INTERIM REPORT
ON PRESERVATION AND SPOLIATION
OF THE
NEW YORK STATE BAR ASSOCIATION'S
SPECIAL COMMITTEE ON DISCOVERY AND CASE MANAGEMENT IN FEDERAL LITIGATION

JULY 28, 2011

New York State Bar Association
SPECIAL COMMITTEE ON DISCOVERY AND CASE MANAGEMENT IN FEDERAL LITIGATION

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This report addresses issues relating to the preservation and spoliation of electronically stored information ("ESI"), documents, and things, including whether changes in the Federal Rules of Civil Procedure are necessary. It provides an overview of current federal case law concerning when and what information is to be preserved, the scope of the duty to preserve, and the elements of a spoliation claim. The second portion of this report discusses proposed Rules and Advisory Committee Notes to provide standards for preservation as well as remedies and sanctions for spoliation.

INTRODUCTION

The New York State Bar Association's Special Committee on Discovery and Case Management in Federal Litigation (the "Committee") was formed at the request of then president Stephen P. Younger in the summer of 2010 to study and make recommendations about the perceived burgeoning cost of litigation, largely attributed to discovery, and in particular ESI discovery, and the lengthy delays in concluding actions and proceedings once initiated. The Committee has been examining various topics

relevant to those issues, including the impact of increasing use of electronic communications and electronically stored information, delays in litigation, proportionality, preservation and spoliation, active judicial intervention in case management, the role of magistrate judges, and narrowing issues for trial. The Committee expects to present to the House of Delegates a full report, which will include recommendations for amendments to the Federal Rules of Civil Procedure.

The issues the Committee is addressing are also under consideration by the Civil Rules Advisory Committee of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. The Standing Committee develops proposed amendments to the Federal Rules of Civil Procedure which may eventually be presented to Congress under the Rules Enabling Act of 1934, 28 U.S.C. § 2071, *et seq.* The Civil Rules Advisory Committee is currently studying proposals for federal rules concerning preservation and spoliation. *See* Agenda of the Advisory Committee on Civil Rules, April 4-5, 2011, at 192-271, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-04.pdf ("Agenda"). The Advisory Committee's schedule calls for consideration of proposed rules concerning preservation and spoliation at its November 2011 meeting after a "mini-conference" in September 2011. Accordingly, proposals on preservation and spoliation should be presented to the Civil Rules Advisory Committee by August 2011 at the latest.

The views of the New York State Bar Association, the largest voluntary bar association in the country, and one whose members represent a significant number of parties involved in complex litigation, carry great weight and should be part of the

dialogue on issues such as preservation and spoliation. Therefore, to comply with the schedule of the Civil Rules Advisory Committee and to ensure that the Association will be heard, the Committee has prepared this interim report solely on the subject of preservation and spoliation.[1]

Technological developments in data processing and electronic storage have exponentially increased the amount of information available to parties in litigation. Practical realities of business and the expense of maintaining this cache of data militate against indefinite information storage. In the course of business or other activities, ESI is destroyed or compromised through normal and customary document retention/destruction practices. In the past, it was enough to keep paper documents for a set period of time, such as seven years, and off-site facilities could be used for storage. Today, the sheer mass of e-mails and attachments and the capacity of personal computers and networks results in the propagation of enormous amounts of information. This information must be regularly purged or an enterprise may perhaps be overwhelmed.[2]

The possibility of the loss of such potentially relevant information has led some courts to grapple with preservation and spoliation in an electronic context. Some courts have formulated guidelines to advise parties as to their responsibilities regarding preservation. These guidelines include whether and when a "litigation hold" should be placed on document preservation, how long it should last, what it should encompass, and to whom it should be directed. These cases also address the remedies and sanctions when documents have been lost or destroyed.

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[1] This interim report will be incorporated in the Committee's final report that will address additional issues and make proposals that seek to enhance access to the federal civil justice system, while preventing unnecessary burdens on litigants and the court system.

[2] In addition, the cost of storage of large volumes of hard-copy documents compels companies to periodically destroy them.

The lack of a federal rule governing preservation complicates the analysis so that courts are often operating within their inherent authority. Consequently, a divergence has arisen in judicial viewpoints analyzing the concepts of preservation and spoliation, particularly in the area of ESI. Amendment of the Federal Rules of Civil Procedure is now necessary to ameliorate this lack of uniformity.

We recommend amending Rules[3] 26 and 37 to provide that a duty to take reasonable and proportionate actions to preserve discoverable documents, ESI or things commences (a) for parties or anticipated parties, when they become aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action, and (b) for non-parties, when they receive a subpoena. We propose that the duty require actions that are reasonable under the circumstances to preserve documents, ESI or things discoverable under Rules 26(b) and 34(a) taking into consideration appropriate proportionality factors; that the material be preserved in a form as close to, if not identical to, its original condition, without material loss of accessibility; and that timely preparation, dissemination and maintenance of a reasonable litigation hold should be considered due care, absent exceptional circumstances. Remedies and sanctions should be commensurate with the culpability of the person failing to preserve evidence, the prejudice suffered, and the relevance of the unavailable information or things.

BACKGROUND

A. Historical Overview

"Spoliation" is derived from the Latin "to spoil." The prohibition against negligent spoliation may be traced to Roman law and Justinian's maxim *omnipraesumuntur contra spoliatorem* (all presumption against the spoliator), Note, *The Spoliation*

[3] All references to "Rules" are to the Federal Rules of Civil Procedure unless otherwise noted.

Doctrine and Expert Evidence in Civil Trial, 32 U.B.C. L. Rev. 293, 294-96 (1995); to English cases dating back to the seventeenth century; and to American cases including *The Pisarro*, 15 U.S. (2 Wheat.) 91 (1817), and *Pomeroy v. Benton*, 77 Mo. 64 (1882). *See generally* Lawrence Solum & Stephen Marzen, *Truth & Uncertainty: Legal Control of the Destruction of Evidence*, 36 Emory L.J. 1085, 1087, n.4 (1987). Early American cases generally required a showing of some level of intent, at times even evil animus or bad faith, before imposing sanctions. *See* Solum & Marzen at 1088-90. For example, erasing to make corrections or destroying handwritten notes after creating a typewritten document were not spoliation, because the evidence was essentially preserved. *See id.*

> Although sanctions have typically been imposed for destruction of evidence after suit has formally begun, some courts have announced rules condemning, or have sanctioned, evidence destruction completed prior to filing of the complaint. The doctrine forbidding [creation] of legal impediments clearly governs obstructive acts committed before suit is filed. The doctrine, which prevents prospective litigants from squirreling away documents into a foreign jurisdiction from whence they cannot be removed, must of necessity govern actions taken before litigation begins. Courts have similarly condemned record-keeping practices – instituted long before any concrete legal action arises – which prevent location of relevant documents in company files. Consistent with these principles, it is not surprising that courts have sanctioned destruction of evidence prior to the filing of a lawsuit when litigation was reasonably foreseeable.

Id. at 1098-1099, nn.58-62, and cases cited therein.

B. Source of the Duty to Preserve

There is as yet no explicit Federal Rule of Civil Procedure concerning preservation in general, although a court can fashion an order to preserve evidence in a particular case. *See Pension Comm. of the Univ. of Montreal Pension Plan v Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010) ("*Pension Comm.*") (Scheindlin, J.) ("breach of the duty to preserve, and the resulting spoliation of evidence, may result in

the imposition of sanctions by a court because the court has the obligation to ensure that the judicial process is not abused").[4]

Federal courts have issued sanctions for pre-litigation spoliation under the "inherent authority of the court." *See Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) ("the power to sanction for spoliation derives from the inherent power of the court, not substantive law") (pre-litigation destruction of car alleged to be defectively designed or manufactured); *Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009) (authority to impose sanctions for spoliated evidence arises from a court's inherent power); Thomas Y. Allman, *Preservation and Spoliation Revisited: Is it Time for Additional Rulemaking?*, 2010 Conf. on Civil Litig., Duke Law School, May 10-11, 2010, at 7, *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/02E441B3AD64B2D9852576DB005D976D/$File/Thomas%20Allman%2C%20Preservation%20and%20Spoliation%20Revisited.pdf?OpenElement ("Allman"); John M. Barkett, *Walking the Plank, Looking Over Your Shoulder, Fearing Sharks Are in the Water: E-Discovery in Federal Litigation*?, 2010 Conf. on Civil Litig., Duke Law School, May 10-11, 2010, at 28, n.67, *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/699991AD4965C1A78525771C0060372C/$File/John%20Barkett%2C%20Walking%20the%20Plank.pdf?OpenElement ("*Walking the Plank*").

[4] There are numerous municipal and state regulations and laws that address duties to preserve documents in a surprising variety of particularized and technical fields, including alligator parts dealers (Ala. Code § 9-12-207(d) (2010)), transporters of inedible kitchen grease (Cal. Food & Agric. Code § 19313.1); utilities (N.Y. Energy Law § 17.103(2)(a)), and chemical manufacturers (15 U.S.C. § 2607). The proposed amendments to the federal rules would not affect these regulations, and this report does not otherwise address such statutes, codes or regulations.

Some courts have reasoned that the obligation to preserve is owed to the court, rather than litigants. *See Krumwiede v. Brighton Assocs., L.L.C.*, No. 05 C 3003, 2006 WL 1308629 at *11 (N.D. Ill. May 8, 2006) (prejudice to judicial system); *Pension Comm.*, 685 F. Supp. 2d at 461; *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 517. (D. Md. 2010) ("*Victor Stanley*") (Grimm, M.J.). *See also* John M. Barkett, *Zubulake Revisited: Pension Committee and the Duty to Preserve*, 2010 Conf. on Civil Litig., Duke Law School, May 10-11, 2010, at 20-24, *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/C3A77C696C1B3540852576DB005D8764/$File/John%20Barkett%2C%20Zubulake%20Revisited.pdf?OpenElement ("*Zubulake Revisited*"). Typical of this view is a 1977 opinion from the United States District Court for the Northern District of Indiana:

> Although a potential litigant is under no obligation to preserve every document in its possession, whatever its degree of relevance, prior to the commencement of a lawsuit, some duty must be imposed in circumstances such as these lest the fact-finding process in our courts be reduced to a mockery.

Bowmar Inst. Corp. v. Texas Inst. Inc., 25 Fed. R. Serv. 2d (Callaghan) 423, 426-27 (N.D. Ind. 1977) (case citation omitted).

Courts have also relied upon Rule 37 as a source of power to impose sanctions for spoliation arising post-litigation. "[I]f the spoliation violates a specific court order or disrupts the court's discovery plan, sanctions also may be imposed under Fed. R. Civ. P. 37 [(b) (2)]." *Victor Stanley,* 269 F.R.D. at 517. *See also Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 106-107 (2d Cir. 2002) ("*Residential Funding*") (discussing broad discretion to fashion remedies under Rule 37 for violation of a discovery order).

