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KEEPING THE INFERENCE IN THE ADVERSE INFERENCE INSTRUCTION: ENSURING THE INSTRUCTION IS AN EFFECTIVE SANCTION IN ELECTRONIC DISCOVERY CASES

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I. INTRODUCTION

In an adversarial judicial system, a litigant's ability to access evidence controlled by the opposing party is crucial for the system to function effectively. Thus, "[d]iscovery is a fundamental cornerstone of the civil judicial process in the United States."[1] The ever-expanding use of technology and the rise of

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1. Lauren R. Nichols, Note, *Spare the Rod, Spoil the Litigator? The Varying Degrees of Culpability Required for an Adverse Inference Sanction Regarding Spoliation of Electronic Discovery*, 99 KY. L.J. 881, 901 (2011) (citing JAMES N. DERTOUZOS ET AL., RAND INSTITUTE FOR

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electronically stored information has drastically changed litigation, with potential evidence now coming in many different forms, some of which can be easily accessed and others of which cannot be so easily obtained.[2] This change has resulted in "[d]iscovery issues [becoming] more complex because of the 'significant differences between paper and electronic information in terms of structure, content and volume.'"[3]

At times, unfortunately, litigants violate the rules of discovery by destroying evidence, thereby undermining the judicial system.[4] This destruction of evidence—known as spoliation—has become increasingly problematic as more evidence is stored electronically.[5] Courts have many tools to combat spoliation,

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CIVIL JUSTICE, THE LEGAL AND ECONOMIC IMPLICATIONS OF ELECTRONIC DISCOVERY: OPTIONS FOR FUTURE RESEARCH 1 (2008), *available at* http://www.rand.org/pubs/occasional_papers/OP183).

2. *See* Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309, 318–20 (S.D.N.Y. 2003) (discussing the five most common categories of electronic data: active, online data; near-line data; offline storage or archives; backup tapes; and erased, fragmented, or damaged data); *see also* Salvatore Joseph Bauccio, Comment, *E-Discovery: Why and How E-mail Is Changing the Way Trials Are Won and Lost*, 45 DUQ. L. REV. 269, 271–73 (2007) (discussing the storage of electronic data and the difficulty in responding to discovery requests).

3. Nichols, *supra* note 1, at 898 (quoting THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, at iii (2005)).

In addition to increasing the complexity of discovery, electronic-discovery issues are far more costly than traditional discovery issues, raising concerns that litigants are settling lawsuits "to avoid the high costs," rather than "on the merits of the case." Bauccio, *supra* note 2, at 271 (citing ADVISORY COMM. ON THE FED. RULES OF CIVIL PROCEDURE, 109TH CONG., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 19 (2005)); *see also* Regan-Touhy v. Walgreen Co., 526 F.3d 641, 649 (10th Cir. 2008) ("[T]he burdens and costs associated with electronic discovery, such as those seeking 'all email,' are by now well known, and district courts are properly encouraged to weigh the expected benefits and burdens posed by particular discovery requests (electronic and otherwise) to ensure that collateral discovery disputes do not displace trial on the merits as the primary focus of the parties' attention.").

4. *See, e.g.*, Mosaid Techs. Inc. v. Samsung Elecs. Co. (*Mosaid II*), 348 F. Supp. 2d 332, 335 (D.N.J. 2004) ("Sanctions are appropriate when there is evidence that a party's spoliation of evidence threatens the integrity of this Court."); Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511, 515 (Cal. 1998) ("Destroying evidence can destroy fairness and justice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action. Destroying evidence can also increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence, which may be less accessible, less persuasive, or both.").

5. *See* Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 790–91 (2010) ("Our analysis indicates that although the annual number of e-discovery sanction cases is generally increasing, there has been a significant increase in both motions and awards since 2004. Motions for sanctions have been filed in all types of cases and all types of courts. The sanctions imposed against parties in many cases are severe, including dismissals, adverse jury instructions, and significant monetary awards."); *see also* Hon. David C. Norton et al., *Fifty Shades of Sanctions: What Hath the Goldsmith's Apprentice Wrought?*, 64 S.C. L. REV. 459, 468 (2013) (discussing the frequency with which courts impose the adverse inference instruction).

ranging from the dismissal of a case and default judgment to fines.[6] Among the tools that judges may use to combat spoliation is the adverse inference instruction. When a court employs this sanction, it instructs the jury that it may infer from the destruction of evidence that the evidence was harmful to the spoliator's case.[7] The importance of the instruction is evident from the role it can play in major litigation, including the recent patent dispute between technology giants Apple and Samsung.[8]

As discovery sanctions have become more common in the age of electronic discovery, courts and scholars have begun to reevaluate the sanctions that courts impose.[9] One change that many courts and scholars have suggested for the adverse inference instruction is lowering the level of mental culpability required for courts to give the sanction.[10] Traditionally, the instruction was given only when the spoliator acted in bad faith.[11] Since the 1990s, however, courts and scholars have argued that negligence[12] should suffice for a court to give the instruction.[13]

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6. *See, e.g.*, Silvestri v. Gen. Motors Corp., 271 F.3d 583, 585 (4th Cir. 2001) (affirming the dismissal of a case as a spoliation sanction); Mosaid Techs. Inc. v. Samsung Elecs. Co. (*Mosaid I*), 224 F.R.D. 595, 601 (D.N.J. 2004) (granting fees and costs as a spoliation sanction).

7. *See generally* 75A AM. JUR. 2D *Trial* § 1102 (2007) (discussing the adverse inference instruction).

8. *See* Apple Inc. v. Samsung Elecs. Co., 881 F. Supp. 2d 1132, 1151 (N.D. Cal. 2012) (granting in part Apple's motion for an adverse inference jury instruction based on Samsung's failure to preserve evidence); *see also* Jessica E. Vascellaro, *Apple Wins Big in Patent Case: Jury Finds Samsung Mobile Devices Infringed Six Apple Patents, Awards $1.05 Billion in Damages*, WALL ST. J., Aug. 25, 2012, at A1 (discussing a $1 billion verdict for Apple in its suit against Samsung for patent infringement); Norton et al., *supra* note 5, at 481–85 (discussing the imposition of an adverse inference instruction in the Apple litigation).

9. *See, e.g.*, Maria Perez Crist, *Preserving the Duty to Preserve: The Increasing Vulnerability of Electronic Information*, 58 S.C. L. REV. 7, 47–48 & n.219 (2006) (noting that "[c]ourts . . . are divided as to the requisite level of [mental] culpability" for giving the instruction and citing cases from various courts showing this division).

10. *See, e.g.*, Stevenson v. Union Pac. R.R., 354 F.3d 739, 750 (8th Cir. 2004) (concluding that, despite no finding of bad faith, sanctioning the ongoing destruction of records during litigation and discovery through the imposition of an adverse inference instruction did not abuse trial court's discretion).

11. *See, e.g.*, The Pizarro, 15 U.S. (2 Wheat) 227, 240–41 (1817) (explaining that the destruction of evidence "is not of itself a sufficient ground for [an adverse inference instruction]" because the destruction may have occurred by "accident, necessity, or superior force," but that the instruction is justified if there is "a vehement presumption of bad faith").

12. According to Black's Law Dictionary, *spoliation* is the "*intentional* destruction, mutilation, alteration, or concealment of evidence." BLACK'S LAW DICTIONARY 1531 (9th ed. 2009) (emphasis added). This Article leaves aside the argument that courts may not give an adverse inference instruction based on negligent spoliation because *negligent spoliation* does not exist. Rather, this Article assumes, *arguendo*, that negligent spoliation does actually exist and explains why courts should not give the instruction based on that level of mental culpability.

13. For courts that have adopted this position, see *infra* Part III.A.3. For an example of legal scholarship that takes this position, see generally Matthew S. Makara, Note, *My Dog Ate My Email: Creating a Comprehensive Adverse Inference Instruction Standard for Spoliation of Electronic Evidence*, 42 SUFFOLK U. L. REV. 683, 686 (2009).

This Article pushes back on this trend of allowing negligent spoliation to warrant an adverse inference instruction. The temptation to believe that the party who destroyed evidence should bear the risk of an adverse interference regarding destroyed evidence is understandable,[14] but this rationale ignores the connection required for the jury to properly make the inference and takes a myopic view of the instruction that disregards the instruction's three goals: to punish, deter, and remedy.[15] These three goals are best served when courts demand a showing of bad faith in the destruction of evidence prior to giving the adverse inference instruction. With the ever-increasing amount of litigation[16] and the rise of electronic discovery violations,[17] ensuring that courts and scholars have a proper understanding of the adverse inference instruction is crucial if the instruction is going to continue to play an effective role in punishing spoliators.

Part II of this Article begins with an introduction of the adverse inference instruction, focusing on its purposes, its origin and history, and the test for deciding whether to give the instruction. Part III discusses the circuit split that has developed in federal courts over the level of mental culpability justifying the instruction and gives examples of how courts have used the adverse inference instruction in electronic discovery cases.

With this foundation laid, Part IV demonstrates the necessity of requiring bad faith for a court to give the adverse inference instruction. It argues that, as a logical matter, courts should never give an adverse inference instruction based on a spoliator's negligence. It explains how a spoliator's bad faith provides the critical connection to suggest that the destroyed evidence was harmful to the spoliator's case. It then explains how negligent, as well as grossly negligent and willful, destruction of evidence fails to provide this essential nexus.

Next, Part IV shows why not giving an adverse inference instruction based on the spoliator's negligent destruction of evidence serves the instruction's three purposes of punishment, deterrence, and remedy. It explains how the punitive goal is best served by allowing the instruction to be given only when a spoliator acts in bad faith because only such bad behavior deserves such a harsh punishment. It next shows how the bad faith requirement deters spoliation without sacrificing other important goals of litigation, goals that are not achieved when courts give the instruction based on lesser levels of culpability. Finally, Part IV demonstrates how giving the instruction for less than bad faith spoliation

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14. *See, e.g.*, Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002) ("The 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.").

15. *See infra* Part IV.B.

16. *See, e.g.*, ADMIN. OFFICE OF THE U.S. COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 10 (2011), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf (providing annual statistics of the caseload of federal courts).

17. *See* Willoughby et al., *supra* note 5, at 794 (noting the rise in sanctions in electronic-discovery cases).

does more than provide a remedy and instead gives the nonspoliating party an unfair advantage.[18]

II. THE ADVERSE INFERENCE INSTRUCTION

This Part provides the necessary background on the adverse inference instruction for fully engaging in the debates over the use of the instruction in electronic discovery cases. It begins by defining the instruction. It then offers a short historical overview of the instruction. It concludes by turning to the variations of the test that courts apply for determining whether to give the instruction.

A. The Adverse Inference Instruction and Its Purposes

The adverse inference instruction is a jury instruction in which the judge tells the jury that it may infer that destroyed evidence was harmful to the spoliator's case.[19] The instruction is based on "that favourite maxim of the law, *omnia presumuntur contra spoliatorem*,"[20] which translates to "[a]ll presumtions are against [the spoliator]."[21] An adverse inference instruction can be as simple as: "[Y]ou may, but are not required to, assume that the [destroyed evidence] would have been adverse, or detrimental, to the [spoliator]."[22]

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18. Although this Article focuses on why courts *should* not give an adverse inference instruction based on anything other than bad faith, federal courts may not be able to give the instruction based on anything other than bad faith, either under their inherent power or Rule 37 of the Federal Rules of Civil Procedure. I will explore this potential restriction on federal courts in a later article.

19. *See* United States v. Laurent, 607 F.3d 895, 902 (1st Cir. 2010) (citing SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS: CIVIL § 75.01 at 75-16 to -18 (2012) (instruction 75-7)) (noting that a spoliation instruction "is commonly appropriate . . . where there is evidence from which a reasonable jury might conclude that evidence favorable to one side was destroyed by the other").

20. West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) (quoting SIR THOMAS WILLES CHITTEY ET AL., A SELECTION OF LEADING CASES ON VARIOUS BRANCHES OF THE LAW 404 (13th ed. 1929) (internal quotation marks omitted)); *see also* Nichols, *supra* note 1, at 885 ("The adverse inference jury instruction is founded on the 'common sense' principle that a party is more likely to destroy evidence that is harmful to his or her position than evidence that is beneficial to his or her case." (quoting Nation-Wide Check Corp. v. Forest Hills Distribs., Inc., 692 F.2d 214, 218 (1st Cir. 1982))).

