1 The Duty to Preserve Evidence

Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence. Our adversarial process is designed to tolerate human failings—erring judges can be reversed, uncooperative counsel can be shepherded, and recalcitrant witnesses compelled to testfy. But, when critical documents go missing, judges and litigants alike descend into a world of ad hocery and half measures—and our civil justice system suffers.[1]

Gathering factual information is at the "core of our civil discovery system."[2] Consequently, there are rules regarding how information is to be preserved and produced in civil disputes. Courts first consider whether a duty to preserve evidence exists. To assess whether a duty exists, courts may consider: the conduct, event or information that may trigger a preservation obligation, to whom the preservation duty may extend, and the scope of the preservation obligation.

1. United Medical Supply Co. v. United States, 77 Fed. Cl. 257, 259 (Fed. Cl. 2007).

Answering these questions is critical to parties and their counsel in making timely decisions to safeguard data, documents, and tangible evidence when litigation is filed, threatened, or is reasonably anticipated. Likewise, attorneys bringing or defending claims in litigation must appropriately supervise the preservation of evidence because the potential exposure to sanctions or tort claims for the loss of relevant data, documents or physical evidence can be substantial.

The duty to preserve documents, electronically stored information, or tangible evidence based on the existence of pending, threatened, or reasonably foreseeable litigation arises under the common law. It also can arise from a number of other sources, including a contract, a voluntarily assumed duty, a statute or regulation, an ethical code, or another special circumstance.[3] Yet, the duty to preserve is not explicitly defined in the Federal Rules of Civil Procedure or in most state rules of civil practice.[4]

APPLICABLE LAW

To determine whether and when a duty to preserve exists, a party must determine what law applies to spoliation issues that arise during pending litigation or in the context of an independent tort claim for spoliation. The forum in which spoliation occurs may have a substantial impact on the remedies available to the non-spoliating party since the duty to preserve arises from independent sources of law and depends on the substantive law in a particular jurisdiction.[5] State and federal

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2. The Sedona Conference, *The Sedona Conference Commentary on Legal Holds: The Trigger and The Process* (hereinafter *The Sedona Conference Commentary on Legal Holds*), 11 SEDONA CONF. J. 266, 267 (2010), *available at* http://www.mad.uscourts.gov/bbc/pdf/EDISCSedonaConferenceLegalHolds.pdf.

3. Trevino v. Ortega, 969 S.W.2d 950, 955 (Tex. 1998) (Baker, J., concurring); Boyd v. Travelers, Ins. Co., 652 N.E.2d 267 (Ill. 1995); Callahan v. Stanley Works, 703 A.2d 1014, 1018 (N.J. Super. 1997). *See also* Victor Stanley, Inc. v. Creative Pipe Inc., 269 F.R.D. 497, 521 (D. Md. 2010).

4. *The Sedona Conference Commentary on Legal Holds*, *supra* note 2, at 267.

5. The Honorable Paul W. Grimm, et al., *Advanced Issues in Electronic Discovery: The Impact of the First Year of the Federal Rules and the Adoption of the Maryland Rules,* 37 U. BALT. L. REV. 381, 389, n.36 (Spring 2008) (hereinafter *Advanced Issues in Electronic Discovery)* ("Preservation obligations arise from independent sources of law and are dependent on the substantive law of each jurisdiction.").

courts disagree on the substantive law of spoliation and in some instances on which law applies.

State courts apply the substantive and procedural law of their state to spoliation that occurs in litigation pending within that state. Federal courts sitting in diversity must first consider whether spoliation that occurs during pending litigation is a substantive matter, to be governed by state law, or a procedural matter, subject to federal law.[6] A court analyzing the issue initially must determine whether the result would differ under federal or state law.[7] If the result would be the same, there is only a "false conflict" and the choice of law analysis ends. If the result would differ, the court must then determine which law applies.[8]

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6. *See, e.g.*, Nayokpuk v. United States, 848 F. Supp. 2d 1030 (D. Alaska 2012) (applying Alaska substantive law to burden shifting discovery sanction); Rowe v. Albertson's, Inc., 116 Fed. Appx. 171, 2004 U.S. App. LEXIS 20959 (10th Cir. Oct. 7, 2004) (affirming a district court's decision to apply Texas substantive law to spoliation questions in a diversity case); Ward v. Texas Steak, Ltd., No. 7:03cv00596, 2004 U.S. Dist. LEXIS 10575 (W.D. Va. May 27, 2004) (applying Virginia law and stating, "When spoliation of evidence does not occur in the course of pending federal litigation, a federal court exercising diversity jurisdiction in which the rule of decision is supplied by state law is required to apply those spoliation principles the forum state would apply."); American Family Ins. v. Black & Decker (U.S.), Inc., No. 3:00CV50281, 2003 U.S. Dist. LEXIS 16245 (N.D. Ill. Sept. 16, 2003) (holding a party's pre-suit duty to preserve evidence is a substantive rule of law requiring application of state law in a diversity case); Keller v. United States, 58 F.3d 1194, 1197–98 (7th Cir. 1995) (applying New Mexico law and noting that in diversity actions courts are split regarding whether state or federal law applies to the spoliation of evidence); Allstate Ins. Co. v. Sunbeam Corp., 865 F. Supp. 1267, 1278 (N.D. Ill. 1994) (holding that whether a plaintiff has a duty to preserve a defective product is a substantive issue to be decided by state law); State Farm Fire & Cas. Co. v. Frigidaire, 146 F.R.D. 160, 162 (N.D. Ill. 1992) (finding "pre-suit duty to preserve material evidence is substantive and is controlled by state law rather than federal law"); Headley v. Chrysler Motor Corp., 141 F.R.D. 362, 364 (D. Mass. 1991) (explaining federal law controls regarding whether dismissal is proper for spoliation), *approved and adopted*, No. 881642MA, 1992 U.S. Dist. LEXIS 3758 (D. Mass. Jan. 23, 1992).

7. Toste v. Lewis Controls, Inc., No. C-95-01366-MHP, 1996 U.S. Dist. LEXIS 2359, at *18 n.2 (N.D. Cal. Feb. 28, 1996); Baliotis v. McNeil, 870 F. Supp. 1285, 1289 (M.D. Pa. 1994).

8. *Id.*

Federal courts have split regarding whether state or federal law governs sanctions for spoliation in a diversity suit.[9] But the majority of circuits have held that federal law applies.[10] These courts note that the authority to impose sanctions for destruction of evidence arises not from substantive law, but rather "from a court's inherent power to control the judicial process."[11] They also consider a spoliation ruling evidentiary in nature, to which federal courts generally apply federal evidentiary rules in both federal question and diversity matters.[12]

The question of whether a duty to preserve evidence exists is a question of law for the court, but courts reviewing decisions sanctioning spoliation have applied several standards of review to the question of sanctions for failure to preserve evidence.[13] For instance, the Federal Circuit explained in *Hynix Semiconductor Inc. v. Rambus Inc.*, that it reviewed "the district court's spoliation decision under the law of the regional circuit as follows: *de novo* for the legal standard, clear

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9. When a federal court has federal question jurisdiction, the "federal law of spoliation will be applied." Communities for Equity v. Mich. High School Athletic Ass'n, No. 1:98-CV-479, 2001 U.S. Dist. LEXIS 16019 (W.D. Mich. Sept. 21, 2001).

10. *See, e.g.,* Sherman v. Rinchem Co., 687 F.3d 996, 1006 (8th Cir. 2012); Adkins v. Wolever, 554 F.3d 650, 652 (6th Cir. 2009) (citing Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001)); Condrey v. SunTrust Bank of Ga., 431 F.3d 191, 203 (5th Cir. 2005) ("[F]ederal courts . . . apply federal evidentiary rules rather than state spoliation laws in diversity suits."); Flury v. Daimler Chrysler Corp., 427 F.3d 939, 944 (11th Cir. 2005); Hodge v. Wal-Mart Stores, Inc., 360 F.3d 446, 449–50 (4th Cir. 2004) (imposing sanction for spoliation is among the court's inherent power and the decision to impose sanctions is a matter of federal law). *But see* Keller v. United States, 58 F.3d 1194, 1197–98 (7th Cir. 1995) (applying New Mexico law and noting that courts are split regarding whether state or federal law applies in diversity actions, to the spoliation of evidence); Reilly v. Natwest Mkts. Grp. Inc., 181 F.3d 253, 267 (2d Cir. 1999); Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993).

11. *Adkins*, 554 F.3d at 652; *Silvestri*, 271 F.3d at 590 (citing Chambers v. NASCO, Inc., 501 U.S. 32, 45–46 (1991)).

12. *Adkins*, 554 F.3d at 652.

13. Cockerline v. Menendez, 988 A.2d 575, 590 (N.J. Super. 2010) (holding that the duty to preserve evidence is a question of law for the court) (citing Manorcare Health Servs. v. Osmose Wood Preserving, Inc., 764 A.2d 475, 479 (N.J. Super. 2001)). *See* Hynix Semiconductor Inc. v. Rambus Inc., 645 F.3d 1336, 1345 (Fed. Cir. 2011) (noting a de nov*o* standard of review applies to a legal standard).

error for the underlying facts, and abuse of discretion for the propriety of the remedy."[14]

There are a handful of states that recognize an independent tort claim for spoliation of evidence, which allows a plaintiff who can establish the requisite elements of this tort to recover money damages.[15] Most states, however, do not recognize either the tort of intentional or negligent spoliation. Therefore, if spoliation occurs in these states, the non-spoliating party's remedies are limited to non-tort remedies, including civil or evidentiary sanctions.

