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Risk Aversion, Risk Management, and the "Overpreservation" Prolbem in Electronic Discovery

Kenneth J. Withers
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RISK AVERSION, RISK MANAGEMENT, AND THE "OVERPRESERVATION" PROBLEM IN ELECTRONIC DISCOVERY

Kenneth J. Withers*

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*Director of Judicial Education, The Sedona Conference. The Sedona Conference is a nonprofit, nonpartisan legal education foundation headquartered in Phoenix, Arizona. The author gratefully acknowledges the research and editorial assistance of Nancy L. Davidson, Phoenix School of Law Class of 2012. The views expressed in this Article are solely those of the author and do not necessarily represent views of The Sedona Conference or any of its members, sponsors, or Working Groups.

I. INTRODUCTION

It is widely agreed among lawyers, judges, and technologists that of all the challenges associated with the discovery of electronically stored information (ESI) in civil litigation, the most vexing is the sheer volume of data that may be subject to preservation, review, and eventual production.[1] Close behind in relative vexatiousness are the facts that the subject data may be scattered among hundreds or thousands of storage, management, and communications systems and devices, and that the potential relevance of the data in these sources may not be readily apparent, requiring some content analysis.[2] Layered on top of these technical challenges presented by ESI is a pervasive fear among lawyers, based on a cursory reading of the confusing case law, that any failure to completely and accurately preserve, collect, review, and produce relevant nonprivileged ESI in discovery—no matter how innocent or immaterial—will subject them to severe case-altering and career-damaging spoliation sanctions.[3] This belief has led lawyers to adopt a risk-averse "keep everything" approach to data management, even in the absence of an identifiable business need, a statutory or regulatory retention requirement, or a reasonably likely threat of litigation.[4] But the risk-aversion approach actually costs clients more and increases risk in the long run.[5] It needs to be replaced with a risk-management approach that realistically assesses the costs of retention and preservation, weighing those costs against a similarly realistic assessment of the value of the information to the business and the risk of sanctions for its loss.

In Part II, this Article explores the reasons behind the explosion of potentially discoverable information, the pressure to "keep everything" in light of perceived preservation obligations, and the enormous costs associated with that approach. It then dissects the case law on spoliation, focusing first on the common law as expressed in Fourth Circuit jurisprudence in Part III and then in Part IV on the so-called safe harbor of Rule 37(e) of the Federal Rules of Civil Procedure[6] and the cases in the Fourth Circuit that either apply it, decline to apply it, or appear to ignore it in situations in which it arguably applies. Finally,

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1. *See, e.g.*, Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 791 (2010) (listing the "high volume" of ESI as its first defining characteristic).

2. *See generally id.* (listing "broad dispersal" as ESI's second defining characteristic).

3. *See generally* Burke T. Ward et al., *Electronic Discovery: Rules for a Digital Age*, 18 B.U. J. SCI. & TECH. L. 150, 167 ("This uncertainty within both the legal community and courts has only caused an increase [in] costs and fears to litigants associated with electronic discovery.").

4. *See generally* CAROL STAINBROOK ET AL., COHASETT ASSOCS. INC., ELECTRONICALLY STORED INFORMATION (ESI)—LEGAL HOLDS & DISPOSITION 5 (2012) (showing how organizations have a "[h]old everything" attitude, retaining large amounts of information).

5. *See generally* NICHOLAS M. PACE & LAURA ZAKARAS, RAND INST. FOR CIVIL JUSTICE, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY 88 (2012) (discussing how expensive it is for a company to store data).

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

drawing on the lessons of case law, in Part V this Article urges lawyers to abandon the risk-aversion approach and adopt a variant of the business judgment rule to make reasonable risk-management decisions regarding information governance that minimize the ESI held in the ordinary course of business, thereby greatly reducing the costs associated with preservation.

II. THE CAUSES AND COST OF OVERPRESERVATION

A. Expansion of Physical Data Storage Capacity

The numbers are staggering. According to a 2011 article in *Science Magazine*, by 2007 people were storing approximately 295 exabytes of digital information, the equivalent of more than 60 CD-ROMs per person.[7] If one could stack up those roughly 404 billion CD-ROMs, the stack would surpass the distance to the moon by 25%.[8]

In corporations, government agencies, universities, and other organizations, this digital information can be found on employee desktop computers; network servers and peripheral devices such as printers and fax machines; mobile devices such as smart phones, laptops, and tablets; countless removable media such as USB drives, CD-ROMs, storage tapes, and external hard drives; archival or disaster-recovery backup media; or the equipment of third-party data communications, hosting, and storage companies such as Google and Amazon. In 2005, an in-house attorney for an international energy firm painted a very concrete picture of the problem for the Advisory Committee on the Federal Rules of Civil Procedure:

> We operate in 200 countries in the world. We have 306 offices around the world, 70 of them in the U.S. We generate 5.2 million e-mails a day, about half of that in the U.S. We have 65,000 desktop computers around the world and 30,000 laptop computers. These are for our employees, about half of those in the U.S.
>
> We have, in addition to the 65,000 desktops and 30,000 laptops, we have between 15,000 and 20,000 Blackberries and PDAs around the world. We have 7,000 servers worldwide, 4,000 of them in the U.S. We have 1,000 to 2,000 networks worldwide, about half of those in the U.S. We have 3,750 e-collaboration rooms. I assume that they're chat room type things, for people to be working on documents simultaneously. About 3,000 of those are in the U.S.

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7. *See* Martin Hilbert & Priscila López, *The World's Technological Capacity to Store, Communicate, and Compute Information*, 332 SCI. 60, 62 (2011).

8. *See id.*

> We have 3,000 databases; 2,000 of those in the U.S. Our total storage of information that we now have is 800 terabytes, 500 terabytes in the U.S.[9]

And that was several years ago, before the rise of Twitter, social media, tablet computers, cloud computing, and "bring your own device" policies in business.[10]

Acting as both cause and effect in the explosion of digital information is the decreasing cost of digital storage capacity, in accordance with the venerated Moore's Law, which predicted as early as 1965 that the capacity of digital information storage devices would double roughly every eighteen months.[11] More recently, dramatic increases in digital telecommunications speed and bandwidth have made remote hosting of data feasible, revolutionizing the economics of information technology.[12] With cloud-based computing services now readily available, enterprises may now generate and store far more information, as their own investment in technology infrastructure will no longer limit them.[13] Enterprises can simply rent additional digital capacity when needed and distribute it via the Internet to employees, business partners, and customers.[14]

B. Changes in the Way We Create, Store, and Manage Information

Perhaps more significant than the explosive growth in the capacity of equipment, media, and services to store vast amounts of data are changes in the way we generate, communicate, and manage data. There are two significant

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9. COMPLIANCE, GOVERNANCE & OVERSIGHT COUNCIL, BENCHMARK SURVEY ON PREVAILING PRACTICES FOR LEGAL HOLDS IN GLOBAL 1000 COMPANIES 14 (2008) (citing *Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure* 36–38 (2005) (statement of Charles A. Beach, Coordinator of Corporate Litigation, Exxon Mobil Corporation), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/e-discovery/DallasHearing12805.pdf).

10. *See* Ana Cantu, *The History and Future of Cloud Computing*, FORBES (Dec. 20, 2011, 1:20 PM), http://www.forbes.com/sites/dell/2011/12/20/the-history-and-future-of-cloud-computing/ (discussing the rise of cloud computing); Anthony Curtis, BRIEF HISTORY SOCIAL MEDIA, http://www.uncp.edu/home/acurtis/NewMedia/SocialMedia/SocialMediaHistory.html (last visited Feb. 17, 2013) (discussing the evolution of social media from 1969 to 2012); Catherine Ho, *A Minefield of Legal Risks Come with "Bring Your Own Device" Policies*, WASH. POST (Sept. 30, 2012), http://articles.washingtonpost.com/2012-09-30/business/35497401_1_privacy-group-byod-sensitive-data (discussing the prevalence of "bring your own device" policies).

11. Gordon E. Moore, *Cramming More Components onto Integrated Circuits*, ELECTRONICS, Apr. 19, 1965, at 114, 115.

12. *See* Jon Brodkin, *Bandwidth Explosion: As Internet Use Soars, Can Bottlenecks Be Averted?*, ARS TECHNICA (May 1, 2012, 12:40 PM EDT), http://arstechnica.com/business/2012/05/bandwidth-explosion-as-internet-use-soars-can-bottlenecks-be-averted/.

13. *See* Jared A. Harshbarger, *Cloud Computing Providers and Data Security Law: Building Trust with United States Companies*, 16 J. TECH. L. & POL'Y 229, 233 (2011).

14. *See id.* at 234.

contributors to data proliferation: routine replication and the replacement of ephemeral communications with digital media.[15]

Information constantly is being replicated in digital information systems.[16] Every time information is sent from one person to another using a digital information system, it is being replicated on the recipient's device, and perhaps on several stations along the way.[17] Internally, information circulated within an organization is being replicated in the process, as well as being regularly backed up on archival or disaster-recovery media.[18] This replication is a fundamental difference between digital information systems and paper-based ones that physically send information from one location to another and are limited in the number of copies that could proliferate and be stored, even with the advent of photocopiers and fax machines.[19]

Communications that were truly ephemeral in the past are now routinely captured and replicated in digital information systems. Analog telephone conversations that would have disappeared as soon as the receiver was hung up have largely been replaced by email, text messages, and social media posts, which are stored and replicated with other digital business communications. Handwritten notes have almost disappeared from the modern office environment, replaced with electronic "sticky notes," voicemail, and instant messages. Paper sales slips and receipts, once the only recorded evidence of routine transactions, are now superfluous memos of transactions that have been recorded in vast sales, inventory management, financial, and customer relations databases.

Against the backdrop of lower data storage costs and the prospect of cheaply developing vast data collections utilizing cloud infrastructure, the concept of "big data" has recently emerged to add to the pressure to hoard data.[20] Access to collections of data large and diverse enough to perform advanced analytics was previously limited to large-scale scientific and medical research projects and law enforcement, defense, and national security agencies.[21] But because of the transformation of business processes to digital models and the collection of vast

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15. *See generally* 3 JEFFREY S. KINSLER & JAY E. GRENIG, VIRGINIA PRACTICE SERIES: CIVIL DISCOVERY § 21:25 (2012–2013 ed.) (detailing how holding replicant data becomes redundant and expensive); Vawn Himmelsbach, *Dealing with Data Proliferation*, IT BUSINESS (Sept. 19, 2006, 10:20 AM), http://www.itbusiness.ca/it/client/en/home/News.asp?id=40615&cid=13 (discussing the proliferation of email).

16. *See* KINSLER & GRENIG, *supra* note 15, at § 21:25.

17. *See* Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, 174 (2006).

18. *See id.*

19. *See id.*

20. *See generally* Jeff Bertolucci, *Big Data Tip: Don't Save Everything*, INFORMATIONWEEK (Dec. 18, 2012, 9:06 AM), http://www.informationweek.com/big-data/news/big-data-analytics/big-data-tip-dont-save-everything/240144506 (discussing organizations' desires to collect data).

21. *See generally* Uri Friedman, *Anthropology of an Idea: Big Data*, FOREIGN POL'Y, Nov. 2012, at 30, 30 (walking through the history of "big data," showing how the concept originated in government and scientific use).

amounts of consumer data through web sites and social networking, it is now possible for private industry to perform the same level of advanced analytics.[22] The effectiveness of targeted behavioral marketing based on analytics and the much publicized success of the Obama campaign in the 2012 general election have raised national consciousness of the potential—and perhaps dangers—of "big data."[23] As a consequence, many businesses are tempted to collect and store more data than they might otherwise collect or retain for primary business purposes, anticipating possible secondary uses, either internally for analysis or to sell as by-products of their digital business processes.[24]

C. Pressures to "Keep Everything"

The fundamental law regarding the duty of preservation has not changed over the years, despite the astronomical increase in the volume of data businesses, institutions, government agencies, and even private individuals routinely generate, collect, manage, and store.[25] The law is relatively easy to articulate:

> [W]henever litigation is reasonably anticipated, threatened, or pending against an organization, that organization has a duty to undertake reasonable and good faith actions to preserve relevant and discoverable information and tangible evidence. This duty arises at the point in time when litigation is reasonably anticipated whether the organization is the initiator or the target of litigation.
>
> The duty to preserve requires a party to identify, locate, and maintain information and tangible evidence that is relevant to specific and identifiable litigation. It typically arises from the common law duty to avoid spoliation of relevant evidence for use at trial and is not explicitly defined in the Federal Rules of Civil Procedure.[26]

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22. *See generally id.* ("As social networks proliferate, technology bloggers and professionals breathe new life into the 'big data' concept."); Edd Dumbill, *What Is Big Data?*, STRATA (Jan. 11, 2012), http://strata.oreilly.com/2012/01/what-is-big-data.html (describing how large corporations as well as small startups can now process big data).

