

MEMORANDUM

DATE: September 23, 2010

TO: Discovery Subcommittee

FROM: Andrea Kuperman

CC: Judge Mark Kravitz
Judge Lee H. Rosenthal
Professor Edward Cooper
John Rabiej

SUBJECT: Case Law on Elements of a Potential Preservation Rule

This memorandum summarizes research on case law addressing potential elements of a civil rule on preservation of evidence. During the May 2010 Conference on Civil Litigation, the e-discovery panel suggested that the Civil Rules Advisory Committee examine the possibility of adopting a rule on preservation/spoliation. The panel submitted a proposal containing elements of a potential preservation rule and suggested that the Committee consider the proposal in its examination of the possibility of adopting a preservation rule. Following the 2010 Conference, the Discovery Subcommittee began examining the possibility of adopting a rule on preservation and determined that it would be useful to have information on how courts have handled various preservation and spoliation issues. The Discovery Subcommittee asked me to research the case law on each of the elements in the e-discovery panel's proposal. This memo summarizes a representative sampling of case law regarding each of the elements.¹ Each element suggested by the e-discovery

¹ The elements suggested by the e-discovery panel encompass a broad range of issues considered by courts in evaluating preservation/spoliation issues. Because preservation involves discovery conduct, many of the issues have been examined in much more detail at the district court level than at the appellate level. Limiting the research to the appellate level likely would have failed to capture some of the more substantial discussions of these issues. However, expanding the research to include district court cases in every circuit on each of the various elements suggested by the e-discovery panel would encompass virtually every decision on preservation or spoliation in the country and would have resulted in thousands of results. To narrow the results to a useful

panel is set out below, followed by the case law on that particular element.

and manageable set of cases, I used key search terms in Westlaw for each of the proposed elements, searching in a database that covers all federal court decisions, including appellate, district, and bankruptcy cases. From those results, I examined the cases that seemed to have the most significant discussions of the key issues. In short, this memo covers a representative sample of the cases addressing spoliation rather than an exhaustive summary of all of the case law in every circuit for every proposed element. If the Subcommittee desires more research into any of the proposed elements, I can continue to collect cases.

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I. Trigger

A. E-Discovery Panel's Proposal

The rule should specify the point in time when the obligation to preserve information, including electronically stored information, accrues. Potential triggers:

- a. A general trigger restating the common law (pending or reasonably foreseeable litigation) standard and/or
- b. Specific triggers (which could appear in the text or Advisory Committee Note):
 - i. Written request or notice to preserve delivered to that person (perhaps in a prescribed form).
 - ii. Service on, or delivery to, that person of a
 - A. Complaint or other pleading,
 - B. Notice of claim,
 - C. Subpoena, CID or similar instrument.
 - iii. Actual notice of complaint or other pleading, or a notice of claim, asserting a claim against, or defense involving that person or an affiliate of that person.
 - iv. Statutory, regulatory, contractual duty to preserve.
 - v. Steps taken in anticipation of asserting or defending a potential claim (*e.g.*, preparation of incident report, hiring expert, drafting/filing claim with regulator, drafting/sending prelitigation notice, drafting complaint, hiring counsel, destructive testing).

B. Case Law on the Trigger Element

Nearly all cases addressing preservation of evidence touch on when the duty to preserve evidence attaches and there is not much variation between the circuits on the general common law standard. The courts generally require that a party begin preservation efforts once it knows or should know that that evidence is likely to be relevant to pending or future litigation. *See, e.g., Consol.*

Edison Co. of N.Y., Inc. v. United States, 90 Fed. Cl. 228, 256–57 (2009) (“The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.” (quotation marks omitted) (quoting *Dong Ah Tire & Rubber Co. v. Glasforms, Inc.*, No. 06-3359, 2008 WL 4298331, at *3 (N.D. Cal. Sept. 19, 2008))); *Renda Marine, Inc. v. United States*, 58 Fed. Cl. 57, 60 (2003) (“[T]he case law imposes a ‘duty to preserve material evidence . . . not only during litigation but also . . . [during] that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.’ A party’s obligation to preserve evidence that may be relevant to litigation is triggered once the party has notice that litigation may occur.” (second alteration and omissions in original) (internal citation omitted)); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, No. MJG-06-2662, 2010 WL 3530097, at *22–23 (D. Md. Sept. 9, 2010) (noting that the duty to preserve “‘may arise from statutes, regulations, ethical rules, court orders, or the common law . . . , a contract, or another special circumstance,’” and that “[t]he common law imposes the obligation to preserve evidence from the moment that litigation is reasonably anticipated.” (citations omitted)); *O’Brien v. Ed Donnelly Enters., Inc.*, No. 2:04-cv-85, 2010 WL 1741352, at *3 (S.D. Ohio Apr. 29, 2010) (“The duty to preserve evidence in civil litigation is triggered when a party either has notice or ‘should have known that the evidence may be relevant to future litigation.’” (quoting *John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008))); *Crown Castle USA Inc. v. Fred A. Nudd Corp.*, No. 05-CV-6163T, 2010 WL 1286366, at *9 (W.D.N.Y. Mar. 31, 2010) (“A party is obligated to preserve evidence when it 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.’” (quoting *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001))); *Rimkus Consulting*

Group, Inc. v. Cammarata, 688 F. Supp. 2d 598, 612 (S.D. Tex. 2010) (“Generally, the duty to preserve arises when a party “has notice that the evidence is relevant to litigation or . . . should have known that the evidence may be relevant to future litigation.”” (omission in original) (citations omitted)); *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010) (“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.*” (emphasis added));² *id.* at 466 (“It is well established that the duty to preserve evidence arises when a party reasonably anticipates litigation.” (footnote omitted)); *In re Nat’l Century Fin. Enters., Inc. Fin. Inv. Litig.*, No. 2:03-md-1565, 2009 WL 2169174, at *3 (S.D. Ohio Jul. 16, 2009) (“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.” (citing *Zubulake v. UBS Warburg, LLC (Zubulake IV)*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003))); *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 509 (D. Md. 2009) (“[T]he duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.” (quoting *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001))); *Asher Assocs., LLC v. Baker Hughes Oilfield Operations, Inc.*, No. 07-cv-01379-WYD-CBS, 2009 WL 1328483, at *7 (D. Colo. May 12, 2009) (“In most cases, the duty to preserve evidence is triggered by the filing of a lawsuit. However, the obligation to preserve evidence may arise even earlier if a party has notice that future litigation is likely.” (citations omitted)); *Marceau*

² The *Pension Committee* court also recognized that “[a] plaintiff’s duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation.” 685 F. Supp. 2d at 466 (footnote omitted).

v. Int'l Bhd. of Elec. Workers, 618 F. Supp. 2d 1127, 1174 (D. Ariz. 2009) (““The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.”” (quoting *World Courier v. Barone*, No. C 06-3072 THE, 2007 WL 1119196, at *1 (N.D. Cal. 2007))); *Micron Tech., Inc. v. Rambus, Inc.*, 255 F.R.D. 135, 148 (D. Del. 2009) (“A duty to preserve evidence arises when there is knowledge of a potential claim. A potential claim is generally deemed cognizable in this regard when litigation is pending or imminent, or when there is a reasonable belief that litigation is foreseeable. For instance, a duty to preserve evidence can arise many years before litigation commences; imminency is sufficient to create the duty, but it is not a requirement.” (internal citation and other citations omitted)); *Velez v. Marriott PR Mgmt., Inc.*, 590 F. Supp. 2d 235, 258 (D.P.R. 2008) (“[T]his obligation [to preserve evidence] predates the filing of the complaint and arises once litigation is reasonably anticipated.”); *Nucor Corp. v. Bell*, 251 F.R.D. 191, 194 (D.S.C. 2008) (“A party has a duty to preserve evidence during litigation and at any time ‘before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.’” (quoting *Silvestri*, 271 F.3d at 591)); *Bd. of Regents of Univ. of Neb. v. BASF Corp.*, No. 4:04CV3356, 2007 WL 3342423, at *4 (D. Neb. Nov. 5, 2007) (“The obligation to preserve evidence begins when a party knows or should have known that the evidence is relevant to future or current litigation.” (citations omitted)); *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 621 (D. Colo. 2007) (“In most cases, the duty to preserve is triggered by the filing of a lawsuit. However, the obligation to preserve evidence may arise even earlier if a party has notice that future litigation is likely.” (citations omitted)); *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 339 (M.D. La. Jul. 19, 2006) (“According to *Zubulake IV*, spoliation is ‘the destruction or

significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” (quoting *Zubulake IV*, 220 F.R.D. at 216);³ *id.* (The duty to preserve “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.” (quoting *Zubulake IV*, 220 F.R.D. at 216)); *id.* at 342 (“Alcoa’s duty to preserve was triggered, not when it had actual knowledge of this litigation and its scope, but instead when it had constructive knowledge or should have known that certain information may be relevant to future litigation.”); *Danis v. USN Commc’ns, Inc.*, No. 98 C 7482, 2000 WL 1694325, at *33 (N.D. Ill. Oct. 23, 2000) (“[T]he case law establishes that a discovery request is not necessary to trigger this duty [to preserve]. ‘A party clearly is on notice of [t]he relevance of evidence once it receives a discovery request. However, the complaint itself may also alert a party that certain information is relevant and likely to be sought in discovery.’” (third alteration in original) (citations omitted)); *McGinnity v. Metro-North Commuter R.R.*, 183 F.R.D. 58, 60 (D. Conn. Aug. 18, 1998) (“[N]o duty to preserve arises unless the party possessing the evidence has notice of its relevance. Of course, a party is on notice once it has received a discovery request. Beyond that, the complaint itself may alert a party that certain information is relevant, and likely to be sought in discovery. Finally, the obligation to preserve evidence even arises prior to the filing of a complaint where the party is on notice that litigation is likely to be

³ The *Consolidated Aluminum* court noted that, at the time of its opinion, “[n]either the Fifth Circuit Court of Appeal nor any district court within the Fifth Circuit ha[d] had the opportunity to directly address the standards for preservation of electronic evidence and applicable sanctions where such evidence has been spoliated,” and it therefore looked to “[t]he cases which have been recognized as setting the benchmark standards for modern discovery and evidence-preservation issues”—“the series of *Zubulake* decisions out of the Southern District of New York.” *Consol. Aluminum*, 244 F.R.D. at 339. The *Zubulake* decisions include *Zubulake v. UBS Warburg, LLC (Zubulake I)*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg, LLC (Zubulake II)*, 230 F.R.D. 290 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg, LLC (Zubulake III)*, 216 F.R.D. 280 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg, LLC (Zubulake IV)*, 220 F.R.D. 212 (S.D.N.Y. 2003); and *Zubulake v. UBS Warburg, LLC (Zubulake V)*, 229 F.R.D. 422 (S.D.N.Y. 2004).

commenced.” (alteration in original) (quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72–73 (S.D.N.Y. 1991), *aff’d*, No. 89 Civ. 4252(PKL), 1992 WL 51570, at *3–4 (S.D.N.Y. Mar. 9, 1992)); *Indem. Ins. Co. of N. Am. v. Liebert Corp.*, No. 96 CIV. 6675(DC), 1998 WL 363834, at *3 (S.D.N.Y. Jun. 29, 1998) (“The obligation to preserve evidence also ‘arises prior to the filing of a complaint where a party is on notice that litigation is likely to be commenced.’” (quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 73 (S.D.N.Y. 1991))); *In re Kmart Corp.*, 371 B.R. 823, 842 (Bankr. N.D. Ill. 2007) (“[A] party’s duty to preserve specific types of documents does not arise unless the party controlling the documents has notice of those documents’ relevance,” and “[t]his notice ordinarily comes from discovery requests or from the complaint itself,” but “the obligation to preserve evidence may arise prior to the filing of a complaint where a party is on notice that litigation is likely to commence.” (citations omitted)).

Although a party’s duty to preserve may often be triggered before litigation, courts have emphasized that the mere possibility of litigation is not sufficient to trigger the duty because “[t]he undeniable reality is that litigation ‘is an ever-present possibility’ in our society.” *See Cache*, 244 F.R.D. at 621; *accord Salvatore v. Pingel*, No. 08-cv-00312-BNB-KMT, 2009 WL 943713, at *4 (D. Colo. Apr. 6, 2009); *see also RealNetworks, Inc. v. DVD Copy Control Ass’n, Inc.*, 264 F.R.D. 517, 523–24 (N.D. Cal. 2009) (noting that “[a]s soon as a potential claim is identified, a litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action,” but that “[t]he future litigation must be ‘probable,’ which has been held to mean ‘more than a possibility’” (citations omitted)); *id.* at 526 (“A general concern over litigation does not trigger a duty to preserve evidence.”); *but see Goodman*, 632 F. Supp. 2d at 509 n.7 (declining to follow *Cache*’s holding that more than a mere possibility of litigation is necessary to trigger a duty to

preserve, explaining that “the law surrounding the duty to preserve is well-settled in the Fourth Circuit” and requires preservation whenever litigation is *reasonably anticipated* and that date does not necessarily correspond to when litigation becomes *probable* (citing *Silvestri*, 271 F.3d at 591; *Samsung Elecs. Co., Ltd. v. Rambus, Inc.*, 439 F. Supp. 2d 524, 568 (E.D. Va. 2006), *vacated on other grounds*, 523 F.3d 1374 (Fed Cir. 2008), *cert. denied*, 129 S. Ct. 279 (2008))).⁴ In *Cache*, the court explained that “[w]hile a party should not be permitted to destroy potential evidence after receiving unequivocal notice of impending litigation, the duty to preserve relevant documents should require more than a mere possibility of litigation,” 244 F.R.D. at 621 (citing *Hynix Semiconductor Inc. v. Rambus, Inc.*, 591 F. Supp. 2d 1038, No. C-0020905 RMW, 2006 WL 565893, at *21 (N.D. Cal. Jan. 5, 2006)), and that “[u]ltimately, the court’s decision must be guided by the facts of each case,” *id.*; accord *Ernest v. Lockheed Martin Corp.*, No. 07-cv-02038-WYD-KLM, 2008 WL 2945608, at *2 (D. Colo. Jul. 28, 2008) (citing *Cache*, 244 F.R.D. at 621). Other courts have explained that “‘imminence [is] sufficient, rather than necessary, to trigger the duty to preserve documents.’” *Keithley v. Homestore.com, Inc.*, No. C-03-04447 SI (EDL), 2008 WL 4830752, at *7 (N.D. Cal. Nov. 6, 2008) (quoting *UMG Recordings, Inc. v. Hummer Winblad Venture Partners (In re Napster, Inc. Copyright Litig.)*, 462 F. Supp. 2d 1060, 1070 (N.D. Cal. 2006)); *see also Micron Tech.*, 255 F.R.D. at 148 (“[I]mminency is sufficient to create the duty, but it is not a requirement.”). One court indicated that “the duty to preserve evidence may arise when a substantial number of key personnel anticipate litigation,” but explained that “speculation by one or two employees regarding a lawsuit ‘does not generally impose a firm-wide duty to preserve.’” *Crown*

⁴ *Goodman* still recognized that “[t]he mere existence of a dispute does not necessarily mean that parties should reasonably anticipate litigation or that the duty to preserve arises.” *Goodman*, 632 F. Supp. 2d at 510 (citing *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 371 (S.D.N.Y. 2006)).

Castle, 2010 WL 1286366, at *9 (quoting *Zubulake IV*, 220 F.R.D. at 217).

Some courts have also likened the “anticipation of litigation” analysis for purposes of preservation duties to the “anticipation of litigation” analysis for purposes of assessing the applicability of the work product doctrine. *See, e.g., Consol. Edison*, 90 Fed. Cl. at 252–53, 258, 259–60, 262 (finding it relevant for purposes of determining whether the duty to preserve had been triggered that the court had previously rejected a work product claim because the documents at issue were not prepared in anticipation of litigation); *Siani v. State Univ. of N.Y. at Farmingdale*, No. C09-407 (JFB)(WDW), 2010 WL 3170664, at *5 (E.D.N.Y. Aug. 10, 2010) (“If it was reasonably foreseeable for work product purposes, Siani argues, it was reasonably foreseeable for duty to preserve purposes. The court agrees.”); *Sanofi-aventis Deutschland GmbH v. Glenmark Pharms. Inc., USA*, No. 07-CV-5855, 2010 WL 2652412, at *5 (D.N.J. Jul. 1, 2010) (holding that the defendants’ duty to impose a litigation hold and institute legal monitoring for purposes of complying with the duty to preserve arose no later than the date on which the defendants began withholding documents as protected by the work-product doctrine because “[a] party claiming work-product immunity bears the burden of showing that the materials in question ‘were prepared in the course of preparation for possible litigation.’” (quoting *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 138 (3d Cir. 2000))); *Anderson v. Sotheby’s Inc. Severance Plan*, No. 04 Civ. 8180(SAS), 2005 WL 2583715, at *4 (S.D.N.Y. Oct. 11, 2005) (date of documents claimed to be protected by work product triggered the duty to preserve even though the documents were ultimately determined not to be protected by work product); *but see Salvatore*, 2009 WL 943713, at *7 (rejecting the plaintiff’s argument that the defendants’ assertion of work product immunity as to certain documents established that the defendants anticipated litigation for the purpose of triggering the duty to preserve

because “[t]he question is not the propriety of the defendants’ assertion of the work product immunity, but when under the totality of the circumstances the defendants knew or reasonably should have known of the likelihood of litigation stemming from this accident”); *Marceau*, 618 F. Supp. 2d at 1176 (“The fact that the Report was not eligible for work product protection under Rule 26(b)(3) does not dictate a finding that documents that were destroyed at the same time the audit beg[an] were not destroyed in anticipation of litigation.” (citing *Hynix*, 591 F. Supp. 2d at 1064, for its conclusion that “[t]he fact that Rambus has previously claimed work product protection for some documents dated prior to late 1999 does not dictate a finding that Rambus was anticipating litigation at the time the documents were created”)).

The case law has also recognized certain specific triggers in various contexts. *See, e.g., Consol. Edison*, 90 Fed. Cl. at 262 (finding that dispute and audit by IRS were not sufficient to trigger a duty to preserve, given the party’s past experience in resolving disputes with the IRS and the fact that the administrative process is designed specifically to avoid litigation); *Victor Stanley*, 2010 WL 3530097, at *23 (noting that in one case the defendant’s duty arose no later than the date when the plaintiff’s counsel asked the defendant to preserve evidence, even though that request was before the filing of the complaint, but that “the duty exists, for a defendant, at the latest, when the defendant is served with the complaint” (citations omitted)); *O’Brien*, 2010 WL 1741352, at *4 (defendant’s knowledge of litigation against previous owners of defendant’s restaurant and knowledge of two isolated incidents in which restaurant managers manipulated the hours of employees other than the plaintiffs did not put defendant on notice about potential litigation by the plaintiffs under the Fair Labor Standards Act and was not sufficient to trigger a duty to preserve); *Crown Castle*, 2010 WL 1286366, at *10 (duty to preserve was triggered as early as when several of the plaintiff’s employees,

including in-house counsel, considered filing a notice of claim with the defendant’s insurance carrier and began labeling communications regarding the defendant as “work product,” and no later than when the plaintiff retained outside counsel “for purposes of litigation”); *Richard Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284, 289 (S.D.N.Y. 2009) (“Although [the time when litigation is reasonably anticipated] commonly occurs at the time a complaint is filed, it can also arise earlier, for instance when a disgruntled employee files an EEOC charge or at the point where relevant individuals anticipate becoming parties in imminent litigation.” (internal citation omitted) (citing *Zubulake IV*, 220 F.R.D. at 216–17)); *Goodman*, 632 F. Supp. 2d at 511 (“[P]re-filing communications between the litigants can . . . provide constructive notice that litigation is likely. Demand letters stating a claim may be sufficient to trigger an obligation to preserve.” (omission in original) (quoting SHIRA A. SCHEINDLIN, DANIEL J. CAPRA & THE SEDONA CONFERENCE, ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE: CASES AND MATERIALS 106 (2008)));⁵ *Asher Assocs.*, 2009 WL 1328483, at *8 (finding a letter from counsel that stated that the plaintiff had been “significantly damaged,” that provided the defendant with an “interim damage calculation,” that claimed that “damages continue[d] to accrue,” that demanded immediate payment with a 5-day deadline, and that identified specific claims that the plaintiff “would assert if it initiated ‘such legal or other action to enforce its rights’” was sufficient to trigger a duty to preserve because the defendant “should have understood that future litigation was reasonably foreseeable and substantially ‘more than a possibility’”); *Forest Labs., Inc. v. Caraco Pharm. Labs., Ltd.*, No. 06-CV-13143, 2009 WL

⁵ *Goodman* distinguished *Cache*, which had concluded that demand letters that did not threaten litigation did not trigger the duty to preserve when the plaintiff seemed amenable to a non-litigious resolution. See *Goodman*, 632 F. Supp. 2d at 511. The *Goodman* court stated that “[i]t may be that a letter that merely identifies a dispute but expresses an invitation to discuss it or otherwise negotiate does not trigger the duty to preserve evidence, but where, as here, the letter openly threatens litigation, then the recipient is on notice that litigation is reasonably foreseeable and the duty to preserve evidence relevant to that dispute is triggered.” *Id.*

998402, at *2 (E.D. Mich. Apr. 14, 2009) (in patent suit, plaintiffs had obligation to preserve evidence related to the patent from the time when plaintiffs received notice that the defendant had filed an Abbreviated New Drug Application); *Salvatore*, 2009 WL 943713, at *7 (finding that a settlement demand that threatened litigation, “albeit equivocal[ly],” triggered a duty to preserve);⁶ *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 430 (S.D.N.Y. 2009) (“Where copyright infringement is alleged, and a cease and desist letter issues, such a letter triggers the duty to preserve evidence, even prior to the filing of the litigation.” (citations omitted)); *MeccaTech, Inc. v. Kiser*, No. 8:05CV570, 2008 WL 6010937, at *8 (D. Neb. Apr. 2, 2008) (finding that litigation was anticipated for purposes of triggering the duty to preserve when the defendants jointly obtained a legal opinion); *Cache*, 244 F.R.D. at 623 (recognizing that “under different circumstances, a demand letter alone may be sufficient to trigger an obligation to preserve evidence and support a subsequent motion for spoliation sanctions,” but concluding that the letters at issue were not explicit enough and were too equivocal to trigger a duty to preserve);⁷ *Consol. Aluminum*, 244 F.R.D. at 340

⁶ A party’s failure to specifically request preservation does not prevent the duty from being triggered. *See Asher Assocs.*, 2009 WL 1328483, at *8 n.10 (“The court acknowledges that Plaintiffs’ letters of September 1 and 8, 2006, never specifically asked that the ESPs be preserved nor sought an opportunity to conduct their own inspection of the pumps. Those oversights, however, do not excuse Centrilift’s failure to preserve relevant evidence.” (citation omitted)).

⁷ The letters at issue alluded to “possible ‘exposure,’” but did not threaten litigation or demand preservation of evidence. *See Cache*, 244 F.R.D. at 623. Instead, the letters “hinted at the possibility of a non-litigious resolution.” *Id.*; *cf. Schlumberger Tech. Corp. v. Greenwich Metals, Inc.*, No. 07-2252-EFM, 2009 WL 5252644, at *5 & n.21 (D. Kan. Dec. 31, 2009) (declining to find that a duty to preserve was triggered before the lawsuit was filed because “it appears the parties were trying to reach a resolution . . .”). The *Cache* court stated that “[g]iven the dynamic nature of electronically stored information, prudent counsel would be wise to ensure that a demand letter sent to a putative party also addresses any contemporaneous preservation obligations.” 244 F.R.D. at 623. The court also found it relevant that nearly two years passed between an initial phone call between counsel for the parties regarding potential trademark infringement and the filing of the suit. The court concluded that “[t]hat delay, coupled with the less-than adamant tone of Cache La Poudre’s letters belies Plaintiff’s contention that Land O’Lakes should have anticipated litigation as early as” the initial phone call. *Id.* The court “acknowledge[d] that the common-law obligation to preserve relevant material is not necessarily dependent upon the tender of a ‘preservation letter,’” but concluded that “a party’s duty to

n.8 (“The propounding of a demand letter has been found to be the point when litigation should be reasonably anticipated” (citing *Housing Rights Center v. Sterling*, No. CV 03-859 DSF, 2005 WL 3320739 (C.D. Cal. Mar. 2, 2005))); *Broccoli v. Echostar Commc’ns Corp.*, 229 F.R.D. 506, 511 (D. Md. 2005) (finding that duty to preserve arose for employment discrimination claim when the plaintiff complained to his superiors of harassment and when management learned of the plaintiff’s potential Title VII claim); *Kmart*, 371 B.R. at 844 (concluding that debtor’s obligation to preserve documents relating to contested administrative claims arose when the claims were filed, “not because the claim filing date *per se* constitutes the latest possible trigger date, . . . but because the particular administrative claim filed in this case contained sufficient information to put Kmart on notice that litigation was likely”).⁸ In one case, the court determined that the plaintiff was on notice of the need to preserve based on the following factors: “(1) the sheer magnitude of the losses; (2) that plaintiff attempted to document the damage through photographs and reports; and (3) that it immediately brought in counsel as well as experts to assess the damage and attempt to ascertain its likely causes in anticipation of litigation.” *Indem. Ins. Co. of N. Am.*, 1998 WL 363834, at *4 n.3. Certain statutes

preserve evidence in advance of litigation must be predicated on something more than an equivocal statement of discontent, particularly when that discontent does not crystalize into litigation for nearly two years.” *Id.* The court explained: “Any other conclusion would confront a putative litigant with an intractable dilemma: either preserve voluminous records for an indefinite period at potentially great expense, or continue routine document management practices and risk a spoliation claim at some point in the future.” *Id.* (footnote omitted).

