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Gross Negligence and the Rebuttable Presumption of Prejudice  
within the Doctrine of Spoliation in Federal Courts**

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# THE ELECTRONIC DOCUMENT RETENTION SYSTEM ATE MY HOMEWORK: GROSS NEGLIGENCE AND THE REBUTTABLE PRESUMPTION OF PREJUDICE WITHIN THE DOCTRINE OF SPOILIATION IN FEDERAL COURTS

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## INTRODUCTION

Mankind's ability to record and store information was dramatically increased by the advent of electronically stored information ("ESI"). Presently, roughly ninety-two percent of newly created information is stored electronically.<sup>1</sup> Moreover, the ways in which we communicate information are increasingly electronic: Over one hundred billion emails are sent each day and less than one-third of all electronic documents are ever printed.<sup>2</sup> Every year the world produces electronic information that is equal to three million times the amount of information stored in every book ever written.<sup>3</sup> Furthermore, the amount of ESI will continue to multiply at an exponential rate as computing powers continue to expand and evolve.<sup>4</sup>

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<sup>2</sup> THE RADICATI GROUP, INC., EMAIL STATISTICS REPORT, 2013–2017, at 3 (2013), available at <http://www.radicati.com/wp/wp-content/uploads/2013/04/Email-Statistics-Report-2013-2017-Executive-Summary.pdf>.

<sup>3</sup> JOHN F. GANTZ ET AL., INT'L DATA CORP., THE EXPANDING DIGITAL UNIVERSE: A FORECAST OF WORLDWIDE INFORMATION GROWTH THROUGH 2010, at 1 (2007), available at <http://www.emc.com/collateral/analyst-reports/expanding-digital-idx-white-paper.pdf>.

<sup>4</sup> *Cf. In re United States' Application for a Search Warrant To Seize & Search Elec. Devices from Edward Cunniss*, 770 F. Supp. 2d 1138, 1144 (W.D. Wash. 2011).

While ESI has given litigants unheralded access to information, it has also placed a large financial burden on the discovery process. Litigants are obligated to preserve electronic information under both state and federal rules.<sup>5</sup> Preserving ESI is not as straightforward as the duty to preserve hardcopies: Electronic information is created at a breakneck speed, so much so that even the most powerful ESI systems cannot retain all of the electronic information that is produced. Consequently, ESI systems use retention protocols that actively destroy electronic information. Once an ESI retention protocol is set in motion, a company may need to take complicated steps to prevent the routine destruction of information. The cost of stopping an ESI retention protocol increases the already high economic burdens of discovery.<sup>6</sup> Litigants may need to hire IT specialists to assist them in stopping the routine destruction of ESI. Disabling a litigant's ESI retention protocol increases the amount of ESI it stores and may create the need to purchase storage space to hold the excess information.

Litigants' duty to preserve ESI has also increased the amount of sanctions issued as a result of the spoliation of electronic information.<sup>7</sup> The increase in spoliation sanctions

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(quoting David A. Couillard, Note, *Defogging the Cloud: Applying Fourth Amendment Principles to Evolving Privacy Expectations in Cloud Computing*, 93 MINN. L. REV. 2205, 2216 (2009)) (discussing a new way to store information called "cloud computing" that "allows individuals and businesses to collaborate on documents, spreadsheets, and more, even when the collaborators are in remote locations").

<sup>5</sup> See, e.g., *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010), *abrogated by Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012); *Voom HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 44, 939 N.Y.S.2d 321, 330 (1st Dep't 2012).

<sup>6</sup> See AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 3 (2008) (internal quotation marks omitted), *available at* [http://www.actl.com/AM/Template.cfm?Section=All\\_Publications&Template=/CM/ContentDisplay.cfm&ContentID=3650](http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentID=3650) ("Discovery costs far too much and has become an end in itself. . . . The discovery rules in particular are impractical in that they promote full discovery as a value above almost everything else. Electronic discovery, in particular, clearly needs a serious overhaul.")

<sup>7</sup> See Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 790-91 (2010) ("E-discovery sanctions are at an all-time high. We identified 230 sanction awards in 401 cases involving motions for sanctions relating to the discovery of electronically stored information (ESI) in federal courts prior to January 1, 2010. . . . Our analysis indicates that although the annual

raises litigation costs and puts additional stress on crowded dockets. Federal courts have struggled to deal with the increase in spoliation sanctions and have adopted conflicting standards when issuing spoliation sanctions.

Generally, a party moving for spoliation sanctions in a federal court has the burden of showing that (1) the spoliating party had a duty to preserve the information; (2) the party failed to preserve the information with a culpable mens rea; and (3) the destroyed information would have been prejudicial to the spoliating party's claim had it not been destroyed.<sup>8</sup>

The third element of the test is the hardest burden to meet. It is difficult for the non-spoliating party to comment on the subject matter of information when that information has been destroyed. Given that difficulty, federal courts have provided an escape hatch: Courts will presume the prejudicial nature of the destroyed evidence when the spoliating party acted intentionally or in bad faith.<sup>9</sup> This presumption shifts the burden to the spoliating party, which now has to prove that the destroyed information was not prejudicial to its claim. The rebuttable presumption of prejudice is often triggered when federal courts deal with hardcopies, for the simple reason that it is difficult to unintentionally shred a hard document. In the context of electronic information, however, federal courts are less likely to find a rebuttable presumption of prejudice because electronic information is often destroyed automatically via automated document purging.<sup>10</sup>

The ease with which electronic information can be unintentionally destroyed has two effects. First, it makes it harder to prove that a spoliating party who deletes electronic information did so with intent or bad faith. Second, because it is difficult to show the required intent or bad faith necessary to

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number of e-discovery sanction cases is generally increasing, there has been a significant increase in both motions and awards since 2004.”)

<sup>8</sup> See *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002).

<sup>9</sup> See *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 340 n.6 (M.D. La. 2006).

<sup>10</sup> Michael R. Nelson & Mark H. Rosenberg, *A Duty Everlasting: The Perils of Applying Traditional Doctrines of Spoliation to Electronic Discovery*, 12 RICH. J.L. & TECH. 1, 3 (2006) (discussing the fact that corporations commonly adopt document retention policies in which ESI “is routinely deleted from a business’ ‘active’ computer system”).

trigger the presumption of prejudice in satisfaction of the third prong of the test, the non-spoiling party shoulders the burden of proving that the spoliating party was actually prejudicial to the spoliating party. To ease this burden, some courts have begun allowing gross negligence to trigger a rebuttable presumption that the unintentionally destroyed evidence was prejudicial to the spoliating party.<sup>11</sup>

This Note argues against imposing such a rebuttable presumption where the spoliating party acted with gross negligence. Part I provides a general background of the doctrine of spoliation and its application to electronic information. Part II examines the three different approaches taken by the federal circuits to whether gross negligence should trigger a rebuttable presumption that the spoliating party was prejudicial to the spoliating party. Finally, Part III argues that courts should not allow gross negligence to trigger a rebuttable presumption that the spoliating party was prejudicial to the spoliating party.

## I. A GENERAL BACKGROUND OF THE DOCTRINE OF SPOILIATION AND ITS APPLICATION TO ELECTRONIC INFORMATION

Part I of this Note provides a general background of the doctrine of spoliation and its application to electronic information. First, Section A discusses the source of federal courts' power to issue spoliation sanctions. Section B then introduces the test federal courts use to decide whether to issue spoliation sanctions. Then, Section C analyzes the three rationales federal courts use for issuing spoliation sanctions. Finally, Section D provides an overview of the kinds of spoliation sanctions federal courts issue.

### A. *Federal Courts' Authority To Grant Spoliation Sanctions*

The doctrine of spoliation refers to "the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."<sup>12</sup> English courts have imposed sanctions

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<sup>11</sup> See *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 467–68 (S.D.N.Y. 2010), *abrogated by* *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012).

<sup>12</sup> *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) (citing *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999)); *Pension Comm.*, 685 F. Supp. 2d at 465; *accord Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*,

for spoliation of evidence since the eighteenth century.<sup>13</sup> In *Armory v. Delamirie*, a tortfeasor could not locate a jewel he stole from the plaintiff.<sup>14</sup> As a result, the judge instructed the jury to presume that the stolen jewel was of the highest quality for the purposes of measuring damages.<sup>15</sup> Since the early nineteenth century, American courts embraced the rule embodied in *Armory v. Delamirie*.<sup>16</sup>

Today, federal courts' power to issue spoliation sanctions comes from two sources. First, federal courts possess an inherent power to sanction parties when carrying out their judicial duties.<sup>17</sup> The rationale for the inherent power of the courts to sanction parties comes from the understanding that courts would be unable to accomplish their judicial responsibilities without

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244 F.R.D. 614, 620 (D. Colo. 2007); BLACK'S LAW DICTIONARY 1351 (9th ed. 2009); THE SEDONA CONFERENCE, THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT 48 (2d ed. 2007).

<sup>13</sup> See, e.g., *Armory v. Delamirie*, (1721) 93 Eng. Rep. 664 (K.B.); see also *Welsh v. United States*, 884 F.2d 1239, 1246 (6th Cir. 1988) ("That an adverse presumption may arise from the fact of missing evidence is a generally accepted principle of law that finds its roots in the 18th century . . . . The venerable principle of *Armory v. Delamirie* remains good law."), overruled by *Adkins v. Wolever*, 554 F.3d 650 (6th Cir. 2009); accord *Global Technovations, Inc. v. Onkyo U.S.A. Corp.* (*In re Global Technovations, Inc.*), 431 B.R. 739, 781 (Bankr. E.D. Mich. 2010), *aff'd sub nom.* *Global Technovations, Inc. v. Global Technovations, Inc.* (*In re Global Technovations, Inc.*), No. 10-12781, 2011 WL 1297356 (E.D. Mich. Mar. 31, 2011), *aff'd*, 694 F.3d 705 (6th Cir. 2012).