Even then, disagreement exists about the proper analysis for spoliation tort claims and for sanctioning spoliation in ongoing litigation.[16] Not only does this absence of consensus create questions regarding the scope of preservation obligations, it can contribute to the cost of litigation.[17]

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14. *Hynix Semiconductor Inc.,* 645 F.3d at 1345 (citing Qualcomm Inc. v. Broadcom Corp., 548 F.3d 1004, 1019 (Fed. Cir. 2008)). *See also* Major Tours, Inc. v. Colorel, 720 F. Supp. 2d 587, 619 (D.N.J. 2010) (observing that "[t]o the extent that plaintiffs frame their appeal as an argument that no matter the other circumstances, as a matter of law, a defendant cannot be granted a protective order under 26(b)(2)(B) if the failure to institute a proper litigation hold was the cause of the inaccessibility, then the Court reviews this question of law *de novo*. . . . To the extent that plaintiffs are . . . arguing that, in this particular case, [the magistrate judge] gave insufficient weight to defendants' culpability as one of several factors, then this argument would be a challenge to the exercise of discretion.").

15. *See* Hannah v. Heeter, 584 S.E.2d 560 (W. Va. 2003); Oliver v. Stimson Lumber Co., 993 P.2d 11 (Mont. 1999); Smith v. Howard Johnson, 615 N.E.2d 1037 (Ohio 1993). *See generally* Chapter 4.

16. For example, Illinois courts are split over whether to focus solely on the prejudice suffered by the non-spoliating party in determining the proper sanction or whether also to consider the level of culpability of the party responsible for the destruction of evidence. *Cf.* H & H Sand & Gravel Co. v. Coyne Cylinder Co., 632 N.E.2d 697 (Ill. App. Ct. 1994) (state of mind of spoliating party a factor to be analyzed) *with* Farley Metals, Inc. v. Barber Colman Co., 645 N.E.2d 964 (Ill. App. Ct. 1994) (upholding dismissal of complaint based on prejudice and stating that "when crucial evidence is destroyed, the offending party's intent becomes significantly less germane in determining a proper sanction"); *see also* David A. Bell, *et al.*, *An Update on Spoliation of Evidence*, 85 Ill. B.J. 530 (1997); *Victor Stanley*, 269 F.R.D. at 521.

17. *Victor Stanley*, 269 F.R.D. at 517 n.24 (observing the "lack of a national standard or even a consensus among courts in different jurisdictions about what standards should govern preservation/spoliation issues" and appending a list of

No federal court has recognized an independent tort claim for spoliation under federal law.[18] At least two federal courts have rejected an attempt to assert a federal independent tort claim of spoliation based on a federal regulation requiring retention of records.[19] For example, in *Lombard v. MCI Telecommunications Corporation*,[20] an Ohio district court held failure to comply with 29 C.F.R. § 1602.14, a provision that requires an employer to retain records relevant to a charge of employment discrimination, was not "actionable *per se*" because the regulation does not provide the employee with the right to sue for damages. Rather, the court followed other decisions that establish the proper remedy for such a violation is imposition of a sanction, in these cases a rebuttable presumption "that the destroyed document would have bolstered [the plaintiff's] case."[21]

When available tort claims for spoliation are brought in federal court, they will be analyzed under applicable state law.[22] Thus, it is essential that counsel facing a spoliation issue become familiar with the law governing spoliation in the applicable forum.

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standards applied in each circuit). Magistrate Judge Paul W. Grimm's Memorandum, Order and Recommendation in *Victor Stanley* "attempt[s] to . . . provide counsel with an analytical framework that may enable them to resolve preservation/spoliation issues with a greater level of comfort" by synthesizing the law of Maryland, the Fourth Circuit and putting it in "the context of the state of the law in other circuits." *Id.* at 518.

18. Lombard v. MCI Telecomm. Corp., 13 F. Supp. 2d 621, 627 (N.D. Ohio 1998). *See also* Catoire v. Caprock Telecomm. Corp., No. 01-3577, 2003 U.S. Dist. LEXIS 8812 (E.D. La. May 22, 2003) (rejecting claim for spoliation of evidence noting the absence of a private cause of action for relief under 29 C.F.R. § 1602.14); *Silvestri*, 271 F.3d at 590 (finding that "while the spoliation of evidence may give rise to court imposed sanctions deriving from [its] inherent power, the acts of spoliation do not themselves give rise in civil cases to substantive claims or defenses").

19. *See Lombard*, 13 F. Supp. 2d at 627; *Catoire*, 2003 U.S. Dist. LEXIS 8812.

20. 13 F. Supp. 2d 621.

21. *Lombard*, 13 F. Supp. 2d at 628.

22. Unigard Security Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 367 (9th Cir. 1992) (stating, in a strict liability/negligence case, that a spoliation counterclaim brought in diversity is controlled by state law, but holding that there was no valid spoliation claim); Lewis v. J.C. Penny, Inc., 12 F. Supp. 2d 1083, 1086 (E.D. Cal. 1998) (addressing the applicable law for a spoliation claim and holding that in a diversity action the legal issues are governed by the substantive law of the forum state).

TRIGGERING THE DUTY TO PRESERVE EVIDENCE

There is no general duty to preserve evidence before litigation is filed, threatened, or reasonably foreseeable, unless the duty is voluntarily assumed or imposed by a statute, regulation, contract, or another special circumstance.[23] Absent notice of a governmental investigation, probable or pending litigation, or another source of a duty to preserve evidence, a company or individual generally has the right to dispose of its own property, including documents, electronically stored information, or tangible things, without liability.[24]

Sometimes a party will receive its first notice that particular documents or things are relevant upon receipt of a complaint or document requests from an opposing party.[25] To effectively trigger an obligation

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23. *Victor Stanley*, 269 F.R.D. at 521 ("Absent some countervailing factor, there is no general duty to preserve. . . ." evidence); *see also Hannah*, 584 S.E.2d at 569; Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718 (Tex. 2003); Gilleski v. Community Med. Ctr., 765 A.2d 1103 (N.J. App. 2001); Kelly v. Sears Roebuck & Co., 720 N.E.2d 683 (Ill. App. Ct. 1999). *See, e.g.,* Distefano v. Law Offices of Barbara H. Katsos, PC, No. CV 11-2893 (JS)(AKT), 2013 U.S. Dist. LEXIS 47036, *16-18 (E.D.N.Y. Mar. 29, 2013) (concluding that the duty to preserve was triggered when client discharged counsel and noting that the Second Circuit has held that in certain circumstances, "a regulation can create the requisite obligation to retain records," even where litigation involving the records is not reasonably foreseeable) (internal citations omitted); Martin v. Keeley & Sons, Inc., 979 N.E.2d 22 (Ill. 2012) (noting that a voluntary undertaking requires a showing of affirmative conduct by the party evincing its intent to voluntarily assume a duty to preserve evidence, and that a mere opportunity to exercise control over evidence is insufficient to establish a special relationship that would establish a duty to preserve it); *but see* Powers v. S. Family Mkts. of Eastman, LLC, No. A12A2382, 2013 Ga. App. LEXIS 212 (Ga. Ct. App. Mar. 18, 2013) (holding that merely contemplating potential liability and completing an accident report after an investigation do not demonstrate contemplated or pending litigation).

24. *See, e.g.*, Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212 (S.D.N.Y. 2003) ("It goes without saying that a party can only be sanctioned for destroying evidence if it had a duty to preserve it."); Coleman v. Eddy Potash, Inc., 905 P.2d 185, 191 (N.M. 1995) ("We hold that in the absence of such a circumstance [requiring a duty to preserve evidence], a property owner has no duty to preserve or safeguard his or her property for the benefit of other individuals in a potential lawsuit.").

25. Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 73 (S.D.N.Y. 1991); *see also* Jarmak v. Ramos, No. 6:10-cv-00048, 2011 U.S. Dist. LEXIS 75304 (W.D. Va. July 13, 2011) (refusing to sanction alleged spoliation where evidence disposed of long before any knowledge of complaint, much less any injury from a broken hammock rope). Discussing when a defendant's duty to preserve evidence arose in a claim for copyright violation, one court explained:

to preserve, the complaint must allege facts describing the conduct that affords notice to the party in possession of evidence.[26] Of course, parties to litigation should promptly request relevant records and documents from the opposing party so that unexplained laxness does not undercut a claim of harm from a later failure to produce. In cases where "a party has had an opportunity to pursue discovery but has not aggressively done so, the courts have gone so far as to hold that the subsequent improper destruction of relevant evidence by the other side should not trigger any spoliation sanctions."[27]

On the other hand, the duty to preserve potentially relevant evidence may arise before the commencement of a lawsuit if it is reason-

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> All reasonable inferences lead inexorably to the conclusion that [the defendant] must have been aware that [plaintiff's] source code would be the subject of a discovery request long before it stopped destroying older versions, . . . It is inconceivable that after the [prelitigation] meeting, [defendant] did not realize that the software in its possession would be sought during discovery. Certainly, commencement of the action settled any doubts. Thereafter, the request for production, followed by the motion to compel, provided repeated, insistent reminders of the duty to preserve this irreplaceable evidence. Yet the destruction proceeded. . . . Even assuming that maintenance of only a single, updated version of the source code was, in other circumstances, a bona fide business practice, any destruction of versions of the code [20 days after service of the complaint] could not be excused as a bona fide business practice.

Computer Assocs. Int'l, Inc. v. American Fundware, Inc., 133 F.R.D. 166, 169 (D. Colo. 1990).

26. *Kelly*, 720 N.E.2d 693; *see also* Valentine v. Mercedes-Benz Credit Corp., No. 98 Civ. 1815, 1999 U.S. Dist. LEXIS 15378 (S.D.N.Y. Sept. 30, 1999).

