PROSECUTING AND DEFENDING AGAINST A CLAIM OF SPOLIATION: HIGH STAKES DISCOVERY TACTICS IN THE ELECTRONIC AGE

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PROSECUTING AND DEFENDING AGAINST A CLAIM OF SPOILATION:
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I. SPOILATION DEFINED

Spoliation derives from the Latin word spoliare, meaning to plunder, to pillage, to despoil, or to rob. Its modern legal meaning originates from a Roman rule of conduct, Contra spoliatorem omnia praesumuntur, which translates loosely as "let everything be presumed against the spoiler [of evidence]."¹

As it turns out, however, in the modern legal landscape not all jurisdictions agree on precisely what constitutes spoliation, making it difficult to come up with a universal definition. Most jurisdictions, for example, include the concealment of evidence in their definition of spoliation.² At least one jurisdiction, however, has expressly declined to extend the definition of spoliation to the concealment of evidence.³ Generally speaking, however, spoliation includes any type of conduct that involves the destruction or alteration of evidence, or the failure to preserve evidence for another's use in reasonably foreseeable litigation.

For purposes of this paper and our workshop, "spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."⁴ While this definition is a good starting point, it does not fully explain what a successful claim of spoliation can portend nor does it identify the frightening consequences that may accompany such a claim.

A. When Is Spoliation Found

Wrapped up in the definition of spoliation are three essential elements: (1) reasonably foreseeable litigation; (2) destruction, alteration, or loss (and in some jurisdictions, concealment) of relevant evidence; and (3) prejudice, although not always required, to the other party's case.

The question of reasonable foreseeability raises two questions: (1) when does a duty to preserve evidence arise; and (2) who has a duty to preserve it? The destruction, alteration, or loss of evidence element raises two questions as well: (1) what evidence must be preserved; and (2) if evidence is not preserved, what level of culpability results

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⁴ West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999).
in spoliation sanctions? The final element poses a straightforward question of whether the loss of evidence prejudices the non-spoliating party.

1. **When Is Litigation Reasonably Foreseeable?**

Because the duty to preserve evidence arises when litigation becomes reasonably foreseeable, practitioners must understand what that means. “[A] litigant has a duty to preserve evidence that it ‘knows, or reasonably should know, will likely be requested in reasonably foreseeable litigation.’”\(^5\) The standard for determining when litigation is reasonably foreseeable, like the definition of spoliation, is not uniform from jurisdiction to jurisdiction. Moreover, when litigation is reasonably foreseeable is going to depend largely on the facts and circumstances of each case: “When 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.”\(^6\)

The majority of courts hold that a duty to preserve evidence as a result of “reasonably foreseeable litigation” can arise prior to litigation, including when a non-party or defendant receives pre-litigation communications. This timing, however, can be ambiguous because the duty to preserve relevant information attaches at the time litigation is “reasonably anticipated,”\(^7\) which provides little guidance. It is a fact intensive analysis, and the court in *Zubulake v. UBS Warburg LLC* held that the duty to preserve evidence in the pre-litigation contexts arises “when a party should have known that the evidence may be relevant to future litigation.”\(^8\) That court, however, noted that this inquiry is going to be specific to the facts of each individual case.\(^9\)

The duty to preserve is not triggered from the mere existence of a potential claim or the distant possibility of litigation.\(^10\) Litigation, however, need not be “imminent” or “probable” to trigger the duty to preserve.\(^11\) Such a flexible standard creates a substantial degree of uncertainty for litigants or potential litigants.

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\(^6\) *Micron Technology, Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011) (citing *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001)).


\(^9\) *Id.*

\(^10\) *Id.* at 216.

\(^11\) *Micron Tech., Inc.*, 645 F.3d at 1320 (citing *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681-82 (7th Cir. 2008)).

\(^12\) *Id.*
A demand letter sent to a party, for example, may establish a duty to preserve relevant evidence. In Wal-Mart Stores, Inc. v. Lee, the court held:

Although [Lee] had not yet filed suit at the time the videotape was destroyed, Wal-Mart was aware, or should have been aware, that [she] was contemplating a lawsuit. [Lee’s] former counsel had written to Wal-Mart’s CEO on May 3, 2001 about the shooting in an attempt to settle and “avoid costly litigation.” Wal-Mart apparently chose to treat the letter as a request for payment of medical expenses and subsequently denied liability for such expenses. Despite Wal-Mart’s apparent “misinterpretation” of the May 3 letter, it is clear that [Lee] was contemplating litigation. Wal-Mart destroyed or failed to preserve the videotape, which would have been evidence for the contemplated litigation.\(^\text{13}\)

The decision in Wal-Mart Stores, Inc. shows that a demand letter expressly seeking to “avoid costly litigation” should put a party on notice of “reasonably foreseeable litigation,” or, as the court phrased it in this case, “contemplated litigation.”

A demand letter, however, may not always establish a duty to preserve evidence because such a demand letter may not establish “reasonably foreseeable litigation.” In Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc., for example, the court held that a duty to preserve relevant documents requires more than a mere possibility of litigation and a demand letter that sought to resolve a dispute short of litigation did not trigger a duty to preserve.\(^\text{14}\) The attorney for Cache La Poudre wrote a letter to Land O’Lakes’ general counsel to put Land O’Lakes on notice of Cache La Poudre’s trademark rights and to determine whether the situation involving a trademark dispute could be resolved without litigation.\(^\text{15}\) Thus, rather than threatening imminent litigation, Cache La Poudre’s letter implied that Cache La Poudre preferred to explore a negotiated resolution.\(^\text{16}\)

While the court held that a demand letter alone may be sufficient to trigger an obligation to preserve evidence in some cases, such as a letter evidencing an “unequivocal notice of impending litigation,”\(^\text{17}\) the letter from Cache La Poudre’s attorney, was too equivocal regarding imminent litigation to trigger the duty to preserve.\(^\text{18}\) Because the focus of the letter was on seeking to resolve the dispute without litigation,\(^\text{19}\)

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\(^{14}\) 244 F.R.D. 614, 623, 68 Fed. R. Serv. 3d 1181 (D. Colo. 2007).

\(^{15}\) Id. at 622.

\(^{16}\) Id.

\(^{17}\) Id. at 621.

\(^{18}\) Id. at 623.

\(^{19}\) Id. at 622 (“Rather than threatening impending litigation, Ms. Anderson-Siler’s June 5th letter implied that her client preferred and was willing to explore a negotiated resolution.”).
the court held that it did not trigger a duty to preserve evidence because litigation was not “reasonably foreseeable.”

The Cache La Poudre decision is troubling to the extent it may force parties to take more aggressive tones in initial demand letters in order to ensure the recipient preserves relevant evidence. The court specifically noted that the letter “implied” that the party writing the letter wanted to explore a possible negotiated resolution, and failed to “threaten[] imminent litigation.”

The following passage from the letter, however, expressly mentions and implies the possibility of litigation:

[The purpose of this letter] is to clearly put [Land O'Lakes] on notice of our client's trademark rights and clearly establish the opportunities we have given Land O'Lakes to avoid exposure. The second purpose of this letter is to determine whether this situation can be resolved without litigation and media exposure. We think you will agree that the company's interests are best served by trying to resolve this unfortunate and difficult situation.

A party reading this case, however, should not rely on it and assume a demand letter seeking negotiations does not trigger a duty to preserve. Given the significant spoliation sanctions potentially available, a party relies on its interpretation of a demand letter at its own risk. Moreover, absent a duty to preserve, a party does not have carte blanche to destroy documents, and a court would likely look unfavorably upon deviations from normal retention practices in the face of a demand letter, even if the demand was equivocal.

On the other hand, counsel sending demand letters on behalf of a client might consider taking an aggressive tone and specifically mentioning litigation in order to avoid the possibility that the receiving party continues its document retention/destruction policy and destroys relevant evidence. Also, counsel sending demand letters should consider including a section at the end of the letter, demanding that the recipient take immediate steps to preserve relevant evidence. This would allow for the sending of demand letters that do not threaten imminent litigation, but still trigger a duty to preserve:

It is clear that defendant had a duty to preserve relevant evidence that arose no later than June 26, 2006, when plaintiff’s counsel sent the letter to defendant requesting the preservation of relevant evidence, including electronic documents. At that time, although litigation had not yet begun, defendant reasonably should have known that the evidence described in the letter "may be relevant to anticipated litigation.”

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20 Id.

21 Id.

Of course, this may not always be sufficient, but it at least weighs in favor of finding a duty to preserve.

An even more aggressive approach may be to enclose an acknowledgement with a demand letter to be signed by the receiving party that the receiving party will comply with its obligation to preserve relevant evidence. This puts the burden on the receiving party to: (a) initiate a litigation hold to preserve relevant evidence; or (b) disregard the acknowledgment, allowing the sending party to use the lack of an acknowledgement, should litigation ensue, to argue that the receiving party failed to comply with its duty to preserve.

Additionally, demand letters should be specific in the claims alleged. In *Goodman v. Praxair Services, Inc.*, the court held that demand letters asserting specific claims may be sufficient to trigger the duty to preserve. The court distinguished *Cache La Poudre* on the grounds that Goodman’s letter “openly threaten[ed] litigation,” and did more than merely identify a dispute and invite negotiations: it openly threatened litigation by stating that if the sender of the letter was “forced to litigate,” he could receive damages in excess of the amount disputed from the contract. Both the letter in *Goodman* and *Cache La Poudre*, however, mentioned the possibility of litigation and other than an inclusion of damages in the *Goodman* letter, there does not appear to be much to actually distinguish the two letters, showing the difficulty potential litigants face in determining when the duty to preserve is triggered.

In *Asher Associates, LLC v. Baker Hughes Oilfield Operations, Inc.*, where a demand letter asserted specific claims for relief that the party would assert if it initiated legal action to enforce its rights and where it used aggressive terms, such as “significantly damaged,” and where it demanded “immediate payment,” the tenor of the letter triggered a duty to preserve by making litigation reasonably foreseeable.

Some courts have held that litigation is reasonably foreseeable in far more obscure contexts. For example, Toshiba paid billions of dollars in a class action settlement related to a floppy disk error, and class action lawsuits had been filed against Hewlett Packard and Sony based on a similar error. The court in *Philip M. Adams & Associates, LLC v. Dell Inc.* later held that Dell should have been preserving evidence related to floppy disk errors because it was aware of and sensitive to the fact that other companies had been and were being sued for similar errors.

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25 Id.


Finally, in addition to “foreseeable litigation” triggering a duty to preserve, laws and regulations can establish a duty to preserve.28

2. Who Has A Duty To Preserve?

Included within the duty to preserve is the duty to ensure that all persons with relevant evidence are preserving such relevant evidence. Thus, a party under a duty to preserve must identify potential custodians of evidence to determine just who must preserve information.29 An overly cautious approach would be to impose a litigation hold on all of a company’s employees, but this would likely be costly and unnecessary. Counsel for a corporate party under a duty to preserve should meet with the decision makers of that corporation to identify potential custodians of relevant evidence and inform them of their responsibilities to preserve evidence.