23. *See* Sasha Issenberg, *How President Obama's Campaign Used Big Data to Rally Individual Voters*, MIT TECH. REV., Jan./Feb. 2013, at 38, 49.

24. *See generally* Bertolucci, *supra* note 20 ("[O]ften organizations make the mistake of trying to collect every bit of data that's available to them, no matter how inconsequential.").

25. *Compare* Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001) (citing Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998) (describing the duty to preserve), *with* Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 521 (D. Md. 2010) (applying the same standard nearly ten years later).

26. The Sedona Conference, *Commentary on Legal Holds: The Trigger & the Process*, 11 SEDONA CONF. J. 265, 267 (2010).

Because preservation is a common law duty, its contours are subject to a wide range of interpretation by the courts.[27] Decisions regarding the duty to preserve are invariably post-hoc judgments on the adequacy of a party's preservation efforts, analyzed in the context of an alleged failure to preserve and resulting motion to either compel production or issue sanctions.[28] Successful preservation efforts are never the subject of judicial decisions, and it is next to impossible to obtain an advisory opinion from a court to guide preservation activities.[29]

Various defense-oriented law firms and legal organizations have noted an alarming increase in the number of reported spoliation sanctions decisions over the past few years, concurrent with the rise of electronic discovery.[30] On the other hand, legal commentators sympathetic to requesting parties in litigation counter that the numbers are overblown and misleading and that in recent months the number of reported spoliation sanction decisions has actually declined.[31]

While the commentators debate the significance of the statistics, it is undisputed that risk-averse attorneys are advising their business and institutional clients to formalize their preservation efforts, expand their scope, and keep material longer than ever before.[32] As observed by Judge Lee Rosenthal, former Chair of the Judicial Conference's Standing Committee on Rules of Practice and Procedure, "[t]he frequency of spoliation allegations may lead to decisions about preservation based more on fear of potential future sanctions than on reasonable need for information."[33]

Organizations that participate in interstate commerce, and may be subject to the jurisdiction of courts in different states and federal circuits, have to deal with conflicting guidance on preservation and spoliation.[34] Again, risk-aversion dictates that attorneys advise their clients to follow the strictest guidelines regarding preservation from any court in which they could reasonably face litigation.

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27. *See Victor Stanley, Inc.*, 269 F.R.D. at 519.

28. *See id.* at 514.

29. *See, e.g.*, Texas v. City of Frisco, No. 4:07cv383, 2008 WL 828055, at *3, *4 (E.D. Tex. Mar. 27, 2008) (dismissing request for declarative judgment and protective order defining preservation obligations in pending litigation for lack of "case or controversy" conferring jurisdiction).

30. *See, e.g.*, Willoughby et al., *supra* note 1, at 791 ("Producing parties have struggled to comply with ever-expanding and increasingly complex responsibilities as ESI has played a predominant role in pretrial discovery.").

31. *See* Ariana J. Tadler & Henry J. Kelston, *Fears of Discovery Burden Are Exaggerated*, NAT'L L.J., Dec. 19, 2011, at 18, 18.

32. *See generally* STAINBROOK ET AL., *supra* note 4, at 5 (showing how organizations have a "[h]old everything" attitude, retaining large amounts of information).

33. Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 607 (S.D. Tex. 2010).

34. *See generally* GARY L. WICKERT, SPOLIATION OF EVIDENCE IN ALL 50 STATES (2012), http://www.mwl-law.com/CM/Resources/Spoliation-Laws-In-All-50-States.pdf (surveying state court spoliation cases).

Organizations that routinely are involved in multiple legal actions face the additional pressure of rolling litigation holds, in which collections of documents and ESI are preserved for litigation, overlapping with subsequent litigation and with litigation to come.[35] Since the scope of the duty of preservation includes "reasonably anticipated" litigation as well as filed actions, caches of data may be under one or more litigation holds interminably.[36]

A recent survey of professional records and information managers attending a conference in Chicago attempted to define the "overpreservation" problem.[37] More than 200 attendees from large companies, institutions, and government agencies participated.[38] The survey report indicated that 25% of all participating organizations had 100 or more active litigation holds; over half, 53%, of large organizations (over 25,000 employees) had 100 or more active litigation holds, and over 25% of those large organizations reported more than 300 active litigation holds.[39] Sixty-five percent of respondents from smaller organizations and 100% of respondents from larger organizations described the scope of their litigation holds as "very broad," leading the report's authors to conclude that "[i]mpacted organizations tend to transition to a 'Hold everything' frame of mind."[40] Twenty to 32% of respondents reported that they routinely "preserve everything" when it comes to email and other ESI, rather than attempt to preserve narrowly and selectively.[41]

Eighty-eight percent of respondents reported that they have litigation holds that include material more than ten years old.[42] Half reported that they have litigation holds involving material more than twenty years old, and 13% have material more than fifty years old under litigation hold.[43]

Although most organizations have well-developed retention and disposition schedules for their paper records and electronic data, the survey reports that approximately 25% are not routinely destroying outdated records and ESI, and 50% have an approval process that adds a layer of decisionmaking on top of the disposition schedule, rendering it largely ineffective because decisionmakers are averse to disposing of records and ESI, even when no longer needed for business purposes, subject to legal retention requirements, or subject to a formal litigation

35. *See, e.g.*, STAINBROOK ET AL., *supra* note 4, at 5 (showing how in one survey, 100% of large organizations were involved in a litigation hold "very broad in nature affecting a large amount of information").

36. *See id.*

37. *See id.* at 3.

38. *See id.*; *see also About MER: Attendees by Organization*, NAT'L CONF. ON MANAGING ELECTRONIC RECS., http://www.merconference.com/about/pastMER/attendees_organization.php (last visited Mar. 3, 2013) (providing a general list of the companies and organizations that attend the conference).

39. *Id.* at 4.

40. *Id.* at 5.

41. *Id.* at 6.

42. *Id.* at 8.

43. *Id.*

hold.[44] "Fear" was listed as a primary cause for overpreservation, with such comments from the survey respondents as:

> "Not sure if it is subject to a Hold."
>
> "Information might be needed for [regulatory] audits."
>
> "Legal makes it too complicated with all the caveats, so employees feel safer keeping it all."
>
> "Legal moratoriums, too focused on the next project/fire to address closing out content, MAY be needed . . . ."[45]

D. Costs Associated with the "Keep Everything" Approach

The "keep everything" approach comes with a price, even factoring in the relatively low cost of physical storage.[46] According to a recent study published by the RAND Institute for Civil Justice:

> The purchase price of individual servers needed to store preserved data may not be impressive in and of itself, it was said, but, when associated expenses for network connections, maintenance, redundancy, development, security, and backup are factored in, all resources associated with a single terabyte of preserved data were said to cost in excess of $100,000. One company reported that one-third of its IT department's email resources were now dedicated to preserved information.[47]

While the cost of data storage is not insignificant, the cost of handling this data is significantly higher. According to the same RAND study, the median cost for data collection in response to discovery is $940 per gigabyte for collection, $2,931 per gigabyte for processing, and $13,636 per gigabyte for review.[48] Extrapolating from the RAND figures, that one-third of a terabyte of email being preserved costs $313,853 to collect and will cost $976,902.20 to process and $4,544,878.80 to review for production.[49]

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44. *See id.* at 12–13.
45. *Id.* at 15.
46. *See generally* Moore, *supra* note 11, at 115 (explaining the low cost of electronic storage).
47. *See* PACE & ZAKARAS, *supra* note 5, at 88.
48. *Id.* at 28.
49. *Id.*

A survey of Global 1000 companies with revenue over $5 billion was conducted between October 2007 and March 2008.[50] It attempted to quantify the costs associated with litigation holds.[51] The respondents reported an average of 980 new legal matters each year, of which 80% required formal litigation holds.[52] The survey broke down the administration of legal holds into a series of discrete tasks, such as issuing the hold notice, following up with individual custodians, and collecting files.[53] An organization with 200 legal holds per year, involving an average of seventy-five custodians each, will need to execute approximately 167,000 discrete tasks occupying approximately 15,000 staff hours.[54]

For all their expense, preservation activities seldom return value to the parties.[55] In a surprising admission, a defense-oriented legal organization acknowledged that little of what is preserved is ever called for in litigation, implying that either little analysis is going into preservation decisionmaking, or it is driven more by fear than by need:

> [A] shockingly small percentage of the information preserved is actually utilized by the parties in support of their claims or defenses. Indeed, much of what is preserved is never even collected, let alone produced. This disparity will only widen as the explosion of technology continues and greater and greater volumes of ESI are created and subsequently subjected to preservation obligations resulting from litigation.[56]

One would think a higher value would be placed on activities aimed at reducing the volume of data subject to preservation in the first place, rather than on conducting expensive, complex, and ultimately valueless preservation, collection, and review projects.

III. CASE LAW ON PRESERVATION AND SPOLIATION

A. Spoliation and the Adverse Inference Jury Instruction

Fear of sanctions drives the pressure for overpreservation, and the sanction for the loss of discoverable information that parties to litigation fear most is the adverse inference jury instruction, a type of spoliation sanction.

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50. *See* COMPLIANCE, GOVERNANCE & OVERSIGHT COUNCIL, *supra* note 9, at 6–7.
51. *See id.* at 6.
52. *Id.* at 9.
53. *Id.* at 16–20.
54. *Id.* at 22.
55. *See* LAWYERS FOR CIVIL JUSTICE, PRESERVATION—MOVING THE PARADIGM TO RULE TEXT 14 (2011), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/Lawyers%20for%20Civil%20Justice.pdf.
56. *Id.*

The doctrine of spoliation arose as a judge-made rule to address the impact of missing evidence.[57] Spoliation is best understood as a rule of evidence[58] because its primary purpose is to shift the burden of demonstrating the value of a particular piece of evidence from the proponent to the party deemed responsible for the loss of the evidence.[59] The oft-cited origin of the doctrine of spoliation is the eighteenth century King's Bench decision in *Armory v Delamirie*,[60] in which a chimneysweep's assistant found a jewel and brought it to a goldsmith for appraisal.[61] The goldsmith's apprentice took the jewel, declared it to be of no value, and offered only the value of the setting.[62] The chimneysweep's boy refused the offer and requested return of the jewel itself, but the goldsmith's apprentice would not return it.[63] The chimneysweep's apprentice sued the goldsmith in trover, demanding return of the jewel or its value as damages.[64] Because the jewel itself was lost, the value could not be determined directly.[65] The court resorted to circumstantial evidence, essentially invoking the Latin maxim *omnia praesumuntur contra spoliatorem*[66]:

> As to the value of the jewel several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.[67]

The burden of demonstrating the value of the missing jewel was shifted from the plaintiff to the defendant through the mechanism of a rebuttable presumption, based on the culpable conduct of the goldsmith's apprentice and, by extension, the goldsmith himself. While the presumption was technically rebuttable, as a practical matter it was highly unlikely that the defendant would find the jewel to present to the jury for valuation.

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57. *See id.* at 517 n.12 (citing Armory v. Delamirie, (1722) 93 Eng. Rep. 664, 664 (K.B.); 1 Strange 506).

58. *See* Vodusek v. Bayliner Marine Corp., 71 F.2d 148, 155 (4th Cir. 1995) ("[T]he spoliation of evidence rule . . . is not an affirmative defense, but a rule of evidence, to be administered at the discretion of the trial court.").

59. *See* Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 468–69 (S.D.N.Y. 2010), *abrogated by* Chin v. Port Auth., 685 F.3d 135 (2d Cir. 2012).

60. (1722) 93 Eng. Rep. 664 (K.B.); 1 Strange 506.

61. *See id.*

62. *See id.*

63. *See id.*

64. *See id.*

65. *See id.*

66. "All presumptions are against [the wrongdoer]." BLACK'S LAW DICTIONARY 1857 (9th ed. 2009).

67. 93 Eng. Rep. at 664 (K.B.); 1 Strange at 506.