⁸ The *Kmart* court explained that “[b]earing in mind that the ‘trigger date’ should represent the date by which a party is on notice of the potential relevance of documents to pending or impending litigation, a *per se* rule that the claim filing date is the latest possible trigger would seem inappropriate” because “[p]roofs of claim are often perfunctory, containing few, if any, details concerning the bases for liability.” *Kmart*, 371 B.R. at 844. The court also determined that “[o]n the other hand, setting the ‘trigger’ in this matter as the objection filing date (or a date shortly before such filing) . . . seems equally unreasonable, not only because the objection deadline may be months or even years after the claim was filed, but also because the onset of the duty would then be largely in [the debtor’s] control.” *Id.* at 845. The court concluded that “in light of the central question of notice, the determination should depend on all the facts and circumstances of the case.” *Id.*

can also trigger a duty to preserve. *See, e.g., Danis*, 2000 WL 1694325, at *32 (“The PSLRA requires that a defendant in a securities action preserve evidence.” (footnote omitted)).

In short, when the duty to preserve is triggered seems to depend on the facts and circumstances of the particular case. *See Consol. Edison*, 90 Fed. Cl. at 259 (“[T]he facts and circumstances of the individual case must be assessed to decide when litigation should be deemed by a court to be anticipated, either in a work product privilege dispute or in a spoliation claim.”).

II. Scope

A. E-Discovery Panel’s Proposal

The rule should specify with as much precision as possible the scope of the duty to preserve, including, *e.g.*:

- a. Subject matter of the information to be preserved.
- b. Relevant time frame.
- c. That a person whose duty has been triggered must act reasonably in the circumstances.
- d. Types of data or tangible things to be preserved.
- e. Sources on which data are stored or found.
- f. Specify the form in which the information should be preserved (*e.g.*, native).
- g. Consider whether to impose presumptive limits on the types of data or sources that must be searched.
- h. Consider whether to impose presumptive limits on the number of key custodians whose information must be preserved.
- i. Consider whether the duty should be different for parties (or prospective parties) and non-parties.

B. Case Law on the Scope Element

“The scope of the duty to preserve is a broad one, commensurate with the breadth of discovery permissible under FED. R. CIV. P. 26.” *Danis*, 2000 WL 1694325, at *32. It “includes an obligation to identify, locate, and maintain, information that is relevant to specific, predictable, and identifiable litigation.” *Victor Stanley*, 2010 WL 3530097, at *23 (quoting THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COMMENTARY ON LEGAL HOLDS: THE TRIGGER AND THE PROCESS 3 (public cmt. ed. Aug. 2007), available at http://www.thesedonaconference.org/content/miscFiles/Legal_holds.pdf). “Generally, the duty to preserve extends to documents or tangible things (defined by Federal Rule of Civil Procedure 34) by or to individuals ‘likely to have discoverable information that the disclosing party may use to support its claims or defenses.’” *Rimkus*, 688 F. Supp. 2d at 612–13 (quoting *Zubulake IV*, 220 F.R.D. at 217–18); *accord Consol. Aluminum*, 244 F.R.D. at 339 (“[T]he duty to preserve extends to any documents or tangible things made by individuals ‘likely to have discoverable information that the disclosing party may use to support its claims or defenses.’ The duty also extends to documents prepared *for* those individuals and to information that is relevant to the claims and defenses of *any* party, or which is ‘relevant to the subject matter involved in the action.’” (internal citation omitted) (quoting *Zubulake IV*, 220 F.R.D. at 218)); *Kmart*, 371 B.R. at 842 (“The duty to preserve evidence includes any relevant evidence over which the non-preserving entity had control and reasonably knew or could reasonably foresee was material to a potential legal action.” (citations omitted)).

Other courts have summarized the scope of the preservation duty as follows:

“While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably

likely to be requested during discovery, and/or is the subject of a pending discovery request.”

Indem. Ins. Co. of N. Am., 1998 WL 363834, at *3 (quoting *Turner*, 142 F.R.D. at 72); *accord Consol. Edison*, 90 Fed. Cl. at 256 (quoting *Zubulake IV*, 220 F.R.D. at 217); *Crown Castle*, 2010 WL 1286366, at *10 (quoting *Zubulake IV*, 220 F.R.D. at 217); *Arista Records*, 608 F. Supp. 2d at 433 (citations omitted); *Danis*, 2000 WL 1694325, at *32 (citation omitted).

Any relevant documents must be preserved. Some courts have summarized the scope of “relevant” documents as follows:

“Relevant documents” includes the following:

[A]ny documents or tangible things (as defined by [FED. R. CIV. P. 34(a)]) made by individuals “likely to have discoverable information that the disclosing party may use to support its claims or defenses.” The duty also includes documents prepared *for* those individuals, to the extent those documents can be readily identified (*e.g.*, from the “to” field in e-mails). The duty also extends to information that is relevant to the claims or defenses of *any* party, or which is “relevant to the subject matter involved in the action.” Thus, the duty to preserve extends to those employees likely to have relevant information—the “key players” in the case.

Goodman, 632 F. Supp. 2d at 511–12 (alterations in original) (quoting *Zubulake IV*, 220 F.R.D. at 217–18 (footnotes omitted)); *see also Victor Stanley*, 2010 WL 3530097, at *23 (same) (quoting *Zubulake IV*, 220 F.R.D. at 217–18); *Crown Castle*, 2010 WL 1286366, at *10 (stating a similar holding) (quoting *Zubulake IV*, 220 F.R.D. at 217–18). Another court explained that “[r]elevant evidence is that which may prove or disprove a party’s liability theory.” *Velez*, 590 F. Supp. 2d at 258 (citations omitted). Another court described the scope of relevant documents for preservation as follows: “A document is potentially relevant, and thus must be preserved for discovery, if there is a possibility that the information therein is relevant to any of the claims.” *Jones v. Bremen High Sch.*

Dist. 228, No. 08 C 3548, 2010 WL 2106640, at *5 (N.D. Ill. May 25, 2010) (citing *Ares-Serano, Inc. v. Organon Int'l B.V.*, 151 F.R.D. 215, 219 (D. Mass. 1993)).

In addition, the preservation duty clearly encompasses both electronic and paper documents. *See Consol. Edison*, 90 Fed. Cl. at 257 (“The scope of the duty to preserve extends to electronic documents, such as e-mails and back-up tapes.” (quoting *AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 441 (2007))); *Pension Comm.*, 685 F. Supp. 2d at 475 n.82 (“This duty [to preserve electronic records] was well established as early as 1985 and has been repeatedly stated by courts across the country.” (citations omitted)).

But the case law recognizes that the duty to preserve does not expand to cover every possible piece of data that might be relevant. *See, e.g., In re Nat'l Century Fin. Enters.*, 2009 WL 2169174, at *11 (“[A] corporation, upon recognizing the threat of litigation, need not preserve ‘every shred of paper, every email or electronic document, and every backup tape.’” (alteration in original) (quoting *Consol. Aluminum*, 244 F.R.D. at 339)); *Consol. Aluminum*, 244 F.R.D. at 339 (same) (quoting *Zubulake IV*, 220 F.R.D. at 217); *Danis*, 2000 WL 1694325, at *32 (“To be sure, the duty to preserve does not require a litigant to keep every scrap of paper in its file.” (citations omitted)); *Kmart*, 371 B.R. at 842 (“While the scope of the preservation duty is broad, the ‘duty to preserve potentially discoverable information does not require a party to keep every scrap of paper’ in its file.” (internal citations omitted)); *but see Victor Stanley*, 2010 WL 3530097, at *26 (“Although it is well established that there is no obligation to ‘preserve every shred of paper, every e-mail or electronic document, and every backup tape,’ in some circumstances, ‘[t]he general duty to preserve may also include deleted data, data in slack spaces, backup tapes, legacy systems, and metadata.’” (alteration in original) (internal citation omitted) (quoting Paul W. Grimm, Michael D. Berman, Conor R.

Crowley & Leslie Wharton, *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381, 410 (2008)).

Several courts have followed the *Zubulake IV* court's summary of the scope of the preservation obligation, which generally excludes inaccessible backup tapes from the preservation obligation:

“Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a “litigation hold” to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (*e.g.*, those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (*i.e.*, actively used for information retrieval), then such tapes would likely be subject to the litigation hold.”

Consol. Aluminum, 244 F.R.D. at 339 (quoting *Zubulake IV*, 220 F.R.D. at 218); *see also Cache*, 244 F.R.D. at 628 (“As a general rule, [a] litigation hold does not apply to inaccessible back-up tapes . . . which may continue to be recycled on the schedule set forth in the company's policy.” (footnote omitted) (quoting *Zubulake V*, 229 F.R.D. at 431)); *Consol. Aluminum*, 244 F.R.D. at 339 (“As a general rule, a party need not preserve all backup tapes even when it reasonably anticipates litigation.” (citing *Zubulake IV*, 220 F.R.D. at 217)). Backup tapes need only be preserved if they are the only source of relevant information. *See Pension Comm.*, 685 F. Supp. 2d at 479 n.99 (“I am not requiring that *all* backup tapes must be preserved. Rather, if such tapes are the *sole* source of relevant information (*e.g.*, the active files of key players are no longer available), then such backup tapes should be segregated and preserved. When accessible data satisfies the requirement to search for and produce relevant information, there is no need to save or search backup tapes.” (citing FED. R. CIV. P. 26(b)(2)(B))). In *Victor Stanley*, the court noted that the *Zubulake* court is one of the few courts to have directly addressed retention requirements for multiple copies or backup tapes, and that

court stated that “although ‘[a] party or anticipated party must retain all relevant documents,’ it need not ‘preserve all backup tapes even when it reasonably anticipates litigation’ or retain ‘multiple identical copies.’” *Victor Stanley*, 2010 WL 3530097, at *26 (alteration in original) (quoting *Zubulake IV*, 220 F.R.D. at 217–18). The *Victor Stanley* court noted that while “[d]istrict courts in the Fifth and Sixth Circuit have relied on *Zubulake IV*’s discussion of backup tape preservation, . . . because . . . discrepancies exist among circuits on other topics, it is not clear for litigants how uniformly the *Zubulake IV* opinion will be applied.” *Id.*

The duty to preserve “extends to those employees likely to have relevant information, i.e., the ‘key players’ in the litigation.” *Consol. Aluminum*, 244 F.R.D. at 339 (citing *Zubulake IV*, 220 F.R.D. at 218); *see also Cache*, 244 F.R.D. at 629 (same). In *Goodman*, the court explained that “identifying a ‘key player’ in litigation is not dependent on the volume of interaction between an individual and a litigant, but rather is determined by whether an individual is likely to have information relevant to the events that underlie the litigation.” *Goodman*, 632 F. Supp. 2d at 512. The case law does not generally address placing a limit on the number of “key players.” In *Zubulake V*, the court identified “key players,” as “the people identified in a party’s initial disclosure and any subsequent supplementation thereto,” which might be one means of limiting the identification of “key players.” *See Zubulake V*, 229 F.R.D. at 433 (footnote omitted).

In addition, the duty to preserve covers any relevant evidence within the party’s “control.” *See Danis*, 2000 WL 1694325, at *32 (“The duty to preserve evidence includes any relevant evidence over which the nonpreserving entity had control and reasonably knew or could reasonably foresee was material to a potential legal action.” (emphasis added) (citation omitted)). If relevant evidence is in the hands of third parties, most courts require the party with the preservation obligation to give

notice to its opponents. See *King v. Am. Power Conversion Corp.*, 181 F. App'x 373, 378 (4th Cir. 2006) (unpublished) (per curiam) (“If a party cannot fulfill this duty to preserve *because he does not own or control the evidence*, he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction” (quoting *Silvestri*, 271 F.3d at 591)); *Velez*, 590 F. Supp. 2d at 258 (“The duty to preserve extends to giving notice if the evidence is in the hands of third-parties. . . . ‘If a party cannot fulfill this duty to preserve because he does not own or control the evidence, he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence.’” (quoting *Perez-Velasco v. Suzuki Motor Co. Ltd.*, 266 F. Supp. 2d 266, 268 (D.P.R. 2003))); see also *Goodman*, 632 F. Supp. 2d at 514 (stating a similar holding) (quoting *Silvestri*, 271 F.3d at 591); but see *Townsend v. Am. Insulated Panel Co.*, 174 F.R.D. 1, 5 (D. Mass. 1997) (“[A]bsent some . . . control over the evidence which is in the possession of a nonparty, the plaintiff is not under a duty to act [to preserve the evidence].”).

The *Goodman* court noted that “[w]hat is meant by ‘control,’ as used by *Silvestri* in the context of a spoliation claim, has yet to be fully defined.” *Goodman*, 632 F. Supp. 2d at 514. The *Goodman* court analogized to another case in which the court had analyzed the meaning of “control” in the context of a Rule 34 request for production, and explained that “Rule 34 ‘control’ would not require a party to have legal ownership or actual physical possession of any documents at issue,” and that “[i]nstead, documents are considered to be under a party’s control when that party has “the right, authority, or *practical ability* to obtain the documents from a non-party to the action.”” *Id.* at 515 (emphasis added) (quoting *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007)). The court noted, however, that the “practical ability” test has not been uniformly adopted:

In *Steele Software Sys., Corp. v. DataQuick Info. Sys., Inc.*, 237 F.R.D. 561 (D. Md. 2006), this Court adopted, by reference, the “practical ability” test when determining the scope of a party’s obligation to produce documents in response to a Rule 34 request. *Id.* at 564 (“Control has been construed broadly by the courts as the legal right, authority, or practical ability to obtain the materials sought on demand.”) (citations and internal quotation marks omitted). However, not all courts have accepted this test, *see Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1427 (7th Cir. 1993) (“[T]he fact that a party could obtain a document if it tried hard enough and maybe if it didn’t try hard at all does not mean that the document is in its possession, custody, or control; in fact, it means the opposite.”); *Bleecker v. Standard Fire Ins. Co.*, 130 F. Supp. 2d 726, 739 (E.D.N.C. 2000) (“Adopting the ‘ability to obtain’ test would usurp [the principles of Rule 34], allowing parties to obtain documents from non-parties who were in no way controlled by either party.”), and the contours of the practical ability test are still evolving. *See, e.g., In re Rudolfo Lozano*, 392 B.R. 48, 55–56 (Bankr. S.D.N.Y. 2008) (holding there is a practical ability to obtain documents “if the assignee of the original mortgagee, or the current loan servicer, can by custom or practice in the mortgage business informally request and obtain the original loan file, and any related documents, including a payment history”); *Ice Corp. v. Hamilton Sundstrand Corp.*, 245 F.R.D. 513, 521 (D. Kan. 2007) (finding a practical ability present when the defendants could “simply ask” or “employ their ‘right or ability to influence’” so as to gain documents); *Bank of N.Y. [v. Meridien Biao Bank Tanzania Ltd.]*, 171 F.R.D. [135, 149 (S.D.N.Y. 1997)] (holding there was a practical ability by defendant to obtain documents from third-party because “[the defendant] ha[d] been able to obtain documents from [the third-party] when it ha[d] requested them,” and the third-party readily cooperated with the defendant’s requests by searching for and turning over relevant documents from its files); *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138–39 (2d Cir. 2007) (suggesting a practical ability to obtain documents if a party “has access to them and can produce them”) (citing *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 530 (S.D.N.Y. 1996) (citations omitted)); *Synopsys, Inc. v. Ricoh Co.*, No. C-03-2289 MJJ (EMC), 2006 WL 1867529, at *2 (N.D. Cal. July 5, 2006) (finding defendant had practical ability to obtain documents because third-party agreed to be represented by defense counsel for purposes of discovery, and that the defendant was able to secure a search for documents in the third-party’s facility within three days); *Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 525 (S.D.N.Y. 1992) (holding there was a practical ability of plaintiff to obtain documents from third-party, because sub-license agreement provided the plaintiff the “right to cooperation” by the third-party, and that prior history of the case suggested such cooperation encompassed “production of documents and other assistance in conducting

discovery”). While the practical ability test may be useful in assessing a party’s obligations under Rule 34, the “control” test articulated by the *In re NTL, Inc. Securities Litigation* court appears to be more useful in determining the control required under *Silvestri* to trigger a party’s duty to preserve evidence.

Id. at 516 n.11 (all alterations, except the third and fourth, in original). Similarly, the *Victor Stanley* court noted a lack of uniformity across the circuits as to when documents are considered within a party’s control:

[P]arties must preserve potentially relevant evidence under their “control,” and in the Fourth Circuit and the Second Circuit, “documents are considered to be under a party’s control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action.” *Goodman*, 632 F. Supp. 2d at 515 (quoting *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007)). And, in this circuit, as well as the First and Sixth Circuits, the preservation duty applies not only when the evidence is in the party’s control; there is also a duty to notify the opposing party of evidence in the hands of third parties. *See Silvestri*, 271 F.3d at 590; *Velez v. Marriott PR Mgmt., Inc.*, 590 F. Supp. 2d 235, 258 (D.P.R. 2008); *Jain v. Memphis Shelby Airport Auth.*, No. 08-2119-STA-dkv, 2010 WL 711328, at *2 (W.D. Tenn. Feb. 25, 2010). In contrast, district courts in the Third, Fifth, and Ninth Circuits have held that the preservation duty exists only when the party controls the evidence, without extending that duty to evidence controlled by third parties. *Bensel v. Allied Pilots Ass’n*, 263 F.R.D. 150, 152 (D.N.J. 2009); *Rimkus*, 688 F. Supp. 2d at 615–16; *Melendres [v. Arpaio]*, No. CV-07-2513-PHX-GMS, 2010 WL 582189, at *4 [(D. Ariz. Feb. 12, 2010)]. So, what should a company that conducts business in the First, Second, Third, Fourth, Fifth, Sixth, and Ninth Circuits do to develop a preservation policy that complies with the inconsistent obligations imposed by these circuits? This is the question for which a suitable answer has proven elusive.

Victor Stanley, 2010 WL 3530097, at *25.

With respect to the format in which documents must be preserved, the *Zubulake IV* court noted that “[i]n recognition of the fact that there are many ways to manage electronic data, litigants are free to choose how this task [of retaining relevant documents (but not multiple identical copies)] is

accomplished.” *Zubulake IV*, 220 F.R.D. at 218.⁹ Another court declined to impose sanctions for a party’s failure to keep electronic documents in an accessible format, even after it anticipated litigation. See *Quinby v. WestLB AG (Quinby I)*, No. 07Civ-7406(WHP)(HBP), 2005 WL 3453908, at *8 n.10 (S.D.N.Y. Dec. 15, 2005) (“I am unaware of any case . . . that states that the duty to preserve electronic data includes a duty to keep the data in an accessible format. The cases plaintiff cites speak to the general proposition that a defendant has a duty to preserve evidence, but do not state that the evidence must be kept in a particular form. Based on this, I decline to sanction defendant for converting data from an accessible to inaccessible format, even if they should have anticipated litigation.” (internal citations omitted)); see also *Best Buy Stores, L.P. v. Developers Diversified Realty Corp., DDR GLH, LLC*, 247 F.R.D. 567, 570 (D. Minn. 2007) (concluding that the plaintiff did not have to maintain a database at a monthly cost of over \$27,000, absent specific discovery requests or additional facts suggesting that the database was of particular relevance to the litigation, even though Best Buy should have been on notice that some of the information in the database would be sought in discovery, explaining that “by downgrading the database, Best Buy did not destroy the information it contained but rather removed it from a searchable format”);¹⁰ *Quinby*

⁹ The court explained:

For example, a litigant could choose to retain all then-existing backup tapes for the relevant personnel (if such tapes store data by individual or the contents can be identified in good faith and through reasonable effort), and to catalog any later-created documents in a separate electronic file. That, along with a mirror-image of the computer system taken at the time the duty to preserve attaches (to preserve documents in the state they existed at that time), creates a complete set of relevant documents. Presumably there are a multitude of other ways to achieve the same result.

Zubulake IV, 220 F.R.D. at 218.

¹⁰ The court concluded that because Best Buy did not have a duty to preserve the database, it was not obligated

v. WestLB AG (Quinby II), 245 F.R.D. 94, 104 (S.D.N.Y. 2006) (“This conclusion [that a party need not preserve data in an accessible format] ensures that in complying with a duty to preserve evidence, a party will be free to preserve electronic evidence in any format it chooses, including inaccessible formats. Preservation of data, even in an inaccessible form, will not result in spoliation because the responding party will be able to produce the electronic evidence by restoring it from an inaccessible format, albeit at a higher cost.”). However, another court within the same district as the *Quinby* court subsequently disagreed with the conclusion that making data inaccessible is compatible with preservation:

One of my colleagues recently declined to sanction a party for converting data to an inaccessible format, taking the position that there is no obligation to preserve electronic data in an accessible form, even when litigation is anticipated. *See Quinby v. Westlab AG [(Quinby I)]*, No. 04 Civ. 7406, 2005 WL 3453908, at *8 n. 10 (S.D.N.Y. Dec. 15, 2005). I respectfully disagree. The Second Circuit has held that conduct that hinders access to relevant information is sanctionable, even if it does not result in the loss or destruction of evidence. *See Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 110 (2d Cir. 2002). Accordingly, permitting the downgrading of data to a less accessible form—which systematically hinders future discovery by making the recovery of the information more costly and burdensome—is a violation of the preservation obligation.

Treppel v. Biovail, 233 F.R.D. 363, 372 n.4 (S.D.N.Y. 2006).¹¹

to restore the information to a searchable format unless the defendants established good cause. *Best Buy Stores*, 247 F.R.D. at 570–71.

¹¹ In *Quinby II*, the court countered that the *Residential Funding* court addressed only the proper standards for giving an adverse inference instruction against a party that failed to produce emails sufficiently in advance of trial, but “did not hold that sanctions were appropriate for downgrading into an inaccessible format electronic evidence that was subject to a litigation hold.” *Quinby II*, 245 F.R.D. at 103 n.12. The court concluded that “if, as *Residential Funding* implies, any document storage practice that makes the recovery of documents more burdensome constitutes a violation of the preservation obligation, then a whole range of document storage practices, such as off-site storage in ‘dead’ files, microfilming and digital imaging, would violate the preservation obligation because these practices also increase the burden of retrieving documents.” *Id.* The court concluded that “construing the preservation obligation this broadly is inappropriate because it creates the potential for punishing routine business practices that do not destroy documents or alter them in any

The case law also recognizes the element proposed by the e-discovery panel that a person whose duty to preserve has been triggered must act reasonably in the circumstances. See *Victor Stanley*, 2010 WL 3530097, at *24 (“Proper analysis requires the Court to determine reasonableness under the circumstances—‘reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation.’” (quoting THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION ii (2d ed. 2007), available at <http://www.thesedonaconference.org/content/miscFiles/> (follow link))); *id.* at *26 (“Breach of the preservation duty, also, is premised on reasonableness: A party breaches its duty to preserve relevant evidence if it fails to act reasonably by taking ‘positive action to preserve material evidence.’” (quoting *Jones*, 2010 WL 2106640, at *6)); *Jones*, 2010 WL 2106640, at *6 (“A party fulfills its duty to preserve evidence if it acts reasonably. ‘More than good intentions [are] required; those intentions [must] be followed up with concrete actions reasonably calculated to ensure that relevant materials will be preserved,’ such as giving out specific criteria on what should or should not be saved for litigation.” (alterations in original) (internal citations and footnotes omitted)); *Rimkus*, 688 F. Supp. 2d at 613 (“Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional*

material sense.” *Id.* The court stated that “if a party creates its own burden by converting into an inaccessible format data that it should have reasonably foreseen would be discoverable material at a time when it should have anticipated litigation, then it should not be entitled to shift the costs of restoring and searching the data.” *Id.* at 104. The court concluded that “[t]his would permit parties to maintain data in whatever format they choose, but discourage them from converting evidence to inaccessible formats because the party responsible for the conversion will bear the cost of restoring the data.” *Id.* However, “[i]f, on the other hand, it is not reasonably foreseeable that the particular evidence in issue will have to be produced, the responding party who converts the evidence into an inaccessible format after the duty to preserve evidence arose may still seek to shift the costs associated with restoring and searching for relevant evidence.” *Id.* at 105.

to that case and consistent with clearly established applicable standards.” (citing THE SEDONA PRINCIPLES: SECOND EDITION, BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 17 cmt. 2.b. (2007)); *Zubulake V*, 229 F.R.D. at 433 (noting that “[a]bove all, the requirement [that counsel ensure preservation] must be reasonable”); *Miller v. Holzmann*, No. 95-01231 (RCL/JMF), 2007 WL 172327, at *6 (D.D.C. Jan. 17, 2007) (““The obligation to preserve electronic data and documents requires *reasonable and good faith efforts* to retain information that may be relevant to pending or threatened litigation.”” (emphasis added) (quoting THE SEDONA CONFERENCE, BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 44 (2004 Annotated Version))); *Consol. Aluminum*, 244 F.R.D. at 345 n.18 (“The obligation to preserve electronic data and documents requires *reasonable and good faith efforts* to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data.” (emphasis added) (citing THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (Sept. 2005))).