Even if there is reasonably foreseeable litigation, however, a duty to preserve may not apply to all possible custodians of documents or electronically stored information that may have been relevant. For example, in E.I. Du Pont De Nemours and Co. v. Kolon Industries, Inc.,30 Kolon moved for spoliation sanctions against Du Pont on the grounds that Du Pont failed to preserve relevant email accounts that Kolon needed “to mount a complete defense” of Du Pont’s misappropriation of trade secrets claims related to Kevlar®.31 The court held that the duty to preserve applied to relevant evidence. Du Pont, however, failed to identify an employee as a potential custodian of relevant evidence because eight months prior to the initial hold order, this employee was transferred to Du Pont’s TYVEK® unit, which had nothing to do with the litigation. While this employee’s email account and electronic documents were not deleted until two years after the litigation hold was initiated, it was not clear that his records were relevant until Kolon issued its second set of interrogatories, after the employee’s email account and electronic documents had been deleted.32 Thus, even when litigation is “reasonably foreseeable” or even pending or imminent, the duty to preserve is limited in the sense that it may not apply to custodians that may have held relevant evidence about which a party is not aware.

The duty to preserve, however, may also apply to evidence held by third parties. The duty to preserve extends to evidence in a party’s “control.”33 In In re NTL, Inc.

28 Byrnie v. Town of Cromwell, 243 F.3d 93, 109, (2d Cir. 2001) (“We agree that, under some circumstances, such a regulation can create the requisite obligation to retain records, even if litigation involving the records is not reasonably foreseeable. For such a duty to attach, however, the party seeking the inference must be a member of the general class of persons that the regulatory agency sought to protect in promulgating the rule.”).

29 Apple Inc. v. Samsung Elecs. Co., Ltd., 888 F. Supp. 2d 976, 998 (N.D. Cal. 2012) (“By failing to do as little as issue a litigation hold notice to any employees for eight months after its preservation duty arose, and by further delaying issuance of litigation hold notices to several key custodians, the Court finds that Apple acted with not just simple negligence but rather conscious disregard of its duty to preserve.”).


31 Id. at *8.

32 Id. at *16.

Securities Litigation, the court held that where a party had a duty to preserve and had the practical ability to obtain documents from a third party, it had the duty to preserve and produce the documents held by the third party.\(^{34}\)

Third parties to litigation may also have an independent duty to preserve relevant evidence. For instance, sanctions have been issued against parties to litigation where their expert witness spoliates evidence. Additionally, third parties may have a duty to preserve relevant evidence, and the failure to do so may subject such third parties to liability. For example, West Virginia recognizes the tort of negligent spoliation by a third party when: (1) there is the existence of a pending or potential civil action; (2) the alleged spoliator had actual knowledge of the pending or potential civil action; (3) a duty to preserve evidence has arisen from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances; (4) there has been spoliation of the evidence; (5) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; and (6) damages resulted from spoliation.\(^{35}\)

Such a duty may also arise for a third party upon receipt of a subpoena, when the third party has knowledge of a pending or potential lawsuit and accepts responsibility for evidence that would be used in the lawsuit,\(^{36}\) or when a specific request has been made to that third party to preserve evidence.\(^{37}\)

Attorneys also play a role in ensuring the duty to preserve is met, when such a duty arises. For example, where outside counsel advised a party on the destruction of evidence after the duty to preserve arose, the crime-fraud exception applied to pierce the attorney-client privilege regarding communications about the spoliated evidence.\(^{38}\) Therefore, attorneys must take care when advising clients on how to handle potentially relevant evidence.

3. What Must Be Preserved When The Duty To Preserve Arises?

The duty to preserve is not so broad as to require a party to preserve any and all documents or electronic files; rather, it is a duty to preserve evidence that may be "relevant to future litigation."\(^{39}\) That said, potentially relevant evidence can include

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\(^{34}\) 244 F.R.D. 179, 195 (S.D. N.Y. 2007).


\(^{38}\) Micron Tech., Inc., 645 F.3d at 1329-1331 (Fed. Cir. 2011).

\(^{39}\) Nutramax Labs., Inc. v. Theodosakis, No. CCB-08-879, 2009 WL 2778388, at *6 (D. Md. June 8, 2009) ("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.") (quoting Broccoli v. Echostar Commc'ns Corp., 229 F.R.D. 506, 510 (D. Md. 2005)).
voluminous material. In the context of electronic evidence, types of electronic data that may be relevant include e-mail, deleted e-mail, metadata, backup files, internet files, voicemail, text messages, instant messages, social media data, and archival tapes. This type of electronic data may not only be found on work computers, but may be stored on servers, employees’ personal computers, smart phones, tablets, thumb drives, and even gaming devices which allow for the storage of electronic data.

Generally, for purposes of determining what evidence must be preserved, evidence is or may be relevant when “a reasonable trier of fact could find that [the evidence] would support [a] claim or defense.” Some courts, however, have concluded that the scope of the duty to preserve is “coextensive with disclosure obligations and available discovery under Rule 26 of the Federal Rules of Civil Procedure,” creating a duty to preserve evidence that is relevant or “reasonably could lead to the discovery of admissible evidence.” Therefore, while a party may not be required to retain every document in its possession, it must 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.”

Whether evidence is “relevant” is not subjective and therefore, parties should not rely on what they believe to be relevant to the complaint when meeting their duty to preserve. “A party cannot destroy documents based solely on its own version of the proper scope of the complaint.” Erring on the side of caution in deciding what is “relevant” evidence is likely the best approach to take given the potentially harsh remedies available to litigants who have suffered prejudice as a result of spoliation.

4. State Of Mind Of Purported Spoliator

The culpability required for imposing sanctions on an alleged spoliator of evidence ranges from negligence to willfulness. For instance, some jurisdictions have refused to apply the spoliation doctrine where evidence was lost only through mere negligence. Court v. Big O Tires, Inc. was a product liability case involving a tire that blew out on the highway. The tire came into the possession of the defendant Big O Tires’ warehouse when the driver with the blown out tire returned it. Because the tire was involved in an accident that caused damage to the vehicle, the tire was set aside at

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the warehouse in a “product liability” category.\textsuperscript{46} Those tires were to remain at the warehouse as potential evidence. This tire was placed about fifty to sixty feet from tires in the scrap category that were to be removed and destroyed.\textsuperscript{47} Through inadvertence, the scrap dealer came to the warehouse and picked up about 500 tires, including the tire at issue in the product liability case. Therefore, it was lost.\textsuperscript{48}

The plaintiff sought an instruction on spoliation that would lead to an inference that the tire was unfavorable to the defendant’s position because it lost and/or destroyed the key piece of evidence in the case. The state district court agreed and issued the following jury instruction: “If you determine that the loss of the tire was deliberately or negligently brought about by the action of defendant Big O Tires, Inc., you may infer that the tire was unfavorable to their position.”\textsuperscript{49} The Idaho Supreme Court, however, held, “The spoliation doctrine is a form of admission by conduct and involves showing ‘intentional destruction of evidence.’”\textsuperscript{50} Thus, the mere negligent loss or destruction of evidence was not sufficient to invoke the spoliation doctrine: “For the loss or destruction of evidence to constitute an admission, the circumstances must indicate that the evidence was lost or destroyed because the party responsible for such loss or destruction did not want the evidence available for use by an adverse party in impending or reasonably foreseeable litigation.”\textsuperscript{51} For that matter, even the intentional obstruction of an item that a party had no reason to believe had any evidentiary significance at the time it was destroyed would not create an issue of spoliation.\textsuperscript{52}

Similarly, the court in \textit{Gentry v. Toyota Motor Corp.}, the Virginia Supreme Court reversed a trial court’s decision to dismiss an action for spoliation of evidence.\textsuperscript{53} In this case, the plaintiff sued Toyota for negligence, breach of implied warranties, and strict liability based on the fact that the plaintiff had lost control of a Toyota pickup truck and suffered significant injuries. The plaintiff’s expert, without authorization or permission, removed the temperature control cable and moved the accelerator pedal rod. Toyota argued that the expert had so damaged the truck that Toyota was deprived of its right to inspect and test the truck and the trial court dismissed the claims on Toyota’s spoliation argument.\textsuperscript{54} The Virginia Supreme Court, however, held that absent bad faith, the

\begin{thebibliography}{99}
\bibitem{46} Id.
\bibitem{47} Id.
\bibitem{48} Id.
\bibitem{49} Id.
\bibitem{50} Id.
\bibitem{51} Id.
\bibitem{52} Id.
\bibitem{54} Id.
\end{thebibliography}
sanction was not permissible\textsuperscript{55} and some Virginia courts have read this to preclude sanctions for spoliation absent a showing of bad faith.\textsuperscript{56}

That said, other courts in Virginia have been willing to extend the spoliation doctrine in a negligence context: “Spoliation ‘encompasses [conduct that is either] . . . intentional or negligent.’”\textsuperscript{57} Thus, in Virginia, a claimant may be entitled to a spoliation inference on proof that the absence of critical evidence resulted from negligent behavior,\textsuperscript{58} even though other Virginia courts have required a showing of bad faith.

One way to read the cases in Virginia in a consistent manner is to read the cases as applying a balancing test, looking at various factors to determine not necessarily what constitutes spoliation, but what sanctions are authorized for spoliation. For example, the \textit{Gentry} court held that the sanction of dismissal was not authorized where there was no bad faith in the destruction of evidence, and in \textit{Dudley v. Cash}, the court refused to strike the pleadings and evidence of a party where there was no bad faith in a party’s repairing and putting back into service a trailer prior to the initiation of litigation. Thus, the courts did not necessarily refuse to find spoliation where evidence was destroyed or lost only by negligence, but perhaps refused to impose overly harsh sanctions against a party involved in merely negligent spoliation. In fact, such a balancing test is often applied to determine what sanction should be imposed on a spoliating party.\textsuperscript{59}

Many jurisdictions are willing to apply the spoliation doctrine in cases of negligence. “In [the Second Circuit], a ‘culpable state of mind’ for purposes of spoliation inference includes ordinary negligence.”\textsuperscript{60} In \textit{Treppel v. Biovail Corp.}, Biovail failed to preserve backup tapes until December 2003, even though it was aware of litigation in May 2003. Because the law in 2003 was not clear that backup tapes containing the documents of key players must be preserved and accessible, the court held that the failure to preserve the backup tapes was “merely negligent.” Nonetheless, it imposed sanctions on Biovail, permitting the plaintiff to undertake, at the spoliating defendants’ expense, a forensic examination of a relevant laptop in an effort to recover additional relevant emails that had been deleted.\textsuperscript{61} The court also held that should additional

\textsuperscript{55} \textit{Id.}


\textsuperscript{58} \textit{Id.} at 476 (citing \textit{Kidder v. Virginia Birth-Related Neurological Injury Compensation Program}, 37 Va. App. 764, 779, n.6, 560 S.E.2d 907, 914, n.6 (Va. Ct. App. 2002)).


\textsuperscript{60} \textit{Treppel v. Biovail Corp.}, 249 F.R.D. 111, 121 (S.D. N.Y. 2008) (citing \textit{Residential Funding Corp. v. DeGeorge Financial Corp.}, 306 F.3d 99, 108 (2d Cir. 2002)).

