

# ELECTRONIC DISCOVERY SANCTIONS IN THE TWENTY-FIRST CENTURY

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## I. INTRODUCTION

Liberal discovery is a hallmark of our civil justice system because parties need information to prosecute or defend their cases. Relevant information may be conveyed to the adversary in a myriad of ways, including pretrial disclosures, responses to interrogatories, and an exchange of documents. In today’s paperless world, discovery has focused less on hard copy documents and more on electronically-stored information. Requests for electronic information have become so commonplace that one judge has remarked, “[I]t is black letter law that computerized data is discoverable if relevant.”<sup>1</sup>

A problem with discovering electronic data, however, is that it is much more susceptible to unintentional destruction than hard copy documents. Electronic data is often recycled or overwritten as part of normal business practices because a business cannot or need not retain large volumes of outdated information. When litigation ensues, companies need to take affirmative steps to prevent the destruction of certain relevant electronic documents, such as e-mails, computer records, and possibly back-up tapes. Not surprisingly, spoliation has become a significant e-discovery problem, and businesses have expressed the need for

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1. *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 Civ. 2120, 1995 WL 649934, at \*2 (S.D.N.Y. Nov. 3, 1995).

a “safe harbor” to protect themselves from sanctions for the inadvertent loss of electronic documents.<sup>2</sup>

Parties may be sanctioned for spoliation under Federal Rule of Civil Procedure 37, a state-law equivalent of Rule 37, or a court’s inherent power.<sup>3</sup> Rule 37 does not specifically authorize a court to impose sanctions for the spoliation of evidence. However, courts frequently rely on subsections (b) and (c) of Rule 37 when imposing such sanctions because a party has destroyed documents in violation of a court order or the destruction of documents has rendered a party unable to comply with its disclosure obligations under the Rules. Subsection (b) provides: “[I]f a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just . . . .” Subsection (c) permits a court to “impose other appropriate sanctions” if a party “without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2).”

At the federal level, the Civil Rules Advisory Committee has responded to the “unique and necessary feature of computer systems—the automatic recycling, overwriting, and alteration of electronically stored information”<sup>4</sup>—with a proposed amendment to Rule 37. The proposed Rule 37(f) would shield litigants from sanctions for the destruction of electronic data if the party “took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action” and “the failure resulted from the loss of the information because of the routine operation of the party’s electronic information system.”<sup>5</sup> The safe harbor provision would not apply if “a party violated an order in the action requiring it to preserve electronically stored information.”<sup>6</sup>

This proposed rule is controversial for several reasons. Businesses have complained that reform is needed because requiring them to store and retrieve electronic information is expensive and burdensome—much more so than with paper documents. Although the proposal acknowledges the need to recycle electronic data regularly, it does not provide the broad protection sought by the business community to forbid sanctions in the absence of willful or reckless conduct. In addition, some view the proposed rule as insufficient because it may not adequately address the prejudice caused to the party that can no longer obtain information that has been destroyed. To the extent the rule is perceived

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2. See, e.g., Thomas Y. Allman, *A Preservation Safe Harbor in e-Discovery*, THE ANTI-TRUST SOURCE (July 2003), available at <http://www.antitrustsource.com>.

3. See *infra* notes 33–35.

4. Report of the Civil Rules Advisory Committee 17 (Aug. 3, 2004), available at <http://www.uscourts.gov/rules/comment2005/CVAug04.pdf>.

5. Proposed Amendments to the Federal Rules of Civil Procedure 32 (proposed Aug. 3, 2004), available at <http://www.uscourts.gov/rules/comment2005/CVAug04.pdf>.

6. *Id.* at 31–32.

as a blank check to destroy electronic information with impunity,<sup>7</sup> however, that criticism is misplaced. Proposed Rule 37(f) provides that a company cannot be punished *merely* for the routine recycling of information. If the company knows or should know that electronic information is discoverable in the action or if the court issues a preservation order, the company must take reasonable steps to preserve the information.

The shape and form of a safe harbor provision—or even the need for one—can only be understood by analyzing how courts have been addressing this problem in the absence of such a rule. Have courts sanctioned parties for conduct that is merely negligent, as opposed to willful or reckless? Have they insisted on a showing of prejudice before they will sanction parties for spoliation? Have parties generally deserved the sanctions they received? In an attempt to provide guidance to the legal community, we have surveyed recent written opinions on this topic to determine how courts have defined sanctionable conduct and what sanction has been imposed for such conduct.

Our sample consisted of all the written opinions in the sanctions arena since January 1, 2000:<sup>8</sup> 45 federal cases, and 21 state cases. We included state cases in the sample because spoliation issues are not confined to federal court. We limited the sample to the twenty-first century because we believed recent cases would be the most indicative of whether courts had appropriately adapted to e-discovery issues caused by technological advancements. Although we are pleased to report that courts seem to be “getting it right,” our analysis is necessarily limited by our small sample and cannot be applied to sanctions cases generally.<sup>9</sup>

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7. E.g., Mike France, *Taking the Fear Factor Out of E-Mail*, BUSINESSWEEK (Dec. 20, 2004).

8. Although strictly speaking the twenty-first century (and third millennium) began on January 1, 2001, we used January 1, 2000, as our starting date based on the colloquial use of the term “twenty-first century” and on the desirability of having a larger sample size.

9. We did not include *Rambus, Inc. v. Infineon Technologies*, 220 F.R.D. 264 (E.D. Va. 2004), in our sample because the various decisions did not reveal whether the alleged spoliation covered electronic as well as paper records. But because the case has been frequently cited in e-discovery circles it makes sense to summarize its holding in this article. In *Rambus*, the defendant filed a motion to compel the production of documents and testimony relating to the plaintiff’s document retention policy because the plaintiff allegedly destroyed documents when it knew or should have known of the impending patent infringement action. Defendants cited to plaintiff’s e-mails as proof that the plaintiff engaged in a “Shred Day,” in which its employees shredded approximately two million pages of documents, including evidence related to the pending patent infringement case. The plaintiff admitted that its document purging system was adopted due to discovery-related concerns but denied that it was trying to keep unfavorable information from its adversaries. The plaintiff argued that it had accumulated too much information, including back up tapes, which would involve huge search and review costs in any future litigation. The court held that even if the plaintiff had not instituted its document retention policy in bad faith, it would be guilty of spoliation if it reasonably anticipated litigation when it implemented the policy.

In a later opinion, the court held that defendant had made a prima facie showing that the plaintiff intentionally engaged in spoliation of evidence and that the crime fraud exception

Because we could only locate and analyze written opinions, the sample is undoubtedly skewed in favor of cases granting sanctions. Many sanctions decisions are issued from the bench, and courts are less likely to issue written opinions when they are denying sanctions than when they are granting them.

With those caveats in mind, we now turn to the substance of the survey. Part II of this Article summarizes the data gleaned from the cases, while Part III interprets the data. Part III also highlights representative cases in which sanctions were granted or denied and the reasoning behind those decisions. The Article concludes with a discussion of how our survey can inform the current debate on e-discovery reform.

## II. SUMMARY OF DATA

In written opinions, requests for sanctions arose most often in tort (24%)<sup>10</sup> and intellectual property cases (20%),<sup>11</sup> followed by contract

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should operate to pierce the attorney-client privilege. *See Rambus*, 222 F.R.D. 280 (E.D. Va. 2004). The court granted defendant discovery for the purpose of making a presentation to the court as to what the appropriate sanction should be.

10. *See Rowe v. Albertsons, Inc.*, No. 02-4186, 2004 WL 2252064 (10th Cir. Oct. 7, 2004); *Computer Task Group, Inc. v. Broby*, 364 F.3d 1112 (9th Cir. 2004); *Morris v. Union Pac. R.R. Co.*, 373 F.3d 896 (8th Cir. 2004); *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739 (8th Cir. 2004); *United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 21 (D.D.C. 2004); *Metropolitan Opera Ass'n v. Local 100*, 212 F.R.D. 178 (S.D.N.Y. 2003); *Cobell v. Norton*, 206 F.R.D. 324 (D.D.C. 2002); *Filanowski v. Wal-Mart Stores, Inc.*, No. Civ. 99-147-B-H, 2000 WL 761890 (D. Me. Apr. 6, 2000); *GTFM, Inc. v. Wal-Mart Stores, Inc.*, No. 98 Civ. 7724, 2000 WL 335558 (S.D.N.Y. Mar. 30, 2000); *Tomlin v. Wal-Mart Stores, Inc.*, 100 S.W.3d 57 (Ark. Ct. App. Mar. 12, 2003); *Mariner Health Care, Inc. v. PriceWaterhouseCoopers LLP*, No. 02VS037631-F, slip op. (Ga. Fulton Cty. Nov. 9, 2004); *Bandy v. Cincinnati, New Orleans and Tex. Pac. Ry. Co.*, No. 2001-CA-002121, 2003 WL 22319202 (Ky. Ct. App. Oct. 10, 2003); *Wadja v. Kingsbury*, 652 N.W.2d 856 (Minn. Ct. App. 2002); *Playball at Hauppauge, Inc. v. Narotzky*, 745 N.Y.S.2d 70 (N.Y. Ct. App. 2002); *Eichman v. McKeon*, 824 A.2d 305 (Pa. Super. 2003); *Demelash v. Ross Stores, Inc.*, 20 P.3d 447 (Wash. Ct. App. 2001).

11. *See Inst. for Motivational Living, Inc. v. Doulos Inst. for Strategic Consulting, Inc.*, No. 03-4177, 2004 WL 2241745 (3d Cir. Oct. 5, 2004); *Minn. Mining & Mfg. v. Pribyl*, 259 F.3d 587 (7th Cir. 2001); *Advantacare Health Partners v. Access IV*, No. C 03-04496, 2004 WL 1837997 (N.D. Cal. Aug. 17, 2004); *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, No. 01 CV 4340, 2004 U.S. Dist. LEXIS 23596 (D.N.J. July 7, 2004); *MasterCard Int'l, Inc. v. Moulton*, No. 03 Civ. 3613, 2004 WL 1393992 (S.D.N.Y. June 22, 2004); *Aero Prods. Int'l v. Intex Recreation Corp.*, No. 02 C 2590, 2004 WL 417193 (N.D. Ill. Jan. 30, 2004); *Arista Records, Inc. v. Sakfield Holding Co. S.L.*, 314 F. Supp. 2d 27 (D.D.C. 2004); *Convolv, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162 (S.D.N.Y. 2004); *Liafaül, Inc. v. Learning 2000, Inc.*, No. C.A. 01-599, 2002 WL 31954396 (D. Del. Dec. 23, 2003); *Kucala Enters., Ltd. v. Auto Wax Co., Inc.*, No. 02 C 1403, 2003 WL 22433095 (N.D. Ill. May 27, 2003); *Essex Group v. Express Wire Servs.*, 578 S.E.2d 705 (N.C. Ct. App. 2003); *Hildreth Mfg., LLC v. Semco, Inc.*, 785 N.E.2d 774 (Ohio Ct. App. 2003); *QZO, Inc. v. Moyer*, 594 S.E.2d 541 (S.C. Ct. App. 2004).