<sup>14</sup> See *Armory*, 93 Eng. Rep. at 664.

<sup>15</sup> *Id.* (The judge instructed the jurors that "unless the defendant did produce the jewel . . . they should presume the strongest against him, and make the value of the best jewels the measure of their damages . . . .").

<sup>16</sup> An early Supreme Court case expresses the rule found in *Armory v. Delamirie*:

Concealment, or even spoliation of papers, is not of itself a sufficient ground for condemnation . . . . But it is a circumstance open to explanation . . . and if the party in the first instance fairly and frankly explains it to the satisfaction of the court, it deprives him of no right to which he is otherwise entitled. If, on the other hand, the spoliation be unexplained, or the explanation appear weak and futile . . . condemnation ensues from defects in the evidence which the party is not permitted to supply.

*The Pizarro*, 15 U.S. (2 Wheat.) 227, 241 (1817).

<sup>17</sup> See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45 (1991) (holding that courts have an inherent power "to fashion an appropriate sanction for conduct which abuses the judicial process"); *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006).

such a power.<sup>18</sup> For instance, without the power to issue sanctions for the destruction of evidence, courts could not ensure adequate compliance with procedural discovery rules.

In addition to courts' inherent power to issue sanctions for spoliation, they may also issue spoliation sanctions under the Federal Rules of Civil Procedure.<sup>19</sup> Under Rule 37, a court may issue sanctions for spoliation when a party "fails to obey [a court] order to provide or permit discovery."<sup>20</sup> Though the federal courts' inherent power to issue sanctions is broader than their power to issue sanctions under the Federal Rules of Civil Procedure, the latter power gives federal courts more definitive guidelines for issuing sanctions.

While the Federal Rules of Civil Procedure have given courts authority to grant sanctions for spoliation since 1937,<sup>21</sup> the Rules were recently amended to address the spoliation doctrine in the context of ESI. In 2006, the Judicial Conference Committee on the Rules of Practice and Procedure adopted Rule 37(e) to designate when parties should be sanctioned for the spoliation of electronic information: "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."<sup>22</sup> Despite its purpose, Rule 37 failed to create a bright-line rule for the imposition of sanctions, leading to divergent results and subsequent confusion.<sup>23</sup>

The main debate concerning the application of Rule 37(e) depends on the interpretation of the term "good faith." Rule 37(e)'s "good faith" requirement does not specify the mens rea sufficient to trigger sanctions and makes no effort to define good faith.<sup>24</sup> Under Rule 37, it is unclear whether the "good faith" requirement encompasses negligent actions that result in the destruction of electronic information. Indeed, the drafting

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<sup>18</sup> See *Chambers*, 501 U.S. at 43.

<sup>19</sup> FED. R. CIV. P. 37(b).

<sup>20</sup> *Leon*, 464 F.3d at 958 (quoting *Fjelstad v. Am. Honda Motor Co.*, 762 F.2d 1334, 1337-38 (9th Cir. 1985)).

<sup>21</sup> See FED. R. CIV. P. 37.

<sup>22</sup> *Id.* at 37(e).

<sup>23</sup> Alexander B. Hastings, Note, *A Solution to the Spoliation Chaos: Rule 37(e)'s Unfulfilled Potential To Bring Uniformity to Electronic Spoliation Disputes*, 79 GEO. WASH. L. REV. 860, 872 (2011).

<sup>24</sup> FED. R. CIV. P. 37(e).

history of Rule 37 reveals the Judicial Conference's reluctance to establish a bright-line rule for issuing spoliation sanctions.<sup>25</sup> In a rejected version of Rule 37, federal courts would have been barred from issuing sanctions against the spoliating party "unless the party recklessly or intentionally failed to preserve the [electronic] information."<sup>26</sup> The Judicial Conference's decision to adopt the "good faith" standard in favor of the more discreet "reckless" standard has triggered a debate about what level of mens rea is necessary to trigger Rule 37 spoliation sanctions.<sup>27</sup>

Thus, while courts have the power to issue sanctions for the spoliation of electronic information, the bounds of sanctionable action are not clear.<sup>28</sup>

### B. *The Test for Issuing Spoliation Sanctions*

Although there are three distinct rationales for the doctrine of spoliation, federal courts generally apply the same test for determining when severe sanctions should be levied as a result of spoliation.<sup>29</sup> Under the test, the party moving for sanctions has the burden of showing that (1) the spoliating party had a duty to preserve the information; (2) the party failed to preserve the

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<sup>25</sup> See COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., REPORTS OF THE JUDICIAL CONFERENCE 86 (2005), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standin g/ST2005-01\(1\).pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standin g/ST2005-01(1).pdf).

<sup>26</sup> Admin. Office of the U.S. Courts, Fed. Rules of Civil Procedure, Adoption & Amendments to Civil Rules, 234 F.R.D. 219, 244 (2006).

<sup>27</sup> See Nicole D. Wright, Note, *Federal Rule of Civil Procedure 37(e): Spoiling the Spoliation Doctrine*, 38 HOFSTRA L. REV. 793, 816 (2009) ("The application of Rule 37(e) has resulted in confusion over its meaning.")

<sup>28</sup> See *id.*

<sup>29</sup> Most courts tend to distinguish between spoliation sanctions such as fines and those that have an adverse impact on one of the parties to the litigation. For example, in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities*, the judge stated that the proof required for the court to issue sanctions hinged on the severity of the sanction:

The burden of proof question differs depending on the severity of the sanction. For less severe sanctions—such as fines and cost-shifting—the inquiry focuses more on the conduct of the spoliating party than on whether documents were lost . . . [F]or more severe sanctions . . . the court must consider, in addition . . . whether any missing evidence was relevant and whether the innocent party has suffered prejudice as a result of the loss of evidence.

685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010), *abrogated by* *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012).



information with a culpable mens rea; and (3) the destroyed information would have been prejudicial to the spoliating party's claim had it not been destroyed.<sup>30</sup>

The first element requires the court to consider whether the spoliating party had a duty to preserve the information in question. Federal courts generally agree that a party has a duty to preserve evidence within its control once it "reasonably anticipates litigation."<sup>31</sup> While there is a debate among federal courts about when a party should reasonably anticipate litigation, this Note will not address that topic.<sup>32</sup> Nonetheless, so long as a party should not have reasonably anticipated litigation, and there is no explicit statutory requirement governing the type of document at issue,<sup>33</sup> the party has no affirmative duty to retain information.<sup>34</sup> For example, a corporation may destroy ESI in its possession, so long as the ESI is not connected to any litigation the corporation should reasonably anticipate and there is no statutory duty that imposes an explicit duty to retain the information.

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<sup>30</sup> See, e.g., *Residential Funding Corp., v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002) (stating the three part test for determining if sanctions should be issued under the doctrine of spoliation). Some circuits also include an additional factor in the analysis, which considers "whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future." *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994).

<sup>31</sup> *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003); accord *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001) ("The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.").

<sup>32</sup> Compare *Broccoli v. Echostar Commc'ns Corp.*, 229 F.R.D. 506, 511 (D. Md. 2005) (holding that defendant's preservation duty was triggered when plaintiff first complained about sexual harassment to his supervisor), with *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 371 (S.D.N.Y. 2006) (holding that defendant's duty to preserve evidence did not arise until defendant became aware that the complaint had been filed).

<sup>33</sup> For example, 29 C.F.R. § 1910.1020 obligates certain parties to preserve medical records absent reasonably foreseeable litigation. 29 C.F.R. § 1910.1020 (2012).

<sup>34</sup> See *Zubulake*, 220 F.R.D. at 216-17.

Under the second part of the test, the court considers whether the spoliating party acted with the requisite mens rea. In attempting to interpret Rule 37(e), some courts define the requisite mens rea as negligence,<sup>35</sup> while others require a showing of bad faith.<sup>36</sup>

Finally, under the third part of the test, the court looks to the injury done to the non-spoliating party.<sup>37</sup> As stated in *Zubulake v. UBS Warburg LLC*, the third element asks whether “the destroyed evidence was relevant to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.”<sup>38</sup> To determine whether the destroyed evidence was relevant and prejudicial, the court requires the party moving for sanctions to show that the destroyed evidence (1) was relevant to the lawsuit and (2) would have been prejudicial to the spoliating party’s claim had it not been destroyed.<sup>39</sup> In effect, the court requires the party moving for spoliation sanctions to show the damages that resulted from the spoliation.<sup>40</sup> By requiring a showing of damages, courts provide a check against unfounded spoliation claims and the

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<sup>35</sup> See *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 463 (S.D.N.Y. 2010) (explaining that a party’s conduct of discovery is unacceptable when it is “negligent, grossly negligent, or willful.”), *abrogated by Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012).

<sup>36</sup> See, e.g., *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 614 (S.D. Tex. 2010) (stating that courts in the Fifth Circuit will not grant severe sanctions unless there is evidence that the spoliating party acted in bad faith).

<sup>37</sup> See *Zubulake*, 220 F.R.D. at 220.

<sup>38</sup> *Id.* (internal quotation marks omitted).

<sup>39</sup> See *Consol. Aluminum Corp. v. Alcoa, Inc.* 244 F.R.D. 335, 346 (M.D. La. 2006) (citing *Concord Boat Corp. v. Brunswick Corp.*, No. LR-C-95-781, 1997 WL 33352759, at \*7 (E.D. Ark. Aug. 29, 1997)) (holding that the relevance and prejudice factor of the spoliation test can be broken down to three sub-factors: “(1) whether the evidence is relevant to the lawsuit; (2) whether the evidence would have supported the inference sought; and (3) whether the non-destroying party has suffered prejudice from the destruction of the evidence”); accord *Rimkus*, 688 F. Supp. 2d at 616.