\textsuperscript{61} \textit{Id.} at 124.
discovery become necessary that would not otherwise have been conducted as a result of the spoliation, the plaintiff could apply for costs. ⁶²

5. Prejudice To The Party Alleging Spoliation

Absent prejudice to the party alleging spoliation, spoliation will not necessarily result in sanctions. "In determining whether sanctions are appropriate, this Court is guided by whether: 1) there was a duty to preserve the documents; 2) the duty was breached; 3) the culpability for the breach rises to a level of willfulness, bad faith, or fault; 4) Plaintiff was prejudiced; and 5) an appropriate sanction can ameliorate the prejudice from the breach."⁶³ In Petcou v. C.H. Robinson Worldwide, Inc., for example, the court refused to impose sanctions for spoliation where the prejudice resulting from lost evidence was “relatively minor given other available evidence.”⁶⁴ Similarly, in Francis v. Woody, the court held that if the alterations to evidence in that case were to be classified as spoliation, there could be no sanctions because the party seeking sanctions “show[ed] no prejudice.”⁶⁵

Prejudice, however, may not always be necessary for the imposition of sanctions. In Miller v. Time-Warner Communications, Inc., the plaintiff willfully and intentionally erased handwritten notes made on various documents, but the defendants were not prejudiced because sufficient traces of the writing remained to enable the parties to determine what words had been erased.⁶⁶ While the defendants did not suffer prejudice, the court still dismissed the plaintiff’s complaint due to spoliation because the plaintiff deliberately attempted to destroy evidence and exacerbated this spoliation by repeatedly perjuring herself on the subject.⁶⁷ Because one of the purposes of spoliation sanctions is to penalize bad conduct, even though the defendants did not suffer prejudice, the court felt that the only sufficient way to punish the plaintiff was to dismiss the plaintiff’s complaint, perhaps the harshest available spoliation sanction.⁶⁸ Thus, while prejudice is often a prerequisite for obtaining spoliation sanctions, that is not always the case.

B. Consequences

Courts may issue sanctions for spoliation pursuant to their inherent authority or Federal Rule of Civil Procedure 37 (and corresponding state procedural rules).⁶⁹ Rule 37, however, only authorizes a court to sanction a party for spoliation when the

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⁶² Id.


⁶⁷ Id. at *2.

⁶⁸ Id. at *3.

⁶⁹ Leon v. IDX Sys. Corp., 464 F.3d 951, 958 (9th Cir. 2006).
spoliation also constitutes a failure to comply with a court order, when a party fails to disclose or supplement pursuant to Rule 26(a) or (e), or when a party fails to admit something later proven to be true. On the other hand, a court’s authority permits it to award sanctions based on its inherent power to manage and ensure the expeditious resolution of cases and is therefore, not limited like Rule 37. While Rule 37 is somewhat limited in scope, the analysis for imposing sanctions under Rule 37 and pursuant to the court’s inherent authority is the same.

Sanctions for spoliation run a wide gamut. When a court decides which sanction to apply to spoliation, that court will likely consider a variety of factors. In Robertet Flavors, Inc. v. Tri-form Construction, Inc., for example, the court held that when confronted with spoliation a variety of factors bear on the appropriate remedy, including: (1) the identity of the spoliator, (2) the manner in which the spoliation occurred, including the reason for and timing of its occurrence; (3) the prejudice to the non-spoliating party, including whether the non-spoliating party bears any responsibility for the loss of the spoliated evidence; and (4) the alternate sources of information that are, or are likely to be, available to the non-spoliator from its own records and personnel, from contemporaneous documentation or recordings made by or on behalf of the spoliator, and from others as a result of the usual and customary business practices. The court in Almarri v. Gates, looked to the following factors to determine what remedial measure or sanction was appropriate for spoliation: (1) the degree or fault or culpability of the party that destroyed the evidence; (2) the degree of prejudice to the opposing party caused by the spoliation; and (3) the availability of sanctions that will avoid substantial unfairness to the opposing party and, if the offending party is seriously at fault, will serve to deter such conduct by others in the future. The court in Cooper v. Toshiba Home Tech Corp., analyzed four factors in deciding the appropriate remedy for spoliation of evidence: (1) The importance of evidence destroyed; (2) the culpability of the offending party; (3) fundamental fairness; and (4) alternative sources of information. Still other courts have set forth goals that courts should look to in determining what sanctions to apply, including to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.

70 FED. R. CIV. P. 37(b) and (c).


72 Id.; Barsoum v. NYC Housing Authority, 202 F.R.D. 396, 399 n.3, 50 F. R. Serv. 3d 26, n.3 (S.D. N.Y. 2001) (“The considerations to be applied in determining whether to impose a sanction are the same whether the court is proceeding under [Rule 37] . . . or under its inherent authority . . . .”).

73 203 N.J. 252, 282, 1 A.3d 658, 676 (N.J. 2010).


75 76 F. Supp. 2d 1269, 1274 (M.D. Ala. 1999).

Therefore, there is no bright line test for determining what sanction or remedy for spoliation should be applied in a given situation. Courts are given broad discretion in determining what remedy to apply, and courts look to a variety of factors in deciding how to exercise that discretion.\textsuperscript{77}

1. \textbf{Monetary Sanctions}

When seeking less harsh sanctions that do not impact the merits of a claim, there may not be a substantial burden on the party alleging spoliation. For example, in \textit{Keithley v. Homestore.com, Inc.},\textsuperscript{78} the court held that where a party negligently lost attachments to several discoverable emails, but there had been no showing of bad faith, the party seeking sanctions was not entitled to harsh sanctions, but found that an award of fees and costs reasonably attributable to the spoliation was sufficient.\textsuperscript{79} While the lost documents were relevant, the party alleging spoliation had received many documents of greater relevance than any that were lost.\textsuperscript{80} Thus, harsher sanctions, such as the adverse inference or dismissal of claims were not warranted because the party still could present a strong case with the evidence it had, and the evidence destroyed was even less relevant than the evidence it was able to obtain.

2. \textbf{Exclusion of Evidence}

The exclusion of evidence sanction may be appropriate when the spoliated evidence is essential to claims or defenses, and the spoliation of such evidence therefore substantially prejudices a party. In \textit{Smothers v. Insurance Restoration Specialist, Inc.}, a plaintiff’s home was damaged in a tornado and sustained water damage.\textsuperscript{81} The plaintiff then began having sinus problems and headaches that required surgery. The plaintiff hired a contractor to repair and clean the home, including replacing wet drywall and insulation to prevent mold growth. The plaintiff’s health problems remained and her doctor suggested that mold might be causing the problems. Because mold continued to be a problem, the plaintiff sued the general contractor and two days after filing the complaint (and six days prior to service), the plaintiff tore down her house.\textsuperscript{82} The district court excluded evidence gathered from the house given the destruction of the house that “significantly prejudiced” the defendant.\textsuperscript{83} Because the plaintiff could not use evidence from the house, the plaintiff could not prove her claim and the court awarded the defendants’ summary judgment, dismissing all of plaintiff’s claims. The Minnesota Court of Appeals upheld the district court’s exclusion of evidence.

\textsuperscript{77} Id. (holding that a district court has broad discretion in crafting proper sanctions for spoliation but that the applicable sanctions should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine).

\textsuperscript{78} No. C-03-04447SI (EDL), 2008 WL 4830752, at *8-10 (N.D. Cal. Nov. 6, 2008).

\textsuperscript{79} Id.

\textsuperscript{80} Id. at *10.


\textsuperscript{82} Id. at *2.

\textsuperscript{83} Id. at *5-6.
sanction, which in turn led to the dismissal of the complaint, because the defendant did not have access to the house in preparation for litigation.\textsuperscript{84}

Therefore, the exclusion of evidence sanction remedy applies where one party had access to the spoliated evidence in preparation for litigation, but the other party was precluded from accessing the evidence due to spoliation, thereby resulting in prejudice. Additionally, the exclusion of evidence can be so drastic that it leaves no genuine issue of material fact where the excluded evidence was the basis for any genuine issue of material fact.

Moreover, the exclusion of evidence sanction often arises as a sanction for spoliation caused by experts, and it may apply in cases of mere negligent spoliation:

The reason for the [exclusion of evidence remedy] is the unfair prejudice that may result from allowing an expert deliberately or negligently to put himself or herself in the position of being the only expert with first-hand knowledge of the physical evidence on which expert opinions as to defects and causation may be grounded.\textsuperscript{85}

Thus, litigants must work closely with experts to ensure that an expert’s actions do not result in a spoliation sanction against the litigant.

Even where there is no intent to prevent the other party’s expert from reviewing relevant evidence, the exclusion of evidence remedy may apply. For example, where one party’s experts had the opportunity to investigate a fire scene and a car that caught fire, but the fire scene (the house and garage) had later been demolished and the car removed and partially corroded, the party’s experts that had the opportunity to review the evidence were excluded from testifying and their photographs were also excluded.\textsuperscript{86} While the evidence may not have been destroyed with the intent to harm the other party’s case, that party would have been substantially prejudiced absent the exclusion of evidence: “Exclusion of evidence is an appropriate sanction when spoliation deprives a party of an opportunity to inspect the evidence.”\textsuperscript{87}

3. Default Judgment Or Dismissal Of Lawsuit

Dismissing a lawsuit is a harsh sanction for spoliation and courts often look to various factors to determine whether dismissal is appropriate. The Third Circuit, for example, lists six factors that a district court must consider before imposing dismissal as a sanction for spoliation: (1) the extent of the party’s personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the

\textsuperscript{84} Id. at *6.


attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.\(^88\) How those factors are weighed is going to depend on the facts and circumstances of each case.

For example, entry of a default judgment, being a very harsh sanction, is often only appropriate where spoliation is due to willfulness, bad faith, or fault, resulting in unfair prejudice to the opposing party that no lesser remedy can sanction.\(^89\) In an employer’s action against former employees for breach of an employment contract, based on their departure to work for a competitor, the court awarded the plaintiff a default judgment due to the employees’ spoliation of evidence, including the intentional destruction of incriminating computer files, e-mails, thumb drives, and CD-ROMs and where the evidence was irreplaceable.\(^90\)

On the other hand, some cases show that the balancing test can still weigh in favor of dismissal even absent bad faith or intentional spoliation. In *King v. American Power Conversion Corp.*,\(^91\) for example, the Fourth Circuit affirmed the trial court’s decision to dismiss the plaintiff’s complaint even though the spoliation that occurred may have only been negligent. While the court noted that dismissal as a sanction for spoliation is usually appropriate only in circumstances of bad faith, a finding of bad faith is not a prerequisite for the dismissal sanction.\(^92\) Therefore, where the defendant would have been forced to mount a defense without the key piece of evidence due to the plaintiff’s negligent failure to ensure that a non-party to the action would preserve the relevant evidence, dismissal of the plaintiff’s claim was appropriate, even though there was no evidence of bad faith.\(^93\) In this case, the prejudice to the defendant weighed so heavily that the harshest of sanctions was appropriate despite the absence of bad faith or willfulness on the part of the spoliating party.

One reason that courts generally shy away from dismissing a claim outright for spoliation is that courts are bound by constitutional limitations. “[T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.”\(^94\) In fact, there may be an argument that courts have overreached on constitutional grounds in dismissing claims as a result of spoliation. For


\(^{91}\) 181 Fed. Appx. 373 (4th Cir. 2006).

\(^{92}\) Id. at 376 (quoting *Silvestri v. General Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001)).

\(^{93}\) Id. at 377-379.

example, in *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, the United States Supreme Court noted that due process was violated where a defendant’s answer is struck for refusing to obey a court order pertinent to the lawsuit, but that due process was not violated where a party’s hindrance of the discovery process justified a presumption that its claims lacked merit. Therefore, a party that has its claims or defenses dismissed on spoliation grounds may find it worthwhile to appeal on due process grounds, unless there is evidence tending to show that the spoliated evidence would have been unfavorable to that party.

