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**ANALYSIS OF RECORDS HOLD ISSUES AND
CASE LAW ON THE DUTY TO PRESERVE DATA**

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I. The scope and purpose of this memorandum.

This memorandum provides an overview of the current state of the law regarding the duty to preserve documents and data. As spoliation claims have increased nationwide, courts have developed widely varying standards regarding the onset of the duty to preserve evidence, the scope of evidence to be retained, and the sanctions that may be imposed for violations of the preservation duty. Because court decisions are unclear and often inconsistent, industry groups, such as The Sedona Conference®, are working to develop consistent standards to guide litigants regarding the triggering and scope of the retention duty. This memo is not intended to provide advice on the specific standards that companies should adopt, but instead aims to provide a basic overview of the issues and the rulings. Meanwhile, litigants and potential litigants have no choice but to keep a diligent watch on the emerging standards stemming from litigation, identify risks, and adjust their policies and practices accordingly.

II. The duty to preserve documents/data.

Courts are increasingly distracted by issues ancillary to the questions of liabilities and damages that underlie litigants' lawsuits. Parties are more often using discovery disputes in tactical (and sometimes strategic) efforts to disrupt opponents, and to divert courts from the substantive issues in a case. A growing element of this trend is the focus on the failure of opposing parties to preserve records before, during, and even *after* litigation.

Generally, parties have a common law duty to preserve documents, tangible items, and information that are relevant to actual or potential litigation or are reasonably calculated to lead to the discovery of admissible evidence for such actual or potential litigation.¹ Two key questions arise under the common law: (1) when does the duty arise; and (2) what must be preserved?²

A. When does the duty to preserve documents/data arise?

1. The duty to preserve evidence is triggered when a party knows or reasonably should know that the evidence may be relevant to anticipated or pending litigation—a case-specific inquiry.

Litigants have a duty to preserve documents that are relevant to pending litigation, as well as relevant to litigation that is reasonably anticipated.³ Because courts tend to focus on the

¹ *Trevino v. Ortega*, 969 S.W.2d 950, 955 (Tex. 1997) (Baker, J. concurring) (citing cases and noting that “[a] party may [also] have a statutory, regulatory, or ethical duty to preserve evidence”).

² *Id.*; see also *Zubulake v. UBS Warburg, L.L.C.*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) [hereinafter *Zubulake IV*] (stating that “[i]dentifying the boundaries of the duty to preserve involves two related inquiries: *when* does the duty to preserve attach, and *what* evidence must be preserved?”) (emphases in original).

³ *Trevino v. Ortega*, 969 S.W.2d at 955 (Baker, J. concurring) (citing cases); see, e.g., *William T. Thompson Co. v. Gen. Nutrition Corp., Inc.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984) [hereinafter *Wm. T. Thompson*] (stating that “a litigant 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”).

triggering of the duty, the question of the *scope* of the duty, that is, the duty to preserve *relevant* evidence, may be overlooked.⁴ Relevance is defined equally broadly in the context of electronic discovery as in traditional discovery.⁵

Although the general duty to preserve relevant documents is clear, courts do not agree on *when* the duty arises. In making this determination, courts generally focus on whether the party had notice that the information was relevant to pending or reasonably anticipated litigation. Yet, the determination of when this notice occurs is so fact intensive and case-specific⁶ that parties have difficulty outlining parameters and risk-factors for identifying when the duty may arise.

Despite the uncertainty, litigants must identify when the duty arises because, once it does, they generally have a duty to preserve all unique, relevant evidence. Counsel, in particular, must be careful to identify when the duty arises because “[o]nce on notice, the obligation to preserve evidence *runs first to counsel*, who then has a duty to advise and explain to the client its obligations to retain pertinent documents that may be relevant to the litigation.”⁷ More specifically, counsel must (1) issue a timely litigation hold; (2) communicate directly with the key players, i.e., the “employees likely to have relevant information;” and (3) “instruct all

⁴ See, e.g., *Zubulake IV*, 220 F.R.D. at 217 (litigant and counsel must preserve any unique evidence that it knows or should know is relevant to litigation); *In re Wechsler*, 121 F. Supp. 2d 404, 415 (D. Del. 2000) (holding that a party who reasonably anticipates litigation has an affirmative duty to preserve relevant evidence); *Brandt v. Rokeby Realty Co.*, No. C.A. 97C-10-132-RFS, 2004 WL 2050519, at *11 (Del. Super. Ct. Sept. 8, 2004) (unpublished) (recognizing that a party anticipating litigation has “an affirmative duty to preserve relevant evidence”); *Bloemendaal v. Town & Country Sports Ctr. Inc.*, 659 N.W.2d 684, 686 (Mich. Ct. App. 2002) (per curiam) (explaining that parties have a pre-litigation duty to preserve evidence they know or reasonably should know will be relevant to potential litigation); *Broyles v. Hunt-Wesson Inc.*, No. 3740, 57 Pa. D. & C.4th 25, 30, 2002 WL 31426195 (Pa. Ct. Com. Pleas 2002) (stating parties reasonably anticipating litigation have “an affirmative duty to preserve relevant evidence”). A review of the cases cited in this memorandum suggests that litigants should be quick to draw the court’s attention to the ways in which the allegations in the pleadings limit the scope of relevant documents. To avoid uncertainty and to reduce the risk of losing a spoliation motion that arises when a party is claimed not to preserve enough evidence, parties may wish to confer with opposing counsel and attempt to reach agreements regarding the boundaries of relevance.

⁵ See, e.g., *AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 441 (Fed. Cl. 2007) (“[t]he scope of the duty to preserve extends to electronic documents, such as e-mails and back-up tapes”); *Broccoli v. Echostar Commc’ns Corp.*, 229 F.R.D. 506, 509 (D. Md. 2005) (speaking of deleted e-mails, “[a] party has a duty to preserve evidence when the party is placed on notice that the evidence is relevant to litigation or when the party should have known that the evidence may be relevant to future litigation”); *Zubulake IV*, 220 F.R.D. at 217 (quoting *Wm. T. Thompson* for the proposition in n.3, and stating, in regard to destroyed e-mail back-up tapes, that “anyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary”); see also *McGuire v. Acufex Microsurgical, Inc.*, 175 F.R.D. 149, 153 (D. Mass. 1997) (quoting *Wm. T. Thompson*, but holding that, under the facts of the case, deletion of a paragraph in plaintiff employee’s electronic evaluation file was not misconduct).

⁶ Adam I. Cohen & David J. Lender, *ELECTRONIC DISCOVERY: LAW AND PRACTICE* § 3.01 (Aspen Publishers, Supp. 2008) [hereinafter Cohen & Lender, *ELECTRONIC DISCOVERY*].

⁷ *Telecom Int’l Am., Ltd. v. AT&T Corp.*, 189 F.R.D. 76, 81 (S.D.N.Y. 1999) (emphasis added). *But see Danis v. USN Commc’ns, Inc.*, No. 98 C 7482, 2000 WL 1694325, at **14, 41, 51 (N.D. Ill. Oct. 23, 2000) (recommending monetary sanctions against *company CEO* who displayed “extraordinarily poor judgment” in delegating supervision of preservation program to inexperienced in-house counsel, who was in turn negligent and ineffectual).

employees to produce electronic copies of their relevant active files.”⁸ In some cases, it might make sense for counsel to take possession of files or backup tapes, or place them in storage.⁹

Counsel’s ignorance of computer matters may not be excused. At least one ruling stated that local court rules impose a duty on counsel “to become knowledgeable about their client’s information management system.”¹⁰ Courts expect counsel to be proactive as soon as document preservation becomes an issue; simply sending out a “litigation hold” order is not enough.¹¹ Sanctions may befall counsel who fail to coordinate and oversee document preservation and production, and let their clients lose or discard data.¹² Moreover, two recent rulings dramatically demonstrate the consequences of counsel’s failure to conduct discovery with due diligence, with the resulting failure to identify, segregate, and eventually produce, key documents.¹³

The preservation responsibility is not limited to counsel. Unquestionably, a party has a duty to preserve relevant documents once litigation commences.¹⁴ In one employment case, for

⁸ *Zubulake v. UBS Warburg, L.L.C.*, 229 F.R.D. 422, 433-34 (S.D.N.Y. 2004) [hereinafter *Zubulake V*].

⁹ *Zubulake V*, 229 F.R.D. at 434.

¹⁰ *Johnson v. Kraft Foods, N. Am., Inc.*, 238 F.R.D. 648, 655 (D. Kan. 2006); see also *Mosaid Techs. Inc. v. Samsung Elecs. Co., Ltd.*, 348 F. Supp. 2d 332, 336-37 (D.N.J. 2004) (invoking L. Civ. R. 26.1(d), which requires, among other things, that counsel investigate how clients’ computers store digital information); *GTFM, Inc. v. Wal-Mart Stores, Inc.*, No. 98 CIV. 7724 RPP, 2000 WL 335558, at *2 (S.D.N.Y. Mar. 30, 2000) (imposing sanctions on defendant company after in-house counsel failed to consult with company’s MIS vice-president and, consequently, misrepresented to the court company’s ability to produce sales records).

¹¹ *Zubulake V*, 229 F.R.D. at 432; see also *School-Link Tech., Inc. v. Applied Res., Inc.*, No. 05-2088-JWL, 2007 WL 677647 (D. Kan. Feb. 28, 2007) (citing *Zubulake V* and stating that “party’s discovery obligations do not end with the implementation of a “litigation hold;” counsel must oversee compliance with the litigation hold, and monitor the party’s efforts to retain and produce the relevant documents”).

¹² *Cache La Poudre Feed, LLC v. Land O’ Lakes, Inc.*, 244 F.R.D. 614, 630 (D. Colo. 2007) (imposing a \$5,000 sanction against defendant whose in-house counsel issued a litigation hold but did not follow through, and holding that “[a] ‘litigation hold,’ without more, will not suffice to satisfy the ‘reasonable inquiry’ requirement in Rule 26(g)(2) [now Rule 26(g)(1)]”); *Phoenix Four, Inc. v. Strategic Res. Corp.*, No. 05 Civ. 4837(HB), 2006 WL 1409413, at **5, 9 (S.D.N.Y. May 23, 2006) (citing *Zubulake V*, imposing monetary sanctions on defendant’s counsel for its ineffectual oversight of production, and holding that “counsel’s obligation is not confined to a request for documents; the duty is to search for *sources* of information”) (emphasis in original).

¹³ *Qualcomm Inc. v. Broadcom, Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932, slip op. at **13, 17-18 (S.D. Cal. Jan. 7, 2008) (concluding that plaintiff’s “retained lawyers *chose not to look*” in the right place for the right documents in what it called a “monumental discovery violation” involving 46,000 e-mails; imposing an \$8.6 million Rule 37 sanction against the plaintiff; and referring six of its retained counsels to the State Bar of California for possible ethical violations) (emphasis added) [the Federal District Judge overseeing the lawsuit has since allowed Qualcomm’s six retained attorneys to invoke the self-defense exception to the attorney-client relationship, in light of Qualcomm’s court filings critical of the attorneys; *Qualcomm Inc. v. Broadcom, Corp.*, No. 05cv1958-RMB (BLM), slip op. at 5 (S.D. Cal. Mar. 5, 2008)]; *In re Sept. 11th Liab. Ins. Coverage Cases*, 243 F.R.D. 114, 128, 131 (S.D.N.Y. 2007) (imposing a \$750,000 Rule 11 sanction jointly and severally against defendant and its two outside counsels for making contentions that “were either dishonest, or objectively unreasonable, or *the product of a failure to make reasonable inquiries*”) (emphasis added).

¹⁴ See, e.g., *Clark Constr. Group, Inc. v. City of Memphis*, 229 F.R.D. 131, 136-37 (W.D. Tenn. 2005) (finding in a construction dispute that the duty triggered “at the *latest*” on the date Clark filed its federal complaint); *Mosaid Techs. Inc. v. Samsung Elecs. Co., Ltd.*, 348 F. Supp. 2d at 336-37 (recognizing the defendant had a preservation duty when it reasonably anticipated litigation, and without a doubt upon service of the complaint; moreover, the plaintiff’s requests for production plainly covered e-mails, placing the defendant on notice of its duty to retain them); *Thompson v. HUD*, 219 F.R.D. 93, 105 (D. Md. 2003) (recognizing that a party has the duty to preserve

example, the court found that the defendant had a duty to preserve recorded conversations between its limousine drivers and dispatchers upon receipt of the plaintiff's age discrimination complaint, which alleged that "colorful language" was common between drivers and dispatchers.¹⁵ Having been accused of firing the plaintiff for the use of vulgar language in such conversations, the defendant was found to be on notice that the recordings would be relevant to the issue of whether the given excuse for the termination was pretextual.¹⁶ This preservation duty also can be triggered by the filing of an administrative complaint.¹⁷ For example, courts have held that defendant employers had a duty to preserve documents *no later than* the date an EEOC complaint was filed but potentially as early as the date when an employee lodges an internal complaint about alleged discrimination.¹⁸

Courts and parties often struggle with the determination of when a *pre-litigation* preservation duty arises.¹⁹ A court may sanction a party that destroys documents and information if it is merely on notice that the information or documents are reasonably calculated to lead to the discovery of admissible evidence, relevant to litigation, or even potential litigation.²⁰ One court defined the scope and duty of a litigant concerning the retention of documents:

evidence at least as of the date of the lawsuit); *Danis v. USN Commc'ns, Inc.*, 2000 WL 1694325, at *12 (holding, in a securities case, that the defendant had a preservation duty when the lawsuit was filed).

¹⁵ *Abramowitz v. Inta-Boro Acres, Inc.*, No. 98-CV-4139 (ILG), 1999 WL 1288942, at *3 (E.D.N.Y. Nov. 16, 1999) (mem.).

¹⁶ *Id.*

¹⁷ *Byrnie v. Town of Cromwell*, 243 F.3d 93, 108 (2d Cir. 2001) (finding, in a case alleging age and gender discrimination in hiring, that the duty was triggered upon the filing of an administrative complaint, yet noting the defendant *arguably* should have reasonably anticipated litigation earlier, when the plaintiff filed Freedom of Information Act requests and aired complaints to the company); *Lombard v. MCI Telecomm. Corp.*, 13 F. Supp. 2d 621, 629 (N.D. Ohio 1998) (holding that EEOC retaliation charge obligated the defendant to preserve documents relating to the discipline of the plaintiff's supervisor, and recognizing the duty was bolstered by federal regulations requiring employers to maintain relevant personnel records once an employer learns that a current or former employee has filed an EEOC retaliation charge).

¹⁸ *Zubulake IV*, 220 F.R.D. at 216-17 (while noting that the duty to preserve arose "no later" than the filing of the EEOC charge, the court held that, in this case, the preservation duty arose earlier because the evidence demonstrated that "the relevant people"—the plaintiff's former supervisors and co-workers—anticipated litigation before the EEOC charge was filed). *But see Hansen v. Dean Witter Reynolds Inc.*, 887 F. Supp. 669, 675-76 (S.D.N.Y. 1995) (rejecting request for sanctions because neither the EEOC charge nor the complaint put Dean Witter on notice that the particular evidence sought by the plaintiff—tickets from securities trades—would be relevant to the litigation).

¹⁹ *Trevino*, 969 S.W.2d at 955 (Baker, J. concurring) (comparing various court approaches to the issue, and citing cases).

²⁰ *Optowave Co., Ltd. v. Nikitin*, No. 6:05-cv-1083-Orl-22DAB, 2006 WL 3231422, at *7 (M.D. Fla. Nov. 7, 2006) (stating that "[s]anctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and destroys such documents and information," and imposing adverse inference jury instructions against defendant who deleted e-mails after being placed on notice of their relevance to pending litigation by plaintiff's counsel); *Paramount Pictures Corp. v. Davis*, 234 F.R.D. 102, 110-13 (E.D. Pa. 2005) (where defendant had "wip[ed] his hard drive clean of all data" after being placed on notice of litigation, court ruled that it would take spoliation of evidence into account during bench trial); *Wm. T. Thompson*, 593 F. Supp. at 1455 (finding that the defendant knowingly and purposefully permitted its employees to destroy key documents after being on notice of pending litigation from the pre-litigation correspondence between counsel for the parties, the complaint, and subsequent discovery). *But see* n.18 (*Hansen v. Dean Witter Reynolds Inc.*).

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.²¹

Federal cases analyzing the pre-litigation triggering of the duty to preserve evidence are highly fact-dependent. Not surprisingly, courts have held a potential plaintiff contemplating litigation is duty-bound to preserve all relevant evidence.²² Many courts also have held that parties are on notice of the likelihood of litigation when an accident occurs and results in severe injuries or death.²³ Other courts have held that an accident that results in less severe injuries can

²¹ *Optowave Co., Ltd. v. Nikitin*, 2006 WL 3231422, at *7 (quoting *Wm. T. Thompson*, 593 F. Supp. at 1455).

²² *In re WRT Energy Sec. Litig.*, 246 F.R.D. 185, 199-201 (S.D.N.Y. 2007) (issuing spoliation sanctions against plaintiff who allowed third party to destroy documents plaintiff knew were relevant to on-going lawsuit); *Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 286 (E.D. Va. 2004) (finding the plaintiff in a complex patent infringement suit failed to keep all relevant information and suggesting that plaintiff's document retention policy was potentially instituted in bad faith because it was developed at about the same time as plans to file the lawsuit, but failed to retain all records pertinent to the lawsuit); *see also Silvestri v. Gen. Motors Corp.*, 271 F.3d 583 (4th Cir. 2001) (affirming a spoliation finding and dismissal when the plaintiff, who was injured in an auto accident, hired an attorney, who in turn hired accident reconstructionists, yet failed to preserve the vehicle or notify GM of its existence until long after the car had been sold to the insurance company, repaired and resold); *Story v. RAJ Props., Inc.*, 909 So. 2d 797 (Ala. 2005) (affirming summary judgment as spoliation sanction when plaintiff homeowner filed suit for allegedly defective imitation stucco siding but failed to preserve the evidence for testing by the defendants; plaintiff's photographs taken during repair were deemed insufficient to determine the cause, according to defendants' expert); *Bloemendaal v. Town & Country Sports Ctr. Inc.*, 659 N.W.2d at 686 (affirming, in a case involving a motorcycle crash, sanction of dismissal for spoliation of evidence; testing of the steering mechanism was destructive, and although the plaintiff's expert video recorded the testing, a test was not performed that would have analyzed a theory important to the defense); *Eichman v. McKeon*, 824 A.2d 305, 313 (Pa. Super. Ct. 2003) (upholding an adverse inference instruction, but refusing to grant judgment n.o.v. against the plaintiff who: (1) destroyed a fire-damaged building after receipt of township's letter stating the building was unsafe and should be demolished; yet (2) preserved the furnace the defendants requested to be salvaged and made numerous photographs of the fire scene); *Broyles v. Hunt-Wesson Inc.*, 57 Pa. D. & C.4th at 31-33 (excluding evidence and imposing adverse inference instruction in defective product case in which the plaintiff alleges throat injuries caused by foreign substance in a package of pudding; the plaintiff had refused defendant's request to turn over the container to a national testing laboratory and failed to have her expert test the container). *But see Brandt v. Rokeby Realty Co.*, 2004 WL 2050519, at *13 (unpublished) (refusing to sanction plaintiff for spoliation when defendant-movant had an opportunity to test the evidence, but failed to do so; a party cannot rely on destructive testing then, years later, claim a foul because the testing was destructive and prevented it from making its own examination); *see also n.130 (Columbia Commc'ns Corp. v. EchoStar Satellite Corp.)*.