"Whether exercising its inherent power, or acting pursuant to Rule 37, a district court has wide discretion in sanctioning a party for discovery abuses." *Nycomed US Inc. v. Glenmark Generics Ltd.*, 08-CV-5023 (CBA)(RLM), 2010 U.S. Dist. LEXIS 82014, at *11-12, (E.D.N.Y. Aug. 11, 2010) (some case citations omitted).

C. The Rules Enabling Act

The federal rules, when originally adopted, arguably concerned themselves with conduct after the commencement of litigation on the purported ground that regulation of pre-litigation conduct was outside the Rules Enabling Act.[5] *See* Allman, at 6; *Walking the Plank*, at 28, n.66. We have found no cases that specifically address whether a rule governing a pre-litigation duty to preserve evidence would run afoul of the Rules Enabling Act. *Cf. Jacobs v. Scribner*, Case No. 1:06-cv-01280-AWI-NEW (DLB) PC, 2007 U.S. Dist. LEXIS 51729 (E.D. Cal. July 5, 2007) (declining to enter a preservation order prior to the appearance of the defendants on the grounds the court lacked jurisdiction to enter such an order as to them).[6] And, the Civil Rules Advisory Committee was careful in the 2006 amendments to Rule 37 not to make the Rules applicable to pre-litigation conduct. *See* Allman, at 8.

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[5] The Rules Enabling Act, 28 U.S.C. § 2072, provides limits on the rule-making authority delegated to the Supreme Court by Congress. It states: "(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals. (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title."

[6] Commentator Thomas Y. Allman, who also favors a rule governing a pre-litigation duty to preserve rather than reliance on the inherent authority of the court, finds succor in a Supreme Court decision involving pre-commencement conduct relating to a fraudulent transfer of assets, *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). *See* Thomas Y. Allman, *Addressing Preservation & Spoliation After The Conference on Civil Litigation at Duke Law School*, Mar. 21, 2011, at 11, *available at* http://www.thesedonaconference.org/conferences/20110407/conference_papers/pdf/Chapter%207%20-%20Addressing%20Preservation%20and%20Spoliation.pdf. However, the *Chambers* decision relied on the inherent authority of the court.

However, there are federal rules that apply to pre-litigation conduct. Rule 27(a) provides for depositions to perpetuate testimony "[b]efore an [a]ction [i]s [f]iled," albeit on petition to the court with notice to expected adverse parties. Rule 11 imposes a pre-litigation duty to investigate before filing a complaint. Once a complaint is filed, under Rule 11, the court may impose sanctions on an offending party or his attorney, even in the absence of subject matter jurisdiction over the cause of action. *See Willy v. Coastal Corp.*, 503 U.S. 131, 139 (1992) ("[t]he interest in having rules of procedure obeyed, by contrast, does not disappear upon a subsequent determination that the court was without subject matter jurisdiction"). A court has significant discretion in determining what sanctions, if any, should be imposed for a violation of Rule 11 in filing a complaint. *See Perez v. Posse Comitatus*, 373 F.3d 321, 325-26 (2d Cir. 2004); 1993 Advisory Committee Notes to Rule 11 subdivisions (b) and (c).

Were a rule adopted that aimed at a pre-litigation duty to preserve evidence, it would appear to be consistent with the Rules Enabling Act. Indeed, as under Rule 11, the potential violation of such a duty would be tested only only once litigation has commenced, and any sanctions or remedies would depend on the particular circumstances.

The regulation of discovery is now clearly considered to be within the scope of the Rules Enabling Act.[7] Discovery requires not only the collection and production of ESI, documents and things, but also concomitantly their preservation in the first place. Accordingly, a rule concerning the preservation of ESI, documents, and things, even before litigation commences, must be within the scope of rules regulating the disclosure

[7] *See Sibbach v. Wilson*, 312 U.S. 1 (1940) (determining that Rules 35 (inspection rights) and 37 (sanctions for discovery violations) were constitutional exercises of rule-making power under the Rules Enabling Act and did not abridge or modify substantive rights).

or discovery of those items during litigation. Persons would not be subject to a preservation rule absent some connection to a lawsuit – whether by commencing the action, receiving service of process, or receiving a subpoena in the case of third parties. A pre-litigation failure to preserve could be made sanctionable in a lawsuit only after a consideration of a variety of factors, including a culpable state of mind. Remedies or sanctions could then be narrowly tailored both to deter future conduct and to ameliorate the wrong, if any, committed.

CURRENT STATE OF THE LAW

A. Triggering the Duty

The duty to preserve arises when litigation is reasonably foreseeable or anticipated. *See Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001); *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 587-88 (6th Cir. 2009) (remanding to the district court to consider whether it was reasonably foreseeable that missing documents would be needed in future litigation); *Pension Comm.*, 685 F. Supp. 2d at 465, 496 ("pending or reasonably foreseeable litigation"); *Victor Stanley*, 269 F.R.D. at 521 ("reasonably anticipated" litigation); *Rimkus Consulting Group. Inc. v. Cammarata*, 688 F. Supp. 2d 598, 641, 642 (S.D. Tex. 2010) ("*Rimkus*") (Rosenthal, J.) ("reasonably anticipated" litigation); *see also* The Sedona Conference, *The Sedona Principles: Second Edition, Best Practices, Recommendations & Principles For Addressing Electronic Document Production,* 70 cmt. 14.a (2007) ("*Sedona Principles*") ("the common law duty of preservation arises when a party, either plaintiff or defendant, reasonably anticipates litigation"). It has been held that the litigation must be "more than a possibility."[8] *Knight*

[8] One court has rejected a temporal requirement between the destruction of evidence and the commencement of litigation, because to find otherwise would allow a party to destroy evidence so long as

v. Deere & Co., 2:08-cv-01903-GEB-EFB, 2010 U.S. Dist. LEXIS 56736 at *10-11 (E.D. Cal. May 11, 2010) (citing *Realnetworks, Inc., v. DVD Copy Control Ass'n, Inc.*, 264 F.R.D. 517, 524 (N.D. Cal. 2009)).[9]

The standard is not difficult to state; it's application is more problematic. For example, Judge Shira Scheindlin held that the duty to preserve arose four months before the filing of a discrimination claim, because e-mails were marked as privileged attorney-client communications, even though they were not sent to or from an attorney and were not legal in nature. *See Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 216-17 (S.D.N.Y. 2003) *("Zubulake IV")*. In *Pension Committee*, Judge Scheindlin again imposed a duty to preserve on certain plaintiffs after two prospective plaintiff groups retained counsel, a bankruptcy had been filed, administrative remedies had been invoked, and some prospective plaintiffs communicated with other parties. *Id.*, 685 F. Supp. 2d at 476.[10]

The court in *Aiello v. Kroger Co.*, 2:08-cv-01729-HDM-RSS, 2010 U.S. Dist. LEXIS 97927 (D. Nev. Sept. 1, 2010), held that the filing of an accident report triggered the duty to preserve a surveillance video that may have recorded an accident. *Id.* at *4. However, another court has held that a demand letter does not trigger a duty to preserve,

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the action was not commenced within a certain period of time. *See Durham v. Country of Maui,* CIV. NO. 08-00342 JMS/LEK, 2010 U.S. Dist. LEXIS 95219, at *19-20, n.6 (D. Haw. Sept. 10, 2010).

[9] However, some courts have held that spoliation sanctions require notice that litigation was "imminent." *See Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681 (7th Cir. 2008); *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007).

[10] Consulting an attorney may provide guidance in determining whether a duty to preserve exists (if advice is sought regarding rights, then evidence should be preserved as a matter of caution). A letter threatening possible litigation and noting the retention of attorneys was sufficient to trigger a duty, even though litigation was not commenced until three years later. *See Goodman v. Praxair Services Inc.*, 632 F. Supp. 2d 494, 504, 511 (D. Md. 2009). It is less clear that a duty should be imposed on a party not planning to litigate, but who is similarly situated to others who are in litigation. *See Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1194 (D. Utah 2009) (company held to have violated its duty to preserve by not placing a hold on documents five years earlier when it learned that other companies in its industry were being sued).

if the letter does not actually threaten litigation or demand preservation. *See Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 623 (D. Colo. 2007).

Gregory P. Joseph has criticized the reasonably-anticipates-litigation standard as "nebulous, creat[ing] uncertainty, [and] impos[ing] needless costs." Gregory P. Joseph, *Electronic Discovery and Other Problems*, 2010 Conf. on Civil Litig., Duke Law School, May 2010, at 8, *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/EE0CC8AFE81F5D90852576480045504B/$File/Gregory%20P.%20Joseph%2C%20Electronic%20Discovery%20and%20Other%20Problems.pdf?OpenElement ("Joseph"). He proposes instead that a rule specify the following triggers for an obligation to preserve information: (i) receiving a written notice to preserve; "[ii] preparing an incident report or other steps taken in the ordinary course of business in anticipation of potential litigation; [iii] notifying an insurance company or indemnitor of a potential liability; [iv] hiring an investigator or photographer; [v] retaining or instructing counsel; [vi] engaging experts; [vii] breaching a contractual, regulatory or statutory duty to preserve or produce specific data; [viii] issuing an oral or written notice to preserve, or taking steps to draft one; [ix] filing a complaint with a regulator; [x] sending a pre[-]litigation notice that is prerequisite to filing suit or advising that litigation is contemplated; [or] [xi] conducting destructive testing."[11] *Id.* at 8.

[11] The Civil Rules Advisory Committee has suggested that the following list of events would lead a reasonable person to conclude that he or she could expect to be a party to an action: (1) service of a pleading or other document asserting a claim; (2) receipt of a notice of claim or other communication – whether formal or informal – indicating an intention to assert a claim; (3) service of a subpoena or similar demand for information; (4) retention of counsel, retention of an expert witness or consultant, testing of materials, discussion of a possible compromise of a claim, or taking any other action in anticipation of litigation; (5) receipt by a person of a notice or demand to preserve discoverable information; or (6) the occurrence of an event that results in a duty to preserve information under a statute, regulation, or contract,

Applying a general standard incorporated in a rule may be difficult and result in some inconsistencies, but the alternative of incorporating a laundry list of triggering events is too limited and inflexible and may create loopholes. *See Victor Stanley,* 269 F.R.D. at 522 ("the duty to preserve evidence should not be analyzed in absolute terms; it requires nuance, because the duty 'cannot be defined with precision'") (citations omitted). Thus, the better approach is to provide examples in Advisory Committee Notes to a general standard stated in a rule.

B. Relevance

The information to be preserved is that which is "relevant to litigation or . . . future litigation," *Fujitsu*, 247 F.3d at 436, and within a party's possession, custody or control, *Residential Funding*, 306 F.3d at 107. Relevance for purposes of preservation may have a different meaning than relevance in the context of evidence admissible at trial or even in determining a remedy or sanction for spoliation.