4. **Contempt**

Courts occasionally apply contempt sanctions against a spoliating party where there has been a court order to preserve or produce evidence. In *SonoMedica, Inc. v. Mohler*, the court referred the case to the United States Attorney to investigate criminal contempt proceedings because the court found that third party witnesses were guilty of willful spoliation of certain files on their computer that were subject to production under the court’s order to compel. This is a drastic sanction and is rare, but it can result in fine or imprisonment.

Courts may also use civil contempt to punish a spoliating party where there is a court order in place requiring the parties to preserve or produce evidence. In *Koon Chun Hing Kee Soy & Sauce Factory, Ltd. v. Murray Intern. Trading Co., Inc.*, the court ordered the parties to preserve evidence relevant to the action and thus, there was a clear duty to preserve. The defendants destroyed certain relevant evidence and the plaintiff filed a motion for civil contempt. The court noted that civil contempt can be appropriate in certain cases involving spoliation, but it refused to hold the defendants in contempt because any destruction of evidence was merely negligent and did not result in any prejudice to the plaintiffs.

5. **Spoliation Inference (Adverse Inference)**

The spoliation inference is generally permissive and permits a jury to infer that the content of the destroyed or lost information would have been unfavorable to the party that allegedly spoliated evidence. “[A] spoliation inference is not a mandatory presumption, but may be accepted or rejected by the fact-finder.” Some courts, however, have held that where the spoliation is committed willfully in order to harm another party, as opposed to negligently, there should be a rebuttable presumption that the evidence would be unfavorable to the spoliating party if produced. Still other

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95 *Id.* at 209-10.


courts are willing to sanction a spoliating party with a rebuttable presumption that the spoliated evidence would have been harmful to the spoliating party’s case, even where the spoliation occurred only negligently.\textsuperscript{101}

Nonetheless, the spoliation inference generally permits a fact finder to infer that the destroyed or lost evidence would have been unfavorable to the position of the offending party but does not mandate that inference.\textsuperscript{102} Because this sanction is fairly harsh, and relates to the merits of a dispute, courts look to various factors to determine whether such a strong sanction is warranted. For example, in \textit{AMG National Trust Bank}, the defendant deleted computer files and the evidence strongly suggested that the purpose in deleting the files was to prevent their discovery. Nonetheless, the court refused to enter judgment in favor of the plaintiff as a sanction because the extent of the prejudice resulting from the spoliation was not fully known.\textsuperscript{103} Instead, the court ordered the defendant to pay for a forensic examination of his computer to determine what evidence, if any, could be recovered and the court also held that it would give a spoliation inference at a trial after the results of the forensic examination illuminate the amount of prejudice to the plaintiff.\textsuperscript{104}

While the spoliation inference is generally only given in cases where there is a higher degree of culpability than negligence, some courts have been willing to apply it when evidence has been destroyed negligently.\textsuperscript{105} In \textit{MOSAID Technologies, Inc.}, the court noted that while some courts in the Third Circuit have held that for the spoliation inference to apply there must have been intentional or knowing destruction or withholding of evidence as opposed to lost or accidentally destroyed evidence, other courts have used a more flexible approach that does not require a showing of intentional or knowing destruction for the spoliation inference to apply.\textsuperscript{106} Therefore, where Samsung negligently destroyed relevant evidence, the court still applied the spoliation inference because Samsung knew it had a duty to preserve evidence, knew how to institute a litigation hold, and yet failed to institute a litigation hold when the litigation began.\textsuperscript{107}

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\textsuperscript{101} \textit{Young v. McCord}, No. 05-358-KSF, 2007 WL 2407268, at *7 (E.D. Ky. 2007) ("Where, as here, a plaintiff is unable to prove an essential element of her case due to the negligent loss or destruction of evidence by an opposing party, and the proof would otherwise be sufficient to survive a directed verdict, it is proper for the trial court to create a rebuttable presumption that establishes the missing elements of the plaintiff’s case that could only have been proved by the availability of the missing evidence. The burden thus shifts to the defendant-spoliator to rebut the presumption and disprove the inferred element of plaintiff’s prima facie case.") (quoting \textit{Welsh v. U.S.}, 844 F.2d 1239, 1248 (6th Cir. 1988) rev’d on other grounds).


\textsuperscript{103} \textit{Id.}

\textsuperscript{104} \textit{Id.}

\textsuperscript{105} \textit{MOSAID Techs., Inc.}, 348 F. Supp.2d at 338.

\textsuperscript{106} \textit{Id.}

\textsuperscript{107} \textit{Id.} at 338.
\end{flushright}
There is no bright line test or specific set of elements that must be shown for the spoliation inference (or, in some cases, rebuttable presumption) to apply. Parties that reasonably foresee litigation should ensure they take the proper steps to preserve evidence because a defense that the alleged spoliating party was merely negligent may not be sufficient to avoid the harsh spoliation inference, or even the imposition of a rebuttable presumption.\(^{108}\)

6. **Spoliation As An Independent Tort**

Most jurisdictions do not recognize spoliation as an independent tort. Among those who do, however, are Alaska\(^ {109} \) and Ohio.\(^ {110} \) In such jurisdictions, damages, as well as punitive damages, may be awarded where spoliation has occurred.\(^ {111} \) Some of the states that have recognized the independent tort of spoliation, however, refuse to apply the tort of spoliation where the alleged spoliator and the defendant in the underlying action are one and the same, believing that remedies for spoliation exist in the context of the underlying suit.\(^ {112} \) Other courts recognizing an independent tort for spoliation, however, have permitted it to apply against parties to a lawsuit.\(^ {113} \)

Those jurisdictions that have refused to recognize an independent tort for spoliation, include New York,\(^ {114} \) California,\(^ {115} \) and Arkansas.\(^ {116} \) Courts refusing to recognize an independent tort of spoliation have found that when a party to a lawsuit has committed spoliation, there are adequate remedies within the litigation itself, and the tort of negligence provides sufficient remedies to any party harmed by spoliation.\(^ {117} \)

\(^ {108} \) Young, No. 05-358-KSF, 2007 WL 2407268, at *7.


\(^ {111} \) See, e.g., State v. Carpenter, 171 P.3d 41, 65-6 (Alaska 2007).

\(^ {112} \) Green Leaf Nursery, 341 F.3d at 1308, n.16 (citing Jost v. Lakeland Reg'l Med. Ctr., Inc., 844 So.2d 656, 657 (Fla. Ct. App. 2003)).

\(^ {113} \) Davis v. Wal-Mart Stores, Inc., 93 Ohio St. 3d 488, 491 (Ohio 2001) (holding that spoliation claims may be brought against a party to the underlying litigation).


\(^ {115} \) Rosen v. St. Joseph Hospital of Orange County, 193 Cal. App. 4th 453, 459, 122 Cal. Rptr. 3d 87, 91 (Cal. Ct. App. 2011) ("Over a decade ago our Supreme Court prohibited a tort claim for intentional spoliation of evidence against either a party to the underlying litigation . . . or a nonparty to the underlying litigation . . . .") (citing Cedars-Sinai Med. Ctr. v. Superior Court, 18 Cal. 4th 1, 17-8, 74 Cal. Rptr. 2d 248, 258 (Cal. 1998)).


\(^ {117} \) Ortega, 9 N.Y.3d at 79, 876 N.E.2d at 1194-95; see, e.g. Smith v. Atkinson, 771 So.2d 429, 432 (Ala. 2000).
II. SPOLIATION IN THE FRANCHISE CONTEXT

A. Franchise-Specific Issues

Spoliation raises a variety of issues in the franchise context given the amount of documentation involved in selling franchises and in maintaining the franchise relationship. For example, as noted above, statutes and regulations may trigger a duty to preserve. This is particularly relevant where the FTC Franchise Rule and various state statutes and regulations require franchisors to preserve certain documents. For example, 16 C.F.R. § 436.6(h) requires a franchisor to “retain, and make available to the Commission upon request, a sample copy of each materially different version of their disclosure documents for three years after the close of the fiscal year when it was last used.” And 16 C.F.R. § 436.6(i) requires a franchisor to retain, for each completed franchise sale, “a copy of the signed receipt for at least three years.” Similarly, the Minnesota Franchise Act requires a franchisor to keep the receipt acknowledging that the franchisee received a copy of the FDD prior to executing any franchise agreement or paying any consideration for three years.\(^\text{118}\)

Some laws and regulations, however, do not specify for how long certain records must be retained, leaving the franchisor in a state of limbo. Under the New York Franchise Sales Act, for example, if the Department of Law imposes an escrow on the franchisor, the franchisor must deliver a purchase receipt to the franchisee, stating that the funds are to be held in escrow by the franchisor, setting forth details of the escrow account, and a copy of the purchase receipt must be “retained by the franchisor.”\(^\text{119}\) The time a franchisor is required to retain such receipt is not provided for in the regulations.

Another franchise-specific spoliation issue arises when considering the role of franchise brokers. Independent franchise brokers, for example, may make financial performance representations that do not comply with the FTC Franchise Rule. If a franchisee later sues the franchisor for fraud as a result of those representations, the franchisor may have a duty to ensure the broker preserves evidence. In short, a party may have a duty to ensure evidence is not spoliated by its agents.\(^\text{120}\) Whether an independent franchise broker constitutes an agent of a franchisor raises its own questions, but it is certainly something that franchisors must consider when litigation becomes reasonably foreseeable and an independent franchise broker is the custodian of potentially relevant evidence.

Franchise brokers may themselves have a duty to preserve evidence relevant to litigation where the brokers are bound by a special relationship with a party to the litigation, whether by agreement, contract, statute or other special circumstance.\(^\text{121}\) Therefore, franchise brokers may be subject to liability in jurisdictions that recognize an independent spoliation tort against third parties where they destroy, alter, or lose

\(^{118}\) Minn. Stat. § 80C.06, Subd. 5.

\(^{119}\) NYCRR 200.06(e).

\(^{120}\) Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 157 (4th Cir. 1995) (“We conclude that the district court acted within its discretion in permitting the jury to draw an adverse inference if it found that Vodusek or her agents caused destruction or loss of relevant evidence.”).

relevant evidence. And, of course, franchise brokers have a duty to preserve relevant evidence where they themselves are parties to litigation.

As franchisors and franchisees, as well as other businesses, begin storing more information in the “cloud,” or on third party controlled servers, issues will arise as to the extent over which such a business has “possession, custody, or control” over data stored with cloud service providers. In *Gatto v. United Air Lines, Inc.*, a plaintiff, in the midst of litigation, deactivated his Facebook account after finding out that it had been accessed from an unknown New Jersey IP address.\(^{122}\) The defendant requested that the plaintiff immediately reactivate the account, but Facebook had “automatically deleted” the account fourteen days after deactivation. Thus, the contents of the account no longer existed and could not be retrieved.\(^{123}\) The defendant sought an adverse inference on the evidence resulting from the plaintiff’s spoliation. The plaintiff argued that the permanent deletion was accidental and resulted from Facebook’s practices, not his deactivation. The court held that even if the eventual loss of the evidence was negligent, because it was relevant evidence that had been lost, imposition of the spoliation inference was appropriate.\(^{124}\) Thus, while a party to litigation may not completely control data stored in the cloud, that party cannot avoid the obligation and risks of preserving evidence by storing it with a third party cloud storage provider. Franchisors and franchisees should keep this in mind as they begin to move data and information to the cloud.