(18%),<sup>12</sup> and employment (15%)<sup>13</sup> cases. The remaining 23% involved various subject matters.<sup>14</sup>

Courts granted sanctions 65% of the time,<sup>15</sup> with defendants being sanctioned four times (81%)<sup>16</sup> as often as plaintiffs

12. See *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002); *Lyondell-Citgo Ref., L.P. v. Petroleos de Venezuela, S.A.*, No. 02 Civ. 0795, 2004 WL 1924810 (S.D.N.Y. Aug. 30, 2004); *YCA, LLC v. Berry*, No. 03 C 3116, 2004 WL 1093385 (N.D. Ill. May 7, 2004); *Invision Media Communications, Inc. v. Fed. Ins. Co.*, No. 02 Civ. 5461, 2004 WL 396037 (S.D.N.Y. Mar. 2, 2004); *Network Computing Servs. Corp. v. Cisco Sys., Inc.*, 223 F.R.D. 392 (D.S.C. 2004); *Renda Marine, Inc. v. United States*, No. 02-306, 58 Fed. Cl. 57 (2003); *Pennar Software Corp. v. Fortune 500 Sys. Ltd.*, No. 01-01734, 2001 U.S. Dist. LEXIS 18432 (N.D. Cal. Oct. 25, 2001); *Feather River Anesthesia Med. Group, Inc. v. Fremont-Rideout Health Group*, No. C044559, 2004 WL 1468741 (Cal. Ct. App. June 30, 2004); *Montage Group, Ltd. v. Athle-Tech Computer Sys., Inc.*, No. 2D03-2026, 2004 WL 2892394 (Fla. Ct. App. Oct. 13, 2004); *Munshani v. Signal Lake Venture Fund II*, 805 N.E.2d 998 (Mass. App. Ct. Mar. 26, 2004); *Nartron Corp. v. Gen'l Motors Corp.*, No. 232085, 2003 WL 1985261 (Mich. Ct. App. Apr. 29, 2003); *Long Island Diagnostic Imaging v. Stony Brook Diagnostic Assocs.*, 286 A.D.2d 320 (N.Y. Ct. App. 2001).

13. See *Zubulake v. UBS Warburg, LLC*, No. 02 Civ. 1243, 2004 WL 1620866 (S.D.N.Y. July 20, 2004) (“*Zubulake V*”); *Anderson v. Crossroads Capital Partners, LLC*, No. Civ. 01-2000, 2004 WL 256512 (D. Minn. Feb. 10, 2004); *Wiginton v. Ellis*, No. 02 C 6832, 2003 WL 22439865 (N.D. Ill. Oct. 27, 2003); *Sonii v. Gen. Elec. Corp.*, No. 95 C 5370, 2003 WL 21541039 (N.D. Ill. June 11, 2003); *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (“*Zubulake IV*”); *Kormendi v. Computer Assocs. Int'l*, No. 02 Civ. 2996, 2002 WL 31385832 (S.D.N.Y. Oct. 21, 2002); *Williams v. Saint-Gobain Corp.*, No. 00-CV-0502E, 2002 WL 1477618 (W.D.N.Y. June 28, 2002); *Sheppard v. River Valley Fitness One, L.P.*, 203 F.R.D. 56 (D.N.H. 2001); *Lombardo v. Broadway Stores, Inc.*, No. G026581, 2002 WL 86810 (Cal. Ct. App. Jan. 22, 2002); *Comm'r of Labor v. Ward*, 580 S.E.2d 432 (N.C. Ct. App. 2003).

14. See *Beck v. Haik*, 377 F.3d 624 (6th Cir. 2004) (civil rights); *In re Heritage Bond Litig.*, 223 F.R.D. 527 (C.D. Cal. 2004) (commercial); *Williams v. Ehlenz*, No. Civ. 02-978, 2004 WL 742076 (D. Minn. Mar. 30, 2004) (civil rights); *Keir v. UnumProvident*, No. 02 Civ. 8781, 2003 WL 21997747 (S.D.N.Y. Aug. 22, 2003) (ERISA); *Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 70 (D.D.C. 2003) (FOIA); *Thompson v. United States Dep't of Hous. and Urban Dev.*, 219 F.R.D. 93 (D. Md. 2003) (modification of consent decree to desegregate public housing); *DeLoach v. Philip Morris Co.*, 206 F.R.D. 568 (M.D.N.C. 2002) (antitrust); *Trigon Ins. Co. v. United States*, 234 F. Supp. 2d 592 (E.D. Va. 2002) (tax refund action); *United States v. Murphy Oil USA, Inc.*, 155 F. Supp. 2d 1117 (W.D. Wis. 2001) (environmental); *W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc.*, No. 98-CV-838S, 2000 WL 1843258 (W.D.N.Y. Nov. 2, 2000) (contribution for CERCLA response costs); *Danis v. USN Communications*, No. 98 C 7482, 2000 WL 1694325 (N.D. Ill. Oct. 23, 2000) (securities); *Sieferman v. State Farm Mut. Auto. Ins. Co.*, 796 So.2d 833 (La. Ct. App. 2001) (insurance coverage); *Thomas v. Isle of Capri Casino*, 781 So.2d 125 (Miss. 2001) (challenge of Gaming Commission decision); *Crescendo Invs., Inc. v. Brice*, 61 S.W.3d 465 (Tex. App. 2001) (securities); *Yao v. Bd. of Regents of Univ. of Wis. Sys.*, 649 N.W.2d 356 (Wis. Ct. App. 2002) (appealing Board of Regents action).

15. See *infra* notes 16–17.

16. See *Inst. Motivational Living*, 2004 WL 2241745; *Computer Task Group, Inc. v. Brothy*, 364 F.3d 1112 (9th Cir. 2004); *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739 (8th Cir. 2004); *Minn. Mining*, 259 F.3d 587; *Advantacare*, 2004 WL 1837997; *Zubulake V*, 2004 WL 1620866; *Mosaid*, 2004 U.S. Dist. LEXIS 23596; *MasterCard*, 2004 WL 1393992; *United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 21 (D.D.C. 2004); *In re Heritage Bond Litig.*, 223 F.R.D. 527; *Sonii*, 2003 WL 21541039; *Landmark Legal*, 272 F. Supp. 2d 70; *Zubulake IV*, 220 F.R.D. 212; *Thompson*, 219 F.R.D. 93; *Renda*, 58 Fed. Cl. 57; *Metropolitan Opera Ass'n v. Local 100*, 212 F.R.D. 178 (S.D.N.Y. 2003); *DeLoach*, 206 F.R.D. 568; *Cobell v. Norton*, 206 F.R.D. 324 (D.D.C. 2002); *Pennar*, 2001 U.S. Dist. LEXIS 18432; *Trigon*, 234 F. Supp. 2d 592; *Sheppard*, 203 F.R.D. 56; *W.R. Grace*, 2000 WL 1843258; *Danis*, 2000 WL 1694325; *GTFM, Inc. v. Wal-Mart Stores, Inc.*, No. 98 Civ. 7724, 2000 WL 335558 (S.D.N.Y. Mar. 30, 2000); *Feather River*, 2004 WL 1468741; *Lombardo*, 2002 WL 86810; *Montage*, 2004 WL 2892394; *Bandy v. Cincinnati, New Orleans and Tex. Pac. Ry. Co.*, No. 2001-CA-002121, 2003 WL 22319202 (Ky. Ct. App. Oct. 10, 2003); *Sieferman*, 796 So.2d 833; *Wadja v. Kingsbury*, 652 N.W.2d 856 (Minn. Ct. App. 2002); *Isle*

(19%).<sup>17</sup> The sanctioned behavior most often involved the non-production, *i.e.*, destruction of electronic documents (84%),<sup>18</sup> rather than a delay in production (16%).<sup>19</sup> When parties were sanctioned for delay, the late production was sometimes coupled with some form of deception or misrepresentation to the court, such as the fabrication of evidence or falsely claiming that documents did not exist (43%).<sup>20</sup>

Often, the sanctioned party had violated a court order (53%),<sup>21</sup> though not necessarily a specific order to preserve documents (16%).<sup>22</sup> Spoliation also occurred where there were general discovery (30%)<sup>23</sup> or injunctive orders in place (7%).<sup>24</sup> When courts imposed sanctions, they

*of Capri*, 781 So.2d 125; *Long Island*, 286 A.D.2d 320; *Ward*, 580 S.E.2d 432; *Essex Group*, 578 S.E.2d 705; *QZO*, 594 S.E.2d 541.

17. See *Invision Media*, 2004 WL 396037; *Anderson*, 2004 WL 256212; *Network Computing*, 223 F.R.D. 392 (D.S.C. 2004); *Kucala Enters., Ltd. v. Auto Wax Co., Inc.*, No. 02 C 1403, 2003 WL 22433095 (N.D. Ill. May 27, 2003); *Mariner Health Care, Inc. v. PriceWaterhouseCoopers LLP*, No. 02VS037631-F, slip op. (Ga. Fulton Cty. Nov. 9, 2004); *Munshani*, 805 N.E.2d 998; *Nartron*, 2003 WL 1985261; *Playball at Hauppauge, Inc. v. Narotzky*, 745 N.Y.S.2d 70 (N.Y. Ct. App. 2002).

18. See *Inst. for Motivational Living*, 2004 WL 2241745; *Computer Task*, 364 F.3d 1112; *Stevenson*, 354 F.3d 739; *Minn. Mining*, 259 F.3d 587; *Advantacare*, 2004 WL 1837997; *Zubulake V*, 2004 WL 1620866; *Mosaid*, 2004 U.S. Dist. LEXIS 23596; *MasterCard*, 2004 WL 1393992; *Anderson*, 2004 WL 256512; *Philip Morris*, 327 F. Supp. 2d 21; *In re Heritage Bond Litig.*, 223 F.R.D. 527; *Kucala*, 2003 WL 22433095; *Landmark Legal*, 272 F. Supp. 2d 70; *Zubulake IV*, 220 F.R.D. 212; *Thompson*, 219 F.R.D. 93; *Metropolitan Opera*, 212 F.R.D. 178; *Renda*, 58 Fed. Cl. 57; *Pennar*, 2001 U.S. Dist. LEXIS 18432; *Trigon*, 234 F. Supp. 2d 592; *Sheppard*, 203 F.R.D. 56; *W.R.Grace*, 2000 WL 1843258; *Danis*, 2000 WL 1694325; *GTFM*, 2000 WL 335558; *Lombardo*, 2002 WL 86810; *Montage*, 2004 WL 2289569; *Bandy*, 2003 WL 22319202; *Sieferman*, 796 So.2d 833; *Nartron*, 2003 WL 1985261; *Wadja*, 652 N.W.2d 856; *Isle of Capri*, 781 So.2d 125; *Long Island*, 286 A.D.2d 320; *Playball*, 745 N.Y.S.2d 70; *Ward*, 580 S.E.2d 705; *Essex*, 578 S.E.2d 705; *QZO*, 594 S.E.2d 541.