At minimum, relevance in the preservation context includes information or things "relevant to any party's claim or defense," Rule 26(b)(1), *Victor Stanley*, 269 F.R.D. at 531 (quoting *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 219 F.R.D. 93, 101 (D. Md. 2003)) ("if 'a reasonable trier of fact could conclude that the lost evidence would have supported the claims or defenses of the party that sought it'"). But, it also might include information or things "relevant to the subject matter involved in the action," Rule 26(b)(1); *Zubulake IV*, 220 F.R.D. at 218; *Victor Stanley*, 269 F.R.D. at 522; or even information or things "reasonably calculated to lead to the discovery of admissible evidence," Rule 26(b)(1).

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or (7) knowledge of an event that calls for preservation under a person's own retention program. Agenda, at 198-99.

> Until a more precise definition [of relevance] is created by rule, a party is well-advised to "retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches." *Zubulake IV*, 220 F.R.D. at 218. In this respect, "relevance" means relevance for purposes of discovery, which is "an extremely broad concept." *Condit v. Dunne*, 225 F.R.D. 100, 105 (S.D.N.Y. 2004). . . . "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

Orbit One Commc'ns, Inc. v. Numerex Corp., 08 Civ. 0905 (LAK)(JCF), 08 Civ. 6233 (LAK)(JCF), 08 Civ. 11195 (LAK)(JCF), 2010 U.S. Dist. LEXIS 123633, at *20-21 (S.D.N.Y. Oct. 26, 2010) (some case citations omitted) (Francis, M.J.).

C. Scope of the Duty

> A district court recently expressed the basic obligation of parties to preserve and produce documents relating to a claim, and the consequences that flow from a failure to observe that obligation: "Courts cannot and do not expect that any party can meet a standard of perfection. Nonetheless, the courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party. . . . [W]hen this does not happen, the integrity of the judicial process is harmed and the courts are required to fashion a remedy. . . . By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records – paper or electronic – and to search in the right places for those records, will inevitably result in the spoliation of evidence."

Webb v. CBS Broad., Inc., Case No. 08 C 6241, 2010 U.S. Dist. LEXIS 51242, at *15-16 (N.D. Ill. May 25, 2010) (quoting *Pension Comm.*, 685 F. Supp. 2d. at 461-62) (some citations omitted).

The person with a duty to preserve must act reasonably in the circumstances. *Victor Stanley*, 269 F.R.D. at 522. "The duty to preserve evidence 'includes an obligation to identify, locate, and maintain[ ] information that is relevant to specific, predictable, and identifiable litigation.'" *Id.* (quoting The Sedona Conference, *The*

Sedona Conference Commentary on Legal Holds: The Trigger and the Process 3 (public cmt. ed. Aug. 2007), *available at* http://www.thesedonaconference.org/content/miscFiles/Legal_holds.pdf ("*Sedona Conf. on Legal Holds*")). *See Tango Transp., LLC v. Transp. Int'l Pool, Inc.*, Civ. A. No. 5:08-CV-0559, 2009 WL 3254882, at *3 (W.D. La. Oct. 8, 2009) (the scope of a party's duty to preserve potentially relevant evidence includes evidence in possession of "employees likely to have relevant information, *i.e.*, 'the key players'"). "The action must be 'reasonably calculated to ensure that relevant materials will be preserved,' such as giving out specific criteria on what should or should not be saved for litigation." *Victor Stanley,* 269 F.R.D. at 525 (quoting *Jones v. Bremen High Sch. Dist. 228*, No. 08 C 3548, 2010 WL 2106640, at *6 (N.D. Ill. May 25, 2010) (quoting *Danis v. USN Commc'ns, Inc.,* No. 98 C 7482, 2000 WL 1694325, at *38 (N.D. Ill. 2000))).

According to Judge Scheindlin, acting reasonably requires (i) prohibiting the destruction of information, (ii) taking steps to collect and review it, and (iii) monitoring those steps. *Pension Comm.*, 685 F. Supp. 2d at 465. (S.D.N.Y. 2010); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) ("*Zubulake V*") (Scheindlin, J.). Prohibiting the destruction of information may include issuance of a written litigation hold notice to all persons who possess relevant information, *Pension Comm.*, 685 F. Supp. 2d at 465; *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 194 (S.D.N.Y. 2007); *Zubulake IV*, 220 F.R.D. at 217-18, and suspension of a routine document retention/destruction policy, *Zubulake IV*, 220 F.R.D. at 218; *In re Kessler*, No. 05 CV 6056 (SJF)(AKT), 2009 WL 2603104 (E.D.N.Y. Mar. 27, 2009). *See Victor Stanley,* 269 F.R.D. at 524. In other words, prohibiting destruction of information may require a party

"to issue a written litigation hold; to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources." *Pension Comm.*, 685 F. Supp. 2d at 471.

A litigation hold should "direct employees to *preserve* all relevant records – both paper and electronic" – and "create a mechanism for *collecting* the preserved records so that they can be searched by someone other than the employee." *Pension Comm.*, 685 F. Supp. 2d at 473 (original emphasis). However, "a litigation hold might not be necessary under certain circumstances," *Victor Stanley*, 269 F.R.D. at 524 (citing *Jones*, 2010 WL 2106640, at *7), such as, for example, when "all sources of likely relevant information are subject to permanent retention pursuant to the organization's record retention policy" or "all sources of the information can be immediately secured without requiring preservation actions by employees," *Sedona Conf. on Legal Holds*, at 15.

A litigation hold should generally take the form of a written notice to be distributed to the client, or, where the client is an organization, to any employees who may be in possession of relevant information. *See, e.g.*, *Haynes v. Dart*, Civ. A. No. 08 C 4834, 2010 WL 140387, at *4 (N.D. Ill. Jan.11, 2010) (failure to issue a written notice is at least "relevant" to consideration of sanctions for spoliation of evidence). It should inform the recipient, among other things, as to what information is potentially relevant to the lawsuit. *See, e.g.*, *Chan v. Triple 8 Palace, Inc.*, No. 03 CIV 6048 (GEL) (JCF), 2005 WL 1925579, at *6 (S.D.N.Y. Aug. 11, 2005). The notice should "describe the litigation

in a way that will be understood by everyone with responsibility for preserving documents," and should "provide specific examples of the types of information" that should be preserved. *See Sedona Conf. on Legal Holds*, at 14-15. A written litigation hold should also "identify potential *sources* of information" (emphasis added) and give "detailed instructions" explaining what each recipient must do in order to ensure that no sources of information are overlooked. *Id.*, at 15; *cf. Orbit One*, 2010 WL 4615547, at *12 (instructions to employees were not sufficiently "detailed" to communicate preservation duties). Moreover, a proper litigation hold should advise the client against "downgrading [potentially relevant] data to a less accessible form – which systematically hinders future discovery by making the recovery of the information more costly and burdensome." *Treppel v. Biovail Corp.*, 233 F.R.D. 363, n.4 (S.D.N.Y. 2006).

"Although it is well established that there is no obligation to '"preserve every shred of paper, every e-mail or electronic document, and every backup tape,"' *Consol. Edison Co. of N.Y., Inc. v. United States,* 90 Fed. Cl. 228, 256 (Fed. Cl. 2009) (quoting *Zubulake IV*, 220 F.R.D. at 217), in some circumstances, '[t]he general duty to preserve *may* also include deleted data, data in slack spaces, backup tapes, legacy systems, and metadata.' [Paul W.] Grimm, [Michael D. Berman, Conor R. Crowley, Leslie Wharton, *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*,] 37 U. Balt. L. Rev. [381,] 410 [(2008)] (emphasis added)." *Victor Stanley*, 269 F.R.D. at 524. "[A] litigant could choose to retain all then-existing backup tapes for the relevant personnel (if such tapes store data by individual or the contents can be identified in good faith and through reasonable effort), and to catalog any later-created documents in a separate electronic file. That, along with a mirror-image of the computer system taken at

the time the duty to preserve attaches (to preserve documents in the state they existed at that time), creates a complete set of relevant documents." *Id.* (quoting *Zubulake IV*, 220 F.R.D. at 218).[12]

> Reasonableness and proportionality are surely good guiding principles for a court that is considering imposing a preservation order or evaluating the sufficiency of a party's efforts of preservation after the fact. Because those concepts are highly elastic, however, they cannot be assumed to create a safe harbor for a party that is obligated to preserve evidence but is not operating under a court-imposed preservation order. Proportionality is particularly tricky in the context of preservation. It seems unlikely, for example, that a court would excuse the destruction of evidence merely because the monetary value of anticipated litigation was low.

Orbit One, 2010 WL 4615547, at *20, n.10. The *Orbit One* court concluded, "Although some cases have suggested that the definition of what must be preserved should be guided by principles of 'reasonableness and proportionality,' *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010); *see Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010), this standard may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle." *Orbit One*, 2010 U.S. Dist. LEXIS 123633, at *20 (some citations omitted).

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[12] The Civil Rules Advisory Committee has suggested excluding specific categories of electronic data from any preservation obligation, such as deleted, slack, fragmented or unallocated data on hard drives, RAM, and legacy media. Agenda, at 202-03. *See Columbia Pictures Indus. v. Fung*, Case No. CV 06-5578 SVW (JCx), 2007 U.S. Dist. LEXIS 97576, at *39 (C.D. Cal. June 8, 2007) (holding that, while data passing through RAM and written only to temporary files constitutes ESI under Rule 34, failure to preserve such evidence would not be sanctioned, although the service log data was to be preserved); *cf. Arista Records LLC v. Usenet.com., Inc.*, 608 F. Supp. 2d 409, 432 (S.D.N.Y. 2009) (discussing case law on duty to preserve transient data absent specific request for same).

We reject the approach of excluding specific categories of ESI. Such a list may well become obsolete in the near future for technical or other reasons. Given the lead time necessary to change a federal rule, a more general standard of preservation seems better. For example, metadata has become an increasingly useful tool for searching or culling ESI, rather than merely an evidentiary requirement in relatively rare cases. *See Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep't of Homeland Sec.*, 255 F.R.D. 350, 356 (S.D.N.Y. 2008) (noting that the *Sedona Principles* rejected the Sedona Conference's statement of only two years earlier that there should be a modest legal presumption against the production of metadata).