When litigation becomes reasonably foreseeable, companies may even want to notify the applicable cloud storage company of the duty to preserve so that the storage company is made aware of this duty. Companies storing data in the cloud will also want to make themselves aware of in what form and where the storage company maintains data, whether the storage company can work with the company to segregate and preserve relevant data, and what the cloud provider does to ensure the data is secure. Finally, it should be noted that general counsel should take steps to choose a cloud provider that will meet the storing company’s needs with relative ease when a dispute arises. Cloud providers themselves, as third parties with potentially relevant evidence, may be subject to a duty to preserve themselves, particularly in jurisdictions where there is an independent spoliation tort recognized against third parties.

Other courts have labored to decipher the appropriate sanctions for the negligent, as opposed to intentional, loss of relevant evidence in the franchise context. In *Bass-Davis v. Davis*, a patron was injured at a 7-Eleven convenience store.\(^{125}\) The patron sued the franchisees and requested a copy of the store’s surveillance tape. Pursuant to the franchisor’s corporate policy, the franchisees were required to submit the evidence to the franchisor. The franchisor then sent the tape to the insurance company, where it was lost.\(^{126}\) The court held that the franchisor and its insurer were the

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\(^{123}\) Id.

\(^{124}\) Id. at *4.

\(^{125}\) *Bass-Davis v. Davis*, 122 Nev. at 445, 134 P.3d at 105.

\(^{126}\) Id.
franchisees’ agents with respect to the lost evidence. The court concluded that the lower court abused its discretion by refusing either to give an adverse inference instruction, permitting the jury to infer that the lost evidence would have been unfavorable to the franchisees, or to impose other appropriate sanctions for the lost evidence.

Facebook raises another serious consideration that franchisors and franchisees must take into account. Franchise agreements typically require franchisees to de-identify upon termination or expiration. This often includes a requirement that franchisees cease using the trademarks associated with the franchise system. When a franchisee is terminated, however, there is often a dispute and reasonably foreseeable litigation. If a franchisee has a Facebook page related to the franchise and the franchisee, complying with its post-termination obligations deactivates its Facebook page (or any website for that matter), to what extent does that franchisee risk allegations by the franchisor that he or she spoliated evidence? It puts the franchisee in something of a bind; either risk spoliating evidence by complying with the franchise agreement’s post-termination obligations, or risk liability for failing to comply with post-termination obligations.

For example, assume that franchisee of Restaurant X has a Facebook page dedicated to her franchised business and customers have complained about the cleanliness of the restaurant on that Facebook page. Then assume that the franchisor inspected the restaurant and terminated the franchisee after a notice of default and the franchisee’s failure to cure. If the franchisee complies with her post-termination obligations, she deactivates the Facebook page dedicated to her franchised restaurant, which Facebook deletes as a matter of corporate policy after fourteen days. Has that franchisee spoliated relevant evidence regarding the cleanliness of her restaurant? If she challenges the franchisor’s termination in court, can the franchisor seek sanctions for spoliation, even though she was merely complying with her post-termination obligations? Franchisors may want to begin addressing this in their agreements by requiring that prior to deletion or deactivation of a website or social media webpage, the franchisee ensure that the data on the webpages will be preserved elsewhere.

Some franchise agreements also include requirements that franchisees maintain [for a certain number of years] books, records and accounts, including sales slips, coupons, payroll records, bank statements, sales tax records and returns, etc. Such a contractual provision can be used to establish a duty to preserve, even if there is no reasonably foreseeable litigation on the horizon. This may place a substantial burden on franchisees and can be used by franchisors as yet another weapon in litigation arising from franchise agreements if litigation arises and relevant evidence has been lost or destroyed as part of the franchisee’s retention/destruction policy where the agreement called for a longer retention period.

Another issue related to a franchisee’s duty to retain certain records is the frequent updating of software and POS systems in the franchise industry. If a franchisee

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127 Id. at 453, 134 P.3d at 110.
128 Id. at 453, 134 P.3d at 111.
updates software or a POS system at the franchisor’s demand, what happens to the data on the old software or POS system? Is the franchisee obligated to back it up somewhere and pay for the additional storage costs of all of that electronically stored information? And if so, should the costs of storing electronic data upon a change in software or a POS system be disclosed in the franchise disclosure document? Or generally, if a franchisor requires a franchisee to retain records for three years or five years, should the cost of storing that data be disclosed in the franchise disclosure document?

Some franchisors have begun making it a practice to install security cameras at its franchised locations that the franchisors can monitor directly. Franchisors in this position are likely third parties that, due to special circumstances, have a duty to preserve evidence when aware of litigation or reasonably foreseeable litigation. There does not appear to be case law on point, but franchisors would run the risk of opening themselves up to claims for spoliation of evidence if they delete or lose relevant security tape evidence related to litigation against it and/or its franchisee.

B. Franchise-Specific Spoliation Cases

One particularly interesting franchise-specific spoliation case is *Medicine Shoppe International, Inc. v. Mitsopoulos.* The franchisee’s principals, defendants in the litigation, alleged that they purchased the franchise, relying on the franchisor’s advertisements that included earnings claims that were purportedly supported by the April 15, 1996 UFOC. The franchisee sought production of the April 15, 1996 UFOC, and, initially, the franchisor stated that the request was premature, and it only later stated that it was not in possession of the document. The franchisee argued that the franchisor must have intentionally destroyed or concealed the document because the franchisor did not initially state that it did not possess the requested document. Thus, the franchisee sought spoliation sanctions.

There was no evidence, however, that the franchisor was actually in possession of the requested document when the duty to preserve arose. While the franchisor did have the UFOC used before April 15, 1996, as well as the UFOC dated six months later, the court did not view this as problematic, particularly because the October 1, 1996 UFOC contained information similar to the information supporting the alleged false representations.

Moreover, the franchisee argued that the franchisor was required by the FTC Franchise Rule to maintain records substantiating its earnings claims without setting a time limit as to when the FTC may request the documents. The court, however, noted that the Rule allowed for enforcement actions under section 19 of the FTC Act to be

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132 *Id.*

133 *Id.*
brought within a three year statute of limitations.\textsuperscript{134} Thus, the court held that the franchisor was not obligated to maintain a 1996 UFOC through 2005. Further, even if there had been a duty to preserve the document through 2005, there was no evidence that the franchisor deliberately failed to segregate and preserve the April 15, 1996 UFOC.

Additionally, the court held that because the loss of the evidence was, at best, negligent, and there was no showing the destroyed evidence would have supported the franchisee’s claims, no sanctions were warranted. Because the franchisee was unable to inspect the document, however, the court was willing to preclude the franchisor from using the April 15, 1996 UFOC or any information derived from the document to the extent such information had not otherwise been produced.

Another franchise-specific spoliation case is \textit{Maaco Franchising, Inc. v. Augustin},\textsuperscript{135} where a franchisee allegedly destroyed documents and failed to produce requested documents. In this case, the franchisor sued the former franchisee for violation of its non-compete and to protect its trade secrets. There was substantial proof that the franchisee had destroyed relevant documents. A witness testified that she assisted the franchisee in attempting to hide documents and manuals at her house and that she assisted the franchisee in shredding boxes of documents. Another witness testified that she also shredded documents for the franchisee, including invoices from the franchisee’s former Maaco center, letters, and bank statements. The franchisee even admitted that he directed the shredding of documents at a preliminary injunction hearing.\textsuperscript{136}

Maaco sought dismissal of the franchisee’s counterclaims and affirmative defenses as a result of the spoliation. The court looked to several factors to determine whether the spoliation justified sanctions. While the intentionality of the spoliation favored sanctions, Maaco had not presented evidence as to why the spoliation resulted in prejudice. Additionally, monetary sanctions would have only delayed trial because the franchisee was having trouble finding an attorney as a result of his lack of financial resources. And given the fact that there was no evidence the franchisee’s counterclaims were without merit, dismissal would have been excessive. Thus, the court refused to award sanctions for the franchisee’s spoliation. The court did hold, however, that Maaco could submit evidence at trial to try and justify an adverse inference sanction that would allow the jury to infer that the destroyed evidence would have been unfavorable to the franchisee. In sum, at the time of the motion, Maaco had not yet justified application of the adverse inference sanction because it had not yet shown prejudice.\textsuperscript{137}

In \textit{FLB, LLC, v. 5LINX},\textsuperscript{138} a cellular telephone service franchisee/sub-agent sued its franchisor for fraud, breach of contract, and tortious interference, among other claims,

\textsuperscript{134} \textit{Id.} (citing 15 U.S.C. § 57b).

\textsuperscript{135} \textit{Maaco Franchising, Inc.}, Bus. Franchise Guide (CCH) ¶ 14,460.

\textsuperscript{136} \textit{Id.}

\textsuperscript{137} \textit{Id.}

when the franchisee lost the franchise as a result of the franchisor's breach of its agency agreement with Verizon Wireless. The franchisee sought to strike the franchisor's president's affidavit submitted in support of summary judgment as a sanction for his alleged spoliation of evidence. The franchisee argued that the president spoliated evidence because the president testified that he “assumed” corporate records of the franchisor were either lost or discarded in 2007 because he did not have possession of documents other than those already produced. The court held that this was insufficient to show spoliation.\textsuperscript{139} The franchisee did not specify what documents had been lost or thrown away and the franchisee did not even maintain that it demanded the destroyed or lost documents in discovery. Finally, the franchisee did not state how the discarded documents would have helped its case. Therefore, there was no evidence of spoliation sufficient to justify any type of sanction.\textsuperscript{140}

Similarly, in \textit{Tri-County Motors, Inc. v. American Suzuki Motor Corp.},\textsuperscript{141} an automobile dealership franchise applicant sued an automobile manufacturer for failing to award it a franchise. The prospective franchisee sought spoliation sanctions against the manufacturer on the grounds that the manufacturer deleted emails concerning the dealer's dealership application that would have shown it had no meritorious reason for “reneging on the application.”\textsuperscript{142} The prospective franchisee, however, had no evidence that the emails actually existed or that they were relevant. Thus, parties seeking spoliation sanctions must remember to provide evidence of the existence of the allegedly spoliated evidence and its relevance to litigation.

III. BEST PRACTICES

Document retention practice is obviously a critical area when discussing spoliation. In addition, the scope and timing of demand letters and litigation holds are crucial to consider. Finally, a thorough knowledge of the applicable rules of procedure is also important, as the rules may afford opportunities to careful attorneys in mitigating the chances of facing a spoliation claim.

A. Document Retention Practices

Of course, a discussion of document retention practices goes hand-in-glove with a discussion of spoliation. Document retention policies are important because they provide express, predetermined guidance for not only how long documents should be preserved, but also when a document can and should be destroyed. In fact, given the importance of the “destruction” component to the policies, it may be better to refer to these policies not as “document retention” policies, but as overall document management policies. Indeed, the United States Supreme Court noted in 2005 that, "'Document retention policies,' which are created in part to keep certain information from

\textsuperscript{139} Id.

\textsuperscript{140} Id.

\textsuperscript{141} Bus. Franchise Guide (CCH) ¶ 14,029 (2d Cir. Nov. 24, 2008).