The *Rimkus* court explained that the “analysis depends heavily on the facts and circumstances of each case and cannot be reduced to a generalized checklist of what is acceptable or unacceptable.” *Rimkus*, 688 F. Supp. 2d at 613 (citing *Pension Comm.*, 685 F. Supp. 2d at 464–65). And the *Victor Stanley* court explained that “the duty to preserve evidence should not be analyzed in absolute terms; it requires nuance, because the duty “cannot be defined with precision.”” *Victor Stanley*, 2010 WL 3530097, at *24 (quoting *Grimm et al.*, 37 U. BALT. L. REV. at 393). The *Victor Stanley* court emphasized that the focus should be on both what is reasonable under the circumstances and what

is proportional to the case:

Thus, “[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards.” . . . “Put another way, ‘the scope of preservation should somehow be proportional to the amount in controversy and the costs and burdens of preservation.’” Although, with few exceptions, such as the recent and highly instructive *Rimkus* decision, courts have tended to overlook the importance of proportionality in determining whether a party has complied with its duty to preserve evidence in a particular case, this should not be the case because Fed. R. Civ. P. 26(b)(2)(C) cautions that all permissible discovery must be measured against the yardstick of proportionality. Moreover, the permissible scope of discovery as set forth in Rule 26(b) includes a proportionality component of sorts with respect to discovery of ESI, because Rule 26(b)(2)(B) permits a party to refuse to produce ESI if it is not reasonably accessible without undue burden and expense. Similarly, Rule 26(g)(1)(B)(iii) requires all parties seeking discovery to certify that the request is “neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, the amount in controversy, and the importance of the issues at stake in the action.” Thus, assessment of reasonableness and proportionality should be at the forefront of all inquiries into whether a party has fulfilled its duty to preserve relevant evidence. *Jones*, 2010 WL 2106640, at *6–7 (“[R]easonableness is the key to determining whether or not a party breached its duty to preserve evidence.”).

Id. (alterations in original) (internal citations and footnote omitted).

III. Duration

A. E-Discovery Panel’s Proposal

The rule should specify how long the information or tangible things must be preserved, but should explicitly provide that the rule does not supersede any statute or regulation.

B. Case Law on the Duration Element

“The duty to preserve discoverable information persists throughout the discovery process; a litigant must ensure that all potentially relevant evidence is retained.” *Richard Green*, 262 F.R.D. at 289 (citing *Zubulake V*, 229 F.R.D. at 433; FED. R. CIV. P. 26(e)); *see also Schlumberger*, 2009

WL 5252644, at *7 (“Defendant’s preservation duty extends throughout the case and the fact that Plaintiff did not request to inspect or sample the [evidence] at the start of the litigation does not give Defendant the ability to dispose of evidence.”). However, “[t]he Second Circuit has made clear that the obligation to preserve may not continue indefinitely, and, where the defendant fails to ask to inspect the evidence at issue, the defendant may not later seek sanctions for spoliation from the court.” *Wade v. Tiffin MotorHomes, Inc.*, 686 F. Supp. 2d 174, 194 n.17 (N.D.N.Y. 2009) (citing *Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc.*, 473 F.3d 450, 458 (2d Cir. 2007)); *see also Townes ex rel. Estate of Townes v. Cove Haven, Inc.*, No. 00 CV 5603 (RCC), 2003 WL 22861921, at *4 (S.D.N.Y. Dec. 2, 2003) (noting that “[t]he scope of the duty to preserve evidence is not boundless,” and “[a] potential spoliator need do only what is reasonable,” and concluding that the defendants’ preservation of the pool at issue for two years after the accident and one year after the filing of the complaint afforded the plaintiff a reasonable opportunity to inspect it). There appears to be some disagreement in the case law as to whether the duty to preserve extends throughout the litigation even if the opposing party makes no attempt to inspect the evidence.

IV. Ongoing Duty

A. E-Discovery Panel’s Proposal

The rule should specify whether the duty to preserve extends to information generated after the duty has accrued.

B. Case Law on the Ongoing Duty Element

Courts recognize that the duty to preserve continues after it is initially triggered. *See, e.g., Cache*, 244 F.R.D. at 629 (“A party must ensure that relevant information is retained on a continuing basis once the preservation obligation arises.” (citing *Zubulake V*, 229 F.R.D. at 431)); *id.* at 630

(“While instituting a ‘litigation hold’ may be an important first step in the discovery process, the obligation to conduct a reasonable search for responsive documents continues throughout the litigation. A ‘litigation hold,’ without more, will not suffice to satisfy the ‘reasonable inquiry’ requirement in Rule 26(g)(2). Counsel retains an ongoing responsibility to take appropriate measures to ensure that the client has provided all available information and documents which are responsive to discovery requests.” (internal citation to FED. R. CIV. P. 26(e)(2) omitted)); *Zubulake V*, 229 F.R.D. at 433 (“The *continuing* duty to supplement disclosures strongly suggests that parties also have a duty to make sure that discoverable information is not lost. Indeed, the notion of a ‘duty to preserve’ connotes an ongoing obligation.”).

V. Litigation Hold

A. E-Discovery Panel’s Proposal

The rule should provide that if an organization whose duty has been triggered prepares and disseminates a litigation hold notice, that is evidence of due care on the part of the organization. If the rule requires issuance of a litigation hold, it should include an out like that in Rule 37(c)(1) excusing (for sanctions purposes) a failure that was substantially justified or is harmless.

B. Case Law on the Litigation Hold Element

The case law generally recognizes that once a party’s duty to preserve is triggered, it must implement a litigation hold. *See, e.g., Pension Comm.*, 685 F. Supp. 2d at 466 (“[O]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” (alteration in original) (quoting *Treppel v. Biovail Corp.*, 249 F.R.D. 111, 118 (S.D.N.Y. 2008) (quoting *Zubulake IV*, 220 F.R.D. at 218))); *see also Consol. Edison*, 90 Fed. Cl. at 256 (same) (quoting *Adorno v. Port*

Auth. of N.Y. & N.J., 258 F.R.D. 217, 227 (S.D.N.Y. 2009)); *Crown Castle*, 2010 WL 1286366, at *10 (similar) (citation omitted); *Richard Green*, 262 F.R.D. at 289 (same) (citing *Zubulake V*, 229 F.R.D. at 431); *Major Tours, Inc. v. Colorel*, No. 05-3091 (JBS/JS), 2009 WL 2413631, at *2 (D.N.J. Aug. 4, 2009) (same) (citing *Zubulake IV*, 220 F.R.D. at 218); *Goodman*, 632 F. Supp. 2d at 511 (same) (citing *Thompson v. U.S. Dep't of Housing & Urban Dev.*, 219 F.R.D. 93, 100 (D. Md. 2003)); *Micron Tech.*, 255 F.R.D. at 148 (same) (quoting *Zubulake IV*, 220 F.R.D. at 218); *Consol. Aluminum*, 244 F.R.D. at 342 (same) (citing *Zubulake IV*, 220 F.R.D. at 218); *cf. Bd. of Regents of Univ. of Neb.*, 2007 WL 3342423, at *4 (“At a minimum, . . . counsel must direct the client to ensure that documents are preserved, not deleted from an electronically stored information system or otherwise destroyed or made unavailable. Failure to do so has been found to be ‘grossly negligent.’” (citing *Zubulake IV*, 220 F.R.D. at 221)); *but see Victor Stanley*, 2010 WL 3530097, at *25 (noting that a litigation hold is generally required once the duty to preserve is triggered, but that “a litigation hold might not be necessary under certain circumstances, and reasonableness is still a consideration.” (citations omitted)); *Jones*, 2010 WL 2106640, at *6 (“In the Northern District of Illinois, a party’s failure to issue a litigation hold is not per se evidence that the party breached its duty to preserve evidence. Instead, reasonableness is the key” (internal citation and footnote omitted));¹² *Kmart*, 371 B.R. at 847 (“[W]hile failure to implement a litigation hold does not necessarily give rise to sanctions for spoliation of evidence, it is at least ‘relevant’ to the spoliation

¹² The *Jones* court distinguished another case that had “found that, in certain cases, a defendant’s failure to issue a litigation hold at the start of a case would not, standing alone, be a breach of the duty to preserve documents,” noting that the defendant in that case was a party in approximately 800 pending lawsuits and in those circumstances “[i]mposing a broad litigation hold in each case could cause an undue burden to the [party].” *Jones*, 2010 WL 2106640, at *7 (citing *Haynes v. Dart*, No. 08 C 4834, 2010 WL 140387, at *4 (N.D. Ill. Jan. 11, 2010)). In contrast, in the *Jones* case, the court found that there was “no evidence that a simple litigation hold to preserve existing electronic mail would have placed any burden on defendant.” *Id.*

inquiry . . .”).

The hold must require employees to preserve both electronic and paper documents and create a mechanism for collecting the documents so they can be searched. *See Pension Comm.*, 685 F. Supp. 2d at 473 (disapproving of a litigation hold instruction that did “not direct employees to *preserve* all relevant records—both paper and electronic—[and that did not] create a mechanism for *collecting* the preserved records so that they can be searched by someone other than the employee” (footnote omitted)); *see also Consol. Edison*, 90 Fed. Cl. at 257 (“[T]he obligation to retain discoverable materials is an affirmative one; it requires that the agency or corporate officers having notice of discovery obligations communicate those obligations to employees in possession of discoverable materials.” (quoting *Dong Ah Tire & Rubber Co.*, 2008 WL 4298331, at *3)); *Kmart*, 371 B.R. at 846 (“As a large corporation, Bank One can only discharge its duty by: 1) creating a ‘comprehensive’ document retention policy that will ensure that relevant documents are retained . . . and 2) disseminating that policy to its employees.” (quoting *Larson v. Bank One Corp.*, No. 00 C 2100, 2005 WL 4652509, at *8 (N.D. Ill. Aug. 18, 2005))).

The case law emphasizes that after a litigation hold is instituted, a party should not rely on its employees to determine what documents are relevant to the litigation. *See Jones*, 2010 WL 2106640, at *7 (“It is unreasonable to allow a party’s interested employees to make the decision about the relevance of such documents, especially when those same employees have the ability to permanently delete unfavorable email from a party’s system.”); *Pension Comm.*, 685 F. Supp. 2d at 473 (disapproving of a litigation hold instruction that “place[d] total reliance on the employee to search and select what that employee believed to be responsive records without any supervision from Counsel” (footnote omitted)); *Richard Green*, 262 F.R.D. at 289 (“Once a ‘litigation hold’ is in

place, a party *and her counsel* must make certain that all sources of potentially relevant information are identified and placed ‘on hold’’ Then, ‘[c]ounsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.’” (emphasis added) (internal citation omitted) (citing *Zubulake V*, 229 F.R.D. at 432)); *Major Tours*, 2009 WL 2413631, at *2 (“[A] party’s discovery obligations do not end with the implementation of a litigation hold. *Counsel must oversee compliance* with the litigation hold, monitoring the party’s efforts to retain and produce relevant documents.” (emphasis added) (internal citation omitted) (citing *Zubulake V*, 229 F.R.D. at 432)); *Bd. of Regents of Univ. of Neb.*, 2007 WL 3342423, at *5 (“When faced with responding to a request for the production of documents, *counsel are required to direct the conduct of a thorough search* for responsive documents with due diligence and ensure all responsive documents under the ‘custody or control’ of the client, unless protected from discovery, are produced.” (emphasis added) (citing FED. R. CIV. P. 34)); *Cache*, 244 F.R.D. at 627–28 (“Certainly, ‘once a ‘litigation hold’ in place, a party *and her counsel* must make certain that all sources of potentially relevant information are identified and placed ‘on hold.’” (emphasis added) (quoting *Zubulake V*, 229 F.R.D. at 432));¹³ *id.* at 629 (“[C]ounsel cannot turn a blind eye to a procedure that he or she should realize will adversely impact that search.”);¹⁴ *In re NTL, Inc., Sec. Litig.*, 244 F.R.D.

¹³ In *Cache*, the court noted that the *Zubulake* court had recognized that it might not be possible for counsel to speak to every key player and had suggested the alternative of running a systemwide keyword search to find responsive materials. *Cache*, 244 F.R.D. at 628 (citing *Zubulake V*, 229 F.R.D. at 432). But the *Cache* court did “not interpret Judge Scheindlin’s suggestion as establishing an immutable ‘obligation,’” explaining that “in the typical case, ‘[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronic data and documents.’” *Id.* (alteration in original) (quoting THE SEDONA PRINCIPLES: BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (Sedona Conference Working Group Series July 2005)).

¹⁴ In *Cache*, the court detailed counsel’s failure to properly monitor employees’ collection of documents:

at 194 (“Although NTL sent out hold memos in March and June 2002 . . . , those hold memos were not sufficient, since they were ignored by both NTLs.” (citing *Zubulake V*, 229 F.R.D. at 432)); *Zubulake V*, 229 F.R.D. at 432 (“In short, it is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.”);¹⁵ *Danis*, 2000 WL 1694325, at *32 (“The duty to preserve documents in

Land O’Lakes directed employees to produce all relevant information, and then relied upon those same employees to exercise their discretion in determining what specific information to save. As Mr. Janzen said repeatedly, he and outside counsel simply accepted whatever documents or information might be produced by Land O’Lakes employees. Yet here, counsel was aware that an accessible source of information (i.e., computer hard drives used by departed employees) was being eliminated as a routine practice, thereby further distancing counsel from the discovery process and his monitoring obligations. By wiping clean the computer hard drives of former employees who worked on the PROFILE project, Land O’Lakes effectively eliminated a readily accessible source of potentially relevant information. This procedure is all the more questionable given [counsel’s] understanding that Land O’Lakes did not keep backup tapes for computer hard drives for more than ten days. Once a “litigation hold” has been established, a party cannot continue a routine procedure that effectively ensures that potentially relevant and readily available information is no longer “reasonably accessible” under Rule 26(b)(2)(B).

244 F.R.D. at 629. The court explained that counsel was required to oversee the litigation hold and make sure it was properly implemented:

In this case, Land O’Lakes’s General Counsel and retained counsel failed in many respects to discharge their obligations to coordinate and oversee discovery. Admittedly, in-house counsel established a litigation hold shortly after the lawsuit commenced and communicated that fact to Land O’Lakes employees who were believed to possess relevant materials. However, by his own admission, Land O’Lakes’ General Counsel took no independent action to verify the completeness of the employees’ document production.

Id. at 630.

¹⁵ In *Zubulake V*, the court suggested that counsel follow the following procedures to ensure the client’s

the face of pending litigation is not a passive obligation. Rather, it must be discharged actively: ‘The obligation to preserve documents that are potentially discoverable materials is an affirmative one that rests squarely on the shoulders of senior corporate officers.’” (quoting *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598, 615 (D.N.J. 1997))).

Although most case law requires implementing a litigation hold once the duty to preserve is triggered, a litigation hold may not be sufficient on its own to show that the party acted with due care, particularly if the implementation of the hold is not properly supervised by the party and its counsel. *See Cache*, 244 F.R.D. at 630 (noting that although the party implemented a litigation hold shortly after litigation was commenced, counsel did not properly supervise whether the hold led to complete document production). In addition, “courts differ in the fault they assign when a party fails to implement a litigation hold.” *Victor Stanley*, 2010 WL 3530097, at *25 (*comparing Pension Comm.*, 685 F. Supp. 2d at 466 (“stating that failure to implement a written litigation hold is gross negligence

preservation of relevant documents:

In particular, once the duty to preserve attaches, counsel must identify sources of discoverable information. This will usually entail speaking directly with the key players in the litigation, as well as the client’s information technology personnel. In addition, when the duty to preserve attaches, counsel must put in place a litigation hold and make that known to all relevant employees by communicating with them directly. The litigation hold instructions must be reiterated regularly and compliance must be monitored. Counsel must also call for employees to produce copies of relevant electronic evidence, and must arrange for the segregation and safeguarding of any archival media (*e.g.*, backup tapes) that the party has a duty to preserve.

Once counsel takes these steps (or once a court order is in place), a party is fully on notice of its discovery obligations. If a party acts contrary to counsel’s instructions or to a court’s order, it acts at its own peril.

Zubulake V, 229 F.R.D. at 439.

per se”) with *Haynes v. Dart*, No. 08 C 4834, 2010 WL 140387, at *4 (N.D. Ill. Jan. 11, 2010) (“The failure to institute a document retention policy, in the form of a litigation hold, is relevant to the court’s consideration, but it is not *per se* evidence of sanctionable conduct.”)).

VI. Work Product

A. E-Discovery Panel’s Proposal

The rule should specify whether, or to what extent, actions taken in furtherance of the preservation duty are protected by work product (or privilege).

B. Case Law on the Work Product Element

“As a general matter hold letters are not discoverable, particularly when a party has made an adequate showing that the letters include material protected under attorney-client privilege or the work-product doctrine.” *Major Tours*, 2009 WL 2413631, at *2 (citations omitted). However, “[d]espite the fact that plaintiffs typically do not have the automatic right to obtain copies of a defendant’s litigation hold letters, plaintiffs are entitled to know which categories of electronic storage information employees were instructed to preserve and collect, and what specific actions they were instructed to undertake to that end.” *Id.* (citation omitted). “Although in general hold letters are privileged, the prevailing view . . . is that when spoliation occurs the letters are discoverable.”¹⁶ *Id.* (footnote and citations omitted).

VII. Consequences/Procedures

A. E-Discovery Panel’s Proposal

The rule should set forth the consequences of failing to fulfill the responsibilities it mandates,

¹⁶ The court noted that the Third Circuit had not ruled on this issue, but that “most applicable authority from around the country provides that litigation hold letters should be produced if there has been a preliminary showing of spoliation.” *Major Tours*, 2009 WL 2413631, at *5.

and the obligations of the complainant/failing party.

- a. Sanctions for noncompliance resulting in prejudice to the requesting party should be specified (*e.g.*, FED. R. CIV. P. 37).
 - i. The rule should apply different sanctions depending on the state of mind of the offender. (The state of mind necessary to warrant each identified sanction should be specified.)
 - ii. Certain conduct that presumptively satisfies the requisite state of mind should be specified (*e.g.*, failure to issue a litigation hold = negligence or gross negligence)
- b. A model jury instruction for adverse inference or other jury-specific sanctions should be drafted.
- c. Compliance with the rule should insulate a responding party from sanctions for failure to preserve.
- d. The complainant should be obliged to raise the failure with a judicial officer promptly after it has learned of the alleged spoliation and has assessed the prejudice it has suffered as a result.
- e. Identify the elements that the complainant must specify, such as:
 - i. The information or tangible things lost.
 - ii. Its relevance (specifying the standard (*e.g.*, 401, 26(b)(1), admissibility, discoverability)).
 - iii. The prejudice suffered.
- f. The rule should address burden of proof issues.

B. Case Law on the Consequences/Procedures Element

1. Authority/Purpose

A court may impose sanctions for spoliation under its inherent authority or under rule or statute. *See, e.g., Consol. Edison*, 90 Fed. Cl. at 254 (“Sanctions for spoliation arise out of the court’s inherent power “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of

cases.[’]” (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)); *Rimkus*, 688 F. Supp. 2d at 611 (“Allegations of spoliation, including the destruction of evidence in pending or reasonably foreseeable litigation, are addressed in federal courts through the inherent power to regulate the litigation process if the conduct occurs before a case is filed or if, for another reason, there is no statute or rule that adequately addresses the conduct.” (citing *Chambers*, 501 U.S. at 43–46; *Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1408 (5th Cir. 1993)); *Richard Green*, 262 F.R.D. at 288 (noting that a court’s authority to impose spoliation sanctions derives from at least two sources, including Rule 37 for violation of a court order and a court’s inherent authority); *Goodman*, 632 F. Supp. 2d at 505–06 (“Under federal law, a court’s authority to levy sanctions on a spoliator ultimately derives from two main sources. First, there is the ‘court’s inherent power to control the judicial process and litigation, a power that is necessary to redress conduct ‘which abuses the judicial process.’” Second, if the spoliation violates a specific court order or disrupts the court’s discovery plan, sanctions also may be imposed under FED. R. CIV. P. 37.” (internal citations omitted)); *Asher Assocs.*, 2009 WL 1328483, at *5 (“Plaintiffs correctly note that the court has inherent power to impose sanctions for the destruction or loss of evidence.” (citations omitted)); *Nucor*, 251 F.R.D. at 194 (“The court’s ability to impose sanctions for spoliation stems from its ‘inherent power to control the judicial process and litigation,’” but “‘is limited to that necessary to redress conduct ‘which abuses the judicial process.’” (quoting *Silvestri*, 271 F.3d at 590)); *Kmart*, 371 B.R. at 839 (“A court’s authority to impose sanctions for a party’s failure to preserve or to produce documents is both inherent and statutory.” (citations omitted)). However, “[i]f an applicable statute or rule can adequately sanction the conduct, that statute or rule should ordinarily be applied, with its attendant limits, rather than a more flexible or expansive ‘inherent power.’” *Rimkus*, 688 F. Supp. 2d at 611

(citations omitted); *see also Victor Stanley*, 2010 WL 3530097, at *19 (“[T]he court relies instead on statutory authority when applicable.” (citation omitted)). “When inherent power does apply, it is ‘interpreted narrowly, and its reach is limited by its ultimate source—the court’s need to orderly and expeditiously perform its duties.’” *Rimkus*, 688 F. Supp. 2d at 611 (quoting *Newby v. Enron Corp.*, 302 F.3d 295, 302 (5th Cir. 2002) (footnote omitted)). The *Rimkus* court pointed out that “[i]f inherent power, rather than a specific rule or statute, provides the source of the sanctioning authority, under *Chambers*, it may be limited to a degree of culpability greater than negligence.” *Id.*; *see also Victor Stanley*, 2010 WL 3530097, at *19 (“[T]he court’s inherent authority only may be exercised to sanction ‘bad-faith conduct,’ and ‘must be exercised with restraint and discretion.’” (second alteration in original) (internal citation to *Chambers*, 501 U.S. at 50, omitted)).

Potential sanctions for spoliation include “from least harsh to most harsh—further discovery, cost-shifting, fines, special jury instructions, preclusion, and the entry of default judgment or dismissal (terminating sanctions).” *Pension Comm.*, 685 F. Supp. 2d at 469 (footnotes omitted). “Pursuant to their inherent authority, courts may impose fines or prison sentences for contempt and enforce ‘the observance of order.’ Additionally, they may ‘prevent undue delays in the disposition of pending cases and . . . avoid congestion in the calendars of the District Courts,’ such as by dismissing a case.” *Victor Stanley*, 2010 WL 3530097, at *19 (internal citation omitted).¹⁷ “In addition, a court has statutory authority to impose costs, expenses, and attorneys’ fees on ‘any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously.’” *Rimkus*, 688 F. Supp. 2d at

¹⁷ The *Victor Stanley* court ordered that as a sanction for spoliation, the defendant be held in contempt of court and imprisoned for up to two years, unless he paid the plaintiff’s attorneys’ fees and costs associated with the filing of the spoliation motion and the efforts throughout to the case to demonstrate the defendant’s spoliation. *See Victor Stanley*, 2010 WL 3530097, at *44.

612 (quoting 28 U.S.C. § 1927). “Sanctions may be imposed ‘on an attorney, a party, or both.’” *Richard Green*, 262 F.R.D. at 288 (citation omitted).