27. Saul v. Tivoli Systems, Inc., No. 97CV2386 (DC) (MHD), 2001 U.S. Dist. LEXIS 9873, at *50 (S.D.N.Y. July 17, 2001). *See also* Gaffield v. Wal-Mart Stores East, LP, 616 F. Supp. 2d 329, 338 (N.D.N.Y. 2009) (denying spoliation sanctions where plaintiff could have inspected bicycle in the nearly two years between the accident and filing of complaint); Klezmer v. Buynak, 227 F.R.D. 43, 52 (E.D.N.Y. 2005) (denying sanctions for failure to preserve maintenance records for ATV where plaintiff never requested inspection of ATV itself); Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 423, 435–36 (2d Cir. 2001); Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc., 473 F.3d 450, 457–58 (2d Cir. 2007) (refusing to impose sanctions where the party "affirmatively disclaimed any interest in the evidence . . . after being provided a full opportunity to inspect the items.").

ably foreseeable that a lawsuit will be filed.[28] It matters not whether "an organization is the initiator or the target of litigation,"[29] the common law duty to preserve evidence arises at "the moment that litigation is reasonably anticipated."[30] The situation can arise, for example, if an individual or an organization plans to initiate litigation, a potential defendant receives a demand letter, a company learns that a former employee is seriously contemplating a lawsuit, or if an event or other circumstance would reasonably put an organization or an individual on notice that a lawsuit is likely to be filed.[31]

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28. Chrysler Realty Co., LLC v. Design Forum Architects, Inc., No. 06-CV-11785, 2009 U.S. Dist. LEXIS 121411, *7–8 (E.D. Mich. Dec. 31, 2009) (citations omitted) ("[T]he first step in the [sanctions] analysis is to determine the 'trigger date,' or 'the date a party is put on notice that it has a duty to preserve evidence. . . . Any destruction of potentially relevant evidence that occurs before the trigger date would be harmless, since the party was unaware of a need to safeguard evidence. The destruction of documents and evidence after the trigger date, however, is not allowed."); EEOC v. New Breed Logistics, No. 10-2696 STA/TMP, 2012 U.S. Dist. LEXIS 136534 (W.D. Tenn. Sept. 25, 2012) (same). *See also Fujitsu Ltd.,* 247 F.3d at 436; Kalumetals, Inc. v. Hitachi Magnetics Corp., 21 F. Supp. 2d 510, 520 (W.D. Pa. 1998); Howell v. Maytag, 168 F.R.D. 502, 505 (M.D. Pa. 1996); Shaffer v. RWP Group, Inc., 169 F.R.D. 19, 24 (E.D.N.Y. 1996); Moyers v. Ford Motor Co., 941 F. Supp. 883, 884 (E.D. Mo. 1996); Baliotis v. McNeil, 870 F. Supp. 1285 (M.D. Pa. 1994).

29. *Victor Stanley*, 269 F.R.D. at 521–22 (citing *The Sedona Conference Commentary on Legal Holds* 3 (pub. cmt. ed. Aug. 2007)). *See, e.g.,* Equal Employment Opportunity Commission v. JP Morgan Chase Bank, N.A., Case No. 2:09-cv-864 (S.D. Ohio, Feb. 28, 2013) (focusing on the pre-lawsuit events that triggered a bank's duty to preserve data and suspend its automatic purging process, including a notice from the EEOC that it was investigating class allegations and a request for information from the commission); Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010) ("A plaintiff's duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation."); Innis Arden Golf Club v. Pitney Bowes, Inc., 257 F.R.D. 334, 340 (D. Conn. 2009) (finding a potential plaintiff anticipates litigation when counsel is retained for the matter).

30. *Hynix Semiconductor Inc.*, 645 F.3d 1336; Micron Tech., Inc. v. Rambus Inc., 645 F.3d 1311 (Fed. Cir. 2011); *Victor Stanley*, 269 F.R.D. at 521.

31. *See*, *e.g.*, *Hynix Semiconductor Inc.*, 645 F.3d 1336; *Micron Tech.,* 645 F.3d 1311 (sanctioning organization that destroyed documents while strategically planning for specific litigation); Stevenson v. Union Pac. R.R. Co., 364 F.3d 739 (8th Cir. 2004) (sanctioning railroad because it destroyed evidence similar to what it previously had used to its advantage in another case, after an accident but before litigation commenced); *see also* Powers v. S. Family Mkts. of Eastman, LLC, No.

For example, in *Ferrel v. Connetti Trailer Sales, Inc.*,[32] plaintiffs failed to bring a motor home to a service center for inspection and necessary repairs, as requested by the dealer. The dealer had offered to pick up the motor home, transport it to another state for inspection and return it to plaintiffs at no charge, but the plaintiffs refused. On at least four or five occasions the manufacturer had requested an opportunity to inspect and repair the vehicle while plaintiffs still owned it, but each time they refused the inspection requests.

The *Ferrel* court criticized plaintiffs for surrendering the vehicle to creditors when they were planning a lawsuit regarding the defective repairs and had threatened to file a lawsuit several times. The manufacturer and dealer pointed to Rhode Island law that gave them the right to inspect or test goods, a right that plaintiffs violated when by rebuffing their requests to inspect the vehicle. The court noted that plaintiffs were aware of the potential relevance of the motor home, yet refused to allow the manufacturer or the dealer to inspect it. As a result, the court precluded all evidence of defective repairs.

On appeal, the Rhode Island Supreme Court reversed, finding that the trial court had gone too far in precluding all evidence of the defective repairs. Instead, the court remanded the case for a new trial allowing plaintiffs to introduce evidence of defective repairs and permitting defendants to rebut this evidence "as best they can." The Rhode Island high court also instructed the trial court that because plaintiffs'

A12A2382, 2013 Ga. App. LEXIS 212 (Ga. Ct. App. Mar. 18, 2013) (holding that merely contemplating potential liability and completing an accident report after an investigation do not demonstrate contemplated or pending litigation); YCB Int'l, Inc. v. UCF Trading Co, No. 09 C 7221, 2012 U.S. Dist. LEXIS 104875, *9–10 (N.D. Ill. July 25, 2012) (finding an email sent by a company official to a supplier 10 months before litigation commenced put a supplier on notice of the potential litigation and triggered its duty to preserve documents because the supplier has a central role in supplying the bearings that plaintiff used to fulfill its obligations under the contract); Ervine v. S.B., No. 11 C 1187, 2011 U.S. Dist. LEXIS 24937 (N.D. Ill. Mar. 10, 2011) (a duty to preserve extends to third parties who should have known evidence may be relevant in future lawsuits); A. Benjamin Spencer, *Symposium: Civil Procedure and the Legal Profession: The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court,* 79 FORDHAM L. REV. 2005, 2008 (Apr. 2011) (citing cases) (observing that a pre-litigation hold request, a demand letter or similar correspondence, such as a cease and desist letter or a cure notice, may trigger the duty to preserve).

32. 727 A.2d 183 (R.I. 1999).

conduct caused the motor home to be unavailable for inspection the jury could infer that if the manufacturer and dealer had been allowed to conduct an inspection, they would have discovered evidence showing the repairs were not defective. The *Ferrel* case illustrates the importance of taking steps to locate missing evidence and tracing it to third parties to the extent necessary, as well as cooperating in any requested inspection by a potentially adverse party.[33]

Pre-litigation discussions or requests to inspect, or a history of previous litigation arising out of similar events or circumstances can trigger a duty to preserve relevant evidence.[34] As one court explained:

> When a party may be deemed to be on notice [that evidence may relevant to future litigation] is a function of the variable chronologies along which issues develop in a lawsuit. Thus, in one case it may be a discovery request, in another the complaint, in still another correspondence prior to the filing of a complaint, that puts a party on notice that material in its custody is, or reasonably should be considered, admissible evidence which the party has a legal duty to preserve.[35]

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33. *Id.* Another example of pre-litigation conduct that triggered a duty to preserve is *Sanchez v. Stanley-Bostitch, Inc.*, No. 98 Civ. 0494, 1999 U.S. Dist. LEXIS 12975 (S.D.N.Y. Aug. 23, 1999). There, counsel directed plaintiff to take photographs of an allegedly defective pneumatic staple gun in anticipation of a lawsuit. Neither plaintiff nor counsel notified the manufacturer about the potential claim. Nor did they identify the allegedly defective product for the manufacturer before it was lost. The court held that because plaintiff knew litigation was possible and had retained counsel, he had an obligation to preserve the evidence finding that even though plaintiff did not have possession of or exercise control over the staple gun, he could have informed the manufacturer of the potential lawsuit and asked his employer to preserve it for future inspection. Because plaintiff did not take these steps, the court imposed an adverse inference instruction at trial. *Id.*

34. EEOC v. JP Morgan Chase Bank, N.A., No. 2:09-cv-864, 2013 U.S. Dist. LEXIS 27499 (S.D. Ohio Feb. 28, 2013) (focusing on the pre-lawsuit events that triggered a bank's duty to preserve data and suspend its automatic purging process, including a notice from the EEOC that it was investigating class allegations and a request for information from the commission); YCB Int'l, Inc. v. UCF Trading Co, No. 09 C 7221, 2012 U.S. Dist. LEXIS 104875, *9–10 (N.D. Ill. July 25, 2012); Ervine v. S.B., No. 11 C 1187, 2011 U.S. Dist. LEXIS 24937 (N.D. Ill. Mar. 10, 2011).