A party subject to a duty to preserve must preserve the information in its possession, custody or control. *See Canton v. Kmart Corp.*, No. 1:05-cv-143, 2009 WL 2058908, at *2 (D.V.I. July 13, 2009) (quoting *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 334 (3d Cir. 1995)); *Velez v. Marriott PR Mgmt., Inc.*, 590 F. Supp. 2d 235, 258 (D.P.R. 2008); *Nat'l Grange Mut. Ins. Co. v. Hearth & Home, Inc.*, Civ. A. No. 2:06CV54WCO, 2006 WL 5157694, at *5 (N.D. Ga. Dec. 19, 2006). "[D]ocuments are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action," according to district courts in the Second and Fourth Circuits. *Victor Stanley,* 269 F.R.D. at 523 (quoting *Goodman*, 632 F. Supp. 2d at 515 (quoting *In re NTL Inc. Sec. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007))). Moreover, according to district courts in the First, Fourth and Sixth Circuits, there is "a [further] duty to notify the opposing party of evidence in the hands of third parties." *Victor Stanley,* 269 F.R.D. at 523 (citing *Silvestri,* 271 F.3d at 590); *Velez*, 590 F. Supp. at 258; and *Jain v. Memphis Shelby Airport Auth.*, No. 08-2119-STA-dkv, 2010 WL 711328, at *2 (W.D. Tenn. Feb. 25, 2010)); *see also Jordan F. Miller Corp. v. Mid-Continent Aircraft Serv.*, 139 F.3d 912, 1998 WL 68879, at *5-6 (10th Cir. 1998) (if a party relinquishes ownership or custody of potentially relevant evidence, it must contact the new custodian to preserve the evidence). However, "district courts in the Third, Fifth, and Ninth Circuits have held that the preservation duty exists only when the party controls the evidence, without extending that duty to evidence controlled by third parties." *Victor Stanley,* 269 F.R.D. at 523 (citing *Bensel v. Allied Pilots Ass'n*, 263 F.R.D. 150, 152 (D.N.J. 2009); *Rimkus*, 688

F. Supp. 2d at 615-16; *Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS, 2010 WL 582189, at *4 (D. Ariz. Feb. 12, 2010)).[13]

"The preservation obligation runs first to counsel, who has 'a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing the destruction.' Where the client is a business, its managers, in turn, are responsible for conveying to the employees the requirements for preserving evidence." *In re NTL, Inc. Secs. Litig.*, 244 F.R.D. 179, 197-98 (S.D.N.Y. 2007) (quoting *Chan*, 2005 WL 1925579, at *6). "[I]t is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information." *Zubulake V*, 229 F.R.D. at 432. Counsel's duties, in designing a litigation hold, also include directly "communicating with the 'key players' in the litigation, in order to understand how they stored information," thereby ensuring that such information is included in the documents being preserved. *Id.*; *see also Pension Comm.*, 685 F. Supp. 2d at 465 ("the failure to collect records – either paper or electronic – from key players constitutes gross negligence or willfulness"). "To the extent that it may not be feasible for counsel to speak with every key player, given the size of a company or the scope of the lawsuit," it may be sufficient to perform "a system-wide keyword search" of the client's electronically stored information, and then to preserve "a copy of each 'hit'"

[13] *But see Columbia Pictures*, 2007 U.S. Dist. LEXIS 97576, at *38-39 (a litigant is under a duty to preserve what it knows or reasonably should know, is relevant in the action, is reasonably calculated to lead to discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request).

One commentator has argued that, because ESI may be stored on non-party servers, discovery of these non-parties should proceed by way of subpoena under Rule 45, rather than by making a demand on a party under Rule 26 and then requiring the party to demand the information from the non-party, under the theory that such ESI is under the party's custody and control. It is argued that courts could better consider the burdens of non-parties in the context of the motion to compel compliance with a subpoena. *See* Comment: Jurisdictional, Procedural, and Economic Considerations for Non-Party Electronic Discovery, 59 Emory L.J. 1339, 1361-1362 (2010).

located by the search. *Zubulake V*, 229 F.R.D. at 432. In addition, counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched." *Id.* "To do this, counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture."[14] *Id.*

Thus, when an allegation of a breach of the duty of preservation leading to spoliation arises, the protections of the attorney-client privilege and attorney work-product doctrine are implicated. For the purposes of determining any sanctions, a tension exists between the prtoections and the need to ascertain the actions taken in furtherance of the preservation duty. *See Pension Comm.*, 685 F. Supp. 2d at 477 (no protection for "[w]hich files were searched, how the search was conducted, who was asked to search, what they were told, and the extent of any supervision").[15]

Counsel should also ensure that the evidence is preserved in its original form, or as close as possible. "The reviewing court, as well as the parties, should be focused upon maintaining the integrity of the evidence in a form as close to, if not identical to, the original condition of the evidence." *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 435 (W.D. Pa. 2004). For ESI, absent agreement, this may

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[14] One court has suggested that the duty to preserve evidence is discharged once the documents are produced. *See Ferron v. Echostar Satellite, LLC*, 2010 Fed. App. 0793 N (6th Cir. Dec. 28, 2010) (when party produced ESI in original form on CD, no continuing obligation to maintain documents).

[15] Guidelines from The *Sedona Conf. on Legal Holds*, at 15, suggest that sufficient documentation of a litigation hold may avoid disclosing attorney work product and still be sufficient to demonstrate that adequate care was taken to preserve documents, so long as it includes:

- the date and by whom the hold was initiated and possibly the triggering event;
- the initial scope of information, custodians, sources and systems involved;
- subsequent scope changes as new custodians or data are identified or initial sources are eliminated;
- notices and reminders sent, confirmations of compliance received (if any), and handling of exceptions;
- a description as to the collection protocol, persons contacted, and the date information was collected; and
- a master list of custodians and systems involved in the preservation effort.

require preserving the evidence in native format and making it available to the requesting party with no loss in the level of accessibility of the document.

> Case law has developed guidelines for what the preservation duty entails. Unfortunately, in terms of what a party must do to preserve potentially relevant evidence, case law is not consistent across the circuits, or even within individual districts. This is what causes such concern and anxiety, particularly to institutional clients such as corporations, businesses or governments, because their activities – and vulnerability to being sued – often extend to multiple jurisdictions, yet they cannot look to any single standard to measure the appropriateness of their preservation activities, or their exposure or potential liability for failure to fulfill their preservation duties. A national corporation cannot have a different preservation policy for each federal circuit and state in which it operates. How then do such corporations develop preservation policies? The only "safe" way to do so is to design one that complies with the most demanding requirements of the toughest court to have spoken on the issue, despite the fact that the highest standard may impose burdens and expenses that are far greater than what is required in most other jurisdictions in which they do business or conduct activities.

Victor Stanley, 269 F.R.D. at 523. A uniform federal rule regarding the preservation duty is required, especially in this age of electronically stored information.

ELEMENTS OF A SPOLIATION CLAIM

> The elements of a claim for spoliation are:
>
> (1) that the party having control over the evidence had an obligation to timely produce it; (2) that the party that failed to produce the evidence had a culpable state of mind; and (3) that the missing evidence is relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Residential Funding, 306 F.3d at 107; *accord Victor Stanley*, 269 F.R.D. at 520-21 (quoting *Goodman*, 632 F. Supp. 2d at 509 (quoting *Thompson*, 219 F.R.D. at 101)); *Rimkus*, 688 F. Supp. 2d at 615-16; *Jones*, 2010 WL 2106640, at *5; *Melendres*, 2010 WL 582189, at *4; *In re Global Technovations, Inc.*, 431 B.R. 739, 778 (Bankr. E.D. Mich. 2010). In other words, the elements for a claim of spoliation are: (1) a duty to

preserve, (2) breach of the duty to preserve, (3) a culpable state of mind, (4) the loss of relevant information, and (5) prejudice.

A. Relevant Information

To determine an appropriate remedy or sanction for spoliation (as opposed to relevance for purposes of preservation), "[e]vidence is relevant if it would have clarified a fact at issue in the trial and otherwise would naturally have been introduced into evidence." *Pension Comm.*, 685 F. Supp. 2d at 496. There must be a showing that "the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction." *Residential Funding*, 306 F.3d at 109 (quoting *Kronisch v. United States*, 150 F.3d 112, 127 (2d Cir. 1998)). "[T]he concept of 'relevance' encompasses not only the ordinary meaning of the term, but also that the destroyed evidence would have been favorable to the movant." *Zubulake V*, 229 F.R.D. at 431. It must be "more than sufficiently probative to satisfy Rule 401 of the Federal Rules of Evidence," *Residential Funding Corp.*, 306 F.3d at 108-09; *Victor Stanley*, 269 F.R.D. at 531 (quoting *Pension Comm.*, 685 F. Supp. 2d at 467).

B. Prejudice

Prejudice "can range along a continuum from an inability to prove claims or defenses to little or no impact on the presentation of proof." *Rimkus*, 688 F. Supp. 2d at 613.

> Spoliation of evidence causes prejudice when, as a result of the spoliation, the party claiming spoliation cannot present "evidence essential to its underlying claim." *Krumwiede v. Brighton Assocs., L.L.C.*, No. 05-C-3003, 2006 WL 1308629, at *10 (N.D. Ill. May 8, 2006) (noting that even if the files were only modified and not deleted, 'the changes to the file metadata call the authenticity of the files and their content into question and make it impossible for [the defendant] to rely on them'). . . . Generally, courts find prejudice where a party's ability to present its case

> or to defend is compromised. . . . [A]t least one court has found that the delayed production of evidence causes prejudice. *See Jones*, 2010 WL 2106640, at *8-9 . . . Th[is] court considers "prejudice to the judicial system." *Krumweide*, 2006 WL 1308629, at *11.

Victor Stanley, 269 F.R.D. at 532. *See Rimkus*, 688 F. Supp. 2d at 613 (prejudice occurs when spoliation substantially denies a party the ability to support or defend its claim); *Henry v. Gill Indus.*, 983 F.2d 943, 948 (9th Cir. 1993) (same); *Pension Comm.*, 685 F. Supp. 2d at 479 (same); *Jain*, 2010 WL 711328, at *4 (same); *Goodman*, 632 F. Supp. 2d at 519 (same); *Velez*, 590 F. Supp. 2d at 259 (same); *Jones*, 2010 WL 2106640, at *8-9 (prejudice occurs when spoliation substantially denies a party the ability to support or defend its claim or delays production of evidence); *see also Dillon v. Nissan Motor Co.*, 986 F.2d 263, 268 (8th Cir. 1993) (prejudice occurs when evidence is destroyed that may have been helpful); *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, Case No. 09-60351-CIV, 2010 WL 3368654, at *8 (S.D. Fla. Aug. 23, 2010) (prejudice occurs from spoliation of evidence crucial to a claim or defense); *Pinstripe, Inc. v. Manpower, Inc.*, No. 07-CV-620-GKF-PJC, 2009 WL 2252131, at *2 (N.D. Okla. July 29, 2009) (prejudice arises from spoliation that impairs a party's ability to support a claim or defense).

C. Rebuttable Presumptions

Since "[c]ourts must take care not to 'hold[ ] the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed [or unavailable] evidence,' because doing so 'would . . . allow parties who have . . . destroyed evidence to profit from that destruction,'" *Pension Comm.*, 685 F. Supp. 2d at 468, 479 n.96 (quoting *Residential Funding*, 306 F.3d at 109 (quoting *Kronisch*, 150 F.3d at 128)), some courts employ presumptions for relevance and prejudice.