<sup>40</sup> See *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108–09 (2d Cir. 2002); *Pension Comm.*, 685 F. Supp. 2d at 467 (“The innocent party must also show that the evidence would have been helpful in proving its claims or defenses—*i.e.*, that the innocent party is prejudiced without that evidence. Proof of relevance does not necessarily equal proof of prejudice.”); *Rimkus*, 688 F. Supp. 2d at 616–17.

resulting motions for sanctions.<sup>41</sup> Without demanding a showing of damages, litigants could use spoliation sanctions as a sword instead of a shield.<sup>42</sup>

### C. *Rationales for Spoliation Sanctions*

The three-part test that federal courts generally use to decide when to issue spoliation sanctions reflects each of the rationales for levying spoliation sanctions: punishment, deterrence, and remediation.<sup>43</sup>

The federal courts' first rationale for issuing spoliation sanctions is punishment. The punishment rationale operates under the belief that sanctions should be levied against a spoliating party in order to punish the spoliator for his or her behavior.<sup>44</sup> Under the punishment rationale, federal courts focus on the behavior of the spoliating party—quantified by the mens rea of the spoliating party and the prejudice caused by the spoliation.<sup>45</sup>

The federal courts' second rationale for issuing spoliation sanctions is deterrence.<sup>46</sup> Under the deterrent rationale, courts use the threat of sanctions to deter parties from destroying evidence.<sup>47</sup> Like the punitive rationale, the deterrent rationale focuses on the behavior of the spoliating party, using the mens rea of the spoliating party and the prejudice caused by the spoliation to measure such behavior.<sup>48</sup>

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<sup>41</sup> See *Rimkus*, 688 F. Supp. 2d at 616 (“Courts recognize that a showing that the lost information is relevant and prejudicial is an important check on spoliation allegations and sanctions motions.”).

<sup>42</sup> See *id.*

<sup>43</sup> See *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (stating that sanctions “should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine”).

<sup>44</sup> See *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (stating that sanctions should be issued to “penalize those whose conduct may be deemed to warrant such a sanction”).

<sup>45</sup> See *id.*

<sup>46</sup> See *id.* (stating that sanctions should be issued “to deter those who might be tempted to such conduct in the absence of such a deterrent”); *Update Art, Inc. v. Modiin Publ'g, Ltd.*, 843 F.2d 67, 71 (2d Cir. 1988) (stating that spoliation sanctions are “specific deterrents”).

<sup>47</sup> See *Nat'l Hockey League*, 427 U.S. at 643.

<sup>48</sup> See *id.*

The federal courts' third rationale for issuing spoliation sanctions is remedial.<sup>49</sup> The remedial rationale acts to restore the injured party to "the same position he would have been in absent the wrongful destruction of evidence by the . . . [spoliating] party."<sup>50</sup> Unlike the punitive and deterrent rationales, which focus on the behavior of the spoliating party, the remedial rationale focuses on the injured party.<sup>51</sup> The remedial rationale measures the injury by looking to the prejudice caused by the spoliation but also uses the mens rea of the spoliating party to quantify the prejudice.<sup>52</sup>

The first element of the spoliation test requires that the party moving for sanctions show that the spoliating party had a duty to preserve the destroyed information.<sup>53</sup> By requiring this, courts ensure that a party that did not breach a legal duty to preserve evidence is not punished. Similarly, under the deterrent rationale, a party that did not breach a legal duty to preserve evidence should not be deterred from acting the same way in the future. Finally, to further the remedial purpose of sanctions, a party that did not breach a legal duty to preserve information should not bear the burden arising from the destruction of evidence.

The second part of the spoliation test requires that the party moving for sanctions show that the spoliator acted with the requisite mens rea.<sup>54</sup> The connection between the spoliating party's mens rea and the court's decision to issue sanctions is clear when the court's *raison d'être* for sanctions is grounded in the punitive or deterrent rationale. Under the punitive rationale, the court focuses on the moral culpability of the spoliating party in determining the propriety of sanctions. Under the deterrent rationale, the court looks to the mens rea of the spoliating party to determine if its actions should be deterred: If a party did not act with a culpable mens rea, it should not be deterred from acting the same way in the future.

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<sup>49</sup> See *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).

<sup>50</sup> *Id.*

<sup>51</sup> See *id.*

<sup>52</sup> See *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 109 (2d Cir. 2002).

<sup>53</sup> See *id.* at 107.

<sup>54</sup> See *id.* (requiring that the party destroy the records "with a culpable state of mind").

Under the remedial rationale, the court looks at the mens rea of the spoliating party to help determine whether the destroyed information was prejudicial. Most federal courts allow the bad faith or intent of the spoliating party to demonstrate the prejudicial effect of the spoliation out of a concern that the burden for moving for spoliation sanctions is too onerous.<sup>55</sup> Courts look to the mens rea of the spoliating party in order to substantiate whether the spoliated information was prejudicial because the prejudicial nature of the destroyed evidence may be hard to prove. For this purpose, the court assumes that the spoliating party would not destroy evidence intentionally or in bad faith unless the evidence was prejudicial to the spoliating party's claim. Thus the spoliation test's mens rea requirement can act to substantiate the spoliation test's prejudice requirement. In other words, the test's mens rea requirement furthers the remedial rationale by acting to quantify the harm caused by the spoliating party.

The third part of the spoliation test requires that the party moving for sanctions show that the destroyed information would have been prejudicial to the spoliating party's claim had it not been destroyed.<sup>56</sup> This requirement ensures consistency with the punitive rationale by preventing a party that did not cause any harm through the destruction of evidence from being punished. Under the deterrent rationale, a party who did not cause any harm through his or her destruction of evidence should not be deterred from acting the same way in the future. Under the remedial rationale, a party who did not cause any harm through his or her destruction of evidence has no harm to remediate.

Though the third part of the spoliation test helps guard against the abuse of the spoliation doctrine, federal courts acknowledge that the burden of proving that the spoliated evidence was prejudicial should not be overly demanding.<sup>57</sup> Courts realize that the prejudice requirement may be

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<sup>55</sup> See *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 340 n.6 (M.D. La. 2006) (stating that bad faith destruction of evidence is "sufficient to demonstrate relevance").

<sup>56</sup> See *Residential Funding Corp.*, 306 F.3d at 107.

<sup>57</sup> See, e.g., *Rimkus Consulting Grp. Inc. v. Cammarata*, 688 F. Supp. 2d 598, 616 (S.D. Tex. 2010); *Chan v. Triple 8 Palace, Inc.*, No. 03CIV6048(GEL)(JCF), 2005 WL 1925579, at \*7 (S.D.N.Y. Aug. 11, 2005).

advantageous to the spoliating party.<sup>58</sup> An innocent party who moves for sanctions under the doctrine of spoliation may not be able to obtain evidence that demonstrates the prejudicial nature of the destroyed information.<sup>59</sup>

#### D. *Different Kinds of Spoliation Sanctions*

Once a party moving for sanctions under the doctrine of spoliation has satisfied the three-part test, the court must still decide which sanctions are appropriate. Courts are empowered to impose sanctions that assess fees, impose an adverse inference, preclude the introduction of certain evidence, and act to enter a default judgment.<sup>60</sup> While federal courts routinely state that sanctions arising from spoliation must be assessed on a “case-by-case basis,” they still struggle to articulate explicit guidelines for determining the appropriate sanctions.<sup>61</sup>

Courts generally divide the range of available sanctions into two categories.<sup>62</sup> The first category consists of sanctions that result in monetary fines. Monetary sanctions are generally levied “to pay the fees incurred by the party that moved for sanctions,” and to “shift costs to a party responsible for wasted discovery efforts or supplemental discovery.”<sup>63</sup> While monetary sanctions hurt a litigant’s pocketbook, they have no material impact on the adjudication of the claim at issue.

The second class is composed of sanctions that have a material impact on the adjudication of the claim. For instance, an adverse inference sanction gives the jury the option to assume that the spoliated information would have been unfavorable to the spoliating party.<sup>64</sup> The adverse inference sanction has a

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<sup>58</sup> See *Triple 8 Palace*, 2005 WL 1925579, at \*7 (discussing that the burden placed on the party moving for sanctions under the spoliation doctrine “ought not be too onerous, lest the spoliator be permitted to profit from its destruction”).

<sup>59</sup> See *id.*

<sup>60</sup> See FED. R. CIV. P. 37(b)(2)(A) (listing the various sanctions courts can impose for the spoliation of evidence).

<sup>61</sup> See *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001).

<sup>62</sup> See *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 467 (S.D.N.Y. 2010) (distinguishing between two different classes of sanctions based on their severity), *abrogated by Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012).

<sup>63</sup> Hon. John M. Facciola, Hon. Elizabeth D. Laporte, Hon. Lorretta A. Preska & Hon. Shira A. Scheindlin, Lecture, Panel Discussion, *Sanctions in Electronic Discovery Cases: Views from the Judges*, 78 *FORDHAM L. REV.* 1, 5–6 (2009).