21. BLACK'S LAW DICTIONARY 1857 (9th ed. 2009).

22. Stevenson v. Union Pac. R.R., 354 F.3d 739, 746 (8th Cir. 2004) (quoting Transcript of Trial at 1415–16, *Stevenson*, 354 F.3d 739 (No. 2:99CV00160WRW)).

An example of a longer instruction comes from *Mosaid II*:

> You have heard that defendants failed to produce virtually all technical and other e-mails in this case. Plaintiff has argued that these e-mails were in defendants' control and would have proven facts relevant to the issues in this case.
>
> If you find that defendants could have produced these e-mails, and that the evidence was within their control, and that the e-mails would have been relevant in deciding

The instruction serves three purposes: to punish, deter, and remedy.[23] First, the punishment purpose is achieved by allowing the jury to decide that the destroyed evidence was harmful to the spoliator, thus denying the spoliator the benefit of the missing evidence for which the spoliator is responsible.[24] Next, the deterrence purpose is accomplished by serving as a warning of the consequences if a party fails to preserve evidence.[25] Finally, the remedial purpose is realized by giving the nonspoliating party the benefit of the evidence that it could not present at trial.[26]

B. The Origins and History of the Instruction

Although electronic discovery is a relatively new legal area, the adverse inference instruction is centuries old. The instruction is often traced to *Armory v. Delamirie*,[27] the famous 1722 English case.[28] In that case, a chimney sweep's

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> disputed facts in this case, you are permitted, but not required, to infer that the evidence would have been unfavorable to defendants.
>
> In deciding whether to draw this inference you may consider whether these e-mails would merely have duplicated other evidence already before you. You may also consider whether you are satisfied that defendants' failure to produce this information was reasonable. Again, any inference you decide to draw should be based on all the facts and circumstances of this case.

348 F. Supp. 2d 332, 334 (D.N.J. 2004) (quoting *Mosaid I*, 224 F.R.D. 595, 600 (D.N.J. 2004)).

23. Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) (citing *West*, 167 F.3d at 779); Byrnie v. Town of Cromwell, 243 F.3d 93, 107 (2d Cir. 2001); Beil v. Lakewood Eng'g & Mfg. Co., 15 F.3d 546, 552–53 (6th Cir. 1994) (citing Welsh v. United States, 844 F.2d 1239, 1246 (6th Cir. 1988), *overruled on other grounds by* Adkins v. Wolever, 554 F.3d 650 (6th Cir. 2009)).

24. *See, e.g.*, Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 74 (S.D.N.Y. 1991) (observing that the adverse inference instruction "serves as retribution against the immediate wrongdoer").

25. *See, e.g.*, Ogin v. Ahmed, 563 F. Supp. 2d 539, 546 (M.D. Pa. 2008) ("[A]n adverse inference instruction is designed to deter similar conduct in future cases.").

26. *See, e.g.*, Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998) (noting that "an adverse inference should serve the function, insofar as possible, of restoring the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party").

27. (1722) 93 Eng. Rep. 664 (K.B.); 1 Strange, 506.

28. For examples of cases citing *Armory* as the basis for the instruction, see *Kronisch*, 150 F.3d at 126 n.11; *Welsh*, 844 F.2d at 1246; Nation-Wide Check Corp. v. Forest Hills Distribs., Inc., 692 F.2d 214, 218 (1st Cir. 1982). For examples of scholars that trace the adverse inference instruction to *Armory*, see MARGARET M. KOESEL & TRACEY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 62–63 (Daniel F. Gourash ed., 2d ed. 2006); Paul Robert Eckert, Note, *Utilizing the Doctrine of Adverse Inferences When Foreign Illegality Prohibits Discovery: A Proposed Alternative*, 37 WM. & MARY L. REV. 749, 777 (1996); Sean R. Levine, Note, *Spoliation of Evidence in West Virginia: Do Too Many Torts Spoliate the Broth?*, 104 W.VA. L. REV. 419, 424 (2002); Makara, *supra* note 13, at 686 & n.28 (2009); Nichols, *supra* note 1, at 883 & n.23; Stefan Rubin, Note, *Tort Reform: A Call for Florida to Scale Back Its Independent Tort for the Spoliation of Evidence*, 51 FLA. L. REV. 345, 347 (1999); Eric Marshall Wilson, Note, *The Alabama Supreme Court Sidesteps a Definitive Ruling in* Christian v. Kenneth Chandler Construction Co.*: Should Alabama Adopt the Independent Tort of Spoliation?*, 47 ALA. L. REV. 971, 973–74 (1996).

boy took a jewel he found to a jeweler to determine its value, and when the boy sued because the jeweler refused to give the jewel back, the judge instructed the jury that it should presume that the jewel was of the "finest" quality, drawing the inference against the goldsmith, based on the goldsmith's intentional decision not to produce the jewel.[29]

American courts adopted the instruction at an early stage. For example, the Supreme Court recognized the validity of the instruction in *The Pizarro*.[30] There, the Court reviewed prize proceedings after a ship was captured by privateers and the owner sought return of the cargo.[31] Because the documents identifying the ship and its contents had been destroyed, the privateers sought to rely on an adverse inference instruction to prevent the owner from providing "farther proof" of his ownership of the vessel.[32] The owner objected to the adverse inference, claiming that, because of a lack of bad faith in the spoliation of the documents, he should be permitted to provide "farther proof" that he was, in fact, the rightful owner of the ship.[33] Although the Court held that the instruction was not warranted in this case, the Court clearly recognized the validity of the instruction.[34]

Today, the adverse inference instruction continues to be an important tool for managing litigations. Federal courts give an adverse inference instruction based on their inherent power or Federal Rule of Civil Procedure 37(b).[35] In state courts, however, the basis for giving the instruction is not always as clear. For example, in South Carolina, courts most often appear to base the instruction on the inherent power of courts to sanction litigants for misbehavior, but the courts do not explicitly state the basis for giving the instruction.[36]

Those scholars who do not trace the instruction to *Armory* often go back a century further to *Rex v. Arundel*, (1617) 80 Eng. Rep. 258 (K.B.); Hobart, 109. Charles W. Adams, *Spoliation of Electronic Evidence: Sanctions Versus Advocacy*, 18 MICH. TELECOMM. & TECH. L. REV. 1, 8 (2011); *see also* Cecilia Hallinan, Comment, *Balancing the Scales After Evidence Is Spoiled: Does Pennsylvania's Approach Sufficiently Protect the Injured Party?*, 44 VILL. L. REV. 947, 949 & n.10 (1999) (tracing the history of courts addressing evidence destruction back to 1617); Lawrence Solum & Stephen Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1087 n.4 (1987) (noting the history of evidence spoliation).

29. *Armory*, 93 Eng. Rep. at 664.

30. 15 U.S. (2 Wheat.) 227 (1817); *see also* Sims v. Rockwell, 31 N.E. 484, 485 (Mass. 1892) (recognizing the validity of the adverse inference instruction); Pomeroy v. Benton, 77 Mo. 64, 85–86 (1882) (same).

31. *The Pizarro*, 15 U.S. (2 Wheat.) at 228.

32. *Id.* at 233–37.

33. *Id.* at 238.

34. *See id.* at 240–41.

35. *See, e.g.*, Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494, 505–06 (D. Md. 2009) (citing United Med. Supply Co. v. United States, 77 Fed. Cl. 257, 263–264 (2007)) (identifying the "inherent power to control the judicial process and litigation" and Rule 37 as sources of authority for the court to issue spoliation sanctions).

36. In *Gathers ex rel. Hutchinson v. S.C. Elec. & Gas Co.*, 311 S.C. 81, 83, 427 S.E.2d 687, 689 (Ct. App. 1993), the South Carolina Court of Appeals stated that "when a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been

C. *Test for Giving the Instruction*

The most common test that courts apply in deciding whether to give an adverse inference instruction requires the party seeking the instruction to prove three elements.[37] First, the party who destroyed the evidence must have had a duty to preserve that evidence at the time it was destroyed.[38] Second, the evidence must have been relevant to the litigation.[39] And third, the party must have destroyed the evidence with a "culpable state of mind."[40] Courts often cite *Byrnie v. Town of Cromwell*[41] as the basis for this test.[42] Judge Shira Scheindlin discussed this test in more detail in *Zubulake v. UBS Warburg LLC*,[43] which has become a leading opinion on the instruction.[44] Now, many courts have generally accepted this test as the means for determining whether to give the instruction.[45]

Not all courts, however, formulate the test the exact same way. The United States District Court for the Eastern District of North Carolina, for instance, has interpreted Fourth Circuit precedent as requiring "that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted

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adverse to that party," citing only *Kershaw Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990). Tracing back this line of cases leads to *Welsh v. Gibbons*, 211 S.C. 516, 518, 46 S.E.2d 147, 148 (1948), which notes the "inherent power" that courts have to enforce discovery.

Although South Carolina Rule of Civil Procedure 37(b)(2)(A) mirrors its counterpart in the Federal Rules of Civil Procedure, South Carolina courts do not appear to use this rule as a basis for giving the adverse inference instruction.

37. Beaven v. U.S. Dep't of Justice, 622 F.3d 540, 553 (6th Cir. 2010) (quoting Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002)).

38. *Id.* (quoting *Residential Funding*, 306 F.3d at 107).

39. *Id.* (quoting *Residential Funding*, 306 F.3d at 107). This factor is listed third in the Sixth Circuit's opinion, but it is listed second here so that the focus is on the third and final factor—whether the evidence was "destroyed with a culpable state of mind," *id.* (internal quotation marks omitted)—because that is the key factor in this Article.

40. *Id.* (quoting *Residential Funding*, 306 F.3d at 107) (internal quotation marks omitted).

41. 243 F.3d 93 (2d Cir. 2001).

42. *E.g.*, Toth v. Calcasieu Parish, No. 06-998, 2009 WL 528245, at *1 n.2 (W.D. La. Mar. 2, 2009); Dupee v. Klaff's, Inc., 462 F. Supp. 2d 244, 248 (D. Conn. 2006); Hamilton v. Signature Flight Support Corp., No. C 05-0490 CW (MEJ), 2005 WL 3481423, at *3 (N.D. Cal. Dec. 20, 2005).

43. Zubulake v. UBS Warburg LLC (*Zubulake II*), 220 F.R.D. 212, 216–21 (S.D.N.Y. 2003).

44. *See, e.g.*, Consol. Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335, 339 (M.D. La. 2006) (noting that the *Zubulake* cases have "been recognized as setting the benchmark standards for modern discovery and evidence-preservation issues"); Thompson v. U.S. Dep't of Hous. & Urban Dev., 219 F.R.D. 93, 100–01 (D. Md. 2003) (applying the *Zubulake* analysis in case involving the destruction of electronic records).

45. *E.g.*, Jandreau v. Nicholson, 492 F.3d 1372, 1375 (Fed. Cir. 2007) (quoting *Residential Funding*, 306 F.3d at 107); Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 520–21 (D. Md. 2010) (quoting Goodman v. Praxair Servs., 632 F. Supp. 2d 494, 509 (D. Md. 2009)); Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 615–16 (S.D. Tex. 2010); Nursing Home Pension Fund v. Oracle Corp., 254 F.R.D. 559, 564 (N.D. Cal. 2008) (quoting *In re* Napster, Inc. Copyright Litig., 462 F. Supp. 2d 1060, 1078 (N.D. Cal. 2006)); Sampson v. City of Cambridge, 251 F.R.D. 172, 179 (D. Md. 2008) (quoting *Thompson*, 219 F.R.D. at 101).

in its loss or destruction" for the instruction to be given.[46] Another example of a different formulation is the Third Circuit's test, which focuses on the "degree of fault" by the spoliator, the "prejudice suffered by the opposing party," and whether a lesser sanction could "avoid substantial unfairness" to the nonspoliating party while deterring future spoliation.[47] Despite these different articulations of the test, all of the tests focus on the same factors: whether the spoliator had a duty to preserve the evidence; whether the evidence was relevant; and whether the spoliator had a sufficient mental culpability.