19. See *Invision Media*, 2004 WL 396037; *Network Computing*, 223 F.R.D. 392; *Sonii*, 2003 WL 21541039; *DeLoach*, 206 F.R.D. 568; *Cobell*, 206 F.R.D. 324; *Feather River*, 2004 WL 1468741; *Mariner*, No. 02VS037631-F, slip op.

20. See *Invision Media*, 2004 WL 396037 (representing falsely the existence and location of relevant documents); *Network Computing*, 223 F.R.D. 392 (producing e-mails after repeatedly telling magistrate judge that they did not exist); *Mariner*, No. 02VS037631-F, slip op. (assuring court that plaintiff could make production deadlines in compliance with court orders when plaintiff knew it could or would not).

21. See *infra* notes 22–24.

22. See *Inst. for Motivational Living*, 2004 WL 2241745; *Philip Morris*, 327 F. Supp. 2d 21; *Kucala*, 2003 WL 22433095; *Landmark Legal*, 272 F. Supp. 2d 70; *Metropolitan Opera*, 212 F.R.D. 178; *Renda*, 58 Fed. Cl. 57; *Danis*, 2000 WL 1694325.

23. See *Computer Task*, 364 F.3d 1112; *Anderson*, 2004 WL 256512; *In re Heritage Bond Litig.*, 223 F.R.D. 527; *Network Computing*, 223 F.R.D. 392; *Thompson*, 219 F.R.D. 93; *Sheppard*, 203 F.R.D. 56; *Feather River*, 2004 WL 1468741; *Montage*, 2004 WL 2892394; *Mariner*, No. 02VS037631-F, slip op.; *Sieferman*, 796 So.2d 833; *Nartron*, 2003 WL 1985261; *Long Island*, 286 A.D.2d 320; *Ward*, 580 S.E.2d 432.

24. See *Minn. Mining & Mfg. v. Pribyl*, 259 F.3d 587 (7th Cir. 2001); *Advantacare Health Partners v. Access IV*, No. C 03-04496, 2004 WL 1837997 (N.D. Cal. Aug. 17, 2004); *QZO, Inc. v. Moyer*, 594 S.E.2d 541 (S.C. Ct. App. 2004).

referred to the willfulness or bad faith of the violator (49%),<sup>25</sup> prejudice to the party requesting production (35%),<sup>26</sup> and/or the gross negligence or recklessness of the spoliating party (9%),<sup>27</sup> as the reason(s) for imposing the sanction(s).

Attorney's fees and costs were the most frequently granted sanction (60%).<sup>28</sup> Courts granted evidentiary sanctions, such as preclusion (30%),<sup>29</sup> adverse inference instructions (23%)<sup>30</sup> and dismissal or default

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25. See *Inst. for Motivational Living*, 2004 WL 2241745; *Computer Task*, 364 F.3d 1112; *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739 (8th Cir. 2004); *Minn. Mining*, 259 F.3d 587; *Advantacare*, 2004 WL 1837997; *Zubulake v. UBS Warburg, LLC*, No. 02 Civ. 1243, 2004 WL 1620866 (S.D.N.Y. July 20, 2004); *Invision Media*, 2004 WL 396037; *Anderson*, 2004 WL 256512; *In re Heritage Bond Litig.*, 223 F.R.D. 527; *Network Computing*, 223 F.R.D. 392; *Kucala*, 2003 WL 22433095; *Cobell v. Norton*, 206 F.R.D. 324 (D.D.C. 2002); *Pennar Software Corp. v. Fortune 500 Sys. Ltd.*, No. 01-01734, 2001 U.S. Dist. LEXIS 18432 (N.D. Cal. Oct. 25, 2001); *Trigon Ins. Co. v. United States*, 204 F.R.D. 277 (E.D.Va. 2001); *Lombardo v. Broadway Stores, Inc.*, No. G026581, 2002 WL 86810 (Cal. Ct. App. Jan. 22, 2002); *Montage*, 2004 WL 2892394; *Mariner*, No. 02VS037631-F, slip op.; *Bandy v. Cincinnati, New Orleans and Tex. Pac. Ry. Co.*, No. 2001-CA-002121, 2003 WL 22319202 (Ky. Ct. App. Oct. 10, 2003); *Munshani v. Signal Lake Venture Fund II*, 805 N.E.2d 998 (Mass. App. Ct. Mar. 26, 2004); *Ward*, 580 S.E.2d 432; *QZO*, 594 S.E.2d 541.

26. See *Computer Task*, 364 F.3d 1112; *Stevenson*, 354 F.3d 739; *Advantacare*, 2004 WL 1837997; *Zubulake V*, 2004 WL 1620866; *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, No. 01 CV 4340, 2004 U.S. Dist. LEXIS 23596 (D.N.J. July 7, 2004); *In re Heritage Bond Litig.*, 223 F.R.D. 527; *Thompson*, 219 F.R.D. 93; *DeLoach v. Philip Morris Co.*, 206 F.R.D. 568 (M.D.N.C. 2002); *Trigon*, 204 F.R.D. 277; *Sheppard*, 203 F.R.D. 56; *W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc.*, No. 98-CV-838S, 2000 WL 1843258 (W.D.N.Y. Nov. 2, 2000); *Mariner*, No. 02VS037631-F, slip op.; *Wadja v. Kingsbury*, 652 N.W.2d 856 (Minn. Ct. App. 2002); *Thomas v. Isle of Capri Casino*, 781 So.2d 125 (Miss. 2001); *Playball at Hauppauge, Inc. v. Narotzky*, 745 N.Y.S.2d 70 (N.Y. Ct. App. 2002).

27. See *MasterCard Int'l, Inc. v. Moulton*, No. 03 Civ. 3613, 2004 WL 1393992 (S.D.N.Y. June 22, 2004); *Philip Morris*, 327 F. Supp. 2d 21; *Sonii v. Gen. Elec. Corp.*, No. 95 C 5370, 2003 WL 21541039 (N.D. Ill. June 11, 2003); *Isle of Capri*, 781 So.2d 125.

28. See *Inst. for Motivational Living*, 2004 WL 2241745; *Computer Task*, 364 F.3d 1112; *Stevenson*, 354 F.3d 739; *Advantacare*, 2004 WL 1837997; *Zubulake V*, 2004 WL 1620866; *Mosaid*, 2004 U.S. Dist. LEXIS 23596; *Invision Media*, 2004 WL 396037; *Anderson*, 2004 WL 256512; *In re Heritage Bond Litig.*, 223 F.R.D. 527; *Philip Morris*, 327 F. Supp. 2d 21; *Sonii*, 2003 WL 21541039; *Kucala*, 2003 WL 22433095; *Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 70 (D.D.C. 2003); *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) ("Zubulake IV"); *Thompson*, 219 F.R.D. 93; *Metropolitan Opera Ass'n. v. Local 100*, 212 F.R.D. 178 (S.D.N.Y. 2003); *Renda Marine, Inc. v. United States*, No. 02-306, 58 Fed. Cl. 57 (2003); *Cobell*, 206 F.R.D. 324; *Pennar*, 2001 U.S. Dist. LEXIS 18432; *Trigon*, 204 F.R.D. 277; *Sheppard*, 203 F.R.D. 56; *W.R. Grace*, 2000 WL 1843258; *Danis v. USN Communications*, No. 98 C 7482, 2000 WL 1694325 (N.D. Ill. Oct. 23, 2000); *GTfM, Inc. v. Wal-Mart Stores, Inc.*, No. 98 Civ. 7724, 2000 WL 335558 (S.D.N.Y. Mar. 30, 2000); *Feather River*, 2004 WL 1468741; *Lombardo*, 2002 WL 86810; *Essex Group v. Express Wire Servs.*, 578 S.E.2d 705 (N.C. Ct. App. 2003).

29. See *Advantacare*, 2004 WL 1837997; *Mosaid*, 2004 U.S. Dist. LEXIS 23596; *In re Heritage Bond Litig.*, 223 F.R.D. 527; *Network Computing*, 223 F.R.D. 392; *Philip Morris*, 327 F. Supp. 2d 21; *Kucala*, 2003 WL 22433095; *Thompson*, 219 F.R.D. 93; *DeLoach*, 206 F.R.D. 568; *Sheppard*, 203 F.R.D. 56; *Montage*, 2004 WL 2892394; *Sieferman v. State Farm Mut. Auto. Ins. Co.*, 796 So.2d 833 (La. Ct. App. 2001); *Ward*, 580 S.E.2d 432; *Essex*, 578 S.E.2d 705.

30. See *Stevenson*, 354 F.3d 739; *Minn. Mining*, 259 F.3d 587; *Zubulake V*, 2004 WL 1620866; *Mosaid*, 2004 U.S. Dist. LEXIS 23596; *MasterCard*, 2004 WL 1393992; *Anderson*,

judgments (23%)<sup>31</sup> with less frequency. The types of sanctions ordered were not mutually exclusive, with courts imposing more than one sanction 28% of the time.<sup>32</sup> Courts based their authority to impose sanctions on Rule 37 (57% of federal cases),<sup>33</sup> state law (40% of state cases),<sup>34</sup> and their inherent power (28%).<sup>35</sup> In 37% of the cases where sanctions were issued, the court cited no authority whatsoever.<sup>36</sup>

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2004 WL 256512; *Trigon*, 204 F.R.D. 277; *Bandy*, 2003 WL 22319202; *Wadja*, 652 N.W.2d 856; *Isle of Capri*, 781 So.2d 125.

31. See *Computer Task*, 364 F.3d 1112; *Metropolitan Opera*, 212 F.R.D. 178; *Mariner*, No. 02VS037631-F, slip op.; *Munshani v. Signal Lake Venture Fund II*, 805 N.E.2d 998 (Mass. App. Ct. Mar. 26, 2004); *Nartron Corp. v. Gen'l Motors Corp.*, No. 232085, 2003 WL 1985261 (Mich. Ct. App. Apr. 29, 2003); *Long Island Diagnostic Imaging v. Stony Brook Diagnostic Assocs.*, 286 A.D.2d 320 (N.Y. Ct. App. 2001); *Playball*, 745 N.Y.S.2d 70; *Ward*, 580 S.E.2d 432; *Essex*, 578 S.E.2d 705; *QZO, Inc. v. Moyer*, 594 S.E.2d 541 (S.C. Ct. App. 2004).

32. See *Stevenson*, 354 F.3d 739 (adverse inference, monetary); *Advantacare*, 2004 WL 1837997 (evidentiary, monetary); *Zubulake V*, 2004 WL 1620866 (adverse inference, monetary); *Mosaid*, 2004 U.S. Dist. LEXIS 23596 (evidentiary, adverse inference, monetary); *Anderson*, 2004 WL 256512 (adverse inference, monetary); *In re Heritage Bond Litig.*, 223 F.R.D. 527 (evidentiary, monetary); *Philip Morris*, 327 F. Supp. 2d 21 (evidentiary, monetary); *Kucala*, 2003 WL 22433095 (evidentiary, monetary); *Thompson*, 219 F.R.D. 93 (evidentiary, monetary); *Metropolitan Opera*, 212 F.R.D. 178 (default judgment, monetary); *Trigon*, 204 F.R.D. 277 (adverse inference, monetary) *Sheppard*, 203 F.R.D. 56 (evidentiary, monetary); *Essex*, 578 S.E.2d 705 (default judgment, evidentiary, monetary).