\textsuperscript{142} Id.
getting into the hands of others, including the Government, are common in business.\textsuperscript{143} For a practical example, in \textit{Morris v. Union Pacific R.R.}, the Eight Circuit held that the district court had erred in giving a spoliation instruction as to an audiotape that had been destroyed pursuant to Union Pacific's document retention policy.\textsuperscript{144} The court noted the intent required in that circuit for an adverse inference instruction, and cited the fact that the evidence showed that the company did not selectively preserve evidence from the relevant time while allowing the tape in question to be destroyed pursuant to the policy.\textsuperscript{145} The court concluded that the lack of evidence showing specific intent to destroy the tape, combined with the function of Union Pacific's standard retention policy, warranted no spoliation sanctions.\textsuperscript{146}

Without a document retention policy expressly noting when electronic records should be destroyed, electronic documents may linger on in existence for an indeterminate time. This creates a potential two-fold problem should litigation subsequently ensue. First, having no effective document management policy in place means that the cost of searching for relevant and responsive documents can be much greater. Discovery is already hugely expensive, and failing to put an effective ceiling on the breadth of potentially responsive documents is a missed opportunity that can only increase costs.\textsuperscript{147} Moreover, failing to have an effective document management policy in place may increase the chances that a search for responsive documents inadvertently misses a responsive document that only turns up later in the litigation, which could lead to an entirely different set of issues and potential sanctions.\textsuperscript{148}

Second, without a document management policy, the chances that an older document, such as an email that is only tangentially relevant to the litigation, will be produced are increased.\textsuperscript{149} Such documents may be used out of context by creative

\begin{itemize}
    \item\textsuperscript{143} Arthur Andersen LLP v. United States, 544 U.S. 696, 704 (2005).
    \item\textsuperscript{144} 373 F.3d 896, 902-03 (8th Cir. 2004).
    \item\textsuperscript{145} Id. at 902 ("The director of dispatching for Union Pacific testified at the sanctions hearing that there was no reason not to follow the standard 90-day retention policy in this case.").
    \item\textsuperscript{146} Id. at 901-05.
    \item\textsuperscript{147} A white paper submitted by the Lawyers for Civil Justice, Civil Justice Reform Group, U.S. Chamber Institute for Legal Reform to the Judicial Conference of the United States reported that, among Fortune 200 companies, the average company paid average discovery costs per case of $621,880 to $2,993,567, with companies at the high end reporting $2,354,868 to $9,759,900 per case. Lawyers for Civil Justice, Civil Justice Reform Group, U.S. Chamber Institute for Legal Reform, Litigation Cost Survey of Major Companies 3 (2010), \textit{available at} http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DukeWebsiteMsg.aspx.
    \item\textsuperscript{148} See \textit{In re Delta/AirTran Baggage Fee Antitrust Litig.}, 846 F. Supp. 2d 1335, 1358-59 (N.D. Ga. 2012) (extending the discovery period and awarding sanctions of reasonable attorney’s fees incurred, among other things, when Delta produced additional responsive documents after representing that its production was complete).
\end{itemize}
opposing counsel to potentially great effect. A working document management policy may prevent this undesirable outcome.

The internet is full of sample document management policies and suggestions for creating one.\textsuperscript{150} Perhaps the most prominent work in the area of electronic document management policy has come from the Sedona Conference. The Sedona Guidelines on managing information and records addresses “questions related to the management of electronic information in organizations as a result of business, statutory, regulatory and legal needs.”\textsuperscript{151} The Guidelines emphasize that, “[t]he hallmark of an organization’s information and records management policies should be reasonableness.”\textsuperscript{152} The Guidelines note that technology is ever-evolving, and a critical issue in determining reasonableness will be the information technology in place at the time.\textsuperscript{153} While noting the obvious caveat that, “there must be an explicit recognition that there will be substantial differences in the approach of a 20-employee local operation versus that of a 100,000 employee multinational corporation,” the Sedona Guidelines provide a set of general principles helpful in designing any document retention policy.\textsuperscript{154}

In addition to the Sedona Conference, another good resource is the Practical Law Company. The Practical Law Company maintains a continuously updated document retention policy on its website, www.practicallaw.com.\textsuperscript{155} The draft policy includes a statement of reasons, definitions for different types of document covered by the policy, a provision dealing with “confidential” information, a mandatory compliance provision, a section detailing a “records management” department, a section on how to store and destroy records, a section detailing litigation hold procedures, and a section on audits and employee questions.\textsuperscript{156} A comprehensive document management policy would do well to address each of these areas. As with the Sedona Conference, the Practical Law Company emphasizes that no single policy will be appropriate for all

\begin{itemize}
\item \textsuperscript{151} THE SEDONA CONFERENCE, THE SEDONA GUIDELINES: BEST PRACTICES GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE iii (2d ed. 2007).
\item \textsuperscript{152} \textit{Id.} at 12.
\item \textsuperscript{153} \textit{Id.}
\item \textsuperscript{154} \textit{Id.} at 31.
\item \textsuperscript{155} Practical Law Company, www.practicallaw.com (last visited May 2, 2013).
\end{itemize}
businesses, and that individual company needs, risk profiles, and applicable law will guide document management for specific companies.\footnote{Id. at 12.}

Finally, there are a number of unique aspects in the franchise context that should be factored into a document retention policy.\footnote{For an overview of document management issues from a franchisor’s perspective, see Craig R. Tractenberg & Jonathan M. Redgrave, Document Retention and Destruction: Issues for Franchisors, \url{http://www.nixonpeabody.com/files/document_destruction_July_2010.pdf} (last visited April 28, 2013).} Of course, apart from the franchising aspect, as with any other business, both franchisors and franchisees will have their own internal records that require management. The relationship between the two, however, generates a large number of certain types of records. Most obviously, there are relationship-governing documents, such as the franchise disclosure document, the franchise and/or development agreement, along with ancillary documents such as guarantees, non-compete agreements, etc. There are communications between the franchisor and franchisee, which may be divided into multiple subject areas: communications with the franchisor’s sales team, communications with the franchisor’s operations/support personnel, ongoing legal/relationship communications, etc. And there will likely be multiple other miscellaneous documents and records created or distributed over the course of the relationship, such as franchise evaluation records, ongoing training materials, site evaluations, etc. Every franchise system is different, and each franchisor or franchisee will have its own unique business and technological circumstances that inform a document management policy. Nonetheless, all of the different potential types of documents inherent in franchising should be taken into account when designing a comprehensive document management policy.

\section*{B. Demand Letters}

The importance of the demand letter is perhaps an underappreciated aspect of prosecuting and defending spoliation claims. As discussed above, courts generally hold that a duty 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.”\footnote{\textit{Fujitsu Ltd. v. Federal Express Corp.}, 247 F.3d 423, 436 (2d Cir. 2001); \textit{see also Burlington Northern & Santa Fe R.R. Co. v. Grant}, 505 F.3d 1013, 1032 (10th Cir. 2007) (noting that a spoliation sanction may be appropriate when, “a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent ”); \textit{Zubulake IV}, 220 F.R.D. at 216.} Importantly, “[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.”\footnote{\textit{Micron Tech., Inc.}, 645 F.3d at 1320.} “This standard does not trigger the duty to preserve documents from the mere existence of a potential claim or the distant possibility of litigation.”\footnote{Id.}
An instructive example of the importance of a demand letter is *Trask-Morton v. Motel 6 Operating, L.P.*, from the Seventh Circuit.\(^{162}\) The plaintiff argued that spoliation sanctions were warranted because the defendant, Motel 6, had destroyed electronic evidence, including backup tapes, from the relevant time period.\(^{163}\) The plaintiff brought negligence claims against Motel 6 for allegedly allowing her to be assaulted in her hotel room.\(^{164}\) Motel 6 hired a private investigation firm shortly after the incident, and the firm concluded that there was no evidence to support the plaintiff’s claims.\(^{165}\) The Seventh Circuit held that Motel 6 had no reason to anticipate any litigation until the plaintiff’s attorney sent a demand letter to Motel 6, and consequently was under no duty to preserve any documents until that point in time.\(^{166}\) The court concluded that because the plaintiff had failed to show that any documents were destroyed after the date of the demand letter, sanctions were not appropriate.\(^{167}\)

*Trask-Morton* illustrates the usefulness of putting a potential defendant on notice of claims at an early date in order to trigger the duty to preserve documents. A separate issue to consider is what about the “demand letter” triggers the duty to preserve documents. For example, as described above, in the *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.* case discussed above, the district court held that pre-suit correspondence from the plaintiff’s attorney did not trigger any duty to preserve documents.\(^{168}\) The court stated that, “[t]he undeniable reality is that litigation ‘is an ever-present possibility’ in our society, and stated that “[w]hile a party should not be permitted to destroy potential evidence after receiving unequivocal notice of impending litigation, the duty to preserve relevant documents should require more than a mere possibility of litigation.”\(^{169}\) The court noted that the pre-suit correspondence between the parties did not threaten litigation, but was instead focused on a negotiated resolution of the trademark claims at issue.\(^{170}\) The court noted that the first letter from the plaintiff’s counsel that explicitly mentioned the need to preserve documents did not come until after suit was filed.\(^{171}\) The court concluded that while, “a demand letter alone may be sufficient to trigger an obligation to preserve evidence and support a subsequent motion

\(^{162}\) 534 F.3d 672.

\(^{163}\) Id. at 681.

\(^{164}\) Id. at 673-74.

\(^{165}\) Id. at 681.

\(^{166}\) Id. at 681-82.

\(^{167}\) Id. at 682.

\(^{168}\) See supra notes 14-21 and accompanying text.

\(^{169}\) *Cache La Poudre Feeds, LLC*, 244 F.R.D. at 621 (quoting Nat’l Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992)).

\(^{170}\) Id. at 622.

\(^{171}\) Id. at 622-23.
for spoliation sanctions” the letter must be “more explicit and less equivocal” than the letters from plaintiff’s counsel in that case. Demand letters must therefore not only be timely, they should be specific in invoking the duty to preserve documents. An explicit statement in the letter invoking that duty would be good practice.

A further complication arises with respect to the scope of the demand letter. Cases often evolve over the course of discovery, and the claims a prospective plaintiff may initially be considering may not be the claims that are ultimately tried. Discovery may lead a plaintiff to bring claims based on separate facts, which arose at a different time, than the claims that initiated the lawsuit.

C. Litigation Holds

Courts have recognized that there is no requirement to “preserve every shred of paper, every e-mail or electronic document, and every backup tape,” even when a party reasonably anticipates litigation. Nonetheless, litigation holds have become practically mandatory. In the widely-noted Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, LLC case, the district court held that, “the failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.” That much-discussed holding was actually later abrogated by the Second Circuit in 2012, which instead held 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.” Nonetheless, courts continue to stress the importance of litigation holds.

A good document management policy will address litigation holds. The Practical Law Company’s sample document retention policy expressly provides that:

“If you believe, or [the Legal Department] informs you, that [COMPANY NAME]’s records are relevant to current litigation, potential litigation (that is, a dispute that could result in litigation), government investigation, audit or other event, you must preserve and not delete, dispose, destroy or

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172 Id. at 623; but see Goodman, 632 F. Supp. 2d at 511 (holding that pre-suit letters discussing the consequence of being “forced to litigate” triggered the duty to preserve documents).


change those records, including emails, until [the Legal Department] determines those records are no longer needed.\footnote{177}

This policy does not put the burden solely on the legal department to formally issue a litigation hold in order for an employee with knowledge of a potential dispute to be required to preserve documents. A corporation’s decision to put this type of policy in place should be an informed decision, however, as it could potentially be used against a corporation in litigation in the event a document is destroyed that should have been preserved under this policy before the legal department ever became aware of the potential for a lawsuit.\footnote{178} In addition, it is important to note that courts have frowned upon policies that rely completely on employees to determine which documents are potentially relevant once a litigation hold has been issued.\footnote{179} As one court stated, “It is unreasonable to allow a party’s interested employees to make the decision about the relevance of such documents, especially when those same employees have the ability to permanently delete unfavorable email from a party’s system.”\footnote{180} The Sedona Conference’s legal hold guidelines include a sample “certification,” which is essentially a document preservation checklist that can be completed by relevant employees and that is returned to the lawyer’s office.\footnote{181} However it is managed, ongoing supervision by counsel is important in meeting the duty to preserve evidence.