Over the years, this classic remedy for the loss of evidence—the adverse inference jury instruction—has become synonymous with spoliation itself.[68] In reality, courts have at their disposal a wide range of remedies and sanctions for the loss of discoverable information, from the simple expedient of ordering alternative discovery to the dramatic sanction of default judgment or dismissal.[69] In addition, the adverse inference jury instruction comes in many flavors.[70] As Judge Shira Scheindlin noted in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*[71]:

> Like many other sanctions, an adverse inference instruction can take many forms, again ranging in degrees of harshness. The harshness of the instruction should be determined based on the nature of the spoliating party's conduct—the more egregious the conduct, the more harsh the instruction.
>
> In its most harsh form, when a spoliating party has acted willfully or in bad faith, a jury can be instructed that certain facts are deemed admitted and must be accepted as true. At the next level, when a spoliating party has acted willfully or recklessly, a court may impose a mandatory presumption. Even a mandatory *presumption*, however, is considered to be rebuttable.
>
> The least harsh instruction *permits* (but does not require) a jury to *presume* that the lost evidence is both relevant and favorable to the innocent party. If it makes this presumption, the spoliating party's rebuttal evidence must then be considered by the jury, which must then decide whether to draw an adverse inference against the spoliating party. This sanction still benefits the innocent party in that it allows the jury to consider both the misconduct of the spoliating party as well as proof of prejudice to the innocent party. Such a charge should be termed a "spoliation charge" to distinguish it from a charge where the a [sic] jury is *directed* to presume, albeit still subject to rebuttal, that the missing evidence would have been favorable to the innocent party, and from a charge where the jury is *directed* to deem certain facts admitted.[72]

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68. *See, e.g.*, Pension Comm. of Univ. of the Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 496 (S.D.N.Y. 2010) (giving an adverse inference jury instruction and telling the jury it is for spoliation of evidence), *abrogated by* Chin v. Port Auth., 685 F.3d 135 (2d Cir. 2012).

69. *Compare* United States v. Universal Health Servs., Inc., No. 1:07cv000054, 2011 WL 3426046, at *6 (W.D. Va. Aug. 5, 2011) (ordering forensic imaging to recover lost data), *with* Silvestri v. Gen. Motors Corp., 271 F.3d 583, 595 (4th Cir. 2001) (holding that the trial court's order dismissing the case for failure to preserve key evidence was not an abuse of discretion).

70. *See, e.g.*, *Pension Comm.*, 685 F. Supp. 2d at 470–71 (describing the different adverse inference instructions with varying levels of harshness).

71. 685 F. Supp. 2d 456.

72. *Id.* at 470–71 (footnotes omitted).

Furthermore, the adverse inference jury instruction is not issued automatically upon a determination that discoverable information has been lost.[73] As an evidentiary ruling, it must be based on a set of findings.[74] While the exact formulation of the elements necessary to justify an adverse inference jury instruction varies from circuit to circuit, state to state, and even from court to court,[75] the essential elements are the same.[76] In the Fourth Circuit, to support a sanction for the loss of discoverable evidence, the court must find:

> (1) [T]he party having control over the evidence had an obligation to preserve it when it was destroyed or altered; (2) the destruction or loss was accompanied by a "culpable state of mind;" and (3) the evidence that was destroyed or altered was "relevant" to the claims or defenses of the party that sought the discovery of the spoliated evidence, to the extent that a reasonable factfinder could conclude that the lost evidence would have supported the claims or defenses of the party that sought it.[77]

While courts will generally consider sanctions on the grounds of these three elements, courts "take into account the blameworthiness of the offending party and the prejudice suffered by the opposing party"[78] to determine the severity of the sanction to be imposed, thus adding a fourth element of prejudice in considering the adverse inference jury instruction or any other particular sanction.

B. The Duty to Preserve and Its Scope

1. No Duty of Preservation in the Abstract

There is no abstract common law duty to preserve information or tangible objects for discovery.[79] On the contrary, the United States Supreme Court

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73. *See generally* Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 535 (D. Md. 2010) ("In its discretion, the court may order an adverse inference instruction . . . .").

74. *See generally id.* at 527 (citing Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 440 (S.D.N.Y. 2004)) (explaining how the "tedious and difficult fact finding" regarding the duty to preserve ESI greatly burdens "a court's limited resources").

75. *See id.* at 516 (stating variations among federal circuits exist regarding the standards for the imposition of spoliation sanctions and that there is a "lack of a federal standard").

76. *See id.* at 521 & n.31.

77. Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494, 509 (D. Md. 2009) (citing Thompson v. U.S. Dep't of Hous. & Urban Dev., 219 F.R.D. 93, 101 (D. Md. 2003)).

78. Broccoli v. Echostar Commc'ns Corp., 229 F.R.D. 506, 510 (D. Md. 2005).

79. *See Victor Stanley, Inc.*, 269 F.R.D. at 521 (explaining that the common law duty to preserve evidence does not begin until "the moment . . . litigation is reasonably anticipated").

recognizes that, as a general proposition, businesses and individuals have a right to dispose of their documents and data as they see fit.[80]

> "Document retention policies," which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business. It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.[81]

In *Micron Technology, Inc. v. Rambus Inc.*,[82] the Federal Circuit Court of Appeals considered the destruction of documents and ESI pursuant to a document retention policy the defendant initiated shortly before launching a series of patent infringement actions.[83] The court stated:

> First, it is certainly true that most document retention policies are adopted with benign business purposes, reflecting the fact that "litigation is an ever-present possibility in American life." In addition, there is the innocent purpose of simply limiting the volume of a party's files and retaining only that which is of continuing value. One might call it the "good housekeeping" purpose. Thus, where a party has a long-standing policy of destruction of documents on a regular schedule, with that policy motivated by general business needs, which may include a general concern for the possibility of litigation, destruction that occurs in line with the policy is relatively unlikely to be seen as spoliation.[84]

2. *The Trigger of the Duty of Preservation*

The extraordinary circumstances under which the dicta from the Supreme Court does not apply, and the "relatively unlikely" circumstances to which the Federal Circuit alludes, are situations in which the information is subject to a specific statute or regulation requiring retention, or when litigation is "reasonably anticipated."[85] The "reasonable anticipation" standard does not encompass the general anxiety that businesses and individuals may feel living in a litigious society but must be grounded in fact.[86] "A reasonable anticipation of

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80. *See generally* Zubulake v. UBS Warburg LLC (*Zubulake IV*), 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (explaining that the court can only a sanction a party "for destroying evidence if it had a duty to preserve it").

81. Arthur Andersen LLP v. United States, 544 U.S. 696, 704 (2005) (citation omitted).

82. 645 F.3d 1311 (Fed. Cir. 2011).

83. *See id.* at 1315, 1316, 1317–18.

84. *Id.* at 1322 (citation omitted) (quoting Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992)).

85. *See* The Sedona Conference, *supra* note 26, at 268, 271.

86. *See id.*

litigation arises when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation."[87]

The duty of preservation can arise well before a party files suit.[88] "The duty to preserve material 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."[89]

3. *The Scope of the Duty of Preservation: Post-Hoc Analysis*

The scope of the duty to preserve does not extend to all information or tangible objects that may be within the possession, custody, or control of the party, but only to that which is likely to be subject to discovery.[90] Rather, "[t]he duty to preserve encompasses any documents or tangible items authored or made by individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses."[91]

Led by Judge Lee Rosenthal, former chair of the Civil Rules Advisory Committee and the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States,[92] a few courts and legal commentators in recent years have injected a reasonableness or proportionality aspect into the post-hoc analysis of the scope of the duty of preservation.[93] According to Judge Rosenthal, "[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards."[94] Judge Paul Grimm of the District of Maryland wrote that "the scope of preservation should somehow be proportional to the amount in controversy and the costs and burdens of preservation."[95] Perhaps most importantly, the concept of reasonableness in the post-hoc analysis of preservation activities has found its way into the current

87. *Id.* at 269.

88. *See, e.g.*, Hon. Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381, 385 (2008) ("[T]he duty to preserve often arises before litigation is commenced . . . .").

89. Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001) (citing Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998)).

90. *See* Broccoli v. Echostar Commc'ns Corp., 229 F.R.D. 506, 510 (D. Md. 2005) (citing *Zubulake IV*, 220 F.R.D. 212, 217–18 (S.D.N.Y. 2003)).

91. *Id.* (citing *Zubulake IV*, 220 F.R.D. at 217–18).

92. *See Biography: Lee H. Rosenthal*, AM. L. INST., http://www.ali.org/index.cfm?fuseaction=about.bio&bio_id=54 (last visited Feb. 24, 2013).

93. *See* Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 607, 613 (S.D. Tex. 2010).

94. *Id.* at 613.

95. Grimm et al., *supra* note 88, at 405.

round of federal rulemaking.[96] The Civil Rules Advisory Committee approved a proposed new Federal Rule of Civil Procedure 37(e), intended to completely replace the current Rule 37(e), which was approved by the Advisory Committee on November 2, 2012, and submitted to the Standing Committee on Rules of Practice and Procedure for consideration at its meeting on January 3–4, 2013.[97] It contains the following language:

> *Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions*
>
> . . . .
>
> *(e) Failure to Preserve Discoverable Information.* If a party failed to preserve discoverable information that reasonably should have been preserved in the anticipation or conduct of litigation,
>
> *(1)* The court may permit additional discovery, order the party to undertake curative measures, or require the party to pay the reasonable expenses, including attorney's fees, caused by the failure.
>
> . . . .
>
> *(3)* In determining whether a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith, the court should consider all relevant factors, including:
>
> . . . .
>
> *(B)* the reasonableness of the party's efforts to preserve the information[.][98]

The proposed Committee Note to accompany the new rule states, "[t]he amended rule is designed to ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts."[99]

According to attendees of the January 2013 Standing Committee meeting, the proposed Rule 37(e) was the subject of spirited debate, ultimately resulting in

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96. *See generally* Advisory Comm. on Fed. Rules of Civil Procedure, Judicial Conference of the U.S., *Draft Minutes of the November 2, 2012 Meeting of the Advisory Committee on Civil Rules*, *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 251, 255 (2013), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2013-01.pdf (explaining how factors in the amended Rule 37(e) emphasize "reasonableness and proportionality").

97. *See id.* at 253–54; Advisory Comm. on Fed. Rules of Civil Procedure, Judicial Conference of the U.S., *Report of the Advisory Committee on Civil Rules (Dec. 5, 2012)*, *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 96, at 91, 93.

98. Advisory Comm. on Fed. Rules of Civil Procedure, Judicial Conference of the U.S., *supra* note 97, at 103–04.

99. *Id.* at 131.

the Standing Committee approving it for publication in August 2013, but with suggested modifications to be submitted at the June 2013 Standing Committee meeting.[100] The inclusion of the reasonableness standard, however, was not considered controversial and will likely survive possible revision.[101]

4. The Scope of the Duty of Preservation: Ex-Ante Analysis

If reasonableness is becoming the guiding principle for judges in analyzing preservation decisions after the fact, may parties rely on reasonableness in making proactive decisions about the scope of discovery? The Sedona Conference, in its *Commentary on Legal Holds*, posits that "[f]actors that may be considered in determining the scope of information that should be preserved include the nature of the issues raised in the matter, the accessibility of the information, the probative value of the information, and the relative burdens and costs of the preservation effort."[102] Similarly, The Sedona Conference states as its Proportionality Principle 1 that "[t]he burdens and costs of preservation of potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation."[103]

But some courts have questioned the efficacy of reasonableness as a reliable standard for making preservation scope and activity decisions:

> Although some cases have suggested that the definition of what must be preserved should be guided by principles of "reasonableness and proportionality," this standard may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle. Until a more precise definition is created by rule, a party is well-advised to "retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches." In this respect, "relevance" means relevance for purposes of discovery, which is "an extremely broad concept."[104]

Additionally:

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100. *See id.* at 93.

101. *See* Advisory Comm. on Fed. Rules of Civil Procedure, Judicial Conference of the U.S., *supra* note 96, at 255–58.

102. The Sedona Conference, *supra* note 26, at 280.

103. The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 296 (2010).

104. Orbit One Commc'ns, Inc. v. Numerex Corp., 271 F.R.D. 429, 436–37 (S.D.N.Y. 2010) (footnotes omitted) (citations omitted) (quoting Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 523 (D. Md. 2010); Condit v. Dunne, 225 F.R.D. 100, 105 (S.D.N.Y. 2004); *Zubulake IV*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)).