33. See *Computer Task*, 364 F.3d 1112; *Zubulake V*, 2004 WL 1620866; *Mosaid*, 2004 U.S. Dist. LEXIS 23596; *Invision Media*, 2004 WL 396037; *In re Heritage Bond Litig.*, 223 F.R.D. 527; *Network Computing*, 223 F.R.D. 392; *Sonii*, 2003 WL 21541039; *Kucala*, 2003 WL 22433095; *Zubulake IV*, 220 F.R.D. 212; *Thompson*, 219 F.R.D. 93; *Metropolitan Opera*, 212 F.R.D. 178; *Pennar*, 2001 U.S. Dist. LEXIS 18432; *Sheppard*, 203 F.R.D. 56; *W.R. Grace*, 2000 WL 1843258; *Danis*, 2000 WL 1694325; *GTFM*, 2000 WL 335558.

34. See *Lombardo v. Broadway Stores, Inc.*, No. G026581, 2002 WL 86810 (Cal. Ct. App. Jan. 22, 2002); *Mariner*, No. 02VS037631-F, slip op.; *Sieferman*, 796 So.2d 833; *Nartron*, 2003 WL 1985261; *Ward*, 580 S.E.2d 432; *Essex*, 578 S.E.2d 705.

35. See *Advantacare*, 2004 WL 1837997; *Mosaid*, 2004 U.S. Dist. LEXIS 23596; *Invision Media*, 2004 WL 396037; *Anderson*, 2004 WL 256512; *Sonii*, 2003 WL 21541039; *Zubulake IV*, 220 F.R.D. 212; *Trigon*, 204 F.R.D. 277; *Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 70 (D.D.C. 2003); *Pennar*, 2001 U.S. Dist. LEXIS 18432; *Mariner*, No. 02VS037631-F, slip op.; *Munshani*, 805 N.E.2d 998; *Wadja*, 652 N.W.2d 856.

36. See *Stevenson*, 354 F.3d 739; *Inst. for Motivational Living, Inc. v. Doulos Inst. for Strategic Consulting, Inc.*, No. 03-4177, 2004 WL 2241745 (3d Cir. Oct. 5, 2004); *Minn. Mining & Mfg. v. Pribyl*, 259 F.3d 587 (7th Cir. 2001); *MasterCard Int'l, Inc. v. Moulton*, No. 03 Civ. 3613, 2004 WL 1393992 (S.D.N.Y. June 22, 2004); *Philip Morris*, 327 F. Supp. 2d 21; *Renda Marine, Inc. v. United States*, No. 02-306, 58 Fed. Cl. 57 (2003); *DeLoach v. Philip Morris Co.*, 206 F.R.D. 568 (M.D.N.C. 2002); *Cobell v. Norton*, 206 F.R.D. 324 (D.D.C. 2002); *Feather River Anesthesia Med. Group, Inc. v. Fremont-Rideout Health Group*, No. C044559, 2004 WL 1468741 (Cal. Ct. App. June 30, 2004); *Montage Group, Ltd. v. Athle-Tech Computer Sys., Inc.*, No. 2D03-2026, 2004 WL 2892394 (Fla. Ct. App. Oct. 13, 2004); *Bandy v. Cincinnati, New Orleans and Tex. Pac. Ry. Co.*, No. 2001-CA-002121, 2003 WL 22319202 (Ky. Ct. App. Oct. 10, 2003); *Wadja*, 652 N.W.2d 856; *Thomas v. Isle of Capri Casino*, 781 So.2d 125 (Miss. 2001); *Long Island*, 286 A.D.2d 320; *Playball*, 745 N.Y.S.2d 70; *QZO*, 594 S.E.2d 541.



In 35% of all the cases examined,<sup>37</sup> sanctions were not imposed even though a party had destroyed electronic data (87%)<sup>38</sup> or had violated a court order (39%).<sup>39</sup> In some instances, the court declined to impose a sanction because it was too early to determine the extent of the harm involved.<sup>40</sup> Of these cases where sanctions were not imposed, 17% involved appellate courts reversing judgments because the district courts had failed to properly consider the need for e-discovery sanctions.<sup>41</sup> When sanctions were denied, the usual reasons were lack of willfulness

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37. See *Rowe v. Albertsons, Inc.*, No. 02-4186, 2004 WL 2252064 (10th Cir. Oct. 7, 2004); *Beck v. Haik*, 377 F.3d 624 (6th Cir. 2004); *Morris v. Union Pac. R.R. Co.*, 373 F.3d 896 (8th Cir. 2004); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002); *Lyondell-Citgo Ref., L.P. v. Petroleos de Venezuela, S.A.*, No. 02 Civ. 0795, 2004 WL 1924810 (S.D.N.Y. Aug. 30, 2004); *Arista Records, Inc. v. Sakfield Holding Co. S.L.*, 314 F. Supp. 2d 27 (D.D.C. 2004); *Convolv, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162 (S.D.N.Y. 2004); *YCA, LLC v. Berry*, No. 03 C 3116, 2004 WL 1093385 (N.D. Ill. May 7, 2004); *Williams v. Ehlenz*, No. Civ. 02-978, 2004 WL 742076 (D. Minn. Mar. 30, 2004); *Aero Prods. Int'l v. Intex Recreation Corp.*, No. 02 C 2590, 2004 WL 417193 (N.D. Ill. Jan. 30, 2004); *Liafail, Inc. v. Learning 2000, Inc.*, No. C.A. 01-599, 2002 WL 31954396 (D. Del. Dec. 23, 2003); *Wiginton v. Ellis*, No. 02 C 6832, 2003 WL 22439865 (N.D. Ill. Oct. 27, 2003); *Keir v. UnumProvident*, No. 02 Civ. 8781, 2003 WL 21997747 (S.D.N.Y. Aug. 22, 2003); *Kormendi v. Computer Assocs. Int'l*, No. 02 Civ. 2996, 2002 WL 31385832 (S.D.N.Y. Oct. 21, 2002); *Williams v. Saint-Gobain Corp.*, No. 00-CV-0502E, 2002 WL 1477618 (W.D.N.Y. June 28, 2002); *United States v. Murphy Oil USA, Inc.*, 155 F. Supp. 2d 1117 (W.D. Wis. 2001); *Filanowski v. Wal-Mart Stores, Inc.*, No. Civ. 99-147-B-H, 2000 WL 761890 (D. Me. Apr. 6, 2000); *Tomlin v. Wal-Mart Stores, Inc.*, 100 S.W.3d 57 (Ark. Ct. App. Mar. 12, 2003); *Hildreth Mfg., LLC v. Semco, Inc.*, 785 N.E.2d 774 (Ohio Ct. App. 2003); *Eichman v. McKeon*, 824 A.2d 305 (Pa. Super. 2003); *Yao v. Bd. of Regents of Univ. of Wis. Sys.*, 649 N.W.2d 356 (Wis. Ct. App. 2002); *Crescendo Invs., Inc. v. Brice*, 61 S.W.3d 465 (Tex. App. 2001); *Demelash v. Ross Stores, Inc.*, 20 P.3d 447 (Wash. Ct. App. 2001).

38. See *Rowe*, 2004 WL 2252064; *Beck*, 377 F.3d 624; *Morris*, 373 F.3d 896; *Residential Funding*, 306 F.3d 99; *Arista Records*, 314 F. Supp. 2d 27; *Convolv*, 223 F.R.D. 162; *Ehlenz*, 2004 WL 742076; *Aero Prods.*, 2004 WL 417193; *Liafail*, 2002 WL 31954396; *Wiginton*, 2003 WL 22439865; *Keir*, 2003 WL 21997747; *Kormendi*, 2002 WL 31385832; *Murphy Oil*, 155 F. Supp. 2d 1117; *Filanowski*, 2000 WL 761890; *Tomlin*, 100 S.W.3d 57; *Hildreth*, 785 N.E.2d 774; *Eichman*, 824 A.2d 305; *Yao*, 649 N.W.2d 356; *Crescendo*, 61 S.W.3d 465; *Demelash*, 20 P.3d 447.

39. See *Lyondell*, 2004 WL 1924810; *Arista Records*, 314 F. Supp. 2d 27; *Aero Prods.*, 2004 WL 417193; *Wiginton*, 2003 WL 22439865; *Keir*, 2003 WL 21997747; *Kormendi*, 2002 WL 31385832; *St.-Gobain*, 2002 WL 1477618; *Hildreth*, 785 N.E.2d 774; *Demelash*, 20 P.3d 447.

40. See *infra* note 44.

41. See *Rowe*, 2004 WL 2252064 (reversing grant of summary judgment to defendant so that district court could consider the appropriateness of imposing spoliation presumption, which it had not considered in the first instance); *Beck*, 377 F.3d 624 (reversing judgment in favor of defendants because, *inter alia*, exclusion of evidence of defendants' spoliation of evidence was abuse of discretion); *Residential Funding*, 306 F.3d 99 (reversing district court's denial of adverse inference instruction because court used wrong standard for culpable state of mind); *Demelash*, 20 P.3d 447 (reversing judgment because it was based on erroneous conclusion that defendant need not produce evidence essential to plaintiff's case).

or bad faith (35%),<sup>42</sup> and/or lack of prejudice (30%).<sup>43</sup> A small percentage of sanctions motions were held to be premature (17%)<sup>44</sup> or denied for a variety of other reasons (30%).<sup>45</sup>

In short, the results of our survey reveal that the profile of a typical sanctioned party is a defendant that destroys electronic information in violation of a court order, in a manner that is willful or in bad faith, or causes prejudice to the opposing party.

### III. INTERPRETATION OF DATA

#### A. Prejudice

Appellate courts have made clear that a finding of bad faith is not required to impose discovery sanctions.<sup>46</sup> Indeed, bad faith was not pre-

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42. See *Morris*, 373 F.3d 896; *Convolve*, 223 F.R.D. 162; *Ehlenz*, 2004 WL 742076; *St.-Gobain*, 2002 WL 1477618; *Murphy Oil*, 155 F. Supp. 2d 117; *Eichman*, 824 A.2d 305; *Yao*, 649 N.W.2d 356; *Crescendo*, 61 S.W.3d 465.

43. See *YCA, LLC v. Berry*, No. 03 C 3116, 2004 WL 1093385 (N.D. Ill. May 7, 2004); *Convolve*, 223 F.R.D. 162; *Wiginton*, 2003 WL 22439865; *St.-Gobain*, 2002 WL 1477618; *Tomlin*, 100 S.W.3d 57 *Hildreth*, 785 N.E.2d 774; *Eichman*, 824 A.2d 305.

44. See *Arista Records*, 314 F. Supp. 2d 27; *Keir*, 2003 WL 21997747; *Liafail, Inc. v. Learning 2000, Inc.*, No. C.A. 01-599, 2002 WL 31954396 (D. Del. Dec. 23, 2003); *Korrendi*, 2002 WL 31385832.