35. Abramowitz v. Inta-Bores Acres, Inc., No. 98-CV-4139 (ILG), 1999 U.S. Dist. LEXIS 20005, *7–8 (E.D.N.Y. Nov. 16, 1999) (citing Kronisch v. United

There is a straightforward rationale for requiring parties to preserve relevant evidence before a lawsuit is filed: Absent a pre-litigation duty to preserve, a party might be able to "subvert the discovery process and the fair administration of justice" by destroying evidence before the potential litigant actually filed a claim.[36]

Many courts have held that a duty to preserve evidence may be triggered even in the absence of pre-litigation discussions or a history of previous litigation, *i.e.,* when litigation is foreseeable. Courts have expressed a number of "subtle variations" in standards for establishing when a pre-litigation duty to preserve evidence is triggered.[37] Some courts apply a two-prong test to determine whether a duty to preserve evidence exists for potential litigation, finding that "a duty exists. . . if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action."[38]

States, 150 F.3d 112, 126 (2d Cir. 1998)); *compare* Kanyi v. United States, No. 99 cv 5851(ILG), 2001 U.S. Dist. LEXIS 19814 (E.D.N.Y. 2001) (refusing to sanction a party where documents were destroyed after the lawsuit had been filed but before service of the first requests for production of documents) *with* Stevenson v. Union Pac. R.R. Co., 354 F.3d 739 (8th Cir. 2004) (sanctioning railroad that destroyed voice tapes immediately after an accident where railroad knew such tapes were relevant in earlier lawsuits).

36. *Trevino*, 969 S.W.2d at 955 (Baker, J., concurring).

37. *See also* The Honorable Paul W. Grimm & Joel P. Williams, *Ethical Issues Associated with Preserving, Accessing, Discovering, and Using Electronically Stored Information,* 14 FIDEL. L. J. 57 (OCT. 2008) (hereinafter *Ethical Issues Associated with Preserving*) (discussing three subtle variations in the pre-litigation duty to preserve evidence).

38. Denton v. Northeast Ill. Reg'l Commuter R.R. Corp., No. 02C2220, 2004 U.S. Dist. LEXIS 7234, *5–6 (N.D. Ill. 2004). As the court explained, "One Illinois court has described this as a two-prong test for the existence of a duty to preserve evidence: (1) the relationship prong; and (2) the foreseeability prong. Unless both prongs are satisfied, there is no duty to preserve evidence." *Id*. (citing Andersen v. Mack Trucks, Inc., 793 N.E.2d 962, 967 (Ill. App. 2d Dist. 2003); *see also* Urban v. United States, No. 03C6630, 2005 U.S. Dist. LEXIS 428 (N.D. Ill. 2005) (same); Albertson's, Inc. v. Arriaga, No. 04-03-00697-CV, No. 2004 Tex. App. LEXIS 8307 (Tex. App. 2004) ("a duty arises only when a party knows, or reasonably should know, that there is a substantial chance that a complaining party will file a claim and that the party possesses or controls material evidence relevant to that claim"). *But see* Royal & SunAlliance v. Lauderdale Marine Ctr., 877 So. 2d 843, 846 (Fla. Dist. Ct. App. 2004) (noting that Florida courts have held that there is no duty to preserve evidence when litigation is merely anticipated).

Other courts have held that once a party knows that information may be relevant to a reasonably foreseeable claim, a duty to preserve such evidence arises.[39] For instance, in the oft-cited *Zubalake* decision, the court found that an employer had a duty to preserve certain electronic records destroyed before an employee ever filed a charge of discrimination,[40] which would have triggered a statutory duty to preserve evidence. Acknowledging that a duty to preserve evidence does not arise "[m]erely because one or two employees contemplated the possibility that a fellow employee might sue," the *Zubalake* court explained that in this case "it appears that almost everyone associated with [the employee] recognized the possibility that she might sue. . . ." Consequently, the court held that the duty to preserve attached at the time that litigation was "reasonably anticipated," and that the relevant people at the employer anticipated litigation months before the employee filed her charge of discrimination.[41]

Still other courts have held that "a party to civil litigation has a duty to preserve relevant information, . . . when that party 'has notice

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39. Mary Kay Brown & Paul D. Weiner, *Digital Dangers: A Primer on Electronic Evidence in the Wake of Enron*, 74 PA. BAR ASSN. Q. 1, 3 (Jan. 2003). *See, e.g., Silvestri,* 271 F.3d at 591; Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998) ("This obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation . . . as for example when a party should have known that the evidence may be relevant to future litigation."); MOSAID Techs. Inc. v. Samsung Elecs. Co., 348 F. Supp. 2d 332, 336 (D.N.J. 2004) (finding that a litigant "is under a duty to preserve what it knows, or reasonably should know, will likely be requested in reasonably foreseeable litigation"); Scott v. IBM Corp., 196 F.R.D. 233, 249 (D.N.J. 2000) (same). *See also* United States v. Rockwell Int'l, 897 F.2d 1255, 1266 (3d Cir. 1990) (holding to shield attorney work product, "[l]itigation need not be imminent . . . as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation"); Mathias v. Jacobs, 197 F.R.D. 29, 37 (S.D.N.Y. 2000) ("duty to preserve arises when a party . . . anticipates litigation").

40. *Zubulake*, 220 F.R.D. 212.

41. *Id.* at 217. *See also* EEOC v. Fry's Elecs., Inc., 874 F. Supp. 2d 1042 (W.D. Wash. 2012) (imposing an adverse inference sanction for destroying documents and computer hard drives because the employer had notice of its duty to preserve this evidence once the employee mentioned he was going to the EEOC); Barsom v. NYC Housing Auth., 202 F.R.D. 396, 400 (S.D.N.Y. 2001) (holding plaintiff had a duty to preserve recording of a key conversation with her boss because she "knew or should have known that it was reasonably foreseeable that the tape would be relevant in future litigation," and she already had consulted an attorney).

that the evidence is relevant to litigation or . . . should have known that the evidence may be relevant to future litigation.'"[42] One circuit court has suggested that a party has a duty to preserve evidence because it knows, or should have known, "that litigation was imminent,"[43] but this decision may have been over read.[44]

In a pair of significant cases discussing when a litigant's preservation duty is triggered, the Federal Circuit refused to "sully the flexible reasonably foreseeable standard with [a] restrictive gloss" that would require a showing that a reasonable person reasonably foresee that "litigation was *imminent*." Rather, the court explained:

> [w]hen litigation is "reasonably foreseeable" is a flexible fact-specific standard that allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry. This standard does not trigger the duty to preserve documents from the mere existence of a potential claim or the distant possibility of litigation. However, it is not so inflexible as to require that litigation be "imminent, or probable without significant contingencies," as [the defendant] suggests. [The defendant's] proposed gloss on the "reasonably foreseeable" standard comes from an overly generous reading of several cases. [These cases] merely noted that imminent litigation was sufficient, not that it was necessary for spoliation, . . . This court declines to sully the flexible reasonably foreseeable standard with the restrictive gloss proposed by [the defendant] in light of the weight of contrary authority and the unnecessary generosity that such a gloss would extend to alleged spoliators. [45]

42. John B. v. Goetz, 531 F.3d 448, 459 (6th Cir. 2008); *Fujitsu Ltd.*, 247 F.3d at 436 ("The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.").

43. Burlington Northern & Santa Fe Ry. v. Grant, 505 F.3d 1013, 1032 (10th Cir. 2007).

44. *See* United States *ex rel*. Baker v. Cmty. Health Sys., No. 05-279 WJ/ACT, 2012 U.S. Dist. LEXIS 146865 (D.N.M. Aug. 31, 2012).

45. *Micron Tech.,* 645 F.3d at 1320-1321 (internal citations omitted). Two of the cases on which the defendant relied to support its assertion that litigation must be imminent were *Burlington N. & Santa Fe Ry. Co.*, 505 F.3d at 1032 (noting that "[a] spoliation sanction is proper where . . . a party has a duty to preserve evidence because it knew, or should have known, that litigation was *imminent*. . .") (emphasis

The *Micron* court pointed out that "it would make little sense to enjoin document destruction only when the party clears all the hurdles on the litigation track, but endorse it when the party begins the race under the reasonable expectation of clearing those same hurdles." The court held that "the proper standard for determining when the duty to preserve documents attaches is the flexible one of reasonably foreseeable litigation, without any additional gloss."[46]

OTHER SOURCES OF THE DUTY TO PRESERVE EVIDENCE

In addition to the duty that arises from foreseeable or reasonably anticipated litigation, a duty to preserve evidence independently may arise from a contract, a statute or regulation, a document retention policy, or in the case of attorneys, ethical duties. A duty to preserve created by these legal, contractual, ethical or voluntarily assumed obligations may exist before litigation is contemplated, or may arise out of a pre-suit agreement to preserve evidentiary material.

There are a number of federal and state statutes and regulations that impose record-keeping obligations on individuals and organizations, requiring companies to retain certain categories of documents for specified periods of time.[47] Some statutes and regulations also specify the required sanction for document destruction in violation of

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added); and *Trask-Morton*, 534 F.3d at 681 (citing *Burlington* for the proposition that "courts have found a spoliation sanction to be proper only where a party has a duty to preserve evidence because it knew, or should known, that litigation was *imminent*," but holding that "Motel 6 had no reason to *suspect litigation* until—at the earliest—Morton's attorney sent Motel 6 a demand letter" after the alleged spoliation (emphases added)).

After the Federal Circuit's decision in *Micron,* a New Mexico district court observed that when the Tenth Circuit court stated in *Burlington Northern* that spoliation sanctions were appropriate when the offending party knew that litigation was "imminent," that court cited a case where the product at issue was destroyed when litigation was in fact imminent. The New Mexico district court "believe[d] the Tenth Circuit's choice of the word "imminent" reflected that fact, rather than creating a standard different from the "virtually universal standard" of "reasonably foreseeable." The district court then applied the reasonably foreseeable analysis to the case before it. *United States* ex rel. *Baker*, 2012 U.S. Dist. LEXIS 146865.