²³ *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 747-48 (8th Cir. 2004) (holding in a case in which plaintiffs died and sustained serious injuries in a train accident at a grade crossing, that the defendant railroad violated its duty to preserve evidence when it failed to suspend an otherwise appropriate records destruction policy in which audio recording tapes are routinely recycled every 90 days); *Aggrey v. Stop & Shop Supermarket Co.*, No. 00 Vic. 7999(FM), 2002 WL 432388 at **1, 5 (S.D.N.Y. Mar. 19, 2002) (mem.) (holding, in slip and fall case in which the plaintiff required surgery and was unable to work for over a year, that the duty was triggered "from the moment the accident occurred"); *see also Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998) (finding spoliation in a case where plaintiff alleged he was the victim of 1950s tests in which LSD was administered to unsuspecting persons because the defendants could have destroyed the documents knowing the consequences to themselves; notably, the documents were destroyed in 1973, a congressional investigation commenced in 1975 and the plaintiff's administrative claim was not filed until 1981); *Tex. Elec. Coop. v. Dillard*, 171 S.W.3d 201, 209 (Tex. App.—Tyler 2005, no. pet.) (finding notice of the potential claim and of the evidence's potential relevance thereto when the

put a defendant on sufficient notice of future litigation to give rise to a preservation duty, especially when the defendant investigated and documented the incident thoroughly.²⁴ Indeed, pre-litigation investigations conducted by a party may lead a court to find that the duty was triggered with the investigation.²⁵ A party can also be placed on notice of potential litigation in the absence of personal injury, when confronted with the “sheer magnitude of the losses” caused by an accident.²⁶ Additionally, courts have held that a party may be put on notice of future litigation from prior litigation,²⁷ from similar litigation in another jurisdiction,²⁸ or even when a formal or informal letter from opposing counsel warns of possible future litigation or requests

company received a letter from counsel indicating that he represented the plaintiff in connection with the death of an employee arising from a collision with a cow and the company confirmed it was in receipt of the letter). *But see Morris v. Union Pac. R.R.*, 373 F.3d 896 (8th Cir. 2004) (finding, in train grade crossing accident resulting in serious injury, it was error to award an adverse inference sanction arising from pre-litigation destruction of voice tape recordings without a finding that the destruction was intentional and showed an intention to suppress the truth).

²⁴ *Houlihan v. Marriott Int'l, Inc.*, No. 00 Civ. 7439(RCC), 2003 WL 22271206, at *2 (S.D.N.Y. Sept. 30, 2003) (holding, in a case in which the plaintiff’s hand was lacerated while attempting to replace a shower soap dish that came loose, that “[w]here a hotel guest is injured in a hotel room, there is a strong likelihood that such injury will be the subject of future litigation”). The *Houlihan* court focused on the fact that a hotel employee was sent to investigate the incident, and to document the results of the investigation in a report to the Director of Loss Prevention. *Id.* at *1. “Because Defendant made attempts to prepare for litigation itself, the Court finds that it had a duty to preserve evidence in its possession for use by the opposing party.” *Id.* at *2; *Pace v. Nat’l R.R. Passenger Corp.*, 291 F. Supp. 2d 93 (D. Conn. 2003) (finding that the duty to preserve arose when an employee was injured on the company’s premises, the company conducted clandestine video surveillance to evaluate the severity of the alleged injuries, and the company had a doctor evaluate the employee’s condition prior to the lawsuit). *But see Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718 (Tex. 2003) (determining, in a case in which a decorative reindeer accidentally knocked off a high shelf fell on the plaintiff’s head, that the defendant was not on notice of a substantial chance of litigation, considering that the plaintiff told the store’s employee that he was not hurt and the plaintiff neither threatened to sue nor indicated the store should pay medical costs or other damage).

²⁵ *Doe v. Norwalk Cmty. Coll.*, No. 3:04-CV-1976 (JCH), 2007 WL 2066497, slip op. at *3 (D. Conn. Jul. 16, 2007) (duty to preserve arose when college Dean and two professors met to discuss sexual assault incident, and not later, when they received notice letter from victim’s counsel); *Broccoli v. EchoStar Commc’ns Corp.*, 229 F.R.D. at 511 (duty to preserve arose when defendant learned of plaintiff’s potential Title VII claim, which could result in a lawsuit); *McClain v. Taco Bell Corp.*, 527 S.E.2d 712, 717 (N.C. Ct. App. 2000) (concluding, in a workplace harassment case, that the preservation duty arose when a supervisor initiated an investigation into the employee’s complaints); *see also Stevenson v. Union Pac. R.R. Co.*, 354 F.3d at 747-48 (holding the defendant railroad violated its duty to preserve evidence and noting that the railroad’s claims representative selectively preserved evidence by requesting train movement records and dispatch orders, but failed to request the audio recording tapes). *But see Morris v. Union Pac. R.R.*, 373 F.3d 896 (8th Cir. 2004) (finding, in train grade crossing accident case, that the railroad did not destroy audio tapes intentionally because, among other things, the claims representative investigating the case did not preserve evidence selectively; at the time of the accident, he did not know the extent of the plaintiff’s injuries and determined that the railroad was not liable); *Wal-Mart Stores v. Johnson*, 106 S.W.3d at 722 (determining the defendant was not on notice of litigation, despite the fact that documents from a routine investigation were destroyed). The *Wal-Mart* case illustrates that a routine investigation into minor injuries does not always result in a finding that litigation is likely.

²⁶ *Indem. Ins. Co. of N. Am. v. Liebert Corp.*, No. 96 CIV.6675(DC), 1998 WL 363834, *4 n.3 (S.D.N.Y. June 29, 1998) (finding that “the sheer magnitude of the losses” is a factor that demonstrates that the “plaintiff was on notice that a lawsuit was likely so as to trigger a duty to preserve the evidence”).

²⁷ *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1070 (N.D. Cal. 2006) (holding that defendant should have remained on notice of probable future litigation, and “had a continuing duty to preserve documents” even after the dismissal of an earlier suit, given plaintiff counsel’s threats, and defendant’s fear, of litigation).

²⁸ *United States v. Koch Indus., Inc.*, 197 F.R.D. 463, 466, 482 (N.D. Okla. 1998) (finding that deposition testimony in previous lawsuit, of which in-house counsel was aware, placed company on notice that future litigation over its alleged mismeasurement of oil produced was likely and thus gave rise to duty to preserve relevant documents).

that the party preserve certain documents in its possession.²⁹ Similarly, a letter giving notice of an opportunity to cure contractual performance may trigger the preservation duty.³⁰

When courts impose a duty on counsel, it may be a relatively straightforward determination as to who is contemplated within the term “counsel.” In contrast, the definition of the “party” who is subject to the preservation duty is broadly defined to include “its agents, servants, and employees.”³¹ Thus, corporate parties may subject a wide group of people to the preservation duties.³²

Furthermore, because discovery requests may place a party on notice of particular documents that may be relevant in a case—the relevance of which might not be obvious from the petition/complaint—preservation orders should be reconsidered for breadth as the case develops through discovery.³³ Spoliation under the federal test requires that the party: (1) be on notice of potential litigation, and (2) be on notice that the destroyed information is relevant to such potential litigation.³⁴ Thus, the federal test *appears* subjective. The cases discussed throughout this memorandum illustrate, however, that the application of the test is actually objective, as courts analyze whether a reasonable person in the circumstances should have foreseen litigation. State-based tests for when a party is on notice of potential litigation may vary from federal tests. Texas, for example, adds an express objective component to the test. In Texas, a party may be

²⁹ *Optowave Co., Ltd. v. Nikitin*, 2006 WL 3231422, at *10 (defendant placed on preservation notice by plaintiff counsel’s letter); *Wm. T. Thompson*, 593 F. Supp. at 1446 (finding party was put on notice of relevance of destroyed documents by opposing counsel’s letter three weeks before complaint filed); *see also Bradley v. Sunbeam Corp.*, No. Civ.A. 5:99CV144, 2003 WL 21982038, at *13 (N.D.W. Va. Aug. 4, 2003) (holding that the duty to preserve product remains—electric blankets that had sparked, smoked, smoldered or caught fire—arguably was triggered by a pre-litigation preservation letter).

³⁰ *Renda Marine, Inc. v. United States*, 58 Fed. Cl. 57, 61-62 (Fed. Cl. 2003) (holding that the government was on reasonable notice of litigation when a contract dispute arose and the government’s officer issued a cure notice to the plaintiff pertaining to the plaintiff’s contractual performance). *But see E*Trade Sec., LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 588-89 (D. Minn. 2005) (rejecting, in a securities lending fraud case, the argument that the defendants should have anticipated litigation by October, 2001, when the defendants had responded to SEC inquiries about trading in the three securities at issue; holding, instead, that the defendants should have reasonably anticipated litigation by December 2001/January 2002, upon receiving notice from a court stating that the court was investigating an apparent complex, far-reaching fraud scheme involving securities lending).

³¹ *See, e.g., Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173, 177-78 (1st Cir. 1998) (duty to preserve depends on “institutional notice—the aggregate knowledge possessed by a party and its agents, servants, and employees”). *But see Zubulake IV*, 220 F.R.D. at 217 (“[m]erely because one or two employees contemplate the possibility that a fellow employee might sue does not generally impose a firm-wide duty to preserve”).

³² *See, e.g., Kemper Mortgage, Inc. v. Russell*, No. 3:06-cv-042, 2006 WL 2319858, at *1, (S.D. Ohio Apr. 18, 2006) (“obviously the duty [to preserve] arises independent of any court declaration of the duty and indeed long before a court is available to make a declaration in the particular case”).

³³ *See, e.g., Applied Telematics, Inc. v. Sprint Commc’ns Co.*, No. Civ.A. 94-4603, 1996 WL 33405972, at **2-3 (E.D. Pa. Sept. 17, 1996) (mem.) (holding that the duty to preserve information, including back-up tapes specifically requested by plaintiffs, arose soon after the service of the complaint and, a few days later, the first request for production of documents).

³⁴ *See Zubulake IV*, 220 F.R.D. at 216. The first part of the federal test indicates when the duty arises, while the second part indicates what information must be preserved. The Second Circuit recognizes that an obligation to preserve evidence arises when a party should have known that evidence may be relevant to future litigation. *See Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc.*, 473 F.3d 450, 458 (2d Cir. 2007); *Byrnie v. Town of Cromwell*, 243 F.3d at 107; *Kronisch v. United States*, 150 F.3d at 126.

on notice of potential litigation when the litigation is reasonably foreseeable.³⁵ Texas courts find litigation to be reasonably foreseeable when a party is aware of circumstances that are likely to give rise to future litigation.³⁶ A party may reasonably foresee litigation “when, after viewing the totality of the circumstances, the party either actually anticipated litigation *or* a reasonable person in the party’s position would have anticipated litigation.”³⁷ Unlike the federal test, the objective prong of the Texas test suggests that a party need not actually foresee litigation to commit spoliation. Rather, if a court finds that a reasonable person in that party’s position would have anticipated litigation, then the duty to preserve may still arise despite the absence of actual notice.

Other states have different tests for determining whether the duty to preserve arises, but the common thread throughout is the concept of reasonable foreseeability. For example, in Illinois, the relationship part of the spoliation test states that “a duty to preserve evidence may arise through an agreement, a contract, a statute or another special circumstance[,]” including a defendant’s affirmative conduct.³⁸ Second, “a defendant owes a duty of due care to preserve evidence if a reasonable person in the defendant’s position should have foreseen that the evidence was material to a potential civil action.”³⁹ Courts in Indiana determine the existence of a duty to preserve by balancing the following factors: (a) the relationship between the parties; (b) the reasonable foreseeability of harm to the person injured; and (c) public policy concerns.⁴⁰

The cases cited in this section illustrate that the determination of when a party should reasonably foresee litigation (and thus, should preserve evidence) must be made on a case-by-case basis. This case law poses a significant challenge for a large company, which must quickly decide whether litigation is foreseeable across a wide spectrum of incidents and disputes. To the extent courts expect that analysis to be performed by lawyers,⁴¹ the current law creates great difficulties for a company’s legal staff. They must evaluate their document retention responsibilities in light of the filing of any complaints (in court or in administrative agencies), discovery served in cases, the types of litigation routinely experienced and the effect on stock prices, incidents involving significant economic losses, incidents involving serious injury or death (and to some degree, other lesser injuries), incidents on the company’s property that result in injury, and other commercial disputes.

³⁵ *Trevino v. Ortega*, 969 S.W.2d at 956 (citing *Blinzler v. Marriott Int’l, Inc.*, 81 F.3d 1148, 1159 (1st Cir. 1996); *Rice v. United States*, 917 F. Supp. 17, 20 (D.D.C. 1996); *White v. Office of the Public Defender*, 170 F.R.D. 138, 148 (D. Md. 1997); *Shaffer v. RWP Group, Inc.*, 169 F.R.D. 19, 24 (E.D.N.Y. 1996)).

³⁶ *Trevino*, 969 S.W.2d at 956.

³⁷ *Id.* (modifying the rule established in *Nat’l Tank Co. v. Brotherton*, 851 S.W.2d 193 (Tex. 1993) regarding the definition of “anticipation of litigation” in the context of whether a party should be allowed to assert an investigative privilege to fit the spoliation context).

³⁸ *Dardeen v. Kuehling*, 821 N.E.2d 227, 231 (Ill. 2004) (citation omitted).

³⁹ *Id.* at 271.

⁴⁰ *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991).

⁴¹ Indeed, some courts have emphasized that the determination of the triggering of the duty to preserve evidence should not be placed in the hands of a non-lawyer. See, e.g., *Clark Constr. Group, Inc. v. City of Memphis*, 229 F.R.D. at 136-37 (holding, in a construction dispute, that an on-site construction project manager should not have been permitted to determine whether copies of documents that contained hand-written notes were “relevant,” and thus, should not have been destroyed).

2. Cases construing the work product privilege may provide analogous guidance because its applicability depends on whether the documents were prepared in anticipation of litigation.

Although there are no bright lines demarcating when the duty to preserve arises, at least one category of risk can be refined by reviewing judicial analyses of pre-litigation privileges. Determining when parties are “on notice of potential litigation” can be analogized to courts’ analysis of when parties prepared documents “in anticipation of litigation” in the context of the investigative privilege and the work product doctrine.⁴² For example, the Texas Supreme Court has ruled that “an investigation is conducted in anticipation of litigation” when it satisfies both elements of a two-prong test.⁴³ The first prong is objective and requires that “a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue”⁴⁴ The second prong is subjective and requires that “the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.”⁴⁵

The phrase “substantial chance of litigation” does not mean a statistically significant probability that litigation will ensue.⁴⁶ If this were the requirement, then it could rarely be met because most accidents do not result in litigation.⁴⁷ Accordingly, it may be of little or no consequence that a certain percentage of categorized incidents lead to litigation and a certain percentage of incidents rarely result in litigation. Rather, courts will often look to the severity of the damages or injury and the totality of the circumstances to determine whether a defendant anticipated litigation arising out of a particular incident.

As in spoliation cases, courts may consider the severity of the accident in determining whether or not the work product exemption applies.⁴⁸ Thus, a litigant should give due consideration to the interplay between the two concepts. By taking a position that documents are protected under the work product doctrine (which presumes that they were prepared in anticipation of litigation), for example, a party may be conceding it had a corresponding preservation duty to preserve *all* relevant documents that were prepared contemporaneously with the documents for which the privilege is asserted.

⁴² See *Nat’l Tank Co. v. Brotherton*, 851 S.W.2d at 204 (discussing “anticipation of litigation” with respect to the investigative privilege).

⁴³ *Id.* at 204, 207.

⁴⁴ *Id.* See *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d at 722 (comparing the objective test in *Nat’l Tank Co. v. Brotherton* with the spoliation test).

⁴⁵ *Nat’l Tank v. Brotherton*, 851 S.W.2d at 207.

⁴⁶ *Id.* at 215 (J. Doggett, concurring and dissenting). The majority agreed with Justice Doggett’s view with regard to the phrase “substantial chance of litigation.” *Id.* at 204.

⁴⁷ *Id.* at 215.

⁴⁸ *Id.* at 204 (noting that “[i]f a reasonable person would conclude from the severity of the accident and the other circumstances surrounding it that there was a substantial chance that litigation would ensue, then the objective prong of [the privilege test] is satisfied”); *cf.* n.23.

The analogy between the spoliation and the privilege tests has its limits, however, because courts disagree on whether a routine investigation is performed in the ordinary course of business, in anticipation of litigation, or both. This problem is especially acute in the insurance industry, where courts have split into three groups on this issue.⁴⁹ One group has adopted the “rule that an adjuster’s file is routinely discoverable.”⁵⁰ These courts adopt the test that “[t]he probability that *some particular litigation* will occur must be substantial before a document may be deemed to be ‘in anticipation of litigation’ Phrased another way, *some particular litigation must be contemplated* at the time the document is prepared.”⁵¹ This first test is less inclusive than the spoliation test. Another group of courts has adopted the opposite rule, holding that any “routine investigation of an accident by a liability insurer is conducted in anticipation of litigation,” and is effectively privileged.⁵² This second group relies on the state equivalent of Fed. R. Civ. P. 26(b)(3) to compel production (requiring the party moving for disclosure to show a substantial need or undue hardship). The third group rejects both of these extremes, and adopts a case by case approach to determine if the documents in dispute were prepared in anticipation of litigation and should be exempted from discovery under the work product concept.⁵³ This last approach, however, has been criticized as burdensome to the courts.⁵⁴

B. What must be preserved?

1. General principles.

Once a trial court determines that a preservation duty exists, the court must determine what evidence must be preserved.⁵⁵ While a party need not preserve “everything,”⁵⁶ the party must preserve evidence that is relevant to the litigation.⁵⁷ “While a litigant is under no duty to keep or retain every document in its possession . . . 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

⁴⁹ *Harriman v. Maddocks*, 518 A.2d 1027, 1032-33 (Me. 1986) (summarizing the three approaches).