“Whether proceeding under Rule 37 of the Federal Rules of Civil Procedure or a court’s inherent powers, the ‘analysis is essentially the same.’” *Kmart*, 371 B.R. at 839 (citations omitted). However, “[w]hen seeking sanctions under subdivision (b) of Rule 37 (as opposed to other subdivisions of that rule), violation of a court order or discovery ruling of some sort is a prerequisite.” *Id.* (citation omitted). “Courts have broadly interpreted what constitutes an ‘order’ for purposes of imposing sanctions [under Rule 37(b)].” *Id.* (citations omitted); *cf. Victor Stanley*, 2010 WL 3530097, at *21 (concluding that the court had “authority to impose Rule 37(b)(2) sanctions, if otherwise appropriate, for violations of a Court-issued preservation order, even if that order d[id] not actually order the actual production of the evidence to be preserved.”).

The courts have recognized several purposes for implementing spoliation sanctions:

If spoliation has occurred, the court should design sanctions “to: (1) deter parties from engaging in spoliation; (2) place the risk of erroneous judgment on the party who wrongfully created the risk; and (3) restore ‘the prejudiced party to the same position he [or she] would have been in absent the wrongful destruction of evidence by the opposing party.’”

Consol. Edison, 90 Fed. Cl. at 257 (alteration in original) (quoting *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999)); *accord Crown Castle*, 2010 WL 1286366, at *16 (quoting *West*, 167 F.3d at 779); *Pension Comm.*, 685 F. Supp. 2d at 469; *Wade*, 686 F. Supp. 2d at 196 (quoting *West*, 167 F.3d at 779); *Arista Records*, 608 F. Supp. 2d at 442 (quoting *West*, 167 F.3d at 779); *see also Richard Green*, 262 F.R.D. at 288 (“[A]ny ‘applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine.’” (citing *West*, 167 F.3d at 779; *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)));

Keithley, 2008 WL 4830752, at *7 (“The policies underlying the spoliation sanctions are many: ‘to punish the spoliator, so as to ensure that it does not benefit from its misdeeds; to deter future misconduct; to remedy, or at least minimize, the evidentiary or financial damages caused by the spoliation; and last, but not least, to preserve the integrity of the judicial process and its truth-seeking function.’” (quoting *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 264 (2007))); *Danis*, 2000 WL 1694325, at *31 (“In general, sanctions are intended to serve one or more of the following purposes: (1) to ameliorate the prejudice caused to an innocent party by a discovery violation; (2) to punish the party who violates his or her obligations; and/or (3) to deter others from committing like violations.” (citation omitted)); *Kmart*, 371 B.R. at 840 (“Sanctions are generally intended to serve the following purposes: (1) amelioration of prejudice; (2) punishment; and/or (3) deterrence.” (citations omitted)). Another court has explained that courts should seek to impose a sanction that accomplishes the following objectives:

- (1) penalize[s] those whose conduct may be deemed to warrant such a sanction;
- (2) deter[s] parties from engaging in the sanctioned conduct;
- (3) place[s] the risk of an erroneous judgment on the party who wrongfully created the risk; and
- (4) restore[s] the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.

United States v. Maxxam, Inc., No. C-06-07497 CW (JCS), 2009 WL 817264, at *8 (N.D. Cal. Mar. 27, 2009) (quotation marks omitted) (quoting *Advantacare Health Partners L.P. v. Access IV*, No. C 03-04496 JF, 2004 WL 1837997, at *3 (N.D. Cal. Aug. 17, 2004)). “Because . . . the duty to preserve relevant evidence is owed to the court, it is also appropriate for a court to consider whether the sanctions it imposes will ‘prevent abuses of the judicial system’ and ‘promote the least harsh sanction that can provide an adequate remedy.’” *Victor Stanley*, 2010 WL 3530097, at *37 (quoting *Pension Comm.*, 685 F. Supp. 2d at 469; citing *Rimkus*, 688 F. Supp. 2d at 618).

2. Case-by-Case Determination

The courts have emphasized that the determination of the appropriate sanction is within the district court's discretion and that it should be made on a case-by-case basis. *See Crown Castle*, 2010 WL 1286366, at *16 (“The determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the trial judge, and is assessed on a case-by-case basis.” (quoting *Fujitsu*, 247 F.3d at 436)); *Pension Comm.*, 685 F. Supp. 2d at 469 (same) (quoting *Fujitsu*, 247 F.3d at 436); *Richard Green*, 262 F.R.D. at 288 (same) (quoting *Zubulake V*, 229 F.R.D. at 430); *Consol. Aluminum*, 244 F.R.D. at 339 (same) (citing *Zubulake IV*, 220 F.R.D. at 216); *Kmart*, 371 B.R. at 840 (“Courts have broad discretion to select the appropriate sanction for a discovery violation in light of the unique factual circumstances of the case.” (citations omitted)).

The *Pension Committee* court emphasized that “at the end of the day the judgment call of whether to award sanctions is inherently subjective,” based on the court’s “‘gut reaction’ based on years of experience as to whether a litigant has complied with its discovery obligations and how hard it worked to comply.” *Id.* at 471. The court stated that “while it would be helpful to develop a list of relevant criteria a court should review in evaluating discovery conduct, these inquiries are inherently fact intensive and must be reviewed case by case.” *Id.* Similarly, in *Rimkus*, the court explained that it would be difficult to come up with a detailed approach to sanctions that would apply in every case:

Applying a categorical approach to sanctions issues is also difficult Determining whether sanctions are warranted and, if so, what they should include, requires a court to consider both the spoliating party’s culpability and the level of prejudice to the party seeking discovery. Culpability can range along a continuum from destruction intended to make evidence unavailable in litigation to inadvertent loss of information for reasons unrelated to the litigation. Prejudice can range along a continuum from an inability to prove claims or defenses to little or no impact on the

presentation of proof. A court's response to the loss of evidence depends on both the degree of culpability and the extent of prejudice. Even if there is intentional destruction of potentially relevant evidence, if there is no prejudice to the opposing party, that influences the sanctions consequence. And even if there is an inadvertent loss of evidence but severe prejudice to the opposing party, that too will influence the appropriate response, recognizing that sanctions (as opposed to other remedial steps) require some degree of culpability.

Rimkus, 688 F. Supp. 2d at 613.

In *Rimkus*, the court noted that “[c]ourts . . . agree that the severity of a sanction for failing to preserve when a duty to do so has arisen must be proportionate to the culpability involved and the prejudice that results.” 688 F. Supp. 2d at 618; *see also Richard Green*, 262 F.R.D. at 288 (“[T]he severity of the sanctions imposed should be congruent with the destroyer’s degree of culpability.” (citations omitted)); *Consol. Aluminum*, 244 F.R.D. at 340 (“[T]he seriousness of the sanctions imposed by a court as a result of spoliation of evidence depends upon: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party.” (citation omitted));¹⁸ *Asher Assocs.*, 2009 WL 1328483, at *10 (“In striving to ‘level the playing field,’ there must be some reasonable relationship between the sanction imposed and the prejudice actually suffered by the moving party.” (citations omitted)); *Keithley*, 2008 WL 4830752, at *2 (“[T]he judge should take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms.” (quoting *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 395 (1st Cir. 1990))); *Danis*, 2000 WL 1694325, at *31 (“Any sanction leveled must adhere to ‘the norm of proportionality’” (omission in original) (quoting *Newman v. Metro. Pier & Exposition Auth.*,

¹⁸ *See also Micron*, 255 F.R.D. at 149 (identifying the same three factors as the key considerations in determining whether spoliation sanctions are warranted).

962 F.2d 589, 591 (7th Cir. 1992)); *id.* (“The Seventh Circuit has directed that any sanctions rendered be proportionate to the offending conduct” (citing *United States v. Golden Elevator, Inc.*, 27 F.3d 301, 303 (7th Cir. 1994); *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376, 1382 (7th Cir. 1993)); *Kmart*, 371 B.R. at 840 (“[T]he Seventh Circuit has cautioned that sanctions must be proportionate to the offending conduct.” (citation omitted)). The *Rimkus* court also noted that sanctions “should be no harsher than necessary to respond to the need to punish or deter and to address the impact on discovery.” 688 F. Supp. 2d at 618 (footnote omitted); *see also Jones*, 2010 WL 2106640, at *5 (“If the court finds that sanctions are appropriate, it must determine whether the proposed sanction can ameliorate the prejudice that arose from the breach; if a lesser sanction can accomplish the same goal, the Court must award the lesser sanction.” (citation omitted)); *Pension Comm.*, 685 F. Supp. 2d at 469 (“[A] court should always impose the least harsh sanction that can provide an adequate remedy.”); *but see Danis*, 2000 WL 1694325, at *31 (“Nor must a court select the ‘least drastic’ or ‘most reasonable’ sanction. Dismissal or default, although harsh, may be appropriate so long as ‘the sanction selected [is] one that a reasonable jurist, appri[s]ed of all the circumstances, would have chosen as proportionate to the infraction.’” (alteration in original) (internal citation omitted)). “A measure of the appropriateness of a sanction is whether it ‘restore[s] the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.’” *Rimkus*, 688 F. Supp. 2d at 618 (alteration in original) (quoting *West*, 167 F.3d at 779).

3. Dismissal or Default Judgment

The sanction of dismissal or default judgment is the harshest sanction available, and “is appropriate only if the spoliation or destruction of evidence resulted in ‘irreparable prejudice’ and no

lesser sanction would suffice.” *Rimkus*, 688 F. Supp. 2d at 644 (citing *Silvestri*, 271 F.3d at 593–94); see also *Schumacher Immobilien Und Beteiligungs AD v. Prova, Inc.*, No. 2:09CV18, 2010 WL 2867603, at *7 (M.D.N.C. Jul. 21, 2010) (“The ‘ultimate sanction’ of dismissal is appropriate where the loss or destruction of the evidence was done in bad faith, or where the prejudice to the defendant is extraordinary and denied defendant the ability to adequately defend its case.” (citing *Silvestri*, 271 F.3d at 593)); *Crown Castle*, 2010 WL 1286366, at *16 (“Before imposing a sanction of dismissal, a court should make a finding of willfulness or bad faith, and should consider whether lesser sanction would be effective.” (internal citations omitted)); *Pension Comm.*, 685 F. Supp. 2d at 469–70 (“[A] terminating sanction is justified in only the most egregious cases, such as where a party has engaged in perjury, tampering with evidence, or intentionally destroying evidence by burning, shredding, or wiping out computer hard drives.” (footnotes omitted)); *Goodman*, 632 F. Supp. 2d at 518–19 (“Generally, dismissal is justified ‘in circumstances of bad faith or other ‘like action,’ and courts should impose sanctions that dispose of a case only in the most egregious circumstances” (internal citation omitted)); *Greyhound Lines, Inc. v. Goodyear Tire & Rubber Co.*, No. 3:08cv516-WHA (WO), 2009 WL 798947, at *2 (M.D. Ala. Mar. 25, 2009) (noting that the Eleventh Circuit has “explained that dismissal is the most severe sanction available and should only be used where there is a showing of bad faith and where lesser sanctions will not suffice” (citing *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005)));¹⁹ *Micron*, 255 F.R.D. at 149 (“[S]uch [dispositive] sanctions are not warranted in the absence of demonstrated bad faith (i.e., the intentional

¹⁹ The court stated that “[i]n describing the standard governing bad faith, the Eleventh Circuit explained that the law does not require a showing of malice, but that instead, in determining whether there is bad faith, a court should weigh the degree of the spoliator’s culpability against the prejudice to the opposing party.” *Greyhound Lines*, 2009 WL 798947, at *2 (citing *Flury*, 427 F.3d at 946).

destruction of evidence) and prejudice. With respect to the latter, the imposition of a dispositive sanction should be confined to those cases where the failure to produce “‘materially affect[s] the substantial rights of the adverse party’ and is ‘prejudicial to the presentation of his case.’” (third alteration in original) (citation omitted)); *Nucor*, 251 F.R.D. at 201 (“Default judgment is a harsh sanction and district courts should be reluctant to impose that penalty. Nonetheless, a district court may impose default judgment if that sanction ‘serves the twin purposes of ‘leveling the evidentiary playing field and . . . sanctioning the improper conduct.’” (internal citations omitted)); *id.* (“[D]efault judgment should be imposed only if ‘a lesser sanction will [not] perform the necessary function.’” (quoting *Silvestri*, 271 F.3d at 593)); *Indemnity Ins. Co. of N. Am.*, 1998 WL 363834, at *3 (“Dismissal of a case with prejudice . . . ‘is a drastic remedy that should be imposed only in extreme circumstances . . . usually after consideration of alternative, less drastic sanctions.’” (quoting *John B. Hull, Inc. v. Waterbury Petroleum Prods.*, 845 F.2d 1172, 1176 (2d Cir. 1988) (internal citations omitted))); *but see S. New England Tel. Co. v. Global NAPs Inc.*, --- F.3d ---, No. 08-4518-cv, 2010 WL 3325962, at *18 (2d Cir. Aug. 25, 2010) (“[D]istrict courts are not required to exhaust possible lesser sanctions before imposing dismissal or default if such a sanction is appropriate on the overall record.” (citing *John B. Hull*, 845 F.2d at 1176–77)).

As one court put it, “[b]ecause a default judgment deprives a party of a hearing on the merits, the harsh nature of this sanction should usually be employed only in extreme situations where there is evidence of willfulness, bad faith or fault by the noncomplying party.” *Danis*, 2000 WL 1694325, at *33 (citing *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212 (1958)); *see also S. New England Tel. Co.*, 2010 WL 3325962, at *15 (noting that “dismissal or default imposed pursuant to Rule 37 is a ‘drastic remedy’ generally to be

used only when the district judge has considered lesser alternatives,” but that “[d]espite the harshness of these measures, . . . ‘discovery orders are meant to be followed,’ and dismissal or default is justified if the district court finds that the failure to comply with discovery orders was due to ‘willfulness, bad faith, or any fault’ of the party sanctioned.” (internal citations omitted); *Clark Constr. Group, Inc. v. City of Memphis*, 229 F.R.D. 131, 138 (W.D. Tenn. 2005) (“In the Sixth Circuit, ‘[d]ismissal is the sanction of last resort. It should be imposed only if the court concludes that the party’s failure to cooperate in discovery was willful, in bad faith, or due to its own fault.’” (alteration in original) (quoting *Beil v. Lakewood Eng’g & Mfg. Co.*, 15 F.3d 546, 552 (6th Cir. 1994))); *Kmart*, 371 B.R. at 840 (Because “the Supreme Court has indicated that there are Fifth Amendment limitations on the power of courts to dismiss an action (or enter default judgment) without affording a hearing on the merits[,] . . . courts hold that this sanction should ordinarily be employed only in extreme circumstances where there is evidence of ‘willfulness,’ ‘bad faith,’ or ‘fault.’” (citations omitted)); *but see King*, 181 F. App’x at 376 (“Because of the extreme nature of dismissal as a sanction for spoliation, it is usually appropriate ‘only in circumstances of bad faith or other ‘like action.’” However, bad faith conduct by the plaintiff may not be needed to justify dismissal if the spoliation of evidence effectively renders the defendant unable to defend its case.” (internal citation to *Silvestri*, 271 F.3d at 593, omitted)). Although the *Danis* court explained that “‘fault’ in this context is more than a mistake, but less than intentional or reckless behavior, it noted that “[t]he Seventh Circuit has also held that dismissal may be appropriate where there is a ‘clear record of delay’ or ‘contumacious conduct,’ or when ‘other less drastic sanctions have proven unavailable.’” *Danis*, 2000 WL 1694325, at *34 n.21 (quoting *Marrocco v. Gen Motors*, 966 F.2d 220, 224 (7th Cir. 1992)). The *Danis* court also concluded that even if there is some prejudice, default judgment

is not appropriate if less drastic measures would remedy the prejudice. *See id.* at *35 (“[T]he purposes for sanctions do not support the entry of a default judgment—which deprives parties of a trial on the merits—when there is at least *some* evidence that allows the plaintiff to prove the case and where there are less drastic remedies available to cure the absence of certain evidence, deter others from similar conduct, and to punish the wrongdoer for destruction of this evidence.” (citations omitted)).

Courts have stated the framework for analyzing the propriety of entering a default sanction in a variety of ways. For example, *Rimkus* pointed out that “[e]xtreme sanctions—dismissal or default—have been upheld when ‘the spoliator’s conduct was so egregious as to amount to a forfeiture of his claim’ and ‘the effect of the spoliator’s conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim.’” 688 F. Supp. 2d at 618 (quoting *Sampson v. City of Cambridge, Md.*, 251 F.R.D. 172, 180 (D. Md. 2008)); *see also Victor Stanley*, 2010 WL 3530097, at *38 (“[I]n the Fifth Circuit, ‘[a] severe sanction such as a default judgment or an adverse inference instruction requires bad faith *and* prejudice.’” (quoting *Rimkus*, 688 F. Supp. 2d at 642)).

A court in the Second Circuit has explained that whether dismissal is appropriate is a function of both the offender’s culpability and the prejudice suffered:

“Dismissal of the complaint would be appropriate if the spoliation was done with wilfulness, bad faith, or fault on the part of the sanctioned party.” However, “dismissal is not limited only to matters where the offending party has acted with bad faith or willful intent, but is permitted where there is any fault of the sanctioned party.” This is because other factors—such as the degree of prejudice to the moving party—may be considered by the court.

Wade, 686 F. Supp. 2d at 196 (internal citations and footnote omitted). Similarly, the *Victor Stanley* court noted:

In the Fourth Circuit, to order these harshest sanctions, the court must “be

able to conclude either (1) that the spoliator's conduct was so egregious as to amount to a forfeiture of his claim, *or* (2) that the effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim."

Victor Stanley, 2010 WL 3530097, at *38 (emphasis added) (additional quotation marks omitted) (quoting *Goodman*, 632 F. Supp. 2d at 519). The court noted that "[a]lthough '*Silvestri* posits an either/or test,' indicating two distinct means of justifying severe sanctions, this Court has not terminated a case where a spoliator acted in bad faith, absent a showing of substantial prejudice," and that other circuits have held that "dispositive or potentially dispositive sanctions are impermissible without bad faith, even if there is considerable prejudice." *Id.* (internal citation and footnote). In one case, however, the court granted dismissal after concluding that the disposal of material evidence was willful, "[e]ven though Plaintiffs' motives were apparently innocent," because the plaintiffs had "denied Defendant access to the only evidence from which Defendant c[ould] adequately investigate Plaintiff's claims and develop its defenses." *Erlandson v. Ford Motor Co.*, No. 08-CV-1137-BR, 2009 WL 3672898, at *6 (D. Or. Oct. 30, 2009).

One court explained that the Ninth Circuit has required consideration of the following factors before implementing a dismissal sanction: "1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Maxxam*, 2009 WL 817264, at *8 (quotation marks and citation omitted).

In another case, the court stated that the following five factors should be considered in evaluating whether to use dismissal as a sanction:

(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action

would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions.

Schlumberger, 2009 WL 5252644, at *3 (quoting *Davis v. Miller*, 571 F.3d 1058, 1061 (10th Cir. 2009)). The *Schlumberger* court emphasized that “[i]t is only when the aggravating factors outweigh the judicial system’s strong predisposition to resolve cases on their merits that dismissal is an appropriate sanction.” *Id.* (quoting *Davis*, 571 F.3d at 1061 (internal citations and quotations omitted)).

In another case, the court set out a similar framework:

When evaluating whether dismissal is an appropriate sanction, courts consider whether the party’s failure is due to willfulness, bad faith, or fault; whether the adversary was prejudiced by the dismissed party’s conduct; whether the dismissed party was warned that failure to cooperate could lead to dismissal; and whether less drastic sanctions were imposed or considered before dismissal was ordered. . . . See *U.S. v. Reyes*, 307 F.3d 451, 458 (6th Cir. 2002) (quoting *Knoll v. Am. Tel. & Tel. Co.*, 176 F.3d 359, 363 (6th Cir.1999)). “Although no one factor is dispositive, dismissal is proper if the record demonstrates delay or contumacious conduct.” *Id.* Dismissal for failing to cooperate in discovery is a “sanction of last resort that may be imposed only if the court concludes that a party’s failure to cooperate in discovery is due to willfulness, bad faith, or fault.” *Patton v. Aerojet Ordnance Co.*, 765 F.2d 604, 607 (6th Cir. 1985).

In re Nat’l Century Fin. Enters., 2009 WL 2169174, at *2. The court emphasized that “[t]hose courts which have imposed the sanction of dismissal have done so when a party’s conduct has been egregious.” *Id.* at *3.

Yet another court described the following analysis for considering a default sanction:

When considering a default sanction in response to spoliation of evidence, the court must determine “(1) the existence of certain extraordinary circumstances, (2) the presence of willfulness, bad faith, or fault by the offending party, (3) the efficacy of lesser sanctions, [and] (4) the relationship or nexus between the misconduct drawing the [default] sanction and the matters in controversy in the case.” *Halaco Eng’g Co. v. Costle*, 843 F.2d 376, 380 (9th Cir. 1988). In addition, the court may consider the

prejudice to the moving party as an “optional” consideration where appropriate. *Id.* This multi-factor test is not “a mechanical means of determining what discovery sanction is just,” but rather “a way for a district judge to think about what to do.” *Valley Engineers, Inc. v. Electric Eng’g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998).

In re Napster, Inc. Copyright Litig., 462 F. Supp. 2d at 1070 (alterations in original). “In the Ninth Circuit, ‘extraordinary circumstances exist where there is a pattern of disregard for Court orders and deceptive litigation tactics that threaten to interfere with the rightful decision of a case.’” *Id.* at 1071 (quoting *Advantacare Health Partners, LP v. Access IV*, No. C 03-04496 JF, 2004 WL 1837997, at *5 (N.D. Cal. Aug. 17, 2004)). “Courts have held that a party’s ‘failure to preserve evidence that they knew or reasonably should have known would be relevant to a potential action and might be sought in discovery’ does not necessarily warrant default or dismissal if these actions ‘do not eclipse entirely the possibility of a just result.’” *Id.* (quoting *Advantacare*, 2004 WL 1837997, at *5).

4. Exclusion of Evidence

“‘[T]he district court has inherent power to exclude evidence that has been improperly altered or damaged by a party where necessary to prevent the non-offending side from suffering unfair prejudice.’” *Velez*, 590 F. Supp. 2d at 258 (alteration in original) (quoting *Collazo-Santiago v. Toyota Motor Corp.*, 149 F.3d 23, 28 (1st Cir. 1998)).

“The intended goals behind excluding evidence, or at the extreme, dismissing a complaint, are to rectify any prejudice the non-offending party may have suffered as a result of the loss of evidence and to deter any future conduct, particularly deliberate conduct, leading to such loss of evidence Therefore, of particular importance when considering the appropriateness of sanctions is the prejudice to the non-offending party and the degree of fault of the offending party.”

Id. (quoting *Collazo-Santiago*, 149 F.3d at 29). “Applicable case law in the First Circuit has clearly established that ‘bad faith or comparable bad motive’ is not required for the court to exclude evidence

in situations involving spoliation.” *Id.* (citing *Trull v. Volkswagen of Am., Inc.*, 187 F.3d 88, 95 (1st Cir. 1999)).

5. Adverse Inference

“It is a well-established and long-standing principle of law that a party’s intentional destruction of evidence relevant to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction.” *Arista Records*, 608 F. Supp. 2d at 443 (quoting *Kronisch*, 150 F.3d at 126). The *Pension Committee* court examined the potential sanction of an adverse inference and its different forms. The court explained:

Like many other sanctions, an adverse inference instruction can take many forms, again ranging in degrees of harshness. The harshness of the instruction should be determined based on the nature of the spoliating party’s conduct—the more egregious the conduct, the more harsh the instruction.

In its most harsh form, when a spoliating party has acted willfully or in bad faith, a jury can be instructed that certain facts are deemed admitted and must be accepted as true. At the next level, when a spoliating party has acted willfully or recklessly, a court may impose a mandatory presumption. Even a mandatory *presumption*, however, is considered to be rebuttable.

The least harsh instruction *permits* (but does not require) a jury to *presume* that the lost evidence is both relevant and favorable to the innocent party. If it makes this presumption, the spoliating party’s rebuttal evidence must then be considered by the jury, which must then decide whether to draw an adverse inference against the spoliating party. This sanction still benefits the innocent party in that it allows the jury to consider both the misconduct of the spoliating party as well as proof of prejudice to the innocent party. Such a charge should be termed a “spoliation charge” to distinguish it from a charge where the a jury is *directed* to presume, albeit still subject to rebuttal, that the missing evidence would have been favorable to the innocent party, and from a charge where the jury is *directed* to deem certain facts admitted.

Pension Comm., 685 F. Supp. 2d at 470–71 (footnotes omitted).