46. *Micron Tech.,* 645 F.3d at 1321. *See also Ethical Issues Associated with Preserving, supra* note 37.

47. Although a comprehensive list of these laws is beyond the scope of this book, select statutory record-keeping requirements are discussed in Chapter 6.

these laws when that destruction results in documents being unavailable in civil litigation. These statutes and regulations typically permit the opposing party to obtain an adverse inference instruction.

For example, regulations governing the Office of Federal Compliance Programs include a record-keeping requirement at § 60-741.80 of Title 41 of the Code of Federal Regulations. This provision requires that personnel and employment records made by a covered contractor be preserved for at least two years from the date of the record or the personnel action involved, whichever occurs later. This regulation provides that failure to preserve such records may result in a presumption that the information destroyed or not preserved would have been unfavorable to the party that failed to retain the records. This presumption does not apply if the contractor can establish that the destruction or failure to preserve resulted from circumstances outside of his control.[48]

Likewise, the Sarbanes-Oxley Act of 2002 imposes certain recordkeeping requirements on corporate entities and creates penalties for failure to comply with these requirements. Among other things, the Act requires that "[a]ny accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 applies, shall maintain all audit and review work papers for a period of 5 years from the end of the fiscal period in which the audit or review was concluded."[49]

As discussed in Chapter Two, a company also may have imposed obligations on itself by creating and implementing a document retention policy requiring preservation of categories of data and documents for a specified time period. A company's failure to retain documents as required by its record retention policy, or to suspend the policy in light of pending litigation, can result in substantial sanctions.[50]

In addition, involvement in spoliation may subject attorneys to sanctions for violation of ethical rules or codes. For example, the American Bar Association Model Rule of Professional Conduct 3.4 prohibits a lawyer from unlawfully altering, destroying, or concealing documents or other material having potential evidentiary value.[51]

48. 41 C.F.R. § 60-741.80.

49. 18 U.S.C. § 1520(a)(1)(2002).

50. *See* Chapters 2 and 3.

51. Among other things, ABA Model Rule 3.4 prohibits a lawyer from unlawfully obstructing another party's access to evidence, unlawfully altering, destroy-

And the ABA recently amended the comment to the model rule requiring competence to state that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*."[52]

SCOPE OF THE DUTY TO PRESERVE

Once a party has notice that litigation has been filed, courts uniformly impose a duty to preserve potentially relevant evidence on parties to the lawsuit.[53] The duty "includes an obligation to identify, locate, and maintain, information that is relevant to specific, predictable, and identifiable litigation."[54] The duty applies only to relevant data, documents and things.[55]

One of the earliest cases delineating the scope of a party's duty to preserve evidence is *William T. Thompson Company v. General Nutrition Corporation*.[56] There, the plaintiff served the defendant with requests for production of documents shortly after filing suit. The court found the defendant had destroyed records, including electronic records, despite having pre-suit notice of their relevance in subsequent potential litigation. The court explained a litigant's duty to retain relevant documents:

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ing or concealing a document or other material that has evidentiary value, or counseling or assisting another person to take any such action. This ethical obligation also requires a lawyer to make a "reasonably diligent effort to comply with a legally proper discovery request."

52. ABA Model Rule 1.1, at comment (emphasis added).

53. *Trevino*, 969 S.W.2d at 954–55. Courts take seriously failure to suspend routine document destruction. *See, e.g.,* State Nat'l Ins. Co. v. County of Camden, No. 08-cv-5128, 2012 U.S. Dist. LEXIS 38504 (D.N.J. Mar. 21, 2012) (sanctioning a party for failing to issue a litigation hold, suspend auto-deletion of email, or retain copies of any backup tapes after being notified about a lawsuit against it, even though there was no evidence of actual spoliation of evidence); *but see* Steuben Foods, Inc. v. Country Gourmet Foods, LLC, No. 08-CV-561S(F), 2011 U.S. Dist. LEXIS 43145 (W.D.N.Y. 2011) ("[F]or sanctions to be appropriate, it is a necessary but insufficient condition that the sought-after evidence *actually existed and was destroyed*.") (emphasis in original and citations omitted).

54. *See Victor Stanley, Inc*., 269 F.R.D. at 522 (citations omitted).

55. *Id.* (citing *Pension Comm*., 685 F. Supp. 2d at 464).

56. 593 F. Supp. 1443 (C.D. Cal. 1984), *aff'd*, 104 F.R.D. 119 (C.D. Cal. 1985).

> 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 discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.[57]

William Thompson demonstrates the general rule in preserving evidence, that "[a] 'potential spoliator' need do only what is reasonable under the circumstances'[58] and does not have a duty to "take extraordinary measures to preserve evidence. . . ."[59] Of course, an organization need not preserve every shred of paper, every e-mail, text message or other electronically stored information once it recognizes the threat of litigation. "At the same time, 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."[60] As one leading authority explained, relevant records include:

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57. *Id.* at 1455. *See also* Howell v. Maytag, 168 F.R.D. 502, 505 (M.D. Pa. 1996) ("A party which reasonably anticipates litigation has an affirmative duty to preserve relevant evidence."); *Toste*, 1996 U.S. Dist. LEXIS 2359, at *8 ("As soon as a potential claim is identified, a litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action.") (citation omitted); Colfer v. Southwest Builders & Dev. Co., 832 P.2d 383, 385 (Nev. 1992) ("[E]ven where an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action.") (citation omitted).

58. Hirsch v. General Motors Corp., 628 A.2d 1108, 1122 (N.J. Super. Ct. Law Div. 1993) (quoting County of Solano v. Delancy, 264 Cal. Rptr. 721, 731 (Cal. Ct. App. 1989), *opinion withdrawn*, No. S013565, 1990 Cal. LEXIS 488 (Feb. 1, 1990)). *See also Baliotis*, 870 F. Supp. at 1290 (quoting Fire Ins. Exch. v. Zenith Radio Corp., 747 P.2d 911, 914 (Nev. 1987) ("litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action")); Willard v. Caterpillar, Inc., 48 Cal. Rptr. 2d 607, 625–26 (Cal. Ct. App. 1995) (noting that some courts impose discovery sanctions only if party is on notice that documents are potentially relevant).

59. *Id. See* J. Kinsler & A. MacIver, *Demystifying Spoliation of Evidence*, 34 TORT AND INS. PRAC. L.J., 761, 768 (1999) (observing that "[t]he critical legal question, . . . is whether the litigation was reasonably foreseeable at the time the discoverable documents were destroyed. The existence of a legal duty depends on the answer to this . . . question.").

60. *Zubulake,* 220 F.R.D. at 217.

> any documents or tangible things (as defined by Rule 34(a)) made by individuals "likely to have discoverable information that the disclosing party may use to support its claims or defenses." The duty also includes documents prepared for those individuals, to the extent those documents can be readily identified. . . . The duty also extends to information that is relevant to the claims or defenses of any party, or which is "relevant to the subject matter involved in the action." Thus, the duty to preserve extends to those employees likely to have relevant information—the "key players" in the case.[61]

Not only must documents and records be preserved, "in the world of electronic data, the preservation obligation is not limited simply to avoiding affirmative acts of destruction."[62] Many computer systems have automatic deletion features that periodically purge electronic documents, so once the duty to preserve is triggered, a party must also take active steps to halt any automatic deletion process.[63]

Leading commentators have declined to define the scope of the preservation obligation more precisely. After identifying the basic scope of the duty, one authority explained that "the duty to preserve evidence should not be analyzed in absolute terms; it requires nuance," because the duty "'cannot be defined with precision.'"[64] Rather, a court

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61. *Victor Stanley, Inc*., 269 F.R.D. at 522 (quoting *Zubulake*, 220 F.R.D. at 217–218). *See also* Broccoli v. Echostar Communications Corp., 229 F.R.D. 506, 510 (D. Md. 2008) ("The duty to preserve encompasses any documents or tangible items authored or made by individuals likely to have discoverable information that the disclosing party may use to support is claims or defenses.").

62. Convolve, Inc. v. Compaq Computer Corp., 223 F.R.D. 162, 175–76 (S.D.N.Y. 2004).

63. *Id. See also* Vagenos v. LDG Fin. Services, LLC, 2009 U.S. Dist. LEXIS 121490 (E.D.N.Y. Dec. 31, 2009) (imposing an adverse inference instruction for failure to preserve voice mail messages on a cell phone). In some cases, it "may be reasonable for a party to not stop or alter automatic electronic document management routines when the party is first notified of the possibility of a suit." Jones v. Bremen High Sch. Dist. 228, No. 08 C 3548, 2010 U.S. Dist. LEXIS 51312, *16–17 (N.D. Ill. May 25, 2010) (citing Cache LaPoudre, Inc. v. Land O'Lakes, Inc., 244 F.R.D. 614, 624 (D. Colo. 2008)). What is required is "positive action to preserve material evidence." *Id.* (citing Danis v. USN Communs., Inc., No. 98 C 7482, 2000 U.S. Dist. LEXIS 16900 (N.D. Ill. Oct. 20, 2000)).

64. *Victor Stanley, Inc*., 269 F.R.D. at 522 (citing *Advanced Issues in Electronic Discovery,* 37 U. BALT. L. REV. at 393 (quoting Shira A. Scheindlin, MOORE'S FEDERAL PRACTICE E-DISCOVERY: THE NEWLY AMENDED FEDERAL RULES OF CIVIL PROCEDURE 7.28

will determine whether under the circumstances a party's preservation efforts were reasonable—with "reasonableness and good faith" being the key issues.[65]

Some cases have found that whether a party's preservation conduct is acceptable depends on what is reasonable, which "in turn depends whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards."[66] Other courts have observed that "this standard may prove too amorphous" to provide much comfort to a party deciding what it may discard, delete or recycle. These courts have rejected this "highly elastic concept" until a more precise definition is created by rule. [67]

Discussing this concept, one court observed that in the context of preservation "[r]easonableness and proportionality are surely good guiding principles" for considering a preservation order, or evaluating a party's efforts at preservation after the fact. But the court cautioned that in the absence of a court-imposed preservation order, a party is well-advised to "retain all relevant documents. . . . in existence at the time the duty to preserve attaches."[68] Because "relevance" is given an

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(2006))). *See also Advanced Issues in Electronic Discovery,* 37 U. BALT. L. REV. at 394–97 (commenting on the scope of the preservation obligation).