<sup>64</sup> See *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 219 (S.D.N.Y. 2003).

material effect on the court's adjudication of the claim because it has the potential to impact the final result of the litigation.<sup>65</sup> Even though the jury is not forced to make an adverse inference, but is simply given the option to do so, the effect of an adverse inference charge generally means that "the party suffering this [adverse] instruction will be hard-pressed to prevail on the merits."<sup>66</sup>

As a general rule, the severity of the sanction imposed on the spoliating party depends on the degree of harm suffered by the opposing party.<sup>67</sup>

## II. CIRCUIT COURTS' APPLICATION OF THE SPOILIATION TEST

In dealing with sanctions that have a material impact on the adjudication of a claim—severe sanctions—courts have struggled when presented with the issue of whether the grossly negligent deletion of ESI should be sufficient to trigger the presumption that the spoliated evidence would have been prejudicial to the spoliating party if not for its destruction. When presented with this issue, courts have taken three distinct approaches. Some circuits hold that severe spoliation sanctions require a mens rea of bad faith or intent and reject the adoption of a rule that would allow gross negligence to trigger a presumption that the spoliated evidence was prejudicial. Other circuits hold that negligence is sufficient to satisfy the mens rea requirement of spoliation sanctions but nonetheless reject the adoption of a rule that would allow gross negligence to trigger a presumption that the spoliated evidence was prejudicial. Finally, other circuits hold that negligence is sufficient to satisfy the mens rea requirement of spoliation sanctions and hold that gross negligence is sufficient to trigger a presumption that spoliated evidence would have been prejudicial to the spoliating party if not for its destruction. This Part examines each approach and the underlying rationales of the three methods.

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<sup>65</sup> See *id.* at 219–20.

<sup>66</sup> *Id.*

<sup>67</sup> See *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 748 (8th Cir. 2004).

### A. No Gross Negligence, Period

The Fourth,<sup>68</sup> Fifth,<sup>69</sup> Seventh,<sup>70</sup> Eighth,<sup>71</sup> Tenth,<sup>72</sup> and Eleventh Circuits decline to issue severe spoliation sanctions where the spoliating party acted with gross negligence.<sup>73</sup> While none of these circuits have explicitly held that gross negligence cannot trigger a presumption of prejudice, it follows as a matter of course that they would not allow such a presumption.<sup>74</sup> Since these circuits do not allow for severe spoliation sanctions when a spoliator acted with gross negligence,<sup>75</sup> it follows that they do not allow gross negligence to trigger a presumption of prejudice for the purposes of issuing spoliation sanctions.

Furthermore, the circuits' rationales for refusing to issue spoliation sanctions for negligent or grossly negligent spoliation are premised on a concern over the prejudicial nature of the destroyed evidence: "[Th]e court must be of the opinion . . . that the [spoliating] party did so in bad faith. Only then may the court infer . . . that the contents of the evidence would be unfavorable to that party if introduced in court. The crucial element is . . . the reason for the destruction."<sup>76</sup>

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<sup>68</sup> See, e.g., *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 449–50 (4th Cir. 2004); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155–56 (4th Cir. 1995).

<sup>69</sup> See, e.g., *Condrey v. Suntrust Bank of Georgia*, 431 F.3d 191, 203 (5th Cir. 2005) (quoting *King v. Ill. Cent. R.R.*, 337 F.3d 550, 556 (5th Cir. 2003)) ("The Fifth Circuit permits an adverse inference against the destroyer of evidence only upon a showing of 'bad faith' or 'bad conduct.'"); *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 614–15 (S.D. Tex. 2010) (distinguishing the Fifth Circuit from other circuits that allow for negligence or gross negligence to trigger sanctions).

<sup>70</sup> See, e.g., *S.C. Johnson & Son, Inc. v. Louisville & Nashville R.R. Co.*, 695 F.2d 253, 258 (7th Cir. 1982).

<sup>71</sup> See, e.g., *Stevenson*, 354 F.3d at 746–47.

<sup>72</sup> See, e.g., *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997).

<sup>73</sup> See, e.g., *Penalty Kick Mgmt. Ltd. v. Coca Cola Co.*, 318 F.3d 1284, 1294 (11th Cir. 2003); *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997) (holding that upper grade spoliation sanctions, such as an adverse inference charge, will only be drawn when the destruction of the information was "predicated on bad faith").

<sup>74</sup> See *supra* text accompanying notes 69–73.

<sup>75</sup> *Id.*

<sup>76</sup> See *S.C. Johnson & Son, Inc.*, 695 F.2d at 258; accord *Vick v. Tex. Emp't Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975) (internal quotation marks omitted) ("The adverse inference to be drawn from destruction of records is predicated on bad conduct of the defendant. Moreover, the circumstances of the act must manifest bad faith. Mere negligence is not enough, for it does not sustain an inference of consciousness of a weak case.").



For example, in the recent case of *Rimkus Consulting Group, Inc. v. Cammarata*, two of Rimkus' employees resigned before immediately forming a competing company named "U.S. Forensic."<sup>77</sup> In response, Rimkus sued the former employees in the Southern District Court of Texas for breaching noncompetition and nonsolicitation covenants that the former employees had signed in their written employment agreements.<sup>78</sup>

In the fall of 2007, during the discovery phase of the litigation, Rimkus sought information from the defendants, including email communications between the defendants and email communications relating to the formation of U.S. Forensic.<sup>79</sup> The defendants initially ignored Rimkus' requests but eventually delivered sixty emails in the summer of 2009.<sup>80</sup> During depositions, U.S. Forensic employees gave conflicting testimony regarding U.S. Forensic's document retention protocol but agreed that U.S. Forensic did not suspend the document retention policy once the instant litigation had begun.<sup>81</sup>

Rimkus also obtained additional emails from the defendants' email and Internet service providers in addition to the sixty emails that it received from U.S. Forensic. These additional emails showed that the defendants had "contacted Rimkus clients . . . to solicit business for U.S. Forensic," a seeming violation of the nonsolicitation covenant that the defendants had previously entered into with Rimkus.<sup>82</sup>

After obtaining the additional emails, Rimkus moved for severe spoliation sanctions against the defendants.<sup>83</sup> Rimkus alleged that (1) the defendants had a duty to preserve the deleted emails; (2) the defendants acted in bad faith by intentionally deleting the emails to conceal unfavorable evidence; and (3) the deleted emails that Rimkus was unable to recover would have been prejudicial to the defendants' claim had they not been destroyed.<sup>84</sup>

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<sup>77</sup> 688 F. Supp. 2d 598, 608 (S.D. Tex. 2010).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 629.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 633.

<sup>82</sup> *Id.* at 633–34 (the court gives specific examples of emails that Rimkus recovered from defendants' internet and email service providers).

<sup>83</sup> *See id.* at 635.

<sup>84</sup> *See id.*

The district court held that the destroyed email communications were prejudicial to the defendants' claim.<sup>85</sup> The court reasoned that because some of the email communications that Rimkus had obtained were prejudicial to the defendants' claim, there was no reason to assume that a portion of the unrecovered email communications would not be prejudicial to the defendants' claim.<sup>86</sup>

The court also held that the jury would decide whether the defendants' deletion of email communications constituted bad faith spoliation of evidence because the court could not decide as a matter of law whether the deletion was in bad faith.<sup>87</sup> Under circuit precedent, if the jury found that the defendants had not deleted email communications in bad faith, no severe spoliation sanctions would be issued.<sup>88</sup> On the other hand, if the jury found that the defendants had deleted email communications in bad faith, the court would give an adverse inference charge to the jury.<sup>89</sup>

In discussing the Fifth Circuit's rationale for forbidding severe spoliation sanctions without a showing of bad faith destruction of evidence, the district court stated "that sanctions—as opposed to other remedial steps—require some degree of culpability."<sup>90</sup> Thus, as evinced by *Rimkus*, even where destroyed evidence was found to be prejudicial, the spoliating party will not suffer severe spoliation sanctions unless the destruction of evidence was done in bad faith.

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<sup>85</sup> See *id.* at 644.

<sup>86</sup> See *id.* at 644–45 ("The evidence of the contents of the deleted emails [that were recovered] . . . shows that deleted and unrecoverable emails . . . were relevant and that some would have been helpful to Rimkus.").

<sup>87</sup> See *id.* 642–44.

<sup>88</sup> *Id.* at 642.

<sup>89</sup> *Id.*; see *supra* Part I.D and accompanying notes for a discussion of the adverse inference charge given as a result of spoliation sanctions.

<sup>90</sup> *Rimkus*, 688 F. Supp. 2d at 613.

### B. Gross Negligence but No Presumption

The First,<sup>91</sup> Third,<sup>92</sup> Sixth,<sup>93</sup> Ninth,<sup>94</sup> and D.C. Circuits generally hold that negligence satisfies the mens rea requirement for spoliation sanctions<sup>95</sup> but nonetheless seem to

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<sup>91</sup> See, e.g., *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 447 (1st Cir. 1997) ("Certainly bad faith is a proper and important consideration in deciding whether and how to sanction conduct resulting in the destruction of evidence. But bad faith is not essential.").

<sup>92</sup> There is some disagreement within the Third Circuit about whether a finding of bad faith spoliation is necessary to issue severe spoliation sanctions. Compare *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 334 (3d Cir. 1995) (holding that severe spoliation sanctions should be issued "only when the spoliation or destruction [of evidence] was intentional, and indicates fraud and a desire to suppress the truth, and it does not arise where the destruction was a matter of routine with no fraudulent intent"), and *Gumbs v. Int'l Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983) (holding that bad faith can trigger spoliation sanctions), with *Mosaid Techs. Inc. v. Samsung Electronics Co.*, 348 F. Supp. 2d 332, 337-38 (D.N.J. 2004) ("As long as there is some showing that the evidence is relevant . . . the offending party's culpability is largely irrelevant as it cannot be denied that the opposing party has been prejudiced."). See also 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, 891-92 (2011) (discussing recent holdings within the Third Circuit that suggest negligence satisfies the mens rea requirement for issuing spoliation sanctions).