> Reasonableness and proportionality are surely good guiding principles for a court that is considering imposing a preservation order or evaluating the sufficiency of a party's efforts at preservation after the fact. Because these concepts are highly elastic, however, they cannot be assumed to create a safe harbor for a party that is obligated to preserve evidence but is not operating under a court-imposed preservation order. Proportionality is particularly tricky in the context of preservation. It seems unlikely, for example, that a court would excuse the destruction of evidence merely because the monetary value of anticipated litigation was low.[105]

C. Culpable State of Mind

If a duty to preserve discoverable evidence has been established, the next element in the spoliation analysis for the court is whether the party that lost the evidence did so with a culpable state of mind.[106] However, the degree of culpability necessary for a court to issue an adverse inference jury instruction is a matter of considerable national debate.[107] In the Second Circuit, the leading opinion on culpability is *Residential Funding Corp. v. DeGeorge Financial Corp.*,[108] in which the court held that negligence is a sufficiently culpable state of mind to warrant an adverse inference jury instruction, reasoning that "[t]he sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence."[109] *Residential Funding* and other Second Circuit precedents were relied upon more recently in *Pension Committee*, in which the court found several parties grossly negligent in their preservation efforts.[110] This provided sufficient basis for an adverse inference jury instruction, although the court did not find that any of the parties acted in bad faith.[111]

The Second Circuit recently clarified *Residential Funding* by stating that "a finding of gross negligence merely permits, rather than requires, a district court to give an adverse inference instruction."[112] It should also be noted that the Second Circuit in *Residential Funding* remanded the case to the trial court for further consideration and did not itself find that the conduct in the case

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105. *Id.* at n.10; *see also* Pippins v. KPMG LLP, No. 11 Civ. 0377(CM)(JLC), 2011 WL 4701849, at *8 (S.D.N.Y. Oct. 7, 2011) (stating that courts have cautioned against the use of the proportionality test for preservation).

106. *See Victor Stanley, Inc.*, 269 F.R.D. at 529.

107. *See id.*

108. 306 F.3d 99 (2d Cir. 2002).

109. *Id.* at 108.

110. Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 479 (S.D.N.Y. 2010), *abrogated by* Chin v. Port Auth., 685 F.3d 135 (2d Cir. 2012).

111. *See id.* at 496–97.

112. *Chin*, 685 F.3d at 162.

warranted the adverse inference jury instruction.[113] Further, it characterized the accused party's conduct as something more than negligence, adopting the trial court's euphonious phrase "somewhat purposeful sluggishness" to describe the accused party's efforts to meet discovery obligations, and indicating that this alone would be a sufficient state of mind to support the adverse inference.[114]

Courts in other circuits have declined to follow the Second Circuit—or at least declined to follow a simplistic interpretation of *Residential Funding*—on the question of culpability.[115] Most notably, just a few weeks after the court published the *Pension Committee* decision, Judge Lee Rosenthal published a decision on spoliation of ESI and used the opportunity to contrast the Second Circuit's approach with that of the Fifth Circuit, which requires the court to find bad faith before an adverse inference instruction can go to the jury.[116] In *Rimkus Consulting Group, Inc. v. Cammarata*,[117] an action to enforce a noncompetition agreement, the court found that the defendants communicated their plans to start a competing business and transferred files from their former employer through secret web-based email accounts.[118] In addition, one defendant donated his computer to charity after litigation commenced,[119] and the defendants agreed to delete the emails of their new business after two weeks,[120] even though litigation was pending.[121] These and other factual findings led the court to

> the conclusion that there is sufficient evidence for a reasonable jury to find that the defendants intentionally and in bad faith deleted emails relevant to setting up and operating U.S. Forensic, to obtaining information from Rimkus and using it for U.S. Forensic, and to soliciting Rimkus clients, to prevent the use of these emails in litigation in Louisiana or Texas.[122]

Characterizing the adverse inference jury instruction as a "severe" sanction, the court held that a finding of bad faith—and not just intentional action—was necessary to support such a sanction:

> Destruction or deletion of information subject to a preservation obligation is not sufficient for sanctions. Bad faith is required. A severe

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113. *See Residential Funding Corp.*, 306 F.3d at 113.

114. *See id.* at 110 (citation omitted).

115. Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 615 (S.D. Tex. 2010) (citing *Pension Comm.*, 685 F. Supp. 2d at 478; *Residential Funding Corp.*, 306 F.3d at 108).

116. *See id.* (citing *Pension Comm.*, 685 F. Supp. 2d at 478; *Residential Funding Corp.*, 306 F.3d at 108).

117. 688 F. Supp. 2d 598.

118. *See id.* at 626.

119. *See id.* at 630 (citation omitted).

120. *See id.* at 633.

121. *Id.* (citation omitted).

122. *Id.* at 644.

> sanction such as a default judgment or an adverse inference instruction requires bad faith and prejudice. ("[A] jury may draw an adverse inference 'that party who intentionally destroys important evidence in bad faith did so because the contents of those documents were unfavorable to that party.'")[123]

In the Fourth Circuit, the leading case defining the "culpable state of mind" is *Vodusek v. Bayliner Marine Corp.*,[124] a personal injury action the widow of a pleasure boat owner killed in an explosion and fire on board brought against the manufacturer and seller of the boat.[125] The spoliation issue did not involve documents or data; rather, it involved physical evidence.[126] In examining the boat to discover the cause of the explosion and fire the plaintiff "employed destructive methods which rendered many portions of the boat useless for examination by the defendants and their experts."[127] The trial court issued an adverse inference jury instruction, and the plaintiff appealed.[128] According to the court:

> Vodusek's principal argument is that the defendants must show that she acted in bad faith before the jury can be permitted to draw adverse inferences as to what the boat would have revealed had it not been damaged. She maintains, "There was not a shred of evidence that [she] or her agents, acted willfully, or in bad faith, when Mr. Halsey examined the boat on December 28, 1989." She also argues that the district court erred in not including the requirement of bad faith as part of its jury instructions. We reject the argument that bad faith is an essential element of the spoliation rule.
>
> As a general proposition, the trial court has broad discretion to permit a jury to draw adverse inferences from a party's failure to present evidence, the loss of evidence, or the destruction of evidence. While a finding of bad faith suffices to permit such an inference, it is not always necessary.[129]

The circuits may be divided by a common language of culpability. While such terms as negligence, gross negligence, and recklessness are difficult enough to define, the term "willful" seems to create the most problem in the spoliation

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123. *Id.* at 642–43 (citations omitted) (quoting Whitt v. Stephens Cnty., 529 F.3d 278, 284 (5th Cir. 2008)).

124. 71 F.3d 148 (4th Cir. 1995).

125. *See id.* at 151.

126. *See id.* at 155.

127. *Id.*

128. *See id.*

129. *Id.* at 156.

cases.[130] In *Pension Committee*, Judge Scheindlin borrowed from tort law to define "willful" as requiring "that 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."[131] On the other hand, the Fourth Circuit's holding in *Buckley v. Mukasey*,[132] remanding to the trial court for further consideration of culpability in spoliation, appears to place "willful" along a continuum, greater than negligence but less than bad faith.[133] The effect is to equate "willful" with "intentional" or "deliberate,"[134] and in the case under consideration, with the destruction of ESI pursuant to "routine internal procedures."[135]

D. Relevance

The third element in the spoliation analysis is the relevance of the lost evidence.[136] For the purposes of spoliation, the term "relevant" has a different and narrower meaning than it has under Federal Rule of Evidence 401[137] or Federal Rule of Civil Procedure 26(b)(1).[138] In the Fourth Circuit, as an element in the spoliation analysis, lost or destroyed evidence is relevant if "a reasonable factfinder could conclude that the lost evidence would have supported the claims or defenses of the party that sought it."[139]

While relevance is a threshold consideration in the spoliation analysis—there is no duty to preserve information that is not relevant to the litigation—the fact that the lost information would have been relevant does not end the

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130. *See, e.g.*, Buckley v. Mukasey, 538 F.3d 306, 323 (4th Cir. 2008) (providing "willful" as an example of a type of conduct, along with "intentional" and "deliberate"); Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 463–64 (S.D.N.Y. 2010) (quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 31, at 169, § 34, at 211–12, 213 (5th ed. 1984)) (seeking to define the term "willful"), *abrogated by* Chin v. Port Auth., 685 F.3d 135 (2d Cir. 2012).

131. *Pension Comm.*, 685 F. Supp. 2d at 464 (quoting KEETON ET AL., *supra* note 130, § 34, at 213).

132. 538 F.3d 306.

133. *See id.* at 323.

134. *See id.*

135. *Id.* at 322.

136. Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 531 (D. Md. 2010).

137. FED. R. EVID. 401 ("Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence . . . .").

138. FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter than is relevant to any party's claim or defense . . . .").

139. Thompson v. U.S. Dep't of Hous. & Urban Dev., 219 F.R.D. 93, 101 (D. Md. 2003) (citing Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002); *Zubulake IV*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003)).

inquiry.[140] If relevant information has been destroyed through culpable conduct after a duty of preservation attached, one has established a prima facie spoliation claim.[141] The relationship of the relevant information, the ability of the parties to present their substantive claims or defenses, and the ability of the court to fairly adjudicate those claims and defenses, however, determines the remedy or sanction.[142]

E. Prejudice

Relevance leads us to the fourth factor in the spoliation analysis: prejudice.[143] To distinguish prejudice from relevance, one needs to understand that the duty of preservation is not a conventional tort concept.[144] The duty to refrain from destroying evidence is not a duty owed to the opposing party in litigation, and the measure of prejudice is not the degree to which the failure to preserve discoverable evidence hindered the discovery process.[145] *The duty is owed* to the court, and the measure of prejudice is the degree to which the failure to preserve discoverable evidence hinders the court's ability to adjudicate the case, by preventing the requesting party from effectively presenting its claims or defenses:

> That the duty is owed to the court, and not to the party's adversary is a subtle, but consequential, distinction. A proper appreciation of the distinction informs the Court's decision regarding appropriate spoliation sanctions. Where intentionally egregious conduct leads to spoliation of evidence but causes no prejudice because the evidence destroyed was not relevant, or was merely cumulative to readily available evidence, or because the same evidence could be obtained from other sources, then the integrity of the judicial system has been injured far less than if simple negligence results in the total loss of evidence essential for an adversary to prosecute or defend against a claim. In the former instance, the appropriateness of a case-dispositive sanction is questionable despite the magnitude of the culpability, because the harm to the truth-finding process is slight, and lesser sanctions such as monetary ones will suffice. In contrast, a sympathetic though negligent party whose want of

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140. *Victor Stanley, Inc.*, 269 F.R.D. at 531 (citing Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 467 (S.D.N.Y. 2010), *abrogated by* Chin v. Port Auth., 685 F.3d 135 (2d Cir. 2012)).

141. *See generally Zubulake IV*, 220 F.R.D. at 220 ("When evidence is destroyed in bad faith (*i.e.*, intentionally or willfully), that fact alone is sufficient to demonstrate relevance.").

142. *See generally Victor Stanley, Inc.*, 269 F.R.D. at 533 (explaining that courts should consider several elements, including the extent of prejudice and degree of culpability, when determining the appropriate sanction for spoliation).

143. *Id.* at 531–32 (citing *Pension Comm.*, 685 F. Supp. 2d at 467).

144. *See id.* at 525.

145. *See id.* at 526.

> diligence eliminates the ability of an adversary to prove its case may warrant case-dispositive sanctions, because the damage to the truth-seeking process is absolute. Similarly, certain sanctions make no logical sense when applied to particular breaches of the duty to preserve. For example, an adverse inference instruction makes little logical sense if given as a sanction for negligent breach of the duty to preserve, because the inference that a party failed to preserve evidence because it believed that the evidence was harmful to its case does not flow from mere negligence—particularly if the destruction was of ESI and was caused by the automatic deletion function of a program that the party negligently failed to disable once the duty to preserve was triggered. The more logical inference is that the party was disorganized, or distracted, or technically challenged, or overextended, not that it failed to preserve evidence because of an awareness that it was harmful. In short, matching the appropriate sanction to the spoliating conduct is aided by remembering to whom the duty to preserve is owed.[146]

In some cases, prejudice may be obvious, such as the loss of the product in a products liability action.[147] But prejudice is difficult to establish if the evidence is missing. Circumstantial evidence helps determine the extent of the prejudice cased by the loss.[148] In those cases, the prejudicial nature of the lost evidence may be inferred by the degree of culpability of the party who lost it.[149] Actions taken in bad faith justify an inference that the party knew the evidence would be harmful to its position or beneficial to the requesting party. This inference is the essence of the adverse inference jury instruction, when viewed as a remedy for the loss of primary evidence.

IV. THE SO-CALLED SAFE HARBOR OF RULE 37(E)

A. History of Rule 37(e)

Federal Rule of Civil Procedure 37(e) provides that:

> Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide

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146. *Id.*

147. *See, e.g.*, Silvestri v. Gen. Motors Corp., 271 F.3d 583, 594 (4th Cir. 2001) (dismissing a products liability action involving airbag deployment because the plaintiff failed to preserve the automobile with the allegedly defective airbag).