65. *Id.*; *The Sedona Conference Commentary on Legal Holds*, *supra* note 2, at 269.

66. *Victor Stanley*, 269 F.R.D. at 522 (quoting Rimkus Consulting Group, Inc. v. Cammarata, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010)) (emphasis in original). *See* FEDERAL JUDICIAL CENTER FEDERAL JUDICIAL CENTER, BENCHBOOK FOR U.S. DISTRICT COURT JUDGES (6th ed. 2013), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf/$file/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf. § 6.01 Civil Case Management, at 195 (suggesting that the time for addressing proportionality in a civil action may be at the initial case management conference when a district court may place limits on discovery, including: "identifying whether discovery should initially focus on particular issues that are most important to resolving the case"; "phasing discovery so that the parties initially focus on the sources of information that are most readily available and/or most likely to yield key information"; "limiting the number of custodians and sources of information to be searched"; and "otherwise modifying the type, amount, or timing of discovery to achieve proportionality.")

67. Orbit One Communs. v. Numerex Corp., 271 F.R.D. 429, 436 (S.D.N.Y. 2010); Pippins v. KPMG LLP, No. 11 Civ. 0377 (CM) (JLC), 2011 U.S. Dist. LEXIS 116427, *16–17 (S.D.N.Y. Oct. 7, 2011).

68. *Id. See generally* The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery* (Jan. 2013), *available at*

exceedingly broad scope under the Federal Rules of Civil Procedure and analogous state rules,[69] the breadth of permitted discovery merits careful consideration by those contemplating preservations obligations.

To ensure that "relevant evidence" is not destroyed or discarded, a party must determine what potentially relevant evidence should be preserved. Once litigation has commenced, potentially relevant evidence can be ascertained from the complaint, from discovery requests, or from a preservation order. If no lawsuit has been filed, a potential defendant may be put on notice of what may be relevant from a demand letter or other correspondence from a potential adversary, or it may have notice through a pattern of complaints received in the past regarding the particular product.[70]

Even though parties must take reasonable steps to preserve relevant evidence, they are not required to make extraordinary efforts to retain evidence. Sometimes it is impossible or impractical for a party to retain all of the relevant evidence. In determining whether nonretention of a particular item of evidence is reasonable, courts weigh such factors as disruption of business operations, safety, expense, and whether the evidence in question is bulky or difficult to store.

For example, in *Conderman v. Rochester Gas & Electric Corporation,*[71] utility poles fell onto a pick-up truck and power lines from the downed poles injured them as they were driving. The defendant utility company sent emergency crews to the scene. In the process of clearing the road, the crews cut the poles into four foot pieces and removed them to a landfill. After filing a lawsuit, the truck driver moved for summary judgment based on alleged spoliation of evidence by the utility company. The trial court granted the motion, essentially precluding the utility company from offering evidence to rebut a presumption of negligence.[72]

The appellate court reversed the grant of summary judgment on spoliation. It reasoned that the utility company was "responding to an

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https://thesedonaconference.org/system/files/sites/sedona.civicactions.net/files/private/drupal/filesys/publications/%20Sedona%20Conference%20Commentary%20on%20Proportionality%20January%202013.pdf.

69. *See, e.g.*, Corrigan v. Methodist Hosp., 158 F.R.D. 54, 57 (E.D. Pa. 1994) ("Relevance for discovery purposes is defined broadly.").

70. Lewy v. Remington Arms Co., 836 F.2d 1104 (8th Cir. 1988).

71. 262 A.2d 1068 (N.Y. 1999).

72. *Id.* at 1068–69.

emergency situation that affected public safety, and it would be unreasonable to have imposed upon [it] at the time the duty to preserve evidence, anticipating the possibility of future litigation."[73]

Courts will consider the surrounding circumstances to determine whether it was reasonable for the party not to retain the evidence in question.[74] *Convolve, Inc. v. Compaq Computer Corporation*[75] is illustrative. There, a technology company shared certain proprietary information with the manufacturers of a disk drive and a computer producer and distributor. The technology company claimed the recipients misappropriated its trade secrets and infringed on its patents and sought sanctions against them for alleged spoliation of certain electronic data or wave forms used to evaluate the performance of disk drives. Rejecting the sanction request, the *Convolve* court explained:

> [T]he preservation of the wave forms in a tangible state would have required heroic efforts far beyond those consistent with [the computer maker's] regular course of business. To be sure, as part of a litigation hold, a company may be required to cease deleting e-mails, and to disrupt its normal document destruction protocol. But e-mails, at least, have some semi-permanent existence. . . . By contrast, the data at issue here are ephemeral. They exist only until the tuning engineer makes the next adjustment, and then the document changes. No business purpose ever dictated that they be retained, even briefly.[76]

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73. *Id.* at 1069.

74. *See, e.g.*, *Zubulake,* 220 F.R.D. 217 ("Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every back-up tape? The answer is clearly, 'no.' Such a rule would cripple large corporations . . . ."); *Conderman*, 262 A.2d at 1069 (finding public safety justified failure to preserve evidence); Sanchez v. Stanley-Bostitch, Inc., No. 98 Civ. 0494, 1999 U.S. Dist. LEXIS 12975 (S.D.N.Y. Aug. 23, 1999) (finding that plaintiff's retention of counsel who directed that certain evidence be photographed suggested plaintiff had a duty to preserve evidence); Concord Boat Corp. v. Brunswick Corp., No. LR-C-95-791, 1997 U.S. LEXIS 24068 (E.D. Ark. Aug. 29, 1997) (explaining "to hold that a corporation is under a duty to preserve all e-mail correspondence potentially relevant to any future litigation would be tantamount to holding that the corporation must preserve all e-mail. . . . Such a proposition is not justified.").

75. 223 F.R.D. 162 (S.D.N.Y. 2004).

76. *Id.* at 177. Among other authorities the court referenced was the proposed FED. R. CIV. P. 37(f), which imposes some limits on the authority of district courts to sanction the destruction of electronically stored information.

On occasion a party may opt to retain photographs, videotapes, test results, or other "secondary evidence," rather than the actual physical evidence. In these situations, the non-spoliating party may argue that the failure to preserve the original evidence constitutes unlawful spoliation and that the secondary evidence is an inadequate substitute. Some courts have accepted this argument and excluded testimony based on the missing evidence.

For example, in *Cincinnati Insurance Company v. General Motors Corporation*,[77] an insurer filed suit against an automobile manufacturer, alleging that a defective motor vehicle caused a fire that damaged its insured's home. After the insurance company's expert had examined the vehicle, someone destroyed the car but not the blower motor. Before it was destroyed, the insurer's expert photographed the vehicle and the surrounding area. Although the insurer gave the manufacturer's expert the photographs, that expert opined that he could not determine the origin and cause of the fire without examining the entire vehicle and possibly the area where the vehicle had been parked.

The trial court granted the manufacturer's sanctions motion and excluded the insurer's expert testimony. Thereafter, it granted summary judgment because without the expert testimony, the insurer could not prove its case. In affirming the trial court's decision, the court of appeals rejected the insurer's contention that its photographs provided the manufacturer with an adequate substitute for the destroyed evidence, explaining that the physical evidence itself is far more probative under these circumstances:

> The physical object itself in the precise condition immediately after an accident may be far more instructive and persuasive to a jury than oral or photograph descriptions.[78]

As another example, in *Dillon v. Nissan Motor Company, Ltd.,*[79] the district court imposed sanctions barring testimony by the expert that inspected the allegedly defective vehicle and excluding any evi-

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77. No. 940T017, 1994 Ohio App. LEXIS 4960 (Ohio Ct. App. Oct. 28, 1994).

78. *Id.* at *13–14 (quoting American Family Ins. Co. v. Village Pontiac-GMC, Inc., 585 N.E.2d 1115, 1118 (Ill. App. Ct. 1992)); *see also* State Farm Fire & Cas. Co. v. Frigidaire, 146 F.R.D. 160, 163 (N.D. Ill. 1992).

79. 986 F.2d 263 (8th Cir. 1993).

dence derived from his inspection, including photographs of the vehicle. In rejecting the photographic evidence, the district court found the photographs were not comprehensive, were blurred, and failed to document the condition of crucial areas of the allegedly defectively designed vehicle.[80]

Although there may be occasions when discarding evidence is warranted, before deciding to discard evidence, consider the remarks a court made after an expert discarded evidence and then tried to substitute photographs and oral testimony for the missing evidence:

> Plaintiffs were the only individuals with first-hand knowledge of the physical evidence which is far more probative under these circumstances in determining whether the [product] caused the fire than photographs and two wires taken from [the product]. . . . As a matter of sound public policy, an expert should not be permitted intentionally or negligently to destroy such evidence and then substitute his or her own description of it.[81]

These cases teach that a party who decides to discard relevant evidence because it is impractical or impossible to retain will bear the burden of showing that it did all that it could to provide a prospective adverse party with an opportunity to inspect the evidence before it elected to "preserve" that evidentiary material by photographs or other secondary means. At a minimum, a party faced with that issue should provide a potentially adverse party an opportunity for inspection or review before relevant evidence is destroyed.[82]

THE OBLIGATION TO SUPERVISE PRESERVATION

Courts increasingly have indicated that counsel must take affirmative steps to ensure their litigation clients comply with the duty to preserve

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80. *Id.* at 268.