⁵⁰ *Id.* at 1032. This first approach is called the *Thomas Organ* approach by some court, for *Thomas Organ v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367 (N.D. Ill. 1972). *Harriman v. Maddocks*, 518 A.2d at 1032.

⁵¹ *Regalbuto v. Republic Ins. Co.*, CIV. A. No. 88-3430, 1988 WL 90421, at *1 (E.D. Pa. Aug. 25, 1988) (citing to an earlier case); *see also Arkwright Mut. Ins. Co. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 771 F. Supp. 149, 151 (S.D.W. Va. 1991) (denying a motion to produce because contested documents fell within the scope of the work product privilege, which applies when the probability of future litigation is substantial and its commencement imminent).

⁵² *Ashmead v. Harris*, 336 N.W.2d 197, 201 (Iowa 1983) (upholding the work-product privilege and reversing the trial court’s decision to compel production of an insurer’s investigation documents, and stating that “[i]t does not matter that the investigation is routine. Even a routine investigation may be made in anticipation of litigation”); *Harriman v. Maddocks*, 518 A.2d at 1034 (rejecting the argument that regular claims evaluations are made in the ordinary course of business and not in anticipation of litigation, agreeing with *Ashmead*, and holding that an adjuster’s case file be discoverable upon a showing of particularized need, per Me. R. Civ. P. § 26(b)(3)).

⁵³ *Harriman v. Maddocks*, 518 A.2d at 1033. *See, e.g., Garcia v. City of El Centro*, 214 F.D.R. 587, 592-93 (S.D. Cal. 2003); *State ex rel. Allstate Ins. Co. v. Gaughan*, 508 S.E.2d 75, 92 (W. Va. 1998).

⁵⁴ *Harriman v. Maddocks*, 518 A.2d at 1033.

⁵⁵ *Trevino v. Ortega*, 969 S.W.2d at 956-57.

⁵⁶ *Wiginton v. CB Richard Ellis, Inc.*, No. 02 C 6832, 2003 WL 22439865, at *4, (N.D. Ill. Oct. 27, 2003) (noting that a party need not go to “‘extraordinary measures’ to protect all potential evidence[,]” nor “‘preserve every single scrap of paper in its business’”); *see also n.3 (Wm. T. Thompson)*.

⁵⁷ *Trevino v. Ortega*, 969 S.W.2d at 957; *see also n.4*.

discovery of admissible evidence, is reasonably likely to be requested during discovery, [or] is the subject of a pending discovery sanction.”⁵⁸ The phrase “reasonably likely to be requested during discovery” *should* effectively limit the preservation duty to encompass only documents likely to be requested *under document requests that are appropriately limited for relevance*. Accordingly, when a corporation has no notice of the potential relevance of the documents when it destroys them in accordance with a document retention policy, sanctions may be inappropriate.⁵⁹

It would seem fair that parties would not have to comply with overly broad preservation demands as dictated by opposing parties, and courts hesitate to sanction parties who fail to comply with such demands.⁶⁰ Nonetheless, to help minimize the risks of being adjudged a “spoliator” as a result of document requests that exceeded the party’s analysis of what would be deemed a “relevant request,” a company may implement procedures to: (1) review and be aware of the limits of reasonable document requests in routine litigation; (2) preserve documents within those reasonable limits; and (3) entertain discussions with opposing counsel soon after litigation is initiated, in order to try to reach agreements regarding the scope of relevant documents. Agreed preservation orders may also decrease risks.⁶¹ Litigants may also consider hiring outside electronic discovery experts to provide guidance regarding the scope of documents to be preserved.

2. Increasing significance of electronic discovery.

Spoliation claims have increased as courts have broadly embraced the digital age. Courts consistently have held that information stored in electronic format is discoverable, both under federal and state rules.⁶² Under existing practice and procedure, electronic information has been deemed discoverable under the Federal Rules of Civil Procedure⁶³ as long as it is otherwise within the scope defined by the Rules. Rule 26 permits parties to “obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense,”⁶⁴ including

⁵⁸ *Id.* (quoting *Wm. T. Thompson*, 593 F. Supp. at 1455); *accord*, *Zubulake IV*, 220 F.R.D. at 217; *accord*, *Wiginton v. CB Richard Ellis, Inc.*, 2003 WL 22439865, at *4.

⁵⁹ *See* n.18 (*Hansen v. Dean Witter Reynolds Inc.*).

⁶⁰ *Frey v. Gainey Transp. Servs., Inc.*, No. 1:05-CV-1493-JOF, 2006 WL 2443787, at *9, (N.D. Ga. Aug. 22, 2006) (refusing to sanction defendant who, upon notice of possible litigation, allowed a tracking system to delete its data in the normal course of business because the prejudice to the plaintiff was small, and because plaintiff’s 15-page preservation letter suggested an impermissible attempt to “sandbag” the defendant in the event any information was not preserved); *Turner v. Resort Condos. Int’l, LLC*, No. 1:03-cv-2025-DFH-WTL, 2006 WL 1990379, at **6-8, (S.D. Ind. July 13, 2006) (refusing to sanction defendant for its belated (post-motion to compel) production in part because plaintiff’s overbroad pre-suit preservation letter ignored defendant’s computing needs, and demanded defendant actions that “went well beyond” the duty to prevent spoliation).

⁶¹ *See, e.g., In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 CDP, 2007 WL 1655757 (E.D. Mo. June 5, 2007) (providing an example of a detailed preservation order in the context of electronic discovery, including term definitions).

⁶² *Cornell Research Found., Inc. v. Hewlett Packard Co.*, 223 F.R.D. 55, 73 (N.D.N.Y. 2003) (“today it is black letter law that computerized data is discoverable if relevant”) (citing *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94CIV.2120 (LMM) (AJP), 1995 WL 649934, at *2 (S.D.N.Y. Nov. 3, 1995)).

⁶³ This memorandum cites to the 2008 version of the Fed. R. Civ. P. (enacted Dec. 1, 2007), the “2008 Federal Rules,” unless noted otherwise.

⁶⁴ Fed. R. Civ. P. 26(b)(1).

“electronically stored information.”⁶⁵ The inclusion of electronic information under the Rules’ aegis is not recent. The 1970 Advisory Committee Notes regarding Rule 34(a) specifically recognize that federal discovery procedures apply to electronic data and information.⁶⁶ Similarly, the 1993 Advisory Committee Notes to Fed. R. Civ. P. 26(a)(1)(A)(ii) (then Fed. R. Civ. P. 26(a)(1)(B) (1993)) indicate that parties should disclose the “nature and location” of “computerized data and other electronically recorded information.”⁶⁷ Rule 26(b)(2)(C)(i)-(iii) sets out the general limitations on the scope of discovery.⁶⁸

Discovery requests targeting non-privileged, relevant electronic information that do not run afoul of Rule 26(b)(2)(C)(i)-(iii) are appropriate under the Federal Rules.⁶⁹ For example,

⁶⁵ Fed. R. Civ. P. 26(a)(1)(A)(ii).

⁶⁶ Fed. R. Civ. P. 34(a) Advisory Committee’s Notes, 1970, in relevant part provided: “The inclusive description of ‘documents’ is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through a respondent’s devices, respondent may be required to use his devices to translate the data into usable form.”

⁶⁷ Fed. R. Civ. P. 26(a)(1)(B) (1993) Advisory Committee’s Notes. This requirement “by its plain language only goes to data *already* in electronic form at the time the mandatory disclosure is to be made.” *In re Bristol Meyers Squibb Securities Litigation*, 205 F.R.D. 437, 441 (D.N.J. 2002) (emphasis in original).

⁶⁸ Discovery shall be limited on motion or by the court if:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2)(C)(i)-(iii).

⁶⁹ However, if a request does not comply with the requirements of Rule 26, courts have not hesitated to deny a requesting party’s motion to compel. *See, e.g., McCurdy Group, LLC v. Am. Biomedical Group, Inc.*, 9 Fed. Appx. 822, 831 (10th Cir. May 21, 2001) (unpublished) (upholding district court’s refusal to permit a physical inspection of the plaintiff’s hard drive); *Emmerick v. Penley-Groseclose*, No. 3:07-cv-13, 2007 U.S. Dist. LEXIS 59147, at **1-3 (E.D. Tenn. Aug. 6, 2007) (denying, without prejudice, *pro se* plaintiff’s request for defendant’s back-up tapes for failure to meet and confer with defendant in good faith, and for breach of a local procedural rule); *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Clearwater Ins. Co.*, No. 04-CV-5032, 2007 WL 2106098, slip op. at *3 and n.10 (S.D.N.Y. July 21, 2007) (burden or expense of the additional discovery of e-mails outweighs its likely benefit when requesting party has not “sufficiently demonstrated that responsive emails exist on the back-up tapes,” but requesting party may pay for data restoration if it wishes); *Scotts Co LLC v. Liberty Mut. Ins. Co.*, CA 2:06-CV-899, 2007 WL 1723509, slip op. at **1-2 (S.D. Ohio June 12, 2007) (denying plaintiff’s motion to search defendant’s computers, networks, and databases, because “mere suspicion . . . that defendant may be withholding discoverable information” is insufficient basis to grant the requested access); *Hedenburg v. Aramark Am. Food Servs.*, No. C06-5267 RBL, 2007 WL 162716, at **1-2 (W.D. Wash. Jan. 17, 2007) (concluding that defendant’s motion to gain access to plaintiff’s computer was an attempt to find impeaching evidence, and issuing a denial); *Gibson v. Ford Motor Co.*, 510 F. Supp. 2d 1116, 1123 (N.D. Ga. 2007) (denying plaintiff’s request for defendant’s “suspension order” (its “litigation hold” notice) because “[t]his information is not reasonably calculated to lead to the discovery of admissible evidence”). Both the *Hedenburg* the *Scotts* courts noted that a party is no more entitled to access his opponent’s computers than his home or warehouse; *accord 2005 Civil Rules Report* at 74 (“Rule 34(a) is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents”).

courts routinely have held that electronic information is discoverable,⁷⁰ in forms such as computer magnetic tapes, disks, computer files, e-mails, hard drives, etc.⁷¹ Moreover, due to the unique nature of computerized data, even “deleted” electronic information has been held to be discoverable because it is often saved on a backup or emergency system.⁷² Further, courts have held that electronic information may be discovered even though a responding party has previously produced responsive documents in another form, such as paper.⁷³ In some cases, courts also have ordered a responding party to “manufacture” electronic documents if the party did not have the data in electronic form. However, such an order often is conditioned on the requesting party’s willingness to pay for the creation of the documents.⁷⁴ In this regard, the parties should be constrained by Federal Rule 34, which imposes only a production requirement

⁷⁰ See, e.g., *AAB Joint Venture v. United States*, 75 Fed. Cl. at 441 (“[t]he scope of the duty to preserve extends to electronic documents, such as e-mails and back-up tapes”); *Zubulake v. UBS Warburg, L.L.C.*, 217 F.R.D. 309, 317 (S.D.N.Y. 2003) [hereinafter *Zubulake I*] (plaintiff “is entitled to discovery of the requested e-mails so long as they are relevant to her claims”); *In re Honza*, 242 S.W.3d 578, 581 (Tex. App.—Waco 2008, no pet. h.) (“[f]ederal district courts have consistently held that electronic data stored on computer hard drives, including “deleted” files and related data, is subject to discovery”) (citations omitted).

⁷¹ *AAB Joint Venture v. United States*, 75 Fed. Cl. at 441 (e-mail and back-up tapes); *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443, 446 (C.D. Cal. 2007) (RAM—random access memory); *Playboy Enters., Inc. v. Welles*, 60 F. Supp. 2d 1050 (S.D. Cal. 1999) (hard drives); *Portis v. City of Chi.*, No. 02 C 3139, 2004 WL 1535854, at *1 (N.D. Ill. July 7, 2004) (database).

⁷² See *Ameriwood Indus., Inc. v. Liberman*, No. 4:06CV524-DJS, 2006 WL 3825291, at * (E.D. Mo. Dec. 27, 2006) (“[i]t is generally accepted that deleted computer files are discoverable”); *Simon Prop. Group, L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000) (“computer records, including records that have been ‘deleted,’ are documents discoverable under Fed. R. Civ. P. 34”); *Playboy Enters., Inc. v. Welles*, 60 F. Supp. 2d at 1053 (“[p]laintiff needs to access the hard drive of Defendant’s computer only because Defendant’s actions in deleting those e-mails made it currently impossible to produce the information as a ‘document’”); see also n.70 (*In re Honza*).

⁷³ See, e.g., *Auto Club Family Ins. Co. v. Ahner*, No. 05-5723, 2007 WL 2480322, at *1 (E.D. La. Aug. 29, 2007) (compelling a *third party* to an action to produce its electronic information after it had agreed to produce a hard copy of its entire file, because the third party had not shown that the information was “not reasonably accessible because of undue burden or cost” under Federal Rules 26 and 45); *Cornell Research Found., Inc. v. Hewlett Packard Co.*, 223 F.R.D. at 74 (“[t]he mere fact that information which as a matter of ordinary course of one’s business is electronically stored has been produced in functional equivalent, such as through hard copy, does not in and of itself excuse a party from producing the requested information in electronic form”).

⁷⁴ See *Portis v. City of Chi.*, 2004 WL 1535854, at **4-5 (ordering requesting party to pay a “fair share” of the expenses of developing database); *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94CIV.2120 (LMM) (AJP), 1995 WL 649934, at *1 (S.D.N.Y. Nov. 3, 1995) (stating that “the producing party can be required to design a computer program to extract data from its computerized business records, subject to the court’s allocation of the costs”); *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 Civ.2120(LMM)(AJP), 1996 WL 22976, at *2 (S.D.N.Y. Jan. 23, 1996) (requesting party had to pay for the costs responding party incurred in the “creation” of the electronic data); *In re Air Crash Disaster at Detroit Metro. Airport on Aug. 16, 1987*, 130 F.R.D. 634, 636 (E.D. Mich. 1989) (responding party required to create computer tape but requesting party was to “pay all reasonable and necessary costs that may be associated with the manufacture of the computer-readable tape”). But see *In re Claims for Vaccine Injuries Resulting in Autism Spectrum Disorder*, 2007 WL 1983780, **8+ (Fed. Cl. May 25, 2007) (refusing to order the CDC to perform a study to produce the “data” that the petitioner wanted, noting that the study was not necessary, that ample evidence existed elsewhere, and that it would not be reasonable to order the study; but concluding nonetheless that “[t]here may be instances when it may be reasonable to so order, especially in this era of computerized data”); compare n.66.

on *existing* documents. As a court noted, “a party cannot be compelled to create or cause to be created, new documents solely for their production.”⁷⁵

Resolving any doubt about the discoverability of electronic information, in 2006, the United States Supreme Court approved the Federal Civil Rules Advisory Committee’s recommended amendments to the Federal Rules, which were drafted specifically to address electronic discovery.⁷⁶ The amendments relevant to electronic discovery apply to Federal Rules 16, 26, 33, 34, 37, and 45, and Civil Form 35.⁷⁷ The new rules went into effect on December 1, 2007.

Federal Rule 26(a), for example, now adds “electronically stored information” to the list of information that a party may use to support its claims or defenses and that must be disclosed or described by category without awaiting a discovery request.⁷⁸ Rule 26(f) requires parties to discuss any issues relating to preserving discoverable information before the initial scheduling conference in the case.⁷⁹ This rule also calls for the parties’ discovery plan to include “views and proposals on: . . . any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;”⁸⁰ and “any issues about claims of privilege or of protection as trial-preparation material,”⁸¹ including: (1) potential agreements on procedures to assert claims of privilege after production (such as non-waiver or “claw-back” provisions); and (2) the possibility of any such agreements being included in the

⁷⁵ *Columbia Pictures, Inc. v. Bunnell*, No. CV 06-1093FMCJXC, 2007 WL 2080419, at *6 (C.D. Cal. May 29, 2007) (citations omitted).

⁷⁶ See www.supremecourtus.gov/orders/courtorders/frcv06p.pdf.

⁷⁷ See Judicial Conference of the United States, Comm. on Rules of Practice & Procedure, *Report of the Civil Rules Advisory Comm.*, 1, 18-110 (May 27, 2005) [hereinafter *2005 Civil Rules Report*], <http://www.uscourts.gov/rules/Reports/CV5-2005.pdf>.

⁷⁸ Fed. R. Civ. P. 26(a)(1)(A)(ii); *2005 Civil Rules Report* at 29-31. The term “data compilations” used in the previous version of the Rules was deleted. *Id.* The Committee also discusses revisions to Rule 33 to clarify how a party may respond to interrogatories with the production of electronic information. *Id.* at 64-70. Rule 34 also adds “electronically stored information” among the categories of items for production. Fed. R. Civ. P. 34(a)(1)(A); *2005 Civil Rules Report* at 64.

⁷⁹ Fed. R. Civ. P. 26(f)(2); *2005 Civil Rules Report* at 34.

⁸⁰ Fed. R. Civ. P. 26(f)(3)(C); *2005 Civil Rules Report* at 33-34. The Committee Notes explain that the discussion is not required in cases in which electronic discovery is not involved. *Id.* at 33. The Committee Notes suggest, for example, that the parties might specify topics for electronic discovery, the sources of information within the parties’ control that may be searched for information, and/or whether the information is reasonably accessible to the storing party, including burdens and costs of retrieval and review. *Id.* at 33-34. Rule 34(b) permits the requesting party to specify the “form or forms” in which information is to be produced, and if not so requested, calls for the producing party to specify the form or forms in which it intends to produce information. *Id.* at 34. The Notes also explain that, especially with respect to dynamic information, the failure to discuss preservation issues early can raise risks of disputes. *Id.* The parties should balance the need to preserve information with the impact that cessation of routine operations could have on the litigants. *Id.*

⁸¹ Fed. R. Civ. P. 26(f)(3)(D); *2005 Civil Rules Report* at 35. The Committee Notes promote agreements that could avoid the heavy costs of electronic document review so that parties can minimize the risks of waiving an entire category of documents through the inadvertent production of a single privileged item. *Id.* at 36. In fact, the Notes encourage counsel to discuss with their adversaries the issue of whether embedded data or metadata should be produced, as well as how to avoid waivers of privilege from inadvertent production of such data. *Id.* at 35-36 “Quick peek” and “claw back” agreements are suggested as ways to facilitate production, while protecting privileges. *Id.* at 36.

court's scheduling order.⁸² Similarly, Rule 16 provides that a court's scheduling order may "provide for disclosure or discovery of electronically stored information" and "any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced."⁸³

Some states also have adopted special rules regarding electronic discovery.⁸⁴ For example, to obtain information in electronic or magnetic form under Rule 196.4 of the Texas Rules of Civil Procedure, the requesting party specifically must request production of electronic or magnetic data and specify the form in which it is requested.⁸⁵ The Texas rule is relatively new, reflecting 1999 revisions to the Texas Rules of Civil Procedure. Few cases have interpreted or applied this rule. State of Virginia Supreme Court Rule 3A:12 provides that responsive information stored in electronic form need only be produced in electronic form if a hard copy is unavailable.⁸⁶ Under Local Rule 26.1 of the Eastern and Western Districts of Arkansas, the Rule 26(f) report must disclose a party's intent to request information contained in electronic or computer based form.⁸⁷ Similarly, under Local Rule 26.1 of the District of Wyoming, the requesting party must disclose its intent to discover computer based or electronic information and identify the categories of information sought.⁸⁸ The promulgation of state rules expressly encompassing electronic discovery is growing. Additionally, state court cases ruling that state discovery rules *inherently* (when not expressly) provide for discovery of electronic documents often borrow from federal case law, which is evolving rapidly as well. Parties operating nationwide or in multiple jurisdictions should stay abreast of rules, statutes and case law across the jurisdictions in which they operate and should update policies accordingly.