D. The Adverse Inference Instruction in Electronic Discovery Cases

The adverse inference instruction is now a common tool in electronic discovery cases. One study has shown that prior to January 1, 2010, fifty-two electronic discovery cases in federal courts involved the adverse inference instruction.[48] This shows how litigants regularly move for courts to impose this sanction when evidence is destroyed and courts engage in lengthy analysis to determine whether the sanction is appropriate.[49] A repeated context—perhaps the most common context—in which the instruction arises, including in cases such as *Treppel v. Biovail Corp.*,[50] *Victor Stanley, Inc. v. Creative Pipe, Inc.*,[51] and *Philips Electronics North America Corp. v. BC Technical*,[52] is deleted backup tapes that resulted in lost evidence that would likely have been critical to the outcome of the case.[53] Ultimately, the vast quantity of electronically stored information creates more material potentially subject to discovery, thereby creating more opportunities for parties to violate discovery rules and leading to more instances in which courts can impose sanctions, including the adverse

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46. Powell v. Town of Sharpsburg, 591 F. Supp. 2d 814, 817 (E.D.N.C. 2008) (quoting Buckley v. Mukasey, 538 F.3d 306, 323 (4th Cir. 2008)) (internal quotation marks omitted).

47. Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 79 (3d Cir. 1994).

48. *See* Willoughby et al., *supra* note 5, at 811–14 (collecting cases).

I have not undertaken a similar study to collect cases from the past three years to see how many more cases can be added to these fifty-two cases from prior to 2010. A cursory search on Westlaw for electronic-discovery cases involving the adverse inference instruction overwhelmingly suggests that the instruction continues to play an important role in these cases.

49. *See, e.g.*, Scalera v. Electrograph Sys., Inc., 262 F.R.D. 162, 179 (E.D.N.Y. 2009) (denying the motion for an adverse inference instruction because the moving party could not prove that the destroyed evidence was relevant to the case); Ferron v. Echostar Satellite, LLC, 658 F. Supp. 2d 859, 864 (S.D. Ohio 2009) (denying the motion for the adverse inference instruction because the moving party could not establish that the evidence was destroyed in bad faith).

50. 249 F.R.D. 111 (S.D.N.Y. 2008).

51. 269 F.R.D. 497 (D. Md. 2010).

52. 773 F. Supp. 2d 1149 (D. Utah 2011).

53. *See, e.g.*, *Philips Elecs.*, 773 F. Supp. 2d at 1204 (noting the defendants failure to preserve backup tapes "during the first twenty months while [the] lawsuit was pending"); *Victor Stanley*, 269 F.R.D. at 531 (finding bad faith spoliation when defendant "deleted thousands of files and ran programs to ensure their permanent loss immediately following preservation requests and orders, and immediately before scheduled discovery efforts"); *Treppel*, 249 F.R.D. at 119 (expressing concern over the failure to preserve backup tapes after litigation had commenced).

inference instruction. The instruction is therefore even more relevant to litigation now than it was in the predigital era.

III. THE CRITICAL ISSUE WITH THE ADVERSE INFERENCE INSTRUCTION: MENTAL CULPABILITY

The basic background information about the adverse inference instruction in Part II is relatively uncontroversial. One aspect of the instruction, however, is the subject of intense debate among scholars and courts: the level of mental culpability required to justify the use of the instruction. This Part sets forth the split that has developed among federal circuit courts, highlights the most prominent example of this debate, and provides examples of these varying mental-culpability standards applied in electronic discovery cases.

A. The Circuit Split over the Mental-Culpability Requirement

For many years, the adverse inference instruction was premised on a spoliator's bad faith destruction of evidence.[54] Since the 1990s, however, some courts have lowered the required culpability and allowed negligent spoliation to provide a basis for giving the instruction.[55] This growing trend has created a split among the circuits—a division recognized by both courts[56] and scholars.[57] This Section highlights this circuit split.

1. Circuits Requiring Bad Faith

The Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits all require that a spoliator act with bad faith for a court to give an adverse inference instruction.

The Fifth Circuit requires "bad conduct" to support an adverse inference instruction and has explicitly held that "[m]ere negligence is not enough" to warrant the instruction.[58] In a more recent case, that circuit articulated the

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54. *See supra* notes 27–34 and accompanying text.

55. *See, e.g.*, Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002) ("The sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence . . . ."); Byrnie v. Town of Cromwell, 243 F.3d 93, 109 (2d Cir. 2001) (acknowledging that "bad faith—an intent to obstruct the opposing party's case—need not be shown to justify an inference of spoliation" and that intentional destruction is sufficient to justify an inference of spoliation); Reilly v. Natwest Mkts. Grp. Inc., 181 F.3d 253, 268 (2d Cir. 1999) (holding that "a finding of bad faith or intentional misconduct is not a *sine qua non* to sanctioning a spoliator with an adverse inference instruction").

56. *See, e.g.*, United States v. Laurent, 607 F.3d 895, 902 & n.5 (1st Cir. 2010) (noting that "the case law is not uniform in the [mental] culpability needed for the instruction" and collecting cases to illustrate the division among the courts).

57. *See, e.g.*, Crist, *supra* note 9, at 47–48 & n.219 (noting that "[c]ourts . . . are divided as to the requisite level of [mental] culpability" for giving the instruction and collecting cases to illustrate this division).

58. Vick v. Tex. Emp't Comm'n, 514 F.2d 734, 737 (5th Cir. 1975) (citations omitted).

standard as "bad faith."[59] Thus, when a defendant in a sex-discrimination case "destroyed [records] under routine procedures *without bad faith* and well in advance" of litigation, an adverse inference instruction was not warranted.[60]

The Seventh Circuit likewise mandates that a spoliator act with "bad faith" for a court to give an adverse inference instruction.[61] In *Park v. City of Chicago*,[62] the court noted that "[t]he crucial element is not that evidence was destroyed but rather the reason for the destruction."[63] For example, when a former employee sued her employer for discrimination and the employer could not find the documents, an adverse inference instruction was not appropriate because all the former employee could prove was that the employer "lost these documents," not that the employer destroyed them in bad faith.[64]

The Eighth Circuit "requires 'a finding of intentional destruction indicating a desire to suppress the truth'" for a court to give an adverse inference instruction.[65] Although the court stated in one case that bad faith was not necessary for the instruction to be given,[66] the court expressly relied on the district court's finding that the spoliator acted in bad faith to uphold the instruction in that case.[67] Several years later, the Eighth Circuit removed any uncertainty, holding that "a finding of bad faith is necessary before giving an adverse inference instruction at trial."[68]

The Tenth Circuit also demands that a spoliator act with "bad faith" before a court gives an adverse inference instruction.[69] Based on this rule, the court affirmed a district court's refusal to give an adverse inference instruction when a

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59. Condrey v. SunTrust Bank of Ga., 431 F.3d 191, 203 (5th Cir. 2005) ("The Fifth Circuit permits an adverse inference against the destroyer of evidence only upon a showing of 'bad faith' or 'bad conduct.'" (quoting King v. Ill. Cent. R.R., 337 F.3d 550, 556 (5th Cir. 2003))).

60. *Vick*, 514 F.2d at 737 (emphasis added).

61. *See, e.g.*, Faas v. Sears, Roebuck & Co., 532 F.3d 633, 644 (7th Cir. 2008) (holding that to give an adverse inference instruction, a court must find that the spoliator "intentionally destroyed the documents in bad faith"); S.C. Johnson & Son, Inc. v. Louisville & Nashville R.R., 695 F.2d 253, 258 (7th Cir. 1982) (explaining that the adverse inference instruction is permissible only when a court finds that evidence was destroyed in bad faith).

62. 297 F.3d 606 (7th Cir. 2002).

63. *Id.* at 615 (alteration in original) (quoting *S.C. Johnson*, 695 F.2d at 258) (internal quotation marks omitted).

64. *Id.* at 616–17.

65. Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1035 (8th Cir. 2007) (quoting Stevenson v. Union Pac. R.R., 354 F.3d 739, 746 (8th Cir. 2004)).

66. *Stevenson*, 354 F.3d at 750 ("Sanctioning the ongoing destruction of records during litigation and discovery by imposing an adverse inference instruction is supported by either the court's inherent power or Rule 37 of the Federal Rules of Civil Procedure, even absent an explicit bad faith finding . . . .").

67. *See id.* at 747–48. The court did acknowledge that this case "test[ed] the limits of what [the court was] able to uphold as a bad faith determination." *Id.*

68. Menz v. New Holland N. Am., Inc., 440 F.3d 1002, 1006 (8th Cir. 2006).

69. Turner v. Pub. Serv. Co. of Colo., 563 F.3d 1136, 1149 (10th Cir. 2009) ("[I]f the aggrieved party seeks an adverse inference to remedy the spoliation, it must also prove bad faith."); *see also* Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997) ("The adverse inference must be predicated on the bad faith of the party destroying the records.").

spoliator in a wrongful death case destroyed records with only "mere negligence."[70]

Finally, the Eleventh Circuit insists that a spoliator act with "bad faith" for a court to give an adverse inference instruction.[71] Because the circuit requires bad faith, it upheld a district court's decision in a wrongful death case not to give an adverse inference instruction because "no probative evidence [indicates that the spoliator] purposely lost or destroyed the relevant [evidence]."[72]

2. Circuits Requiring Less than Bad Faith but More than Negligence

Two circuits—the Third and Fourth—fall between those circuits that require bad faith and those that require only negligence.

The Third Circuit requires that evidence be "destroyed intentionally" for a court to give the adverse inference instruction, demanding more than negligence but less than bad faith.[73] Applying this rule in a products liability case, the circuit court held that the district court was correct in refusing to give the adverse inference instruction because the party seeking the instruction had failed to satisfy its burden of showing that the evidence was "willfully" destroyed.[74]

Like the Third Circuit, the Fourth Circuit does not require bad faith but has explicitly rejected negligent destruction as sufficient to support the adverse inference instruction, instead holding that "willful conduct" is required.[75] This standard was called into question in *Silvestri v. General Motors Corp.*[76] when the court upheld the dismissal of the plaintiff's case—a more severe sanction than an adverse inference instruction—based on conduct by the plaintiff's attorney that was "at least negligent and may have been deliberate."[77] The Fourth Circuit

70. Henning v. Union Pac. R.R., 530 F.3d 1206, 1220 (10th Cir. 2008) (quoting *Aramburu*, 112 F.3d at 1407) (internal quotation marks omitted).

71. Mann v. Taser Int'l, Inc., 588 F.3d 1291, 1310 (11th Cir. 2009) ("In the Eleventh Circuit, 'an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith.'" (quoting Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997))).

Although the D.C. Circuit has never explicitly defined the level of mental culpability required for a court to give an adverse inference instruction, it appears to fall on this end of the spectrum as well. *See* Wyler v. Korean Air Lines Co., 928 F.2d 1167, 1174 (D.C. Cir. 1991) (holding that "mere innuendo" is not enough to justify the instruction); *see also* Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 614 (S.D. Tex. 2010) (including the D.C. Circuit in the list of circuits requiring bad faith for a court to give an adverse inference instruction).

72. *Bashir*, 119 F.3d at 931.

73. *See* Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 334 (3d Cir. 1995).

74. Gumbs v. Int'l Harvester, Inc., 718 F.2d 88, 96–97 (3d Cir. 1983).

75. Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995) ("While a finding of bad faith suffices to permit such an inference, it is not always necessary.").

76. 271 F.3d 583 (4th Cir. 2001).

77. *See id.* at 593–94.

ultimately clarified its position in a later case, holding that "intentional, willful, or deliberate" conduct can support an adverse inference instruction.[78]

This middle-of-the-road standard from the Third and Fourth Circuits may not seem *that* different from the bad faith requirement of many other circuits, but it does miss a critical component of that requirement: it does not require that crucial element of *why* the evidence was destroyed.[79] That said, at least this standard is closer to the bad faith standard than the negligence standard, which the next Section discusses.

3. Circuits Requiring Only Negligence

The Second, Sixth, and Ninth Circuits have adopted the current trend of allowing negligent destruction of evidence to support an adverse inference instruction.

The Second Circuit led the initial charge in allowing negligence to support an adverse inference instruction. After some debate over the mental-culpability requirement,[80] that court ultimately held in *Residential Funding Corp. v.*

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78. Buckley v. Mukasy, 538 F.3d 306, 323 (4th Cir. 2008) (internal quotation marks omitted); *see also* Kenneth J. Withers, *Risk Aversion, Risk Management, and the "Overpreservation" Problem in Electronic Discovery*, 64 S.C. L. REV. 537, 557 (2013) (treating *Buckley* as imposing a requirement that a spoliator's action be at least "willful" for a court to give an adverse inference instruction and placing this requirement "along a continuum" between bad faith and negligence).