45. See *Lyondell-Citgo Ref., L.P. v. Petroleos de Venezuela, S.A.*, No. 02 Civ. 0795, 2004 WL 1924810 (S.D.N.Y. Aug. 30, 2004) (noting that the attorney general of Venezuela had issued directive to defendants not to produce electronic data, contending that the files related to a sabotage investigation); *Aero Prods. Int'l v. Intex Recreation Corp.*, No. 02 C 2590, 2004 WL 417193 (N.D. Ill. Jan. 30, 2004) (noting that plaintiff had not filed a petition, as was its right to do, under the discovery order, seeking the appointment of a computer forensics expert to assist in recovering data); *Filanowski v. Wal-Mart Stores, Inc.*, No. Civ. 99-147-B-H, 2000 WL 761890 (D. Me. Apr. 6, 2000) (failing to recognize a cause of action for spoliation of evidence).

46. See *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 750 (8th Cir. 2004) (“Sanctioning the ongoing destruction of records during litigation and discovery by imposing an adverse inference instruction is supported by either the court’s inherent power or Rule 37 of the Federal Rules of Civil Procedure, even absent an explicit bad faith finding, and we conclude that the giving of an adverse inference instruction in these circumstances is not an abuse of discretion.”); *Young v. Gordon*, 330 F.3d 76, 82 (1st Cir. 2003) (“[A] finding of bad faith is not a condition precedent to imposing a sanction of dismissal.”); *Residential Funding*, 306 F.3d at 113 (“In sum, we hold that . . . discovery sanctions [under Rule 37], including an adverse inference instruction, may be imposed upon a party that has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence.”); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (finding of willfulness, bad faith, or fault not required for entry of sanctions less than a dismissal); *Melendez v. Illinois Bell Telephone Co.*, 79 F.3d 661, 671 (7th Cir. 1996) (“Bad faith . . . is not required for a district court to sanction a party for discovery abuses.”); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (“While a finding of bad faith suffices to permit such an [adverse] inference, it is not always necessary.”); *Bank Atlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045, 1049 (11th Cir. 1994) (holding that bad faith or willfulness not required for entry of discovery sanctions less than default or dismissal); *Turnbull v. Wilcken*, 893 F.2d 256,

sent in most of the cases in our sample, and courts often imposed discovery sanctions where there was a lesser degree of culpability by the offending party, or cognizable prejudice to the injured party.

In cases where a party has been prejudiced by the spoliation of electronic documents, courts have imposed sanctions aimed at restoring the prejudiced party to the position she would have been in had the documents not been destroyed. Courts often sought to remedy the prejudice through an evidentiary sanction or an adverse inference instruction.<sup>47</sup>

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259 (10th Cir. 1990) (noting that sanction of attorney's fees and costs permitted even where there is an absence of bad faith); *Regional Refuse Sys., Inc. v. Inland Reclam. Co.*, 842 F.2d 150, 156 (6th Cir. 1988), *overruled on other grounds as superceded by rule change*; *Vance, by and through Hammons v. United States*, 182 F.3d 920 (6th Cir. 1999) (holding that where a party has the ability to comply with a discovery order but does not, dismissal is not an abuse of discretion even where willfulness or bad faith is not shown); *Merritt v. Int'l Bhd. of Boilermakers*, 649 F.2d 1013, 1019 (5th Cir. 1981) (finding that bad faith not required for imposing sanction of reasonable expenses and attorney's fees in connection with a motion to compel discovery); *cf. Law Enforcement Alliance of Am., Inc. v. USA Direct, Inc.*, No. 02-1715, 2003 WL 1154115, at \*7 (4th Cir. Mar. 14, 2003) (holding that bad faith is one factor in a four factor test in applying Rule 37 sanctions: "Where a district court determines that there was no bad faith, that determination will likely be reflected in a less severe sanction [than dismissal]. *Anderson [v. Found. for Advancement, Educ. and Employment of Am. Indians]*, 155 F.3d 500, 504 (4th Cir. 1998)] does not require a finding of bad faith before discovery sanctions can be awarded and to hold otherwise would be at odds with Rule 37(c)(1)'s plain language, which contains no such requirement."); *Poullis v. State Farm Fire and Cas. Co.*, 747 F.2d 863, 867-68 (3d Cir. 1984) (listing "whether the conduct of the party of the attorney was willful or in bad faith" as one of six factors to be weighed by a court considering a sanction of dismissal under Rule 37; no one factor is determinative). *See also Tennant Co. v. Hako Minuteman, Inc.*, 878 F.2d 1413, 1416 (Fed. Cir. 1989) (noting that when interpreting Rule 37, Federal Circuit applies the law of the regional circuit to which the district court appeals normally lie).

47. *See Stevenson*, 354 F.3d at 748 (affirming adverse inference instruction where destroyed voice tape was "the only recording of conversations between the engineer and dispatch contemporaneous with the accident render[ing] its loss prejudicial to the plaintiffs"); *Zubulake v. UBS Warburg, LLC*, No. 02 Civ. 1243, 2004 WL 1620866 (S.D.N.Y. July 20, 2004) (giving adverse inference instruction because plaintiff prejudiced by spoliation of electronic documents); *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, No. 01 CV 4340, 2004 U.S. Dist. LEXIS 23596, at \*7 (D.N.J. July 7, 2004) (granting adverse inference instruction in case where "[t]he prejudice resulting from complete and total email spoliation seems particularly obvious"); *In re Heritage Bond Litig.*, 223 F.R.D. 527 (C.D. Cal. 2004) (precluding defendants from defending against allegations that they fraudulently transferred the marital residence because failure to produce Quicken files prejudiced the plaintiffs by preventing them from preparing their case); *Thompson v. United States Dep't of Hous. and Urban Dev.*, 219 F.R.D. 93 (D. Md. 2003) (discussed in text); *DeLoach v. Philip Morris Co.*, 206 F.R.D. 568 (M.D.N.C. 2002) (permitting plaintiffs to respond to defendant's expert rebuttal report but not permitting defendants to reply, since information provided to defendant's expert was not made available to plaintiffs until after plaintiff's expert could no longer make use of it); *Trigon Ins. Co. v. United States*, 204 F.R.D. 277 (E.D.Va. 2001) (adverse inference instruction appropriate because plaintiff had suffered prejudice in the form of a diminished ability to cross-examine the testifying experts); *Sheppard v. River Valley Fitness One, L.P.*, 203 F.R.D. 56, 60 (D.N.H. 2001) (precluding witness from testifying about settlement because defendant failed to produce computer records before depositions, which "unfairly prejudiced the plaintiffs by depriving them of the opportunity to question [the witness] about the contents of the documents"). *But see W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc.*, No. 98-CV-838S, 2000 WL 1843258

For instance, in *Thompson v. U.S. Department of Housing and Urban Development*, Magistrate Judge Paul Grimm precluded certain defendants from using 80,000 e-mails for trial purposes because defendants produced them long after the discovery cutoff deadline, contradicting their prior representations that the e-mails did not exist or had already been produced.<sup>48</sup> The magistrate judge concluded that defendants had violated earlier orders of the court by failing to produce electronic records, and that Rule 37(b) sanctions were justified because defendants' non-compliance was not substantially justified and was also prejudicial to the plaintiffs.<sup>49</sup> In considering the remedy, the judge reasoned that "there was no effective way to cure the surprise" short of postponing the trial date and reopening discovery, given the volume of e-mails, the fact that discovery had been closed for months (thereby preventing plaintiffs from using the e-mails during depositions), and trial was set to begin in approximately ninety days.<sup>50</sup> The judge noted that the case had been aggressively litigated for nine years, and that the court had given unambiguous signals to counsel that the trial date would not be postponed.<sup>51</sup>

Ultimately, Magistrate Judge Grimm modified his order precluding three witnesses from testifying because that sanction would have deprived defendants of the ability to prove their defenses. Instead, the magistrate judge precluded defendants from introducing any of the 80,000 e-mails into evidence; forbid defense counsel from using them to prepare or refresh the recollection of trial witnesses; and permitted plaintiffs to use them in their direct and cross-examinations.<sup>52</sup> Plaintiffs were also permitted to request further sanctions if they incurred additional expenses and attorney's fees in connection with the e-mails or if the evidence revealed additional information regarding the non-production of e-mail records.<sup>53</sup> An adverse inference instruction was not appropriate because it was a bench trial, and the judge would be able to draw reasonable inferences from the failure to preserve and produce documents as ordered.<sup>54</sup> By these means, the court felt it was able to remedy plaintiffs' disadvantage.

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(W.D.N.Y. Nov. 2, 2000) (awarding expenses incurred in connection with the sanctions motion, but reserving judgment on further sanction pending discovery regarding whether documents could be reconstructed and the degree of resultant prejudice).

48. 219 F.R.D. 93 (D. Md. 2003).

49. *Id.* at 101.

50. *Id.* at 103.

51. *Id.* at 103 n.9.

52. *Id.* at 104-05.

53. *Id.* at 105.

54. *Id.*

Where there is no effective way to cure the prejudice, however, a court may dismiss the claims or grant a default judgment in favor of the prejudiced party. For example, in *Playball at Hauppauge, Inc. v. Narotzky*, the court dismissed plaintiff's breach of fiduciary duty claim because the deletion of computer data by the plaintiff's son left defendant without the ability to defend against plaintiff's allegations of mismanagement and waste.<sup>55</sup>

Conversely, some courts have denied sanctions where the requesting party did not demonstrate that it had been prejudiced by the other party's e-discovery violations.<sup>56</sup> In *YCA, LLC v. Berry*, defendant Berry moved to strike the testimony of YCA's computer expert, and his findings, because YCA had withheld the expert's name from its interrogatory and document production responses and later misled defense counsel into thinking the expert would not be examining Berry's computer.<sup>57</sup> Berry's counsel had been informed that YCA's expert would be analyzing the computers of certain persons, but did not specifically name Berry.<sup>58</sup> Berry argued that he had been prejudiced because he prepared his summary judgment motion without full knowledge of YCA's case against him.<sup>59</sup> In declining to grant the sanction, the court reasoned that YCA's two-week delay in disclosing its use of a computer forensics expert did not create any appreciable prejudice to Berry.<sup>60</sup> Furthermore, Berry's belated charge of alleged misrepresentations by YCA deprived YCA of the opportunity to respond.<sup>61</sup>

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55. See 745 N.Y.S.2d 70 (N.Y. Ct. App. 2002) (affirming trial court's dismissal).