148. *See, e.g.*, Consol. Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335, 346 (M.D. La. 2006) (citing Concord Boat Corp. v. Brunswick Corp., No. LR–C–95–781, 1997 WL 33352759, at *7 (E.D. Ark. Aug. 29, 1997)) (explaining how extrinsic evidence is needed for evidence that is missing in order to determine if the missing evidence is prejudicial).

149. *See, e.g.*, *id.* at 347 (citing *Concord Boat Corp.*, 1997 WL 33352759, at *7–8; *Zubulake IV*, 220 F.R.D. 212, 222 (S.D.N.Y. 2003)).

> electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.[150]

In its 2005 report to the Standing Committee on Rules of Practice and Procedure proposing the rule, the Civil Rules Advisory Committee observed that "many database programs automatically create, discard, or update information without specific direction from, or awareness of, users" and "the proposed rule recognizes that such automatic features are essential to the operation of electronic information systems."[151] The Advisory Committee's report provided examples of automated operations that would fall within the safe harbor:

> Examples of [routine operations] in present systems include programs that recycle storage media kept for brief periods against the possibility of a disaster that broadly affects computer operations; automatic overwriting of information that has been "deleted"; programs that change metadata (automatically created identifying information about the history or management of an electronic file) to reflect the latest access to particular electronically stored information; and programs that automatically discard information that has not been accessed within a defined period or that exists beyond a defined period without an affirmative effort to store it for a longer period.[152]

The Standing Committee, in its own report on the proposed rule amendments addressing the discovery of ESI, echoed the Advisory Committee's rationale for treating the loss of ESI differently than the loss of traditional paper records:

> The proposed amendment to Rule 37(f) responds to a distinctive and necessary feature of computer systems—the recycling, overwriting, and alteration of electronically stored information that attends normal use. This is a different problem from that presented by information kept in the static form that paper represents; such information is not destroyed without affirmative, conscious effort. By contrast, computer systems lose, alter, or destroy information as part of routine operations,

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150. FED. R. CIV. P. 37(e). The text now appearing as Rule 37(e) was originally added in 2006 as subsection (f), and for the first year that the Rule was in effect, it was cited as such. When the Civil Rules were restyled in 2007, the provision became subdivision (e). *See id.* & committee's note to 2006 amendment.

151. Memorandum from Hon. Lee H. Rosenthal, Chair, Advisory Comm. on the Fed. Rules of Civil Procedure, to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure 73 (July 25, 2005), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/supct1105/Excerpt_CV_Report.pdf [hereinafter Rosenthal Memorandum].

152. *Id.*

> making the risk of losing information significantly greater than with paper.[153]

Andrea Kuperman, Chief Counsel to the Rules Committees,[154] in an exhaustively well-researched memorandum on the history and effectiveness of Rule 37(e), observed that:

> [T]he rule was intended to do something quite limited: to clarify for courts and parties that the world of electronic discovery could not be treated the same in terms of preservation and related sanctions as the world of paper discovery, given the volume of electronic documents and the fact that electronic systems operate in ways that may destroy data unintentionally and often even without a party's knowledge. It was meant to provide limited protection so that parties could be comforted that they would not be sanctioned for good faith destruction done by electronic systems.[155]

It should be noted that all of the examples of automated operations listed by the Advisory Committee involve conscious decisions made by engineers and programmers at some point in the information system design process.[156] Those decisions presumably were made long before any duty of preservation attached—likely before there was even any relevant information to be preserved—and for reasons entirely unrelated to any pending or anticipated litigation.[157]

B. Rule 37(e) and "Auto Delete" Operations

One of the most common examples of the loss of ESI as a result of the "routine, good-faith" operation of an electronic information system at the time Rule 37(e) was being drafted was the automatic deletion of email after a defined period of time, usually sixty to ninety days, or when the recipient's email

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153. COMM. ON RULES OF PRACTICE & PROCEDURE, EXCERPT FROM THE REPORT OF THE JUDICIAL CONFERENCE 13 (2005), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/supct1105/Excerpt_STReport_CV.pdf.

154. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE CHAIRS AND REPORTERS 2 (2011), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Committee_Membership_Lists/Members_List_12_2011.pdf.

155. Advisory Comm. on Fed. Rules of Civil Procedure, Judicial Conference of the U.S., *Report of the Advisory Committee on Civil Rules (Dec. 5, 2012)*, *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 96, at 139.

156. *See* Rosenthal Memorandum, *supra* note 151, at 73.

157. *See generally supra* notes 85–89 and accompanying text (discussing when the duty to preserve arises).

account exceeded a predetermined size limitation.[158] In *Broccoli v. Echostar Communications Corp.*,[159] the court was presented with one of the most draconian automatic email deletion policies in the reported case law:

> Under Echostar's extraordinary email/document retention policy, the email system automatically sends all items in a user's "sent items" folder over seven days old to the user's "deleted items" folder, and all items in a user's "deleted items" folder over 14 days old are then automatically purged from the user's "deleted items" folder. The user's purged emails are not recorded or stored in any back up files. Thus, when 21-day-old emails are purged, they are forever unretrievable. The electronic files, including the contents of all folders, sub-folders, and all email folders, of former employees are also completely deleted 30 days after the employee leaves Echostar.[160]

The court declined to find that the automatic deletion policy itself constituted sanctionable conduct. Relying on the Supreme Court's recently issued dicta in *Arthur Andersen LLP v. United States*,[161] the *Broccoli* court stated that "under normal circumstances, such a policy may be a risky but arguably defensible business practice undeserving of sanctions."[162] However, Echostar's failure to preserve clearly relevant emails and other data that existed at the time the duty of preservation in this case arose, when it was on notice of potential litigation arising out of the plaintiff's allegations of sexual harassment and retaliation, was another matter.[163]

> Echostar clearly acted in bad faith in its failure to suspend its email and data destruction policy or preserve essential personnel documents in order to fulfill its duty to preserve the relevant documentation for purposes of potential litigation. These bad faith actions prejudiced

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158. *See* Alexander B. Hastings, Note, *A Solution to the Spoliation Chaos: Rule 37(e)'s Unfulfilled Potential to Bring Uniformity to Electronic Spoliation Disputes*, 79 GEO. WASH. L. REV. 860, 873 (2011) ("[N]early all companies enable their software to delete e-mails that have been sent or received after a certain time.").

159. 229 F.R.D. 506 (D. Md. 2005).

160. *Id.* at 510.

161. 544 U.S. 696, 704 (2005) ("'Document retention policies,' which are created in part to keep certain information from getting into the hands of others . . . are common in business. It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances." (citation omitted)).

162. *Broccoli*, 229 F.R.D. at 510.

163. *See id.* ("[T]he evidence in this case amply supports the finding that Echostar was placed on notice of potential litigation arising out of the plaintiff's allegations of sexual harassment and retaliation as early as January 2001.").

> Broccoli in his attempts to litigate his claims and measurably increased the costs for him to do so.[164]

Therefore, the action that constituted bad faith warranting sanctions was action taken after the duty of preservation arose: failing to suspend the "risky but arguably defensible business practice" of automatic deletion.[165]

Had Rule 37(e) been in force when *Broccoli* was decided, it probably would not have changed the outcome. In *Broccoli*, the court stated, "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."[166] The Committee Note accompanying Rule 37(f), however, states that once the duty of preservation attaches, affirmative steps *may* be required to halt automatic deletion policies:

> Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. . . . The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold."[167]

While there are inconsistencies in the interpretation of Rule 37(e)—and this Committee Note in particular—between courts in different circuits, and even lower courts within some circuits,[168] most courts have interpreted this passage in light of the pre-2006 case law and have considered the issuance of a litigation hold, including the suspension of any automatic deletion, to be *required* indicia of good faith, and any loss of relevant ESI after the duty of preservation arises to

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164. *Id.* at 512.

165. *See id.*

166. *Id.* at 510 (quoting Thompson v. U.S. Dep't of Hous. & Urban Dev., 219 F.R.D. 93, 100 (D. Md. 2003)) (internal quotation marks omitted).

167. FED. R. CIV. P. 37(f) committee's note to 2006 amendment.

168. *See, e.g.*, Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 464 (S.D.N.Y. 2010) ("A failure to preserve evidence resulting in the loss or destruction of relevant information is surely negligent, and, depending on the circumstances, may be grossly negligent or willful."), *abrogated by* Chin v. Port Auth., 685 F.3d 135, 162 (2nd Cir. 2012) ("We reject the notion that a failure to institute a 'litigation hold' constitutes gross negligence *per se*.").

be evidence of culpable conduct.[169] As a result, "federal courts have all but read this safe harbor provision out of the rules. They have generally concluded that once the duty to preserve arises—and it arises as soon as litigation becomes foreseeable—any deletion of relevant data is, by definition, not in good faith."[170]

In many of these cases, there were other indicia of culpable conduct beyond simple negligence that led to the imposition of sanctions.[171] In *Broccoli*, for instance, a pattern of activity resulting in the loss of key employment-related files—far more than just employee email and ESI—led the court to conclude, "[i]n short, the evidence of a regular policy at Echostar of 'deep-sixing' nettlesome documents and records (and of management's efforts to avoid their creation in the first instance) is overwhelming."[172]

C. Rule 37(e) in the Fourth Circuit

In the Fourth Circuit there are only a handful of reported court opinions applying Rule 37(e), and there is no opinion in which the Rule barred the imposition of a sanction.[173] In some instances, this lack of guidance is because Rule 37(e) was found not to apply at all, as no court order was implicated in the facts to trigger a sanction "under these rules."[174] In other instances, the Fourth Circuit precedent broadly defining "willfulness" effectively negated the good faith element of the Rule 37(e) safe harbor.

Well before Rule 37(e) was drafted, the Fourth Circuit held in *Vodusek v. Bayliner Marine Corp.*[175] that "[w]hile a finding of bad faith suffices to permit such an [adverse inference jury instruction], it is not always necessary."[176] The court went on to explain the factors that allow a court, in its discretion, to impose that particular sanction.[177] First, the evidence that has been lost must appear to "have been relevant to an issue at trial and otherwise would naturally have been introduced into evidence."[178] Second, the loss must have been the result of some

169. *See* Robert Hardaway et al., *E-Discovery's Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age*, 63 RUTGERS L. REV. 521, 585–86 (2011) (citing Peskoff v. Faber, 244 F.R.D. 54, 60 (D.D.C. 2007); Doe v. Norwalk Cmty. Coll., 248 F.R.D. 372, 378 (D. Conn. 2007)).

170. *Id.* at 566.

171. *See, e.g.*, *Broccoli*, 229 F.R.D. at 511 (explaining how the defendant had a history of burying documents).

172. *Id.*

173. *See, e.g.*, Nucor Corp. v. Bell, 251 F.R.D. 191, 196 n.3 (D.S.C. 2008) (quoting FED. R. CIV. P. 37(e)) (refusing to use Rule 37(e) to bar a sanction).

174. *See, e.g.*, *id.* (quoting FED. R. CIV. P. 37(e)) (stating that Rule 37(e) only applies to sanctions imposed "for failing to obey a court order").

175. 71 F.3d 148 (4th Cir. 1995).

176. *Id.* at 156.

177. *See id.* (citing 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 285, at 192 (James H. Chadbourn rev. 1979)).

178. *Id.*

intentional conduct by the party against whom the evidence would have been introduced.[179] These two elements cannot be viewed in isolation:

> An adverse inference about a party's consciousness of the weakness of his case, however, cannot be drawn merely from his 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.[180]

It is against this precedential backdrop that courts in the Fourth Circuit have construed their powers under both Rule 37(e) and their inherent authority to impose sanctions.