Judge Norton, Woodard, and Cleveland assert that negligence is enough in the Fourth Circuit to impose an adverse inference instruction. *See* Norton et al., *supra* note 5, at 465 & n.41. Although the cases cited in that footnote do state that negligent spoliation can warrant an adverse inference instruction, those cases are not controlling or persuasive. By tracing back the citations in each case, the end result is a citation to the Second Circuit's decision in *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002). *See, e.g.*, E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 803 F. Supp. 2d 469, 498 (E.D. Va. 2011) (citing Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 529 (D. Md. 2010) (citing Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494, 518 (D. Md. 2009) (citing Thompson v. U.S. Dep't of Hous. & Urban Dev., 219 F.R.D. 93, 101 (D. Md. 2003) (citing *Residential Funding*, 306 F.3d at 107)))). The Second Circuit's standard is not the same as the Fourth Circuit's standard, as clarified in *Buckley*, 583 F.3d at 323. Thus, these district court cases incorrectly state the law in the Fourth Circuit.

79. As explained in more detail in Part IV.A, to properly infer that destroyed evidence was unfavorable to the spoliator, the jury must know the reason that evidence was destroyed. *See, e.g.*, S.C. Johnson & Son, Inc. v. Louisville & Nashville R.R., 695 F.2d 253, 258 (7th Cir. 1982) ("The crucial element is not that the evidence was destroyed but rather the *reason* for the destruction." (emphasis added)).

80. In *Reilly v. Natwest Markets Group Inc.*, 181 F.3d 253 (2d Cir. 1999), the Second Circuit parsed its previous decisions and noted that it had never before determined the mental culpability required for a district court to give an adverse inference instruction. *Id.* at 267. The court explained that its holding in *Berkovich v. Hicks*, 922 F.2d 1018 (2d Cir. 1991), that the absence of bad faith precluded the instruction, was decided only on "the facts of [that] case," and thus did not announce a per se rule. *Reilly*, 181 F.3d at 267 (quoting *Berkovich*, 922 F.2d at 1024) (internal quotation marks omitted). The court went on to hold that gross negligence was sufficient mental culpability to support an adverse inference instruction because the court had "previously approved more severe sanctions based solely on gross negligence." *Id.* Two years later, in *Byrnie v. Town of Cromwell*,

DeGeorge Financial Co.[81] that any level of culpability from "negligence to intentionality" could warrant an adverse inference instruction.[82] In adopting this position, the Second Circuit cited *Turner v. Hudson Transit Lines, Inc*,[83] a 1991 decision from the Southern District of New York, in which the district court reasoned that the instruction "should be available even for the negligent destruction of documents if that is necessary to further the remedial purpose of the inference."[84]

The Sixth Circuit cited *Residential Funding Corp.* as support for its decision to allow negligence to support an adverse inference instruction.[85] Like the Second Circuit, the Sixth Circuit noted the range of mental culpability that will permit a district court to give an adverse inference instruction: "[T]he culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to [breach a duty to preserve it], or *negligently*."[86] The Sixth Circuit never analyzed what the proper mental-culpability requirement should be, but instead merely cited *Residential Funding Corp.* The court applied that standard to a case involving the Federal Tort Claims Act,[87] upholding the district court's decision to give the instruction because the folder with relevant evidence was destroyed after the defendant knew of the litigation and that the folder was a critical part of the case.[88]

Although the Ninth Circuit has not been clear about the mental-culpability requirement,[89] the best reading of its cases shows that negligence can support an

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243 F.3d 93 (2d Cir. 2001), the court again stated that "[t]he law in this circuit is not clear on what state of mind a party must have when destroying it." *Id.* at 107–08. In that case, the court upheld the adverse inference instruction because the records were destroyed in violation of federal regulations, without ever determining the state of mind with which the documents were destroyed. *Id.* at 108. Later in *Byrnie*, the court seems to suggest that even mere negligence may be enough to support the instruction. *See id.* at 109 ("The party must demonstrate first that the records were destroyed with a culpable state of mind (i.e., where, for example, the records were destroyed knowingly, even if without intent to violate the regulation, or negligently).").

81. 306 F.3d 99 (2d Cir. 2002).

82. *Id.* at 108 (quoting *Reilly*, 181 F.3d at 267) (internal quotation marks omitted).

83. 142 F.R.D. 68 (S.D.N.Y. 1991).

84. *Id.* at 75.

85. *See* Beaven v. U.S. Dep't of Justice, 622 F.3d 540, 554 (6th Cir. 2010) (citing *Residential Funding*, 306 F.3d at 108).

86. *Id.* (alteration in original) (quoting *Residential Funding*, 306 F.3d at 99) (emphasis added) (internal quotation marks omitted).

87. 28 U.S.C. §§ 2671–2680 (2006).

88. *See Beaven*, 622 F.3d at 553–54.

89. I argue here that the Ninth Circuit's cases support a conclusion that it permits negligent spoliation to warrant an adverse inference instruction. I readily acknowledge, however, that the Ninth Circuit has never expressly held this. At the very least, the Ninth Circuit belongs in the middle category with the Third and Fourth Circuits.

See Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993) (citing Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 368–70 & n.2 (9th Cir. 1992)) (noting that a finding of bad faith is not required to support the adverse inference instruction); *see also* United States v. Romo-Chavez, 681 F.3d 955, 961 (9th Cir. 2012) (recognizing that although an adverse inference instruction in criminal cases requires bad faith spoliation, the "standard in civil cases differs

adverse inference instruction. In *Glover v. BIC Corp.*,[90] the court held that "bad faith is only one avenue to the presumption, but not the only one."[91] In *Glover*, the court remanded the case for a new trial and instructed the district court to make sure that an adverse inference instruction did not imply that bad faith was required.[92] Almost a decade later, in *Medical Laboratory Management Consultants v. American Broadcasting Cos.*,[93] the Ninth Circuit again addressed the adverse inference instruction. As in *Glover*, the court in *Medical Laboratory* never expressly stated that negligence was sufficient for a district court to give an adverse inference instruction, but that is the implication of the court's decision in this later case.[94] The court wrote, "When relevant evidence is lost accidentally or for an innocent reason, an adverse evidentiary inference from the loss *may* be rejected."[95] If evidence lost accidentally—that is, negligently[96]—was never enough to permit a court to give an adverse inference instruction, the Ninth Circuit would have held that in such circumstances, the instruction *must* be rejected. But the Ninth Circuit did not do so. Instead, it discussed how the district court did not abuse its discretion in refusing to give an adverse inference instruction because the evidence was lost accidentally and other evidence could be offered on the same point.[97] By undertaking this discussion, the appellate court implied that in some situations, a district court could give an adverse inference instruction based on the negligent or accidental loss of evidence without abusing its discretion. Further supporting the conclusion that negligent spoliation is sufficient for a court to give an adverse inference instruction in the Ninth Circuit is the fact that many district courts cite negligence as the standard and the Ninth Circuit does not appear to have reversed any of these decisions.[98]

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somewhat"). Still, as this paragraph hopefully argues persuasively, the Ninth Circuit has gone further than the Third and Fourth Circuits in lowering the mental culpability required for a court to give the adverse inference instruction.

90. 6 F.3d 1318 (9th Cir. 1993).

91. *Id.* at 1330.

92. *Id.*

93. 306 F.3d 806 (9th Cir. 2002).

94. *See id.* at 824–25.

95. *Id.* at 824 (emphasis added).

96. In describing the facts of the case, the court stated that the evidence was destroyed "at most with negligence." *Id.* at 824. The court thus appeared to treat "accidentally" losing evidence the same as "negligently" losing evidence in its discussion of whether the district court abused its discretion by not giving the instruction. *See id.* at 824–25.

97. *Id.*

98. *See, e.g.*, FTC v. Lights of Am. Inc., No. SACV 10 1333 JVS (MLGx), 2012 WL 695008, at *2 (C.D. Cal. Jan. 20, 2012) ("The 'culpable state of mind' includes negligence." (quoting Lewis v. Ryan, 261 F.R.D. 513, 521 (S.D. Cal. 2009))); Uribe v. McKesson, No. 1:08 cv 01285 DMS (NLS), 2010 WL 4235863, at *3 (E.D. Cal. Oct. 21, 2010) ("The 'culpable state of mind' includes negligence." (quoting Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002))); *Lewis*, 261 F.R.D. at 521 ("The 'culpable state of mind' includes negligence." (quoting *Residential Funding*, 306 F.3d at 108)); Washington Alder LLC v. Weyerhaeuser Co., No. CV 03 753 PA, 2004 WL 4076674, at *1 (D. Or. May 5, 2004) (citing *Residential Funding*, 306 F.3d at 108) (recognizing the allowance of sanctions for acts that were

The position adopted by these circuits has support from recent scholarship. For example, Matthew Makara argues that negligence is "more appropriate" than the stricter standard of bad faith.[99] Ben Farrell similarly claims that "the appropriate level of culpability for an adverse inference instruction should be negligence," based on the deterrent effect and the need for providing a remedy for the innocent party.[100] Jonathan Judge agrees that the adverse inference instruction should be warranted in cases of negligent spoliation.[101] Lauren Nichols supports gross negligence as a standard in electronic discovery cases to "reduce the excessive costs and burdens" of discovery in these cases.[102] Drew Dropkin offers a new framework based on the relative culpability and circumstantial evidence, in which no minimum culpability level exists if enough circumstantial evidence exists.[103]

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done negligently). Other district courts, however, require at least gross negligence. *See, e.g.*, Chavez v. Blue Sky Natural Beverage Co., No. 06 06609 JSW (JSC), 2011 WL 4830997, at *3 (N.D. Cal. Oct. 12, 2011) (recognizing appropriateness of sanctions for "bad faith or gross negligence" (quoting Karnazes v. County of San Mateo, No. C 09 0767 MMC (MEJ), 2010 WL 2672003, at *2 (N.D. Cal. July 2, 2010))); Hester v. Vision Airlines, Inc., No. 2:09 cv 00117 RLH RJJ, 2010 WL 4553449, at *6 (D. Nev. Nov. 3, 2010) (citing *Karnazes*, 2010 WL 2672003, at *2) (recognizing appropriateness of sanctions for bad faith or gross negligence). This conflict underscores the lack of clarity in the Ninth Circuit over the mental-culpability requirement for the adverse inference instruction.

Notably, the First Circuit appears never to have taken a position on the mental culpability required to give an adverse inference instruction. In *Nation-Wide Check Corp., Inc. v. Forest Hills Distributors, Inc.*, 692 F.2d 214 (1st Cir. 1982), the court never evaluated the spoliator's mental culpability in determining whether the instruction was appropriate. *Id.* at 217–20. In no case since that decision has the First Circuit jumped into this fray over the mental culpability required for a court to give an adverse inference instruction. The court has merely said that the finder of fact "is free to reject the inference" if it believes evidence was "destroyed accidentally or for an innocent reason." Blinzler v. Marriott Int'l, Inc., 81 F.3d 1148, 1159 (1st Cir. 1996); *see also* Testa v. Wal-Mart Stores, Inc., 144 F.3d 173, 177 (1st Cir. 1998) (setting the test for giving an adverse inference instruction without referring to the spoliator's mental culpability). This suggests that negligence may justify giving an instruction (for the jury to reject the inference, then the judge must have given it), but the First Circuit has never made such an unequivocal statement. In fact, most recently, the First Circuit has said that "the instruction usually makes sense only where the evidence permits a finding of bad faith destruction." United States v. Laurent, 607 F.3d 895, 902 (1st Cir. 2010) (citing SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS: CIVIL § 75.01 at 75-17 (2010) (instruction 75-7)). Yet the First Circuit explicitly declined to answer finally the question of mental culpability because doing so was not necessary to resolve the case. *See id.* at 902–03.

99. Makara, *supra* note 13, at 708 (noting that "the approach of the negligence jurisdiction is more appropriate than the willfulness doctrine").

100. Ben Farrell, Note, *Spoliation in a Digital World: Proposing a New Standard of Culpability in Massachusetts for an Adverse Inference Instruction*, 14 SUFFOLK J. TRIAL & APP. ADVOC. 110, 123 (2009).

101. Jonathan Judge, Comment, *Reconsidering Spoliation: Common-Sense Alternatives to the Spoliation Tort*, 2001 WIS. L. REV. 441, 463–64 (suggesting that "because the inference is primarily concerned with the restoration of accuracy," it should be extended to negligent spoliation).

102. Nichols, *supra* note 1, at 883.

103. Drew D. Dropkin, Note, *Linking the Culpability and Circumstantial Evidence Requirements for the Spoliation Inference*, 51 DUKE L.J. 1803, 1827–28 (2002).