81. *State Farm Fire & Cas. Co.*, 146 F.R.D. at 163.

82. *Baliotis*, 870 F. Supp. at 1290-91. *See also* Kraft Reinsurance Ireland, Ltd. v. Pallet Acquisitions, LLC, 843 F. Supp. 2d 1318 (N.D. Ga. 2011) (finding an insurance company's failure to take any measures to preserve any samples of the evidence or provide a pallet company the opportunity to inspect contaminated shipping containers before they were incinerated a breach of the carrier's duty to preserve evidence).

evidence.[83] The required steps and limits of counsel's or of a litigant's duty are not always clear.[84]

Some courts have placed the obligation to preserve evidence on the "party," not on counsel. These courts have observed that "[i]f a party has taken reasonable steps to preserve evidence, its attorney's alleged failures to take additional steps should be of no consequence."[85]

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83. *See, e.g.,* Day v. LSI Corp., No. CIV 11-186-TUC-CKJ, 2012 U.S. Dist. LEXIS 180319 (Dec. 20, 2012) (sanctioning defendant after determining in-house counsel's efforts to supervise preservation and production of relevant evidence so inadequate counsel acted "willfully"); Play Visions, Inc. v. Dollar Tree Stores, Inc., No. C09-1769 MJP, 2011 U.S. Dist. LEXIS 61636 (W.D. Wash. June 8, 2011) (requiring counsel to "make reasonable inquiry into whether his client's discovery responses are adequate and to familiarize himself with the documents in the client's possession"); GFI Acquisition, LLC v. Am. Feder. Title Corp. (*In re* A&M Fla. Props. II, LLC), No. 09-15173, 2010 Bankr. LEXIS 1217 (S.D.N.Y. Apr. 7, 2010) (explaining that counsel must take affirmative steps to identify all sources of information and to "become fully familiar with [the] client's document retention policies . . . and data retention architecture."); Wm. A. Gross Constr. Assoc., Inc. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134 (S.D.N.Y. 2009) (stating "[i]t is time that the Bar—even those lawyers who did not come of age in the computer era—understand" the preservation and production of electronically stored information").

84. Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135, 162 (2d Cir. 2012) (rejecting "the notion that a failure to institute a 'litigation hold constitutes gross negligence *per se*'. . . [and] agree[ing] that 'the better approach is to consider [the failure to adopt good preservation practices] as one factor' in the determination of whether discovery sanctions should issue"); *contra Pension Comm.*, 685 F. Supp. 2d at 464–65 (holding that the failure to issue a litigation hold is gross negligence per se); *cf.* Steuben Foods, Inc. v. Country Gourmet Foods, LLC, No. 08-cv-561S(F), 2011 U.S. Dist. LEXIS 43145 (W.D.N.Y. Apr. 21, 2011) (finding an oral litigation hold was adequate given the company's relative size).

85. Centrifugal Force, Inc. v. Softnet Commun., Inc., 783 F. Supp. 2d 736, 742 (S.D.N.Y. 2011) (citing *Fujitsu Ltd.*, 247 F.3d at 436); *Kronisch*, 150 F.3d at 126. Some recent district court decisions focus on reasonableness as the key to determining whether a party breached its duty to preserve evidence, but these courts require more than good intentions. A party's intentions must be followed up with specific actions that are calculated to ensure preservation of relevant materials. *See, e.g.,* Carrillo v. Schneider Logistics, Inc., No. CV 11-8557-CAS (DTB), 2012 U.S. Dist. LEXIS 146903 (D. Cal. Oct. 5, 2012) (concluding that defendant failed to take adequate steps to preserve relevant documents, in part because the litigation hold memorandum it issued failed to instruct employees to retain an entire category of relevant electronic documents); Banks v. Enova Fin., No. 10 C 4060, 2012 U.S. Dist. LEXIS 173649, *10–11 (N.D. Ill. July 10, 2012) ("A party fulfills its duty to preserve evidence if it acts reasonably.") (quoting *Jones,* 2010 U.S. Dist. LEXIS

Other courts have emphasized that counsel has a key role, explaining that "once on notice, the obligation to preserve evidence runs first to counsel, who then had a duty to advise and explain to the client its obligations to retain pertinent documents that may be relevant to the litigation."[86] The *Zubulake* decision, for instance, underscored certain duties of counsel to parties to litigation "designed to promote continued preservation of potentially relevant evidence in the typical case," including:

- Issuing a legal or litigation hold letter to the company officials at the outset of litigation or whenever it is reasonably anticipated;
- Communicating directly with "key players," *i.e.,* the individuals identified in a party's initial disclosures, about the need to preserve evidence in their possession;
- Periodically re-issuing litigation hold letters to employees and reminding key employees that the preservation duty still exists; and
- Instructing all employees to produce electronic copies of their relevant active files and make sure all back-up media is identified and stored in a safe place.[87]

51312, *6); Danis v. USN Communs., Inc., No. 98 C 7482, 2000 U.S. Dist. LEXIS 16900, *38 (N.D. Ill. Oct. 20, 2000) ("a party's intentions must be followed up with concrete actions reasonably calculated to ensure that relevant materials are preserved").

86. Telecom Int'l Am., Ltd. v. AT&T Corp., 189 F.R.D. 76, 81 (S.D.N.Y. 1999); Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432 (S.D.N.Y. 2004); Huntsville Golf Dev., Inc. v. Brindley Constr. Co., No. 1:08-00006, 2011 U.S. Dist. LEXIS 86445 (M.D. Tenn. Aug. 4, 2011). *See, e.g.,* E.I. du Pont de Nemours & Co. v. Kolon Indus., 803 F. Supp. 2d 469, 501 (E.D. Va. 2011) (noting that even though defendant and its counsel issued two litigation hold notices within a week of learning of plaintiff's complaint, the company failed to provide sufficient instruction to employees about the importance of preserving relevant files and email items and the notice it issued was insufficient because it was sent only to upper-level employees).

87. *Zubulake*, 229 F.R.D. 422. *See also* Roland Goss, *Hot Issues in Electronic Discovery: Information Retention Programs and Preservation,* 42 TORT TRIAL & INS. PRAC. L.J. 797, 816 (2007) (listing steps courts have mentioned that could have been taken to institute a legal hold and citing cases); *The Sedona Conference Commentary on Legal Holds, supra* note 2, at 267 (discussing preservation obligations and legal holds); Robert E. Shapiro, *Advance Sheet: Conclusion Assumed,* 36

Another obligation courts impose on counsel is understanding a client's data storage and retrieval systems, since remaining ignorant to the workings of those systems and practices can result in unanticipated consequences for the client.[88] Not only is a complete understanding of a client's record and data storage system essential to satisfy Rule 26 disclosure obligations, it is critical to responding to arguments regarding the burdens and costs associated with complying with discovery requests.[89]

GTFM, Inc. v. Wal-Mart Stores, Inc.,[90] is illustrative. There, plaintiffs sought electronic data regarding local sales. Without consulting with a representative from the information technology group, defense counsel stated the data was no longer available and producing it would be unduly burdensome because there was no centralized computer capacity to track it.[91] A year later, plaintiffs deposed a vice-president from the company's management information systems group who testified the sales data could be tracked for up to one year. That meant the information had been available at the time of plaintiffs' initial request. But because of the delay caused by counsel's misrepresentation, it was no longer available.

The *GTFM* court criticized defense counsel for failure to consult the appropriate personnel observing "whether or not defendant's counsel intentionally misled plaintiffs, counsel's inquiries about defendants' computer capacity were certainly deficient. . . . As a vice president in [defendant's management information systems] department, she was an obvious person with whom defendant's counsel should have re-

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LITIG. 59 (Spring 2010) (criticizing rulemaking by a single court and suggesting that rulemaking of this sort is better handled by the Supreme Court and the Rules Advisory Committee).

88. For example, failure to accurately represent these issues can result in courts allowing on-site inspections of computer systems or the imposition of sanctions. *See*, *e.g.*, *Simon Property Group*, 194 F.R.D. 639 (requiring inspection of hard drive after finding "some troubling discrepancies" in discovery responses); Playboy Enters., Inc. v. Welles, 60 F. Supp. 2d 1050 (S.D. Cal. 1999) (granting access where party testified that relevant emails had been deleted and could not be restored).

89. Virginia Llewellyn, *Planning with Clients for Effective Electronic Discovery*, THE PRAC. LITIGATOR, 7, 10 (July 2003) ("The best electronic discovery response requires work well in advance of litigation.").

90. No. 98 Civ. 7724, 2000 U.S. Dist. LEXIS 3804 (S.D.N.Y. Mar. 30, 2000).

91. *Id.* at *5.

viewed the computer capabilities."[92] As a result, the court ordered an on-site inspection at the company's expense and required the company to pay over $100,000 toward plaintiffs' legal fees.

These cases suggest that counsel should take affirmative steps to ensure their litigation clients take reasonable steps to preserve evidence once litigation is reasonably anticipated, keeping in mind that they may otherwise have to defend a failure to preserve evidence evaluated with the benefit of hindsight.[93]

OBLIGATIONS TO PRESERVE EVIDENCE IN THE POSSESSION OF THIRD PARTIES

As a general rule, there is no duty to retain evidence to aid in future legal action against a third party[94] "[a]bsent some special relationship or duty arising by reason of an agreement, contract, statute, or other special circumstance."[95] That said, a duty to preserve evidence may extend beyond the parties themselves and include evidence entrusted to their agents, experts, insurers, attorneys, and the like. "Parties to litigation are deemed to be in 'control' of information to which they have access or the legal right to obtain, even if it is actually in the possession, custody or control of a third party."[96]

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92. *Id.* at *6.