When a spoliator acts willfully, relevance of evidence or prejudice may be presumed. *See Victor Stanley*, 269 F.R.D. at 532 (relevance); *Sampson*, 251 F.R.D. at 179 (relevance); *Pension Comm.*, 685 F. Supp. 2d at 468 (prejudice). In some circumstances in the Second Circuit, if a spoliator acts in a grossly negligent manner, relevance and prejudice may be presumed. *See Pension Comm.*, 685 F. Supp. 2d at 467 & n.32 (quoting *Residential Funding*, 306 F.3d at 109). However, in the Fourth Circuit, "[n]egligent or even grossly negligent conduct is not sufficient to give rise to the presumption." *Victor Stanley*, 269 F.R.D. at 532; *see also In re Kmart Corp.*, 371 B.R. 823, 853-54 (Bankr. N.D. Ill. 2007) (in the Seventh Circuit, unintentional conduct is insufficient for a presumption of relevance); *Rimkus*, 688 F. Supp. 2d at 617 (no presumption of relevance and prejudice is available when the level of culpability is "mere" negligence).

In the Second Circuit, "bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party." *Residential Funding*, 306 F.3d at 109. However, "[t]he Fifth Circuit has not explicitly addressed whether even bad-faith destruction of evidence allows a court to presume that the destroyed evidence was relevant or its loss prejudicial. Case law in the Fifth Circuit indicates that an adverse inference instruction is not proper unless there is a showing that the spoliated evidence would have been relevant." *Rimkus*, 688 F. Supp. 2d at 617.

If a presumption is available, it is rebuttable by a showing "that the innocent party has not been prejudiced by the absence of the missing information," *Victor Stanley*, 269 F.R.D. at 532 (quoting *Pension Comm.*, 685 F. Supp. 2d at 468), "for example, by

demonstrating that the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party's claims or defenses," *Pension Comm.*, 685 F. Supp. 2d at 469; *Rimkus*, 688 F. Supp. 2d at 617. "If the spoliating party demonstrates to a court's satisfaction that there could not have been any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required." *Pension Comm.*, 685 F. Supp. 2d at 469.

D. Culpable State of Mind

Case law has identified four culpable states of mind: negligence, gross negligence, willfulness and bad faith.

"Negligence, or 'culpable carelessness,' is '[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation[.]'" *Victor Stanley*, 269 F.R.D. at 529 (quoting *Black's Law Dictionary* 846 (Bryan A. Garner ed., abridged 7th ed., West 2000)); *see Jones*, 2010 WL 2106640, at *6-7 (negligence is a failure to act reasonably under the circumstances). Negligence is "unreasonable conduct . . . that . . . creates a risk of harm to others," *Pension Comm.*, 685 F. Supp. 2d at 464, or "conduct 'which falls below the standard established by law for the protection of others against unreasonable risk of harm,'" *id.* (quoting Prosser & Keeton on Torts § 31 at 169 (5th ed. 1984) (*quoting* Restatement (Second) of Torts § 282)) (citations omitted). "Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent." *Zubulake IV*, 220 F.R.D. at 220; *accord BancorpSouth Bank v. Herter*, 643 F. Supp. 2d 1041, 1061 (W.D. Tenn. 2009); *Sampson v. City of Cambridge*, No. WDQ-06-1819, 2008 WL 7514364, at *8 (D. Md. May 1, 2008); *Hous. Rights Ctr. v. Sterling*, No. CV 03-859 DSF, 2005 WL 3320739, at *3 (C.D. Cal. Mar. 2, 2005); *but compare Canton*,

2009 WL 2058908, at *3 (quoting *Mosaid Techs., Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 338 (D.N.J. 2004)) (conduct is culpable if "party [with] notice that evidence is relevant to an action . . . either proceeds to destroy that evidence or allows it to be destroyed by failing to take *reasonable* precautions" (emphasis added)).

Gross negligence is "a failure to exercise even that care which a careless person would use . . . and differs from ordinary negligence only in degree, and not in kind." *Pension Comm.*, 685 F. Supp. 2d at 464 (quoting Prosser & Keeton on Torts § 34 at 211-12 (5th ed. 1984)) (citations omitted). For example, "[a]fter a discovery duty is well established, the failure to adhere to contemporary standards," such as "to issue a written litigation hold; to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources," is gross negligence. *Pension Comm.*, 685 F. Supp. 2d at 471; *accord Victor Stanley*, 269 F.R.D. at 529; *cf. Haynes*, 2010 WL 140387, at *4 ("[t]he failure to institute a document retention policy, in the form of a litigation hold, is relevant to the court's consideration, but it is not per se evidence of sanctionable conduct").

Willfulness is "intentional or reckless conduct that is so unreasonable that harm is highly likely to occur," *Pension Comm.*, 685 F. Supp. 2d at 464, or "an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied

by a conscious indifference to the consequences," *id.* (quoting Prosser & Keeton on Torts § 34 at 213 (5th ed. 1984) (citing Restatement (Second) of Torts § 500 and collecting cases)). *See Victor Stanley*, 269 F.R.D. at 530 ("[w]illfulness is equivalent to intentional, purposeful, or deliberate conduct").

"[B]ad faith requires 'destruction for the purpose of depriving the adversary of the evidence,' *Powell v. Town of Sharpsburg,* 591 F. Supp. 2d 814, 820 (E.D. N.C. 2008), for willfulness, it is sufficient that the actor intended to destroy the evidence." *Victor Stanley*, 269 F.R.D. at 530. "Conduct that is in bad faith must be willful, but conduct that is willful need not rise to bad faith actions." *Id.*

The court in *Pension Committee* provided four examples of different levels of culpability: (i) failure to collect records from key players is either gross negligence or willfulness; (ii) destruction of email or certain backup tapes is either gross negligence or willfulness; (iii) failure to obtain records from employees who had any involvement, but were not key players, could be negligence; and (iv) failure to take all appropriate measures to preserve ESI likely is negligence. *Id.*, 685 F. Supp. 2d at 465.

REMEDIES AND SANCTIONS FOR SPOLIATION

The range of potential remedies and sanctions for spoliation from least harsh to most harsh is:

(a) further discovery, *Pension Comm.*, 685 F. Supp. 2d at 469 (citing, *e.g.*, *Treppel*, 249 F.R.D. at 123-24); *Victor Stanley*, 269 F.R.D. at 536;

(b) cost-shifting, *Pension Comm.*, 685 F. Supp. 2d at 469 (citing, *e.g.*, *Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284, 291-92 (S.D.N.Y. 2009)); *Rimkus*, 688 F. Supp. 2d at 647 ("reasonable costs and attorneys' fees required to identify and respond

to the spoliation . . . [which] may arise from additional discovery needed after a finding that evidence was spoliated, the discovery necessary to identify alternative sources of information, or the investigation and litigation of the document destruction itself"); *Victor Stanley*, 269 F.R.D. at 533, 536 (attorneys' fees and costs);

(c) fines "to punish the offending party . . . to deter the litigant's conduct" *Pension Comm.*, 685 F. Supp. 2d at 469, 471 (citing, *e.g.*, *United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 21, 25 (D.D.C. 2004), and quoting *Green*, 262 F.R.D. at 291 (quoting *In re WRT Energy Sec. Litig.*, 246 F.R.D. 185, 201 (S.D.N.Y. 2007)));[16]

(d) special jury instructions (an adverse inference), *Pension Comm.*, 685 F. Supp. 2d at 469 (citing, *e.g.*, *Arista Records*, 608 F. Supp. 2d at 443-44), "to level the evidentiary playing field and sanction the improper conduct," *Rimkus*, 688 F. Supp. 2d at 645;[17]

(e) preclusion of evidence, *Pension Comm.*, 685 F. Supp. 2d at 469 (citing, *e.g.*, *Brown v. Coleman*, No. 07 Civ. 1345, 2009 WL 2877602, at *4 (S.D.N.Y. Sept. 8, 2009)); *Victor Stanley*, 269 F.R.D. at 533;

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[16] *But see Victor Stanley*, 269 F.R.D. at 536-37 ("[A] few courts have ordered the spoliating party to pay a fine to the clerk of court or a bar association for prolonging litigation and wasting the court's time and resources. *E.g., Pinstripe, Inc. v. Manpower, Inc.,* No. 07-CV-620-GKF-PJC, 2009 WL 2252131, at *4 (N.D. Okla. July 29, 2009); *Claredi v. Seebeyond Tech. Corp.,* No. 4:04CV1304 RWS, 2007 WL 735018, at *4 (E.D. Mo. Mar. 8, 2007); *Wachtel v. Health Net, Inc.,* 239 F.R.D. 81, 111 (D.N.J. 2006); *Turnage,* 115 F.R.D. at 559. However, . . . it is unclear whether these unappealed trial court holdings would withstand appellate review, because in similar cases the Fourth and Tenth Circuits have vacated discovery sanctions ordering the payment of money to the Clerk of the Court, deeming them to be criminal contempt sanctions, which are unavailable without the enhanced due process procedure requirements criminal contempt proceedings require. *Bradley v. Am. Household, Inc.,* 378 F.3d 373, 377-79 (4th Cir. 2004); *Buffington v. Baltimore Cnty., Md.,* 913 F.2d 113, 133 (4th Cir. 1990); *Law v. Nat'l Collegiate Athletic Ass'n,* 134 F.3d 1438, 1442-44 (10th Cir. 1998).").

[17] Judge Scheindlin describes three types of adverse-inference jury instructions: (a) "a jury can be instructed that certain facts are deemed admitted and must be accepted as true;" (b) "a court may impose a mandatory presumption[, that] . . . is considered to be rebuttable;" or (c) a "spoliation charge" may "*permit*[ ] (but . . . not require) a jury to *presume* that the lost evidence is both relevant and favorable to the innocent party . . . [and the jury] must then decide whether to draw an adverse inference against the spoliating party" after considering the spoliating party's rebuttal evidence. *Pension Comm.*, 685 F. Supp. 2d at 470 (original emphasis).

(f) termination (entry of a default judgment or dismissal), *Pension Comm.*, 685 F. Supp. 2d at 469 (citing, *e.g.*, *Gutman v. Klein*, No. 03 Civ. 1570, 2008 WL 5084182, at *2 (E.D.N.Y. Dec. 2, 2008)); *Victor Stanley*, 269 F.R.D. at 533; and

(g) civil or criminal contempt, *Victor Stanley*, 269 F.R.D. at 536 ("Fed.R.Civ.P. 37(b)(2)(A)(vii) provides that the court may 'treat[ ] as contempt of court the failure to obey' a court order to provide or permit discovery of ESI evidence. Similarly, pursuant to its inherent authority, the court may impose fines or prison sentences for contempt and enforce 'the observance of order.' *United States v. Hudson,* 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812).").