B. Examples of the Instruction in Electronic Discovery Cases

With the split among the federal circuit courts offering an example of the debate over the mental-culpability requirement, this Section turns to examples of cases in which courts have given the adverse inference instruction based on the destruction of electronically stored information. This Section highlights two cases involving the various mental-culpability requirements discussed in Part III.A. These cases will provide useful examples in the discussion in Part IV about what the required level of mental culpability should be.

The first example is *Nucor Corp. v. Bell*,[104] in which Nucor Corp. (Nucor) sued John Bell, a former employee, and SeverCorr, LLC (SeverCorr), Bell's new employer, alleging that Bell took trade secrets from Nucor to his new job at SeverCorr.[105] During the course of litigation, Nucor moved for sanctions based on the alleged destruction of electronic evidence.[106] Nucor alleged that evidence on Bell's SeverCorr laptop was destroyed, as was evidence on a thumb drive that Bell used for work.[107] Judge David C. Norton found that Bell had a duty to preserve the evidence on the thumb drive because he knew litigation was imminent and found that Bell destroyed it "intentionally . . . in bad faith" and "precisely because he anticipated litigation."[108] Judge Norton also found that Bell spoliated evidence on the laptop through its continued use.[109] Based on this spoliation, Judge Norton decided to give an adverse inference instruction because it would "adequately sanction the improper conduct and level the evidentiary playing field."[110]

The second example is *Pace v. National Railroad Passenger Corp.*,[111] in which the defendant railroad company moved for a new trial, claiming that the district court erred in giving an adverse inference instruction based on its negligent spoliation.[112] Pace, a former conductor, sued under the Federal

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104. 251 F.R.D. 191 (D.S.C. 2008).

105. *Id.*

106. *Id.*

107. *Id.* at 193–94.

108. *Id.* at 195–96. Note that although the Fourth Circuit falls in the middle of the spectrum of mental culpability, Judge Norton in *Nucor Corp.* emphasized the intentional acts of the spoliator. *Id.*

109. *Id.* at 199. Nucor also alleged that Bell destroyed evidence by wiping data off the laptop and having a hard drive failure, but the district court found that Nucor did not present sufficient evidence to support these allegations. *Id.* at 200. Additionally, Nucor claimed that Bell improperly failed to preserve a CD, but the district court likewise found that Nucor had not presented sufficient evidence to support this allegation. *Id.* at 200–01.

110. *Id.* at 202. Judge Norton reasoned that the adverse inference instruction was more appropriate than granting default judgment, which would have been too harsh. *Id.* at 201. For further discussion of the spoliation and associated sanctions in *Nucor Corp.*, see Norton et al., *supra* note 5, at 470–76.

111. 291 F. Supp. 2d 93 (D. Conn. 2003).

112. *Id.* at 96, 99.

Employers' Liability Act[113] after he suffered a back injury allegedly caused by improperly maintained railroad equipment.[114] During litigation, the railroad company failed to produce maintenance and inspection reports, claiming that the documents were destroyed pursuant to its document-retention policy, but the court noted that the company knew that litigation was imminent at the time the documents would have been destroyed under that policy.[115] The railroad company argued that the negligence standard for spoliation only applied after litigation had begun, but the court rejected the argument.[116] Relying on *Residential Funding Corp.*, the court held that the Second Circuit's adoption of the negligence standard "appl[ied] to document destruction generally," not just documents destroyed after litigation had begun.[117] In this case, the court reasoned, litigation was reasonably foreseeable when the documents were destroyed, and the rationale that the risk of loss "should fall on the party responsible" for the loss applied to these facts.[118]

IV. THE NEED FOR A BAD FAITH MENTAL-CULPABILITY REQUIREMENT

The circuit split over the mental-culpability requirement is clear,[119] as is the trend in legal scholarship toward allowing negligent spoliation to support an adverse inference instruction.[120] This Part challenges this trend by showing why negligence fails both to allow a meaningful inference to be drawn and to serve the three purposes of the instruction. Part IV.A explains how the very inference on which the adverse inference instruction is based requires bad faith spoliation for the jury to draw the inference. Part IV.B then demonstrates how the three purposes of the adverse inference instruction—to punish, deter, and remedy—are best fulfilled by a mental-culpability requirement of bad faith.

A. Connecting the Dots and Making the Inference

Fundamentally, the adverse inference instruction allows just that—an *inference*.[121] The instruction is based on the "common sense observation" that a party who destroys evidence is "more likely to have been threatened" by that

113. 45 U.S.C. § 51 (2006).
114. *Pace*, 291 F. Supp. 2d at 96.
115. *Id.* at 97–98.
116. *Id.* at 99.
117. *Id.*
118. *Id.* (quoting Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002)).
119. *See supra* Part III.A.
120. *See supra* Part III.A.3.
121. *See* Adams, *supra* note 28, at 7 n.30 ("An inference is a deduction based on logic and experience , but a presumption is a rule of law.").

evidence than a party in the same position who did not destroy the evidence.[122] Given that this is the inference that the court allows the jury to draw when the court gives the instruction, the critical issue is ensuring that the spoliator's actions can support this inference. This issue is so critical because the adverse inference instruction has such a powerful effect on litigation.[123] As Judge Scheindlin wrote in *Zubulake II*:

> In practice, an adverse inference instruction often ends litigation—it is too difficult a hurdle for the spoliator to overcome. The *in terrorem* effect of an adverse inference is obvious. When a jury is instructed that it may "infer that the party who destroyed potentially relevant evidence did so 'out of a realization that the [evidence was] unfavorable,'" the party suffering this instruction will be hard-pressed to prevail on the merits. Accordingly, the adverse inference instruction is an extreme sanction and should not be given lightly.[124]

When a spoliator destroys evidence with bad faith, the inference is easy to draw. In bad faith cases, the spoliator knows litigation is pending and makes a conscious, deliberate decision to destroy certain evidence. That decision is made presumably because the evidence is harmful to the spoliator's case and the spoliator does not want that evidence to come before the jury.[125] This is the crucial part of the inference: that the evidence that was destroyed *because* it was unfavorable to the spoliator.[126]

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

123. *See, e.g.*, *Zubulake II*, 220 F.R.D. 212, 219–20 (S.D.N.Y. 2003) ("[T]he adverse inference instruction is an extreme sanction and should not be given lightly.").

124. *Id.* at 219–20 (alteration in original) (footnotes omitted); *see also* Morris v. Union Pac. R.R., 373 F.3d 896, 900 (8th Cir. 2004) ("An adverse inference instruction is a powerful tool in a jury trial.").

That this instruction from a judge would be so powerful is unsurprising. *See* Quercia v. United States, 289 U.S. 466, 470 (1933) ("The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'" (quoting Starr v. United States, 153 U.S. 614, 626 (1894))).

125. *See* Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 721 (Tex. 2003) ("[A] party who has deliberately destroyed evidence is presumed to have done so because the evidence was unfavorable to its case."); *see also* Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 334 (3d Cir. 1995) ("When the contents of a document are relevant to an issue in a case, the trier of fact generally may receive the fact of the document's nonproduction or destruction as evidence that the party that has prevented production *did so out of the well-founded fear that the contents would harm him*." (emphasis added) (citing Gumbs v. Int'l Harvester, Inc., 718 F.2d 88, 96 (3d Cir. 1983); United States v. Cherkasky Meat Co., 259 F.2d 89 (3d Cir. 1958))).

126. S.C. Johnson & Son, Inc. v. Louisville & Nashville R.R., 695 F.2d 253, 258 (7th Cir. 1982) ("The crucial element is not that the evidence was destroyed but rather the reason for the destruction."); Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 526 (D. Md. 2010) ("[A]n adverse inference instruction makes little logical sense if given as a sanction for negligent breach of

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Inferring that the evidence was unfavorable is easy because the spoliator *knew* what it was doing—it knew that it was destroying relevant evidence, and it was doing it for the purpose of keeping the evidence away from the jury. The most logical reason for destroying the evidence is that the evidence was going to hurt its case. Thus, the inference is justified.[127]

In *Nucor Corp. v. Bell*, the jury could readily draw this adverse inference because Bell destroyed evidence on the thumb drive in bad faith.[128] The court explicitly noted that this evidence was not lost "negligently . . . [or] spontaneously."[129] Because Bell acted in bad faith, the necessary connection between why the evidence was destroyed and its impact on Bell's case was present, thus allowing the jury to infer that the destroyed evidence was harmful to Bell and helpful to Nucor.[130]

In cases in which the spoliator's actions are merely negligent, however, the inference is far weaker, if it exists at all. A party who only negligently destroys evidence does not demonstrate a conscious decision to keep evidence away from the jury because the evidence was harmful to its case.[131] Without a deliberate act expressing a "desire to suppress the truth,"[132] determining that the destroyed evidence was harmful to the spoliator is incredibly difficult, if not impossible.[133]

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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 . . . .").

127. Proving bad faith may not always be easy, but a party seeking an adverse inference instruction can prove that the spoliator acted with this level of culpability through a variety of means. *See Morris*, 373 F.3d at 901 ("Intent rarely is proved by direct evidence, and a district court has substantial leeway to determine intent through consideration of circumstantial evidence, witness credibility, motives of the witnesses in a particular case, and other factors.").

128. Nucor Corp. v. Bell, 251 F.R.D. 191, 196 (D.S.C. 2008). Bell also destroyed evidence on a laptop computer; the court found this destruction was intentional, but did not rise to the level of bad faith. *Id.* at 198–99.

129. *Id.* at 196.

130. As Judge Norton noted, a district court must act as the initial fact finder on spoliation in deciding whether to impose a discovery sanction such as the adverse inference instruction. *Id.* at 202. Then, the jury may act as an additional fact finder, in which role the jury may reject the court's finding that spoliation actually occurred. *Id.* at 202–03. As long as the adverse inference instruction is permissive rather than mandatory, such a situation with dual fact finders is unavoidable.

Using a mandatory, rather than a permissive, instruction has much in favor for it. *See* Norton et al., *supra* note 5, at 487–93 (arguing that a mandatory instruction is preferable because it removes duplicative factfinding and prevents the jury from disregarding the instruction). Given the impact of the adverse inference instruction on litigation, see *supra* note 124 and accompanying text, however, ensuring that the instruction is imposed only when a spoliator acts with bad faith is even more important if the instruction is mandatory.

131. *See* Vick v. Tex. Emp't Comm'n, 514 F.2d 734, 737 (5th Cir. 1975) ("Mere negligence is not enough, for it does not sustain an inference of consciousness of a weak case." (citations omitted)).

132. Stevenson v. Union Pac. R.R., 354 F.3d 739, 746 (8th Cir. 2004).

133. *See, e.g.*, United States v. Laurent, 607 F.3d 895, 902 (1st Cir. 2010) ("In general, the instruction usually makes sense only where the evidence permits a finding of bad faith destruction; ordinarily, *negligent* destruction would not support the logical inference that the evidence was

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Thus, the inference that evidence was destroyed because it was damaging to the spoliator's case is lacking. Because this critical connection cannot be made, the adverse inference instruction is inappropriate when the destruction of evidence is the result of negligence.

The most plausible, but ultimately unpersuasive, argument for giving the instruction based on negligence comes from then-Judge Stephen Breyer's decision in *Nation-Wide Check Corp., Inc. v. Forest Hills Distributors, Inc.*[134] The argument is as follows: the "abandonment of potentially useful evidence is, at a minimum, an indication that [the spoliator] believed the records would not *help* his side of the case."[135] Essentially, this argument contends that if the evidence were helpful to the spoliator, he would have consciously preserved it for trial; that the spoliator did not preserve the evidence suggests that the evidence was not helpful.

Yet *not helpful* is not the equivalent of *harmful*; just because the evidence was not going to help the spoliator's case does not mean that the evidence was going to hurt the spoliator's case. The Southern District of New York acknowledged that "[b]ecause we do not know what has been destroyed, it is impossible to accurately assess what harm has been done to the [innocent party] and what prejudice it has suffered."[136] Further, "[s]uch documents may have been helpful to the [defendants], helpful to plaintiffs, or of no value to any party."[137] Thus, without a tighter nexus suggesting that the destroyed evidence was harmful to the spoliator's case, a court should not give an adverse inference instruction when a spoliator's destruction of evidence is merely negligent.[138]

Finally, allowing a spoliator's negligence to support the instruction is saved neither by the permissive, rather than mandatory, nature of the instruction nor by the ability of the jury to decide either that destroyed evidence was irrelevant or

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favorable to the defendant." (citing SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS: CIVIL § 75.01 at 75-17 (2010) (instruction 75-7))); Henning v. Union Pac. R.R., 530 F.3d 1206, 1220 (10th Cir. 2008) ("Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case." (quoting Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997))).