3. What type of electronic discovery must be preserved?

Electronic information must be preserved when the defendant reasonably anticipates litigation.⁸⁹ At that defining moment, the defendant "must suspend its routine document

⁸² 2005 *Civil Rules Report* at 35. The Committee Notes state that orders entered over party objections should be narrowly tailored. *Id.* at 35. Revisions to Rule 45 mirror the revisions in Rule 26(f). *Id.* at 91. The revised rule provides for parties to specify the form or forms for producing electronically stored evidence. Fed. R. Civ. P. 45(a)(1)(C), (c)(2)(B), (d)(1)(B); 2005 *Civil Rules Report* at 91, 104. Conforming with revised Rule 34(b), the default form for production is a "form or forms that are 'reasonably usable.'" *Id.* at 104. Conforming with Rule 26(b)(2)(B), Rule 45(d)(1)(D) protects against production of electronic information that is not reasonably accessible. *Id.*

⁸³ Fed. R. Civ. P. 16((b)(3)(B)(iii)-(iv)); 2005 *Civil Rules Report* at 28. The Committee Note to Rule 16 recognizes that the rule neither gives the court the authority to enter a case management order regarding disclosures of electronic information and the corresponding protection of privileges without party agreement, nor limits the court's authority to act on its own motion. *Id.*

⁸⁴ The California Code of Civil Procedure, section 2017, permits discovery to be conducted in electronic media, and authorizes courts to enter orders for the use of technology in discovery. Illinois Supreme Court Rules 201(b)(1) and 214 provide for discovery into all information retrievable from computer storage. Mississippi Supreme Court Rule 26 specifically allows for the discovery of electronic information, pursuant to request.

⁸⁵ Tex. R. Civ. P. 196.4.

⁸⁶ Va. Sup. Ct. R. 3A:12(b).

⁸⁷ D. Ark. Local Rule 26.1(4).

⁸⁸ D. Wyo. Local Rule 26.1(d)(3)(A).

⁸⁹ *Zubulake IV*, 220 F.R.D. at 216-17 (finding defendant on notice of potential litigation when: (1) Plaintiff filed EEOC charge; (2) defendant's employees began labeling e-mails related to the Plaintiff as "UBS Attorney Client

retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”⁹⁰ The 2008 Federal Rules provide some clarity as to what documents and data will not be considered to be “reasonably accessible”—the information that is found on sources that can be accessed only “by incurring substantial burdens or costs.”⁹¹ Rule 26(b)(2)(B) permits parties to respond to discovery requests by identifying sources of electronic information that are not reasonably accessible due to burdens or costs.⁹² As examples of information that is not reasonably accessible, the Committee cited backup tapes used for disaster recovery, legacy data from obsolete systems, deleted data that requires computer forensics to retrieve or restore, and databases designed to create information in certain ways that cannot easily create different forms of information.⁹³

Likewise, Rule 26(b)(2)(B) provides that a party is not required to produce electronically stored information on “sources that the party identifies as not reasonably accessible because of undue burden or cost” but instead will be required to establish the undue burden and/or cost to access the information in defending any motions to compel.⁹⁴ The requesting party is then required to establish whether the burdens and/or costs are justified in light of the circumstances.⁹⁵ It is noteworthy, however, that a party does not relieve itself of its common-law or statutory duties to preserve evidence by identifying sources of electronic information that are not reasonably accessible.⁹⁶ Moreover, courts have already indicated that they will not allow Rule 26(b)(2)(B) and the “reasonably accessible” analysis to be used as a vehicle to obstruct

Privilege”; and (3) a key employee of the defendant admitted that he feared litigation); *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, No. 502003CA005045XXOCAI, 2005 WL 679071, at *6 (Fla. Cir. Ct. Mar. 25, 2005) (imposing sanctions, including trial sanctions, against Morgan Stanley for discovery misconduct with regard to electronic data—failure to preserve e-mails and to diligently restore back-up tapes) [the trial sanctions led to a \$1.58 billion jury award against Morgan Stanley, which was later reversed on grounds unrelated to the sanctions; *Morgan Stanley & Co., Inc. v. Coleman (Parent) Holdings, Inc.*, 955 So. 2d 1124 (Fla. Dist. Ct. App. 2007)]; see also *In re Telxon Corp. Sec. Litig.*, Nos. 5:98CV2876 & 1:01CV1078, 2004 WL 3192729, at *35 (N.D. Ohio July 16, 2004) (magistrate judge recommending default judgment of liability in light of discovery misconduct with regard to electronic data). *But see cf. Welch v. Wal-Mart Stores, Inc.*, No. 04-C-50023, 2004 WL 1510021, at *1 (N.D. Ill. July 1, 2004) (“[t]he mere existence of a surveillance videotape does not place upon Wal-Mart a duty to preserve all taped footage for possible future litigation. Such a duty is unreasonable and impracticable and would require Wal-Mart to preserve hundreds of videotapes for years. . . . a reasonable person in Defendants’ position would not have foreseen that the videotape was material to a potential civil action”); *Chidichimo v. Univ. of Chi. Press*, 681 N.E.2d 107, 110 (Ill. App. Ct. 1997) (finding no duty to preserve computer records in a workers’ compensation action when the destruction of records occurred in a routine purging process and plaintiff failed to take reasonable steps to ensure preservation of the records after defendants refused to produce them).

⁹⁰ *Zubulake IV*, 220 F.R.D. at 218. All potentially affected custodians, management and IT staff should be recipients of the litigation hold order, and ideally, should have a chance to ask questions to ensure understanding. *Internalizing Zubulake and Other Recent Rulings: In-House Planning for Electronic Discovery*, THE E-DISCOVERY STANDARD, Spring 2005 [hereinafter *Internalizing Zubulake*].

⁹¹ *2005 Civil Rules Report* at 47.

⁹² *Id.* at 42, 47.

⁹³ *Id.* at 42 (Committee Introduction to Rule 26(b)(2)).

⁹⁴ *Id.* at 49 (Committee Note to Rule 26(b)(2)).

⁹⁵ *Id.*

⁹⁶ *Id.* at 48. The Committee states that the determination of whether a party is obligated to preserve unsearched sources of potentially responsible data depends on the circumstances, including whether the party has a basis for reasonably believing discoverable information is not available on reasonably accessible sources. *Id.*

discovery. Faced with evidence of such abuse, courts have ordered the culpable party to produce its backup tapes for discovery.⁹⁷

In *Zubulake IV*, the court distinguished two categories of backup tapes and subjected them to different treatments. 220 F.R.D. at 218. The *Zubulake* court defined “inaccessible” back-up tapes as those “typically maintained solely for purpose of disaster recovery” and noted that the “litigation hold does not apply to inaccessible backup tapes . . . which may continue to be recycled on the schedule set forth in the company’s policy.” *Id.* “Accessible” back-up tapes as those “actively used for information retrieval.” *Id.* Note, however, that accessible backup tapes likely will be subject to the litigation hold because, even though in practice, almost all back-up tapes are intended and created for disaster recovery. It is rare that any back-up tape is used for purposes other than data recovery resulting from a hardware or software failure. It is doubtful that the *Zubulake* court intended for parties to rely heavily or blindly on the argument that back-up tapes are intended solely for disaster recovery. Moreover, when a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the key players’ documents are discoverable and should be preserved, even if the information on the tapes is not otherwise accessible or available.⁹⁸

Even though reported state cases may not have analyzed whether information is “available” or “unavailable,” state courts have ordered discovery of backup tapes, sometimes with a requirement that the requestor pay for the production costs.⁹⁹ Because state courts often

⁹⁷ See *Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth.*, 242 F.R.D. 139, 147-48 (D.D.C. 2007) (applying the seven-factor “reasonably accessible” analysis for Rule 26(b)(2)(C) in the 2005 *Civil Rules Report* (p. 49), noting that the defendant failed to implement a litigation hold, and ordering the latter to produce remaining back-up tapes); see also *Peskoff v. Faber*, 244 F.R.D. 54, 60 (D.D.C. 2007) (holding that defendant’s failure to turn “the automatic deletion feature off once informed of pending litigation may serve as a premise for additional judicial action, including a sanction, without offending amended Rule 37(f)” [Rule 37(e) in the 2008 Federal Rules]).

⁹⁸ *Zubulake IV*, 220 F.R.D. at 218. The *Zubulake* court’s analysis in this regard raises practical questions. For example, without reviewing the information on the back-up tapes and comparing it to key players’ documents, one generally will not know whether the “information on those tapes is not otherwise available.” See *id.* Thus, in order to analyze whether the duty to preserve arises, the test under *Zubulake IV* actually requires the producing party to view the content of the documents/data on “inaccessible” back-up tapes. The Federal Rules Committee recognized this struggle in its introduction to then-proposed Rule 26(b). 2005 *Civil Rules Report* at 42-43, 49-50. The Committee recognized that, in determining whether sources of information are reasonably accessible and whether good cause exists to permit some level of discovery, the “court and parties may know little about what information” the data sources may contain, much less its relevance and value to the litigation. *Id.* at 50.

⁹⁹ *Toshiba Am. Elec. Components, Inc. v. Super. Ct.*, 21 Cal. Rptr. 3d 532 (Cal. Ct. App. 2004) (relying on a California statute in holding that the party demanding production of data from back-up tapes must bear all reasonable expenses in recovering the data and translating it into usable format); *Linnen v. A.H. Robins Co., Inc.*, No. 97-2307, 1999 WL 462015 (Mass. Super. Ct. July 16, 1999) (ordering the production of a sampling of back-up tapes and reserving the issue of what party would bear further costs of production after a sample of the tapes revealed whether and to what extent further recovery was required); *Lipco Elec. Corp. v. ASG Consulting Corp.*, 798 N.Y.S.2d 345 (N.Y. Sup. Ct. 2004) (concluding that data stored on back-up tapes was discoverable, but holding that a New York statute required the requesting party to pay the cost of production); *In re CI Host, Inc.*, 92 S.W.3d 514 (Tex. 2002) (ordering, in a class action against a web host, production of information on the web host’s back-up tapes due to web host’s failure to adhere to discovery rules, specifically, its failure to submit evidence in support of its objection in which it claimed the information was protected under the federal Electronic Communications Privacy Act).

borrow from federal practice, it would not be surprising to see states adopt standards mirroring the revised federal rule.

Recent analysis of Rule 26(b)(2)(B) and the “reasonably accessible” phrase concerns computer backup tapes, especially those containing e-mails. In addition, courts are increasingly confronted with disputes that revolve around short-lived electronic data, and the unique discovery issues that they necessarily raise. In one internet copyright violation case, the court, invoking Federal Rule 45, granted plaintiff musical recording companies an ex parte order against a third-party internet service provider.¹⁰⁰ The order granted the plaintiffs immediate access to the provider’s server activity logs to establish the identities of the defendants, who were accused of Copyright Act violations. Good cause existed to issue the expedited discovery order because the provider’s computer typically kept the logs for brief periods of time before erasing them.¹⁰¹ In another similar internet copyright infringement case, a court ruled that RAM data was electronically stored information under the Federal Rules, despite its short-lived nature, and subject to discovery under the facts of the case.¹⁰² Of significance was that the magistrate judge had ordered the defendants to preserve server log data, kept in RAM, that identified the web site users who signed on and downloaded material—a narrow and technically simple requirement. Not all RAM data was to be preserved.¹⁰³ The copyright cases discussed here address very specific information requests, and the rulings are well-founded. In general, litigators should not expect dynamic RAM-resident data to become the next frontline in electronic discovery.¹⁰⁴ Nonetheless, counsel and parties faced with a situation where RAM-resident data is potentially responsive to a discovery request would be diligent to investigate whether any monitoring program tracks the data and can, could, or should periodically preserve the data to media for long-term retention.

Similarly, real-time data issues are important in industries where specialized software applications record thousands of measurements taken from operating equipment, e.g., machinery, pipes, storage tanks, etc. For the most part, this data is automatically deleted, overwritten, or compressed within a few hours or a few days of collection. In-house counsel confronted with an industrial accident should immediately order the creation of permanent save-sets of all real-time

¹⁰⁰ *Warner Bros. Records Inc. v. Does 1-20*, No. 07-cv-01131-LTB-MJW, 2007 WL 1655365, at *1 (D. Colo. June 5, 2007).

¹⁰¹ *Warner Bros. Records Inc. v. Does 1-20*, 2007 WL 1655365, at *1.

¹⁰² *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. at 446; see also *Columbia Pictures, Inc. v. Bunnell*, No. 2:06-cv-01093 FMC-JCx, 2007 U.S. Dist. LEXIS 96360, at **15-16 (C.D. Cal. Dec. 13, 2007) (terminating the case in plaintiff’s favor because “defendant’s willful spoliation of evidence” “inalterably prejudiced” the case, and is only properly sanctionable by termination).

¹⁰³ *Columbia Pictures, Inc. v. Bunnell*, 2007 WL 2080419, at **1-2.

¹⁰⁴ See, e.g., *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 641-42 (E.D. Pa. 2007) (denying spoliation sanctions against defendants for loss of Internet web site screenshots stored in cache memory) [the defendants viewed plaintiff’s allegedly privileged web site, printed screenshots, but did not save the latter to disk; the plaintiff alleged that the defendant computer’s automatic deletion of the screenshots from the cache was an act of spoliation]; *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 177 (S.D.N.Y. 2004) (refusing to find spoliation where a control engineer failed to record the response curves of hard drive heads as he fine-tuned their performance; the court calling such data ephemeral, noting that “[n]o business purpose ever dictated that they be retained,” and that absent a preservation order, no sanctions were warranted) (citing to then-proposed Rule 37(f)).

process data prior to, during, and even shortly after the accident. The same reasoning holds for voice mail messages which are subject to short-term automatic purges.

III. What are the consequences for violating the duty to preserve?

The consequences for failing to preserve relevant evidence often arise in response to a motion for sanctions for spoliation of evidence. Indeed, spoliation has evolved as an independent tort in some states.¹⁰⁵ Courts take spoliation claims very seriously because:

The destruction of evidence can lead to manifest unfairness and injustice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action and can increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence that may be less persuasive, less accessible, or both.¹⁰⁶

Upon finding that a party has either intentionally destroyed or failed to preserve relevant documents,¹⁰⁷ courts may impose a variety of sanctions on the spoliating party, depending on the severity of the spoliation.¹⁰⁸

¹⁰⁵ *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 847 (D.C. 1998) (recognizing negligent or reckless spoliation as an independent tort); *McCool v. Beauregard Mem'l Hosp.*, 814 So.2d 116, 118 (La. Ct. App. 2002) (reaffirming that spoliation may be pursued as an independent tort). *But see Lucas v. Christiana Skating Center, Ltd.*, 722 A.2d 1247, 1250 (Del. Super. Ct. 1998) (refusing “to recognize independent torts of negligent or intentional spoliation of evidence”); *Trevino v. Ortega*, 969 S.W.2d at 951 (declining “to recognize spoliation as a tort cause of action” in Texas).

¹⁰⁶ *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 285 (E.D. Va. 2001); *see also Silvestri v. Gen. Motors Corp.*, 271 F.3d at 590 (courts must sanction spoliation “to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth”); *Metro. Opera Ass’n v. Local 100, Hotel Employees & Rest. Employees Int’l Union*, 212 F.R.D. 178, 181 (S.D.N.Y. 2003) [hereinafter *Metro Opera*] (noting that lawsuits are a search for the truth, and full and honest discovery is the key to that search); *Danis v. USN Commc’ns, Inc.*, 2000 WL 1694325, at **1-2 (noting that to uphold people’s faith in the judicial process, discovery must be fair and conducted with integrity, so “when a charge is made that relevant information has been destroyed, and especially when a charge is made of intentional destruction, it is a charge that strikes at the core of our civil litigation system”).

¹⁰⁷ *United States v. Esposito*, 771 F.2d 283 (7th Cir. 1985) (spoliation doctrine “applies to a party, not a witness who is not a party”).

¹⁰⁸ *Boneck v. City of New Berlin*, 22 Fed.Appx. 629, 630 (7th Cir. 2001) (unpublished) (finding that Federal Rule of Civil Procedure 37 sanctions for spoliation should be proportional to wrongs, i.e., “[s]poliation that sabotages a strong case supports default judgment; spoliation that destroys collateral evidence in a weak case does not require the same penalty”); *see, e.g., Tri-County Motors, Inc. v. Am. Suzuki Motor Corp.*, 494 F. Supp. 2d 161, 177-78 (E.D.N.Y. 2007) (court must factor the “degree of [the offending] party’s culpability and the amount of prejudice caused by its actions’ in deciding whether and what sanctions are warranted”) (citation omitted); *United States v. Philip Morris USA Inc.*, 327 F. Supp. 2d 21, 25-26 (D.D.C. 2004) (imposing sanctions on defendants, including \$2.995 million fine, for losing or destroying e-mails, including those of senior executives, but, “guided by a ‘concept of proportionality’ between offense and sanction,” declining to impose an adverse jury inference instruction); *see also Silvestri v. Gen. Motors Corp.*, 271 F.3d at 593-94 (dismissal as a sanction for spoliation may be necessary, even if conduct is not culpable, if a party is unable to adequately present or defend its case because of the document destruction); *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d at 1066 (the power of federal trial courts to make appropriate evidentiary rulings in response to evidence of spoliation includes the power to sanction the responsible party, to exclude the spoiled evidence, to admit evidence of the circumstances of the destruction or spoliation, or to instruct the jury that it may infer that the spoiled or destroyed evidence would have been unfavorable to the responsible party).