<sup>93</sup> The Sixth Circuit is split regarding the mens rea necessary to allow for severe spoliation sanctions. Compare *BancorpSouth Bank v. Herter*, 643 F. Supp. 2d 1041, 1062 (W.D. Tenn. 2009) ("[A] finding [of] bad faith or intentional misconduct is not necessary, [but] the more culpable the state of mind, the easier it is for the party seeking the spoliation sanction to establish the third element-relevance."), and *Forest Labs., Inc. v. Caraco Pharm. Labs., Ltd.*, No. 06-CV-13143, 2009 WL 998402, at \*5 (E.D. Mich. Apr. 14, 2009) (holding that ordinary negligence satisfies the culpability requirement for spoliation sanctions), with *In re Nat'l Century Fin. Enters., Inc., Fin. Inv. Litig.*, No. 2:03-md-1565, 2009 WL 2169174, at \*3 (S.D. Ohio, July 16, 2009) ("Generally, a court will not impose an adverse inference with respect to destroyed evidence, unless the party did so in bad faith.").

<sup>94</sup> See, e.g., *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (holding that a spoliator's bad faith "is not a prerequisite" for a sanction that levies an adverse inference charge to the jury). While the Ninth Circuit has stated that bad faith is not necessary to trigger severe spoliation sanctions, it has not yet held whether negligence alone is sufficient to satisfy the mens rea requirement for severe spoliation sanctions. *Id.* But some district courts within the Ninth Circuit have suggested that negligence alone is a sufficient mens rea for the court to issue sanctions. *Surowiec v. Capital Title Agency*, 790 F. Supp. 2d 997, 1008 (D. Ariz. 2011) (citing *Melendres v. Arpaio*, No. Cv-07-2513-PHX-GMS, 2010 WL 582189, at \*5 (D. Ariz. Feb. 12, 2010)).

<sup>95</sup> The D.C. Circuit has no definitive rule regarding whether negligence is sufficient to satisfy the mens rea requirement for spoliation sanctions. However, courts have stated that negligence fulfills the mens rea requirement for issuing spoliation sanctions. See, e.g., *D'Onofrio v. SFX Sports Grp., Inc.*, No. 06-687 (JDB/JMF), 2010 WL 3324964, at \*6 (D.D.C. Aug. 24, 2010).

reject the adoption of a rule allowing gross negligence to trigger a presumption that the spoliated evidence was prejudicial.

These circuits' rationale for allowing negligence to satisfy the mens rea requirement for issuing spoliation sanctions rests on the opinion that the primary element of the spoliation test is the prejudicial requirement: "As long as there is some showing that the evidence is relevant, . . . the offending party's culpability is largely irrelevant as it cannot be denied that the opposing party has been prejudiced."<sup>96</sup>

Moreover, while these circuit courts hold that the bad faith destruction of evidence may be useful in demonstrating the prejudicial nature of the destroyed evidence,<sup>97</sup> grossly negligent destruction of evidence does not provide for the same inference. These circuits only allow for the negligent destruction of evidence to trigger sanctions where "the other side is prejudiced" as a result of the destruction.<sup>98</sup>

For example, in *D'Onofrio v. SFX Sports Group, Inc.*,<sup>99</sup> plaintiff D'Onofrio filed a discrimination suit against her former employer SFX.<sup>100</sup> D'Onofrio alleged that SFX discriminated against her because she was a woman.<sup>101</sup>

During discovery proceedings, D'Onofrio requested SFX to produce electronic documents related to her claim of sexual discrimination, such as email communications regarding her termination.<sup>102</sup> SFX first claimed it did not have any electronic documents in its possession that were responsive to D'Onofrio's request.<sup>103</sup> Later, SFX notified D'Onofrio that there was a "back-up e-mail server" that contained information responsive to her document request.<sup>104</sup> SFX eventually produced some electronic

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<sup>96</sup> *Mosaid Techs. Inc.*, 348 F. Supp. 2d at 337–38.

<sup>97</sup> See, e.g., *BancorpSouth Bank*, 643 F. Supp. 2d at 1060.

<sup>98</sup> *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 447 (1st Cir. 1997); accord *Surowiec*, 790 F. Supp. 2d at 1007–08 (discussing whether the gross negligence on the part of the spoliator should trigger a presumption of prejudice and citing *Rimkus* for the proposition that gross negligence should not trigger such a presumption, but not expressly adopting the *Rimkus* stance on the matter).

<sup>99</sup> No. 06-687 (JDB/JMF), 2010 WL 3324964, at \*1 (D.D.C. Aug. 24, 2010).

<sup>100</sup> *Id.* at \*8.

<sup>101</sup> *Id.* at \*1.

<sup>102</sup> *Id.* at \*1–2.

<sup>103</sup> *Id.* at \*1 n.3.

<sup>104</sup> *Id.*

documents that it culled from the back-up server, but SFX was unable to recover all of the destroyed electronic documents requested by the plaintiff.<sup>105</sup>

D'Onfrio subsequently moved for spoliation sanctions.<sup>106</sup> D'Onfrio alleged that (1) SFX had a duty to preserve her computer and any electronic documents relevant to her discrimination claim; (2) SFX destroyed such information in bad faith; and (3) the destroyed evidence would have been prejudicial to SFX had it not been destroyed.<sup>107</sup>

The district court first held that SFX had a duty to preserve the evidence that D'Onfrio had requested and that SFX had breached that duty by throwing out D'Onfrio's computer after SFX had notice of the impending litigation.<sup>108</sup> The district court then held that D'Onfrio had made no attempt to show why SFX had destroyed the evidence in bad faith.<sup>109</sup> Consequently, the district court held that D'Onfrio had not shown that SFX's spoliation was in bad faith and declined to make any inference regarding the prejudicial nature of the evidence that SFX had destroyed.<sup>110</sup> The court did not make any presumption of prejudice based on SFX's negligent destruction of evidence:

When a person purposefully destroys evidence, it is reasonable to infer that he did so to keep it from being used against him . . . . When, as in this case, it is not a party's bad faith that leads to the destruction of evidence, its actions hardly bespeak an intention worthy of such a harsh punishment because the logical premise of the instruction—that the spoliator must have destroyed the evidence to keep any one from seeing it—is not there . . . . [A] court cannot logically infer the intent of what a party did from its behavior because its behavior was unthinking—it was negligent and sloppy.<sup>111</sup>

Finally, the district court held that it was unclear whether D'Onfrio suffered any actual prejudice as a result of SFX's failure to preserve evidence.<sup>112</sup>

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<sup>105</sup> See *id.* at \*3–4.

<sup>106</sup> *Id.* at \*4.

<sup>107</sup> *Id.* at \*6.

<sup>108</sup> *Id.* at \*8.

<sup>109</sup> *Id.* at \*9.

<sup>110</sup> *Id.* at \*10.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at \*11.

As a result of its holding, the district court remanded the case for an evidentiary hearing in order to ascertain whether the destroyed evidence was prejudicial.<sup>113</sup> Specifically, the evidentiary hearing would address the kind of information that had been stored on D'Onfrio's computer, the portion of information that had been found on SFX's back-up servers, and the nature and evidentiary value of the portion of evidence that had been found on SFX's back-up server.<sup>114</sup>

### C. Gross Negligence and the Presumption of Prejudice

While no federal circuit has uniformly held that gross negligence is sufficient to trigger a presumption that the destroyed information was prejudicial, some district courts within the Second Circuit have suggested that gross negligence is sufficient to trigger the presumption that the spoliated information was prejudicial. In the widely cited opinion *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*,<sup>115</sup> Judge Scheindlin of the Southern District of New York held that negligence may be sufficient to trigger a presumption that the spoliated information was prejudicial: "Relevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner . . . . However, when the spoliating party was merely negligent, the innocent party must prove both relevance and prejudice in order to justify the imposition of a severe sanction."<sup>116</sup>

Judge Scheindlin's decision to allow gross negligence to trigger a rebuttable presumption of prejudice stems from the court's concern over the burden implicit within the prejudice requirement.<sup>117</sup> By allowing gross negligence to evince prejudice,

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at \*11–12.

<sup>115</sup> 685 F. Supp. 2d 456 (S.D.N.Y. 2010). See generally Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 611–20 (S.D. Tex. 2010) (discussing the *Pension Committee* opinion in great detail, even though it arose in a completely different district); Eleanore H. Chin & Ryan D. Derry, *Alt-Delete: Judges Have Made It Clear That Ignorance Is No Longer an Excuse for Spoliation of Electronic Evidence*, 33 LOS ANGELES LAWYER 35 (2010) (commenting on the amount of attention that *Pension Committee* attracted).

<sup>116</sup> *Pension Comm.*, 685 F. Supp. 2d at 467–68.

<sup>117</sup> *Id.* at 467–68 (quoting *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 109 (2d Cir. 2002)) (internal quotation marks omitted) ("Courts must take care not to hold[] the prejudiced party to too strict a standard of proof regarding

the court circumvents the burden of proving prejudice. While other courts in the Second Circuit have adopted the same rule,<sup>118</sup> the belief is not uniformly held.<sup>119</sup>

For example, in *Reilly v. Natwest Markets Group Inc.*, Reilly sued his employer Natwest Markets for breaching his employment contract.<sup>120</sup> After a jury determined that Natwest had breached Reilly's contract, discovery commenced on the issue of damages, which included damages arising from quantum meruit.<sup>121</sup>

During discovery, Reilly requested that Natwest produce documents detailing his activities at Natwest.<sup>122</sup> After Natwest responded to the request, Reilly discovered that his "Deal Files" were not included in Natwest's response.<sup>123</sup> Reilly claimed that the files were important under the theory of quantum meruit because they showed that Natwest had not paid him for various transactions.<sup>124</sup>

Approximately one year later, the presiding judge scheduled a conference with both parties to discuss Natwest's failure to preserve the Deal Files and the possibility of issuing an adverse inference instruction to the jury as a result of Natwest's failure.<sup>125</sup> The day before the conference was scheduled to take

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the likely contents of the destroyed [or unavailable] evidence, because doing so would . . . allow parties who have . . . destroyed evidence to profit from that destruction.'").