"[T]he applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine." *Silvestri,* 271 F.3d at 590 (quoting *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999)). Sanctions "should (1) deter the 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 [it] would have been in absent the wrongful destruction of evidence by the opposing party." *Pension Comm.*, 685 F. Supp. 2d at 469 (quoting *West*, 167 F.3d at 779 (quoting *Kronisch*, 150 F.3d at 126)) (internal quotation marks omitted); *accord Victor Stanley*, 269 F.R.D. at 534. "[T]he range of available sanctions serve both normative – designed to punish culpable conduct and deter it in others – and compensatory – designed to put the party adversely affected by the spoliation in a position that is as close to what it would have been in had the spoliation not occurred – functions. Because . . . the duty to preserve relevant evidence is owed to the court, it is also appropriate for a court to consider whether the sanctions it imposes

will 'prevent abuses of the judicial system' and 'promote the efficient administration of justice.'" *Victor Stanley*, 269 F.R.D. at 534 (quoting *Jones,* 2010 WL 2106640, at *5).

"[A] sanction . . . must be proportionate to the culpability involved and the prejudice that results. Such a sanction should be no harsher than necessary to respond to the need to punish or deter and to address the impact on discovery." *Rimkus*, 688 F. Supp. 2d at 618. "In determining what sanctions are appropriate, the Court must consider the extent of prejudice, if any, along with the degree of culpability." *Victor Stanley*, 269 F.R.D. at 533.

> The harshest sanctions may apply not only when both severe prejudice and bad faith are present, but also when, for example, culpability is minimally present, if there is a considerable showing of prejudice, or, alternatively, the prejudice is minimal but the culpability is great. . . . For example, in some, but not all, circuits, conduct that does not rise above ordinary negligence may be sanctioned by dismissal if the resulting prejudice is great. *Silvestri,* 271 F.3d at 593 (stating that dismissal may be an appropriate sanction for negligent conduct "if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case" and dismissing case without concluding whether plaintiff's conduct rose above negligence); *see Rimkus*, 688 F. Supp. 2d at 614-15 ("The First, Fourth, and Ninth Circuits hold that bad faith is not essential to imposing severe sanctions if there is severe prejudice, although the cases often emphasize the presence of bad faith. In the Third Circuit, the courts balance the degree of fault and prejudice.") (footnotes omitted). Conversely, absence of either intentional conduct or significant prejudice may lessen the potential appropriate sanctions. In the Fifth and Eleventh Circuits, for example, courts may not impose severe sanctions absent evidence of bad faith. *See Rimkus,* 688 F. Supp. 2d at 614; *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.,* No. 09-60351-CIV, 2010 WL 3368654, at *12-13 (S.D. Fla. Aug.23, 2010).

Victor Stanley, 269 F.R.D. at 533.

Judge Scheindlin in *Pension Committee* stated, "For less severe sanctions – such as fines and cost-shifting – the inquiry focuses more on the conduct of the spoliating party . . . for more severe sanctions – such as dismissal, preclusion, or the imposition of

an adverse inference – the court must consider, in addition to the conduct of the spoliating party, whether any missing evidence was relevant and whether the innocent party has suffered prejudice as a result of the loss of evidence." *Id.*, 685 F. Supp. 2d at 467. Magistrate Judge James C. Francis, IV disagrees with the implication in this quote from *Pension Committee* that any sanctions, even less severe ones, would be warranted if any information was lost, if there were also no showing of relevance. *See Orbit One*, 2010 WL 4615547, at *10-11. On the other hand, Judge Lee H. Rosenthal in *Rimkus* stated, "[S]evere sanctions of granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of 'bad faith.'" *Id.*, 688 F. Supp. 2d at 614.[18]

In courts in the Second Circuit, "when the spoliating party was merely negligent, the innocent party must prove both relevance and prejudice in order to justify the imposition of a severe sanction," *Pension Comm.*, 685 F. Supp. 2d at 467-68, "by adduc[ing] sufficient evidence from which a reasonable trier of fact could infer that the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction," *id.* at 468 (quoting *Residential Funding*, 306 F.3d at 109 (quoting *Kronisch*, 150 F.3d at 127)) (internal quotation marks omitted). In courts in the Fifth Circuit, "'[m]ere negligence is not enough' to warrant an instruction on spoliation." *Rimkus*, 688 F. Supp. 2d at 614 (quoting *Russell v. Univ. of Tex. of Permian Basin*, 234

[18] *See Arista Records*, 608 F. Supp. 2d at 442-43, where Magistrate Judge Theodore H. Katz rejected entering case-dispositive sanctions in favor of adverse-inference instructions that would serve the remedial purpose of restoring plaintiffs to the position they would have been in had the evidence not been destroyed. *See also Mullaney v. Hilton Hotels Corp.*, CIVIL NO. 07-00313 ACK-LEK, 2009 U.S. Dist. LEXIS 55629, at *20 (D. Haw. June 30, 2009), where Magistrate Judge Leslie E. Kobayashi held that the loss of digital photographs of an accident warranted telling the jury of the lost photographs and compelling the defendant to produce a live witness with knowledge of the lost photographs to be examined at trial.

Fed. Appx. 195, 208 (5th Cir. 2007) (unpublished) (quoting *Vick v. Tex. Employment Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975))).

"The Eleventh Circuit has held that bad faith is required for an adverse inference instruction.[19] The Seventh, Eighth, Tenth, and D.C. Circuits also appear to require bad faith.[20] The First, Fourth, and Ninth Circuits hold that bad faith is not essential to imposing severe sanctions if there is severe prejudice, although the cases often emphasize the presence of bad faith.[21] In the Third Circuit, the courts balance the degree of fault and prejudice.[22]" *Rimkus*, 688 F. Supp. 2d at 614-15 (footnotes in original). In the Fifth

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[19] *See Penalty Kick Mgmt. Ltd. v. Coca Cola Co.*, 318 F.3d 1284, 1294 (11th Cir. 2003) ("[A]n adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith." (quoting *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997))).

[20] *See, e.g., Turner v. Pub. Serv. Co. of Colo.*, 563 F.3d 1136, 1149 (10th Cir. 2009) ("Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case." (quoting *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997))); *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008) ("In order to draw an inference that the [destroyed documents] contained information adverse to Sears, we must find that Sears intentionally destroyed the documents in bad faith."); *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007) ("A spoliation-of-evidence sanction requires 'a finding of intentional destruction indicating a desire to suppress the truth.'" (quoting *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746 (8th Cir. 2004))); *Wyler v. Korean Air Lines Co.*, 928 F.2d 1167, 1174 (D.C. Cir. 1991) ("Mere innuendo . . . does not justify drawing the adverse inference requested . . . .").

[21] *See, e.g., Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004) (holding that an inference cannot be drawn merely from negligent loss or destruction of evidence but requires a showing that willful conduct resulted in the loss or destruction); *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001) (holding that dismissal is "usually justified only in circumstances of bad faith" but "even when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case"); *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 447 (1st Cir. 1997) ("Certainly bad faith is a proper and important consideration in deciding whether and how to sanction conduct resulting in the destruction of evidence. But bad faith is not essential. If such evidence is mishandled through carelessness, and the other side is prejudiced, we think that the district court is entitled to consider imposing sanctions, including exclusion of the evidence."); *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17, 23-24 (1st Cir. 1981) ("In any event, Allen Pen has not shown that the document destruction was in bad faith or flowed from the consciousness of a weak case. There is no evidence that Springfield believed the lists would have damaged it in a lawsuit. Without some such evidence, ordinarily no adverse inference is drawn from Springfield's failure to preserve them."); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) ("Short of excluding the disputed evidence, a trial court also has the broad discretionary power to permit a jury to draw an adverse inference from the destruction or spoliation against the party or witness responsible for that behavior.").

[22] *See, e.g., Bensel v. Allied Pilots Ass'n*, 263 F.R.D. 150 (D.N.J. 2009) (declining to apply a spoliation inference or other sanction for the loss of information resulting from the defendant's failure to impose litigation holds in a timely manner); *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 335 (D.N.J. 2004) (noting that "[t]hree key considerations that dictate whether such sanctions are warranted are: '(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice

Circuit, an adverse inference instruction may be given "[w]hen a party is prejudiced, but not irreparably, from the loss of evidence that was destroyed with a high degree of culpability." *Id.* at 618. In the Second Circuit, "[t]he sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence." *Residential Funding*, 306 F.3d at 108. *See also Pension Comm.*, 685 F. Supp. 2d at 470 ("[W]hen a spoliating party has acted willfully or in bad faith, a jury can be instructed that certain facts are deemed admitted and must be accepted as true." However, "when a spoliating party has acted willfully or recklessly, a court may impose a mandatory presumption[, that] . . . is considered to be rebuttable."). The Sixth Circuit follows the Second Circuit. *See Rogers v. T.J. Samson Cmty. Hosp.*, 276 F.3d 228, 232 (6th Cir. 2002) (allowing severe sanctions for negligent destruction of evidence following Second Circuit in *Residential Funding*).

A sanction of termination may be imposed in the Second Circuit "where a party has engaged in perjury, tampering with evidence, or intentionally destroying evidence by burning, shredding, or wiping out computer hard drives." *Pension Comm.*, 685 F. Supp. 2d at 470; *see also West*, 167 F.3d at 779 ("willfulness, bad faith, or fault on the part of the sanctioned party" may result in dispositive sanctions). In the Fifth Circuit, a dispositive sanction may be imposed "when 'the spoliator's conduct was so egregious as to amount to a forfeiture of his claim' and 'the effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim.'" *Rimkus*, 688 F. Supp. 2d at 618 (quoting *Sampson*, 251 F.R.D. at 180 (quoting *Silvestri*,

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suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future'" and holding that bad faith was not required for an adverse inference instruction as long as there was a showing of relevance and prejudice (quoting *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994))).