In *Rimkus*, the court explained:

When a party is prejudiced, but not irreparably, from the loss of evidence that was destroyed with a high degree of culpability, a harsh but less extreme sanction than dismissal or default is to permit the fact finder to presume that the destroyed evidence was prejudicial. Such a sanction has been imposed for the intentional destruction of electronic evidence. Although adverse inference instructions can take varying forms that range in harshness, and although all such instructions are less harsh than so-called terminating sanctions, they are properly viewed as among the most severe sanctions a court can administer.

Rimkus, 688 F. Supp. 2d at 618–19 (footnotes omitted); *see also Consol. Aluminum*, 244 F.R.D. at 340 (“In exercising its discretion, a court may exclude the spoiled evidence or allow a jury to infer that the party spoiled the evidence because the evidence was unfavorable to the party’s case. However, these sanctions are considered drastic, and courts generally try to avoid imposing them when lesser sanctions are available.” (footnote omitted)); *id.* at 340 n.5 (“Imposition of an adverse inference instruction has been recognized as a powerful tool in a jury trial since, when imposed, it basically ‘brands one party as a bad actor, guilty of destroying evidence that it should have retained for use by the jury.’” (quoting *Morris v. Union Pacific R.R.*, 373 F.3d 896, 900 (8th Cir. 2004))).

The *Consolidated Aluminum* court explained that “[t]ypically, the giving of an adverse inference instruction has been upheld where the facts of the case are extreme, such as where the destroyed evidence was the very automobile that was the subject of the products liability action.” *Consol. Aluminum*, 244 F.R.D. at 344 (citations omitted). The court noted that “[c]ourts have also found sufficient prejudice to impose an adverse inference instruction where the destroying party has selectively retained relevant evidence and has used retained evidence in prior disputes to its advantage.” *Id.* at 344 n.15 (citation omitted).

In *Keithley*, the court explained the rationales behind imposing an adverse inference:

Imposition of an adverse inference is:

based on two rationales, one evidentiary and one not. The evidentiary rationale is nothing more than the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document

The other rationale for the inference has to do with its prophylactic and punitive effects. Allowing the trier of fact to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial.

Keithley, 2008 WL 4830752, at *9 (omission in original) (quoting *Sensonic v. Aerosonic Corp.*, 81 F.3d 1566 (Fed. Cir. 1996)).

6. Monetary Sanctions

The *Pension Committee* court also examined the circumstances in which monetary sanctions are appropriate:

“Monetary sanctions are appropriate ‘to punish the offending party for its actions [and] to deter the litigant’s conduct, sending the message that egregious conduct will not be tolerated.’” Awarding monetary sanctions “serves the remedial purpose of compensating [the movant] for the reasonable costs it incurred in bringing [a motion for sanctions].”

Pension Comm., 685 F. Supp. 2d at 471 (alterations in original) (footnotes omitted); *see also Richard Green*, 262 F.R.D. at 292 (“Monetary sanctions are appropriate ‘to punish the offending party for its actions [and] to deter the litigant’s conduct, sending the message that egregious conduct will not be tolerated.’” (alteration in original) (quoting *In re WRT Energy Sec. Litig.*, 246 F.R.D. 185, 201 (S.D.N.Y. 2007))). Another court explained:

[A]n award of costs serves both punitive and remedial purposes: it deters spoliation and compensates the opposing party for the additional costs incurred. Such compensable costs may arise either from the discovery necessary to identify alternative sources of information or from the investigation and litigation of the document destruction itself.

Cache, 244 F.R.D. at 636 (quoting *Turner*, 142 F.R.D. at 78 (internal citations omitted));²⁰ accord *Asher Assocs.*, 2009 WL 1328483, at *12. Another court explained:

Attorneys' fees and costs "may be appropriate to punish the offending party for its actions or to deter [the] litigant's conduct, sending the message that egregious conduct will not be tolerated . . . [.] [S]uch an award serves the remedial purpose of making the opposing party whole for costs incurred as a result of the spoliator's wrongful conduct."

Arista Records, 608 F. Supp. 2d at 444 (first and third alterations and omission in original) (quoting *Chan v. Triple 8 Palace, Inc.*, 03 Civ. 6048(GEL)(JCF), 2005 WL 1925579, at *10 (S.D.N.Y. Aug. 11, 2005) (internal quotation marks and citations omitted)). Similarly, in *Goodman*, the court explained that there are four situations in which a court will award costs or attorneys' fees for spoliation, including "award[ing] legal fees in favor of the moving party as an alternative to dismissal or an adverse jury instruction"; "grant[ing] discovery costs to the moving party if additional discovery must be performed after a finding that evidence was spoliated"; "in addition to a spoliation sanction, . . . award[ing] a prevailing litigant the litigant's reasonable expenses incurred in making the motion, including attorney's fees"; and "in addition to a spoliation sanction, . . . award[ing] a prevailing litigant the reasonable costs associated with the motion *plus* any investigatory costs into the spoliator's conduct." *Goodman*, 632 F. Supp. 2d at 523–24 (citations omitted).

In *Rimkus*, the court stated: "Like an adverse inference, an award of costs and fees deters spoliation and compensates the opposing party for the additional costs incurred. These costs may

²⁰ The *Cache* court declined to impose requested fines payable to the Clerk of Court, noting that although there were several cases imposing such fines as a result of sanctionable conduct, most of those cases involved violation of a court order, and "the Tenth Circuit has held a fine that is neither compensatory nor avoidable by complying with a court order is criminal in nature and, therefore, subject to the procedural safeguards governing a criminal contempt order." *Cache*, 244 F.R.D. at 637 (citations omitted); see also *Victor Stanley*, 2010 WL 3530097, at *2 n.5 ("[T]he Court lacks any 'effective' means to order Defendants to pay a fine to the Clerk of the Court. Such an order is regarded as a form of criminal contempt, which may not be imposed without affording Defendants the procedural protections of Fed. R. Crim. P. 42(b)." (citation omitted)).

arise from additional discovery needed after a finding that evidence was spoliated, the discovery necessary to identify alternative sources of information, or the investigation and litigation of the document destruction itself.” *Rimkus*, 688 F. Supp. 2d at 647 (footnote and citations omitted).

7. State of Mind

The *Goodman* court explained that “there are three possible states of mind that can satisfy the culpability requirement [for imposing spoliation sanctions]: bad faith/known destruction, gross negligence, and ordinary negligence.” *Goodman*, 632 F. Supp. 2d at 518 (citing *Thompson*, 219 F.R.D. at 101). In *Pension Committee*, the court defined various states of mind in the discovery context. See *Pension Comm.*, 685 F. Supp. 2d at 463–64 (noting that there is “no clear definition of [the terms “negligence,” “gross negligence,” and “willfulness”] in the context of discovery misconduct,” but that “it is well established that *negligence* involves unreasonable conduct in that it creates a risk of harm to others, but *willfulness* involves intentional or reckless conduct that is so unreasonable that harm is highly likely to occur.”). The *Pension Committee* court elaborated:

A failure to preserve evidence resulting in the loss or destruction of relevant information is surely negligent, and, depending on the circumstances, may be grossly negligent or willful. For example, the intentional destruction of relevant records, either paper or electronic, after the duty to preserve has attached, is willful. Possibly after October, 2003, when *Zubulake IV* was issued, and definitely after July, 2004, when the final relevant *Zubulake* opinion was issued, the failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.

The next step in the discovery process is collection and review. Once again, depending on the extent of the failure to collect evidence, or the sloppiness of the review, the resulting loss or destruction of evidence is surely negligent, and, depending on the circumstances may be grossly negligent or willful. For example, the failure to collect records—either paper or electronic—from key players constitutes gross negligence or willfulness as does the destruction of email or certain backup tapes after the duty to preserve has attached. By contrast, the failure to obtain records

from all those employees who had any involvement with the issues raised in the litigation or anticipated litigation, as opposed to just the . . . key players, could constitute negligence. Similarly, the failure to take all appropriate measures to preserve ESI likely falls in the negligence category. These examples are not meant as a definitive list. Each case will turn on its own facts and the varieties of efforts and failures [are] infinite. I have drawn the examples above from this case and others. Recent cases have also addressed the failure to collect information from the files of former employees that remain in a party's possession, custody, or control after the duty to preserve has attached (gross negligence) or the failure to assess the accuracy and validity of selected search terms (negligence).

Id. at 464–65 (footnotes omitted).

The *Pension Committee* court also offered the following guidance as to conduct that would generally amount to gross negligence:

[A]fter the final relevant *Zubulake* opinion in July, 2004, the following failures support a finding of gross negligence, when the duty to preserve has attached: to issue a written litigation hold; to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.

Id. at 471; *see also Harkabi v. SanDisk Corp.*, No. 08 Civ. 8203(WHP), 2010 WL 3377338, at *4 (S.D.N.Y. Aug. 23, 2010) (“Gross negligence is the ‘failure to exercise even that care which a careless person would use.’ In the discovery context, courts have found gross negligence where data was spoliated because a party failed to take widely-recognized steps to preserve it, such as failing to issue a written litigation hold or failing to prevent backup tapes from being erased.” (internal citation omitted)); *Crown Castle*, 2010 WL 1286366, at *11 (“[F]ailure to implement a litigation hold at the outset of litigation amounts to gross negligence.” (citations omitted)); *Richard Green*, 262 F.R.D. at 290 (“[T]he failure to implement a litigation hold is, by itself, considered grossly negligent

behavior.” (citations omitted)); *but see Victor Stanley*, 2010 WL 3530097, at *32 (noting that in another case, the court had held that a “defendant was negligent, but not grossly negligent, when it failed to implement a litigation hold, because it instructed the employees most involved in the litigation to retain documents” (citing *Sampson*, 251 F.R.D. at 181–82)).

As to what constitutes ordinary negligence, the *Harkabi* court explained that “[i]n the discovery context, negligence is a ‘failure to conform to th[e] standard’ of ‘what a party must do to meet its obligation to participate meaningfully and fairly in the discovery phase of a judicial proceeding.’ ‘A failure to conform to this standard is negligence even if it results from a pure heart and an empty head.’” *Harkabi*, 2010 WL 3377338, at *4 (second alteration in original) (internal citation to *Pension Comm.*, 685 F. Supp. 2d at 464, omitted); *see also Victor Stanley*, 2010 WL 3530097, at *31 (“Negligence, or ‘culpable carelessness,’ is ‘[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation[.]’ . . . With regard to preservation of evidence, if either the failure to collect or preserve evidence or the sloppiness of the review of evidence causes the loss or destruction of relevant information, the spoliator’s actions may amount to negligence, gross negligence, or even intentional misconduct. Failure ‘to assess the accuracy and validity of selected search terms’ also could be negligence.” (alterations in original) (internal citations omitted)).

As to what constitutes “fault,” one court has explained that “[f]ault” is unconcerned with the non-complying party’s subjective motivation, but rather describes the reasonableness of the conduct.” *Mintel Int’l Group, Ltd. v. Neergheen*, No. 08-cv-3939, 2010 WL 145786, at *7 (N.D. Ill. Jan. 12, 2010) (quoting *Langley v. Union Elec. Co.*, 107 F.3d 510, 514 (7th Cir. 1997)). “Fault may include ‘gross negligence’ or ‘a flagrant disregard’ of the duty to ‘preserve and monitor the condition’ of

material evidence.” *Id.* (quoting *Marrocco v. Gen. Motors*, 966 F.2d 220, 224 (7th Cir. 1992)); *see also Jones*, 2010 WL 2106640, at *6 (“Fault is defined not by the party’s intent, but by the reasonableness of the party’s conduct. It may include gross negligence of the duty to preserve material evidence.”) (internal citation and footnote omitted) (citing *Park v. City of Chicago*, 297 F.3d 606, 615 (7th Cir. 2002); *Marrocco*, 966 F.2d at 224)).

As to what constitutes bad faith, one court explained: “‘Bad faith’ is the antithesis of good faith and has been defined in the cases to be when a thing is done dishonestly and not merely negligently. It is also defined as that which imports a dishonest purpose and implies wrongdoing or some motive of self-interest.” *Cache*, 244 F.R.D. at 635 (quoting *Attorneys Title Guaranty Fund v. Goodman*, 179 F. Supp. 2d 1268, 1277 (D. Utah 2001)); *accord Asher Assocs.*, 2009 WL 1328483, at *8 n.11 (same); *see also Jones*, 2010 WL 2106640, at *6 (“Bad faith requires the intent to hide unfavorable information. This intent may be inferred if a document’s destruction violates regulations (with the exception of EEOC record regulations).” (internal citation omitted) (citing *Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1155 (7th Cir. 1998); *Park*, 297 F.3d at 615)); *id.* at *8 (“Bad faith may be inferred when a party disposes of documents in violation of its own policies.” (citing *Park*, 297 F.3d at 615)); *Mintel Int’l Group*, 2010 WL 145786, at *7 (“‘Bad faith’ means destruction ‘for the purpose of hiding adverse information.’” (quoting *Mathis*, 136 F.3d at 1155)); *Goodman*, 632 F. Supp. 2d at 520 (“[D]estruction is willful when it is deliberate or intentional,’ whereas ‘bad faith’ was deemed to ‘mean destruction for the purpose of depriving the adversary of the evidence.’” (quoting *Powell v. Town of Sharpsburg*, 591 F. Supp. 2d 814, 820 (E.D.N.C. 2008))); *Nucor*, 251 F.R.D. at 196 (“Destroying potential evidence in an effort to prevent another party from obtaining it certainly qualifies as ‘bad faith’ under any reasonable definition of the

term.”). In *Victor Stanley*, the court distinguished willful conduct from bad faith:

Willfulness is equivalent to intentional, purposeful, or deliberate conduct. *Buckley v. Mukasey*, 538 F.3d 306, 323 (4th Cir. 2008). In *Goodman*, 632 F. Supp. 2d at 523, this Court held that the defendant “willfully destroyed evidence that it knew to be relevant” because its chief executive officer deleted her emails, and the defendant destroyed the officer’s computer. Conduct that is in bad faith must be willful, but conduct that is willful need not rise to bad faith actions. *See Buckley*, 538 F.3d at 323; *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995); *Goodman*, 632 F. Supp. 2d at 520. While bad faith requires “destruction for the purpose of depriving the adversary of the evidence,” *Powell v. Town of Sharpsburg*, 591 F. Supp. 2d 814, 820 (E.D.N.C. 2008), for willfulness, it is sufficient that the actor intended to destroy the evidence. *See Goodman*, 632 F. Supp. 2d at 520; *see also United Med. Supply Co.*, 77 Fed. Cl. at 268 (distinguishing bad faith and willfulness).

Victor Stanley, 2010 WL 3530097, at *32. The court noted that despite the differences between willfulness and bad faith, courts often combine their analysis of the two. *Id.* at *33 (citations omitted). Another court explained that “[a] party’s destruction of evidence qualifies as willful spoliation if the party has ‘some notice that the [evidence was] potentially relevant to the litigation before [it was] destroyed.’” *Erlandson*, 2009 WL 3672898, at *4 (second and third alterations in original) (quoting *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006)).

The circuits are split as to whether negligence can be sufficient to impose spoliation sanctions. At least in the Second Circuit, most authority indicates that “[s]poliation sanctions ‘are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party’s negligent loss of evidence can be just as fatal to the other party’s ability to present a defense.’” *Indem. Ins. Co. of N. Am.*, 1998 WL 363834, at *3 (citations omitted); *see also Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) (“The sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should

bear the risk of its own negligence.”);²¹ *Harkabi*, 2010 WL 3377338, at *4 (“[T]he culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to breach a duty to preserve it, or *negligently*.” (alteration in original) (quoting *Residential Funding*, 306 F.3d at 108); *Crown Castle*, 2010 WL 1286366, at *11 (“[A] finding of bad faith or intentional misconduct is not a *sine qua non* to sanctioning a spoliator.’ Rather, a finding of gross negligence will satisfy the ‘culpable state of mind’ requirement, as will knowing or negligent destruction of evidence.” (alteration in original) (internal citation omitted)); *Richard Green*, 262 F.R.D. at 290 (“In this circuit, a ‘culpable state of mind’ for purposes of a spoliation inference includes ordinary negligence.” (citing *Residential Funding*, 306 F.3d at 108)); *Cache*, 244 F.R.D. at 635 n.17 (noting that “[t]he Second Circuit has held that an adverse inference instruction may be based [on] a showing of negligence, rather than bad faith,” but stating it was bound to follow Tenth Circuit law to the contrary); *cf. S. New England Tel. Co.*, 2010 WL 3325962, at *18 (“[W]hile the district court concluded that the Global entities engaged in the *willful* destruction of evidence, even the simple failure to produce evidence in a timely manner in and of itself can support an inference that the evidence withheld would be unfavorable to the noncompliant party.” (citing *Residential Funding*, 306 F.3d at 109)); *but see Arista Records*, 608 F. Supp. 2d at 429–30 (“Accordingly, [the Second Circuit] has required a finding of bad faith for the imposition of sanctions under the inherent power doctrine.” (alteration in original) (quoting *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124,

²¹ The *Residential Funding* court may have been considering sanctions under Rule 37, as opposed to sanctions imposed under the court’s inherent authority. See *Residential Funding*, 306 F.3d at 106 (“[T]his case is more akin to those in which a party breaches a discovery obligation or fails to comply with a court order regarding discovery.”). Although at least one district court within the Second Circuit recently noted that the Second Circuit has required bad faith to impose sanctions under the court’s inherent authority, see *Arista Records*, 608 F. Supp. 2d at 429–30, it is not clear that most cases subsequent to *Residential Funding* have limited its holding that negligence can be sufficient to impose sanctions to circumstances involving sanctions under Rule 37.

136 (2d Cir. 1998));²² *McGinnity*, 183 F.R.D. at 61–62 (noting that earlier “Second Circuit decisions were ‘ambiguous’ [as to] whether an ‘adverse inference may be drawn only when it has been shown that the destruction of evidence was intentional[,]’ or whether ‘negligent or reckless destruction of evidence may warrant such a sanction,’” but concluding that the issue was resolved by the Second Circuit in *Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998), in which the court held that “[o]nce a court has concluded that a party was under an obligation to preserve the evidence that it destroyed, it must then consider whether the evidence was *intentionally* destroyed, and the likely contents of that evidence,” and holding that “destruction of evidence cannot be merely negligent or inadvertent” (first alteration in original) (citation omitted)).²³

Not all courts within the Second Circuit have taken a consistent approach. *See Arista Records*, 608 F. Supp. 2d at 434 (“In analyzing this [culpability] prong of the spoliation test, some courts in this Circuit have required a showing of bad faith, some have required proof of intentional destruction, and others have drawn an inference of bad faith based on negligence. The Second Circuit has concluded that a case by case approach [is] appropriate.” (second alteration in original) (internal citation omitted)). Another court explained that the Second Circuit’s approach was inconsistent before the issue was resolved in 2002 in *Residential Funding*:

Before 2002, “[t]he law in this circuit [was] not clear on what state of mind” was sufficiently culpable. *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107–108 (2d Cir. 2001). At various times, the Second Circuit had required showings that the party intentionally destroyed evidence, that the party had

²² The *Arista Records* court noted that bad faith could “be shown by (1) ‘clear evidence’ or (2) ‘harassment or delay or . . . other improper purposes.’” *Arista Records*, 608 F. Supp. 2d at 430 (omission in original) (quoting *United States v. Int’l Bhd. of Teamsters*, 948 F.2d 1338, 1345 (2d Cir. 1991)).

²³ The *McGinnity* opinion was issued before the Second Circuit’s opinion in *Residential Funding*. Many courts have relied on *Residential Funding* to support the proposition that sanctions may be imposed for negligent conduct.

acted in bad faith, and that the party acted with gross negligence. *Byrnie*, 243 F.3d at 107–108. Acknowledging that its precedents were inconsistent, the Second Circuit concluded that a case-by-case approach was appropriate. *Id.* In 2002, the Second Circuit held that even simple negligence was a sufficiently culpable “state of mind.” *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 108 (2d Cir. 2002)[.]

Wade, 686 F. Supp. 2d at 194–95 (first and second alterations in original). It may be that the Second Circuit embraces a case-by-case approach, with negligence sometimes, but not always, being sufficient to impose sanctions.

In addition to the Second Circuit, some other circuits also may not always require bad faith to impose an adverse inference or other sanctions. *See Hatfield v. Wal-Mart Stores, Inc.*, 335 F. App’x 796, 804 (10th Cir. 2009) (unpublished) (noting that to be entitled to an adverse inference instruction, the plaintiff would have been required to show that the defendant knew or should have known that the litigation was imminent and that the plaintiff was prejudiced by the destruction of evidence, but not that the defendant acted in bad faith or intentionally destroyed the evidence); *Goodman*, 632 F. Supp. 2d at 519 (“[A] showing of bad faith is not a prerequisite to obtaining an adverse jury instruction, and a court must only find that the spoliator acted willfully in the destruction of evidence.” (footnote omitted) (citing *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995))); *RealNetworks*, 264 F.R.D. at 523 (“A party’s destruction of evidence need not be in ‘bad faith’ to warrant a court’s imposition of sanctions,” but “a party’s motive or degree of fault in destroying evidence is relevant to what sanction, if any, is imposed.” (citing *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993); *Unigard Sec. Ins. Co. v. Lakewood Eng’g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992)) (additional citations omitted)); *Forest Labs.*, 2009 WL 998402, at *5 (“[A] court need not find bad faith or intentional misconduct before sanctioning a spoliator.” (quoting *Klezmer ex rel. Desyatnik v. Buynak*, 227 F.R.D. 43, 50 (E.D.N.Y. 2005))); *Salvatore*, 2009

WL 943713, at *9–10 (noting that the Tenth Circuit requires bad faith for an adverse inference instruction, but that “[a] sanction less severe than an adverse inference may be imposed . . . without a showing of bad faith.” (citing *103 Investors I, L.P. v. Square D Co.*, 470 F.3d 985, 989 (10th Cir. 2006))); *Marceau*, 618 F. Supp. 2d at 1174 (“[T]he party seeking to introduce evidence of spoliation need not establish bad faith on the part of the party who destroyed the evidence.” (citing *Glover*, 6 F.3d at 1329)); *Maxxam*, 2009 WL 817264, at *7 (“A party’s destruction of evidence need not be done in bad faith to warrant imposition of sanctions, so long as there is a finding of fault.” (citing *Unigard Sec. Ins. Co.*, 982 F.2d at 368)); *Keithley*, 2008 WL 4830752, at *9 (“In drawing an adverse inference, a court need not find bad faith arising from intentional, as opposed to inadvertent, conduct.” (citing *Glover*, 6 F.3d at 1329)); *Nucor*, 251 F.R.D. at 194 (“The court may impose the [adverse inference] sanction even in the absence of bad faith,” but “[t]he harsher sanctions of dismissal and default judgment require a showing of ‘bad faith or other ‘like action,’ unless the spoliation was so prejudicial that it prevents the non-spoliating party from maintaining his case.” (citing *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004); *Silvestri*, 271 F.3d at 583)); *see also id.* at 198 (noting that “[a] party acts intentionally if it knew the evidence would be relevant at trial and its ‘willful conduct’ resulted in the evidence’s loss or destruction”; that “it is not necessary that a party intends to bring about the loss of evidence”; that “spoliation may be inferred when a party intended to take those actions that caused the evidence’s alteration or destruction”; and that requiring “[a]nything more (e.g., requiring that the party intended to bring about the evidence’s loss) would be tantamount to requiring bad faith, and the Fourth Circuit has expressly rejected bad faith as an ‘essential element of the spoliation rule’” (quoting *Vodusek*, 71 F.3d at 156)); *Mazloun v. Dist. of Columbia Metro. Police Dep’t*, 530 F. Supp. 2d 282, 293 (D.D.C. 2008) (“To be sure, any

adverse inference instruction grounded in negligence would be considerably weaker in both language and probative force than an instruction regarding deliberate destruction. But it is nonetheless a cognizable basis for an instruction.”); *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d at 1066–67 (“A party’s destruction of evidence need not be in ‘bad faith’ to warrant a court’s imposition of sanctions. . . . However, a party’s motive or degree of fault in destroying evidence is relevant to what sanction, if any, is imposed.” (citing *Glover*, 6 F.3d at 1329; *Unigard Sec. Ins. Co.*, 982 F.2d at 368; *Baliotis v. McNeil*, 870 F. Supp. 1285, 1291 (M.D. Pa. 1994))).

In one case, a court in the Third Circuit indicated that relevance and prejudice could support the imposition of an adverse inference instruction, even in the absence of bad faith:

Although the Third Circuit has yet to elaborate on what it meant when it stated that it “must appear that there has been actual suppression,” *Samsung* provides no, and this Court did not find any case law in this circuit that requires a finding of bad faith before allowing a spoliation inference. Some courts in the Third Circuit have construed “actual suppression” to mean that the evidence must be intentionally or knowingly destroyed or withheld, as opposed to lost, accidentally destroyed or otherwise properly accounted for. Others have used a more flexible approach that defies being labeled as requiring intentional or knowing destruction.