<sup>118</sup> See, e.g., *Residential Funding Corp.*, 306 F.3d at 109 ("Accordingly, where a party seeking an adverse inference adduces evidence that its opponent destroyed potential evidence (or otherwise rendered it unavailable) in bad faith or through gross negligence (satisfying the 'culpable state of mind' factor), that same evidence of the opponent's state of mind will frequently also be sufficient to permit a jury to conclude that the missing evidence is favorable to the party (satisfying the 'relevance' factor)."); *Treppel v. Biovail Corp.*, 249 F.R.D. 111, 121-22 (S.D.N.Y. 2008) (holding that "under certain circumstances," gross negligence of the spoliating party will trigger the presumption that the evidence destroyed was prejudicial to the innocent party); *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 199-200 (S.D.N.Y. 2007) (stating that the party seeking an adverse inference sanction need not show that the destroyed evidence was prejudicial where the spoliating party acted "in bad faith or through gross negligence").

<sup>119</sup> See *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 440 (S.D.N.Y. 2010) (discussing how a litigant's failure to show that spoliated information was prejudicial should not result in sanctions).

<sup>120</sup> 181 F.3d 253, 259 (2d Cir. 1999).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 260.

place, Natwest produced the Deal Files that Reilly had requested.<sup>126</sup> Further inspection of the files revealed, however, that a substantial portion of the Deal Files was missing from the production.<sup>127</sup> Natwest's reason for the delayed production was that NatWest had previously looked for the files and had "stumbled upon [them] yesterday."<sup>128</sup>

The judge held that Natwest had a duty to preserve the Deal Files and that Natwest's failure to preserve the files amounted to gross negligence.<sup>129</sup> Without referring to the prejudicial nature of the Deal Files that Natwest had failed to preserve, the judge held that the jury would be given an adverse inference charge relating to the subject matter of the lost files.<sup>130</sup> The judge's decision was affirmed on appeal under the rationale that "[t]rial judges should have the leeway to tailor sanctions to insure that spoliators do not benefit from their wrongdoing—a remedial purpose that is best adjusted according to the facts and evidentiary posture of each case."<sup>131</sup> Thus, the court's decision in *Reilly* reflects the Second Circuit's concern about remedying the harm caused by the spoliation of evidence. In allowing gross negligence to trigger a presumption of prejudice, the court eases the burden of proving prejudice, therefore making it easier for the harm to be cured via spoliation sanctions.

However, the Second Circuit holds that gross negligence should only trigger a presumption that the spoliated information was prejudicial when the spoliator's conduct rises "to the egregious level" seen in other cases where prejudice was presumed.<sup>132</sup> In effect, the court is saying that gross negligence will only trigger a presumption that the information was prejudicial when the spoliating party was particularly grossly negligent. While courts allowing the gross negligence presumption have sought to define gross negligence in the

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<sup>126</sup> *Id.*

<sup>127</sup> *See id.* at 261.

<sup>128</sup> *Id.* at 260–61.

<sup>129</sup> *See id.* at 261–62.

<sup>130</sup> *See id.* at 261.

<sup>131</sup> *Id.* at 267.

<sup>132</sup> *Residential Funding Corp. v. DeGeorge Fin. Co.*, 306 F.3d 99, 109 (2d Cir. 2002).



context of preserving electronic documents,<sup>133</sup> no such attempt has been made with respect to the extreme gross negligence said to be necessary to trigger such a presumption.<sup>134</sup>

### III. GROSS NEGLIGENCE AND THE ILL-ADVISED PRESUMPTION OF PREJUDICE

Part III of this Article argues why the gross negligence of the spoliating party should not trigger a presumption that the destroyed evidence was prejudicial to the spoliating party. First, Section A stresses the need for a clear standard of culpability by highlighting the unworkability of the gross negligence standard. Section B then analyzes the adverse costs arising from a presumption of prejudice triggered by gross negligence. Third, Section C discusses why the presumption of prejudice triggered by gross negligence runs contra to the three rationales for spoliation sanctions. Finally, Section D proposes that the only way to ensure that sanctions retain their purpose is to amend Rule 37(e) of the Federal Rules of Civil Procedure to ensure that gross negligence cannot trigger a presumption of prejudice.

#### A. *Judicial Administrability*

The three-part test that courts routinely use when deciding whether to issue spoliation sanctions demands that courts analyze the mens rea of the alleged spoliator. While courts are in agreement about the importance of the mens rea element, they have provided little help in defining the different levels of culpable mens rea in the context of electronic discovery: “While many treatises and cases routinely define negligence, gross negligence, and willfulness in the context of tortious conduct, [there is] no clear definition of these terms in the context of discovery misconduct.”<sup>135</sup>

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<sup>133</sup> See, e.g., *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 464–65 (S.D.N.Y. 2010) (giving specific examples of actions that amount to gross negligence in the discovery context), *abrogated by* *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012).

<sup>134</sup> See *id.* at 463 (making no effort to determine what kind of gross negligence on the part of the spoliating party should trigger a presumption that the spoliated evidence would have been prejudicial to the spoliating party had it not been for its destruction).

<sup>135</sup> See *id.* at 463–64.

In failing to clearly differentiate the different culpability levels in the context of electronic discovery, courts face a problem of judicial administrability: If courts are unable to differentiate between the culpability levels, potential litigants will have little information to guide their conduct. At the same time, Rule 37(e) manifests the fact that courts desire some latitude in crafting spoliation sanctions because what constitutes good faith in one instance may not in another. While courts' desire to maintain some amount of discretion when issuing spoliation sanctions is certainly understandable, granting too much latitude to the courts serves to obfuscate the adjudication of spoliation sanctions.

In *Pension Committee*, Judge Scheindlin asserted that “[t]he standard of acceptable conduct is determined through experience. In the discovery context, the standards have been set by years of judicial decisions.”<sup>136</sup> Thus, a litigant can determine which actions demonstrate a specific culpability by looking to case law.<sup>137</sup> But when litigants take Judge Scheindlin's advice and look to case law to find definitions for the different culpability levels of spoliation, they are met with confusion. Even the cases that Judge Scheindlin cited as examples of grossly negligent spoliation are less than helpful.<sup>138</sup>

In one case cited by Judge Scheindlin, *Adorno v. Port Authority of New York and New Jersey*, the court held that the defendant's partial attempt to preserve electronic information was negligent.<sup>139</sup> The court premised its finding of negligence on the fact that the defendant had made some effort to preserve information, and therefore the defendant's actions did not amount to gross negligence:

The Port Authority does not dispute that it failed to retain at least some of the documents at issue here. I am not convinced, however, that plaintiffs have shown a wholesale failure by the Port Authority to put in place a litigation hold . . . such that a finding of gross negligence by defendant would be appropriate.<sup>140</sup>

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<sup>136</sup> *Id.* at 464.

<sup>137</sup> *See id.*

<sup>138</sup> *See id.* at 464–65 n.18 (citing two opinions that provide for conflicting examples of what constitutes gross negligence).

<sup>139</sup> *See* 258 F.R.D. 217, 228–29 (S.D.N.Y. 2009).

<sup>140</sup> *Id.* at 228 (internal quotation marks omitted).

In another case cited by Judge Scheindlin, *Treppel v. Biovail Corp.*, the court held that a partial attempt to preserve electronic information was grossly negligent.<sup>141</sup> In *Treppel*, the court found that the defendant's failure to preserve certain back-tapes constituted gross negligence, even though the defendant had issued a litigation hold on a large portion of information.<sup>142</sup>

If a federal court is unable to provide case law that is consistent in its culpability findings,<sup>143</sup> it is unlikely that a litigant will be up to the task. And since a litigant can only determine what constitutes gross negligence by looking at case law,<sup>144</sup> a litigant in the Second Circuit has little idea about what constitutes grossly negligent spoliation.

To compound the problem, courts in the Second Circuit have held that gross negligence of the spoliating party should only trigger a presumption of prejudice when the gross negligence is "egregious."<sup>145</sup> But courts within the Second Circuit have not made any attempt to define what constitutes egregious gross negligence of a spoliating party.<sup>146</sup>

Given this lack of clarity, litigants in the Second Circuit have little to no idea when the grossly negligent spoliation of evidence will trigger a presumption of prejudice. The seemingly amorphous nature of such gross negligence will cause inconsistent adjudication of spoliation sanctions within the Second Circuit.

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<sup>141</sup> See 249 F.R.D. 111, 121 (S.D.N.Y. 2008) (holding that a party acted with gross negligence when it preserved some back up tapes, but not all back up tapes).

<sup>142</sup> See *id.*

<sup>143</sup> See *Pension Comm.*, 685 F. Supp. 2d at 463.

<sup>144</sup> See *id.*

<sup>145</sup> See, e.g., *Treppel*, 249 F.R.D. at 121–22 (quoting *Toussie v. Cnty. of Suffolk*, No. CV 01-6716(JS)(ARL), 2007 WL 4565160, at \*8 (E.D.N.Y. April 13, 2007). "[U]nder certain circumstances 'a showing of gross negligence in the destruction or untimely production of evidence' will support" a presumption that the destroyed evidence would have been prejudicial to the spoliating party's claim had it not been destroyed. *Id.* (quoting *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 109 (2d Cir. 2002)).