In *Nucor Corp. v. Bell*,[181] the District Court for the District of South Carolina found ample evidence that the defendant's actions in installing, uninstalling, and reinstalling various utility applications on his work laptop,[182] after having been served a summons in the case and after a state court had issued a preservation order, were intentional, and "[i]t would strain credulity to believe that defendants did not know the laptop would contain relevant evidence in this litigation."[183] The court then defined what constituted intentional actions:

> A party acts intentionally if it knew the evidence would be relevant at trial and its "willful conduct" resulted in the evidence's loss or destruction. Thus, it is not necessary that a party intends to bring about the loss of evidence. Rather, spoliation may be inferred when a party intended to take those actions that caused the evidence's alteration or destruction. Anything more (e.g., requiring that the party intended to bring about the evidence's loss) would be tantamount to requiring bad faith, and the Fourth Circuit has expressly rejected bad faith as an "essential element of the spoliation rule."[184]

However, the *Nucor* court based its imposition of sanctions not on Rule 37, but on its inherent authority, as there had been no violation of a discovery order entered by the court for which sanctions could be imposed "under these rules."[185]

Pandora Jewelry, LLC v. Chamilia, LLC[186] was an unfair trade practices case in which the court imposed monetary sanctions on the defendant for its refusal to respond to discovery requests in a timely manner and for failing to

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179. *See id.*
180. *Id.*
181. 251 F.R.D. 191 (D.S.C. 2008).
182. *See id.* at 197, 198.
183. *Id.* at 198–99.
184. *Id.* at 198 (citations omitted) (quoting *Vodusek*, 71 F.3d at 156).
185. *See id.* at 196 n.3 (quoting FED. R. CIV. P. 37(e)).
186. No. CCB-06-3041, 2008 WL 4533902 (D. Md. Sept. 30, 2008).

produce a qualified Rule 30(b)(6) witness.[187] In considering sanctions for spoliation, the court relied on its inherent authority,[188] rejecting the notion that Rule 37(e) applied:

> To the extent the lack of production results from deletion of emails, Chamilia's failure to prevent the loss does not fall within the routine, good faith exception of Rule 37(e), which protects parties "for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."[189]

While the court found that "it does appear that Chamilia was grossly negligent in its failure to preserve evidence,"[190] the court found neither evidence of bad faith,[191] nor that the emails alleged to have been lost would have supported the plaintiff's claims, and therefore declined to impose further sanctions.[192]

In *Powell v. Town of Sharpsburg*,[193] an employment discrimination suit, the court found that the town's destruction of the terminated employee's work orders, pursuant to its state-mandated document-retention policy, was "willful," albeit not in bad faith, noting Fourth Circuit case law indicating that "destruction can be willful when done through an organization's document retention policy."[194] The court distinguished between willfulness and bad faith, stating that "[d]estruction is willful when it is deliberate or intentional," whereas bad faith was deemed to "mean destruction for the purpose of depriving the adversary of the evidence."[195] The intentionality of the act of destruction, coupled with the centrality of the lost records to the issues in dispute, justified an adverse inference jury instruction.[196] Rule 37(e) was not raised in the opinion.

Goodman v. Praxair Services, Inc.,[197] an environmental consulting contract dispute, also dealt with the court's powers to issue sanctions for spoliation under its inherent authority.[198] The CEO of the defendant's predecessor in interest, believing she had ESI relevant to the consulting project on her laptop, stopped deleting emails she deemed to be relevant to the dispute.[199] However, no formal litigation hold was issued,[200] and the company proceeded to replace and destroy

187. *See id.* at *7 (citing FED. R. CIV. P. 30(b)(7)).
188. *See id.* at *8.
189. *Id.* at *8 n.7 (quoting FED. R. CIV. P. 37(e)).
190. *Id.* at *9.
191. *See id.*
192. *See id.* at *9–10.
193. 591 F. Supp. 2d 814 (E.D.N.C. 2008).
194. *Id.* at 820 (citing Buckley v. Mukasey, 538 F.3d 306, 323 (4th Cir. 2008)).
195. *Id.* (citing *Buckley*, 538 F.3d at 323).
196. *See id.* at 821.
197. 632 F. Supp. 2d 494 (D. Md. 2009).
198. *See id.* at 506.
199. *See id.* at 502.
200. *See id.* at 502–03.

the employee's computer, as well as those of two other important actors, when it changed hands during the pendency of the litigation.[201] The court held that, while the failure to issue a litigation hold was negligent, the destruction of the three computers was intentional and—while not done in "bad faith"—was done with the knowledge that at least one of the computers still held relevant ESI.[202] The combination of intentionality and knowledge that the ESI was relevant warranted an adverse inference jury instruction.[203]

In *Antonio v. Security Services of America, LLC*,[204] African-American plaintiffs sued the defendant for negligence and federal housing law violations after their homes were destroyed by arson.[205] The plaintiffs alleged that their homes, which were still under construction at the time of the alleged arsons, were targeted for destruction by employees of the defendant, who were responsible for guarding and patrolling the homes in the subdivision until they were completed and occupied.[206] The magistrate judge held that that the defendant intentionally and willfully destroyed relevant ESI when it failed to institute a proper litigation hold and allowed its employees to self-select email and personnel documents for deletion while it transitioned to a new computer system.[207] The magistrate judge ordered that an adverse inference be entered against the defendant regarding the deleted emails and personnel files responsive to the plaintiffs' request.[208] On review, the district judge accepted the magistrate judge's conclusion that the failure to preserve ESI lost as a result of the network conversion and destruction of the computer system was "more than gross negligence" and could support spoliation sanctions.[209] But the defendants' limited email production, loss of personnel records, and delay in discovery responses did not represent anything more than gross negligence, and therefore, would not provide the basis for spoliation sanctions.[210]

United States v. Universal Health Services, Inc.[211] was an action where three employees of a social service agency alleged retaliation for providing information to the Commonwealth of Virginia about possible Medicaid fraud.[212]

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201. *See id.* at 503–04, 517.

202. *Id.* at 522 (citing Pandora Jewelry, LLC v. Chamilla, LLC, No. CCB-06-3041, 2008 WL 4533902, at *9 (D. Md. Sept. 30, 2008); Sampson v. City of Cambridge, Md., 251 F.R.D. 172, 182 (D. Md. 2008)).

203. *See id.* at 522–23 (citing Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995)).

204. 701 F. Supp. 2d 749 (D. Md. 2010), *reconsidered in part by* Antonio v. Sec. Servs. of Am., LLC, No. AW 05 2982, 2010 WL 2858252 (D. Md. July 19, 2010).

205. *See id.* at 755–76.

206. *See id.* at 756.

207. *See* Antonio v. Sec. Servs. of Am., LLC, No. AW-05-2982, slip op. at 4, 10 (D. Md. Mar. 29, 2010).

208. *See id.* at *10.

209. *Antonio*, 2010 WL 2858252, at *5.

210. *See id.*

211. No. 1:07cv000054, 2011 WL 3426046 (W.D. Va. Aug. 5, 2011).

212. *See id.* at *1.

The defendants moved to compel production of documents from several state agencies.[213] Although the underlying qui tam action was filed in 2007, and the government gave notice to the court of its election to intervene in late 2009,[214] at least one state agency did not receive a litigation hold notice until April 2010, several months after the agency had converted to a new computer system.[215] At that point, the responsive ESI could have been obtained only from backup media or forensic images of agency employees' computers, none of which were reasonably accessible.[216] The defendant requested that the Commonwealth be compelled to produce the requested ESI or, in the alternative, be sanctioned with an adverse inference jury instruction.[217] The court noted that the Commonwealth, without providing any credible reason, failed to institute a litigation hold for two years after it made the decision to intervene in the qui tam action with a potential recovery of $10 million.[218] "Thus, a portion of the electronically stored information at issue in this Motion became less accessible based on the Commonwealth's own negligent failure to take steps to adequately preserve relevant information and not as a result of the routine, good-faith operation of an electronic information system."[219] The court ordered the Commonwealth to produce the backup media and forensic images to a qualified commercial vendor for retrieval of responsive files without discussing the alternative of imposing an adverse inference jury instruction.[220]

In one very recent decision, a trial court in the Fourth Circuit declined to impose sanctions for the failure to preserve ESI lost due to the routine, good-faith operation of an electronic information system after a duty of preservation had arisen. This decision could serve as a textbook example of the application of Rule 37(e) exactly as its drafters had intended, but for the fact that neither Rule 37(e) nor any other rule is cited relative to the court's discussion of spoliation. *Simms v. Deggeller Attractions, Inc.*[221] was a personal injury suit brought by three teenagers injured on a roller coaster when the car that they were riding in suddenly stopped and was rear-ended by a second car.[222] The defendant operator counterclaimed against one of the teenagers, alleging that he had been told to remove his baseball cap while riding and had failed to do so, resulting in the cap

213. *See id.*

214. *Id.*

215. *See id.* at *2 (citing Affidavit of John Willinger at 2, *Universal Health Servs.*, No. 1:07cv000054).

216. *See id.* at *2–3 (citing Affidavit of John Willinger, *supra* note 215, at 3–4).

217. *Id.* at *4.

218. *Id.* at *5, *6.

219. *Id.* at *5.

220. *See id.* at *6.

221. Nos. 7:12–cv–00038, 7:12–cv–00039, 7:12–cv–00161, 2013 WL 49756, 2013 WL 49756 (W.D. Va. Jan. 2, 2013).

222. *See id.* at *1 (citing Complaint at 2, Goad *ex rel.* Goad v. Degeller Attractions, Inc., No. 7-12-cv-161 (W.D. Va. Jan. 2, 2013)).

flying off and becoming wedged in the car's brake mechanism.[223] The defendant produced photographs of the teenager riding with his cap on and of the crushed cap, with blue paint stains matching the blue paint of the roller coaster's rails.[224] The plaintiffs disputed the defendant's allegations and demanded additional photographs from the roller coaster's integrated photography system that would show other passengers wearing caps while riding the roller coaster that same day.[225] The defendant could not produce any additional photographs, explaining that "the photographs 'are temporarily stored electronically and displayed for riders to view after they have completed the ride.' If an image is not purchased, 'the old photographs are deleted automatically as the new photographs are taken.'"[226]

Although the defendant itself had preserved photographs of the plaintiff, the court declined to find that the defendant had willfully allowed other photographs from that day to be destroyed:

> While the fact that a collision occurred may have alerted Deggeller to the possibility that a lawsuit for injuries might be filed at some point, the Court is not convinced, absent evidence of knowledge or wrongdoing, that employees of Deggeller knew—on July 3, 2011—that photographs of other riders wearing hats would be material to a lawsuit that had not yet been filed.[227]

The court left open the possibility that the plaintiffs could renew their motion for sanctions if evidence of willful conduct on the part of the defendant were to be discovered.[228]

These decisions on spoliation of ESI illustrate how narrow and rocky the Rule 37(e) "safe harbor" is. To invoke Rule 37(e), the court first must be acting pursuant to its powers under the rules, as opposed to its inherent authority.[229] In most of the cases discussed above, the court was either acting outside the scope of Rule 37 entirely, as no order to compel production or to preserve ESI was implicated, or considering actions that took place before suit was filed.[230]

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223. *Id.*
224. *Id.*
225. *See id.* at *5.
226. *Id.* (citations omitted).
227. *Id.* at *6.
228. *See id.*
229. *See, e.g.*, Nucor Corp. v. Bell, 251 F.R.D. 191, 196 n.3 (D.S.C. 2008) (quoting FED. R. CIV. P. 37(e)) ("Rule 37(e)'s plain language states that it only applies to sanctions imposed under the Federal Rules of Civil Procedure . . . .").
230. *See, e.g.*, *Simms*, 2013 WL 49756, at *6 (discussing actions that took place prior to the defendant knowing about the filing of the lawsuit); Pandora Jewelry, LLC v. Chamilla, LLC, No. CCB-06-3041, 2008 WL 4533902, at *8 n.7 (D. Md. Sept. 30, 2008) (quoting FED. R. CIV. P. 37(e)) (finding Rule 37(e) inapplicable); *Nucor Corp.*, 251 F.R.D. at 196 n.3 (invoking sanctions under the court's inherent authority rather than under Rule 37(e)).

Second, the loss of discoverable ESI must have been "a result of the routine, good-faith operation of an electronic information system."[231] Most of the cases discussed above involved extraordinary activity, such as migrating to a new computer system, outside of the context of well-established, routine business practices.[232]

The two cases in which the operation of a routine electronic information system resulted in the loss of discoverable ESI—neither of which applied Rule 37(e)—reached different results. However, these different outcomes can be explained under Fourth Circuit law.