134. 692 F.2d 214 (1st Cir. 1982). Recall that *Nation-Wide* did not address the mental culpability required for the instruction to be given. *See id.* at 217–20; *see also supra* note 98. Nevertheless, then-Judge Breyer's argument clearly applies in the context of negligent spoliation.

135. *Nation-Wide*, 692 F.2d at 219.

136. Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 478 (S.D.N.Y. 2010) (alteration in original) (quoting United States v. Phillip Morris USA Inc., 327 F. Supp. 2d 21, 25 (D.D.C. 2004)) (internal quotation marks omitted).

137. *Id.*

138. Although the court may know in some cases what evidence—i.e., what documents or records—were destroyed, the court remains unaware of what that evidence actually stated. If the court were aware, an adverse inference instruction would be unnecessary because the evidence could be presented to the jury, even if not in its original form. Thus, the Southern District of New York's reasoning applies even if a court knows which documents were lost. *See also infra* notes 199–200 and accompanying text.

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that no spoliation even occurred.[139] If no logical connection exists between the destroyed evidence and the fact that the evidence was harmful to the spoliator's case, the jury should not be given the opportunity to conclude that the connection did, in fact, exist.[140]

Recall that in *Pace*, the adverse inference instruction was based on the railroad company's negligent destruction of evidence when it failed to preserve documents despite foreseeable litigation.[141] The district court never found that the railroad company acted in bad faith.[142] In fact, the railroad company's negligent destruction of documents gave no indication that those documents were destroyed to hide anything.[143] Allowing the jury to draw an inference that the documents were harmful to the railroad company was therefore a mistake.

Although the debate over the adverse inference instruction often focuses on bad faith and negligence, two remaining levels of culpability merit some discussion: destruction by willful act and by gross negligence.[144] The inference may be stronger with these levels of culpability, but they should still be insufficient to justify an adverse inference instruction. Gross negligence, like negligence, fails to allow the jury to make a sufficient connection between the evidence that was destroyed and the fact that the evidence was harmful to the spoliator. Courts have tried to justify the gross negligence standard by requiring a greater showing of relevance,[145] but this justification fails. Most

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139. *See* Panel Discussion, *Sanctions in Electronic Discovery Cases: Views from the Judges*, 78 FORDHAM L. REV. 1, 10 (2009) [hereinafter *Fordham Panel Discussion*] (remarks of Judge Shira A. Scheindlin) ("[W]hen a court issues an adverse inference instruction, the court's finding of spoliation can be second-guessed by the jury. Although the court has already found that a party caused evidence to be lost and that a sanction is appropriate, the jury has to do it all over again.").

140. This raises the question of why a court should not allow a jury to determine whether spoliation occurred in the first instance, even if the court instructs the jury that they may draw an inference only if it finds bad faith spoliation. Although juries are given great deference as finders of fact, see, e.g., *Anderson v. City of Bessemer City*, 470 U.S. 564, 573–76 (1985) (discussing the degree of deference given to the fact finder), judges must make some initial factual decisions before the jury is given the opportunity to make its own findings in a case. Typically, such initial decisions are made before a jury is empanelled or involve a question that cannot be entrusted to a jury because knowledge of the facts, even if ultimately never to be admitted into evidence at trial, could be so prejudicial to a party. *See, e.g.*, United States v. Gray, 491 F.3d 138, 143 (4th Cir. 2007) (reviewing a district court's decision to admit evidence based on the district court's findings of fact in a suppression hearing). An adverse inference has a great impact on a case. *See supra* note 124. The risk that the jury will draw the inference when it is unwarranted is too severe to allow the jury to make initial decisions about whether the inference should be in play. *Cf.* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147–49 (1999) (discussing the gatekeeping function of district courts in the context of expert testimony). Thus, district courts must serve as gatekeepers in this context as well.

141. Pace v. Nat'l R.R. Passenger Corp., 291 F. Supp. 2d 93, 97–98 (D. Conn. 2003).

142. *See id.* at 99.

143. *See id.* at 97–99.

144. *See* 126 AM. JUR. 3D *Proof of Facts* § 4 (2012).

145. *See, e.g.*, Klezmer *ex rel.* Desyatnik v. Buynak, 227 F.R.D. 43, 50 (E.D.N.Y. 2005) ("If a court finds bad faith or gross negligence, the bad faith (always) and the gross negligence (usually) can support a finding that the destroyed or lost evidence was relevant to the claims of the party

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fundamentally, this standard still leaves the court and jury unable to "know what has been destroyed."[146] Without knowing the contents of what has been destroyed, the jury cannot determine whether the spoliator destroyed the evidence to hide something harmful.[147] Just because the destroyed evidence can be proven relevant does not mean that the evidence was harmful.[148] As with the negligent spoliator, the jury still does not know *why* the evidence was destroyed, and thus the jury cannot logically conclude that the grossly negligent spoliator destroyed evidence in order to keep it from the jury. The adverse inference is thus inappropriate when a spoliator destroys evidence in a grossly negligent manner.

Likewise, a willful act should be insufficient to support an adverse inference instruction. With a willful act, done without bad faith,[149] the jury may see a more plausible connection between the destruction of evidence and the fact that the evidence was harmful to the spoliator's case. Here again, the crucial fact—that the evidence was destroyed *because* it was harmful—is missing. Of course, the knowledgeable destruction of evidence supports a stronger inference that the evidence was not helpful, and in fact might have been harmful. Yet a far more tenuous inference is required than when the evidence is destroyed in bad faith because the jury lacks the strong notion of *why* the evidence was destroyed. Therefore, a willful act by a spoliator should still be insufficient for a court to give an adverse inference instruction.[150]

To illustrate why only bad faith spoliation justifies an adverse inference instruction, consider three variations of a hypothetical: a fire destroys a room in an office building that stores a company's records, and the company is engaged

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seeking it." (citing Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 109 (2d Cir. 2002)); Zubulake v. UBS Warburg LLC (*Zubulake III*), 229 F.R.D. 422, 431 (S.D.N.Y. 2004) ("[T]he concept of 'relevance' encompasses not only the ordinary meaning of the term, but also that the destroyed evidence would have been favorable to the movant. 'This corroboration requirement is even more necessary where the destruction was merely negligent, since in those cases it cannot be inferred from the conduct of the spoliator that the evidence would even have been harmful to him.' This is equally true in cases of gross negligence or recklessness . . . ." (footnotes omitted) (quoting Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 77 (S.D.N.Y. 1991))).

146. Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 478 (S.D.N.Y. 2010) (quoting United States v. Phillip Morris USA Inc., 327 F. Supp. 2d 21, 25 (D.D.C. 2004)) (internal quotation marks omitted).

147. *See id.*

148. If the nonspoliating party could prove what the evidence was, rather than just that it was relevant, the nonspoliating party would not need the adverse inference instruction because that party would have the evidence to show to the jury.

149. Recall that the Third and Fourth Circuits adhere to this level of mental culpability. *See supra* Part III.A.2.

150. Some scholars support allowing willfulness to support the instruction. *See, e.g.*, Adams, *supra* note 28, at 58 ("[T]here is no logical basis for a jury to draw an adverse inference from spoliation unless the spoliator acted willfully or in bad faith."). Although Professor Adams recognizes the logical connection necessary for the instruction, he believes—understandably, although unconvincingly—that willfulness provides this connection in the same manner as bad faith. *See id.*

in litigation in which some of those records are relevant. In the first variation, the manager, knowing about the litigation, strikes a match, lights a fire, and burns the records. This is undoubtedly bad faith, and inferring that this manager was trying to prevent something in those records from being disclosed is easy.

In the second variation, the manager is told that the wiring in his building is faulty and should be replaced, but because either he was too busy to address the problem or he did not want to spend the money to fix it, the manager does not replace the wiring. Eventually, the wires cause a fire, and the records burn. The manager was certainly negligent in not fixing the wiring, but his negligence does not support a conclusion that he was trying to hide something in the records.

In the third variation, the manager sneaks into the room with the records to smoke a cigarette, lights a match, and then drops the match in a trashcan full of paper, an act that is at least grossly negligent if not willful. Again, a fire breaks out and burns the relevant records. Here, the manager is more at fault than in the second variation, but connecting his action with a desire to destroy those documents is still difficult.

Ultimately, only the first variation of this hypothetical fairly allows a jury to conclude that the spoliator was trying to prevent evidence from coming to light. The second and third variations simply do not support such an inference.[151]

This Section has shown that only bad faith destruction of evidence logically supports giving an adverse inference instruction. Without this bad faith act by the spoliator, the inference that the destroyed evidence was harmful to the spoliator's case is lacking. Bad faith provides this crucial connection between the destroyed evidence and the inference that the evidence was damaging to the spoliator's case.

B. Furthering the Three Purposes of the Adverse Inference Instruction

The adverse inference instruction serves three purposes: to punish, deter, and remedy.[152] The best use of the instruction will serve all three of the goals and not elevate one goal above the others. Ultimately, requiring a spoliator to act in bad faith best serves all three purposes of the instruction.

1. The Punishment Goal

The punishment goal of the instruction is simple: the spoliator must suffer for its act that harmed the opposing party.[153] As Professor McCormick puts it,

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151. In some cases, determining whether a spoliator acted in bad faith will be a close question. But that should not give any pause. District courts often have to make difficult factual findings.

152. *See supra* notes 23–26 and accompanying text.

153. *See* Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 74 (S.D.N.Y. 1991) ("[The instruction] serves as retribution against the immediate wrongdoer. '[T]he law, in hatred of the spoiler, baffles the destroyer, and thwarts his iniquitous purpose, by indulging a presumption which supplies the lost proof, and thus defeats the wrongdoer by the very means he had so confidentially

"The real underpinning of the rule of admissibility may be a desire to impose swift punishment, with a certain poetic justice, rather than concern over niceties of proof."[154] This sense of punishment is rooted in just deserts, the idea that "wrongdoing deserves punishment."[155]

This goal of punishment, however, is not unbounded. Just as in criminal law, the "notion that the punishment should fit the crime"[156] applies to spoliation sanctions.[157] In the context of spoliation sanctions, the First Circuit colorfully made this point: "[T]he judge should take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms. Whether deterrence or compensation is the goal, the punishment should be reasonably suited to the crime."[158] After all, the more culpable the spoliator, the more deserving of punishment it should be. To determine the spoliator's fault and thus how deserving it is of punishment, the "ultimate focus" is the spoliator's mental culpability.[159] Thus, greater mental culpability merits greater punishment.

To determine what level of mental culpability deserves an adverse inference instruction, one must first have an appreciation for how severe a punishment an adverse inference instruction is. In *Zubulake II*, Judge Scheindlin called the adverse inference instruction "an extreme sanction [that] should not be given lightly."[160] Judge Scheindlin has also noted that the instruction makes it hard—if not impossible—for the party against whom the instruction is given to prevail on the merits.[161] The Tenth Circuit has taken a similar view of the instruction, writing:

> An adverse inference is a powerful sanction as it "brands one party as a bad actor" and "necessarily opens the door to a certain degree of speculation by the jury, which is admonished that it may infer the

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employed to perpetrate the wrong.'" (second alteration in original) (quoting Pomeroy v. Benton, 77 Mo. 64, 86 (1882)).

154. 2 MCCORMICK ON EVIDENCE § 265, at 228 (Kenneth S. Brown ed., 6th ed. 2006).

155. Owen McLeod, *Desert*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter ed. 2008), http://plato.stanford.edu/archives/win2008/entries/desert/.

156. Ewing v. California, 538 U.S. 11, 31 (2003) (Scalia, J., concurring).

157. Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 618 (S.D. Tex. 2010) ("Courts also agree that the severity of a sanction for failing to preserve when a duty to do so has arisen must be proportionate to the culpability involved and the prejudice that results.").

158. Anderson v. Beatrice Foods Co., 900 F.2d 388, 395 (1st Cir. 1990).

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

160. 220 F.R.D. 212, 220 (S.D.N.Y. 2003).

161. *Id.*; *see also Fordham Panel Discussion*, *supra* note 139, at 6–8 (remarks of Judge Shira A. Scheindlin) (explaining that "[a]dverse inference instructions have a strong tendency to affect the outcome of the trial" and "can have a devastating impact on the party against whom the inference is drawn").