<sup>146</sup> See, e.g., *Residential Funding Corp.*, 306 F.3d at 109 (holding that gross negligence of the spoliating party "will in some circumstances suffice" to demonstrate the prejudicial nature of the destroyed evidence, but failing to provide guidance about what circumstances of gross negligence will in fact suffice).

### B. *The Financial Burdens of Presuming Prejudice*

In general, courts have expressed concern about the heavy burden imposed by the duty to preserve electronic information: “In an era where vast amounts of electronic information is available for review, discovery in certain cases has become increasingly complex and expensive.”<sup>147</sup> The advent of electronic information has allowed mankind to retain voluminous amounts of information.<sup>148</sup> Without such electronic storage systems, parties, specifically businesses, would be physically unable to retain the same amount of information. While this power of retention gives parties access to more information, it also exacts a severe burden when parties have a duty to keep track of and preserve such a large amount of information.

The Second Circuit’s decision to allow the gross negligence of the spoliating party to trigger a presumption of prejudice when issuing spoliation sanctions further increases the burden of preserving electronic information. The court’s decision forces litigants to re-think how they preserve electronic information. It forces litigants to be even more cautious when preserving electronic information. This increased burden in turn increases the cost of doing business. Potential litigants may be forced to invest in more sophisticated, more expensive document retention programs in order to allay their fears of spoliation sanctions. And when litigation does occur, law firms will spend more time making sure their clients satisfy their preservation duties, which will in turn cause more billable hours and higher litigation costs. Furthermore, the sheer amount of ESI dramatically increases the possibility that information will be lost, regardless of litigants’ efforts to comply with a preservation duty.

The Second Circuit’s holding also enhances the bargaining power of those who might bring fallacious claims.<sup>149</sup> The spoliation test not only deters would-be spoliators from destroying evidence but also deters litigants from bringing

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<sup>147</sup> See *Pension Comm.*, 685 F. Supp. 2d at 461–62.

<sup>148</sup> See ASS’N OF THE BAR OF THE CITY OF N.Y. JOINT COMM. ON ELEC. DISCOVERY, *supra* note 1, at 1.

<sup>149</sup> See EMERY G. LEE III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER, NATIONAL CASE-BASED CIVIL RULES SURVEY 32 (2009) (expressing the fact that twenty percent of lawyers surveyed believe that discovery costs increased the likelihood of settlement).

spurious spoliation claims.<sup>150</sup> The third part of the test, which requires the party moving for spoliation to show damages, stops litigants from bringing “speculative or generalized assertions” of prejudice stemming from the alleged spoliation.<sup>151</sup> The Second Circuit’s decision to allow gross negligence to trigger a presumption of prejudice when issuing spoliation sanctions makes it easier to pass the spoliation test without proving damages. Thus, the Second Circuit’s decision to allow gross negligence to trigger a presumption of prejudice may increase spurious spoliation claims.

Moreover, the Second Circuit’s decision to weaken the procedural safeguards against spurious litigation increases the cost of litigation. More litigants will move for spoliation sanctions if it is an easier test to satisfy. The increase in motions for spoliation sanctions will prolong litigation and increase settlement costs. Both of these expenses cause an even greater financial burden to be placed on businesses. It will also exact a burden on the court system itself. By delaying and extending litigation, the docket of the federal court will become even more crowded.

Though the Second Circuit’s decision allowing gross negligence to trigger a presumption of prejudice hurts businesses, it also hurts consumers. In order to stay profitable, businesses may be forced to shift this increased cost of doing business onto the consumer.

Thus, while the Second Circuit purports to concern itself with the financial burdens of electronic discovery, it fails to adequately assess the financial burdens it imposed as a result of its decision to allow a presumption of prejudice to be triggered by the grossly negligent spoliation of information.

### *C. The Rationales Against a Presumption of Prejudice*

Federal courts issue spoliation sanctions under three rationales: punishment, deterrence, and remediation.<sup>152</sup> The test used to effectuate these rationales focuses on the duty of the spoliating party to preserve information, the mens rea of the

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<sup>150</sup> See *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 616 (S.D. Tex. 2010).

<sup>151</sup> *Id.*

<sup>152</sup> See *supra* Part I.C and accompanying notes.

spoliating party, and the injury caused by the spoliating party.<sup>153</sup> The third element of the test, the presence of injury, is vital to each of the rationales for the spoliation doctrine.<sup>154</sup>

The concept of punishment is forged in the belief that a party should be punished for its wrongdoing because it deserves to suffer as a result of its wrongdoing.<sup>155</sup> Moreover, the severity of punishment should correspond with the level of wrongdoing: A party whose actions are less egregious should be punished with less severity than a party whose actions are more egregious.<sup>156</sup>

Generally, courts use two instruments to measure the level of a party's wrongdoing: the mens rea of the party and the damage done by the party's wrongful act.<sup>157</sup> The mens rea measures the intent of the party to commit the harm arising from his actions and the damage measurement looks to the result of the wrongful party's actions.<sup>158</sup>

Though the mens rea and damage measurements provide independent means for quantifying the level of wrongdoing, and thus the severity of punishment, the two measurements also inform one another.<sup>159</sup> Take, for example, wrongdoers A and B: A forcibly takes one hundred dollars from V1's person. After A takes one hundred dollars, she takes out a knife in order to harm V1. In a completely separate incident, B forcibly takes one hundred dollars from V2. After B takes the one hundred dollars, she slips. A knife falls out of B's pocket and heads towards V2. This is where our information ends. We do not know if V1 and V2 are injured by A and B's respective acts, nor do we know to what extent V1 and V2 are injured. Given this lack of

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<sup>153</sup> See *supra* Part I.B.

<sup>154</sup> See *supra* Part I.C.

<sup>155</sup> See Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 183 (2009) (discussing the retributive justification of punishment).

<sup>156</sup> See *id.* at 183 (“[A]n offender’s suffering should be proportional to the seriousness of his offense. Hence, murderers should be punished more than thieves . . .”).

<sup>157</sup> See *supra* Part I.B–C.

<sup>158</sup> See Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CALIF. L. REV. 943, 952 (1999) (discussing the concept of mens rea).

<sup>159</sup> Cf. *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997) (discussing why the mens rea of a spoliator is useful in determining the prejudicial nature of the information that was destroyed by the spoliating party); *Vick v. Tex. Emp’t Comm’n*, 514 F.2d 734, 737 (5th Cir. 1975) (citation omitted) (“The adverse inference to be drawn from destruction of records is predicated on bad conduct of the defendant. Moreover, the circumstances of the act must manifest bad faith. Mere negligence is not enough, for it does not sustain an inference of consciousness of a weak case.”).

information, we may still assume that V1 suffered more harm than V2.<sup>160</sup> This assumption is informed by A and B's respective mens rea.<sup>161</sup> A's punishment will be more severe than B's because of A's mens rea and the harm we assume A caused.<sup>162</sup> Specifically, we may infer that A caused more harm than B did because A's mens rea was more severe. Such an inference is predicated on the assumption that those who intend to cause harm generally cause more harm than those who negligently cause harm. Thus, the measurement of harm, and the subsequent severity of punishment is informed by the mens rea.<sup>163</sup> But if A and B suffer the same punishment, the punishment's failure to distinguish between A and B's level of wrongdoing is twofold: The punishment not only ignores the mens rea measurement but also ignores the damage measurement.

When courts levy sanctions against a spoliating party in order to punish that party, the severity of the punishment should correspond with the level of wrongdoing.<sup>164</sup> Since the level of wrongdoing is measured by the mens rea of the spoliating party and the damage inflicted by the spoliating party, the severity of the punishment is a reflection of both measurements. If a federal court ignores one or both of these elements when determining the severity of the sanction, it fails to effectuate the punishment rationale: It fails to distinguish the more egregious act from the lesser and decides to punish both actions with the same punishment.

Take, for example, spoliators, X and Y: The prejudicial nature of the evidence that A and B respectively destroyed cannot be determined. But the court knows that X's spoliation of evidence was in bad faith. The court also knows that Y's spoliation was grossly negligent. If the court issues the same sanctions against X and Y, its failure to properly calibrate the punishment is twofold: It fails to adjust the severity of the sanction based on the respective mens rea of X and Y, and it fails to adjust the severity of the sanctions based upon the respective damage done by X and Y.

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<sup>160</sup> Cf. *Vick*, 514 F.2d at 737.

<sup>161</sup> Cf. *id.*

<sup>162</sup> Cf. *id.*

<sup>163</sup> Cf. *id.*

<sup>164</sup> See Kolber, *supra* note 155, at 183.

Courts that allow gross negligence to trigger a presumption of prejudice when determining spoliation sanctions have failed to limit the severity of sanctions that may be issued.<sup>165</sup> This failure runs contra to the principle of the punitive rationale: It fails to quantify the severity of the sanction with the mens rea and the damage measurements. To state it more succinctly, grossly negligent spoliation should not be punished with the same severity that intentional spoliation is punished when the prejudicial nature of the spoliation is unknown and can only be inferred.

The Supreme Court's second rationale for issuing spoliation sanctions is based upon deterrence.<sup>166</sup> Courts operating under the deterrent rationale assume that would-be spoliators will decide not to destroy information if they know there is a possibility that their destruction will occasion sanctions.<sup>167</sup> Thus, a party who wants to destroy information to deprive an opposing party of that information will be deterred from doing so.<sup>168</sup> Similarly, courts operating under the deterrent rationale assume that parties who have a duty to preserve electronic information will be more careful in satisfying their duty to preserve information.<sup>169</sup> Thus, a party who might be inclined to act negligently in its preservation duties will be deterred from doing so.