A crucial decision-point for counsel is when to issue a litigation hold. As discussed above, there is a large body of case law surrounding this decision. A generally accepted standard is that “[t]he 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.”\footnote{182} Courts also note that “[t]he common law imposes the obligation to preserve evidence from the moment that litigation is reasonably anticipated.”\footnote{183} This standard begs the question of when exactly is litigation reasonably anticipated. Obviously, the receipt of a formal complaint

\footnote{177} Practical Law Company, supra note 156, at 18.

\footnote{178} See Zubulake IV, 220 F.R.D. at 218-19 (explicitly discussing how certain documents were destroyed despite explicit instruction otherwise from the company).

\footnote{179} See Zubulake V, 229 F.R.D. at 432 (“Once a ‘litigation hold’ is in place, a party and her counsel must make certain that all sources of potentially relevant information are identified and placed ‘on hold . . . .’”).

\footnote{180} Jones v. Bremen High Sch. Dist. 228, No. 08 C 3548, 2010 WL 2106640, at *7 (N.D. Ill. May 25, 2010).


\footnote{182} Fujitsu, 247 F.3d at 436; see Zubulake IV, 220 F.R.D. at 216.

\footnote{183} Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 521 (D. Md. 2010); see also Apple, Inc., 888 F Supp. 2d at 990-91 (“Although the Ninth Circuit has not precisely defined when the duty to preserve is triggered, trial courts in this Circuit generally agree that, ‘[a]s soon as a potential claim is identified, a litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action.’” (quoting UMG Recordings, Inc. v. Hummer Winblad Venture Partners, 462 F. Supp. 2d 1060, 1078 (N.D. Cal. 2006))).
will trigger an obligation to preserve evidence. However, as discussed above, a demand letter may trigger a litigation hold, as long as it is explicit enough in threatening litigation. In any case, “[t]he mere existence of a dispute does not necessarily mean that parties should reasonably anticipate litigation or that the duty to preserve arises,” so it will often be a judgment call as to when to issue a hold. Given the potentially severe sanctions that courts may impose for spoliation (as discussed above), best practice is likely to include erring on the side of caution and issuing a litigation hold if future litigation is suspected.

The next step, after recognizing the importance of issuing a litigation hold and deciding when to issue one, is to determine the scope of the hold. Obviously, not every “shred of paper” in the company will be relevant to a given lawsuit (or potential lawsuit). However, the hold should be broad enough to cover all potentially relevant “documents,” wherever they may be located. Further, once the hold is issued, counsel must monitor compliance. The last Zubulake opinion stated that, “it is not sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.” This means, among other things, that counsel must gain familiarity with the steps the client is taking to preserve and collect relevant documents, including understanding the client’s protocols regarding electronically-stored information.

D. Federal Rules of Civil Procedure

There are obviously a multitude of rules and standards in various jurisdictions that may be applicable to discovery in general and spoliation in particular. In addition to Federal Rule of Civil Procedure 37, discussed above, however, one central rule that any litigator should pay particular attention to when it comes to spoliation issues is Federal Rule of Civil Procedure 26. Rule 26 governs the scope of discovery in federal court, and many state rules are either explicitly or implicitly modeled after it. A solid understanding of Rule 26, including its most recent amendments, is a very important tool in any litigator’s practice.

Of particular interest here is Federal Rule of Civil Procedure 26(f). Rule 26(f) provides an express requirement for counsel to confer regarding the scope of discovery. Except in a few specific cases, parties are required to have a Rule 26(f)

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184 Id. at 522 (“Thus, the duty exists, for a defendant, at the latest, when the defendant is served with the complaint.”).

185 See supra notes 13-28 and accompanying text.

186 Goodman, 632 F. Supp. 2d at 510.


188 Zubulake V, 229 F.R.D. at 432.

189 For a good discussion of the history behind the Rule 26(f) conference, see Steven S. Gensler, Some Thoughts on the Lawyer’s E-volving Duties in Discovery, 36 N. Ky. L. Rev. 521, 523-30 (2009).
conference before obtaining discovery “from any source.”

Rule 26(f) is a crucial rule in the Federal Rule’s overall objective to limit court involvement in discovery to the extent possible. Rule 26(f) forces the parties to “discuss any issues about preserving discoverable information and develop a proposed discovery plan” early in the case. The discovery plan must include, inter alia, a discussion on “any issues about disclosure or discovery of electronically stored information.” Courts have noted that, “[p]articularly in complex litigation, there is a heightened need for the parties to confer about the format of the electronic discovery being produced.”

Multiple federal districts have begun adopting local rules that take the Rule 26(f) conference requirements further. For example, in the Western District of Tennessee, there is a local rule requiring identification of relevant document custodians and disclosing the nature of electronically stored information. The rule expressly addresses spoliation, providing that “the parties should work toward an agreed preservation Order that outlines the steps each party shall take to segregate and preserve the integrity of all relevant electronically stored information. In order to avoid later accusations of spoliation, a Fed. R. Civ. P. 30(b)(6) deposition of each party’s retention coordinator may be appropriate.”

The Rule 26(f) conference consequently forces the parties to discuss the scope of discovery in a case at an early stage. The parties may be able to use this opportunity to set reasonable limits and expectations as to discovery, especially with respect to e-discovery, before the parties become overly adversarial. This can be particularly relevant to spoliation claims because providing limits on, for example, which specific document custodians’ files to search for responsive records limits the universe of potential “missing” documents. Moreover, it can be an invaluable opportunity to define

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190 FED. R. CIV. P. 26(d)(1).

191 See Ward v. Estaleiro Itajai S/A, 541 F. Supp. 2d 1344, 1353 (S.D. Fla. 2008) (citing Rule 26(f) for the premise that an “important quality of the federal discovery rules is that they contemplate limited court involvement.”).

192 FED. R. CIV. P. 26(f)(2).


194 In re Seroquel Prods. Liability Litigation, 244 F.R.D. 650, 655 (M.D. Fla. 2007).


196 W.D. TENN. R. 26.1(e).


198 The Northern District of California has published e-discovery guidelines and a Rule 26(f) “checklist” regarding electronically-stored information that can be used by counsel to frame the e-discovery discussion. See United States District Court, Northern District of California, E-Discovery (ESI) Guidelines, http://www.cand.uscourts.gov/eDiscoveryGuidelines.
the parties’ ongoing document retention obligations while the case is proceeding. Counsel for clients possessing large amounts of electronically-stored information would be well-advised to take this opportunity to work with opposing counsel to limit the breadth of ongoing document retention expectations, given the potential cost and inconvenience to the client of maintaining a broad litigation hold. Of course, the discussion above regarding an appropriate and effective litigation hold policy is paramount, and if a particularly relevant document has been inadvertently (or otherwise) destroyed after the threat of litigation but before the Rule 26(f) conference, the conference will not do much to provide protection for a potential spoliation claim.

In addition to the above points, certain proposed amendments to Rule 26 may have a large impact on discovery in general and on spoliation in particular. In April 2013, the United States Courts’ Advisory Committee on Civil Rules voted to send a set of amendments to Rule 26 to its Standing Committee on Rules of Practice and Procedure.\textsuperscript{199} The proposed amendments are significant. They include actually limiting the scope of discovery itself by expressly providing that discovery be “proportional to the needs of the case.”\textsuperscript{200} The familiar language that information “need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence” would be stricken from the rule.\textsuperscript{201} Instead, the scope of discovery would be governed by certain delineated factors, including: “the amount in controversy, the importance of the issues at stake in the action, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”\textsuperscript{202} The proposed amended rule would further provide stricter limits on the quantity of discovery allowed, including further limiting the number of interrogatories and depositions, as well as setting new limits on requests for production and admissions.\textsuperscript{203}

At first glance, narrowing the scope of potential discovery would appear to similarly constrict the opportunity for spoliation claims. In particular, limiting discovery to a “proportional” analysis would appear to make it more difficult to make a spoliation claim for the simple reason that less information will be considered discoverable in the first place. If a particular document would no longer be considered discoverable under the new rule, an argument can be made that the deletion of that document cannot be considered spoliation because the document would never have been subject to


\textsuperscript{201} \textit{Id.} at 227-28.

\textsuperscript{202} \textit{Id.}

\textsuperscript{203} \textit{Id.} at 228-32.
disclosure in the first instance. On the other hand, with a narrowed scope of potentially discoverable documents could come stricter scrutiny by the courts of efforts taken (or not taken) to preserve that more limited set of documents. In any case, because the proposed rule contemplates a “proportionality” analysis with somewhat flexible parameters, it will take some time before clear guidelines are established by the courts. Time will tell what impact the rule, if enacted, will have on spoliation claims.

In addition to the proposed amendments to Rule 26, it should also be noted that there is a potentially significant proposed change to Rule 37 governing sanctions for failure to produce ESI. Currently, Rule 37(e) provides a “safe harbor” against sanctions for the failure to preserve ESI, providing that, “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”\(^\text{204}\) The proposed amendment is designed to, “provide more significant protection against inappropriate sanctions, and also to reassure those who might in its absence be inclined to overpreserve to guard against the risk that they would confront serious sanctions.”\(^\text{205}\) The proposed amendment provides that a court may impose sanctions (or give an adverse inference instruction) for the failure to preserve information “only if” the court finds “that the failure was willful or in bad faith, and caused substantial prejudice in the litigation,” or that, “the failure irreparably deprived a party of any meaningful opportunity to present a claim or defense.”\(^\text{206}\) This rule, if enacted, should help create a more uniform application of sanctions for spoliation among federal courts.

IV. PROSECUTING SPOILATION CLAIMS

A. Detecting Spoliation

Detecting spoliation can be difficult because the evidence allegedly spoliated may no longer exist. Thus, in detecting spoliation, a party must detect the non-existence of something that once did exist. A party could, of course ask in an interrogatory to, “Identify each and every document or other piece of evidence relevant to the claims or defenses in this lawsuit that has been lost, destroyed, or cannot be found.” One immediate problem with this approach is that if the party to whom the interrogatory is directed was willing to destroy relevant evidence, that party may be just as likely to lie responding to an interrogatory about the evidence. Another problem is that if the party that possibly spoliated evidence did so negligently, it simply may not be aware of the prior existence of the spoliated evidence. That said, if a party is concerned about spoliation, it is worth asking this interrogatory. The interrogatory could also ask if the responding party is aware of any means by which such evidence could be restored or found.

There are more indirect ways of detecting spoliation, as well. For example, if an email produced in discovery refers to other communications or documents and those

\(^{204}\) Fed. R. Civ. P. 37(e).

\(^{205}\) COMMITTEE ON RULES OF PRACTICE AND PROCEDURE JANUARY, JANUARY 2013 AGENDA BOOK 99.

\(^{206}\) Id. at 102-03.
communications or documents are not produced, that may indicate the presence of spoliation. Similarly, if testimony uncovered during a deposition refers to documents or evidence not disclosed, that may point to the presence of spoliation.