93. *See* Bozic v. City of Washington, No. 2:11-cv-674, 2012 U.S. Dist. LEXIS 172316 (W.D. Pa. Dec. 5, 2012).

94. Wilson v. Beloit Corp., 921 F.2d 765 (8th Cir. 1990) (explaining that absent special relationship or duty, no duty exists to preserve possible evidence to aid in future legal action against third party).

95. Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177, 1179 (Kan. 1987).

96. Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494, 514 (D. Md. 2009) (addressing whether the duty to preserve extended to the additional third-party consultants retained by the defendant, and indicating that even if a party could not preserve because he lacked ownership or control of the potential evidence, "he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence"); *see also In re* Flag Telecom Holdings, Ltd. Sec. Litig., 236 F.R.D. 177, 180 (S.D.N.Y. 2006) ("The test for the production of documents is control, not location . . . . Documents may be within the control of the party even if they are located abroad."); Moreno v. Autozone, Inc., No. C-05-4432 CRB, 2008 WL 906510, at *1 (N.D. Cal. Apr. 1, 2008) ("Control is generally defined as the legal right to obtain the documents on demand and at times has been construed more broadly to include the practical ability to obtain the documents sought upon

In such instances, a party may be held liable for spoliation committed by a third party to whom it entrusted the destroyed evidence. For example, in *Jordan F. Miller Corporation v. Mid-Continent Aircraft Service, Inc.,*[97] a buyer filed suit against the sellers of a jet aircraft. Shortly after purchase, the aircraft landing gear collapsed and severely damaged the aircraft. The buyer hired a company to repair the aircraft. Thereafter, the buyer filed suit against the sellers, and the buyer's insurer intervened.

The sellers served discovery requests, including a request that all of the aircraft component parts be made available for inspection or testing. Ultimately, during the deposition of the president of the aircraft repair company, the sellers learned for the first time that all but one of the aircraft's component parts had been destroyed.

The sellers filed a motion to dismiss based on spoliation of evidence. The buyers argued that only the insurer had a duty to preserve the landing gear, and that he had no such duty once it was in the possession of the repair company. The court rejected this argument, explaining that the buyer remained responsible for preserving the aircraft parts:

> [The buyer] knew that the damaged landing gear was relevant to his claims against [the sellers] and he, therefore, had a duty to preserve the evidence. His argument that only [the repair company] had a duty to preserve the landing gear is misguided. [The repair company] did not enter the suit as a party until

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demand.") (citing Klesch & Co. v. Liberty Media Corp., 217 F.R.D. 517, 519 (D. Colo. 2003)); Golden Trade, S.r.L. v. Lee Apparel Co., 143 F.R.D. 514, 525 (S.D.N.Y. 1992) (observing that courts have "interpreted Rule 34 [of the Federal Rules of Civil Procedure] to require production if the party has the practical ability to obtain the documents from another, irrespective of his legal entitlement to the documents."). *See* Joseph A. Nicholson, *Plus Ultra: Third-Party Preservation in a Cloud Computing Paradigm,* 8 HASTINGS BUS. L.J. 191, 218 (Winter 2012) (citing *Victor Stanley*, 269 F.R.D. at 523–24) (explaining "cloud computing" and concluding that it is "poised to create a future" where the custodians of electronically stored information are non-parties to whom the duty to preserve "as presently conceived does not effectively attach.").

97. No. 97-5089, 1998 U.S. App. LEXIS 2739 (10th Cir. Feb. 20, 1998). *See also* Pirrello v. Gateway Marina, No. CV 2008-1798 (KAM) (MDG), 2011 U.S. Dist. LEXIS 113632 (E.D.N.Y. 2011) (finding a duty to preserve boat after accident and noting "courts take a broad view of Rule 34(a) . . . in extending the duty to anyone who has the practical ability to obtain evidence.").

> almost a year after [the buyer] filed his complaint. Moreover, that [the repair company] may also have had a duty to preserve the evidence did not absolve [the buyer] of his duty to preserve evidence that was relevant to his own claims against [the seller].[98]

The court held that the buyer's conduct provided a basis for sanctions and, because the seller's experts testified they could not render an opinion without the missing evidence, the trial court appropriately dismissed the complaint.[99]

The third-party destruction of evidence issue also arises when relevant evidence has been turned over by a party to its insurer or expert retained to examine the evidence and to render an opinion. If the insurer or expert loses the evidence or subjects it to destructive testing, then the party that relinquished the evidence may be held liable for its loss. [100]

Even where evidence is simply left in the possession of a party's insurer, if it is lost or destroyed, courts typically hold that the party entrusting the evidence to the insurer retains the duty to preserve it. For example, in *Thompson v. Owensby*,[101] the court held that the relationship between the party and an insurance company in possession of evidence favors a finding that the party had a duty to preserve evidence.

Courts also have found that when the party sought to be held liable for spoliation could have informed the party in possession that a lawsuit existed and requested the evidence be preserved, that party may be held liable for spoliation.[102]

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98. *Id.* at *18–19.

99. *Id.* at *23.

100. *See, e.g.,* Trull v. Volkswagen of Am., Inc., 187 F.3d 88 (1st Cir. 1999) (upholding exclusion of post-accident condition of vehicle because it was discarded by the insurance company and unavailable for inspection).

101. 704 N.E.2d 134 (Ind. Ct. App. 1998). *See also* Coleman Constr., Inc. v. Diamond State Ins. Co., CV 05-148-M-JCL, 2008 U.S. Dist. LEXIS 44735 (D. Mont. June 5, 2008) (noting an insurer's relationship to a third-party claimant arises by virtue of the insurer's obligations to investigate and evaluate claims made by an insured, and "the insurer's possession or control over evidence relative to the insured's claims," which relationship "could warrant recognition of a duty [to preserve evidence] if the carrier knew or should have known of the likelihood of litigation and of the claimant's need for the evidence in the litigation.").

102. *Sanchez*, No. 98 Civ. 0494, 1999 U.S. Dist. LEXIS 12975.

A somewhat related situation occurs when a party claims it has been prejudiced by the loss or destruction of evidence and seeks to hold a third party liable for its loss. As discussed in Chapter Four, courts have taken conflicting positions on the issue of third-party liability for a spoliation tort. For example, in *Holmes v. Amerex Rent-a-Car*,[103] the District of Columbia Court of Appeals considered whether, under District of Columbia law, a plaintiff may recover against a defendant who has negligently or recklessly destroyed, or allowed to be destroyed, evidence that would have assisted the plaintiff in pursuing a claim against a third party. The court held that such a claim is cognizable, provided, however, that the party seeking to assert that claim can establish the existence of a special relationship that would create a duty to preserve the evidence for use in future litigation.[104]

In contrast, the California Supreme Court considered a similar issue in *Temple Community Hospital v. Superior Court of Los Angeles County*,[105] in which it determined whether a party may bring a tort claim against a person who intentionally destroys evidence that would be relevant in an underlying lawsuit to which the spoliator is not a party. The court held that no cause of action exists against a third party for spoliation that affects the existing lawsuit because of concerns over "endless litigation."[106]

Practice Tips

- Err on the side of caution, particularly when it is not inordinately expensive, cumbersome, or disruptive to one's business, when deciding whether to preserve evidence. This requires the parties and counsel to identify the time period, subject matter and locations of potentially relevant information.
- Provide litigants or prospective litigants with a reasonable opportunity to inspect and test the evidence before it is destroyed if evidence cannot reasonably be retained. Keep

103. 710 A.2d 846 (D.C. App. 1998).
104. *Id.* at 849.
105. 976 P.2d 223 (Cal. 1999); *cf. Stimson*, 993 P.2d at 16–17 (recognizing a cause of action for third-party spoliation).
106. *Temple Community*, 976 P.2d at 229.

a written record of any notice and opportunity to inspect given to a potentially adverse party.

- Make a photographic or videotape record of the evidence, if feasible, if any physical evidence must be discarded.
- Be sure no court order or discovery request requires preservation of any data, document, or thing before discarding potentially relevant evidence.
- Instruct third parties, including experts or insurers, not to alter, dispose of or destroy any data, documents or things turned over to them for storage, examination, or any other purpose without your express consent and confirm that instruction in writing.
- Bear in mind that when considering whether a particular piece of documentary or physical evidence should be retained as relevant to potential litigation, the decision may be reviewed by a court that has the benefit of hindsight.
- Promptly determine whether and to what extent an organization should suspend its routine document retention programs once litigation is reasonably anticipated or foreseeable.
- Take an active role in document preservation efforts, including issuing a legal or litigation hold, and following up with company officials and in-house counsel throughout the litigation to ensure relevant records continue to be preserved.
- Consider whether to retain a consultant or vendor to assist with preservation and/or production of electronically stored information.
- Designate a person, *e.g.,* a client records manager or information technology manager, to be responsible for locating, segregating and/or preserving hard copy and electronically stored information.
- Make discovery requests for documents, electronically stored information, and tangible things promptly.
- Monitor your client's preservation practices by asking questions. Pay attention to warning signs that a client has

not adequately searched for records, and be cautious about blindly accepting client assurances.

- Make sure that any retained expert keeps every document he or she writes or receives, even though those records may not be subject to discovery, and include that instruction in correspondence retaining the expert.
- Keep contemporaneous records of what data has been preserved, collected and produced, when legal or litigation hold notices were sent, and the identity of those who can verify the timeliness and completeness of these efforts.
- Be mindful of ethical obligations under the applicable rules or codes of professional responsibility when counseling clients regarding spoliation.