56. See *YCA, LLC v. Berry*, No. 03 C 3116, 2004 WL 1093385 (N.D. Ill. May 7, 2004) (finding the delay in production justified and that there was no prejudice); *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162 (S.D.N.Y. 2004) (noting that plaintiff only established that witnesses communicated by email from time to time, but had not made an effort to determine the substance of those communications in any but the most general terms); *Wiginton v. Ellis*, No. 02 C 6832, 2003 WL 22439865 (N.D. Ill. Oct. 27, 2003) (if back up tapes showed that relevant documents had been destroyed, then plaintiff should renew motion for appropriate sanctions based on the destroyed evidence); *Williams v. Saint-Gobain Corp.*, No. 00-CV-0502E, 2002 WL 1477618 (W.D.N.Y. June 28, 2002) (extending discovery because the violation could be corrected); *Hildreth Mfg., LLC v. Semco, Inc.*, 785 N.E.2d 774, 782 (Ohio Ct. App. 2003) (finding "no reasonable possibility that the missing hard drives contained evidence of the theft of trade secrets" because the erased hard drives were installed after issuance of a temporary restraining order, with defendant "fully aware that these computers were subject to discovery"); *Eichman v. McKeon*, 824 A.2d 305 (Pa. Super. 2003) (noting that plaintiffs were able to, and did, cross-examine the defense experts regarding their opinions, and although plaintiffs were given opportunity to present rebuttal evidence regarding computer logs and the loss of the claim file, they chose not to do so).

57. 2004 WL 1093385, at \*5.

58. *Id.*

59. *Id.*

60. *Id.* at \*7.

61. *Id.*

These cases demonstrate that prejudice is a significant factor in assessing whether parties should be sanctioned for e-discovery violations—even where the spoliating party acted willfully or in bad faith. To the party that cannot prosecute or defend its case, it does not matter if the producing party did not intend to delete relevant electronic data; the information is gone, and the party has been hurt by it. When weighing the level of fault against the extent of the harm, courts have exercised their discretion to protect the party seeking discovery when justice so required.

### B. Willfulness or Bad Faith

On the other hand, courts have been less concerned with proof of prejudice when faced with willful or bad faith conduct.<sup>62</sup> In circumstances

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62. See *Inst. for Motivational Living, Inc. v. Doulos Inst. for Strategic Consulting, Inc.*, No. 03-4177, 2004 WL 2241745 (3d Cir. Oct. 5, 2004) (granting attorney's fees and costs where defendant deleted files from laptop computer the morning he turned it over to plaintiff); *Minn. Mining & Mfg. v. Pribyl*, 259 F.3d 587 (7th Cir. 2001) (imposing adverse inference instruction where defendant wiped his hard drive by downloading six gigabytes of music the night before he was to hand over his computer); *Advantacare Health Partners v. Access IV*, No. C 03-04496, 2004 WL 1837997 (N.D. Cal. Aug. 17, 2004) (instructing trier of fact to find that defendants had copied all of the files on plaintiff's computer as sanction for using software deletion program to cover up illegal copying of files from plaintiff); *Invision Media Communications, Inc. v. Fed. Ins. Co.*, No. 02 Civ. 5461, 2004 WL 396037 (S.D.N.Y. Mar. 2, 2004) (awarding attorney's fees and costs to defendant because plaintiff made false representations about the existence and location of relevant documents in conscious and bad faith effort to hinder insurance company's investigation); *Anderson v. Crossroads Capital Partners, LLC*, No. Civ. 01-2000, 2004 WL 256512 (D. Minn. Feb. 10, 2004) (giving adverse inference instruction because plaintiff willfully deleted computer files using data wiping program); *In re Heritage Bond Litig.*, 223 F.R.D. 527 (C.D. Cal. 2004) (precluding defendants from defending against a claim because they willfully failed to comply with the court's order); *Network Computing Servs. Corp. v. Cisco Sys., Inc.*, 223 F.R.D. 392 (D.S.C. 2004) (allowing defendant to inform jury of plaintiff's discovery misconduct); *Kucala Enters., Ltd. v. Auto Wax Co., Inc.*, No. 02 C 1403, 2003 WL 22433095 (N.D. Ill. May 27, 2003) (permitting jury to hear evidence of plaintiff's destruction of computer evidence with Evidence Eliminator software program, for purpose of determining damages and willfulness issues); *Cobell v. Norton*, 206 F.R.D. 324 (D.D.C. 2002) (sanctioning defendant for moving for protective order clarifying its duty to produce email because the issued had been raised three times before); *Pennar Software Corp. v. Fortune 500 Sys. Ltd.*, No. 01-01734, 2001 U.S. Dist. LEXIS 18432 (N.D. Cal. Oct. 25, 2001) (awarding attorney's fees and costs because defendants deleted web pages that plaintiffs wanted to use to establish personal jurisdiction over defendants); *Lombardo v. Broadway Stores, Inc.*, No. G026581, 2002 WL 86810 (Cal. Ct. App. Jan. 22, 2002) (ordering defendant to pay plaintiff's attorney's fees because willfully destroyed computer files); *Bandy v. Cincinnati, New Orleans and Tex. Pac. Ry. Co.*, No. 2001-CA-002121, 2003 WL 22319202 (Ky. Ct. App. Oct. 10, 2003) (giving adverse inference instruction in response to deliberate and intentional failure to cooperate in discovery process); *Munshani v. Signal Lake Venture Fund II*, 805 N.E.2d 998 (Mass. App. Ct. Mar. 26, 2004) (dismissing plaintiff's complaint because plaintiff committed fraud on the court by fabricating e-mail evidence); *Comm'r of Labor v. Ward*, 580 S.E.2d 432 (N.C. Ct. App. 2003) (striking defendants' answer and default judgment on certain claims because defendants failed to provide plaintiffs with electronically stored information in repeated violation of the court's discovery order and in the face of explicit

where the conduct is particularly egregious, courts have granted the ultimate sanction of dismissal or default judgment in order to deter obstructionist behavior.<sup>63</sup> In those cases, however, the courts have sometimes noted that the party requesting the documents had suffered prejudice as well.<sup>64</sup>

Judge Susan Forsling's decision in *Mariner Health Care, Inc. v. PricewaterhouseCoopers LLP* is instructive of the danger of flouting a court's authority during discovery.<sup>65</sup> The judge dismissed Mariner's complaint with prejudice because of its failure to timely produce documents.<sup>66</sup> Essentially, Mariner had missed several production deadlines and eventually dumped large volumes of documents, including electronic images, on PricewaterhouseCoopers ("PwC") shortly before the start of depositions, which precluded PwC from taking any depositions. Yet Mariner had produced 22 million pages of documents, and the trial date was two years away. At first glance, *Mariner* appears to be a case in which the judge imposed a sanction that was disproportionate to the misconduct. Upon closer inspection, however, the case comports with the body of precedent in which sanctions are imposed to deter recalcitrant behavior by litigants.

*Mariner* was not a simple case of delayed production, but rather a case of systematic discovery abuse. Before being sanctioned, Mariner had violated no less than three separate orders of the court and did so

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warnings that sanctions would be imposed); *QZO, Inc. v. Moyer*, 594 S.E.2d 541 (S.C. Ct. App. 2004) (entering default judgment where defendant reformatted hard drive before producing it to plaintiff).

63. See *Computer Task Group, Inc. v. Broby*, 364 F.3d 1112 (9th Cir. 2004) (entering default judgment where defendant engaged in systematic discovery abuse, including refusal to produce documents and making incredible excuses, such as earthquake and dropped computer, for non-production); *Metropolitan Opera Ass'n. v. Local 100*, 212 F.R.D. 178 (S.D.N.Y. 2003) (entering default judgment against defendants to deter similar conduct by others, remedy the effect of the discovery abuses, and punish the parties responsible for spoliation); *Mariner Health Care, Inc. v. PriceWaterhouseCoopers LLP*, No. 02VS037631-F, slip op. (Ga. Fulton Cty. Nov. 9, 2004) (dismissing complaint with prejudice because lesser sanctions would have been ineffective in changing plaintiff's bad faith behavior); *Munshani*, 805 N.E.2d 998 (dismissing complaint was one of the few ways to deter fraud on the court); *Ward*, 580 S.E.2d 432 (entering default judgment on some claims because defendants failed to provide plaintiffs with copies of electronic data and failed to answer deposition questions regarding the method of access to information stored on the tapes); *Essex Group v. Express Wire Servs.*, 578 S.E.2d 705 (N.C. Ct. App. 2003) (imposing default judgment in order to prevent or eliminate defendant's dilatory and dishonest tactics).

64. See *Metropolitan Opera*, 212 F.R.D. at 229 (noting that plaintiff had been prejudiced by defendants' discovery failures because it was denied the opportunity to plan its strategy in an organized fashion as the case proceeded); *Mariner*, No. 02VS037631-F, slip op. (finding that defendant had been prejudiced in their preparation for depositions).

65. No. 02VS037631-F, slip op.

66. *Id.* at 57-64.

repeatedly.<sup>67</sup> The orders contained production deadlines negotiated by the parties and approved by the court, and the judge expressly warned Mariner that it could not simply disregard the orders it found to be unduly burdensome or inconvenient; if it could not comply, it needed to seek relief from the court.<sup>68</sup> At the time the judge gave her warning to Mariner, she also reserved ruling on PwC's request for attorney's fees in connection with Mariner's previous discovery violations.<sup>69</sup> Judge Forsling informed the parties that she hoped the threat of monetary sanctions "as a 'hammer over Mariner's head' would be more effective than actually awarding fees."<sup>70</sup>

Nonetheless, Mariner repeatedly ignored the court's orders and explicit warning "with conscious indifference to the consequences of those violations."<sup>71</sup> Mariner consistently produced large volumes of documents late, while insisting that PwC adhere to the discovery schedule, which called for depositions shortly after the documents were delivered.<sup>72</sup> Yet Mariner was aware that the discovery schedule was designed to ensure that all parties' interests were protected while the case proceeded in an expeditious manner, *i.e.*, it balanced Mariner's desire for an early trial date with PwC's need to prepare its defense, by having adequate time to review documents in preparation for depositions.<sup>73</sup> Although Mariner claimed that the late productions were due to vendor error, it provided no evidence to that effect, and the judge doubted the veracity of its claims given the number of times it had been before the court and kept silent about any alleged problems.<sup>74</sup>

Judge Forsling considered awarding PwC's attorney's fees or extending all of the deadlines. However, she concluded that "lesser sanctions would not change Mariner's conduct going forward and would not ensure [the] Court's ability to administer the case justly and efficiently."<sup>75</sup> She went on to say:

There comes a point when the Court, to protect the integrity of its Orders and the purposes of [state law], must take action which sends the message: "Enough is enough." This Court is at

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67. *Id.* at 57–58.

68. *Id.* at 26.

69. *Id.*

70. *Id.* at 26–27.

71. *Id.* at 2.

72. For example, after the court granted Mariner's request the production deadline, it missed the deadline and waited until the month before the start of depositions to begin delivering over 25% of the total documents, most of which related to central issues in the case. *See id.* at 36.

73. *Id.* at 57.

74. *Id.* at 34–35, 37.

75. *Id.* at 4.



the point in this case. Therefore, no sanction less severe than dismissal of Mariner's complaint with prejudice would be appropriate under these circumstances.<sup>76</sup>

The judge also expressly rejected Mariner's argument that prejudice was required for the imposition of sanctions, stating that a requirement of prejudice

would essentially allow a party that has violated the Court's orders to defeat a motion for sanctions by belatedly complying with the Court's orders and then arguing that its non-compliance has not caused prejudice to the opposing party. In other words, the integrity of the Court's orders and the ability of the Court to control the proceedings would be secondary to the prejudice to the movant, a proposition that this Court is not willing to adopt.<sup>77</sup>

Notwithstanding her rejection of a prejudice requirement, the judge did find that PwC had suffered prejudice because until PwC filed its motion for sanctions, Mariner refused to extend the start of depositions, which prejudiced PwC in its preparations.<sup>78</sup> Moreover, pushing back the scheduling order deadlines would significantly delay the trial date, allowing witnesses' memories to fade and evidence to become stale.<sup>79</sup> Despite finding prejudice, the tenor of the opinion reveals that the court's focus was on the plaintiff's bad faith.