A. The authority to impose spoliation sanctions.

Federal courts have historically sanctioned parties for spoliation of evidence under either Rule 37(b) authority, or their inherent powers.¹⁰⁹ Similarly, state courts generally have either inherent powers or rule-based authority to sanction parties.¹¹⁰ The 2008 Federal Rules provide a limited safe harbor that curtails a court's authority to impose sanctions in some electronic discovery cases.¹¹¹ Under prior practice, federal courts could use their Rule 37(b) authority to impose sanctions for spoliation only when a party had destroyed or withheld evidence in contravention of a court order.¹¹² Because destruction of evidence most often occurs before the entry of any explicit discovery orders, courts historically have relied on their inherent power to impose sanctions. In general, the analysis may be the same under either the statute or the inherent judicial powers, so the distinction is largely insubstantial.¹¹³

The 2008 Federal Rules not only provide for sanctions for spoliation when a party's actions violate court orders,¹¹⁴ but also provide guidance on the requisite intent necessary to

¹⁰⁹ See, e.g., *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1474-75 (D.C. Cir. 1995) (holding that court has authority under Rule 37(b) or inherent powers to sanction spoliation); *Wiginton v. CB Richard Ellis, Inc.*, 2003 WL 22439865, at *3 & n.5 (same); *Zubulake IV*, 220 F.R.D. at 216 (same); *McGuire v. Acufex Microsurgical, Inc.*, 175 F.R.D. at 153 (same).

¹¹⁰ *Westover v. Leiserv, Inc.*, 831 N.E.2d 400, 404 (Mass. App. Ct. 2005) (explaining that the "judge has the discretion to craft a remedy" for spoliation that addresses the resulting unfairness); *Linnen v. A.H. Robins Co., Inc.*, 1999 WL 462015, at *11 (recognizing adverse inference instructions are permitted under Massachusetts Rule of Civil Procedure for violating court discovery orders, and monetary fines otherwise); *Bloemendaal v. Town & Country Sports Ctr. Inc.*, 659 N.W.2d at 686 (explaining that Michigan courts have inherent powers to sanction parties for the failure to preserve evidence they know or should know is relevant to future litigation); *Travelers Indem. Co. v. C.C. Controlled Combustion Insulation Co., Inc.*, No. 215 CVN 2003, 2003 WL 22798934, at *2 (N.Y. City Civ. Ct. Nov. 19, 2003) (recognizing that the determination of appropriate sanctions for spoliation is committed to the court's sound discretion); *Eichman v. McKeon*, 824 A.2d at 313 (stating a trial court's decision to impose a spoliation sanction is reviewed for abuse of discretion); *Trevino v. Ortega*, 969 S.W.2d at 953 (holding that "[t]rial judges have broad discretion to take measures ranging from a jury instruction on the spoliation presumption to, in the most egregious case, death penalty sanctions" (meaning default judgment or dismissal)); *Ardesson v. Atl. Richfield Co.*, No. 31059-7-II, 2005 WL 950708, at *7 (Wash. Ct. App. Apr. 26, 2005) (unpublished) (reviewing a trial court's rulings on spoliation sanctions under an abuse of discretion standard); *City of Stoughton v. Thomasson Lumber Co.*, 675 N.W.2d 487, 500 (Wis. Ct. App. 2003) (confirming that a decision to sanction a spoliator is committed to the trial court's discretion).

¹¹¹ See 2005 *Civil Rules Report* at 83, 86-87. Note that the *Report* refers to Rule 37(f), which was ultimately enacted as Rule 37(e).

¹¹² See, e.g., *Shepherd v. Am. Broad. Cos.*, 62 F.3d at 1474-75 (turning to inherent power to analyze district court's award of sanctions because the court had not issued any explicit discovery order).

¹¹³ See *Wiginton v. CB Richard Ellis, Inc.*, 2003 WL 22439865, at *3 n.5 (proceeding under the court's inherent authority [sic] because no discovery order had been ignored, "noting that the analysis is essentially the same under either alternative," yet refusing to condone a default judgment because that sanction is reserved for extreme cases that reflect bad faith or willful conduct). But see *Shepherd v. Am. Broad. Cos.*, 62 F.3d at 1480 (overturning district court's award of default judgment for spoliation, and distinguishing between a court's Rule 37(b) authority to award default judgment or dismiss claims and its inherent power, because a court's inherent power "is not grounded in rule or statute and must be exercised with particular restraint"). The *Shepherd* analysis reflects the appellate court's concern that the trial court incorrectly dismissed the case under inherent power because it exercised insufficient judicial restraint. The trial court did not consider alternative, less severe sanctions, and did not fully explain why alternative sanctions such as an award of fines and/or attorney's fees would not be sufficient. *Id.*

¹¹⁴ Fed. R. Civ. P. 37(b). Note that the 2008 Federal Rules bring within the sweep of a party's preservation obligation any data or information that may be stored on a system owned by another, such as through outsourcing

support such spoliation awards. The Rules divide the standards for sanctioning parties into two categories—one for spoliation resulting from the ordinary operation of electronic systems, and another for all other allegedly sanctionable conduct. When information is spoliated *other than through routine, good-faith system operations*, Rule 37(e) gives the court significant discretion in determining whether a party should be sanctioned and the nature of the sanctions.¹¹⁵ Whereas the severity should correspond to the culpability of the conduct, severe sanctions are inappropriate unless the party acted intentionally or recklessly.¹¹⁶

On the other hand, when information is lost as a result of routine system operations, sanctions are inappropriate under Rule 37(e), absent exceptional circumstances.¹¹⁷ The Rules Committee received significant public debate on drafts of Rule 37(e) (safe harbor), especially with regard to the requisite culpability to support an award of sanctions when a loss of information resulted from routine operation of electronic systems.¹¹⁸ Ultimately, the Rules Advisory Committee opted for a standard that falls somewhere between negligent and intentional/reckless conduct. When information is lost by routine operation of systems, Rule 37(e) is a safe haven from sanctions *only* for parties who continued operations in good faith.¹¹⁹ Notably, the Committee Note to Rule 37(e) makes clear that good faith *may require* the suspension of routine operations to prevent loss of information—specifically, a “litigation hold.”¹²⁰ Thus, the 2008 Federal Rules permit courts to consider whether parties analyzed facts and circumstances that might give rise to future litigation and made a decision in good faith (correct or not) regarding whether a litigation hold was necessary.

B. The purposes behind the imposition of spoliation sanctions.

Courts generally recognize that sanctions are intended to serve one or more of three purposes, including: (1) compensation—placing the innocent party in the same evidentiary position that it would have occupied if the evidence not been destroyed; (2) punishment—penalizing the spoliator for discovery abuse; and (3) deterrence—sending a message to other litigants that spoliation will not be tolerated and will be subject to punishment.¹²¹

agreements. *2005 Civil Rules Report* at 85-86 (explaining that the Committee changed the draft reference “a party’s” information system to “an” information system in order to reach vendor relationships). Compliance with court orders also bear on the determination of a party’s good faith under the Rules. For example, a party’s actions in compliance with court orders calling for the preservation of documents bear on the party’s good faith when information is lost through the routine operation of the party’s information systems. *Id.* at 85.

¹¹⁵ *Id.* at 88.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 86-88. The Committee defined “exceptional circumstances” as those in which the loss is highly prejudicial. *Id.* at 88.

¹¹⁸ *Id.* at 84-85. Note that Rule 37(e) is discussed as Rule 37(f) in the *2005 Civil Rules Report*.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 87. When the party has a duty to suspend operations in order to preserve information that is relevant to reasonably anticipated litigation, the party can no longer destroy relevant documents and data pursuant to an otherwise appropriate document retention policy.

¹²¹ *Metro Opera*, 212 F.R.D. at 219 (holding that sanctions serve two functions—punishment and deterrence); *Trigon Ins. Co. v. United States*, 204 F.R.D. at 287 (“[o]nce spoliation has been established, the sanction chosen must achieve deterrence, burden the guilty party with the risk of an incorrect determination and attempt to place the

C. Determining whether to sanction.

Although courts do not completely agree on the essential elements of a spoliation claim, they generally require at least a showing that: (1) the spoliator had a duty to preserve the documents; (2) the spoliator destroyed the documents with some level of culpability or blameworthiness; (3) the spoliated evidence was relevant to some party's claims or defenses; and (4) the moving party suffered some prejudice as a result of the spoliation.¹²²

1. Level of culpability.

Although the level of culpability of a spoliator is necessarily fact-dependent, courts do not hesitate to find parties culpable when they intentionally delete computer files, or use specialized software to “scrub” or “wipe-out” hard drives.¹²³ The use of such cleansing software, easily detectable and auditable with forensic software, is almost guaranteed to lead the court to conclude that the party acted willfully, or in bad faith, or both.¹²⁴ The same result is obtained when parties use less direct (but equally effective) means of data suppression, such as

prejudiced party in the evidentiary position it would have been in but for the spoliation”); *Danis v. USN Commc'ns, Inc.*, 2000 WL 1694325, at *31 (holding that sanctions are intended to serve one or more of three purposes—compensation, punishment, and/or deterrence); *United States v. Koch Indus., Inc.*, 197 F.R.D. at 483 (among the purposes sanctions serve are punishment, general deterrence, and compensation).

¹²² See *In re WRT Energy Sec. Litig.*, 246 F.R.D. at 194 (elements required for an adverse inference instruction are: (a) duty to preserve; (b) destroyed with a “culpable state of mind”; and (c) relevance); *Optowave Co., Ltd. v. Nikitin*, 2006 WL 3231422, at *8 (to apply spoliation sanctions, court must decide: (a) existence of evidence at one time; (b) duty to preserve; and (c) whether evidence was critical to opposing party) (applying Florida law); *Wiginton v. CB Richard Ellis, Inc.*, 2003 WL 22439865, at **4-6 (elements of spoliation are: (a) duty to preserve; (b) intentional or willful destruction; and (c) relevance); *Trigon Ins. Co. v. United States*, 204 F.R.D. at 286 (elements are: (a) duty to preserve; (b) intentional destruction; and (c) prejudice; but some prejudice is presumed as natural consequence of destruction); *Danis v. USN Commc'ns, Inc.*, 2000 WL 1694325, at *31 (elements are: (a) duty to preserve; (b) breach of that duty with some level of culpability; and (c) prejudice); *McGuire v. Acufex Microsurgical, Inc.*, 175 F.R.D. at 154 (elements are: (a) an act of destruction; (b) discoverability of the evidence; (c) an intent to destroy the evidence; (d) occurrence of the act at a time after suit has been filed, or, if before, at a time when the filing is fairly perceived as imminent; and (e) prejudice; but prejudice bears more on the issue of what sanction is appropriate); *Computer Assocs. Int'l, Inc. v. Am. Fundware, Inc.*, 133 F.R.D. 166, 168-69 (D. Colo. 1990) (elements are: (a) duty to preserve; (b) breach of that duty with some culpability; and (c) relevance). These cases illustrate that courts impose differing requisite elements for spoliation claims, but that certain factors can be gleaned generally from the cases as a whole.

¹²³ The deletion of a computer file on a hard disk hides it from the user's view, but does not, in fact, necessarily delete it. The file is deleted (and permanently lost) only when the operating system overwrites it to store new information. Until that happens, the file can be recovered, at least in part, with forensic software. Software programs that “scrub” or “wipe-out” a hard disk *completely* delete files, replacing them with “empty” disk sectors.

¹²⁴ See, e.g., *Anderson v. Crossroads Capital Partners, LLC*, No. Civ.01-2000 ADM/SRN, 2004 WL 256512, at *8 (D. Minn. Feb. 10, 2004) (plaintiff's installation of a new hard drive and the use of CyberScrub software on her computer showed that she “intentionally destroyed evidence and thus attempted to suppress the truth,” which warranted an adverse inference jury instruction at trial); *Covucci v. Keane Consulting Group, Inc.*, No. 033584, 2006 WL 2004215, at **1, 5 (Mass. Super. May 31, 2006) (dismissing plaintiff's complaint because he “intentionally and in bad faith” used BC Wipe to remove files from his computers, including a letter critical to the dispute); see also *Commc'ns Ctr., Inc. v. Hewitt*, No. Civ.S-03-1968 WBS KJ, 2005 WL 3277983 (E.D. Cal. Apr. 5, 2005) (finding “willfulness, fault, or bad faith” for using Evidence Eliminator and reinstalling an operating system); *Advantacare Health Partners, LP v. Access IV*, No. C 03-04496 JF, 2004 WL 1837997 (N.D. Cal. Aug. 17, 2004) (finding “willfulness, fault, or bad faith” for using BC Wipe); *Kucala Enter., Ltd v. Auto Wax Co., Inc.*, No. 02 C 1403, 2003 WL 22433095 (N.D. Ill. Oct. 27, 2003) (finding “egregious conduct” for using Evidence Terminator).

disk defragmentation or reformatting.¹²⁵ Moreover, courts find culpability and impose sanctions even when files are intentionally deleted *after* a paper copy has been saved, or produced, or both.¹²⁶

Courts are also likely to find some level of culpability when a party denies the existence or availability of a document, and that document shows up in the hands of a third party—or worse, an employee (neither of which are unlikely in the Internet Age).¹²⁷

Conversely, good faith, or absence of bad faith, can excuse the destruction of evidence, especially if it is done under the aegis of a bona fide document retention policy, or if it causes no prejudice to the party that claims spoliation.¹²⁸

2. Relevance of the spoliated evidence and prejudice to the spoliated party.

Courts may be reluctant to award spoliation sanctions unless the moving party can show that the missing evidence was relevant to its cause of action, and that its disappearance has

¹²⁵ *Minn. Mining & Mfg. Co. v. Pribyl*, 259 F.3d 587, 606 and n.5 (7th Cir. 2001) (affirming negative inference jury instruction against defendant who flooded his computer with six gigabytes of music the evening before he was to produce it for discovery, and euphemistically calling it “troubling”); *Optowave Co., Ltd. v. Nikitin*, 2006 WL 3231422, at *11 (defendant acted in bad faith when he knowingly reformatted a computer, knowing that it contained relevant documents, and after receiving notice of pending litigation); *RKI, Inc. v. Grimes*, 177 F. Supp. 2d 859, 880 (N.D. Ill. 2001) (finding that the defendant’s four successive defragmentations of his computer was a “deliberate attempt to cover up” his “willful and malicious misappropriation of trade secrets” and imposing sanctions); *QZO, Inc. v. Moyer*, 594 S.E.2d 541 547-48 (S.C. Ct. App. 2004) (finding that defendant willfully violated a court order when he waited seven days to turn over a computer and reformatted the disk the night before to erase its files, and affirming sanctions).

¹²⁶ See *Lombardo v. Broadway Stores, Inc.*, No. G026581, 2002 WL 86810 (Cal. Ct. App. Jan. 22, 2002) (unpublished) (affirming \$31,250 of sanctions against defendant who intentionally deleted electronic employment records and produced 5 million pages of records instead, noting that the former “made the information accessible,” and forcing the defendant to recreate a database from the paper records); see also *In re Sept. 11th Liab. Ins. Coverage Cases*, 243 F.R.D. at 129, 131-32 (imposing \$500,000 of Rule 37 sanctions jointly and severally against defendant and its two outside counsels for willfully deleting a key computer file, and keeping a paper copy “buried in a box for nearly two year,” but specifically declining to rule on spoliation sanctions).

¹²⁷ *Juniper Networks, Inc. v. Toshiba Am., Inc.*, No. 2:05-CV-479, 2007 WL 2021776, at *1 (E.D. Tex. July 11, 2007) (mem.) (ruling that defendant “willfully and intentionally violated the court’s amended discovery order” when his assertion that contested source code was “not available” was contradicted by defendant’s own witness, and imposing sanctions); *Claredi Corp. v. SeeBeyond Tech. Corp.*, No. 4:04CV1304 RWS, 2007 WL 735018, at *3 (E.D. Mo. Mar. 8, 2007) (mem.) (ruling that defendant “failed . . . to disclose documents” and was “dilatatory” after third party produced documents that defendant denied existed, and imposing sanctions); *Ameriwood Indus., Inc. v. Liberman*, 2006 WL 3825291, at **4-5 (questioning whether defendants had, in fact, produced all responsive documents, and allowing plaintiff to image defendant’s computers after third party produced a responsive e-mail that defendant had failed to produce).

¹²⁸ *Columbia Commc’ns Corp. v. EchoStar Satellite Corp.*, 2 Fed. Appx. 360, 368 (4th Cir. 2001) (unpublished) (judgement as a matter of law or new trial denied to losing defendant despite plaintiff’s destruction of databases, because destruction was not in bad faith, and defendant failed to show enough prejudice); *N.Y. State Nat’l Org. for Women v. Cuomo*, No. 93 Civ. 7146(RLC)JCF, 1998 WL 395320 at **2-3 (S.D.N.Y. July 14, 1998) (plaintiff’s failure to “demonstrate prejudice to their case or bad faith by the defendants,” means that they are not entitled to sanctions for defendant’s negligent breach of duty to preserve computer databases).

caused it prejudice.¹²⁹ The destruction of information that can be secured from other sources will usually not warrant a finding of prejudice,¹³⁰ unless the court finds willfulness or bad faith on the part of the actor.¹³¹

D. Determining what sanction is appropriate.

1. The relevant factors.

There is no single test or set of factors for determining appropriate sanctions in a particular case,¹³² although courts generally consider: (1) the degree of fault/culpability of the spoliating party; (2) the degree of prejudice suffered by the innocent party; and (3) whether a lesser sanction will serve the purposes for imposing sanctions.¹³³ The most important considerations are the degree of fault and the degree of prejudice suffered.¹³⁴ If the degree of fault and/or the degree of prejudice suffered is great, the sanction may be severe, including default judgment or dismissal of claims.¹³⁵

¹²⁹ *In re Cheyenne Software, Inc.*, No. CV-94-2771(NG), 1997 WL 714891, at *2 (E.D.N.Y. Aug. 18, 1997) (monetary sanctions imposed on defendant for failure to preserve data on hard drives, but adverse jury instructions denied as too harsh because plaintiff failed to show prejudice with specificity, and plaintiff's counsels made efforts to mitigate the losses); *Hildreth Mfg., LLC, v. Semco, Inc.*, 785 N.E.2d 774, 780-82 (Ohio Ct. App. 2003) (affirming denial of sanctions against party who failed to preserve hard drives, where there was no evidence that the hard drives contained information relevant to the dispute).

¹³⁰ *Floeter v. City of Orlando*, No. 6:05-cv-400-Orl-22KRS, 2007 WL 486633, at **6-7 (M.D. Fla. Feb. 9, 2007) (spoliation sanctions denied because crucial e-mails deleted by defendant could still be obtained from plaintiff, and deletion was without bad faith); *Hynix Semiconductor, Inc. v. Rambus, Inc.*, No. C-00-20905 RMW, 2006 WL 565893, at **27-28 (N.D. Cal. Jan. 5, 2006) (unclean hands defense fails because defendant was not prejudiced by plaintiff's document destruction given that "adequate similar and material documents or classes of documents were not destroyed" and were produced).

¹³¹ See n.128 (*Lombardo v. Broadway Stores, Inc.*, and *In re Sept. 11th Liab. Ins. Coverage Cases*).

