference instruction.

Ben Farrell

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[116] *See* Killelea, *supra* note 6, at 1056 (describing obligations of potential litigants in preserving documents); *see also* Pepe & Cohane, *supra* note 4, at 332-38 (explaining the importance of document retention policies).

[117] *See* discussion *supra* notes 92-112 (analyzing purpose of negligence as standard for adverse inference instruction in response to spoliation of electronic evidence).