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*