¹³² *Trigon Ins. Co. v. United States*, 204 F.R.D. at 288 (quoting *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 167 F.R.D. 90, 102 (D. Colo. 1996)); Cohen & Lender, ELECTRONIC DISCOVERY at § 3.08[D].

¹³³ *Trigon Ins. Co. v. United States*, 204 F.R.D. at 288 (quoting *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994)); *United States v. Koch Indus., Inc.*, 197 F.R.D. at 483 ("[a] court should select the least onerous sanction necessary to serve [the] remedial purposes. The severity of the sanction selected should be a function of and correspond to the willfulness of the spoliator's destructive act and the prejudice suffered by the non-spoliating party"); Cohen & Lender, ELECTRONIC DISCOVERY at § 3.08[D]; see also *Eichman v. McKeon*, 824 A.2d at 313 (recognizing the factors to be considered in fashioning appropriate sanctions for spoliation are: (1) the spoliator's degree of fault; (2) the degree of prejudice imposed on other parties; and (3) the availability of lesser sanctions to protect the parties' rights and deter similar conduct).

¹³⁴ *Silvestri v. Gen. Motors Corp.*, 271 F.3d at 593 (to justify a sanction, the district court must consider the spoliator's conduct and the prejudice caused); *Trigon Ins. Co. v. United States*, 204 F.R.D. at 288 ("[g]iven the rationale for, and the policy behind, the rule against spoliation, assessment of sanctions depends most significantly on the blameworthiness of the offending party and the prejudice suffered by the opposing party"); *United States v. Koch Indus., Inc.*, 197 F.R.D. at 483 (the two factors carrying the most weight are the degree of culpability and the degree of prejudice suffered).

¹³⁵ See, e.g., *Silvestri v. Gen. Motors Corp.*, 271 F.3d at 593 ("[a]t bottom, to justify the harsh sanction of dismissal, the district court must consider both the spoliator's conduct and the prejudice caused and 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"); see also *Story v. RAJ Prop., Inc.*, 909 So. 2d 797, 804 (recognizing that summary judgment is a proper spoliation sanction when all relevant evidence was destroyed and the spoliator appreciated the importance of the evidence to

A general review of the cases shows that judicial standards vary widely in assessing whether and to what extent sanctions are appropriate. Furthermore, even when courts apply the same standards, the cases cannot be reconciled. Actions that one court may deem to be merely negligent may be found by others to be either reckless, willful or intentional.

2. The range of available sanctions.

A court may sanction spoliation of evidence using a variety of remedies, “including imposing fines, shifting costs and awarding attorneys’ fees, excluding evidence, instructing the jury on permissible adverse inferences to be drawn from the missing evidence, or even dismissing claims or entering default judgments.”¹³⁶

a. Adverse inference instructions.

The rationale for imposing an adverse inference instruction¹³⁷ is found “in the maxim *omnia presumuntur contra spoliatores*, which means, ‘all things are presumed against a despoiler or wrongdoer.’”¹³⁸ The inference may be rebutted by evidence that sufficiently

the opponent); *Brandt v. Rokeby Realty Co.*, 2004 WL 2050519, at *11 (unpublished) (recognizing spoliation may be sanctioned by dismissal or default judgment); *City of Stoughton v. Thomasson Lumber Co.*, 675 N.W.2d at 500 (recognizing that dismissal can be entered for spoliation).

¹³⁶ Cohen & Lender, ELECTRONIC DISCOVERY at § 3.08[A]; see also *Shepherd v. Am. Broad. Cos.*, 62 F.3d at 1475 (citing Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* § 28(A) (2d ed. 1994)) (noting that available sanctions under a court’s inherent power include default judgment, fines, expenses, attorneys fees, evidence preclusion, adverse inference instructions, contempt citations, and disqualification of counsel); *Story v. RAJ Prop., Inc.*, 909 So. 2d 797, (affirming summary judgment as a proper spoliation sanction when all relevant evidence was destroyed and the spoliator appreciated the importance of the evidence to the opponent); *Brandt v. Rokeby Realty Co.*, 2004 WL 2050519, at *11 (unpublished) (recognizing spoliation may be sanctioned by dismissal or default judgment, as well as adverse inferences, and overturning decision to preclude evidence from testing of a ceiling tile when the movant knew of the tile’s importance, failed to make arrangements to preserve enough of the tile for sampling by both parties, and instead, relied on the work of another expert); *Linnen v. A.H. Robins Co., Inc.*, 1999 WL 462015, at *11 (recognizing that sanctions for spoliation of evidence may include adverse instructions, the exclusion of evidence or even dismissal, and upholding an adverse inference); *Keen v. Hardin Mem’l Hosp.*, No. 6-03-08, 2003 WL 22939453, at *3 (Ohio Ct. App. Dec. 15, 2003) (recognizing spoliation may be pursued not only as an independent tort, but also may be pursued for purposes of seeking sanctions in the form of adverse inferences; refusing to find error in a court’s refusal to provide an adverse instruction when the evidence suggested that evidence might never have been lost/destroyed); *Broyles v. Hunt-Wesson Inc.*, 57 Pa. D. & C.4th at 30 (stating spoliation penalties range from adverse jury instructions through exclusion of evidence and even include outright dismissal of claims, and holding that the trial court should have imposed a sanction less severe than summary judgment when sufficient evidence remained for the plaintiff to state a claim); *Ardesson v. Atl. Richfield Co.*, 2005 WL 950708, at *7 (affirming the trial court’s refusal to impose an adverse inference instruction, yet recognizing that such instructions are sometimes appropriate when “the only inference which the finder of fact may draw is that such evidence would be unfavorable”); *City of Stoughton v. Thomasson Lumber Co.*, 675 N.W.2d at 500 (recognizing that dismissal can be entered for spoliation and that the preclusion of damages is the equivalent of a dismissal, yet overturning trial court’s ruling that precluded damages for 36 poles that had been cut into pieces without marking which pieces, together, made one pole).

¹³⁷ An adverse inference instruction is an instruction allowing, but not requiring, the jury to infer that the destroyed or withheld evidence would have been harmful to the spoliator’s case if it had been produced. *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155-56 (4th Cir. 1995); *Eichman v. McKeon*, 824 A.2d at 312; *Broyles v. Hunt-Wesson Inc.*, 57 Pa. D. & C.4th at 30.

¹³⁸ *Trigon Ins. Co. v. United States*, 204 F.R.D. at 284 (quoting *Black’s Law Dictionary*, 1086 (6th ed. 1997)).

explains why the spoliated evidence was not produced.¹³⁹ Adverse inference instructions are serious sanctions because it is often difficult to rebut an inference. When not rebutted, the adverse inference may be outcome-determinative.¹⁴⁰

Despite the importance of adverse inference instructions, courts do not agree on the level of fault necessary to support them under current practice. Some courts hold that a party moving for an adverse inference instruction need not show bad faith in the destruction of evidence.¹⁴¹ For example, the Second Circuit requires only a showing of mere negligence,¹⁴² while in the Fourth Circuit, a party must show more than mere negligence, but less than bad faith. Specifically, the Fourth Circuit requires the movant to show that the spoliator knew the evidence was relevant to an issue in the litigation, but willfully destroyed it.¹⁴³ Still, other courts hold that a showing of bad faith is a prerequisite for an adverse inference instruction.¹⁴⁴ In the spoliation context, bad faith is most often understood as intentional destruction of relevant evidence with the desire to suppress the truth or interfering with the other party's ability to make its case.¹⁴⁵

Two Eighth Circuit cases filed against Union Pacific (“UP”) illustrate the effect of adverse inferences on personal injury litigation, as well as the variance among courts as to the degree of culpability required to impose that sanction, both before and after litigation commences. In short, the Eighth Circuit requires a finding of bad faith before imposing adverse

¹³⁹ *Vodusek v. Bayliner Marine Corp.*, 71 F.3d at 156.

¹⁴⁰ *Zubulake IV*, 220 F.R.D. at 219-20.

¹⁴¹ See, e.g., *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2nd Cir. 2002); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d at 156; *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993); *Nation-Wide Check Corp., Inc. v. Forest Hills Distrib., Inc.*, 692 F.2d 214 (1st Cir. 1982).

¹⁴² *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d at 108. To impose an adverse inference instruction (or other sanctions) on a party in the Second Circuit, the party seeking sanctions must establish that: (1) the spoliator had control over the evidence and an obligation to preserve it; (2) the spoliator had a “culpable state of mind” when the records were destroyed; and (3) a reasonable trier of fact could find that the evidence was relevant to the party’s claim or defense, and specifically, “would have been of the nature alleged by the” affected party. *Zubulake IV*, 220 F.R.D. at 220-21 & n.50. The requisite “culpable state of mind” in the Second Circuit includes negligence. *Id.* at 220. However, the Second Circuit imposes a *different level of proof* of “relevant evidence” as a prerequisite to imposing sanctions. *Id.* When a party destroys evidence in bad faith, which the *Zubulake IV* court defined as “intentionally or willfully,” then the court may *presume* that the evidence would have been harmful to the spoliator. *Id.* (citing *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108). When the destruction is merely negligent, the party seeking sanctions must prove that the lost evidence would have supported its claims/defenses. *Id.* at 221 (citing *Byrnie v. Town of Cromwell*, 243 F.3d at 107-12); see also *Concord Boat Corp. v. Brunswick Corp.*, No. LR-C-95-781, 1997 WL 33352759, at *7 (E.D. Ark. Aug. 29, 1997) (stating it is “inappropriate to give an adverse inference instruction based upon speculation that deleted e-mails would be unfavorable”). Again, parties should be aware that, if the court fails to focus on the triggering of the preservation duty and the *scope* of relevant information that reasonably should be retained, the issue of “relevance”—a natural limit on the scope—can become lost.

¹⁴³ *Vodusek v. Bayliner Marine Corp.*, 71 F.3d at 156.

¹⁴⁴ See *Phillips v. Aaron Rents, Inc.*, No. 07-11477, 2008 WL 111038, slip op. at *3 (11th Cir. Jan. 11, 2008); *Condrey v. SunTrust Bank of Ga.*, 431 F.3d 191, 203 (5th Cir. 2005); *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d at 746-47; *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997); *Park v. City of Chi.*, 297 F.3d 606, 615 (7th Cir. 2002); see also *Ardesson v. Atl. Richfield Co.*, 2005 WL 950708, at *9 (requiring proof of bad faith destruction of evidence to support an adverse inference).

¹⁴⁵ See *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d at 746; Cohen & Lender, ELECTRONIC DISCOVERY at § 3.08[D][1][a].

inference sanctions for pre-litigation spoliation, but permits adverse inference sanctions for post-litigation spoliation, even absent bad faith.

The first UP case was a negligence suit filed by Frank Stevenson and the estate of his late wife after Mr. Stevenson was severely injured and his wife was killed in a grade crossing accident. *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 742 (8th Cir. 2004). The jury awarded \$2 million to Mr. Stevenson and \$10,000 to his wife's estate for funeral and ambulance costs.¹⁴⁶

The accident occurred in November 1998, but suit was not filed until September 20, 1999.¹⁴⁷ By the time suit was filed, the tape recordings and the track maintenance records had long-since been destroyed pursuant to UP's records retention schedule and the ordinary reuse of recording tape.¹⁴⁸ Plaintiffs moved for sanctions for destruction of the evidence, and UP raised its routine document retention policies as a defense.¹⁴⁹ The Eighth Circuit found that UP's records retention policy was not unreasonable or instituted in bad faith. Yet, the court found the pre-litigation destruction of the voice recordings pursuant to that policy to be unreasonable *and in bad faith* because, among other things, no other records contained the contemporaneous comments of the train crew and dispatch.¹⁵⁰ Accordingly, the court upheld the adverse inference instruction sanction for the pre-litigation destruction of the recording. The court made clear, however, that bad faith was a prerequisite to imposing an adverse inference instruction in the Eighth Circuit for pre-litigation destruction pursuant to a valid document retention policy.¹⁵¹

The court's analysis regarding the destruction of the track maintenance records was distinct from its analysis of the voice recordings. It found the pre-suit destruction of the track maintenance records pursuant to the records retention policy to be without bad faith because the records had little, if any, relevance to the case.¹⁵² The maintenance records reflected the name of the inspector, the date of inspection and defects appearing at a crossing on the inspection date. They did not show the conditions of the track on the date of the incident.¹⁵³ Moreover, the records were not requested until about a year after the suit was filed, and the complaint did not place track condition at issue until a later amendment.¹⁵⁴ Accordingly, UP was not on notice of the need to retain the documents until the discovery requests alerted it that the documents would be at issue.¹⁵⁵ To the extent the company continued to destroy track maintenance records after the records were requested in ongoing litigation, the appellate court upheld adverse inference

¹⁴⁶ *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d at 743.

¹⁴⁷ *Id.* at 747.

¹⁴⁸ *Id.* at 747-48.

¹⁴⁹ *Id.* at 743, 747-48.

¹⁵⁰ *Id.* at 747.

¹⁵¹ *Id.* at 746-47. The requisite bad faith must be an intent to destroy evidence to obstruct or suppress the truth. *Id.*

¹⁵² *Id.* at 748-49.

¹⁵³ *Id.* at 748.

¹⁵⁴ *Id.* at 749.

¹⁵⁵ *Id.*

instruction sanctions,¹⁵⁶ stating that the sanction was supported either by Federal Rule 37 or the court’s inherent power, “even absent an explicit bad faith finding.”¹⁵⁷

It is noteworthy that the *Stevenson* court stated that “[t]here is *no showing here that Union Pacific knew that litigation was imminent*¹⁵⁸ when, prior to any litigation, it destroyed track maintenance records”¹⁵⁹ This statement deviates from the general preservation duty principle, most likely because the court was considering the issue of whether the trial court erred in finding “bad faith” destruction under a records retention policy. Arguably, the appellate court inherently found a pre-litigation duty to preserve the voice recordings, despite a lack of knowledge that litigation was imminent. The court focused on whether the destruction was in bad faith, considering that: (1) UP’s experience in many grade crossing cases showed that the tape would be relevant to any “potential litigation” involving death or serious injury; (2) UP’s claims representative investigated the accident and gathered train orders and dispatcher records of train movement, but failed to preserve the tape recording; and (3) UP had used the same type of tape recordings in its defense of other cases.¹⁶⁰ The fact that the case involved serious injury and death, as well as UP’s selective preservation of evidence, suggests that the court believed UP should have anticipated litigation, and thus, had a duty to retain *all* relevant records.¹⁶¹ The *Stevenson* case shows that litigants face a significant risk of sanctions when their (otherwise reasonable) document retention policy imposes short retention periods over data that may be uniquely relevant to certain types of litigation. The court’s analysis regarding track maintenance records also illustrates that a party’s risk of defending a sanction motion does not necessarily diminish as time passes.

In a strikingly similar case against UP, the Eighth Circuit Court of Appeals found reversible error in an adverse inference sanction that was imposed without a finding that the pre-litigation destruction of the same type of voice recording was intentional and showed a desire to suppress the truth. *Morris v. Union Pac. R.R.*, 373 F.3d 896, 900-01 (8th Cir. 2004). Indeed, the trial court found that the destruction was unintentional and made pursuant to a reasonable company policy.¹⁶²

The *Morris* case arose from a collision at a crossing in which a UP train separated the two trailers attached to Morris’s tractor-trailer. No one was injured in the initial collision. While Plaintiff Morris was investigating the accident at the scene, however, the train began to move.¹⁶³

¹⁵⁶ *Id.* at 749-50 (holding that, after a specific document request, the defendant cannot rely on its routine document retention policy).

¹⁵⁷ *Id.* at 750.

¹⁵⁸ The court’s opinion does not reflect whether its use of the term “imminent” was pertinent to the issue of whether UP was on notice of “potential litigation” to which the recording would be relevant. The court did not specifically address whether UP should have anticipated litigation within 90 days of the accident—the time period in which the tape was destroyed.

¹⁵⁹ *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d at 749 (emphasis added).

¹⁶⁰ *Id.* at 747.

¹⁶¹ The court also implicitly found that the track maintenance records should not have been considered relevant to the accident at the time of the accident. *Id.* at 749.

¹⁶² *Morris v. Union Pac. R.R.*, 373 F.3d at 899, 901.

¹⁶³ *Id.* at 898.

Pinned between the train and the trailer, Morris suffered severe facial injuries, brain injuries and psychological harm.¹⁶⁴ Finding UP liable, the jury awarded Morris \$8 million in compensatory damages.¹⁶⁵

Like the *Stevenson* case, the *Morris* court’s opinion presumes that UP should have anticipated litigation, giving rise to a duty to preserve relevant evidence. The court again focused on the existence or lack of bad faith. The court recognized that the trial court considered some of the same issues addressed in *Stevenson* in determining whether bad faith existed—the frequency of similar accidents to result in litigation, the magnitude of the injuries and the quality of the evidence destroyed.¹⁶⁶ Yet, unlike the *Stevenson* case, the UP claims representative who investigated the incident did not selectively preserve documents; instead, after visiting the scene, he was unaware of the extent of Morris’s injuries and determined that the company was not liable.¹⁶⁷ The court’s opinion does not make clear whether the claims representative gathered any documents relating to the accident at all.

The court recognized the tension between the *Morris* facts and *Stevenson* case, stating that the “distinction between the cases may be modest, but *Stevenson* ‘test[ed] the limits’ of what evidence will justify an adverse inference instruction.”¹⁶⁸ The cases involved different claims representatives who conducted different investigations and might have had different mental states. “Variances in key personnel, nuances in fact situations, or *even different credibility assessments of identical evidence can lead to varying conclusions about the formation of corporate intent.*”¹⁶⁹

The tension between the *Stevenson* and *Morris* cases illustrates the difficulty a company may have in attempting to adopt litigation hold procedures to protect itself from adverse inference instructions under current federal practice. Unfortunately, the 2008 Federal Rules do not resolve the problem. Consider the facts of the *Stevenson* and *Morris* cases regarding the destruction of the tape recording through the ordinary operation of the systems. Sanctions are inappropriate under Rule 37(e) when information is lost through routine system operations, absent exceptional circumstances—defined as cases in which the loss is highly prejudicial.¹⁷⁰ Plus, Rule 37(e) protects parties from sanctions *only* if they continued operations in good faith, which *may require* the suspension of routine operations (a litigation hold) to prevent the loss of information.¹⁷¹ Both the *Stevenson* and *Morris* opinions emphasize that the crew/dispatch recording may be the only evidence of actual conversations at the time of the incident—information that, if lost, is potentially highly prejudicial. In fact, the same results might be found in *both* cases under the 2008 rules because the new test focuses on prejudice to the opposing party and whether a litigation hold is deemed necessary to show good faith continuation of the

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 900.