Computer forensics may also allow a party to detect spoliation. For example, clients may be unaware that their email automatically deletes email after 365 days. Computer forensics can reveal such negligent deletion of emails and result in spoliation sanctions against the party failing to preserve the deleted emails. Computer forensics can also be used to show that files were altered or deleted after a duty to preserve arose, and it may even lead to the recovery of otherwise lost electronic files. What many clients do not realize is that deleting electronic files does not necessarily delete those files, but merely gets rid of the file from obvious locations. While “wiping” software is becoming more prevalent, a computer forensics expert may still be able to recover “wiped” files, although this “wiping” software may make recovery impossible in some cases.

Moreover, parties often seek to take Rule 30(b)(6) depositions of the person most knowledgeable about the location, format, nature, and maintenance of a company’s data. A few purposes of this type of deposition are to determine what sort of litigation hold the deposed party initiated (i.e. its scope), when a litigation hold was initiated, how company data was searched in responding to discovery requests, and whether data is held by any third parties that may require a subpoena. These types of questions can help the deposing party detect possible spoliation and provide them with insight as to what other interrogatories or document requests can help support a finding of spoliation.

B. Proving Spoliation

Proving spoliation is no easy task; the party alleging spoliation essentially must prove, in addition to a duty to preserve, that relevant evidence that no longer exists: (1) once existed; (2) was lost or destroyed; (3) was relevant; (4) was lost or destroyed with the requisite culpability (whether it be negligence or willfulness); and (5) usually, the lack of which will cause prejudice to the party alleging spoliation.

Additionally, as discussed above, some courts recognize an independent tort of spoliation. When pursuing an independent tort claim for negligent spoliation against a third party, a claimant must show: (1) the existence of a pending or potential civil action; (2) the alleged spoliator had actual knowledge of the pending or potential civil action; (3) a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances; (4) spoliation of the evidence; (5) that the spoliated evidence was vital to a party’s ability to prevail in the

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209 Id.
pending or potential civil action; and (6) damages.210 “Once the first five elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation.”211 Thus, proving a claim of negligent spoliation against a third party likely involves substantial forethought, including, the forethought to place a third party on “actual notice” of a civil action and establishing a duty to preserve on the part of that third party by making a specific request, issuing a subpoena, or obtaining a court order, for example.

When pursuing a tort claim for intentional spoliation, a claimant must show: (1) the defendant's knowledge of a pending or impending civil action involving the plaintiff; (2) knowledge on the part of defendant that litigation exists or is probable; (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case; (4) disruption of the plaintiff's case; and (5) damages.212

Perhaps the most difficult aspect of proving the existence of sanctionable spoliation is showing that destroyed or lost evidence was relevant, and its destruction or loss therefore caused prejudice. In many cases, however, a party can prove relevance by obtaining at least portions of the spoliated evidence from other sources (i.e., another computer, a backup tape, a restoration of a hard drive), and in other cases, the party seeking discovery may be able to obtain extrinsic evidence of the content of at least some of the deleted information from other documents, deposition testimony, or circumstantial evidence.213 Extrinsic evidence that showed the relevance of deleted emails, for example, was found where an executive being sued for misappropriation of trade secrets and violation of a non-compete sent numerous work documents to his personal email account. While the emails themselves may have been deleted, a forensic analysis of the relevant computer systems showed this conduct occurred and it could be sufficient to show the deleted emails were relevant.214

The burden of proof that courts place on parties attempting to prove spoliation varies. This is because when deciding whether to apply an adverse inference to allegedly spoliated evidence, courts have various considerations to balance. On the one hand, courts must not place too strict a standard of proof on the party alleging spoliation because doing so “would allow parties who have . . . destroyed evidence to profit from . . . destruction.”215 Thus, one treatise on evidence states that the failure to produce, or the destruction of, a relevant document is evidence from which alone its contents may be inferred to be unfavorable to the possessor, “provided the opponent . . . first introduce

210 Hannah, 213 W. Va. at 707-08, 584 S.E.2d at 563-64.
211 Id. at 708.
214 See id. at 626.
215 Residential Funding Corp., 306 F.3d at 109.
some evidence tending to show that the document actually destroyed or withheld is the one as to whose contents it is desired to draw an inference.”

On the other hand, however, courts have generally required “some greater showing of the content of the destroyed evidence before drawing an adverse inference.” While a showing of bad faith loss or destruction is itself the basis for some inference that the evidence was detrimental to the destroyer, there must be some extrinsic evidence for the trier of fact to be able to determine in what respect and to what extent it would have been detrimental. This corroboration requirement becomes even more important where the destruction was negligent, because in a case of negligent spoliation, it cannot be inferred from the spoliator’s conduct that the evidence would have been harmful.

V. DEFENDING AGAINST SPOLIATION CLAIMS

A. Analyzing The Claim

Once a claim of spoliation is made, how should counsel defend against it? The logical first step is to understand exactly what opposing counsel claims was spoliated. If opposing counsel has not made it clear, it will be helpful to understand as specifically as possible the documents from which time period were allegedly destroyed. Depending on the circumstances under which the spoliation claim arose, it may be possible that opposing counsel suspects a particular witness or many witnesses to be responsible for the alleged spoliation. The goal is to narrowly define the spoliation claim to a manageable set of particular documents.

Once the set of documents has been identified as precisely as possible, counsel should investigate to see if the documents actually do currently exist. The spoliation claim may be nothing more than a misunderstanding as to what has already been produced in the case, or if documents even existed. For example, a witness during a deposition may refer to a document that has already been produced in the case by a different title than is contained on the document, leading opposing counsel to make a spoliation claim concerning the “missing” document. Providing a convincing explanation of this discrepancy to opposing counsel at the outset may forestall an expensive discovery dispute.

In addition, perhaps the document in question does exist and has not yet been produced due to innocent oversight or the document’s questionable relevance. On that note, it is important to work with counsel and conduct an investigation into the existence of the document, rather than simply take opposing counsel’s word that the document has in fact been lost. If the document does exist, simply working with the client to locate the

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216 Turner, 142 F.R.D. at 76 (quoting 2 Wigmore on Evidence § 291, at 228 (Chadbourn Rev. 1979)).

217 Id. at 77.

218 Id.

219 Id.
document and produce it, even if it is only marginally relevant, is likely the most efficient solution.

Finally, an additional possibility is that the document never existed in the first place. Perhaps a witness was mistaken as to the document’s existence, or opposing counsel is making an unjustified assumption as to the document’s existence. In that case, counsel should work with the client to marshal proof that the document in question never existed. Opposing counsel is not likely to merely take counsel’s word that the document never existed; nonetheless, if a convincing argument with supporting evidence can be assembled, it may be worth it to try to head-off an expensive discovery battle. In summary, clearing up misunderstandings as to the nature of the spoliation claim early on may save a considerable amount of time and money spent on contentious, and needless, discovery disputes.

Once the spoliation claim has been defined and an internal investigation and search for the relevant documents has been conducted without success, the next step is to determine why the document no longer exists. Is it possible to determine when the document was destroyed? If it can be proven that the document was destroyed before the dispute arose, it will be very difficult, if not impossible, for opposing counsel to win any sanctions as a result of the document’s destruction. Perhaps the document was destroyed before the possibility of litigation as part of a formal document management policy, which itself may be produced as evidence of the lack of bad faith in the document’s destruction.

If the document was destroyed after the possibility of litigation, perhaps there is a simple reason for the destruction. In this context, it is important to closely examine what it is that put the client on notice of the possibility of litigation; i.e. the document preservation “trigger.” It may well be that the initial demand letter received from opposing counsel made absolutely no mention of any potential claim for which the missing document could be relevant. Litigation often evolves through discovery. Claims that are ultimately tried in a case may not ever have been contemplated by the plaintiff during the outset of the case. The franchise relationship is a complex, long-term business relationship with many different aspects. If a franchisee brings a claim with respect to, for example, wrongful termination, it may not be apparent at the outset that the franchisee will later amend its claim to include tortious interference claims involving a particular third-party. While a franchisor will almost always be well-advised to preserve all files related to a franchisee with whom it is likely to be involved in litigation, the franchisee’s demand letter/lawsuit may not put the franchisor on notice that all files relating to any particular third-party will eventually be relevant and should be preserved. Courts understand that corporations are not under any general obligation to preserve documents indefinitely, and “the mere existence of a potential claim or the distant possibility of litigation” is not enough to trigger the duty to preserve documents.220 Counsel should closely examine the initial “trigger” to preserve documents to see if there was ever a duty to preserve the document that is presently being claimed as improperly destroyed.

220 See Micron Tech., 645 F.3d at 1320; see also supra note 11 and accompanying text.
B. Framing The Argument

Given the potentially severe sanctions that may be imposed for spoliation, framing a winning argument against a motion for sanctions can be crucial to success in the lawsuit. Counsel should be familiar with the applicable rules of court (i.e. Federal Rules 26 and 37 if in federal court, relevant state court procedural rules in state court), as well as the particular test governing sanctions in their jurisdiction. Counsel should also have a thorough understanding of the client’s document management policy, any litigation holds that were issued, and what steps were taken to preserve and collect relevant documents.

Of course it will be important to emphasize to the court everything that was done to comply with the duty to preserve evidence. Weak points in the facts also need to be examined, however. For example, if, for whatever reason, no litigation hold was issued, recall that the Second Circuit recently reversed the widely-cited Pension Committee v. Bank of America Securities case’s holding that the failure to issue a litigation hold constitutes *per se* negligence.\(^{221}\) What else did the client do to preserve and collect documents? For another example, if a backup tape or other means of preserving electronically-stored information was destroyed, recall the recently enacted safe harbor of Federal Rule of Civil Procedure 37(e) (as well as the present effort to expand that safe harbor). It may be that this rule’s “exceptional circumstances” burden will be too high for the sanctions movant to meet.

An additional consideration in analyzing a spoliation claim is to determine what information was contained within the missing documents. For example, it may be possible to essentially re-construct the missing documents from other documents or witness testimony. If this is possible, a party may avoid an adverse inference instruction. As one court noted, “The destroyed evidence must be ‘relevant’ to warrant an adverse inference instruction. For the purpose of spoliation, ‘relevant’ means that the evidence must be of the sort that a reasonable jury could find harmful to the spoliator’s case.”\(^{222}\) If there is no evidence of intentional destruction that could warrant an inference that the documents contained harmful information, reconstructing the documents’ likely contents may be a way to successfully defend against an adverse inference claim.

VI. CONCLUSION

Courts analyzing whether certain actions or inactions rise to the level of spoliation consider many factors, including at what point the litigation was reasonably foreseeable, who had the duty to preserve, what was to be preserved, whether the state of mind of the purported spoliator should be considered, and whether there is any prejudice to the party alleging spoliation. The consequences of a positive finding of spoliation of evidence are dramatic. They can range from monetary sanctions to an adverse inference on the evidence to dismissal of claims.

\(^{221}\) See *supra* note 175 and accompanying text.

There is no bright line test for determining whether spoliation has occurred, and, if so, what remedy courts are likely to apply. Given the complexities involved, parties to litigation and their attorneys have much to consider in preventing or proving spoliation. While such consideration may involve significant up-front efforts and expenditures, the costs of failing to account for spoliation, whether on the defensive or offensive side of a spoliation claim, may prove to be enormous.
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In his work across various industries, Elliot has gained experience within the hotel, food, energy, automobile, brewery, and medical industries, among others. He has also published several articles on franchise and distribution law. His most recent articles include an article on franchising in the medical marijuana industry and on brewpub distribution law in Minnesota.

Prior to entering law school, Elliot worked as a lobbyist for a non-profit organization in Minnesota that was one of the key organizations in reforming Minnesota’s mortgage laws.

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