Having considered the two different approaches courts take under the Third Circuit’s “actual suppression” standard, and the Third Circuit’s characterization of the spoliation inference as a lesser sanction, this Court believes the flexible approach is the better and more appropriate approach. Primarily, the spoliation inference serves a remedial function—leveling the playing field after a party has destroyed or withheld relevant evidence. As long as there is some showing that the evidence is relevant, and does not fall into one of the three categories enumerated in *Schmid [v. Milwaukee Elec. Tool Corp.]*, 13 F.3d 76 (3d Cir. 1994)], the offending party’s culpability is largely irrelevant as it cannot be denied that the opposing party has been prejudiced. Contrary to *Samsung*’s contention, negligent destruction of relevant evidence can be sufficient to give rise to the spoliation inference. If a party has notice that evidence is relevant to an action, and either proceeds to destroy that evidence or allows it to be destroyed by failing to take reasonable precautions, common sense dictates that the party is more likely to have been threatened by that evidence. *See Schmid*, 13 F.3d at 78.

By allowing the spoliation inference in such circumstances, the Court protects the integrity of its proceedings and the administration of justice.

MOSAID Techs. Inc. v. Samsung Elecs. Co., Ltd., 348 F. Supp. 2d 332, 338 (D.N.J. 2004) (internal citations and footnotes omitted). The court emphasized that its analysis was “limited to the spoliation inference and [wa]s not meant to infer that a lesser showing of culpability permits imposition of the far more serious sanctions—dismissal, summary judgment, and exclusion of evidence.” *Id.* at 338 n.11.

Even when bad faith is not required, some courts may not impose an adverse inference based on an innocent mistake. *See Marceau*, 618 F. Supp. 2d at 1174 (noting that even though bad faith is not required, “when relevant evidence is lost accidentally or for an innocent reason, an adverse evidentiary inference from the loss may be rejected” (quoting *Med. Lab. Mgmt. Consultants v. Am. Broadcasting Cos., Inc.*, 306 F.3d 806, 824 (9th Cir. 2002))).

In contrast to the approach taken in the Second Circuit, which generally allows imposition of an adverse inference instruction for even negligent behavior, several other circuits have rejected the imposition of at least some sanctions without a showing of bad faith. In *Rimkus*, for example, the court stated that in the Fifth Circuit, “the severe sanctions of granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of ‘bad faith,’” and that “‘[m]ere negligence is not enough’ to warrant an instruction on spoliation.” *Rimkus*, 688 F. Supp. 2d at 614 (citations omitted); *see also id.* at 642 (“A severe sanction such as a default judgment or an adverse inference instruction requires bad faith and prejudice.” (citations omitted)); *Consol. Aluminum*, 244 F.R.D. at 340 (“[T]he Fifth Circuit only permits an adverse inference sanction against a destroyer of evidence upon a showing of ‘bad faith’ or ‘bad conduct.’” (citing *Condrey v. SunTrust Bank of Ga.*, 431 F.3d 191 (5th Cir. 2005); *King v. Ill. Cent. R.R.*, 337

F.3d 550 (5th Cir. 2003); *United States v. Wise*, 221 F.3d 140, 156 (5th Cir. 2000)).²⁴ The *Rimkus* court noted that, in contrast to the approach taken in the Second Circuit, “[i]n the Fifth Circuit and others, negligent as opposed to intentional ‘bad faith’ destruction of evidence is not sufficient to give an adverse inference instruction and may not relieve a party seeking discovery of the need to show that missing documents are relevant and their loss prejudicial,” and that “to the extent sanctions are based on inherent power, the Supreme Court’s decision in *Chambers* may also require a degree of culpability greater than negligence.” *Rimkus*, 688 F. Supp. 2d at 615. The *Rimkus* court also noted that the Fifth Circuit is not alone in requiring bad faith for an adverse inference instruction:

Other circuits have also held negligence insufficient for an adverse inference instruction. The Eleventh Circuit has held that bad faith is required for an adverse inference instruction. The Seventh, Eighth, Tenth, and D.C. Circuits also appear to require bad faith. The First, Fourth, and Ninth Circuits hold that bad faith is not essential to imposing severe sanctions if there is severe prejudice, although the cases often emphasize the presence of bad faith. In the Third Circuit, the courts balance the degree of fault and prejudice.

Id. at 614–15 (footnotes omitted); *see also id.* at 614–15 nn.10–13 (collecting cases in the First, Third, Fourth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits discussing whether bad faith is required to impose an adverse inference instruction); *Mann v. Taser Int’l, Inc.*, 588 F.3d 1291, 1310 (11th Cir. 2009) (“In the Eleventh Circuit, ‘an adverse inference is drawn from a party’s failure to preserve evidence only when the absence of that evidence is predicated on bad faith.’” (quoting

²⁴ The *Consolidated Aluminum* court explained that “[f]or the spoliator to have a ‘culpable state of mind,’ it must act with fraudulent intent and a desire to suppress the truth. Such state of mind is not present where the destruction is a matter of routine or where employees have simply deleted emails because they had no legitimate business reason, even though the contents of the communications might, at a later date, have some relevance to a lawsuit.” 244 F.R.D. at 344 (citation omitted). The court concluded that “[t]hough the nature of the sanction depends in part on the state of mind of the destroyer, some remedy may be appropriate even where the destruction is merely negligent.” *Id.* at 347 n.28 (citing *Chan*, 2005 WL 1925579).

Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997) (per curiam));²⁵ *Turner v. Pub. Serv. Co. of Colo.*, 563 F.3d 1136, 1149 (10th Cir. 2009) (“[I]f the aggrieved party seeks an adverse inference to remedy the spoliation, it must also prove bad faith. ‘Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.’ Without a showing of bad faith, a district court may only impose lesser sanctions.” (internal citation omitted)); *Renda Marine*, 58 Fed. Cl. at 61 n.4 (“To draw an adverse inference based on the alleged spoliation of documents, the court requires a showing of subjective bad faith.” (citations omitted)); *Grubb v. Bd. of Trustees of Univ. of Ill.*, --- F. Supp. 2d ----, No. 09-cv-2255, 2010 WL 3075517, at *3 (N.D. Ill. Aug. 4, 2010) (“Before a Court may impose sanctions for the destruction of evidence, the party moving for sanctions must make a showing that destruction of materials occurred in bad faith.” (citing *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681 (7th Cir. 2008))); *Walter v. Carnival Corp.*, No. 09-20962-CIV, 2010 WL 2927962, at *2 (S.D. Fla. Jul. 23, 2010) (“[A] party’s failure to preserve evidence rises to the level of sanctionable spoliation ‘only when the absence of that evidence is predicated on bad faith,’ such as where a party purposely loses or destroys relevant evidence.” (quoting *Bashir*, 119 F.3d at 931));²⁶ *Jones*, 2010 WL 2106640, at *6 (“[A] court may

²⁵ The court explained that “[w]hile [the Eleventh Circuit] does not require a showing of malice in order to find bad faith, mere negligence in losing or destroying records is not sufficient to draw an adverse inference.” *Mann*, 588 F.3d at 1310 (citing *Bashir*, 119 F.3d at 931).

²⁶ The *Walter* court explained:

If direct evidence of bad faith is unavailable, bad faith may be founded on circumstantial evidence when the following criteria are met: (1) evidence once existed that could fairly be supposed to have been material to the proof or defense of a claim at issue in the case; (2) the spoliating party engaged in an affirmative act causing the evidence to be lost; (3) the spoliating party did so while it knew or should have known of its duty to preserve the evidence; and (4) the affirmative act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator. *Calixto v.*

only grant an adverse inference sanction upon a showing bad faith. . . . Mere negligence is not enough for a factfinder to draw a negative inference based on document destruction.” (citing *Fass v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008); *Rodgers v. Lowe’s Home Ctrs., Inc.*, 05 C 0502, 2007 WL 257714, at *5 (N.D. Ill. Jan. 30, 2007)); *Schlumberger*, 2009 WL 5252644, at *8 (“Before a litigant is entitled to a spoliation instruction, *i.e.*, an adverse-inference instruction, there must be evidence of intentional destruction or bad faith. . . . The Tenth Circuit, however, does not have a similar requirement of bad faith for other spoliation sanctions.” (citing *Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1220 (10th Cir. 2008); *103 Investors I*, 470 F.3d at 988)); *In re Nat’l Century Fin. Enters.*, 2009 WL 2169174, at *2 (“Absent exceptional circumstances, courts generally do not dismiss an action or permit an adverse inference without consideration of whether the party acted in bad faith.”); *Asher Assocs.*, 2009 WL 1328483, at *8 (noting that the Tenth Circuit has found that bad faith gives rise to an adverse inference, while negligence does not); *Cache*, 244 F.R.D. at 635 (noting that the Tenth Circuit has found that an adverse inference should not be imposed “where the destruction of a document resulted from mere negligence, because only bad faith would support an ‘inference of consciousness of a weak case.’” (quoting *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997)));²⁷ *Miller*, 2007 WL 172327, at *2 (“The exercise of this [inherent] power [to sanction] is subject to the requirement that it be based on a showing of bad faith.” (citing

Watson Bowman Acme Corp., 2009 WL 3823390, at *16 (S.D. Fla. Nov. 16, 2009)[.]

Walter, 2010 WL 2927962, at *2.

²⁷ The *Cache* court noted that “the evidence upon which the movant relies to show bad faith must be more than conjecture or speculation; the movant must present evidence that would support an inference that a party actually suppressed or withheld evidence because they were conscious of a weakness in their case.” 244 F.R.D. at 635 (citing *Richins v. Deere & Co.*, 231 F.R.D. 623, 626 (D.N.M. 2004)).

United States v. Wallace, 964 F.2d 1214, 1219 (D.C. Cir. 1992); *Lucas v. Spellings*, 408 F. Supp. 2d 8, 10 (D.D.C. 2006)); *Clark Constr. Group*, 229 F.R.D. at 139 (“In [the Sixth] Circuit, “[i]n general, a court may not allow an inference that a party destroyed evidence that is in its control, unless the party did so in bad faith.” (second alteration in original) (quoting *Tucker v. Gen. Motors Corp.*, No. 91-3019, 1991 WL 193458, at *2 (6th Cir. Sept. 30, 1991)));²⁸ *cf. O’Brien*, 2010 WL 1741352, at *5 (“According to federal-spoliation law, “[a]ny adverse inference from spoliation, while not entirely dependent on bad faith, is based on the spoliator’s mental state.” (alteration in original) (quoting *Joostberns v. United Parcel Serv., Inc.*, 166 F. App’x 783, 797 (6th Cir. 2006))).

In *Salvatore*, the court explained the standard in the Tenth Circuit:

“[T]he general rule is that bad faith destruction of a document relevant to proof of an issue at trial gives rise to an inference that production of the document would have been unfavorable to the party responsible for its destruction. The adverse inference must be predicated on the bad faith of the party destroying the records. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.”

Salvatore, 2009 WL 943713, at *9 (alteration in original) (quoting *Aramburu*, 112 F.3d at 1407 (internal citations omitted)).

The *Goodman* court stated the standard in the Fourth Circuit:

“[T]he trial court has broad discretion to permit a jury to draw adverse inferences from a party’s failure to present evidence, the loss of evidence, or the destruction of evidence. While a finding of bad faith suffices to permit

²⁸ However, the *Clark Constr. Group* court stated that “the Sixth Circuit, in an unpublished opinion, note[d] that a negative inference should *generally* not be allowed absent bad faith,” and that “[t]herefore, the Court should not be precluded from imposing a rebuttable adverse inference sanction against a party because the party did not act in bad faith.” 229 F.R.D. at 139. The court noted that “numerous other Circuits have established that bad faith is a prerequisite to ordering a negative inference against a party,” but, “using its inherent power, conclude[d] that the facts of th[e] case justif[ied] a rebuttable adverse inference . . .,” despite the absence of bad faith. *Id.* at 139 n.2. The court relied in part on state law, but the Sixth Circuit has subsequently determined that federal law applies to spoliation issues.

such an inference, *it is not always necessary* An adverse inference about a party’s consciousness of the weakness of his case, however, cannot be drawn merely from his negligent loss or destruction of evidence; the inference requires a showing that the party *knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction.*”

Goodman, 632 F. Supp. 2d at 520 (alteration and omission in original) (quoting *Vodusek*, 71 F.3d at 156 (emphasis added) (citations omitted)); *see also Victor Stanley*, 2010 WL 3530097, at *27 (“[A]n adverse inference instruction makes little logical sense if given as a sanction for negligent breach of the duty to preserve, because the inference that a party failed to preserve evidence because it believed that the evidence was harmful to its case does not flow from mere negligence—particularly if the destruction was of ESI and was caused by the automatic deletion function of a program that the party negligently failed to disable once the duty to preserve was triggered. The more logical inference is that the party was disorganized, or distracted, or technically challenged, or overextended, not that it failed to preserve evidence because of an awareness that it was harmful.”); *id.* at *38 (“In [the Fourth] Circuit, to impose an adverse jury instruction, the court ‘must only find that the spoliator acted willfully in the destruction of evidence.’” (quoting *Goodman*, 632 F. Supp. 2d at 519)); *id.* (“While negligence or even gross negligence is not sufficient in this Circuit, the conduct need not rise to the level of bad faith.” (citing *Goodman*, 632 F. Supp. 2d at 519)).

The *Victor Stanley* court explained that there is wide variation among the circuits as to the level of intent required for spoliation sanctions:

“Courts differ in their interpretation of the level of intent required before sanctions may be warranted.” [THE SEDONA CONFERENCE,] SEDONA CONFERENCE GLOSSARY[: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT 48 (2d ed. 2007), *available at* http://www.thesedonaconference.org/content/miscFiles/TSCGlossary_12_07.pdf]. In *United Medical Supply Co. v. United States*, 77 Fed. Cl. 257, 266 (Fed. Cl. 2007), the court noted that a “distinct minority” of courts

“require a showing of bad faith before any form of sanction is applied”; some courts require a showing of bad faith, but only “for the imposition of certain more serious sanctions”; some do not require bad faith for sanctions, but require more than negligence; and others “require merely that there be a showing of fault.” In the Fourth Circuit, for a court to impose some form of sanctions for spoliation, any fault—be it bad faith, willfulness, gross negligence, or ordinary negligence—is a sufficiently culpable mindset. *Goodman*, 632 F. Supp. 2d at 518, 520; *Thompson*, [219] F.R.D. at 101; *see Pandora Jewelry, LLC v. Chamilia, LLC*, No. CCB-06-3041, 2008 WL 4533902, at *9 (D. Md. Sept. 30, 2008). Under existing case law, the nuanced, fact-specific differences among these states of mind become significant in determining what sanctions are appropriate *See Sampson*, 251 F.R.D. at 179 (“Although, some courts require a showing of bad faith before imposing sanctions, the Fourth Circuit requires only a showing of fault, with the degree of fault impacting the severity of sanctions.”) (citing *Silvestri*, 271 F.3d at 590).

Victor Stanley, 2010 WL 3530097, at *31; *see also id.*, slip op. app. (identifying the state of mind required by circuit for imposing sanctions generally, for imposing dispositive sanctions, and for imposing an adverse inference instruction sanction, and showing disparities between and within the circuits).²⁹

In *Consolidated Edison*, the Federal Claims Court noted that the Federal Circuit has not definitively addressed whether bad faith is required to impose an adverse inference sanction or other sanction, and that judges in the Federal Claims Court have taken differing positions on the bad faith requirement. *See Consol. Edison*, 90 Fed. Cl. at 255 n.20.

One court in the Seventh Circuit, in stating that severe sanctions, such as a default judgment, require evidence of willfulness, bad faith, or fault, explained that a party need not act with intentional or reckless behavior to be subject to such sanctions:

“Although wilfulness and bad faith are associated with conduct that is intentional or reckless, the same is not true for fault. Fault does not speak

²⁹ The appendix is not currently available in Westlaw.

to the noncomplying party's disposition at all, but rather only describes the reasonableness of the conduct—or lack thereof—which eventually culminated in the violation. Fault, however, is not a catch-all for any minor blunder that a litigant or his counsel might make. Fault, in this context, suggests objectively unreasonable behavior; it does not include conduct that we would classify as a mere mistake or slight error in judgment.”

Danis, 2000 WL 1694325, at *33 (quoting *Long v. Steepro*, 213 F.3d 983, 987 (7th Cir. 2000)). But the court stated that “[t]o justify a dismissal or default judgment, the level of ‘fault’ must reflect ‘extraordinarily poor judgment,’ ‘gross negligence,’ or ‘a flagrant disregard’ of the duty to ‘preserve and monitor the condition of evidence which could be pivotal in a lawsuit.” *Id.* at *34 (quoting *Marrocco*, 966 F.2d at 224).

A court in the Eighth Circuit explained that whether bad faith must be shown in order to impose sanctions depends on whether the spoliation occurred before or after the litigation was commenced:

If destruction of relevant information occurs before any litigation has begun, in order to justify sanctions, the requesting party must show that the destruction was the result of bad faith. [*Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746 (8th Cir. 2004)]. Bad faith need not directly be shown but can be implied by the party's behavior. For example, the Eighth Circuit has explained that (1) a party's decision to selectively preserve some evidence while failing to retain other or (2) a party's use of the same type of evidence to their advantage in prior instances, may be used to demonstrate a party's bad faith. *Stevenson*, 354 F.3d at 747–48. In order to determine whether sanctions are warranted when documents have been destroyed due to a company's retention policy prior to litigation, the court must consider: “(1) whether the retention policy is reasonable considering the facts and circumstances surrounding those documents, (2) whether lawsuits or complaints have been filed frequently concerning the type of records at issue, and (3) whether the document retention policy was instituted in bad faith.” *Id.* (citing *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988)).

If, however, the destruction of evidence occurs after litigation is imminent or has begun, no bad faith need be shown by the moving party. *Id.* When litigation is imminent or has already commenced, “a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy.” *See id.* at 749 (quoting *Lewy*, 836

F.2d at 1112).

MeccaTech, 2008 WL 6010937, at *7–8 (alteration in original) (quotations marks omitted) (quoting *E*Trade Sec. LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 588–89 (D. Minn. 2005)).

Another court stated that the state of mind required for imposing spoliation sanctions depends on whether the sanctions are imposed under the court’s inherent authority or under Rule 37:

Although there is some ambiguity in the caselaw as to the precise state of mind required to support the imposition of sanctions under the Court’s inherent power (*see United Medical Supply*, 77 Fed. Cl. at 266–67), the Ninth Circuit has stated that sanctions are available under the Court’s inherent power if “preceded by a finding of bad faith, or conduct tantamount to bad faith,” such as recklessness “combined with an additional factor such as frivolousness, harassment, or an improper purpose.” *See Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001); *see also Gomez v. Vernon*, 255 F.3d 1118, 1134 (9th Cir. 2001). Dismissal sanctions under a court’s inherent power may be imposed upon a finding of willfulness, fault or bad faith. *See Leon v. IDX Systems Corp.*, 464 F.3d 951, 958 (9th Cir. 2006). . . .

Sanctions for violations of Rule 37, by contrast, may be imposed for even negligent conduct. *See FED. R. CIV. P. 37(b); Fjelstad*, 762 F.2d at 1343; *Hyde & Drath v. Baker*, 24 F.3d 1162, 1171 (9th Cir. 1994) (“We have not required a finding of bad faith on the part of the attorney before imposing sanctions under Rule 37.”). The lack of bad faith does not immunize a party or its attorney from sanctions, although a finding of good or bad faith may be a consideration in determining whether imposition of sanctions would be unjust, *see Hyde & Drath*, 24 F.3d at 1171, and how severe the sanctions should be. Dismissal, the most drastic sanction, generally requires a finding that the conduct was “due to willfulness, bad faith or fault of the party,” including “[d]isobedient conduct not shown to be outside the litigants’s control.” *In re Phenylpropanolamine (PPA) Products Liability Litig.*, 460 F.3d 1217, 1233 (9th Cir. 2006). In deciding whether to grant a motion for sanctions under Rule 37, the Court may “properly consider all of a party’s discovery misconduct . . . , including conduct which has been the subject of earlier sanctions.” *Payne v. Exxon Corp.*, 121 F.3d 503, 508 (9th Cir. 1997).

Keithley, 2008 WL 4830752, at *1–2 (alteration and omission in original).

Often, the degree of culpability required may depend on the sanction sought. For example, in

Arista Records, the court noted that severe sanctions, such as dismissal, require intentional conduct such as bad faith or gross negligence, while “[l]esser sanctions, such as an adverse inference instruction, may be imposed where a party acted ‘knowingly, even if without intent . . . or negligently.’” 608 F. Supp. 2d at 434 (omission in original) (quoting *Residential Funding*, 306 F.3d at 108)); *see also Goodman*, 632 F. Supp. 2d at 518 (“The degree of fault impacts the severity of the sanction”); *Asher Assocs.*, 2009 WL 1328483, at *8 (“Of course, in cases where an adverse instruction is neither requested nor appropriate, the Tenth Circuit has held that a finding of bad faith is not required to impose non-dispositive sanctions, such as excluding evidence.” (citing *103 Investors I*, 470 F.3d at 988–89)).

In sum, no clear standard for the state of mind required for various types of sanctions emerges from the case law. Some courts require bad faith to impose any sanctions. Others require bad faith only for severe sanctions. Some require more than negligence, but less than bad faith, for certain sanctions. And still others allow sanctions such as an adverse inference based on only negligence. This is complicated further by the fact that the degree of prejudice and relevance sometimes factors into the state of mind requirement. Some circuits even vary within the circuit on the requisite state of mind. It seems that a case-by-case approach is often used.

8. Elements the Complainant Must Prove

a. Generally

The case law describes several elements that the party seeking spoliation sanctions must prove. The *Pension Committee* court set out the following elements, which are similarly used by many other courts:

In short, the innocent party must prove the following three elements: that the spoliating party (1) had control over the evidence and an obligation

to preserve it at the time of destruction or loss; (2) acted with a culpable state of mind upon destroying or losing the evidence; and that (3) the missing evidence is relevant to the innocent party's claim or defense.

Pension Comm., 685 F. Supp. 2d at 467 (footnote omitted); *accord Consol. Edison*, 90 Fed. Cl. at 255 (quoting *Jandreau v. Nicholson*, 492 F.3d 1372, 1375–76 (Fed. Cir. 2007) (quoting *Residential Funding*, 306 F.3d at 107)); *Harkabi*, 2010 WL 3377338, at *4 (quoting *Residential Funding*, 306 F.3d at 107); *Schumacher*, 2010 WL 2867603, at *5 (quoting *Goodman*, 632 F. Supp. 2d at 509); *Rimkus*, 688 F. Supp. 2d at 615–16 (citing *Zubulake IV*, 220 F.R.D. at 220); *Crown Castle*, 2010 WL 1286366, at *9 (citing *Residential Funding*, 306 F.3d at 107); *Wade*, 686 F. Supp. 2d at 194 (citing *Residential Funding*, 306 F.3d at 107); *Richard Green*, 262 F.R.D. at 289 (quoting *Residential Funding*, 306 F.3d at 107); *Goodman*, 632 F. Supp. 2d at 509 (quoting *Thompson*, 219 F.R.D. at 101 (citing *Zubulake IV*, 220 F.R.D. at 220));³⁰ *Arista Records*, 608 F. Supp. 2d at 430 (citing *Residential Funding*, 306 F.3d at 107; *Zubulake IV*, 220 F.R.D. at 220); *Keithley*, 2008 WL 4830752, at *9 (quoting *Residential Funding*, 306 F.3d at 105); *Consol. Aluminum*, 244 F.R.D. at 340 (citing *Zubulake IV*, 220 F.R.D. at 220); *see also Victor Stanley*, 2010 WL 3530097, at *22 & n.31 (noting that a party must prove similar elements in the Fourth Circuit; that “[d]istrict courts in the Second, Fifth, Sixth, Seventh, and Ninth Circuits have identified the same factors for sanction-worthy spoliation”; and that “[t]he same factors can be culled from the case law in most other circuits”);³¹

³⁰ In *Goodman*, the court noted that “[t]he *Zubulake IV* test has perennially been cited by other courts when considering spoliation sanctions.” 632 F. Supp. 2d at 519 n.15 (collecting cases). The court determined that the *Zubulake IV* test applied to the case before it, but noted that “[w]hile *Zubulake IV* remains insightful, to the extent it could be read to limit the availability of sanctions, *Vodusek* must ultimately prevail in the Fourth Circuit.” *Id.*

³¹ The *Victor Stanley* court noted that while the case law in most circuits recognizes the same factors, “some courts address the factors in the context of two separate issues: was there spoliation, and if so, what sanctions are appropriate, with state of mind only figuring into the second issue.” 2010 WL 3530097, at *22 n.31 (citations omitted).