In *Powell v. Town of Sharpsburg*,[233] the failure to suspend the document destruction schedule was deemed willful but not in bad faith.[234] The work orders that were destroyed "relate[d] directly to plaintiff's claim of discriminatory discipline and defendant's apparent defense of deficient performance by plaintiff."[235] The court concluded that the "defendant knew or should have known that the work orders would be relevant to any action brought by plaintiff against it relating to his employment."[236] This knowledge of relevance elevated the act of destruction from intentional to "willful," as defined by the Fourth Circuit,[237] dispensing with the necessity for a finding of bad faith to justify the adverse inference jury instruction,[238] as might be required in other circuits.[239] In *Simms*, the court imputed no such knowledge of relevance to the defendant, negating the allegation that the destruction was willful, even though a duty of preservation may have been triggered and the lost evidence was later deemed to be relevant.[240]

D. Navigating Past Rule 37(e)

An analysis of these cases from the Fourth Circuit indicates that the navigation hazards in the Rule 37(e) "safe harbor" are not whether the duty of preservation had been triggered before the destruction of the ESI, or whether the party had instituted a timely litigation hold, but whether the party knew or should

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

232. *See, e.g.*, United States v. Universal Health Servs. Inc., No. 1:07cv000054, 2011 WL 3426046, at *5 (W.D. Va. Aug. 5, 2011) (discussing retrieval of old email files); Antonio v. Sec. Servs. of Am., LLC, No. AW 05 2982, 2010 WL 2858252, at *4 (D. Md. July 19, 2010) (stating that defendant "destroyed the computer and converted the network").

233. 591 F. Supp. 2d 814 (E.D.N.C. 2008).

234. *See id.* at 821.

235. *Id.* at 817.

236. *Id.* at 819.

237. Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995).

238. *See Powell*, 591 F. Supp. 2d at 820 (citing Buckley v. Mukasey, 538 F.3d 306, 323 (4th Cir. 2008)).

239. *See, e.g.*, Micron Tech., Inc. v. Rambus Inc., 645 F.3d 1311, 1327 (Fed. Cir. 2011) ("A determination of bad faith is normally a prerequisite to the imposition of dispositive sanctions for spoliation under the district court's inherent power . . . .").

240. *See Simms*, 2013 WL 49756, at *6.

have known that the lost ESI would likely be subject to discovery in pending or reasonably anticipated litigation. It is that knowledge that elevates an intentional act of destruction pursuant to a "routine, good-faith operation of an electronic information system"[241] to a "willful" act subject to spoliation sanctions.[242] And it is this insight into Rule 37(e), and spoliation analysis in general, that provides a chart for navigating between the threat of sanctions for the failure to preserve and the enormous cost and burden of the "keep everything" approach.[243]

This conclusion is in accord with current efforts to amend Rule 37(e),[244] replacing it entirely with a more comprehensive rule that covers spoliation in general and is not limited in scope to the loss of ESI, "the result of the routine, good-faith operation of an electronic information system," or consideration of sanctions "under these rules."[245] As discussed in Part III.B.3. above, the Advisory Committee on Civil Rules approved the text of a proposed new Rule 37(e) in November 2012, and presented it to the Standing Committee on Rules of Practice and Procedure at its meeting in January 2013.[246] It is important to note that the language of proposed Rule 37(e)(3)(B) changed considerably in the fall of 2012.[247] Going into the Civil Rules Advisory Committee meeting in November, the proposed language was: "the reasonableness of the party's efforts to preserve the information, including the use of a litigation hold and the scope of the preservation efforts."[248] By December 5, when the Advisory Committee formally transmitted its proposal to the Standing Committee, that particular clause had been shortened considerably to remove the phrase "including the use of a litigation hold and the scope of the preservation efforts."[249]

The proposed Committee Note discusses Rule 37(e)(3)(B) as the second relevant factor in courts' consideration of sanctions, saying:

> The second factor focuses on what the party did to preserve information after the prospect of litigation arose. The party's issuance of a litigation hold is often important on this point. But it is only one

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

242. *See Simms*, 2013 WL 49756, at *6.

243. *See, e.g.*, Bennett B. Borden et al., *Four Years Later: How the 2006 Amendments to the Federal Rules Have Reshaped the E-Discovery Landscape and Are Revitalizing the Civil Justice System*, RICH. J.L. & TECH., Fall 2010, at 1, 4 ("The immense volume of potentially relevant evidence has driven the cost of finding, reviewing, and producing that information to unprecedented heights, threatening the very purposes of our civil justice system.").

244. *See supra* notes 93–101 and accompanying text.

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

246. *See supra* note 97 and accompanying text.

247. *See generally* Advisory Comm. on Fed. Rules of Civil Procedure, Judicial Conference of the U.S., *supra* note 96, at 127 (illustrating how the change originally listed "the reasonableness of the party's efforts to preserve the information," as well as two additional factors, as issues for consideration in spoliation matters under Rule 37(e)(3)(B)), but then the Subcommittee decided to strike the two additional factors).

248. *See id.*

249. *See id.* at 103–04.

> consideration, and no specific feature of the litigation hold—for example, a written rather than an oral hold notice—is dispositive. Instead, the scope and content of the party's overall preservation efforts should be scrutinized. . . . The fact that some information was lost does not itself prove that the efforts to preserve were not reasonable.[250]

With this action, the Advisory Committee on Civil Rules may be signaling that it is time to clear the mines in the Rule 37(e) "safe harbor" and allow for more reasonable course charting.

V. RISK AVERSION V. RISK MANAGEMENT

A. Law School Training v. Business School Training

Those of us with fond memories of law school may have a sense of humor that tends towards the macabre. Day after day, in contracts, torts, criminal law, and even civil procedure classes, we were taught using Dean Langdell's famous casebook method, which is based on a thorough analysis of exemplary court decisions to derive the underlying legal principles and see them in action.[251] But each of these judicial opinions we studied, by virtue of the fact that they were the culmination of an adjudication of a "case or controversy," represented the post mortem of a business, personal, or societal relationship gone awry, to the point that the parties required court intervention to sort things out.[252] Three years of reading and listening to such horror stories prepares one for entry in a legal culture in which risk aversion is understandably the dominant trait.

By contrast, our peers in the graduate business school were being taught with the "case method": they were presented with detailed background information on a business problem or opportunity and required to make decisions to achieve the most optimal result.[253] The goal of this method is to produce graduates suited for a business culture in which well-thought-out risk taking is encouraged.[254]

In the real world, the representatives of these two cultures must work together, and as a general proposition, they do. Entrepreneurs and lawyers craft deals together and govern businesses that make profits and comply with the law. Lawyers often become business people themselves, joining corporations, institutions, and government agencies, and becoming immersed in the organizational culture; conversely, they may start their own businesses, drawing

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250. *Id.* at 108.

251. *See* Arthur D. Austin, *Is the Casebook Method Obsolete?*, 6 WM. & MARY L. REV. 157, 157, 160 (1965).

252. *See id.* at 157.

253. *See* Benjamin H. Barton, *A Tale of Two Case Methods*, 75 TENN. L. REV. 233, 235–36 (2008) (citing DAVID W. EWING, INSIDE THE HARVARD BUSINESS SCHOOL 20 (1990)).

254. *See id.*

on their own entrepreneurial skill and spirit—assuming it was not beaten out of them in law school.[255] But business people tend not to cross over into the practice of law and generally do their best to avoid litigation. That is almost exclusively the realm of the lawyers, and in that realm it should be no surprise that risk-aversion rules, particularly when it comes to preservation decisionmaking.[256] The lawyers view this using the casebook method they were taught in law school, and a business-school-style analysis that emphasizes risk management, as opposed to risk aversion, is foreign to them.[257]

This assertion is not to say that, as a whole, the law frowns on risk management. On the contrary, as a matter of substantive law, risk management analysis is encouraged. The most prominent expression of this risk management consideration is the business judgment rule.

B. Importing the Business Judgment Rule into Preservation

The business judgment rule is a common law doctrine, a standard of due care, classically stated by the American Law Institute as:

> (c) A director or officer who makes a business judgment in good faith fulfills the duty [of care] under this Section if the director or officer:
>
> (1) is not interested . . . in the subject of the business judgment;
>
> (2) is informed with respect to the subject of the business judgment to the extent the director or officer reasonably believes to be appropriate under the circumstances; and
>
> (3) rationally believes that the business judgment is in the best interests of the corporation.[258]

While the burden is placed on the directors or officers to demonstrate that the elements of good faith have been met, once that burden is fulfilled, American Law Institute Principle 401(c) acts essentially as a safe harbor.[259]

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255. *Cf.* Thomas K. Byerley, *Wearing Two Hats: Lawyers Who Also Practice in Other Professions*, MICH. B.J., Jan. 2000, at 74, 74 (listing the various other occupations lawyers may hold).

256. *See* Robert J. Rhee, *On Legal Education and Reform: One View Formed from Diverse Perspectives*, 70 MD. L. REV. 310, 326 (2011).

257. *See generally* Barton, *supra* note 253, at 236 (describing management skills as a skill students gain in business school that is not taught in law school).

258. 1 PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01(c) (1992) [hereinafter PRINCIPLES OF CORPORATE GOVERNANCE].

259. *See* Douglas M. Branson, *The Rule That Isn't a Rule—The Business Judgment Rule*, 36 VAL. U. L. REV. 631, 636 (2002).

Delaware courts, which pioneered the business judgment rule, state it slightly differently as "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[260] By formulating the rule as a presumption, the burden shifts to the party seeking liability to come forward with evidence that the presumption should not apply.[261]

In addition to providing a rule of law to be applied in particular cases, the business judgment rule serves broader policy functions. First, the rule conserves judicial resources by requiring some threshold showing before allowing a full-blown inquiry into the motivations behind, or objective "reasonableness" of, an officer's or director's actions.[262] Perhaps more importantly, the rule allows individuals to make business decisions with some assurance a court will not routinely second-guess their actions:

> The business judgment rule now more than ever is necessary to encourage truly independent persons to serve as directors. "[Persons] of reason, intellect and integrity would not serve if the law exacted from them a degree of prescience not possessed by others." Once on the board, a strong business judgment rule is necessary to encourage those independent directors to engage in the type of informed risk taking that is essential to business success.[263]

The business judgment rule was originally developed in the context of shareholder derivative actions to address the appropriate standard of review to be applied to the decision of corporate directors and officers to forebear from pursuing the stockholder's claim on behalf of the corporation.[264] But business judgment rule analysis has been extended to other areas of corporate decisionmaking, such as a board's response to a takeover bid,[265] a board's decision to grant an allegedly overgenerous severance package to a departing CEO,[266] and a network television upper management's racially motivated programming decisions.[267]

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260. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (citing Kaplan v. Centex Corp., 284 A.2d 119, 124 (Del. Ch. 1971); Robinson v. Pittsburgh Oil Ref. Corp., 126 A. 46, 49 (Del. Ch. 1924)), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

261. *See* Branson, *supra* note 259, at 635.

262. *See id.*

263. *Id.* at 637 (quoting S. Samuel Arsht, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93, 97 (1979)).

264. *See Arsht*, *supra* note 263, at 95.

265. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).

266. *See In re* Walt Disney Co. Derivative Litig., 731 A.2d 342, 350, 353–54 (Del. Ch. 1998) (citing Aronson v. Lewis, 473 A.2d 805, 814 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000)), *aff'd in part, rev'd in part*, *Brehm*, 746 A.2d 244.

267. *See* Leonard M. Baynes, *Racial Stereotypes, Broadcast Corporations, and the Business Judgment Rule*, 37 U. RICH. L. REV. 819, 898 (2003).

While the business judgment rule originally provided courts with guidance in considering a corporate board's decision not to pursue litigation,[268] the policy considerations behind the rule apply equally to decisions by management—at any appropriate level in the corporate hierarchy—to establish and maintain an information governance program that rationally considers both the risks and costs of preservation.

C. Applying the Business Judgment Rule to Preservation

The three essential elements of the business judgment rule are that the decisionmaker be independent, in that the individual does not have an inappropriate personal interest in the outcome; that the decisionmaker be armed with the facts necessary to make an informed judgment; and that the judgment be made on the basis of the best interests of the business.[269] Whether or not the decision, in hindsight, was objectively the best decision or was the decision that a judge or jury would have made is immaterial, assuming that the business is willing to live up to the consequences of that decision.[270]

For instance, management may decide that it is in the business's best interest to hire a celebrity sports figure as a spokesperson and pay him a princely sum of money. If that celebrity spokesperson is later arrested for unlawful use of steroids, the stockholders may regret the management's decision; but if that decision met the requirements of the business judgment rule, the decision itself is not open to legal challenge.[271] That does not absolve the business from the consequences of its decision; it must accept the risks associated with hiring a sports celebrity.[272] It can (and should) mitigate those risks by thoroughly vetting the spokesperson before offering the contract and by inserting a "morals clause" in the contract itself,[273] but there will always be some risk that the spokesperson will end up costing the business money or goodwill that cannot be fully recovered.

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268. *See Arsht*, *supra* note 263, at 100.

269. *See* PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 258, at § 4.01(c).

270. *See, e.g.*, Brehm v. Eisner (*In re* Walt Disney Co. Derivative Litig.), 906 A.2d 27, 56, 60 (Del. 2006) (approving the Court of Chancery's finding that, though corporate processes did not meet the "best practices" standard, the operations still did not violate the duty of care).