¹⁶⁷ *Id.* at 901-02.

¹⁶⁸ *Id.* at 902.

¹⁶⁹ *Id.* at 903 (emphasis added).

¹⁷⁰ 2005 *Civil Rules Report* at 85, 88. The Committee Note also provides that severe sanctions are generally appropriate only when a party has acted intentionally or recklessly. *Id.* at 88.

¹⁷¹ *Id.* at 85, 87.

policy. An employee's incorrect decision regarding whether litigation is reasonably foreseeable could result in a court finding that highly prejudicial evidence was lost when a party should have initiated a litigation hold that would preserve not only prejudicial evidence, but all relevant evidence.

b. Fines/attorneys' fees.

The most common sanction for spoliation is an award of costs and attorneys' fees.¹⁷² Fines are also relatively common.¹⁷³ Courts may grant these monetary sanctions under the current Federal Rules, state rules,¹⁷⁴ their inherent powers, or by statute. Monetary sanctions can be levied against the spoliating party, including its officers, its attorney(s), or both, depending on whom the court finds responsible for the spoliation.¹⁷⁵ In short, anyone with the responsibility to preserve and produce relevant documents may face monetary sanctions for spoliation.

Because fines and an award of attorneys' fees are essentially punitive, some courts will not impose monetary sanctions without a showing of discovery misconduct by clear and convincing evidence.¹⁷⁶ Others require a showing of bad faith, at least when proceeding under the court's inherent power to impose sanctions.¹⁷⁷ Still others award attorneys fees, costs or impose fines without either clear and convincing evidence or a finding of bad faith.¹⁷⁸

Under Rule 37(e), when information is spoliated *other than through routine system operations*, the court may decide whether and how to sanction the spoliator, with the severity corresponding to the culpability of the conduct at issue.¹⁷⁹ Although severe sanctions are

¹⁷² Cohen & Lender, ELECTRONIC DISCOVERY at § 3.08[D][2].

¹⁷³ *Id.*

¹⁷⁴ See, e.g., *Linnen v. A.H. Robins Co., Inc.*, 1999 WL 462015, at *11 (recognizing monetary fines as appropriate sanctions for violation of a court's discovery order under Mass. R. Civ. P. 37(b)(2)(D)).

¹⁷⁵ *Metro Opera*, 212 F.R.D. at 220 (court may sanction party and/or attorneys under inherent power); *Danis v. USN Commc'ns, Inc.*, 2000 WL 1694325, at *6 (fining CEO personally for spoliation caused by his lack of action to ensure preservation).

¹⁷⁶ See *Shepherd v. Am. Broad. Cos.*, 62 F.3d at 1477 (citation omitted); *Bowers v. Rectors & Visitors of the Univ. of Va.*, No. 3:06cv00041, 2007 WL 2963818, at *4 (W.D. Va. Oct. 9, 2007) (courts must find predicate misconduct by "clear evidence" before imposition of fines and attorneys' fees) (citing *Weinberger v. Kendrick*, 698 F.2d 61, 80 (2d Cir. 1982)) (*Bowers* was a case of statutory sanctions; *Weinberger* a case of inherent power sanctions); *Danis v. USN Commc'ns, Inc.*, 2000 WL 1694325, at *34 n.22 (imposition of fines requires clear and convincing evidence under Rule 37 or inherent power because of penal nature; reasoning would apply with equal force to attorneys' fees).

¹⁷⁷ See *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d at 751 (courts have the inherent power to award attorneys' fees so long as there is a finding of bad faith—i.e., the misconduct "abuses the judicial process in some manner"); *Metro Opera*, 212 F.R.D. at 220 (under inherent power, bad faith must be shown before attorneys' fees are awarded).

¹⁷⁸ *Zubulake IV*, 220 F.R.D. at 222 (finding no bad faith and proceeding under preponderance of evidence rule, yet ordering spoliating party to pay costs of re-deposing four witnesses regarding the destruction of relevant electronic documents and issues raised by destruction); *Trigon Ins. Co. v. United States*, 204 F.R.D. at 291 (awarding attorneys' fees and costs of preparing for and litigating spoliation issues under preponderance of evidence standard and after explicitly acknowledging that bad faith is not necessary for sanctions in the Fourth Circuit).

¹⁷⁹ 2005 *Civil Rules Report* at 88.

inappropriate without proof of intentional or reckless behavior,¹⁸⁰ courts are not likely to view monetary sanctions as “severe” unless they are disproportionate to the offending activity. Absent exceptional circumstances (severe prejudice), monetary sanctions are inappropriate under Rule 37(e) for evidence lost in routine system operations conducted in good faith.¹⁸¹

Because Rule 37 provides courts with flexibility to sanction spoliators according to culpability, and because courts previously have employed varying standards of culpability to support a monetary sanction, the standards can be expected to continue to vary from jurisdiction to jurisdiction, even under potential rule changes. Thus, parties should implement and follow retention policies created in good faith based upon legal duties for preservation, the parties’ needs for documentation and a consideration of litigation the parties regularly face.

c. Default judgment/dismissal.

A default judgment/dismissal of claims is the most severe sanction that can be imposed for spoliation. Because courts recognize a general presumption in favor of disposition of cases on the merits,¹⁸² a default judgment or dismissal of claims generally is viewed as a last resort.¹⁸³ Nevertheless, such sanctions may be imposed without a prior warning that continued spoliation will result in sanctions, in general, or default/dismissal, in particular.¹⁸⁴ On the other hand, a court may consider prior warnings and a party’s continued spoliation in determining whether default/dismissal is appropriate.¹⁸⁵ Although the courts are not in total agreement on the standards used to determine whether default/dismissal is appropriate, most consider: (1) the egregiousness of the spoliator’s conduct; (2) the prejudice caused by the spoliation; and (3) whether lesser sanctions would sufficiently compensate for, punish and deter the spoliation.¹⁸⁶

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 108-110.

¹⁸² *See, e.g., Shepherd v. Am. Broad. Cos.*, 62 F.3d at 1475.

¹⁸³ *Wiginton v. CB Richard Ellis, Inc.*, 2003 WL 22439865, at *6 (default is reserved for extreme cases); *Metro Opera*, 212 F.R.D. at 220 (default is reserved only for extreme circumstances); *ABC Home Health Serv., Inc. v. Int’l Bus. Mach. Corp.*, 158 F.R.D. 180, 182 (S.D. Ga. 1994) (default or dismissal is used only as a last resort).

¹⁸⁴ *Metro Opera*, 212 F.R.D. at 230 (warning is not required before sanctions, including default, can be given for spoliation); *Danis v. USN Commc’ns, Inc.*, 2000 WL 1694325, at *31 (same).

¹⁸⁵ *Metro Opera*, 212 F.R.D. at 184 n.4 (Counsel and the litigant “had more than sufficient opportunity to correct their deficiencies during the course of discovery...The time to face the consequences is now at hand”); *Wm. T. Thompson*, 593 F. Supp. at 1455-56 (pattern of violations, including ignoring four separate court orders, served as an independent basis for granting default judgment and dismissing claims in a related suit); *Cire v. Cummings*, 134 S.W.3d 835, 839-41 (Tex. 2004) (requiring the consideration of less stringent sanctions and whether the lesser sanctions would fully induce compliance before awarding “death penalty” sanctions; upholding, in a legal malpractice action, the striking of pleadings and imposition of death penalty sanctions for spoliation of recorded conversations between the parties; the plaintiff intentionally destroyed the records after being thrice ordered to produce them); *see also Shepherd v. Am. Broad. Cos.*, 62 F.3d at 1480 (overturning district court’s award of default judgment for spoliation because, among other things, the trial court failed to consider lesser sanctions and failed to exercise sufficient restraint; the case did not present sufficient exceptional circumstances to warrant dismissal, rather than a lesser sanction).

¹⁸⁶ *Silvestri v. Gen. Motors Corp.*, 271 F.3d at 593-94 (holding that court must consider the egregiousness of the spoliator’s conduct and/or the prejudice caused, and find one or the other so egregious as to warrant dismissal); *Shepherd*, 62 F.3d at 1478-79 (default is usually reserved only for cases of wholesale destruction or the destruction of dispositive evidence, and district court must specifically provide a reasoned basis why lesser sanctions are insufficient); *Wm. T. Thompson*, 593 F. Supp. at 1456 (granting default judgment because spoliator acted willfully,

The most severe sanctions may be appropriate either when the conduct is egregious or the resulting prejudice is severe.¹⁸⁷ Historically, courts generally have agreed that proof of willfulness or bad faith is a prerequisite to a default/dismissal.¹⁸⁸ Under Rule 37(e), intentional or reckless conduct must predicate severe sanctions.¹⁸⁹ Courts disagree, however, over the level of proof required to support a default/dismissal. Some courts require clear and convincing evidence of the spoliator's conduct and level of culpability, especially when proceeding under their inherent power.¹⁹⁰

IV. Document retention policies as a possible defense to spoliation.

A document retention policy is a set of guidelines for a company and its employees to follow when determining how to handle company records created in the ordinary course of business. A document retention policy not only specifies the period of time during which documents are to be retained, but also specifies the manner of destruction for documents that are no longer needed.¹⁹¹

A formal electronic document retention program may reduce a company's legal exposure.¹⁹² In particular, a formal, comprehensive electronic document retention policy can help the company avoid spoliation of evidence claims and their attendant sanctions.¹⁹³

spoliation destroyed the best available evidence regarding central issues in the case, and lesser sanctions would effectively reward spoliator for egregious conduct).

¹⁸⁷ *Silvestri v. Gen. Motors Corp.*, 271 F.3d at 593-94 (court must consider conduct and prejudice—dismissal usually granted only where bad faith shown, but may also be used when prejudice is “extraordinary;” affirming dismissal because plaintiff destroyed only physical evidence in products liability case even though was perhaps merely negligent); *Danis v. USN Commc’ns, Inc.*, 2000 WL 1694325, at *34 (when spoliation is negligent, look to prejudice to balance; declining to grant default judgment because spoliation was negligent and destroyed evidence was not the only evidence, even if it was the best); *Wm. T. Thompson*, 593 F. Supp. at 1456 (finding two independent bases for granting default—spoliation deprived the aggrieved party of critical evidence, and spoliation was willful, i.e., there was a pattern of violations of court orders). *But see Danis v. USN Commc’ns, Inc.*, 2000 WL 1694325, at *12 (awarding a monetary sanction instead of a default for post-litigation spoliation because the plaintiffs failed to prove the missing documents were “critical”).

¹⁸⁸ *Silvestri v. Gen. Motors Corp.*, 271 F.3d at 593 (proof of bad faith is generally required for default/dismissal in the Fourth Circuit, but negligence may be sufficient if extreme prejudice); *Wiginton v. CB Richard Ellis, Inc.*, 2003 WL 22439865, at *6 (requiring willfulness, bad faith or objective unreasonableness); *ABC Home Health Services, Inc. v. Int’l Bus. Mach. Corp.*, 158 F.R.D. at 182 (willfulness or bad faith required in Eleventh Circuit); *Wm. T. Thompson*, 593 F. Supp. at 1455 (willfulness/bad faith required, at least under the court’s inherent power); *see also Clark Constr. Group, Inc. v. City of Memphis*, 229 F.R.D. at 138-39 (recognizing dismissals are “last resort” sanctions in the Sixth Circuit that are appropriate only when a party’s discovery violations are “willful, in bad faith or due to its own fault”; analyzing cases in which defaults were granted, both of which showed conduct that met the definition of “willful”; and rejecting a request for default judgment because the spoliator’s actions were “not willful”).

¹⁸⁹ *See* Rule 37(e) (Committee Note), 2005 *Civil Rules Report* at 88.

¹⁹⁰ *See, e.g., Shepherd v. Am. Broad. Cos.*, 62 F.3d at 1472 (requiring clear and convincing evidence of abusive discovery misconduct, as opposed to preponderance, before granting default under inherent power); *see also Danis v. USN Commc’ns, Inc.*, 2000 WL 1694325, at *34 (clear and convincing evidence is required under both inherent power and Rule 37(b)).

¹⁹¹ Cohen & Lender, *ELECTRONIC DISCOVERY* at § 4.01.

¹⁹² *Id.*; Lawrence B. Solum & Stephen J. Marzen, *Destruction of Evidence*, 16 No. 1 Litig. 11, 15, 64-65 (Fall 1989).

¹⁹³ *See generally* 7 James Wm. Moore et al., *Moore’s Federal Practice* ¶ 37A.56 (Matthew Bender Online ed. 2007).

Compliance with a reasonable document retention policy may illustrate a company's considered reasoning of its use of documents in light of its needs and historical litigation. Failing to follow a formal policy may be worse than having no policy at all because the court may consider the policy a standard for the party's duty to retain documents, the breach of which might be construed as negligence, willfulness, recklessness or bad faith.

Even though there are few cases concerning electronic document retention policies in particular, there have been several important decisions that have dealt with document retention policies in general, in addition to the sanctions that a party may suffer for destroying relevant documents pursuant to its policy. Court cases analyzing spoliation claims under ordinary records retention policies and electronic records retention policies illustrate general principles that companies should consider when formulating and implementing electronic document retention policies.

A. Non-electronic document retention policy cases.

In one of the earliest cases addressing the destruction of relevant documents under an established document retention policy, *Vick v. Tex. Employment Comm'n*, 514 F.2d 734 (5th Cir. 1975), the Fifth Circuit held that destruction of records about the plaintiff under a routine document retention policy "well in advance" of the plaintiff's service of interrogatories did not give rise to an adverse inference.¹⁹⁴ The plaintiff sued the Texas Employment Commission under Title VII and the Civil Rights Act of 1871 for gender discrimination, alleging that the commission had unlawfully denied her unemployment benefits and failed to refer her for jobs because of her pregnancy.¹⁹⁵ She claimed that the district court erred because it did not impose an adverse inference against the agency in light of the destruction of relevant documents.¹⁹⁶ The appellate court disagreed, holding that the "adverse inference to be drawn from destruction of records is predicated on bad conduct of the defendant."¹⁹⁷ Because the agency destroyed the records under its routine document retention policy before interrogatories were served, the destruction did not show bad faith and thus, the court found insufficient grounds to support an adverse inference.¹⁹⁸ *Vick* was a pioneering case. In light of more recent decisions, however, it is unlikely that the *Vick* facts would yield the same result today.

Conversely, in *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472 (S.D. Fla. 1984), the district court held that the defendant-company's document retention policy provided no defense to a spoliation claim and the sanction of default judgment.¹⁹⁹ In this wrongful death and products liability action against an aircraft manufacturer, the court found that the company intentionally destroyed relevant documents, both before and after the suit was filed.²⁰⁰ The defendant cited its document retention policy as a defense, but the court rejected the defendant's arguments because the company had not consistently followed its policy and because it failed to

¹⁹⁴ *Vick v. Tex. Employment Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975).

¹⁹⁵ *Id.* at 735.

¹⁹⁶ *Id.* at 737.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 486 (S.D. Fla. 1984).

²⁰⁰ *Id.*

impose a litigation hold on the policy after the suit commenced.²⁰¹ In essence, the court found that the policy was a “sham,” rendering the company’s defense ineffective.²⁰² However, the court was careful to emphasize that it was “not holding that the good faith disposal of documents pursuant to a *bona fide*, consistent and reasonable document retention policy cannot be a valid justification for a failure to produce documents in discovery.”²⁰³ The defendant simply failed to prove that the case at bar met that standard. Left without a justifiable defense for its destruction of relevant evidence, the court granted the plaintiff’s motion for default judgment on the issue of liability.²⁰⁴ The *Carlucci* case is an excellent reminder that consistent compliance with a document retention policy is as important as creating a reasonable policy. Courts will consider whether the policy was followed and may interpret a party’s motives accordingly.

In *Lewy v. Remington Arms Co.*, 836 F.2d 1104 (8th Cir. 1988), another products liability case, the Eighth Circuit remanded the issue of whether the defendant gun manufacturer’s destruction of certain relevant evidence (including complaints and gun examination reports) under its document retention policy should be sanctioned by an adverse inference jury instruction in a new trial.²⁰⁵ The defendant argued that the trial court had erred in giving such an instruction in the first trial, arguing “that destroying records pursuant to routine procedures does not provide an inference adverse to the party that destroyed the documents.”²⁰⁶ Although the court found that it lacked a sufficient record to rule one way or the other, it provided guidance to the trial court for determining the issue on remand.

The appellate court delineated three factors for the trial court to consider. First, the court should determine if the document retention policy “is reasonable considering the facts and circumstances surrounding the relevant documents.”²⁰⁷ As an example, the court noted that a three year retention policy may be long enough for some documents, such as appointment books and telephone messages, but not long enough for others, such as customer complaints. Second, the trial court should consider whether lawsuits concerning the particular complaint or similar ones had been filed, as well as “the frequency of such complaints, and the magnitude of the complaints,” if any.²⁰⁸ Finally, the appellate court directed the district court to determine whether the policy was instituted or applied in bad faith.²⁰⁹ The appellate court noted that when a policy is used for the purpose of destroying or withholding damaging evidence from potential plaintiffs, then an adverse inference instruction to the jury may be proper.²¹⁰ Furthermore, “even if the court finds the policy to be reasonable given the nature of the documents subject to the policy, the court may still find that circumstances required the retention of documents

²⁰¹ *Id.* at 485.

²⁰² *Id.*

²⁰³ *Id.* at 486.

²⁰⁴ *Id.*

²⁰⁵ There is no reported case from the district court following remand.

²⁰⁶ *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1111 (8th Cir. 1988). The company had implemented the policy in 1970. Under its policy, complaints and gun examination reports were kept for three years and then destroyed if no action was taken with respect to the particular record in that time.

²⁰⁷ *Id.* at 1112.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

notwithstanding the policy.”²¹¹ As an illustration, the court observed that preservation is necessary when a company knows or should know that documents would be relevant to litigation at some point. In sum, a party “cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy.”²¹²

The *Lewy* court addressed the concept that, when creating a document retention policy, the retention periods will vary, depending on the substance and character of a company’s different kinds of documents and data. Because courts likely will address whether a policy’s retention periods are appropriate, companies might be well advised to begin forming industry groups that address industry-wide benchmark standards for document retention periods. Outside support for policy retention periods may help illustrate that a party’s policy is reasonable.