Maxxam, 2009 WL 817264, at *13 (noting that the party alleging spoliation had the burden to demonstrate that the missing evidence existed at a time when a duty to preserve was triggered). As the *Victor Stanley* court explained, “[t]he first element involves both the duty to preserve and the breach of that duty through the destruction or alteration of the evidence.” 2010 WL 3530097, at *22 (citing *Jones*, 2010 WL 2106640, at *5). The appropriate sanction is often dependent on how the various factors interact. *See id.* at *36 (“The harshest sanctions may apply not only when both severe prejudice and bad faith are present, but also when, for example, culpability is minimally present, if there is a considerable showing of prejudice, or, alternatively, the prejudice is minimal but the culpability is great For example, in some, but not all, circuits, conduct that does not rise above ordinary negligence may be sanctioned by dismissal if the resulting prejudice is great. Conversely, absence of either intentional conduct or significant prejudice may lessen the potential appropriate sanctions. In the Fifth and Eleventh Circuits, for example, courts may not impose severe sanctions absent evidence of bad faith.” (internal citations omitted)).

In *Victor Stanley*, the court noted that whether relevance and prejudice may be presumed after a showing of culpable conduct varies among the circuits:

When the party alleging spoliation shows that the other party acted willfully in failing to preserve evidence, the relevance of that evidence is presumed in the Fourth Circuit. *Sampson*, 251 F.R.D. at 179; *Thompson*, 219 F.R.D. at 101. Negligent or even grossly negligent conduct is not sufficient to give rise to the presumption; in the absence of intentional loss or destruction of evidence, the party “must establish that the lost documents were relevant to her case.” *Sampson*, 251 F.R.D. at 179; *see Thompson*, 219 F.R.D. at 101. Similarly, in the Seventh Circuit, unintentional conduct is insufficient for a presumption of relevance. *In re Kmart Corp.*, 371 B.R. 823, 853–54 (Bankr. N.D. Ill. 2007). However, in the Second Circuit, in the court’s discretion, “[r]elevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner.” *Pension Comm.*, 685 F. Supp. 2d at 467 (emphasis added). Also, “[t]he Fifth Circuit has not explicitly addressed whether even bad-faith destruction

of evidence allows a court to presume that the destroyed evidence was relevant or its loss prejudicial.” *Rimkus*, 688 F. Supp. 2d at 617–18. Where there is a presumption, the spoliating party may rebut this presumption by showing “that the innocent party has not been prejudiced by the absence of the missing information.” *Pension Comm.*, 685 F. Supp. 2d at 468. If the spoliating party makes such a showing, “the innocent party, of course, may offer evidence to counter that proof.” *Id.* As with the other elements, the lack of a uniform standard regarding the level of culpability required to warrant spoliation sanctions has created uncertainty and added to the concern that institutional and organizational entities have expressed regarding how to conduct themselves in a way that will comply with multiple, inconsistent standards.

2010 WL 3530097, at *35 (alterations in original) (footnote omitted). The court noted that the fact that the Second Circuit allows relevance and prejudice to be presumed if the spoliating party acted with gross negligence “is all the more significant because . . . in the Second Circuit, certain conduct is considered gross negligence *per se*. Thus, for example, if a party fails to issue a written litigation hold, the court finds that it is grossly negligent, in which case relevance and prejudice are presumed. Point. Game. Match.” *Id.* at *35 n.34 (internal citation omitted).

Other courts have discussed the elements in slightly different terms from those used in the *Pension Committee* court’s formulation. For example, one court has described the spoliation analysis as follows:

In determining whether sanctions are appropriate, the court must first determine whether the missing documents or materials would be relevant to an issue at trial. If not, then the court’s analysis stops there. If the missing documents would be relevant, the court must then decide whether Land O’Lakes was under an obligation to preserve the records at issue. Finally, if such a duty existed, the court must consider what sanction, if any, is appropriate given the non-moving party’s degree of culpability, the degree of any prejudice to the moving party, and the purposes to be served by exercising the court’s power to sanction.

Cache, 244 F.R.D. at 621; *accord Asher Assocs.*, 2009 WL 1328483, at *5 (same); *Salvatore*, 2009 WL 943713, at *3 (same, and noting that the standard under Colorado law is similar). The *Cache*

court explained that the analysis is similar to that used in the non-spoilation context:

In a non-spoilation context, the Tenth Circuit has held that the trial court should weigh several factors in determining an appropriate sanction: (1) the degree of actual prejudice to the moving party; (2) the amount of interference with the judicial process; (3) the culpability of the non-moving party; (4) whether the court warned the party in advance that a dispositive sanction would be likely for non-compliance, and (5) the efficacy of lesser sanctions.

244 F.R.D. at 636 (citations omitted); *accord Asher Assocs.*, 2009 WL 1328483, at *10. But the court stated that “[w]here a non-dispositive sanction is not at issue, only the first three factors are applicable.” *Cache*, 244 F.R.D. at 636 (citation omitted).

Another court stated that in order to find spoliation, the court must find the following: “(1) that there was a duty to preserve the specific documents and/or evidence, 2) that the duty was breached, 3) that the other party was harmed by the breach, and 4) that the breach was caused by the breaching party’s wilfulness, bad faith, or fault.” *Jones*, 2010 WL 2106640, at *5 (citation omitted).

And a court within the Eleventh Circuit has stated that the party seeking sanctions must prove: “first, that the missing evidence existed at one time; second, that the alleged spoliator had a duty to preserve the evidence; and third, that the evidence was crucial to the movant being able to prove its prima facie case or defense.” *Walter*, 2010 WL 2927962, at *2.

When sanctions are sought under Rule 37(b),

“[s]everal factors may be useful in evaluating a district court’s exercise of discretion” . . . , including “(1) the willfulness of the non-compliant party or the reason for noncompliance; (2) the efficacy of lesser sanctions; (3) the duration of the period of noncompliance, and (4) whether the non-compliant party had been warned of the consequences of noncompliance.” *Agiwal v. Mid Island Mortg. Corp.*, 555 F.3d 298, 302 (2d Cir. 2009) (quoting *Nieves v. City of New York*, 208 F.R.D. 531, 535 (S.D.N.Y. 2002)) (internal quotation marks and alteration omitted). Because the text of the rule requires only that the district court’s orders be “just,” however, and because the district court has “wide discretion in imposing sanctions under Rule 37,”

Shcherbakovskiy v. Da Capo Al Fine, Ltd., 490 F.3d 130, 135 (2d Cir. 2007) (internal quotation marks omitted), these factors are not exclusive, and they need not each be resolved against the party challenging the district court’s sanctions for us to conclude that those sanctions were within the court’s discretion. *See, e.g., Daval Steel Prods., a Div. of Francosteel Corp. v. M/V Fakredine*, 951 F.2d 1357, 1366 (2d Cir. 1991).

S. New England Tel. Co., 2010 WL 3325962, at *15.

b. Culpable State of Mind

The requisite state of mind varies by sanction sought and by circuit. The variety of standards are discussed earlier in this memo in the section on state of mind.

c. Relevance and Prejudice

The court in *Rimkus* explained that “[t]he ‘relevance’ and ‘prejudice’ factors of the adverse inference analysis are often broken down into three subparts: ‘(1) whether the evidence is relevant to the lawsuit; (2) whether the evidence would have supported the inference sought; and (3) whether the nondestroying party has suffered prejudice from the destruction of the evidence.’” *Rimkus*, 688 F. Supp. 2d at 616 (quoting *Consol. Aluminum*, 244 F.R.D. at 346). Similarly, in *Salvatore*, the court noted that “[t]he burden is on the aggrieved party to establish a reasonable possibility, based on concrete evidence rather than a fertile imagination, that access to the lost material would have produced evidence favorable to his cause.” *Salvatore*, 2009 WL 943713, at *10 (quoting *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 167 F.R.D. 90, 104 (D. Colo. 1996) (internal citation and quotation omitted)); *see also Asher Assocs.*, 2009 WL 1328483, at *10 (“[T]he imposition of severe sanctions requires a showing that the lost information would have been favorable to the moving party.”).

In the Second Circuit, “[r]elevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner.” *Pension Comm.*, 685 F. Supp. 2d at 467. The

Pension Committee court explained that in the Second Circuit, “[w]here a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party.” *Id.* (quoting *Residential Funding*, 306 F.3d at 109); *see also Wade*, 686 F. Supp. 2d at 195 (“When a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from . . . which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party.” (quoting *Residential Funding*, 306 F. 3d at 109)); *Richard Green*, 262 F.R.D. at 291 (“When evidence is destroyed in bad faith, that fact alone is sufficient to support an inference that the missing evidence would have been favorable to the party seeking sanctions, and therefore relevant.” (citing *Residential Funding*, 306 F.3d at 109));³² *Arista Records*, 608 F. Supp. 2d at 439 (same) (citations omitted). The *Pension Committee* court also noted that while many courts in its district “presume relevance where there is a finding of gross negligence, application of the presumption is not required.” 685 F. Supp. 2d at 467 (footnote omitted); *cf. Arista Records*, 608 F. Supp. 2d at 439–40 (“[A] showing of gross negligence in the destruction or untimely production of evidence’ will support an inference that the evidence would have been unfavorable to the spoliator.” (quoting *Residential Funding*, 306 F.3d at 109)).

But the *Pension Committee* court explained that “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.” 685 F. Supp. 2d at 467–68; *see also Harkabi*, 2010 WL 3377338,

³² The court noted that “under certain circumstances ‘a showing of gross negligence in the destruction or untimely production of evidence’ will support the same inference,” but found that the circumstances of the case did not warrant such an inference. *Richard Green*, 262 F.R.D. at 291 n.6; *see also Crown Castle*, 2010 WL 1286366, at *13 (“A court may assume that the destroyed evidence was relevant if it was destroyed in bad faith or through gross negligence.” (quoting *Residential Funding*, 306 F.3d at 109)).

at *6 (“When a spoliating party is negligent, the innocent party bears the burden of proving the relevance of the lost materials in order to justify the imposition of a severe sanction.” (citing *Pension Comm.*, 685 F. Supp. 2d at 467–68)); *Wade*, 686 F. Supp. 2d at 195 (“[W]hen destruction is negligent, relevance must be proven by the party seeking the sanctions.” (quoting *Zubulake IV*, 220 F.R.D. at 220)); *Richard Green*, 262 F.R.D. at 291 (“[W]hen the destruction is negligent or reckless, relevance must be proven by the party seeking the sanctions.” (citing *Zubulake IV*, 220 F.R.D. at 221)); *Arista Records*, 608 F. Supp. 2d at 439 (“[W]hen the destruction of evidence is negligent, relevance must be proven through extrinsic evidence by the party seeking sanctions. ‘This corroboration requirement is . . . necessary where the destruction was merely negligent since in those cases it cannot be inferred from the conduct of the spoliator that the evidence would even have been harmful.’” (omission in original) (internal citation omitted) (quoting *Zubulake IV*, 220 F.R.D. at 221)). The *Pension Committee* court further explained that the innocent party could prove relevance and prejudice “by ‘adduc[ing] sufficient evidence from which a reasonable trier of fact could infer that ‘the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction.’” 685 F. Supp. 2d at 468 (alterations in original) (quoting *Residential Funding*, 306 F.3d at 109); *accord Harkabi*, 2010 WL 3377338, at *6 (quoting *Residential Funding*, 306 F.3d at 109). The *Pension Committee* court continued:

“In other words, the [innocent party] must present extrinsic evidence tending to show that the destroyed e-mails would have been favorable to [its] case.”
“Courts must take care not to ‘hold[] the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed [or unavailable] evidence,’ because doing so ‘would . . . allow parties who have . . . destroyed evidence to profit from that destruction.’”

685 F. Supp. 2d at 468 (alterations in original) (footnotes omitted). The court also explained that “[n]o matter what level of culpability is found, any presumption is rebuttable and the spoliating party

should have the opportunity to demonstrate that the innocent party has not been prejudiced by the absence of the missing information.” *Id.* (footnote omitted). And, “[i]f the spoliating party offers proof that there has been no prejudice, the innocent party, of course, may offer evidence to counter that proof.” *Id.*

With respect to requiring the innocent party to show relevance of missing documents, the *Pension Committee* court acknowledged the potential unfairness in requiring such a demonstration from a party that has not reviewed the information, but concluded that “the party seeking relief has some obligation to make a showing of relevance and eventually prejudice, lest litigation become a ‘gotcha’ game rather than a full and fair opportunity to air the merits of a dispute.” *Pension Comm.*, 685 F. Supp. 2d at 468. The court developed a test “[t]o ensure that no party’s task is too onerous or too lenient,” stating:

When the spoliating party’s conduct is sufficiently egregious to justify a court’s *imposition* of a presumption of relevance and prejudice, or when the spoliating party’s conduct warrants *permitting* the jury to make such a presumption, the burden then shifts to the spoliating party to rebut that presumption. The spoliating party can do so, for example, by demonstrating that the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party’s claims or defenses. If the spoliating party demonstrates to a court’s satisfaction that there could not have been any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required.

Id. at 468–69; *cf. Rimkus*, 688 F. Supp. 2d at 616 (“Courts recognize that “[t]he burden placed on the moving party to show that the lost evidence would have been favorable to it ought not be too onerous, lest the spoliator be permitted to profit from its destruction.” (alteration in original) (quoting *Chan*, 2005 WL 1925579, at *7)). In *Rimkus*, the court noted that “[c]ourts recognize that a showing that the lost information is relevant and prejudicial is an important check on spoliation

allegations and sanctions motions.” *Rimkus*, 688 F. Supp. 2d at 616. In addition, “[c]ourts have held that speculative or generalized assertions that the missing evidence would have been favorable to the party seeking sanctions are insufficient.” *Id.* (footnote omitted). “By contrast, when the evidence in the case as a whole would allow a reasonable fact finder to conclude that the missing evidence would have helped the requesting party support its claims or defenses, that may be a sufficient showing of both relevance and prejudice to make an adverse inference instruction appropriate.” *Id.* at 616–17 (footnote omitted). In contrast to the approach utilized in *Pension Committee*, in which the court allowed relevance and prejudice to be presumed when the spoliating party acted with gross negligence,³³ the *Rimkus* court explained that “[t]he Fifth Circuit has not explicitly addressed whether even bad-faith destruction of evidence allows a court to presume that the destroyed evidence was relevant or its loss prejudicial.” *Id.* at 617. The court stated that “[c]ase law in the Fifth Circuit indicates that an adverse inference instruction is not proper unless there is a showing that the spoliated evidence would have been relevant.”³⁴ *Id.* (citations omitted); *but see Consol. Aluminum*, 244 F.R.D. at 340 n.6 (“When evidence is destroyed in bad faith, that fact alone is sufficient to demonstrate relevance. However, when the destruction is negligent, relevance must be proven by the party seeking sanctions.” (citing *Zubulake IV*, 220 F.R.D. at 220)).

In *Consolidated Aluminum*, the court described what the innocent party must show with respect to relevance:

³³ Under the *Pension Committee* approach, “[w]hen the level of culpability is ‘mere’ negligence, the presumption of relevance and prejudice is not available; the *Pension Committee* court imposed a limited burden on the innocent party to present some extrinsic evidence.” *Rimkus*, 688 F. Supp. 2d at 617.

³⁴ The *Rimkus* court did not need to decide whether to apply a presumption of relevance or prejudice because the innocent party had presented evidence on both issues. *See Rimkus*, 688 F. Supp. 2d at 617–18.

The party seeking the sanction of an adverse inference “must adduce sufficient evidence from which a reasonable trier of fact could infer that the ‘destroyed or [unavailable] evidence would have been of the nature alleged by the party affected by its destruction.’” *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2nd Cir. 2002). In other words, some extrinsic evidence of the content of the emails is necessary for the trier of fact to be able to determine in what respect and to what extent the emails would have been detrimental. Thus, before an adverse inference may be drawn, there must be some showing that there is in fact a nexus between the proposed inference and the information contained in the lost evidence.

Consol. Aluminum, 244 F.R.D. at 346 (alteration in original) (internal citations and footnote omitted); see also *In re Nat’l Century Fin. Enters.*, 2009 WL 2169174, at *12 (“There must be some showing of a nexus between the missing information and the issue on which the instruction is requested.” (citing *Consol. Aluminum*, 244 F.R.D. at 346)); *Forest Labs.*, 2009 WL 998402, at *6 (“The Fourth Circuit, for example, ‘describes the test for relevant evidence necessary to impose sanctions as that evidence which would ‘naturally have been introduced into evidence.’” (quoting *Sampson*, 251 F.R.D. at 179–80)); *Nucor*, 251 F.R.D. at 195 (“To justify the imposition of a sanction for spoliation, ‘it would have to appear that the evidence would have been relevant to an issue at trial and otherwise would naturally have been introduced into evidence.’ The non-spoliator does not have to show that the evidence would have been favorable to his case; it is enough to show that the evidence ‘naturally would have elucidated a fact at issue.’” (internal citation omitted) (quoting *Vodusek*, 71 F.3d at 156)); *McGinnity*, 183 F.R.D. at 62 (“‘Before an adverse inference may be drawn, there must be some showing that there is in fact a nexus between the proposed inference and the information contained in the lost evidence.’” (quoting *Turner*, 142 F.R.D. at 76)). The *Consolidated Aluminum* court emphasized that “a court cannot infer that destroyed documents would contradict the destroying party’s theory of the case, and corroborate the other[] party’s theory, simply based upon temporal coincidence.” *Consol. Aluminum*, 244 F.R.D. at 347. Providing evidence of the existence of relevant

documents will not, standing alone, be sufficient to prove that missing documents are relevant. *See id.* at 347 n.25 (“Courts will not make an ‘inferential leap’ that because some relevant emails are in existence, the deleted emails must have been relevant also.” (citation omitted)). Instead, there must be some evidence that the missing documents would have been unfavorable to the spoliator’s case. *See id.* at 347 n.26 (“It is inappropriate to give an adverse inference instruction based upon speculation that the deleted emails would have been unfavorable to Alcoa’s case. Without some evidence, direct or circumstantial, of the unfavorable content of the deleted emails, the Court simply cannot justify giving the requested adverse inference instructions.” (citation omitted)).

Several courts have concluded that “relevance” in the context of preservation means something more than “relevance” as defined in Federal Rule of Evidence 401. For example, in *Pension Committee*, the court stated:

“[O]ur cases make clear that ‘relevant’ in this context means something *more than sufficiently probative to satisfy Rule 401* of the Federal Rules of Evidence. Rather, the party seeking an adverse inference must adduce sufficient evidence from which a reasonable trier of fact could infer that ‘the destroyed or unavailable evidence would have been of the nature alleged by the party affected by its destruction.’”

685 F. Supp. 2d at 467 (alteration in original) (quoting *Residential Funding*, 306 F.3d at 108–09); *accord Crown Castle*, 2010 WL 1286366, at *13 (quoting *Residential Funding*, 306 F.3d at 108–09); *Wade*, 686 F. Supp. 2d at 195 (quoting *Residential Funding*, 306 F.3d at 108–09); *Richard Green*, 262 F.R.D. at 291 (quoting *Residential Funding*, 306 F.3d at 108–09); *Arista Records*, 608 F. Supp. 2d at 439 (quoting *Residential Funding*, 306 F.3d at 108–09); *see also Victor Stanley*, 2010 WL 3530097, at *34 (“In the context of spoliation, lost or destroyed evidence is ‘relevant’ if ‘a reasonable trier of fact could conclude that the lost evidence would have supported the claims or defenses of the party that sought it.’ It is not enough for the evidence to have been ‘sufficiently

probative to satisfy Rule 401 of the Federal Rules of Evidence,’” (internal citations omitted)). In addition, “[i]t is not enough for the innocent party to show that the destroyed evidence would have been responsive to a document request.” *Pension Comm.*, 685 F. Supp. 2d at 467. Instead, “[t]he 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.” *Id.*; *see also Goodman*, 632 F. Supp. 2d at 522 (“In a spoliation motion, ‘relevancy’ is determined ‘to the extent that a reasonable factfinder could conclude that the lost evidence would have supported the claims or defenses of the party that sought it.’” (quoting *Thompson*, 219 F.R.D. at 101)). But “‘evidence need not be conclusive in order to be relevant.’” *Asher Assocs.*, 2009 WL 1328483, at *6 (quoting *United States v. Schultz*, 333 F.3d 393, 416 (2d Cir. 2003)). While the relevance and prejudice elements seem to be intertwined, the *Pension Committee* court emphasized that “[p]roof of relevance does not necessarily equal proof of prejudice.” 685 F. Supp. 2d at 467.

Most, but not all, courts take the degree of prejudice into account in determining the appropriate remedy. *See, e.g., Victor Stanley*, 2010 WL 3530097, at *34 (“[A] finding of ‘relevance’ for purposes of spoliation sanctions is a two-pronged finding of relevance and prejudice.”); *Crown Castle*, 2010 WL 1286366, at *16 (“An instruction to the jury ‘that the [destroyed] evidence would have been unfavorable to the party responsible for its destruction,’ ‘serves to ‘restor[e] the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence.’” For this reason, an adverse inference instruction may not be appropriate where the destruction of evidence has not prejudiced the movant.” (alterations in original) (internal citations omitted)); *Schlumberger*, 2009 WL 5252644, at *5 (In determining whether to impose a spoliation sanction, “[t]he court considers two primary factors: ‘(1) the degree of culpability of the party who lost or destroyed the

evidence; and (2) the degree of actual prejudice to the other party.” (citation omitted)); *In re Nat’l Century Fin. Enters.*, 2009 WL 2169174, at *12 (“The party seeking [a] spoliation instruction must demonstrate that it was prejudiced by the loss of the information.”); *Asher Assocs.*, 2009 WL 1328483, at *5 (“A spoliation sanction is proper where (1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence.” (quoting *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007))); *Salvatore*, 2009 WL 943713, at *11 (“A sanction for spoliation is not appropriate where, as here, the destruction of evidence does not cause any prejudice.” (citations omitted)); *E*Trade Sec.*, 230 F.R.D. at 592 (“An imposition of sanctions is only merited when the moving party can demonstrate that they have suffered prejudice as a result of the spoliation.” (citation omitted)); *Indem. Ins. Co. of N. Am.*, 1998 WL 363834, at *5 (“Where . . . a party has had some opportunity to view the allegedly defective product in its post-accident state, spoliation motions generally are denied.” (citation omitted)). In *Consolidated Edison*, the court explained that “[o]nce a showing of spoliation has been established, the burden shifts to the party against which the motion was made to show that the destruction of the evidence and failure to produce the documents did not prejudice the opponent.” *Consol. Edison*, 90 Fed. Cl. at 257 (citation omitted).

In describing the measure of prejudice, one court stated that “[p]rejudice will be measured by the degree in which a party’s ability to adequately develop its liability theory or mount a proper defense has been hampered.” *Velez*, 590 F. Supp. 2d at 258 (citations omitted); *see also Victor Stanley*, 2010 WL 3530097, at *35 (“Spoliation of evidence causes prejudice when, as a result of the spoliation, the party claiming spoliation cannot present ‘evidence essential to its underlying claim.’”

(quoting *Krumwiede v. Brighton Assocs., L.L.C.*, No. 05-C-3003, 2006 WL 1308629, at *10 (N.D. Ill. May 8, 2006)); *id.* (“Generally, courts find prejudice where a party’s ability to present its case or to defend is compromised.” (citing *Silvestri*, 271 F.3d at 593–94)). “The court considers prejudice to the party and ‘prejudice to the judicial system.’” *Victor Stanley*, 2010 WL 3530097, at *35 (quoting *Krumwiede*, 2006 WL 1308629, at *11).

If prejudice is severe, that can weigh in favor of entering a severe sanction. *See Danis*, 2000 WL 1694325, at *35 (“The prejudice suffered from the destruction of documents can take many forms, the most severe of which occurs when the evidence destroyed is the only proof available on an issue or defense in the case. In such cases, evidence of fault in conjunction with such prejudice would support the entry of severe sanctions, such as a default judgment . . . because ‘the dilemma of lost evidence is that the aggrieved party can never know what it was, and can therefore never know the value that it may have had to the aggrieved party’s case’” (internal citations omitted)). But even severe prejudice may not warrant a severe sanction if the spoliating party did not act with a culpable state of mind, even if that party is at fault. *See id.* (“[I]n cases where fault, rather than a culpable state of mind, gives rise to the destruction of evidence and the prejudice suffered is because some—perhaps even the ‘best,’ but not necessarily the only—evidence has been destroyed, then the choice of the severest sanction is not necessarily justified.” (citations omitted)); *see also Kmart*, 371 B.R. at 842 (“In cases where spoliation is the result of ‘fault,’ as opposed to willfulness or bad faith, courts often use prejudice as a ‘balancing tool’ to tip the scales in favor of or away from severe sanctions.” (citations omitted)).