> presence of damaging information in the unknown contents of an erased audiotape."[162]

These statements recognize just how incredibly harsh the adverse inference instruction is. That other harsher sanctions—such as dismissal[163]—exist does not mean that the adverse inference instruction is not a severe sanction. For example, dismissing a case officially ends the litigation, but the adverse inference instruction effectively does the same thing.[164] Similarly, that the jury may refuse to draw the inference does not undercut the severity of the instruction.[165]

For a party that destroys evidence in bad faith, such a severe sanction is appropriate. That party has deliberately tried to subvert the judicial process, and punishment should be harsh and swift. But for a party who only negligently destroys evidence, the punishment should be less severe. The negligent spoliator, of course, deserves some punishment; costs for trying to recover destroyed evidence and fines are reasonable and proportionate punishments for the negligent spoliator.[166] The negligent spoliator does not, however, deserve a litigation-ending sanction. The spoliator's conduct, although culpable, was not terribly bad.[167] Additionally, courts have a preference for deciding cases on their merits,[168] which adverse inference instructions undermine.

Rather than focusing explicitly on the punitive rationale, arguments favoring the allowance of negligent spoliation in support of an adverse inference instruction typically take either of two approaches: First, they deemphasize the

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162. Henning v. Union Pac. R.R., 530 F.3d 1206, 1219–20 (10th Cir. 2008) (quoting *Morris*, 373 F.3d at 900–01; *see also* Nucor Corp. v. Bell, 251 F.R.D. 191, 202 (D.S.C. 2008) (calling the adverse inference instruction "a heavy sanction").

163. *See, e.g.*, Silvestri v. Gen. Motors Corp., 271 F.3d 583, 585 (4th Cir. 2001) (dismissing a case as punishment for spoliating evidence).

164. *See, e.g.*, *Zubulake II*, 220 F.R.D. at 220 ("[T]he party suffering [an adverse inference] instruction will be hard-pressed to prevail on the merits.").

165. Despite concerns about juries ignoring the instruction, see James T. Killelea, Note, *Spoliation of Evidence: Proposals for New York State*, 70 BROOK. L. REV. 1045, 1060 & n.102, 1061 (2005) (recognizing the possibility that juries may refuse to follow an adverse inference instruction), no evidence suggests that juries do this with any regularity.

166. *See, e.g.*, Passlogix, Inc. v. 2FA Tech., LLC, 708 F. Supp. 2d 378, 420–23 (S.D.N.Y. 2010) (discussing remedies for negligent spoliation and imposing a fine on a negligent spoliator but declining to impose costs due to difficulties in determining actual costs incurred).

167. Courts must use their normal factfinding means, such as briefing and hearings, to determine the level of culpability with which a spoliator acted. If a spoliator consistently fails to preserve evidence relevant to litigation, that pattern of destruction may well be evidence of bad faith. Thus, while negligent spoliation itself is insufficient to warrant an adverse inference instruction, it may be an indicator of bad faith, which would warrant the instruction.

168. *See, e.g.*, Eitel v. McCool, 782 F.2d 1470, 1472 (9th Cir. 1986) (citing Pena v. Seguros La Comercial, S.A., 770 F.2d 811, 814 (9th Cir. 1985)) ("Cases should be decided upon their merits whenever reasonably possible.").

role of punishment in the instruction.[169] Alternatively, they fold the punitive rationale into the instruction's deterrence aim.[170]

Both of these approaches are misguided. Those seeking to remove or diminish the punitive rationale blatantly ignore a fundamental aspect of the adverse inference instruction. Courts have repeatedly recognized that the instruction should punish the spoliator in *that* case, not just deter future spoliation.[171] By removing punishment as a rationale for the instruction, the instruction becomes less of a scalpel for courts to manage a particular case and more of a blunt tool for broadly affecting the behavior of all litigants. The instruction, from its earliest days, focused on the parties in a particular case.[172] Therefore, ignoring the punitive rationale untethers the instruction from its moorings.

Those who seek to combine the punitive and deterrence rationales are on more solid ground with the instruction's historical underpinnings,[173] but this approach runs the risk of overpunishing spoliators. If courts consider punishment and deterrence together, they are far more likely to issue harsher punishments because of the deterrent effect that a particularly harsh punishment has on potential wrongdoers. The punishment would no longer fit the crime, and the spoliator's punishment would be disproportionate to its offense.

The best way to ensure that the spoliator's punishment comports with its culpability is to treat the punishment rationale as focused on just deserts. For

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169. *See* Judge, *supra* note 101, at 463–64 (recommending that the adverse inference instruction be "extended to negligent spoliation of evidence, and that its use as a punishment device be curtailed").

170. *See* Adams, *supra* note 28, at 17 ("Punishing the negligent spoliation of evidence deters spoliation by imposing the consequence of the spoliation on the spoliator, who would generally be the cheapest cost avoider.").

Some courts also combine the punishment and deterrence rationale. *See, e.g.*, Shamis v. Ambassador Factors Corp., 34 F. Supp. 2d 879, 890 (S.D.N.Y. 1999) ("The punitive purpose both deters parties from destruction of relevant evidence and directly punishes the party responsible for spoilation [sic]."). The better—and more common—view is to treat deterrence and punishment as separate rationales. *See* Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) ("[T]he applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine." (quoting West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999)) (internal quotation marks omitted). Treating punishment and deterrence as separate rationales also provides support for treating the punishment rationale as focused on just deserts because deterrence, another purpose of punishment, is treated as a distinct rationale for the adverse inference instruction.

171. *See, e.g.*, Clark Constr. Grp., Inc. v. City of Memphis, 229 F.R.D. 131, 141 (W.D. Tenn. 2005) (noting that the court should "punish the spoliating party for *its* actions" (emphasis added)).

172. *See, e.g.*, The Pizarro, 15 U.S. (2 Wheat.) 227, 240 (1817) (focusing on the litigants in that case in determining that the instruction was not appropriate); Armory v. Delamirie, (1722) 93 Eng. Rep. 664 (K.B.); 1 Strange, 506 (focusing on the goldsmith's conduct in determining that the instruction was warranted).

173. *See* Nation-Wide Check Corp., Inc. v. Forest Hills Distribs., Inc., 692 F.2d 214, 218 (1st Cir. 1982) (treating the "prophylactic and punitive effects" of the instruction as part of the same rationale); *cf.* Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) (citing, in a criminal case, deterrence as a rationale for punishment).

example, in *Nucor*, Bell deserved harsh punishment for intentionally destroying important evidence.[174] Conversely, in *Pace*, a far less culpable mistake did not deserve litigation-ending punishment.[175] Only the most culpable spoliators—that is, those acting in bad faith—deserve the harsh punishment of the adverse inference instruction. By focusing on the punishment rationale to ensure that a spoliator gets its just deserts, courts can ensure that the punishment fits the crime.

2. The Deterrence Goal

To have an effective adversarial system, courts must have rules that deter misconduct and encourage parties to preserve relevant evidence.[176] Because potential spoliators control the evidence, they are in the best position to preserve that evidence.[177] Thus, courts seek to deter potential spoliators from destroying evidence and undermining the judicial process. The adverse inference instruction serves that prophylactic purpose—deterring the destruction of evidence by threatening potential spoliators with severe punishment.[178] The instruction therefore places the risk of destroyed evidence "on the party responsible for its loss."[179]

Those who believe negligent spoliation should support an adverse inference instruction look to tort law as an analogy. In *Turner*, the Southern District of New York reasoned:

> The adverse inference thus acts as a deterrent against even the negligent destruction of evidence. This is perfectly appropriate: deterrence is not a function limited to punitive sanctions where intent has been demonstrated. In the law of torts, for example, damages for negligence serve to deter such conduct in the future.[180]

Certainly, the adverse inference instruction can be administered in a way to deter negligent spoliation—indeed, the law can deter any level of undesirable

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174. *See* Nucor Corp. v. Bell, 251 F.R.D. 191, 195–99, 202 (D.S.C. 2008).

175. *See* Pace v. Nat'l R.R. Passenger Corp., 291 F. Supp. 2d 93, 97–99 (D. Conn. 2003).

176. *See* Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998) (citing Nation-Wide Check Corp. v. Forest Hills Distribs., Inc., 692 F.2d 214, 218 (1st Cir. 1982)).

177. *See* Adams, *supra* note 28, at 17 ("The spoliator usually has access to the evidence and can prevent its spoliation . . . .").

178. *See Nation-Wide*, 692 F.2d at 218.

179. Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002) (quoting Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 75 (S.D.N.Y 1991)); *see also* Laurie S. Longinotti, Comment, *Evidence—*Welsh v. United States*: Negligent Spoliation of Evidence: The Creation of a Rebuttable Presumption*, 19 MEM. ST. U. L. REV. 229, 233 (1989) (citing *Nation-Wide*, 692 F.2d at 218) (observing that the deterrence rationale "attempts to deter a party from destroying relevant evidence prior to trial by placing the risk of destruction upon that party").

180. *Turner*, 142 F.R.D. at 75 n.3.

conduct.[181] For proponents of allowing negligent spoliation to justify the instruction, placing the burden to preserve evidence on the party in control of the evidence—and thus placing the risk of loss with this party—is paramount.[182]

Admittedly, the party in control of evidence should bear both the duty to preserve and the risk of loss of that evidence. That proposition seems uncontestable. But myopically focusing on deterrence is too narrow, as looking in a vacuum at how the adverse inference can deter spoliation misses the broader purpose of the instruction. The instruction is part of the judge's toolbox for managing litigation. It is designed to help resolve disputes, but other considerations are also involved in how best to resolve disputes. Litigation seeks to discover the truth and resolve disputes fairly.[183] These truth-seeking and dispute-resolution functions—not the preservation of evidence—are most important.[184] Evidence therefore should be preserved because it leads to the truth and fair resolution of disputes, not because of some inherent value in preserving it. In this sense, using the adverse inference instruction—or, for that matter, any and all discovery sanctions—to deter spoliation is useful because it increases the odds that evidence is preserved for trial.

That desire to preserve evidence for trial, however, must be balanced with the costs of deterrence and the larger goals of litigation. Litigation, particularly discovery, is an incredibly expensive endeavor,[185] and the Supreme Court has shown acute concern for this expense.[186] The benefits and costs of discovery must be balanced to allow parties access to the relevant evidence without imposing burdens that drive the cost of the discovery beyond the value of the

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181. *Cf.* Herring v. United States, 555 U.S. 135, 144 (2009) (observing that the Fourth Amendment's exclusionary rule is designed "to deter deliberate, reckless, or grossly negligent conduct" by police).

182. *See* Creative Res. Grp. of N.J., Inc. v. Creative Res. Grp., Inc., 212 F.R.D. 94, 107 (E.D.N.Y. 2002) (citing *Residential Funding*, 306 F.3d at 108).

183. *See* United States v. Harper, 662 F.3d 958, 961 (7th Cir. 2011) (commenting that "trials *are* searches for truth").

184. *See* Adams, *supra* note 28, at 17 ("If the goal of the litigation process is simply to achieve the optimal level of preservation of evidence, allocating the cost of spoliation onto the spoliator through an adverse inference instruction could well be appropriate. But the goal of litigation should be ascertaining the true facts in the case, not efficiently preserving evidence."); Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J.L. & ECON. 1, 1 (1994) ("The degree of accuracy is a central concern of adjudication.").

185. *See generally* Conference Report, Lawyers for Civil Justice et al., Litigation Cost Survey of Major Companies 2–7 (May 10–11, 2010), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf (summarizing the key findings of a survey regarding the costs of litigation to major companies across the United States).

186. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557–60 (2007) (citing Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005); Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 528 n.17 (1983); 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, at 233–34 (3d ed. 2004)) (showing particular concern for the costs of discovery in evaluating the standard that a complaint must meet to survive a motion to dismiss).

litigation.[187] If negligent spoliation can support an adverse inference instruction, litigants will be forced to greater extremes to preserve any evidence that may be relevant to the litigation, which will undoubtedly increase expenses. This increased cost will be particularly applicable to organizational litigants consisting of multiple individuals accessing electronically stored information. Although a technical cost–benefit analysis would be difficult, if not impossible, to complete, these costs are significant. Yet the benefits of preserving evidence are significant, particularly to the party who suffers the harm of losing that evidence. Still, despite the natural desire to ensure that a party gets the chance to put on its evidence at trial, that desire should not lead to a policy creating such an overwhelming deterrence that the deterrence has greater compliance costs than evidentiary benefits.[188]

Requiring a spoliator act in bad faith before giving an adverse inference instruction still acts as a deterrent. The instruction provides a clear punishment—and a severe one—for the spoliator who acts in bad faith. This bad faith is not limited to actually destroying evidence after litigation arises; it also extends to bad faith decisions to never preserve evidence in the first place. For example, in *Lewy v. Remington Arms Co.*,[189] the Eighth Circuit noted that a document-retention policy could be instituted in bad faith, if that policy were designed to ensure that potentially damaging documents never were preserved.[190] The adverse inference instruction thus deters litigants from engaging in such behavior and encourages them to act in good faith.