More recently, in *Stevenson v. Union Pac. R.R. Co.*, discussed above, the Eighth Circuit held that the defendant railroad company had destroyed relevant evidence—voice tapes from the time of the plaintiff’s death—under its document retention policy in bad faith and, therefore, the district court did not err in giving an adverse inference instruction. The court remarked:

We have never approved of giving an adverse inference instruction on the basis of prelitigation destruction of evidence through a routine document retention policy on the basis of negligence alone. Where a routine document retention policy has been followed in this context, we now clarify that there must be some indication of an intent to destroy the evidence for the purpose of obstructing or suppressing the truth in order to impose the sanction of an adverse inference instruction.²¹³

The court reiterated and purportedly applied the three factors described above in making its determination. Yet, it did not perform a step-by-step analysis of those factors. Instead, the court noted initially that the company kept the tapes of the conversations between the train engineer and dispatch for only ninety days before reusing them.²¹⁴ It implicitly adopted the district court’s finding that such a short period was unreasonable under the circumstances pertaining to the accident, although the policy was not otherwise inherently unreasonable.²¹⁵ Second, the court found that the company was aware that litigation arising from grade crossing death accidents was common and that voice tapes were relevant to such litigation.²¹⁶ Finally, the court emphasized that the voice tapes were the only contemporaneous recording of conversations about the accident, and thus, would always be “highly relevant” in litigation over fatal accidents.²¹⁷ In essence, the court relied on the fact that the plaintiff was greatly prejudiced by the destruction of the voice tapes in finding bad faith: “[t]he prelitigation destruction of the voice tape in this combination of circumstances, though done pursuant to a routine retention

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d at 747 (footnote and citation omitted).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 748.

²¹⁷ *Id.*

policy, creates a sufficiently strong inference of an intent to destroy it for the purpose of suppressing evidence”²¹⁸

As to the destruction of relevant documents after commencement of the suit, the court easily found sufficient evidence to support the adverse inference instruction.²¹⁹ In reaching its conclusion, the court held that, after receiving a specific document request, a party “cannot rely on its routine document retention policy as a shield” against sanctions.²²⁰ It must institute a litigation hold on its document retention policy.²²¹

B. Electronic document retention policy cases.

The first major case addressing a spoliation claim under an electronic document retention policy was *Computer Assocs. Int’l, Inc. v. Am. Fundware, Inc.*, 133 F.R.D. 166 (D. Colo. 1990). The plaintiff in *Computer Associates* asserted claims of breach of computer software agreement, unfair competition, and copyright infringement. The plaintiff moved for default judgment because the defendant destroyed the source code it used to create the disputed software under the defendant’s electronic document retention policy.²²² A magistrate judge recommended that the district court enter a sanction, but did not recommend the entry of a default judgment. Rejecting the magistrate’s recommendation, the district court judge entered default judgment against the defendant for its destruction of the source code.²²³

The court recognized that the defendant’s document retention policies and procedures required retention of only the current source code and that, “[u]nder that procedure, as the program was revised, previous versions were destroyed.”²²⁴ The court also recognized that the defendant’s policy incorporated common practice in the computer software industry, and thus, was legitimate and not wrongful, per se.²²⁵ However, after litigation began, the defendant continued to follow its routine policy and destroyed source code, despite knowing the old versions of the code were the best evidence regarding the key disputed issue.²²⁶ Because it intentionally failed to place a litigation hold on its electronic document retention policy, the

²¹⁸ *Id.* This conclusion is supported by the fact that the court did not find sufficient evidence of bad faith in the company’s destruction of track maintenance records to give an adverse inference instruction on that issue. The court noted that the track maintenance records were not as relevant as the voice tapes because they would not show the track’s condition on the date of the accident and the plaintiff did not suffer as much prejudice from the maintenance records’ destruction. *See id.* at 748-49. It is also important to note that the court may have been swayed by the fact that there was some evidence that the company often retained and produced voice tapes that were helpful to it in similar cases. *See id.* at 748.

²¹⁹ *Id.* at 749-50.

²²⁰ *Id.* at 750.

²²¹ Finally, the appellate court held that the district court erred in not permitting the company to present evidence regarding its routine document retention policy in order to rebut the permissive adverse inference instruction. *Id.*

²²² *Computer Assocs. Int’l, Inc. v. Am. Fundware, Inc.*, 133 F.R.D. at 167. Source code is computer programming that is written in a coding “language” and that, generally, only “suitably trained programmers can read and understand.” *Id.* at 168 n.1.

²²³ *Id.* at 170.

²²⁴ *Id.* at 168.

²²⁵ *Id.*

²²⁶ *Id.* at 169.

defendant was found to have willfully violated its discovery obligations.²²⁷ Accordingly, the court granted the plaintiff's motion and entered a default judgment.

In *Trigon Ins. Co. v. United States*, 204 F.R.D. 277 (E.D. Va. 2001), the plaintiff challenged the Internal Revenue Service's denial of tax refunds and filed a motion in limine, requesting sanctions against the government for destruction of documents pertinent to the litigation.²²⁸ The government hired a litigation consultant to help it prepare for trial due to the complexity of the case. The government used the consultant as both a non-testifying consulting expert and a testifying expert.²²⁹ Upon learning of the expert's dual capacity, the plaintiff requested production of all correspondence between the consultant and testifying experts, including e-mails and drafts of expert opinions.²³⁰ The government refused to produce the documents, some of which had been destroyed either pursuant to the consultant's document retention policy or as a matter of course by the experts in their work.²³¹ Among other arguments asserted in defense of the spoliation claim, the government maintained that the documents had been destroyed pursuant to the consultant's document retention policy.²³² The court disagreed, stating that the policy did "not trump the Federal Rules of Civil Procedure or requests by opposing counsel, even if the requests primarily [were] informal."²³³ Furthermore, the court found that the consultant's policy was not a safe harbor for the government against an intentional spoliation claim because the policy ran contrary to the Federal Rules in calling for the destruction of discoverable documents, including anything the experts considered in forming their opinions.²³⁴

In *Zubulake v. UBS Warburg, L.L.C.*, 220 F.R.D. 212 (S.D.N.Y. 2003) [known as "*Zubulake IV*"], the plaintiff in an employment discrimination case sought sanctions against the defendant-employer for failing to preserve employee e-mails that were central to the issues at stake.²³⁵ The defendant's electronic document retention policy called for the retention of all monthly backup tapes for three years.²³⁶ Additionally, after the plaintiff filed its EEOC charge, the defendant's in-house lawyer instructed employees in writing to keep all documents that might be relevant to the suit, including e-mails and backup tapes,²³⁷ and outside counsel reiterated the need to stop recycling backup tapes.²³⁸ Despite these warnings, the company destroyed relevant e-mails and backup tapes.²³⁹

²²⁷ *Id.* at 170.

²²⁸ *Trigon Ins. Co. v. United States*, 204 F.R.D. at 279.

²²⁹ *Id.* at 280.

²³⁰ *Id.* at 281.

²³¹ *Id.* at 280-81.

²³² *Id.* at 289.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Zubulake IV*, 204 F.R.D. at 215.

²³⁶ *Id.* at 218.

²³⁷ *Id.* at 216 n.15.

²³⁸ *Id.* at 215.

²³⁹ *Id.*

The court noted that, if the document retention policies and counsel's instructions had been observed, the company would have met its obligations by preserving a single copy of "all relevant documents that existed at, or were created after, the time when the duty to preserve attached."²⁴⁰ Because the policy and instructions were not followed, the defendant breached its duty to preserve evidence by destroying pertinent documents. The court summarized a party's duty to preserve, stating:

The scope of a party's preservation obligation can be described as follows: *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.²⁴¹

In *E*Trade Sec., LLC v. Deutsche Bank AG*, 230 F.R.D. 582 (D. Minn. 2005), E*Trade filed suit, claiming the defendants engaged in a fraudulent securities lending scheme involving three securities by manipulating prices and skimming large amounts of cash from a series of lending transactions, leaving intermediate lenders like E*Trade to suffer large losses.²⁴²

E*Trade moved for sanctions based on spoliation of evidence, among other things.²⁴³ Although the defendants had responded to SEC inquiries into Defendant NSI's trading position on the three securities at issue by October 22, 2001, the court disagreed with E*Trade's contention that the defendants should reasonably have anticipated litigation at the time of the SEC responses. Instead, the court held that the defendants should reasonably have anticipated litigation in the December 2001/January 2002 time frame, when the defendants received notice from a Minnesota bankruptcy court that informed the defendants of an investigation of an apparent complex, far-reaching fraud scheme involving securities lending.²⁴⁴

The *E*Trade* court recognized that the preservation obligation begins when a party knows or should know that evidence is relevant to current or future cases.²⁴⁵ It also recognized that, when destruction of relevant evidence occurs before litigation, the party requesting sanctions must prove that the spoliator acted in bad faith. Bad faith can be implied from the spoliator's behavior, such as: (1) selective preservation of some evidence while failing to retain other evidence; or (2) the spoliator's advantageous use of the same type of evidence in the same

²⁴⁰ *Id.* at 218-19.

²⁴¹ *Id.* at 218 (emphasis added). The court did create one exception to its general rule. If a company is capable of identifying particular employees' documents, then the company should preserve the back-up tapes containing the documents of "key" employees if it is not otherwise available. The exception applies to all back-up tapes, inaccessible and accessible. *Id.*

²⁴² *E*Trade Sec., LLC v. Deutsche Bank AG*, 230 F.R.D. at 585.

²⁴³ *Id.* at 586.

²⁴⁴ *Id.* at 589-90.

²⁴⁵ *Id.* at 588.

or other cases.²⁴⁶ The court explained that, in determining whether sanctions are warranted when destruction occurs pursuant to a records retention policy, Eighth Circuit courts consider: (1) whether the policy is reasonable in light of the facts and circumstances revolving around the documents; (2) whether the company defends frequent complaints or lawsuits arising from the records at issue; and (3) whether the policy was instituted in bad faith.²⁴⁷

One of the defendants, Nomura Canada, had a system that recorded securities traders' calls on recordable DVDs. The system switched back and forth between two DVDs, reusing the first when the second was filled.²⁴⁸ In previous cases, Nomura Canada had used recordings from the system in its favor to defend broker disputes, but Nomura Canada did not change the taping system until many months after the litigation began.²⁴⁹ Accordingly, the court found its spoliation in bad faith and sanctionable.

Defendant NSI claimed that it also placed a litigation hold on the relevant players' e-mail boxes for all of 2001.²⁵⁰ NSI had a policy that retained backup e-mail tapes for three years.²⁵¹ NSI also relied on the backup tapes to preserve evidence, but did not keep a copy of the backup tapes to capture evidence that was not saved through the informal litigation hold over active e-mail boxes.²⁵² Finding prejudice to the plaintiff because e-mail messages in the record revealed evidence of certain key players' knowledge at the pertinent time, the court issued an adverse instruction to impose sanctions for NSI's spoliation conduct.²⁵³

In *Broccoli v. Echostar Commc'ns Corp.*, 229 F.R.D. 506 (D. Md. 2005), Plaintiff Broccoli alleged that a human resources administrator, Andersen, created a hostile work environment and, in retaliation for refusing the administrator's advances, the administrator orchestrated Broccoli's termination under the guise of a reorganization and reduction in force.²⁵⁴ The court found that Echostar was on actual notice of its duty to preserve all documents relevant to Plaintiff's complaints in January 2001, when Broccoli first informed two of his Echostar supervisors (both orally and in e-mail) of Andersen's harassing behavior.²⁵⁵

Echostar did not suspend its aggressive e-mail destruction policy, by which: (1) sent e-mails were "purged . . . and forever unretrievable [sic]" within 21 days; and (2) all employee e-

²⁴⁶ *Id.* (citing *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d at 747-48 and opining that certain defendants' action justified the heightened "bad faith" standard because the defendants retained certain documents and not others before wiping hard drives on computers that were being donated as company operations were being closed). *Id.* at 589-90.

²⁴⁷ *Id.* at 588-89 (citing *Lewy v. Remington Arms Co.*, 836 F.2d at 1112); *see also* explanations of *Stevenson* and *Morris*, above.

²⁴⁸ *Id.* at 590.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 591.

²⁵² *Id.* at 591.

²⁵³ *Id.* at 592-93.

²⁵⁴ *Broccoli v. Echostar Commc'ns Corp.*, 229 F.R.D. at 509.

²⁵⁵ *Id.* at 510-11 (citing *Zubulake IV*, 220 F.R.D. at 217 for justification of a preservation trigger when plaintiff first communicated grievances).

mail folder and subfolder contents were deleted within 30 days after the employee left the company.²⁵⁶ The company did not retain Broccoli's e-mails from the 30 days before his termination, even after receiving Broccoli's written complaint.²⁵⁷ The court held that Echostar acted in bad faith by failing to suspend its e-mail and data destruction policy, which prejudiced Broccoli in the litigation. Accordingly, the court awarded a lodestar-based attorney's fee sanction for the preparation of the sanctins motion, pursuant to Federal Rule 37(a)(4)(A).²⁵⁸

It is noteworthy that, although the *Echostar* court relied on *Zubulake IV*, the *Echostar* opinion is potentially broader.²⁵⁹ In essence, the court found that Echostar should have reasonably anticipated litigation and instituted a litigation hold to suspend destruction of pertinent documents pursuant to its records retention policy when its employee first gave notice of behavior that could lead to litigation.²⁶⁰ *Zubulake IV*, on the other hand, provides that a duty of firm-wide preservation does not arise "[m]erely because one or two employees contemplate the possibility that a fellow employee might sue."²⁶¹

C. No Document Retention Policy Cases.

In addition to cases in which courts have analyzed spoliation claims in light of formal electronic document retention policies, courts have also considered motions for sanctions when companies destroyed documents, either before or after suit was filed without having a formal document retention policy.

Federal courts routinely focus on the lack of a formal, comprehensive document retention policy, either before or after the suit commences, in determining whether to sanction a party. For instance, in *Danis v. USN Comms., Inc.*, No. 98 C 7482, 2000 WL 1694325 (N.D. Ill. Oct. 23, 2000), a securities class action suit, the plaintiffs claimed that the defendant-company had intentionally destroyed relevant electronic documents after the suit commenced. The plaintiffs stressed that the defendant continued to purge its system of terminated employees' records after the suit was filed.²⁶² Although the district court rejected the intentional destruction argument, it did find that the company "failed to implement an adequate document preservation policy."²⁶³

In this context, it is important to note that the company did take some affirmative action to ensure that relevant electronic documents were preserved. On the day the plaintiffs filed their complaint, the Board of Directors met with both in-house and outside counsel to discuss the

²⁵⁶ *Id.* at 510-12.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 512-13.

²⁵⁹ It is also noteworthy that the court mentioned with disfavor the fact that Echostar never communicated a *company-wide* instruction to suspend data destruction policies after Broccoli was terminated and Broccoli's girlfriend sent a letter to the company accusing it of discriminatory conduct. *Id.* at 512.

²⁶⁰ *See id.* at 512-13.

²⁶¹ *Zubulake IV*, 220 F.R.D. at 217 (ruling that a preservation duty arose because "almost everyone associated with *Zubulake* recognized the possibility that she might sue").

²⁶² *Danis v. USN Commc'ns, Inc.*, 2000 WL 1694325, at *37 n.23.

²⁶³ *Id.* at *30.

company's duty to preserve all relevant existing documents.²⁶⁴ At the meeting, outside counsel emphasized that document preservation had to be a top priority.²⁶⁵ Consequently, the Board directed senior management, including the CEO, to take prompt action to preserve documents.²⁶⁶ In-house counsel also held a meeting attended by the company's officers and high-level managers in which the need to preserve documents was discussed.²⁶⁷ In-house counsel specifically instructed the officers and managers to preserve all relevant documents and to communicate this directive to the employees in their respective departments.²⁶⁸ The senior executives, including the outside directors, preserved their computer files.²⁶⁹

Nonetheless, the court found that the company failed to implement and enforce an adequate electronic document retention plan. The court outlined a litany of reasons why the company's plan was grossly inadequate, including: (1) the CEO personally took no affirmative steps to ensure that the preservation directive was followed; (2) he also failed to direct anyone to develop a written comprehensive document preservation policy, either in general or specifically for the lawsuit; (3) he did not order any e-mail or other communication to be sent to the company's employees to ensure broad awareness of the lawsuit and the need to preserve all relevant documents; (4) he did not follow up on counsel's directive to make sure it was being implemented; (5) he delegated the document preservation responsibility to in-house counsel; who had no litigation experience or experience in preparing a document preservation plan; (6) neither the CEO nor in-house counsel consulted outside counsel for assistance in developing or implementing a suitable document preservation plan; (7) in-house counsel did not ensure that all employees who handled relevant documents were aware of the lawsuit and the need to preserve documents; (8) in-house counsel did not follow up to make sure the directive was being followed; (9) in-house counsel did not review the pre-existing practice of deleting terminated employees' files to determine whether it was suitable in light of the need to preserve documents relevant to the litigation; and (10) there was no systematic effort to archive e-mails at the commencement of the suit.²⁷⁰

V. Conclusion.

As these cases illustrate, a comprehensive document retention policy can limit a company's exposure to sanctions for spoliation when it is implemented in good faith and applied consistently. Indeed, the absence of a policy can be used as evidence that a litigant was culpable in its spoliation of relevant evidence. The implementation of litigation holds pursuant to a reasonable document retention policy, on the other hand, can help a party show that it acted reasonably and effectively when litigation (or potential litigation) arises. Yet, a document

²⁶⁴ *Id.* at *12.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at *13.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.* at *19.

²⁷⁰ *Id.* at **14-15. The court held the CEO personally liable for the company's failure to implement and follow an adequate document preservation policy and fined him \$10,000. *Id.* at *51. In contrast, the court did not hold the outside director defendants personally liable for the company's failings because they did not have a day-to-day presence at the company and, therefore, could not as effectively ensure that documents were preserved. *Id.*

retention policy will not shield a litigant from sanctions if the policy was implemented in bad faith or applied unreasonably or inconsistently. Most importantly, even an otherwise valid policy will be insufficient to defend against sanctions if a party fails to implement a litigation hold of appropriate scope once it reasonably anticipates that the documents may be relevant to some pending or threatened litigation.

Document retention policies should call for the implementation of document holds not only when litigation commences, but also when litigation is reasonably foreseeable. Policies should consider circumstances in which a company's routine operations, as well as unusual events, may give rise to future litigation. The determination of when a party is on notice of future litigation, giving rise to a duty to preserve relevant evidence, requires an analysis of the totality of the circumstances on a case-by-case basis. Furthermore, because a court may, with 20/20 hindsight determine that a company should have anticipated litigation before the circumstances were brought to the legal department's attention, such as when a disgruntled employee or customer voices complaints, a company should educate managers about adverse consequences that can arise in litigation due to the failure to preserve evidence. Companies should educate their managers to look for and report incidents in which an outsider (a court) might later decide that litigation was foreseeable. Companies may also consider the appointment of one or more gatekeepers for the management of their document retention policies so that uniform compliance and analysis is applied, not only in the destruction of evidence pursuant to policy, but also in the issuance of litigation holds when litigation arises or is foreseeable.

Finally, companies should remember that the law regarding parties' duty to preserve documents is evolving rapidly. Policies that may be deemed reasonable today may become obsolete with the introduction of new rules, statutes and case law.