The Second Circuit's decision to allow gross negligence to trigger a presumption of prejudice certainly deters the grossly negligent spoliation. Commercial entities have undoubtedly reacted to the Second Circuit's decision by instituting sophisticated document retention programs that decrease the likelihood of grossly negligent spoliation sanctions. At the same time, mistakes will almost certainly happen. The amount of ESI being produced is growing at a breakneck pace.<sup>170</sup> As the amount

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<sup>165</sup> See, e.g., *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 470, 496–97 (S.D.N.Y. 2010) (declining to limit the severity of spoliation sanctions when a court levies such sanctions based upon a presumption of prejudice stemming from the gross negligence of the spoliating party), *abrogated by* *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012).

<sup>166</sup> See *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976).

<sup>167</sup> See *id.*

<sup>168</sup> See *id.*

<sup>169</sup> See *id.*

<sup>170</sup> See Catherine A. Casey & Alejandra P. Perez, *The Rising Tide of Nonlinear Review; Disruptive Technology, Savvy Clients and Cost Pressures are Changing the*



of ESI grows, the chance that grossly negligent spoliation will occur also increases. Though large commercial entities may be able to keep up with the document retention demands that arise as a result of the increase in ESI, smaller enterprises will have a harder time keeping pace due to their fiscal constraints. Thus, while the Second Circuit's decision to allow gross spoliation to trigger a presumption of prejudice certainly acts to deter bad behavior, it does so by setting an impractical standard that will act to harm litigants more than it helps them. Though the Second Circuit's attempt to curb spoliation is admirable, it effectuates an unreasonable standard of care.

Courts' third rationale for issuing sanctions is based upon the remedial nature of sanctions. The remedial rationale acts to restore the injured party to "the same position he would have been in absent the wrongful destruction of evidence by the . . . [spoliating] party."<sup>171</sup> The remedial rationale focuses on the third element of the spoliation test—prejudice.<sup>172</sup>

Although the remedial rationale for sanctions focuses on prejudice, the mens rea of the spoliating party may still be relevant when quantifying the prejudice suffered as a result of the spoliating party's actions.<sup>173</sup> A court can infer the prejudicial nature of evidence if the evidence was destroyed in bad faith.<sup>174</sup> A party would have no reason to deprive the opposing party of evidence if that evidence was not prejudicial to the spoliating party.<sup>175</sup>

Even though the mens rea of the spoliating party can be useful in qualifying the prejudicial nature of the spoliated information, it is not always useful. When a party acts negligently, "a court cannot logically infer the intent of what a party did from its behavior because its behavior was unthinking . . . ."<sup>176</sup>

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*E-discovery Game; E-Discovery*, NAT'L L.J. (2012) ("ESI has been doubling or tripling every 18 to 24 months.").

<sup>171</sup> *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).

<sup>172</sup> *See id.*

<sup>173</sup> *See D'Onofrio v. SFX Sports Grp., Inc.*, No. 06-687 (JDB/JMF), 2010 WL 3324964, at \*10 (D.D.C. Aug. 24, 2010).

<sup>174</sup> *See id.*

<sup>175</sup> *See id.*

<sup>176</sup> *See id.*

If a court is willing to presume the prejudicial nature of information based on the fact that the information was destroyed in a grossly negligent matter, the court necessarily predicates its presumption on a coin toss: When information is destroyed negligently, the information is just as likely to be prejudicial as it is to be beneficial. The court is in effect engaging in a fifty-fifty proposition.

Furthermore, if a court presumes the prejudicial nature of evidence based upon gross negligence, the court may provide a windfall to the non-spoiling party: A party who successfully moves for spoliation sanctions, but has not suffered harm from the spoliation, may receive a tactical advantage as a result of the sanction. The possibility that the party moving for spoliation sanctions will reap a windfall changes the effect of the sanction. Instead of curing the injured party, the spoliation sanction may provide an added benefit to the non-spoiling party.

#### *D. Solving the Problem*

“It has long been understood that ‘[c]ertain implied powers must necessarily result to our [c]ourts of justice from the nature of their institution,’ powers ‘which cannot be dispensed with in a [c]ourt, because they are necessary to the exercise of all others.’”<sup>177</sup> Courts’ ability to levy spoliation sanctions is undoubtedly one such power, a power whose absence would result in the destruction of the discovery process. Yet, while the power to issue spoliation sanctions is necessary for the just adjudication of claims, it must be wielded with care, less a shield be turned to a sword. As Part III illustrates, the decision to allow grossly negligent spoliation to trigger a presumption of prejudice weaponizes the procedural armor offered by spoliation sanctions. In the name of safeguarding the discovery process, the Second Circuit has adopted a standard that is ambiguously stated and poorly defined, that imposes overly onerous burdens on litigants and the court, and that runs contra to the three rationales for issuing spoliation sanctions. In order to correct the Second Circuit’s error, the Federal Rules of Civil Procedure must be amended to bar the grossly negligent spoliation of evidence from triggering a presumption of prejudice.

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<sup>177</sup> *Chambers v. Nasco, Inc.*, 501 U.S. 32, 43 (1991) (quoting *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812)).

While the Second Circuit is the only circuit that allows gross negligence of the spoliating party to trigger a presumption of prejudice,<sup>178</sup> the effect of its holding is felt on a national level. The Second Circuit's holding makes it easier to successfully move for spoliation sanctions. A disproportionate amount of litigants will consequently choose to bring suit in the Second Circuit because of the lax standard for granting spoliation sanctions. The result of such forum shopping will increase compliance costs for national or even regional companies who have to invest in costly, overly burdensome ESI systems in reaction to the Second Circuit's decision.

Though there has been some dispute within the Second Circuit concerning the propriety of its decision to allow gross negligence to trigger a presumption of prejudice,<sup>179</sup> the decision is unlikely to change. Without a judicial change of heart, the only way to correct the Second Circuit's error and ensure the just adjudication of claims is by amending the Federal Rules of Civil Procedure.

This Note proposes that Rule 37(e) should be amended as follows: Absent exceptional circumstances, a court may not impose sanctions under these rules on a party (1) for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system and (2) unless the spoliated evidence was shown to be prejudicial, or was presumed to be prejudicial from a showing of bad faith or intentional destruction of electronically stored information.<sup>180</sup>

The effect of such an amendment would still allow circuit courts the same level of flexibility in interpreting the good faith requirement of Rule 37(e).<sup>181</sup> Thus, the amended Rule does not conflict with the Judicial Conference's stance on not having a bright-line rule for the spoliation test's mens rea requirement.<sup>182</sup>

This amended Rule 37(e) gives courts a wide degree of latitude in fashioning appropriate spoliation sanctions, which in turn preserves the courts' ability to craft spoliation sanctions on

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<sup>178</sup> See *supra* Part II.

<sup>179</sup> See *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 440 (S.D.N.Y. 2010) (discussing how a litigant's failure to show that spoliated information was prejudicial should not result in sanctions).

<sup>180</sup> Rule 37(e)(1) of my proposed revision to Rule 37(e) is the same text as that currently found in the rule. See FED. R. CIV. P. 37(e).

<sup>181</sup> See *supra* notes 24–27 and accompanying text.

<sup>182</sup> See *supra* notes 24–26.

a case-by-case basis. At the same time, the amended Rule restricts courts' ability to trigger a presumption of prejudice on a showing of gross negligence. This limitation eliminates the definitional problems implicit in allowing courts to presume prejudice on a showing of gross negligence. Simply put, the amended Rule impinges on judicial discretion only to the degree necessary to ensure the fair judicial administration of spoliation sanctions and avoids the misapplication of judicial remedies proliferated by the Second Circuit's erroneous standard.

Furthermore, amended Rule 37(e) allows federal courts to use a rebuttable presumption of prejudice if the spoliation is intentional or done in bad faith. Thus, federal courts can ease the onerous burden of proving prejudice by utilizing the rebuttable presumption. At the same time, the amended Rule bars courts from imposing an overly onerous preservation duty on commercial entities.

This amended Rule 37(e) also serves the three rationales inherent in the doctrine of spoliation. The amended Rule punishes spoliators based upon their culpability and the harm caused as a result of their spoliation. The amended Rule deters spoliation by imposing serious penalties on spoliating parties who act with intent or bad faith, while also realizing that it is an exercise in futility to deter honest mistakes. Finally, the amended Rule satisfies the remedial purpose of spoliation sanctions by providing litigants with the means to cure harm suffered as a result of spoliation through the retention of the rebuttable presumption when the spoliator destroyed evidence with the requisite intent.

While amended Rule 37(e) stops federal courts from allowing gross negligence to trigger a presumption of prejudice when issuing spoliation sanctions, its adverse impact on federal procedure is minute: The only circuit affected by the amended Rule is the Second Circuit, because it is the only circuit which currently allows gross negligence to trigger a presumption of prejudice.<sup>183</sup> Thus, the amended Rule would only have the detrimental effect of unsettling litigants' expectations in a single circuit. At the same time, the amended Rule ensures that the Second Circuit's deleterious practice does not spread to other circuits.

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<sup>183</sup> See *supra* Part II.C.

## CONCLUSION

Courts should not use the gross negligence of a spoliating party to presume that the destroyed evidence would have been prejudicial to the spoliating party if not for its destruction. Such a rule runs contra to the rationales for issuing sanctions under the doctrine of spoliation, increases litigation costs, poses problems of judicial administrability, and encourages forum shopping. And perhaps even more importantly, such a rule ignores the changing realities of our technological capacity. As the amount of ESI continues to increase at exponential rates, the burden imposed by the Second Circuit's holding will grow both in weight and force. In order to stop courts from using such a rule, Rule 37(e) should be amended to ensure that spoliation sanctions continue to shield those harmed by the destruction of evidence and are not used as a procedural sword to attack an innocent party.