While most courts require a showing of prejudice in order to impose sanctions for spoliation, some courts have stated that prejudice is not required, even if it is often a consideration in the

sanctions analysis. See *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d at 1075 (“Prejudice is an ‘optional’ consideration when determining whether default sanctions are appropriate.” (footnote omitted) (citing *Halaco Eng’g Co. v. Costle*, 843 F.2d 376, 380 (9th Cir. 1988)); *Danis*, 2000 WL 1694325, at *34 (“Although careful to ‘eschew grafting a requirement of prejudice onto a district court’s ability to dismiss or enter judgment as a sanction under its inherent power[,] the Seventh Circuit has recognized that ‘dismissal or judgment is such a serious sanction that it should not be invoked without first considering what effect—if any—the challenged conduct has had on the course of the litigation.’” (quoting *Barnhill v. United States*, 11 F.3d 1360, 1368 (7th Cir. 1993))); *Kmart*, 371 B.R. at 842 (“[W]hile prejudice is not an element in imposing sanctions, the prejudice to the non-offending party should be considered by the court.” (citations omitted)); see also *S. New England Tel. Co.*, 2010 WL 3325962, at *19 (“We, along with the Supreme Court, have consistently rejected the ‘no harm, no foul’ standard for evaluating discovery sanctions Although *one* purpose of Rule 37 sanctions may in some cases be to protect other parties to the litigation from prejudice resulting from a party’s noncompliance with discovery obligations, Rule 37 sanctions serve other functions unrelated to the prejudice suffered by individual litigants” (internal citations omitted)).³⁵

³⁵ The *Southern New England Telephone Co.* court explained:

Disciplinary sanctions under Rule 37 are intended to serve three purposes. First, they ensure that a party will not benefit from its own failure to comply. Second, they are specific deterrents and seek to obtain compliance with the particular order issued. Third, they are intended to serve a general deterrent effect on the case at hand and on other litigation, provided that the party against whom they are imposed was in some sense at fault.

2010 WL 3325962, at *19 (quotation marks omitted) (quoting *Update Art, Inc. v. Modiin Publ’g, Ltd.*, 843 F.2d 67, 71 (2d Cir. 1988)). The court concluded that “[e]ven when a party finally (albeit belatedly) *complies* with discovery orders after sanctions are imposed, these purposes may still justify sanctions” *Id.*

9. Burden of Proof

There is some disagreement in the case law as to whether the party attempting to show spoliation must prove the elements by clear and convincing evidence or only by a preponderance of the evidence. In *Danis*, the court explained:

The Seventh Circuit has not indicated the quantum of proof necessary for a moving party to establish such culpability [willfulness, bad faith, or fault required to impose dismissal or a default judgment] under Rule 37. With respect to a court's *inherent powers*, cases outside this Circuit apply a clear and convincing evidence standard for default judgments. *Compare Shepherd v. Am. Broadcasting Companies, Inc.*, 62 F.3d 1469, 1472, 1477 (D.D.C. 1995) (because sanction of dismissal serves same purpose as contempt, same standard of proof, clear and convincing evidence, should apply) *with Gates Rubber Co.*, 167 F.R.D. at 108 (“burden of proof for sanctions should be as stringent as the circumstances require” and “if a judge intends to order dismissal or default judgment . . . the judge should do so only . . . by evidence which is clear and convincing”). Because there is no material difference between an analysis under the Court's inherent powers and under Rule 37, we believe the rationale for applying a clear and convincing evidence standard applies with equal force to Rule 37 cases, and in the absence of any contrary authority, adopt the clear and convincing evidence standard in this case.

Danis, 2000 WL 1694325, at *34 (footnote omitted); *see also Mintel Int'l Group*, 2010 WL 145786, at *6 (“A party asserting spoliation must show by ‘clear and convincing evidence’ that the opposing party intentionally destroyed the evidence.” (citations omitted)); *Am. Family Mut. Ins. Co. v. Roth*, No. 05 C 3839, 2009 WL 982788, at *11 (N.D. Ill. Feb. 20, 2009) (“Until the Court of Appeals speaks definitively to the question, the test is whether spoliation has been proved by clear and convincing evidence.”); *cf. Grubb*, 2010 WL 3075517, at *4 (noting that there is case law supporting the imposition of a “clear and convincing” burden of proof to support a sanctions motion, but that “a more recent Seventh Circuit case calls that holding into question and indicates that the proper standard is ‘preponderance of the evidence.’” (citing *Ridge Chrysler Jeep, LLC v. DaimlerChrysler*

Fin. Servs. Ams. LLC, 516 F.3d 623, 625 (7th Cir. 2008), and *Maynard v. Nygren*, 332 F.3d 462, 468 (7th Cir. 2003))). The *Danis* court noted that the burden of proof is lower for certain other sanctions:

Issue-related sanctions, such as adverse inferences, preclusion of evidence, and jury instructions do not require clear and convincing evidence but may be imposed by preponderance of the evidence showings “that a party's misconduct has tainted the evidentiary resolution of the issue.” *Shepherd*, 62 F.3d at 1478. This is because “issue-related sanctions are fundamentally remedial rather than punitive and do not preclude a trial on the merits.” *Id.* Fines, however, still require clear and convincing evidence under the *Shepherd* rationale because they are “fundamentally penal.” *Id.*

2000 WL 1694325, at *34 n.22.

Another court indicated that the burden of proof is also unclear in the Third Circuit, at least for the imposition of dispositive sanctions. *See Micron*, 255 F.R.D. at 149 (“The required burden of proof to establish spoliation is not a matter of settled law in the Third Circuit. On the one hand, in order to prove prejudice ‘[u]nder *Schmid* [*v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3d Cir. 1994)], a party need only ‘come forward with plausible, concrete suggestions as to what [the destroyed] evidence might have been.’” On the other hand, because dispositive sanctions ‘contravene the strong public policy [that] favors adjudication of cases on their merits,’ a higher burden of proof may be appropriate.” (first, third, and fourth alterations in original) (internal citations omitted)). The court noted that “[t]he elimination of valued rights should not occur in the absence of a degree of proof [that] reflects the very serious nature of the decision,’ that is, proof by clear and convincing evidence.” *Id.* (alterations in original) (quoting *Gates Rubber Co. v. Bando Chem. Indus. Ltd.*, 167 F.R.D. 90, 108 (D. Colo. 1996)). The court concluded that clear and convincing evidence was required to impose dispositive sanctions:

Although the court recognizes that requiring clear and convincing

evidence for the imposition of dispositive sanctions for spoliation places an onerous burden on the aggrieved party (where the very proof of intent and prejudice arguably has been destroyed), . . . the court concludes that this higher burden can appropriately operate as the clear and convincing burden operates in the patent arena in proving inequitable conduct. More specifically, once intent and prejudice have been established, the court must determine whether their total weight satisfies the clear and convincing standard of proof. In this regard, the showing of intent (i.e., bad faith) can be proportionally less when balanced against high prejudice. In contrast, the showing of intent must be proportionally greater when balanced against low prejudice. *See, e.g., N.V. Akzo v. E.I. DuPont de Nemours*, 810 F.2d 1148, 1153 (Fed. Cir. 1987).

Id.

In *Kmart*, the court noted that “the quantum of proof necessary for the imposition of the various sanctions depends on the severity of the specific sanction sought.” *Kmart*, 371 B.R. at 841 (citation omitted). The court explained that “[c]lear and convincing evidence of willfulness, bad faith, or fault is required for the sanction of dismissal with prejudice or default judgment,” but that “[n]on-dismissal sanctions are generally permissible even without clear and convincing evidence.” *Id.* (citations omitted).

Other cases state that the burden of proof for imposing spoliation sanctions is a preponderance of the evidence. *See, e.g., Fairfield Dev., Inc. v. J.D.I. Contractor & Supply, Inc.*, No. 08-cv-02792-MSK-KMT, 2010 WL 3023822, at *2 (D. Colo. Jul. 30, 2010) (“The burden is on the moving party to prove, by a preponderance of the evidence, that the opposing party failed to preserve evidence or destroyed it.” (citation omitted)); *Sue v. Milyard*, No. 07-cv-01711-REB-MJW, 2009 WL 2424435, at *1 (D. Colo. Aug. 6, 2009) (“The movant has the burden of proving, by a preponderance of the evidence, that the opposing party failed to preserve evidence or destroyed it.” (citation omitted)); *Ernest v. Lockheed Martin Corp.*, No. 07-cv-02038-WYD-KLM, 2008 WL 2945608, at *1 (D. Colo. Jul. 28, 2008) (same). In *In re Napster, Inc. Copyright Litigation*, the court rejected the argument

that willfulness, bad faith, or fault necessitated proof by clear and convincing evidence in order to warrant a dismissal sanction. 462 F. Supp. 2d at 1072. The court noted that the party facing sanctions pointed “to no Ninth Circuit authority applying the clear and convincing standard to the exercise of the court’s inherent authority to impose dismissal or default sanctions, and [that] the Ninth Circuit has not squarely addressed the issue of which standard of proof is appropriate.” *Id.*

10. Agency Liability

A party can be sanctioned for spoliation acts committed by its employees or other agents. *See Victor Stanley*, 2010 WL 3530097, at *17 n.23 (“[A]gency law is directly applicable to a spoliation motion, and the level of culpability of the agent can be imputed to the master.” (citations omitted)); *Nucor*, 251 F.R.D. at 196 (“Ordinary agency principles govern a party’s responsibility for spoliation committed by its employees. An employer is liable for any acts committed by employees acting within the scope of their employment.” (internal citations omitted)); *see also Schumacher*, 2010 WL 2867603, at *5 (“[A] party can be held liable for spoliation of relevant evidence by its agents.” (citation omitted)); *Goodman*, 632 F. Supp. 2d at 522 n.16 (“A party may be held responsible for the spoliation of relevant evidence done by its agents. Thus, agency law is directly applicable to a spoliation motion, and the level of culpability of the agent can be imputed to the master.” (internal citation omitted)). A party may also be held responsible for failing to preserve if its counsel had knowledge of that duty. *See Maxxam*, 2009 WL 817264, at *13 (“Defendants are therefore chargeable with their agent Morrison & Foerster’s knowledge that a duty to preserve evidence had been triggered.” (citation omitted)).

11. Safe Harbor

The e-discovery panel proposed having a safe harbor that would insulate a party from sanctions

for failure to preserve if the party complied with the rule. One court has noted that the safe harbor provision in Rule 37(e), which provides that “[a]bsent 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,” does not apply when a court sanctions a party under its inherent powers because the rule text is specifically limited to sanctions entered under the rules. *See Nucor*, 251 F.R.D. at 196 n.3. Although the statement by the *Nucor* court involved the safe harbor in Rule 37(e), its point that the rule’s safe harbor could not overrule a court’s inherent authority to sanction may be applicable in the context of drafting a preservation rule. One question may be how a safe harbor in a preservation rule would interact with a court’s inherent authority to sanction despite compliance with the rule’s requirements.

12. Timeliness

In *Goodman*, the court addressed the importance of bringing a spoliation claim to the court’s attention as soon as possible and considered the circumstances in which a motion for sanctions for spoliation would be untimely. The court stated:

Courts considering this issue have identified a number of factors that can be used to assess the timeliness of spoliation motions. First, “[k]ey to the discretionary timeliness assessment of lower courts is how long after the close of discovery the relevant spoliation motion has been made” Second, a court should examine the temporal proximity between a spoliation motion and motions for summary judgment. Third, courts should be wary of any spoliation motion made on the eve of trial. Fourth, courts should consider whether there was any governing deadline for filing spoliation motions in the scheduling order issued pursuant to FED. R. CIV. P. 16(b) or by local rule. Finally, the explanation of the moving party as to why the motion was not filed earlier should be considered.

Goodman, 632 F. Supp. 2d at 506–08 (alteration and omission in original) (internal citations and

footnote omitted).³⁶ The court emphasized the need for spoliation motions to be filed as soon as possible:

The lesson to be learned from the cases that have sought to define when a spoliation motion should be filed in order to be timely is that there is a particular need for these motions to be filed as soon as reasonably possible after discovery of the facts that underlie the motion. This is because resolution of spoliation motions are fact intensive, requiring the court to assess when the duty to preserve commenced, whether the party accused of spoliation properly complied with its preservation duty, the degree of culpability involved, the relevance of the lost evidence to the case, and the concomitant prejudice to the party that was deprived of access to the evidence because it was not preserved. *See, e.g., Silvestri*, 271 F.3d at 594–95. Before ruling on a spoliation motion, a court may have to hold a hearing, and if spoliation is found, consideration of an appropriate remedy can involve determinations that may end the litigation or severely alter its course by striking pleadings, precluding proof of facts, foreclosing claims or defenses, or even granting a default judgment. And, in deciding a spoliation motion, the court may order that additional discovery take place either to develop facts needed to rule on the motion or to afford the party deprived of relevant evidence an additional opportunity to develop it from other sources. *The least disruptive time to undertake this is during the discovery phase, not after it has closed.* Reopening discovery, even if for a limited purpose, months after it has closed or after dispositive motions have been filed, or worse still, on the eve of trial, can completely disrupt the pretrial schedule, involve significant cost, and burden the court and parties. Courts are justifiably unsympathetic to litigants who, because of inattention, neglect, or purposeful delay aimed at achieving an unwarranted tactical advantage, attempt to reargue a substantive issue already ruled on by the court through the guise of a spoliation motion, or use such a motion to try to reopen or prolong discovery beyond the time allotted in the pretrial order.

Id. at 508 (emphasis added) (footnote omitted).

³⁶ The court noted that “[s]ome courts have examined whether the spoliation motion ‘was made in accordance with Rule 37,’” and that the courts evaluating this factor do not “provide an explanation as to the meaning of this phrase; however, it stands to reason that a court should take Rule 37 compliance into consideration when dealing with a spoliation motion founded on a violation of a specific court order, rather than a motion brought under the court’s inherent power to control the judicial process.” *Goodman*, 632 F. Supp. 2d at 507 n.5. The *Goodman* court did not evaluate this factor because the plaintiff did not argue that the alleged spoliation violated an order of the court, making “compliance with Rule 37 . . . irrelevant to determining whether *Goodman*’s Motion was timely.” *Id.*

13. Choice of Law³⁷

Most courts apply federal law to spoliation issues. *See Walter*, 2010 WL 2927962, at *2 (“Federal law governs the imposition of sanctions for spoliation of evidence in a diversity action.” (citing *Martinez v. Brink’s, Inc.*, 171 F. App’x 263, 269 (11th Cir. 2006))); *Schumacher*, 2010 WL 2867603, at *5 (federal law of spoliation applied in a diversity case because “the power to sanction for spoliation derives from the inherent power of the court, not substantive law.” (quoting *Silvestri*, 271 F.3d at 590; citing *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 449–50 (4th Cir. 2004))); *O’Brien*, 2010 WL 1741352, at *3 (“In determining whether spoliation sanctions are appropriate, federal law applies.” (citing *Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009))); *In re Nat’l Century Fin. Enters.*, 2009 WL 2169174, at *3 (“[C]ourts should apply federal law in cases concerning spoliation of evidence, which is derived from a court’s inherent power to control the judicial process.”); *Forest Labs.*, 2009 WL 998402, at *1 (“The Sixth Circuit has recently recognized that federal law governs spoliation sanctions in all federal court cases, thereby bringing the case law in the Sixth Circuit ‘in line with other courts of appeals.’” (quoting *Adkins*, 554 F.3d at 652));³⁸ *Greyhound Lines*, 2009 WL 798947, at *1 (“The Eleventh Circuit has held that federal law governs the imposition of sanctions for spoliation of the evidence in a diversity suit because spoliation sanctions are an evidentiary matter. The Eleventh Circuit also has explained, however, that in

³⁷ The e-discovery panel did not suggest that choice-of-law issues be addressed in the preservation rule, but since I came across some case law on that issue in looking into the other elements, a brief summary is included here.

³⁸ Earlier Sixth Circuit case law indicated that spoliation sanctions may be governed by state law. *See Clark Constr. Group*, 229 F.R.D. at 138 (“This matter involves possible bad faith conduct during the discovery period and the destruction of potentially relevant evidence; therefore, ‘[t]he rules that apply to the spoiling of evidence and the range of appropriate sanctions are defined by state law’” (alteration and omission in original) (quoting *Beck v. Haik*, 377 F.3d 624, 641 (6th Cir. 2004))).

evaluating the need for sanctions, federal courts look to factors enumerated in state law, because federal law does not set forth specific guidelines regarding sanctions for spoliation.” (internal citation to *Flury*, 427 F.3d at 944, omitted)); *Townsend*, 174 F.R.D. at 4 (federal law controls spoliation sanctions issues). In patent cases, regional circuit law governs sanctions for spoliation. *Micron*, 255 F.R.D. at 148 (citing *Monsanto Co. v. Ralph*, 382 F.3d 1374, 1380 (Fed. Cir. 2004)).

VIII. Judicial Determination

A. E-Discovery Panel’s Proposal

It should provide access to a judicial officer, following a meet and confer, to

- a. Resolve disputes
- b. Apply Rule 26(c)/proportionality
- c. Consider the potential for cost allocation
- d. Impose sanctions (*e.g.*, of the sort provided for by Rule 37).

B. Case Law on the Judicial Determination Element

While it is difficult to find case law specifically addressing access to a judicial officer to handle preservation issues, a related issue is what spoliation issues are for the judge and what issues are for the jury. For example, in *Nucor*, the court explained:

There is inconsistency in how courts deal with the division of fact-finding labor in spoliation cases. The court makes the findings of fact necessary to reach a conclusion on the spoliation issue. *See, e.g., Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958–61 (9th Cir. 2006); *Zubulake v. UBS Warburg (Zubulake V)*, 229 F.R.D. 422 (S.D.N.Y. 2004). That practice follows the usual rule that the court, rather than a jury, is responsible for finding facts on a motion for sanctions. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399–401, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)[;] *Brubaker v. City of Richmond*, 943 F.2d 1363, 1374 (4th Cir. 1991)[;] *Blue v. U.S. Dep’t of the Army*, 914 F.2d 525, 540–44 (4th Cir. 1990). Indeed, a district court is granted broad discretion to impose appropriate sanctions, *Silvestri*, 271 F.3d at 590, and the abuse of discretion

standard accounts for the judge’s role as a fact-finder. *See Cooter & Gell*, 496 U.S. at 400–01, 110 S. Ct. 2447[;] *see also Brubaker*, 943 F.2d at 1374 (“A district court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.”)[.]

Nonetheless, when imposing an adverse inference charge as a sanction for spoliation, district courts permit the jurors to re-assess the evidence and determine whether, in their judgment, spoliation has occurred at all. For example, in *Zubulake V*, the court engaged in a thorough and well-reasoned assessment of the evidence, and ultimately concluded that the defendant had spoliated relevant evidence. Nonetheless, the district court’s charge stated that the jury should decide whether the defendant failed to produce relevant evidence and, if it answered that question affirmatively, then decide whether to apply an adverse inference. *See Zubulake V*, 229 F.R.D. at 439–40.

251 F.R.D. at 202–03 (footnote omitted). The *Nucor* court questioned the approach of allowing the jury to reassess spoliation issues previously addressed by the court:

While this court is content to allow the jury to decide whether spoliation occurred for itself, the allocation of labor in *Zubulake V*, *Vodusek*, and other cases makes little sense when viewed in light of all the sanctions available to remedy spoliation of evidence. If a district court finds that a party spoliated evidence and sanctions that conduct by giving an adverse inference charge, the spoliating party gets an opportunity to re-argue the spoliation issue before the jury. However, if a district court makes the same findings and chooses to impose any other sanction, including the harsher sanctions of default judgment or dismissal, the spoliating party is not afforded the same opportunity. In other words, the judge is the final authority to make the relevant findings of fact (subject, of course, to appellate review) in those cases. Because good authority trends toward such an outcome, notably the *Zubulake V* and *Vodusek* cases, this court will permit the parties to present all spoliation issues anew before the jury. The inconsistency is noted simply because courts and parties should be mindful of the consequences the different sanctions may have on who ultimately gets to decide the factual disputes.

Id. at 203.

In *Residential Funding*, the Second Circuit explained:

Although the issue of whether evidence was destroyed with a “culpable state of mind” is one for a court to decide in determining whether the imposition of sanctions is warranted, whether the materials were in fact unfavorable to

the culpable party is an issue of fact to be determined by the jury. Accordingly, a court's role in evaluating the "relevance" factor in the adverse inference analysis is limited to insuring that the party seeking the inference had adduced enough evidence of the contents of the missing materials such that a reasonable jury could find in its favor.

Residential Funding, 306 F.3d at 109 n.4 (internal citations omitted).

A court within the Eleventh Circuit noted that the Eleventh Circuit has concluded that "a district court's drawing of an adverse inference had to be supported by a finding of bad faith . . . , and that it was proper for the court, not the jury, to find bad faith, because the inference is a sanction for the failure to preserve evidence." See *Greyhound Lines*, 2009 WL 798947, at *2 (citing *BP Prods. N.A., Inc. v. SE Energy Group, Inc.*, 282 F. App'x 776, 780 n.3 (11th Cir. 2008)).

Another issue related to judicial oversight is when a court should enter a preservation order.

One court has described the test used for evaluating whether such an order is warranted:

It is true that the issuance of a preservation order is by no means automatic, even in a complex case. Nevertheless, such orders "are increasingly routine in cases involving electronic evidence, such as e-mails and other forms of electronic communication." *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 136 (2004). The critical question is under what circumstances a preservation order should be issued.

Some courts have taken the position that a party seeking a preservation order must meet the standards for obtaining injunctive relief. In the Second Circuit, a party seeking a preliminary injunction "must show, first, irreparable injury and, second, either (a) likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly in the movant's favor."

However, attempting to apply these requirements in the context of a request for a preservation order creates anomalies. For example, the court must evaluate the merits of the litigation even before evidence has been gathered, let alone produced to the opposing party or submitted to the court. As one court has observed, there is no reason "to consider whether plaintiff is likely to be successful on the merits of its case in deciding whether to protect records from destruction. . . . [S]uch an approach would be decidedly to put the cart before the horse." Likewise, it is difficult to

evaluate the injury that might be caused by the destruction of evidence without yet knowing the content of that evidence.

Instead of importing the standards for injunctive relief, some courts have instituted a balancing test for determining whether to issue a preservation order. For example, in *Capricorn Power [Co. v. Siemens Westinghouse Power Corp.]*, 220 F.R.D. 429 (W.D. Pa. 2004)], the court outlined a three-factor test, taking into consideration:

- 1) the level of concern that the court has for the continuing existence and maintenance of the integrity of the evidence in question in the absence of an order directing preservation of the evidence; 2) any irreparable harm likely to result to the party seeking the preservation of evidence absent an order directing preservation; and 3) the capability of an individual, entity, or party to maintain the evidence sought to be preserved, not only as to the evidence's original form, condition, or contents, but also the physical, spatial and financial burdens created by ordering evidence preservation.

220 F.R.D. at 433–34. Other courts have adopted a more streamlined test that simply “requires that one seeking a preservation order demonstrate that it is necessary and not unduly burdensome.” The difference between these two tests lies in what the moving party must show with respect to the content of the evidence that is in danger of being destroyed. However, the distinction is more apparent than real. Even under the two-factor approach, one element of demonstrating the necessity for an order is a showing that the documents in jeopardy are in fact relevant. And, while the three-factor test suggests a more specific demonstration of the importance of the evidence—whether, for example, it is “one-of-a-kind,”—neither this nor any other single factor is determinative. Thus, while the ability to establish that unique and critical evidence will be destroyed would certainly buttress any motion for a preservation order, it is not an absolute requirement under either articulation of the balancing test. That test, in turn, is better adapted than the standard for injunctive relief for dealing with the question of whether to require the preservation of evidence, the nature of which may not yet be fully known, and I will therefore apply a balancing standard in this case.

Treppel v. Biovail, 233 F.R.D. 363, 369–71 (S.D.N.Y. 2006) (first alteration in original) (internal citations omitted).

IX. Conclusion

The case law across the country contains many variations as to what is necessary to establish each of the proposed elements of a preservation rule. While there is general agreement on some of the elements, such as when the duty to preserve is triggered, there is disagreement with respect to aspects of many others. The widest range of disagreement is with respect to sanctions and the state of mind required to impose different types of sanctions. Particularly with respect to the state-of-mind element, the standards often vary even within a circuit.