Of course, willful or grossly negligent acts still remain. If deterring simple negligence is too costly but bad faith can still be deterred by the instruction, then the instruction may also deter willful and grossly negligent acts. Thus, a decision must be made about the extent to which courts should deter potential spoliation. In the context of the Fourth Amendment, the Supreme Court has drawn the line between negligence and gross negligence: grossly negligent—or more culpable—police acts result in the exclusion of evidence, but merely negligent acts do not.[191] Although this exclusionary rule standard may suggest that the line be drawn in the same place for the adverse inference instruction, the

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187. *See* Regan-Touhy v. Walgreen Co., 526 F.3d 641, 649 (10th Cir. 2008) ("[T]he burdens and costs associated with electronic discovery, such as those seeking 'all email,' are by now well known, and district courts are properly encouraged to weigh the expected benefits and burdens posed by particular discovery requests (electronic and otherwise) to ensure that collateral discovery disputes do not displace trial on the merits as the primary focus of the parties' attention.").

188. Although Federal Rule of Civil Procedure 37(e) may not provide an excuse for negligent spoliation, that rule does reflect the reality that preserving *all* electronically stored information is virtually impossible. *See* FED. R. CIV. P. 37(e) ("Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.").

189. 836 F.2d 1104 (8th Cir. 1988).

190. *Id.* at 1112 (citing Gumbs v. Int'l Harvester, Inc., 718 F.2d 88, 96 (3d Cir. 1983)).

191. *See* Herring v. United States, 555 U.S. 135, 147–48 (2009) (citing United States v. Leon, 468 U.S. 897, 907 n.6 (1984)) (holding that police negligence does not trigger the exclusionary rule).

exclusionary rule does not compel this result. Other sanctions exist for spoliation. For instance, the spoliator can be fined or pay costs incurred by the other side.[192] For Fourth Amendment violations, however, the exclusionary rule is the only realistic sanction to remedy the wrong.[193] Furthermore, the exclusionary rule applies in the criminal context, in which courts jealously protect defendants' rights, whereas the adverse inference instruction applies in the civil context, in which liberty concerns are not typically present.[194]

Still, the adverse inference instruction can deter grossly negligent or willful spoliation, just as it can deter negligent spoliation. But that deterrence comes at the same cost as deterring negligent spoliation: it leaves open the possibility that by using such a powerful tool to deter misconduct, the litigation could be effectively ended without reaching the truth. The instruction does, after all, effectively end litigation.[195] Willful or grossly negligent spoliation can lead to a sanction ending the case without sufficiently supporting the inference that the destroyed evidence was that damaging to the spoliator's case.[196]

Ultimately, the adverse inference instruction serves as a useful tool against bad faith spoliation. That the instruction can also deter other types of spoliation does not mean that using the instruction to deter that type of spoliation is the correct choice. The instruction is simply a tool that the judge can use to help reach the truth. Allowing the instruction to deter spoliation other than bad faith spoliation risks elevating the desire to preserve evidence above the search for truth. Hence, the instructions in both *Nucor* and *Pace* serve as warnings to future litigants, but the instruction in *Pace* may overdeter litigants, forcing them to save every document for fear of a severe sanction.[197] The instruction is therefore best used to deter bad faith spoliation while serving the broader truth-seeking goals of the judicial system.

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192. *See, e.g.*, *Mosaid I*, 224 F.R.D. 595, 601 (D.N.J. 2004) (granting fees and costs as a spoliation sanction).

193. *See* RONALD JAY ALLEN ET AL., CRIMINAL PROCEDURE: INVESTIGATION AND RIGHT TO COUNSEL 352–61 (2d ed. 2011) (discussing tort damages, injunctions, criminal prosecutions, and administrative and political remedies as alternatives to the exclusionary rule, and noting that these options are far less common remedies for Fourth Amendment violations).

194. In some civil cases, such as habeas cases, liberty interests are at stake. *See, e.g.*, 28 U.S.C. § 2254 (2006) (providing procedures for habeas petitions in federal courts for a prisoner in a state's custody); *id.* § 2255 (providing procedures for habeas petitions in federal courts for a prisoner in federal custody). Yet civil cases with such liberty interests are not the norm.

195. *See, e.g.*, *Zubulake II*, 220 F.R.D. 212, 219 (S.D.N.Y. 2003) ("In practice, an adverse inference instruction often ends litigation—it is too difficult a hurdle for the spoliator to overcome.").

196. *See supra* notes 145–50 and accompanying text.

197. *See* Nucor Corp. v. Bell, 251 F.R.D. 191, 197–99, 203–04 (D.S.C. 2008); Pace v. Nat'l R.R. Passenger Corp., 291 F. Supp. 2d 93, 97–99 (D. Conn. 2003).

3. The Remedial Goal

The adverse inference instruction's third goal is to provide a remedy for the injured party who was denied the advantage of useful evidence. The instruction should "place the non-spoliating party in the position it should have been in" if the evidence had not been destroyed.[198]

When the spoliator acts with bad faith and the inference that the instruction allows the jury to draw is supported by the facts, the adverse inference instruction serves this remedial purpose nicely. The prejudiced party gets the benefit of the destroyed evidence because the jury knows the type of evidence that was destroyed and presumes that the evidence was harmful to the spoliator.

When the spoliator acts with less than bad faith, however, the instruction no longer serves its remedial purpose and "goes beyond making [the] plaintiff whole."[199] Recall why negligent, grossly negligent, and willful spoliation do not logically support the inference: these levels of culpability do not sufficiently connect the destroyed evidence to the fact that the evidence was harmful to the spoliator.[200] Without this connection, giving the adverse inference instruction when the spoliator acts with less than bad faith does not make the nonspoliating party whole. Rather, it gives the nonspoliating party a windfall: the nonspoliating party gets the benefits of the instruction without showing that the instruction is actually warranted by the connection of the destroyed evidence to the fact that the evidence was harmful to the spoliator's case. Like other areas of the law that reject remedies that do more than make the plaintiff whole,[201] spoliation sanctions should similarly reject such remedies.

Proponents of allowing a spoliator's negligence to support the instruction have two arguments that the remedial purpose is served when negligent spoliation results in an adverse inference instruction, but these are arguments are ultimately unpersuasive. First, they point to the corroboration requirement. In *Turner*, the Southern District of New York wrote:

198. Clark Constr. Grp., Inc. v. City of Memphis, 229 F.R.D. 131, 141 (W.D. Tenn. 2005); *see also* Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 618 (S.D. Tex. 2010) ("A measure of the appropriateness of a sanction is whether it 'restore[s] the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.'" (alteration in original) (quoting West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999))).

199. *Mosaid I*, 224 F.R.D. 595, 600 (D.N.J. 2004). In *Mosiad I*, the court was worried that giving the instruction "would elevate [the evidence] to an arguably unjustified level of importance and create a potentially insurmountable hurdle for defendants." *Id.*

200. *See supra* Part IV.A.

201. Most notably, contract law prohibits a recovery that puts a party "in a better position than [the party] would have been in had the contract been satisfactorily performed." Ostano Commerzanstalt v. Telewide Sys., Inc., 880 F.2d 642, 649 (2d Cir. 1989).

> [S]ome extrinsic evidence of the content of the evidence is necessary for the trier of fact to be able to determine in what respect and to what extent it would have been detrimental.
>
> This corroboration requirement is even more necessary where the destruction was merely negligent, since in those cases it cannot be inferred from the conduct of the spoliator that the evidence would even have been harmful to him.[202]

Yet this very statement explains why the instruction is both unwarranted and unnecessary in the case of negligent spoliation. The instruction is unwarranted because no inference connects the "conduct of the spoliator" with the fact that the evidence "would even have been harmful to him."[203] Thus, the very inference that the court would be allowing the jury to draw by giving the instruction is utterly lacking.

Next, the instruction is unnecessary because when the nonspoliating party can offer extrinsic evidence of what the destroyed evidence was, the jury can base its decision on that extrinsic evidence, rather than on the destroyed evidence. The adverse inference instruction is premised on the idea that the spoliator tried to suppress damaging evidence.[204] That a jury may logically infer something about the content of destroyed evidence from extrinsic evidence is not the same as the adverse inference, and the judge need not give that instruction. Jury instructions generally tell jurors to "use their general knowledge and experience possessed in common with other people" to reach a verdict.[205] Therefore, jurors do not need an adverse inference instruction because they can use extrinsic evidence related to the destroyed evidence as an aid in interpreting that destroyed evidence.

Second, proponents of allowing a spoliator's negligence to support the instruction claim that if the spoliator is still allowed to present rebuttal evidence, then the spoliator can overcome the instruction and explain why the jury should not draw the inference. Courts that allow negligent spoliation to support the instruction often give an irrebuttable presumption when the spoliator acts in bad faith but only a rebuttable presumption when the spoliator is merely negligent.[206]

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202. Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 77 (S.D.N.Y. 1991).

203. *See id.*

204. *See* Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1035 (8th Cir. 2007) (stating that the instruction is premised on preventing spoliators from "suppress[ing] the truth" (quoting Stevenson v. Union Pac. R.R., 354 F.3d 739, 746 (8th Cir. 2004)) (internal quotation marks omitted)).

205. 75A AM. JUR. 2D *Trial* § 1223 (2007) (citing Commonwealth v. Jones, 683 A.2d 1181, 1196 (Pa. 1996); Hoover v. Gregory, 117 S.E.2d 395, 396 (N.C. 1960); Gillette Motor Transp. Co. v. Whitfield, 200 S.W.2d 624, 625 (Tex. 1947); Fisher v. O'Brien, 162 P. 317, 319 (Kan. 1917)).

206. For example, the Southern District of New York described its adverse inference instruction as follows:

> 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

The rebuttable presumption, however, still leaves open the likely possibility that the jury will draw the inference because the instruction itself, no matter how carefully phrased,[207] still labels the spoliator as a wrongdoer.[208] This labeling makes the jury far less likely to believe the spoliator's explanation of what happened to the destroyed evidence.[209] The rebuttable presumption thus provides little protection for the negligent spoliator from facing a severe sanction. Instead, it provides the nonspoliating party with an unwarranted benefit.

Returning again to *Nucor Corp.* and *Pace*, the plaintiff in *Nucor Corp.* rightly deserved the benefit of the adverse inference instruction after Bell deliberately destroyed evidence that would have proven the plaintiff's case.[210] By contrast, in *Pace*, the plaintiff received a windfall when the court gave the instruction because the plaintiff had never shown any strong connection that suggested the lost documents were harmful to the railroad company's case.[211] These two cases illustrate why bad faith is necessary for the adverse inference instruction to be given.

V. CONCLUSION

This trend of allowing negligent spoliation to support the adverse inference instruction ignores the inference in the adverse *inference* instruction: the spoliator's bad faith provides the logical link between the destroyed evidence and the fact that the evidence was harmful to the spoliator's case. Negligence does not provide this connection because a negligent spoliator does not consciously destroy evidence, thereby suggesting it was trying to hide something. Also, this bad faith requirement serves the three purposes of the adverse inference instruction. This requirement ensures that only the most culpable spoliators receive this severe punishment. Next, it effectively deters spoliation in the broader context of the judicial process. And finally, it provides an appropriate remedy for a party who suffers the harm of bad faith spoliation

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> 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.

Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 470–71 (S.D.N.Y. 2010) (footnotes omitted).

207. Again, recall the impact a judge's words can have on a jury. *See supra* note 124.

208. *See* Morris v. Union Pac. R.R., 373 F.3d 896, 900 (8th Cir. 2004) (observing that the instruction "brands one party as a bad actor").

209. *Id.* at 899–901.

210. *See* Nucor Corp. v. Bell, 251 F.R.D. 191, 197–99 (D.S.C. 2008).

211. *See* Pace v. Nat'l R.R. Passenger Corp., 291 F. Supp. 2d 93, 97–99 (D. Conn. 2003).

without giving an undeserved benefit to the party who suffers the harm of merely negligent spoliation. As more and more electronic discovery issues arise and more and more sanctions are imposed, the importance of this mental-culpability requirement will continue to grow. The adverse inference instruction should therefore be reserved for cases when the spoliator acts in bad faith if it is to remain an effective tool for combating spoliation.

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