271. *Cf.* Pinnacle Labs, LLC v. Goldberg, No. 07-C-196-S, 2007 WL 2572275, at *5 (W.D. Wis. Sept. 5, 2007) (listing certain protected decisions that "are typical difficult choices which managers of a cash strapped enterprise must make and which are not subject to legal challenge with the benefit of hindsight").

272. *Cf., e.g.*, Emily Jane Fox & Chris Isidore, *Nike Ends Contracts with Lance Armstrong*, CNNMONEY (Oct. 17, 2012, 3:02 PM), http://money.cnn.com/2012/10/17/news/companies/nike-lance-armstrong/index.html (discussing endorsements cyclist Lance Armstrong lost after the United States Anti-Doping Agency reported certain doping allegations made against the athlete).

273. *Cf., e.g.*, Darren Heitner, *Nike's Disassociation from Lance Armstrong Makes Nike a Stronger Brand*, FORBES (Oct. 17, 2012, 10:22 AM), http://www.forbes.com/sites/darrenheitner/2012/10/17/nikes-disassociation-from-lance-armstrong-makes-nike-a-stronger-brand/ (discussing the "morals clause" in Lance Armstrong's contract with Nike).

The same can be said of adopting an enterprise-wide information governance program that includes litigation response and preservation:

> There is nothing necessarily improper about a company's reasonable pre-litigation document retention policy whereby documents are disposed of in periodic intervals. Generally speaking, spoliation arguments are unsuccessful if relevant documents were destroyed in accordance with the business'[s] reasonable document retention policy and/or practices. However, even a reasonable practice of destroying documents may have unintended consequences.[274]

Setting aside the level of risk that can be considered acceptable in adopting an information governance program, can we establish a program that meets the requirements of the business judgment rule, such that the program itself would not be considered improper, and the risks are isolated from any possible adverse consequences?

The first and third elements of the business judgment rule can be met by having decisionmakers involved who do not have personal stakes in the outcome and who are motivated by legitimate business interest.[275] In the context of an information governance program that involves a significant litigation response element, this requirement may mean removing from the process—or appropriately limiting involvement in the process—those who might have a financial or reputational stake in the outcome. That would include internal business units or outside contractors who stand to profit from the collection, processing, and storage of information that is not needed for a legitimate business purpose. It may mean keeping outside litigation counsel at a respectful arm's length. While their advice and counsel, based on their experience and knowledge of the law, can and should be sought, their immediate litigation needs should not drive the process.

Likewise, the development and implementation of an information governance program should not be conducted under the cloud of pending litigation or the threat of reasonably anticipated litigation. That may be impossible for some organizations, in which case the organization must ensure that reasonable steps have been taken to meet current preservation obligations. Otherwise the process of developing and implementing an information governance program may be viewed as tainted with self-interest in avoiding discovery.[276]

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274. Peter Kiewit Sons', Inc., v. Wall St. Equity Grp., Inc., No. 8:10CV365, 2011 WL 5075720, at *5 (D. Neb. Oct. 25, 2011) (citation omitted).

275. *See* PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 258, at § 4.01(c)(1), (3).

276. *See, e.g.*, Mircon Tech., Inc. v. Rambus Inc., No. 00-792-SLR, slip op. at 26–27 (D. Del. Jan. 2, 2013) ("Such conduct by Rambus is sufficient to evince knowledge on Rambus' part that its document destruction was an improper attempt to gain a litigation advantage.").

The second element of the business judgment rule involves gathering and analyzing the facts necessary to make a reasoned decision regarding information governance.[277] Each organization will need to devote the necessary resources to assess its own situation, and there is no "one size fits all" information governance program; however, a strong case can be made for a document retention policy, as part of an overall information governance program, that features very tight definitions of what is considered a "business record" and very short retention periods.[278] The starting point for building such a policy is a presumption that all information and records are to be routinely destroyed, unless a business case can be made for retention, and in those situations, retention should be for the shortest period necessary.

A very easy business case can immediately be made for all communications and records which law or regulation requires to be retained for defined periods of time, such as tax, employment, and environmental records, or broker–dealer communications the Securities and Exchange Commission regulates.[279] Here, the keys will be to catalog these requirements thoroughly, organize the business's files for easy identification and management, and minimize duplication and proliferation in the information management system.

A more nuanced business case, but a necessary one, must be made for routine communications and records that serve a bona fide business purpose, such as contracts, invoices, and personnel records.[280] For each of these many categories of records—and there could be thousands—the information governance policy must be governed by actual experience, and not by tradition. For instance, a business may have an existing policy of keeping maintenance work orders for five years, but a study of businesses may indicate that they are rarely, if ever, consulted after one year. If there is no business purpose for keeping them, they should be disposed of. In *Peter Kiewit Sons', Inc. v. Wall Street Equity Group, Inc.*[281] the court considered, without objection, a policy in which all communications with potential customers regarding sales were routinely destroyed if the sale was not consummated.[282]

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277. *See* PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 258, at § 4.01(c)(2).

278. While the definition of a "business record" is up to the enterprise to formulate and articulate in its retention policy, the Federal Rules of Evidence provide useful guidance in describing business records for the purposes of admissibility and to overcome the hearsay objection. *See generally* Rambus, Inc., v. Infineon Techs. AG, 348 F. Supp. 2d 698, 704 (E.D. Va. 2004) (quoting United States v. Wells, 262 F.3d 455, 462 n.8 (5th Cir. 2001); United States v. Foster, 711 F.2d 871, 882 (9th Cir. 1983)) (noting the different standards for business records among federal circuits).

279. *See, e.g.*, Self-Regulatory Organizations, Exchange Act Release No. 34-66681, at 21–22 (Mar. 29, 2012), http://www.sec.gov/rules/sro/finra/2012/34-66681.pdf (discussing proposed rule changes regarding regulation of broker–dealer communications).

280. *See generally Rambus, Inc.*, 348 F. Supp. 2d at 704 (quoting *Wells*, 262 F.3d at 462 n.8; *Foster*, 711 F.2d at 882) (noting different definitions of when business records are "considered kept in the ordinary course of business" (internal quotation marks omitted)).

281. No. 8:10CV365, 2011 WL 5075720 (D. Neb. Oct. 25, 2011).

282. *See id.* at *5.

As business transitions to all electronic record systems, there is a temptation to keep everything because the physical storage problem has been eliminated. However, the transition should instead be viewed as an opportunity to keep a cleaner house, as the electronic business process can more easily be designed to accommodate routine and automatic deletion, with appropriate safeguards built in to meet unforeseen future retention or preservation obligations. This possibility is one aspect of "records management by design."[283]

Perhaps the largest categories of information held by businesses that serve no long term business purpose, that are not governed by any statutory or regulatory retention requirement, and that represent only potential cost and burden if subject to a duty of preservation, are the cases of redundant ESI found on employee desktops, shared drives, offline storage, and legacy system media.[284] The information-technology (IT) department should be provided with the resources and appropriate guidance to trim down storage of redundant ESI, if not eliminate them entirely going forward, by implementing an IT architecture that seeks out and destroys unnecessary duplicate files, or better yet, never creates them. In addition, disaster-recovery systems should be designed with data minimization as a goal. There is no business purpose for keeping disaster-recovery backup data any longer than it takes to overwrite it with more current data on a real-time basis.

The examples of ways that businesses can reduce their data footprint are boundless and beyond the scope of this Article. But before the information governance program can be formulated, due consideration must also be paid to the risk of data loss, particularly the risk of violating the duty of preservation and incurring sanctions. It is well-established that a document retention policy—even a draconian one—does not, in and of itself, justify any spoliation sanction.[285] For a sanction to be imposed, the elements of spoliation must be met, and the policy should address each one to minimize that risk.[286]

The first element is a determination that a duty of preservation has arisen.[287] If the document retention policy is in place before there is any reasonable anticipation of litigation, this risk is minimized.[288] For those businesses that face ongoing litigation, the policy may be limited to data generated on a going-

283. *See, e.g.*, SYMANTEC, SYMANTEC 2010 INFORMATION MANAGEMENT HEALTH CHECK GLOBAL RESULTS 9 (2010), http://www.symantec.com/content/en/us/about/media/pdfs/symantec_2010_information_management_health_check_report_global.pdf (recommending that companies create a "formal plan" for data retention).

284. *See generally* Withers, *supra* note 17, at 174 (discussing how replicated ESI causes a "tremendous volume" of information on a computer system).

285. *See* Micron Techs., Inc. v. Rambus Inc., 645 F.3d 1311, 1319–20 (Fed. Cir. 2011) (citing Arthur Andersen, LLP v. United States, 544 U.S. 696, 704 (2005); *Zubulake IV*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)).

286. *See generally Zubulake IV*, 220 F.R.D. at 220 (citing Byrnie v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 107–11 (2d Cir. 2001)) (listing the elements of spoliation).

287. *See id.* (quoting *Byrnie*, 243 F.3d at 107).

288. *See supra* note 276 and accompanying text.

forward basis or steps taken to assure that information already subject to a duty of preservation has been identified and preserved.

The second element is the "culpable state of mind."[289] This consideration is not relevant for decisions made before there is a reasonable anticipation of litigation.[290] After a duty has arisen, as the case law strongly suggests, the culpable state of mind necessary to support a sanction for spoliation need only be the intentional act of continuing to administer the policy, without implementation of any litigation hold.[291] Therefore, to minimize risk, the business must have in place a system for the prompt implementation of litigation holds, including clear internal communications, a chain of command, decisionmaking authority, and a preestablished litigation hold procedure flexible enough to meet a variety of situations.[292] Think of this as similar to an emergency evacuation procedure in case of fire—no responsible business should be without one.

The third element in the spoliation analysis is relevance.[293] In the context of minimizing risks inherent in the document retention policy, this means having well-organized, transparent indexing systems to quickly locate relevant data, and avoid capturing irrelevant data, or automated search technologies capable of identifying relevant data across the business's entire information system.[294]

The fourth element in the spoliation analysis is prejudice, which for the purposes of minimizing risk in the tight document retention policy, can be addressed through relevance.[295] If the information management system is able to accurately identify the data relevant to a given need, the risk that any loss of data will be prejudicial to the opposing party in litigation is minimal.

These sorts of risk minimization steps cannot guarantee that no information subject to a duty of preservation will ever be lost, nor do they represent any "safe harbor" or "get out of jail free" card for businesses that choose to implement them. And they do not come without cost. They require significant investment in information-technology infrastructure, employee training, and proactive legal analysis. But when weighed against the costs of endemic overpreservation, a

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289. *Zubulake IV*, 220 F.R.D. at 220 (quoting *Byrnie*, 243 F.3d at 109).

290. *See* Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001) (citing Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998)).

291. *See, e.g.*, *Zubulake IV*, 220 F.R.D. at 220 ("Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent."); *see also* E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 803 F. Supp. 2d 469, 497 (E.D. Va. 2011) ("In the Fourth Circuit, any level of fault, whether it is bad faith, willfulness, gross negligence, or ordinary negligence, suffices to support a finding of spoliation.").

292. *Cf.* Thomas Y. Allman, *The Impact of the Proposed Federal E-Discovery Rules*, RICH. J.L. & TECH., Spring 2006, at 1, 25 (noting the importance of an "innovative" and flexible approach to litigation holds).

293. *See Zubulake IV*, 220 F.R.D. at 220 (citing *Byrnie*, 243 F.3d at 109).

294. *See* Gregory D. Shelton, *Providing Competent Representation in the Digital Information Age*, 74 DEF. COUNS. J. 261, 265 (2007).

295. *See* Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 532 (D. Md. 2010).

business may well decide that the necessary investment in risk management is far less costly than the burden of conventional risk avoidance.

VI. CONCLUSION

The combination of the volume and dispersion of data with the numbing fear of sanctions, based on the confusing and contradictory case law, has led to a failure of the legal community to properly advise clients on their retention and preservation obligations. Instead of providing clients with sound analysis of the costs, benefits, and risks of instituting and maintaining disciplined ESI retention and destruction programs, many lawyers—both in-house counsel and retained attorneys—opt for a costly, risk-averse "keep everything" approach to data management. But a closer analysis of the case law—and an appreciation for where that law is heading—provides the basis for a risk-management approach that realistically assesses the need to collect, manage, and store ESI for business purposes; minimizes the amount of data that is kept when it no longer has a business purpose; quantifies the risk of noncompliance with preservation obligations in light of the case law; and makes a sensible business judgment that includes an acceptable level of risk.