In an ironic twist, PwC is now facing sanctions for its own e-discovery violations. In *In re Telxon Securities Litigation*, Magistrate Judge Patricia Hemann has recommended that a default judgment be entered against PwC for its failure to preserve documents (including electronic information), incomplete production of relevant information, and the destruction of documents (including electronic information).<sup>80</sup> Magistrate Judge Hemann summarized PwC's violations as follows: At the outset of the discovery process, PwC failed to check thoroughly its local servers and its archives for relevant documents, failed to compare the various versions of relevant documents in those databases, failed to produce documents as they were kept in the ordinary course of business, and failed to reproduce thoroughly and accurately all documents and their attachments.<sup>81</sup> Prior to the filing of this litigation, PwC had permitted documents to be destroyed even though it had promised to preserve

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76. *Id.* at 5.

77. *Id.* at 66.

78. *Id.* at 67.

79. *Id.* at 66-67.

80. *See* No. 5:98-cv-2876, slip op. at 72 (N.D. Ohio July 16, 2004).

81. *See id.* at 67.

these documents.<sup>82</sup> Despite these failures, PwC repeatedly told the court and the parties that it had made complete disclosure of all relevant documents and attachments and that it had produced them in the ordinary manner in which they were stored by PwC.<sup>83</sup> “The only conclusion the court [could] reach [was] that PwC and/or its counsel engaged in deliberate fraud or was so recklessly indifferent to their responsibilities as a party to the litigation that they failed to take the most basic steps to fulfill those responsibilities.”<sup>84</sup> The magistrate judge found that PwC’s actions evidenced lack of good faith.<sup>85</sup> The judge noted that she could not recommend any sanction less than a default judgment because “PwC’s conduct [had] made it impossible to try [the] case with any confidence in the justice of the outcome. . . .”<sup>86</sup> The district judge has not yet decided the issue, but the magistrate’s recommended sanction is supported by precedent.

The results of our sample support the general principle that where there has been a high degree of willfulness or bad faith, a court is justified in sanctioning a party to maintain the integrity of the judicial process.<sup>87</sup> The fact-finder cannot uncover the truth when parties flout their discovery obligations and demonstrate by their conduct that they have no intention of complying with those obligations. Occasionally, however, courts have been swayed by the *lack* of willfulness or bad faith when they have denied sanctions.<sup>88</sup>

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82. *See id.*

83. *See id.*

84. *Id.* at 67–68.

85. *See id.* at 49–50.

86. *Id.* at 71–72.

87. *See supra* notes 62–64.

88. *See Morris v. Union Pac. R.R. Co.*, 373 F.3d 896 (8th Cir. 2004) (adverse inference instruction should not have been given where there was an absence of information to support an inference of conscious destruction of tape); *Williams v. Ehlenz*, No. Civ. 02-978, 2004 WL 742076 (D. Minn. Mar. 30, 2004) (noting that tapes had been destroyed in accordance with prison policy before magistrate judge had ordered that they be produced); *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162 (S.D.N.Y. 2004) (noting that there was no evidence of intentional destruction); *Williams v. Saint-Gobain Corp.*, No. 00-CV-0502E, 2002 WL 1477618 (W.D.N.Y. June 28, 2002) (denying sanction because defendant produced e-mails as soon as it had received them, “albeit on the eve of trial—and there is no evidence of any bad faith as to any withholding or destruction of the same”); *Tomlin v. Wal-Mart Stores, Inc.*, 100 S.W.3d 57, 64–65 (Ark. Ct. App. Mar. 12, 2003) (finding no indication that the missing strapping band that caused the slip and fall was “bad” evidence); *United States v. Murphy Oil USA, Inc.*, 155 F. Supp. 2d 1117 (W.D. Wis. 2001) (finding nothing in the record to indicate bad faith by the employees or that the evidence would have been favorable to defendants); *Eichman v. McKeon*, 824 A.2d 305 (Pa. Super. 2003) (finding that there had been no willful discovery violation); *Crescendo Invts., Inc. v. Brice*, 61 S.W.3d 465 (Tex. App. 2001) (refusing to grant spoliation instruction because affidavit established that shareholder did not act with fraudulent intent in destroying weekly and biweekly e-mail reports); *Yao v. Bd. of Regents of Univ. of Wis. Sys.*, 649 N.W.2d 356 (Wis. Ct. App. 2002) (surveillance tapes deleted at a time

### C. Mixed Cases: Willfulness and Prejudice

Although our earlier discussion categorizes cases by whether courts emphasized the state of mind of the wrongdoer or the prejudice to the party seeking discovery, sanctions decisions seldom focus solely on one or the other. More often than not, both elements are involved, though one may dominate the court's discussion, as in the *Thompson* and *Mariner* cases. In cases where one or the other of these elements is less pronounced, there appears to be a sliding scale between the two. That is, the more prejudice there is, the less willfulness courts require before sanctioning a party for e-discovery violations, and vice versa.<sup>89</sup> The decisions in *Mosaid Technologies Inc. v. Samsung Electronics Co.*,<sup>90</sup> *United States v. Philip Morris USA, Inc.*,<sup>91</sup> and *Metropolitan Opera Ass'n, Inc. v. Local 100*,<sup>92</sup> are illustrative of this sliding scale.

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when it was not apparent that they would be significant and were not destroyed in order to impede the case).

89. In approximate order of declining prejudice: *See Thompson v. United States Dep't of Hous. and Urban Dev.*, 219 F.R.D. 93 (D. Md. 2003), 219 F.R.D. 93 (prejudice); *Sheppard v. River Valley Fitness One, L.P.*, 203 F.R.D. 56 (D.N.H. 2001) (prejudice); *Playball at Hauppauge, Inc. v. Narotzky*, 745 N.Y.S.2d 70 (N.Y. Ct. App. 2002) (prejudice); *DeLoach v. Philip Morris Co.*, 206 F.R.D. 568 (M.D.N.C. 2002) (prejudice); *Wadja v. Kingsbury*, 652 N.W.2d 856 (Minn. Ct. App. 2002) (prejudice); *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, No. 01 CV 4340, 2004 U.S. Dist. LEXIS 23596 (D.N.J. July 7, 2004) (prejudice, recklessness); *Trigon Ins. Co. v. United States*, 204 F.R.D. 277 (E.D.Va. 2001) (finding of willfulness, but emphasis on prejudice); *In re Heritage Bond Litig.*, 223 F.R.D. 527 (C.D. Cal. 2004) (prejudice, willfulness); *Zubulake v. UBS Warburg, LLC*, No. 02 Civ. 1243, 2004 WL 1620866 (S.D.N.Y. July 20, 2004) (prejudice, willfulness); *Thomas v. Isle of Capri Casino*, 781 So.2d 125 (Miss. 2001) (prejudice, gross negligence); *MasterCard Int'l, Inc. v. Moulton*, No. 03 Civ. 3613, 2004 WL 1393992 (S.D.N.Y. June 22, 2004) (prejudice, gross negligence); *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739 (8th Cir. 2004) (prejudice, bad faith); *Advantacare Health Partners v. Access IV*, No. C 03-04496, 2004 WL 1837997 (N.D. Cal. Aug. 17, 2004) (prejudice, willfulness and bad faith); *United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 21 (D.D.C. 2004) (finding of prejudice, but emphasis on reckless disregard and gross indifference); *Computer Task Group, Inc. v. Brotby*, 364 F.3d 1112 (9th Cir. 2004) (willfulness, prejudice); *Metropolitan Opera Ass'n. v. Local 100*, 212 F.R.D. 178 (S.D.N.Y. 2003) (prejudice, high willfulness and bad faith); *Mariner*, No. 02VS037631-F, slip op. (prejudice, high willfulness and bad faith); *Anderson v. Crossroads Capital Partners, LLC*, No. Civ. 01-2000, 2004 WL 256512 (D. Minn. Feb. 10, 2004) (willfulness); *Montage Group, Ltd. v. Athle-Tech Computer Sys., Inc.*, No. 2D03-2026, 2004 WL 2892394 (Fla. Ct. App. Oct. 13, 2004) (willfulness); *Kucala Enters., Ltd. v. Auto Wax Co., Inc.*, No. 02 C 1403, 2003 WL 22433095 (N.D. Ill. May 27, 2003) (willfulness); *Network Computing Servs. Corp. v. Cisco Sys., Inc.*, 223 F.R.D. 392 (D.S.C. 2004) (willfulness); *Pennar Software Corp. v. Fortune 500 Sys. Ltd.*, No. 01-01734, 2001 U.S. Dist. LEXIS 18432 (N.D. Cal. Oct. 25, 2001) (willfulness, bad faith); *Inst. for Motivational Living, Inc. v. Doulos Inst. for Strategic Consulting, Inc.*, No. 03-4177, 2004 WL 2241745 (3d Cir. Oct. 5, 2004) (willfulness, bad faith).

90. No. 01 CV 4340, 2004 U.S. Dist. LEXIS 23596 (D.N.J. July 7, 2004).

91. 327 F. Supp. 2d 21 (D.D.C. 2004).

92. 212 F.R.D. 178 (S.D.N.Y. 2003).

In *Mosaid*, a patent infringement case, the court sanctioned the defendants for, *inter alia*, their spoliation of technical e-mails.<sup>93</sup> The court found that defendants were required to preserve and disclose the e-mails even though Mosaid had not expressly asked for them in its document request.<sup>94</sup> Magistrate Judge Ronald Hedges reasoned that defendants “knew, or should have known, those e-mails were discoverable, given their heavy reliance on e-mails obtained from plaintiff during discovery, not to mention the obvious realities of modern litigation. . . . [T]he fact that no technical emails were preserved, and that no ‘off-switch’ policy existed, demonstrate[d], at the least, extremely reckless behavior.”<sup>95</sup> Mosaid had made a prima facie showing of relevance through an affidavit by a former Samsung employee, testifying to the extensive and technical use of e-mail at defendants’ plants.<sup>96</sup> Given the technical nature of the case, the magistrate found the prejudice to Mosaid to be “particularly obvious.”<sup>97</sup> Although the magistrate imposed several sanctions for various discovery violations, he addressed defendants’ spoliation of e-mails by granting an adverse inference instruction.<sup>98</sup> Mosaid proposed that the jury be instructed that it “may infer that the contents of those email messages would have been harmful to the Samsung defendants’ positions in this case.”<sup>99</sup> The magistrate judge rejected the proposed instruction, however, because it “fail[ed] adequately to take into account the ‘make whole’ aim of the adverse inference instruction. The breadth and finality of plaintiff’s instruction . . . would elevate [the] e-mails to an arguably unjustified level of importance and create a potentially insurmountable hurdle for defendants.”<sup>100</sup> Furthermore, plaintiff’s instruction “appear[ed] on its face to deprive defendants of an opportunity to put on any evidence either in defense of their discovery failures or concerning the implication of those failures in this case.”<sup>101</sup> Instead, Magistrate Judge Hedges believed Mosaid could be made whole with an instruction that permitted jurors “to infer that the evidence would have been unfavorable to defendants. In deciding whether to draw this inference, [the jurors could] consider whether these e-mails would merely have duplicated

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93. 2004 U.S. Dist. LEXIS 23596, at \*7–8.