271 F.3d at 593)). "In the Fourth Circuit, to order these harshest sanctions, the court must ""be able to conclude either (1) that the spoliator's conduct was so egregious as to amount to a forfeiture of his claim, *or* (2) that the effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim[,]""" *Goodman,* 632 F. Supp. 2d at 519 (quoting *Sampson,* 251 F.R.D. at 180 (quoting *Silvestri,* 271 F.3d at 593)) (emphasis in *Goodman*)[.]" *Victor Stanley*, 269 F.R.D. at 534. According to Magistrate Judge Grimm, "Elsewhere [than in the Fourth Circuit], dispositive or potentially dispositive sanctions are impermissible without bad faith, even if there is considerable prejudice. *See Rimkus,* 688 F. Supp. 2d at 614 (In the Seventh,[23] Eighth,[24] Tenth,[25] Eleventh,[26] and D.C. Circuits,[27] 'the severe sanctions of granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of "bad faith."')." *Victor Stanley*, 269 F.R.D. at 535 (footnotes added). *See also Micron Tech., Inc. v. Rambus, Inc.*, ___ F.3d ___, 2011 WL 1815975, at *13 (Fed. Cir. May 13, 2011) ("[a] determination of bad faith is normally a prerequisite to the imposition of dispositive sanctions for spoliation"); *Dae Kon Kwon v. Costco Wholesale Corp.*, Civ. No. 08-00360 JMS BMK, 2010 WL 571941, at *2 (D. Haw. Feb. 17, 2010) (requiring that party "engaged deliberately in deceptive practices"); *Global Technovations*, 431 B.R. at 779 (willfulness, bad faith, or fault

[23] In contrast, in his appendix in *Victor Stanley*, Magistrate Judge Grimm states that the standard in the Seventh Circuit for imposing dispositive sanctions is "willfulness, bad faith, or fault" citing *Kmart*, 371 B.R. at 840.

[24] *See Menz v. New Holland N. Am., Inc.*, 440 F.3d 1002, 1006 (8th Cir. 2006); *Johnson v. Avco Corp.*, 702 F. Supp. 2d 1093, 1111 (E.D. Mo. 2010).

[25] In contrast, in his appendix in *Victor Stanley*, Magistrate Judge Grimm states that the standard in the Tenth Circuit for imposing dispositive sanctions is "willfulness, bad faith, or [some] fault" (brackets in original) citing *Procter & Gamble Co. v. Haugen*, 427 F.3d 727, 738 (10th Cir. 2005).

[26] *See Managed Care Solutions*, 2010 WL 3368654, at *12.

[27] *See Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1477 (D.C. Cir. 1995); *D'Onofrio v. SFX Sports Group, Inc.*, Civ. A. No. 06-687 (JDB/JMF), 2010 WL 3324964, at *5 (D.D.C. Aug. 24, 2010).

ranging from intentional conduct to ordinary negligence may support dispositive sanctions); *Mosaid,* 348 F. Supp. 2d at 335 (dispositive sanctions "should only be imposed in the most extraordinary of circumstances"); *Driggin v. Am. Sec. Alarm Co.*, 141 F. Supp. 2d 113, 123 (D. Me. 2000) ("severe prejudice or egregious conduct" required for dispositive sanctions).

"Pursuant to their inherent authority, courts may impose fines or prison sentences for contempt and enforce 'the observance of order.' *Hudson*, 7 Cranch at 34, 3 L.Ed. 259. . . . [T]hey may 'prevent undue delays . . . and . . . avoid congestion . . ., such as by dismissing a case. *Roadway Exp., Inc. v. Piper*, 447 U.S. [752,] 765 [(1980)] . . . However, the court's inherent authority only may be exercised to sanction 'bad-faith conduct,' *Chambers v. NASCO, Inc.*, 501 U.S. [32,] 50 (1991), and 'must be exercised with restraint and discretion,' *id.* at 44." *Victor Stanley,* 269 F.R.D. at 518.

PROPOSED RULES AND ADVISORY COMMITTEE NOTES

We propose that the following Rules be adopted:

Proposed Rule 26(h). Preservation of Relevant Documents, Electronically Stored Information or Things.

(1) A duty to preserve documents, electronically stored information, or things discoverable under Rules 26(b) and 34(a) arises when: (A) a person becomes aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action, or (B) a subpoena is received by a non-party.

(2) A person whose duty to preserve has been triggered must take actions that are reasonable under the circumstances to preserve discoverable documents, electronically stored information, or things in regard to potential claims or defenses of which the person is or should be aware, taking into consideration:
   (A) the potential importance of the preserved information in resolving the issues,
   (B) the importance of the issues at stake in the action,
   (C) the amount likely to be in controversy,
   (D) the burden or expense of preservation,
   (E) the parties' resources, and

(F) the likely needs of the case.

(3) This duty shall continue for existing and subsequently created documents, electronically stored information, or things: (A) when no action has been commenced, until a person becomes aware of facts or circumstances that would lead a reasonable person to expect not to be a party to an action, or (B) when an action has been commenced, until the termination of the party's or non-party's involvement.

(4) The documents, electronically stored information, or things shall be preserved, subject to Rule 26(h)(2), in a form as close to, if not identical to, their original condition without material loss of accessibility.

Proposed Rule 37(g). Failure to Comply with the Duty to Preserve.

(1) If a party or non-party is shown to have failed to preserve documents, electronically stored information, or things in accordance with Rule 26(h), the court where the action is pending may enter an appropriate order:
- (A) providing for further discovery, including the shifting of reasonable expenses of the further discovery to the party or non-party that failed to preserve documents, electronically stored information, or things;
- (B) requiring the party or non-party, or the attorney representing that party or non-party, or both to pay the movant's reasonable expenses, including attorneys' fees, caused by the failure, including expenses incurred in providing proof of spoliation and in making the motion;
- (C) imposing a fine upon the party or non-party, or the attorney representing that party or non-party, or both;
- (D) directing that matters or designated facts be taken as established against a party for purposes of the action, with or without the opportunity for rebuttal;
- (E) providing for an adverse-inference jury instruction against a party, with or without the opportunity for rebuttal;
- (F) prohibiting a party from supporting or opposing designated claims or defenses or from introducing designated matters in evidence;
- (G) dismissing the action or proceeding in whole or in part;
- (H) rendering a default judgment against the party; or
- (I) treating the failure as a contempt of court, if there has been a violation of a previous order.

(2) The court must select the least severe remedy or sanction necessary to redress a violation of Rule 26(h), taking into account all relevant factors, including:
- (A) the relevance of the documents, electronically stored information, or things,
- (B) the prejudice suffered, and
- (C) the level of culpability of the party or non-party failing in its duty.

(i) A contempt of court may be imposed only if the level of culpability includes bad faith.

(ii) A dismissal or entry of default judgment may be imposed only if the level of culpability includes at least willfulness.

(iii) An adverse-inference jury instruction, direction as to the establishment of matters or facts, or preclusion of evidence may be imposed only if the level of culpability includes at least gross negligence.

(iv) A sanction may be imposed only if the level of culpability includes at least negligence.

(v) The remedy of further discovery, including shifting of expenses, may be ordered regardless of any culpability.

(vi) Absent exceptional circumstances, it is evidence of due care if a person whose duty to preserve under Rule 26(h) has been triggered timely prepares, disseminates and maintains a reasonable litigation hold.

Advisory Committee Notes to Rule 26(h)(1)

It is inadvisable to formally set forth every single possible event that may trigger the duty to preserve. The circumstances of each case will vary. Nevertheless, if a person is anticipating commencing litigation, it should certainly begin preserving its own documents, electronically stored information, or things, and, if a person reasonably anticipates being sued, then it should similarly ensure that information or things that may be discoverable under Rules 26(b) or 34(a) are preserved. Similarly, if a person sends a written notice requesting or demanding that specified information be maintained, then that person should begin preserving its own material, and, when a person receives such a written notice indicating that it will be a party to an action, it should ensure that discoverable material is preserved. For a non-party, receipt of a subpoena should trigger the duty to preserve.

We propose that the duty to preserve be triggered "when a person becomes aware of facts or circumstances that would lead a reasonable person to expect to be a party to an

action."[28] This language appears to provide more guidance than the simpler "reasonably anticipates litigation" articulated in some cases and in the *Sedona Principles*, 70 cmt. 14.a. Accordingly, the duty may be triggered, among others, by the filing of an incident report, *Aiello,* 2010 U.S. Dist. LEXIS 97927, at *6-*7; retaining attorneys and sending a letter threatening litigation, *Goodman,* 632 F. Supp. 2d at 511; sending communications bearing the legend "attorney-client privilege," *Zubulake IV*, 220 F.R.D at 216-17; or learning that others in one's industry who are similarly situated are being sued, *Phillip M. Adams & Assocs.*, 621 F. Supp 2d at 1194. However, the receipt of a demand letter, which does not purport to present any legal claim, or otherwise to threaten litigation within a reasonable period of time, should, in and of itself, be insufficient to trigger preservation obligations of the recipient. Similarly, seeking advice on the possibility of litigation, whether through solicitation of in-house counsel or retention of outside counsel, should be insufficient, in and of itself, to trigger an obligation to preserve documents. Commentators have suggested other triggering events such as notifying an insurer, hiring an investigator or photographer, engaging experts, breaching a contractual, regulatory or statutory duty to preserve or produce specific data, filing a complaint with a regulator, or conducting destructive testing. *See* Joseph, at 8.

Courts have been more sympathetic to non-parties opposing discovery demands, recognizing that they are strangers to the litigation. *See, e.g., Lawson v. Chrysler LLC*, Case 4:08-cv-19-DDS-JCS, 2008 U.S. Dist. LEXIS 118677, at *4-5 (S.D. Miss. Dec. 18, 2008) (non-party is entitled to special consideration as to time and expense in

[28] This proposal is similar to what the Civil Rules Advisory Committee has suggested. *See* Rule 26.1(b) at Agenda page 212,

compliance, citing cases). Accordingly, the proposed Rule provides that non-parties will not have a duty of preservation until receipt of a subpoena.

Consistent with current case law, the description of material to be preserved – discoverable under Rules 26(b) and 34(a) – is broader than relevant material for purposes of determining a remedy or sanction for spoliation. It is logical that material produced in litigation will be a subset of material that is preserved. It also follows that not all material that is or should have been produced will be probative at trial. Therefore, relevance varies according to the stage of the litigation and the purpose for which material is being examined.

Advisory Committee Notes to Rule 26(h)(2)

Proposed Rule 26(h)(2) describes the scope of the duty to preserve.[29] The scope of the duty can only be generally described in order to cover the myriad situations that arise. The standard is that a person subject to the duty must act reasonably under the circumstances. What some courts have deemed reasonable under the circumstances is described in more detail above, and it is our expectation that courts will continue development of this standard on a case-by-case basis. *See, e.g., Victor Stanley*, 269 F.R.D. at 524 (quoting *Sedona Conf. on Legal Holds*, at 3) ("conduct that 'demonstrates reasonableness and good faith in meeting preservation obligations' includes 'adoption and consistent implementation of a policy defining a document retention decision-making process' and the 'use of established procedures for the reporting of information relating to a potential threat of litigation to a responsible decision maker'").

[29] This proposal is based on the Civil Rules Advisory Committee's proposed Rule 26.1(c) at Agenda pages 200 and 213.

The duty to preserve applies to "discoverable documents." This is meant to be a reference to proposed Rule 26(h)(1), which describes the subject matter of the duty as documents, electronically stored information, or things "discoverable under Rules 26(b) and 34(a)."

The proposed Rule seeks to limit the potentially broad scope of the materials required to be preserved in two ways. The first is by requiring preservation only of materials regarding "potential claims or defenses of which the person is or should be aware." The second is by explicitly describing factors that define a proportionality test applicable to preservation.

The duty to preserve evidence may impose significant burdens. The "presumption is that the party possessing [evidence] must bear the expense of preserving it for litigation," *Treppel,* 237 F.R.D. at 373, although "[t]his presumption may be overcome if the demanding party seeks preservation of evidence that is likely to be of marginal relevance and is costly to retain and preserve, or where a non-party is in possession of the requested evidence," *Mahar v. US. Xpress Enters. Inc.,* 688 F. Supp. 2d 95, 113 (N.D.N.Y. 2010); *see also Victor Stanley,* 269 F.R.D. at 522 ("'[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable,* and that in turn depends on whether what was done – or not done – was *proportional* to that case and consistent with clearly established applicable standards . . . the scope of preservation should somehow be proportional to . . . the costs and burdens of preservation.' ") (emphasis in original; citations omitted).

The proportionality limitation is particularly important as a guide to courts trying to determine in hindsight whether a particular preservation program was appropriate and

as a counter to blunderbuss written notices to preserve. Notices to preserve may trigger the duty to preserve, but should not define the scope of that duty.

Advisory Committee Notes to Rule 26(h)(3)

Because the cost of a pre-litigation duty to preserve may be quite high and it may currently be argued that it extends for years (or decades under some state statutes of repose or discovery rules for limitations purposes), the proposed Rule provides a limit on the pre-litigation duty to preserve. While this limit is merely the obverse of when the duty to preserve is triggered, it allows for the cessation of the duty to preserve when a change in circumstances makes it no longer reasonable to expect to be a party to an action.

In the event of litigation, the duty to preserve continues until the person's involvement ends. The obligation for non-parties should ordinarily end once they have complied with a subpoena. If there is doubt about when the duty ends and no agreement can be reached, then the court, upon an appropriate application, may determine when the duty terminates as to all or a portion of the material being preserved.

Advisory Committee Notes to Rule 26(h)(4)

"The reviewing court, as well as the parties, should be focused upon maintaining the integrity of the evidence in a form as close to, if not identical to, the original condition of the evidence." *Capricorn Power Co.*, 220 F.R.D. at 435. While even copying an electronic file may change it to some degree, such slight change to the original form of the document is better than its destruction. *See Arista Records*, 608 F. Supp. 2d at 435 n.39 (S.D.N.Y. 2009) ("[e]ven if preserving the data meant altering the

Digital Music Files in some manner, to do so would have been for more appropriate than completely deleting data").

There should also be no material loss in accessibility of the information once the duty to preserve arises.[30] Issues pertaining to back-up tapes will continue to evolve as back-up tapes either become an obsolete form of storage or are reconfigured so that they become more easily searchable. *See* The Sedona Conference, *Interview of Judge Scheindlin* (Mar. 24, 2004), *available at* http://www.thesedonaconference.org/content/miscFiles/ScheindlinInterview.pdf.

The proposed Rule recognizes that ESI need not be retained in exactly the condition it exists when the duty to preserve is triggered. The obligation is specifically stated to be subject to the proportionality principles of proposed Rule 26(h)(2), and "immaterial" losses of accessibility are acceptable, such as transfer to storage media.

The "native format" of ESI refers to the associated file structure that is defined by the original creating application. Viewing or searching documents in native format often requires the availability of the original application. Preserving ESI in native format would comply with the proposed Rule.

It is also possible to store ESI in a "static" or imaged format, such as .tiff or .pdf format, where the static image is designed to retain an image of the document as it would look in the original creating application. Static images, however, generally do not allow metadata to be viewed or the document information to be manipulated. Therefore, the preservation duty under proposed Rule 26(h)(4) under current technology may require

[30] In the absence of an event that would otherwise trigger a duty to preserve, data may be deleted, purged, or otherwise subjected to a reduced level of accessibility due to normal document data retention policies. *See Peterson v. Seagate LLC.*, Civil No. 07-2502 MJD/AJB, 2011 US Dist. LEXIS 12423 (D. Minn. January 27, 2011) (where no duty to preserve, ESI may be deleted or stored on backup tapes as the result of normal retention policies).

any load files to be preserved with the static images. *Cf. Jannx Med. Sys. v. Methodist Hosps. Ins.*, Case No. 2:08-CV-286-PRC, 2010 U.S. Dist. LEXIS 122574 (N.D. Ind. Nov. 17, 2010) (conversion of electronic documents to PDF format did not comply with Rule 34(b)(2)(E)(ii) requirement that the documents be produced in reasonably usable form).

Not all ESI may be conducive to production in either native or imaged format, and some other form of production may be necessary (*e.g.*, databases, legacy data). The Sedona Conference, *The Sedona Conference Glossary: E-Discovery & Digital Information Management* (3rd ed. September 2010) *available at* http://www.thesedonaconference.org/dltForm?did= glossary2010.pdf. Preservation should enable as wide a variety of production as feasible.

Advisory Committee Notes to Rule 37(g)

Case law on the standards for an appropriate remedy or sanction for spoliation is confused, particularly regarding what culpable state of mind is required to impose any particular sanction. *Compare Residential Funding*, 306 F.3d at 109 (negligence sufficient to impose sanctions terminating the litigation), with *Vick v. Tex. Employment Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975) (negligence not enough to impose severe sanctions). Proposed Rule 37(g) seeks to correct this situation.

The proposed Rule sets out the different remedies and sanctions and then calibrates the severity of the remedy or sanction to minimum levels of culpability. Thus, the most severe sanctions of termination of an action or contempt may only be imposed upon a finding of willfulness for termination or bad faith for contempt. Further, for any sanction (not the remedies of further discovery or cost-shifting), there must be at least

negligence. *See* proposed Rule 37(g)(2)(C)(v). This changes current case law holding that, even if no one was at fault, the party losing the information may still be sanctioned. *See Residential Funding*, 306 F.3d at 109; *Pension Comm.*, 685 F. Supp. 2d at 478-79.

Under proposed Rule 37(g)(2)(C)(iv), a sanction under proposed Rules 37(g)(1)(B) or (C) may be imposed only if the person having a duty to preserve was negligent, meaning that the spoliator failed "to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation." *Victor Stanley*, 269 F.R.D. at 529 (quoting *Black's Law Dictionary* 846 (Bryan A. Garner ed., abridged 7th ed., West 2000)).

Under proposed Rule 37(g)(2)(C)(iii), an adverse-inference jury instruction or direction establishing matters or facts may imposed under proposed Rules 37(g)(1)(D), (E) or (F) only if the person was grossly negligent, meaning that the spoliator failed "to exercise even that care which a careless person would use." *Pension Comm.*, 685 F. Supp. 2d at 464 (quoting Prosser & Keeton on Torts § 34 at 211-12 (5th ed. 1984)). Mere negligence would be insufficient.

Under proposed Rule 37(g)(2)(C)(ii), termination of the litigation may be imposed under Rules 37(g)(1)(G) or (H), if the person acted willfully, meaning that the spoliator engaged in "intentional or reckless conduct that is so unreasonable that harm is highly likely to occur," *Pension Comm.*, 685 F. Supp. 2d at 464. Negligence or gross negligence would not be enough.

Finally, under proposed Rule 37(g)(2)(C)(i), a contempt may be found under Rules 37(g)(1)(I), only if the person violated a previous order in bad faith, meaning that the spoliator destroyed the evidence "for the purpose of depriving the adversary of the

evidence," *Victor Stanley*, 269 F.R.D. at 530 (quoting *Powell,* 591 F. Supp. 2d at 820). Even willfulness, and certainly not negligence or gross negligence, would not result in a finding of contempt.

The severity of the remedy or sanction should still depend on the extent of the prejudice and the relevance of the lost information. For example, on one end of the continuum, a remedy of the cost of filing the motion may be imposed when the level of culpability is lowest, *Columbia Pictures*, 2007 U.S. Dist. LEXIS 97576, at *40;[31] near the other end of the continuum, an adverse-inference instruction may be given to a jury "[w]hen a party is prejudiced, but not irreparably, from the loss of evidence that was destroyed with a high degree of culpability," *Rimkus*, 688 F. Supp. 2d at 618; *see also Arista Records,* 608 F. Supp. 2d at 443 (same).

"Preservation of evidence may be particularly burdensome for non-parties, considering their interest in the litigation is minuscule, while the restrictions that can be imposed in a motion for preservation may be expensive and voluminous." *Capricorn Power Co.*, 220 F.R.D. at 436. Therefore, only the less severe remedies or sanctions under proposed Rule 37(g) would apply to non-parties.

Relevance for purposes of determining an appropriate remedy or sanction is different than relevance of purposes of complying with the duty to preserve. In this context, relevant material is that which "would have clarified a fact at issue in the trial and otherwise would naturally have been introduced into evidence." *Pension Comm.*, 685 F. Supp. 2d at 496.

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[31] For example, in *Sanders v. Kohler Co.*, 4:08CV00222 SWW/JTR, 2009 U.S. Dist.. LEXIS 113803 (D. Ak. Nov. 20, 2009), the court declined to assess costs, but promised to revisit the issue if compliance was not forthcoming.

The proposed Rule also provides a limited "safe harbor" for compliance with a litigation hold. Such compliance is to be considered "due care," absent exceptional circumstances, thereby avoiding any sanctions for spoliation, although further discovery could still be ordered. However, if an employee intentionally destroyed potentially relevant documents, electronically stored information or things despite his or her company's timely preparation, dissemination and maintenance of a reasonable litigation hold, a court might be justified in finding such actions constituted exceptional circumstances that would eliminate the safe harbor. Best practices dictate that a "litigation hold" be issued and monitored for the duration of the litigation. This litigation hold should preferably be in writing, although it need not be so; should specify the nature and subject matter of the information to be retained and the time period covered; should state the necessity to preserve metadata or equivalent; and should be directed to the "key players" – those individuals most likely to have knowledge of the subject matter of the lawsuit or have institutional responsibility for managing and storing documents. *See Sedona Conference on Legal Holds*, at 3. However, the litigation hold should be tailored to the facts and circumstances of the specific situation and the actual or anticipated case, without being in a certain form or covering a maximum number of custodians.

Thus, the proposed Rule provides flexibility by which a court may calibrate the remedies or sanctions necessary to compel compliance and ensure justice. Further, the Rule provides for courts to consider "all relevant factors," which might additionally include: (A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable; (B) the reasonableness of the party's efforts to preserve the information, including the scope of the preservation efforts; (C) the clarity

and reasonableness of any request for preservation; (D) whether there were any good-faith consultations regarding the scope of preservation; (E) the party's resources and sophistication in matters of litigation; (F) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and (G) whether the party sought timely guidance from the court regarding any unresolved disputes concerning preservation.[32]

[32] *See* Agenda, at 217-219, 229.