94. *Id.* at \*7.

95. *Id.* at \*7–8.

96. *Id.* at \*7.

97. *Id.*

98. *Id.*

99. *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 224 F.R.D. 595, 599 (D.N.J. Sept. 1, 2004).

100. *Id.* at 600.

101. *Id.*

other evidence”<sup>102</sup> or whether they were “satisfied that defendants’ failure to produce this information was reasonable.”<sup>103</sup>

Defendants appealed the decision, and the district court affirmed.<sup>104</sup> Judge William Martini found that the spoliation inference applied because four factors had been satisfied: (1) the e-mails had been within Samsung’s control since the inception of the litigation; (2) it appeared that there had been “actual suppression” or withholding of evidence; (3) the deleted e-mails were relevant to the claims or defenses in the case; and (4) it was reasonably foreseeable that technical e-mails would later be sought in discovery.<sup>105</sup> In response to Samsung’s argument that the magistrate relied upon an incorrect, lower standard of culpability for “actual suppression,” Judge Martini found that “negligent destruction of relevant evidence can be sufficient to give rise to the spoliation inference.”<sup>106</sup> In sum, the *Mosaid* court required a state of mind less than willfulness, *i.e.*, negligent or reckless, because the prejudice to plaintiff was so palpable.

By contrast, the court in *United States v. Philip Morris USA, Inc.*, was less concerned with prejudice because Philip Morris (“PM”) had shown a “reckless disregard and gross indifference” towards its discovery obligations.<sup>107</sup> In this case, PM continued deleting e-mails for two years after the court issued a preservation order.<sup>108</sup> Furthermore, after PM learned of its inadequate compliance with the order, it continued deleting e-mails for two more months and waited four months to inform the court and the government of the deletions.<sup>109</sup> If PM had complied with its own document retention policy, it would have ensured the retention of the lost e-mails.<sup>110</sup> The government moved for evidentiary and monetary sanctions for PM’s spoliation of evidence. Although Judge Gladys Kessler granted sanctions, she held that the loss of e-mail records did not warrant such a far-reaching sanction as the adverse inference instruction sought by the government, *i.e.*, an inference that the company had actively targeted youth through marketing and advertising campaigns, manipulated the nicotine content of its cigarettes to make and keep smokers addicted,

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102. *Id.* (citing *Zubulake v. UBS Warburg, LLC*, No. 02 Civ. 1243, 2004 WL 1620866 (S.D.N.Y. July 20, 2004)).

103. *Id.*

104. *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, No. 01 Civ. 4340, 2004 U.S. Dist. LEXIS 25286, at \*21 (D.N.J. Dec. 7, 2004).

105. *See Mosaid*, 2004 U.S. Dist. LEXIS 25286.

106. *Id.* at \*15–16.

107. 327 F. Supp. 2d 21, 26 (D.D.C. 2004).

108. *Id.* at 23.

109. *Id.* at 23–24.

110. *Id.* at 25.

and failed to market potentially less hazardous cigarettes.<sup>111</sup> The requested inference was simply not proportional to the offense. However, the judge did think it was appropriate to preclude the testimony of all individuals who had failed to comply with PM's own document retention policy.<sup>112</sup> Additionally, PM was fined \$2.75 million to be paid to the Court Registry as punishment for violating the preservation order.<sup>113</sup> In so holding, Judge Kessler stated:

A monetary sanction is appropriate. It is particularly appropriate here because we have no way of knowing what, if any, value those destroyed emails had to Plaintiff's case; because of that absence of knowledge, it was impossible to fashion a proportional evidentiary sanction that would accurately target the discovery violation. Despite that, it is essential that such conduct be deterred, that the corporate and legal community understand that such conduct will not be tolerated, and that the amount of the monetary sanction fully reflect the reckless disregard and gross indifference displayed by Philip Morris and [its co-defendant] toward their discovery and document preservation obligations.<sup>114</sup>

Finally, Judge Loretta Preska's decision in *Metropolitan Opera Ass'n, Inc. v. Local 100* represents the furthest end of the scale, with such a high degree of willfulness that the prejudice to plaintiff was merely a secondary consideration.<sup>115</sup> The Metropolitan Opera Association ("Met") sued a restaurant-workers' union and its individual officers, alleging that the union distributed false, misleading, and defamatory materials in its attempt to unionize the Met's restaurant workers. The Met requested from the union all documents concerning the Met that were communicated or intended to be communicated to any patron, donor, board member, or agent, regarding the use or application of pressure on the Met or any of the foregoing persons, and which concerned certain events by the union. Almost from the outset, the Met's counsel began questioning the adequacy of the union's document production. At a point, it became clear that at least some electronic documents had been destroyed because the union had not understood that e-mails were called for and had not retained any electronic document or drafts. Judge Preska

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111. *Id.* This case is being conducted as a bench trial. As noted by the *Thompson* court, an adverse inference instruction does little, if anything, in a bench trial because a judge is able to draw reasonable inferences from the defendants' spoliation. *See* 219 F.R.D. at 105.

112. *Philip Morris*, 327 F. Supp. 2d at 25.

113. *Id.* at 26.

114. *Id.*

115. 212 F.R.D. 178 (S.D.N.Y. 2003).

therefore permitted the Met to propound discovery requests concerning the union's compliance with its discovery obligations.<sup>116</sup>

It was revealed that defense counsel's behavior during discovery "was in no way 'consistent with the spirit and purposes of Rules 26 and 37.'"<sup>117</sup> "Representative examples" of the discovery abuses included: defense counsel's repeated misrepresentations to the court that all responsive documents had been produced when, in fact, a thorough search had never been made and counsel had no basis for making such representations; counsel knew the union had no document retention policy but failed to cause one to be adopted; the union delegated document production responsibilities to a non-lawyer, yet failed to explain that a document included a draft or other non-identical copy and included documents in electronic format; the non-lawyer failed to speak to all persons who might have had relevant documents, never followed up with people he did speak to, and failed to contact all of the union's internet service providers to retrieve deleted e-mails, as counsel represented he would; counsel lied to the court about a witness's vacation schedule in order to delay the witness's court-ordered deposition; and after plaintiff's counsel announced that the Met might seek to have a forensic computer expert examine the union's computers in an attempt to retrieve deleted e-mails, the union replaced their computers without notice.<sup>118</sup>

Judge Preska granted the Met's motion for sanctions and entered a default judgment against defendants "in order to (1) remedy the effect of the discovery abuses, *viz.*, prejudicing the Met's ability to plan and prepare its case, (2) punish the parties responsible, and (3) deter similar conduct by others."<sup>119</sup> The court held that the actions of the union and its counsel rose to the level of willfulness and bad faith.<sup>120</sup> Not only had defendants made inadequate inquiries and inadequate production, but they also failed to comply with several court orders and uttered falsehoods regarding simple but material factual matters. Judge Preska concluded that lesser sanctions, such as an adverse inference or preclusion, would not be effective because there was "no indication that lesser sanctions would bring about compliance, and 'there is no meaningful way in which to correlate [defendants'] discovery failures with discrete issues in the case.'"<sup>121</sup> She adhered to her decision upon reconsideration.<sup>122</sup>

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116. *Id.* at 224.

117. *Id.* at 221.

118. *Id.* at 222–29.

119. *Id.* at 182.

120. *Id.* at 224.

121. *Id.* at 230.

122. *See* 2004 WL 1943099 (S.D.N.Y. Aug. 27, 2004).

#### IV. CONCLUSION

Many practitioners have expressed concern that in the absence of a safe harbor provision, courts will sanction parties for the routine recycling of electronically-stored information. They contend that the fear of sanctions will prevent businesses from adopting and implementing rational information technology systems, in which data that serves no business purpose can be deleted or otherwise destroyed. They argue that courts should be prohibited from imposing sanctions where electronic documents are lost through automatic recycling, except where the conduct was willful or reckless, or where the party violated a preservation order. In particular, defense lawyers tend to favor a safe harbor provision stronger than the one currently proposed, such as the proposal contained in the footnote accompanying proposed Rule 37(f):

A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless: (1) the party intentionally or recklessly failed to preserve the information; or (2) the party violated an order issued in the action requiring the preservation of the information.

These arguments are unfounded though because they do not comport with how courts actually behave, or with principles of fundamental fairness.

*First*, despite ominous forecasts, the sky has not fallen in the absence of a safe harbor provision. In our sample, we did not discover a single case where a court sanctioned a party solely for following its document retention and recycling policy; there was always another consideration. Whether documents had been deleted or destroyed was not dispositive of whether courts were likely to impose e-discovery sanctions.<sup>123</sup> Courts tended to focus on the prejudice to the party seeking discovery, as well as on the spoliator's culpable state of mind. Judges did not impose sanctions for the smallest infractions, but rather, exercised their discretion to ensure that cases could be fairly adjudicated on the merits. Sometimes this meant sanctioning negligent but prejudicial conduct, and sometimes it meant denying sanctions altogether. When judges did decide to sanction e-discovery violations, willfulness played a role in the severity of the sanctions imposed. Less severe penalties, such as preclusion, were imposed for the unintentional loss of documents while the most severe sanctions (*e.g.*, dismissal or default) were reserved for the most culpable

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123. Electronic information had been lost in 84% of the cases granting sanctions, and 87% of the cases denying sanctions.



conduct.<sup>124</sup> In no case did a judge sanction a party for the routine recycling of backup tapes where the party did not know (or should not have known) of its obligation to retain discoverable information.

*Second*, many of the cases in our sample did not involve intentional destruction of electronic information, and did not implicate preservation orders. If a broader safe harbor provision—such as the one quoted above—were adopted, it would hinder the courts' ability to ensure substantial justice. As previously discussed, prejudice was a significant factor in determining whether and which sanctions should be imposed. When spoliation of electronic information was prejudicial but not necessarily willful, courts asked, "How can this prejudice be overcome?" The answer ranged from the imposition of evidentiary sanctions, such as preclusion, to allowing an adverse inference to be drawn by the trier of fact. When the conduct was willful, however, the focus was no longer solely on leveling the playing field. While prejudice to the opposing party remained a powerful factor in assessing sanctions, courts also sought to punish wrongdoers. When the wrongdoer acted willfully or recklessly and the problem could not be corrected, courts have not hesitated to dismiss the complaint with prejudice or to enter default judgments. In all cases, courts were guided by notions of fairness. Any proposals to change federal or state rules of civil procedure should be similarly guided.

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124. See *supra* note 89 and accompanying text.