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# THE PRESERVATION OBLIGATION: REGULATING AND SANCTIONING PRE- LITIGATION SPOILIATION IN FEDERAL COURT

A. Benjamin Spencer\*

## INTRODUCTION

The issue of discovery misconduct, specifically as it pertains to the pre-litigation duty to preserve and sanctions for spoliation, has garnered much attention in the wake of decisions by two prominent jurists whose voices carry great weight in this area. In *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities LLC*,<sup>1</sup> Judge Shira A. Scheindlin—of the *Zubulake v. UBS Warburg LLC*<sup>2</sup> e-discovery cases—penned a scholarly and thorough opinion setting forth her views regarding the triggering of the duty to preserve potentially relevant information pending litigation and the standards for determining the appropriate sanctions for various breaches of that duty.<sup>3</sup> Not long afterwards, Judge Lee H. Rosenthal, Chair of the Judicial Conference Committee on the Rules of Practice and Procedure (the Standing Committee) and former Chair of the Civil Rules Advisory Committee, issued an opinion in *Rimkus Consulting Group, Inc. v. Cammarata*,<sup>4</sup> describing her understanding of many of the same issues touched on in *Pension Committee*.<sup>5</sup> Both of these opinions have come at a time when the legal community is looking for better and more consistent guidance regarding the preservation obligations attendant to prospective litigation in the federal courts. Unfortunately, although other courts may draw some guidance from these two opinions, the fact is that variation among district courts and among the circuits will persist as long as policing pre-litigation preservation obligations remains largely the product of common law regulation via the inherent power of the courts.<sup>6</sup>

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\* Professor of Law, Washington & Lee University School of Law. Copyright © 2011 A. Benjamin Spencer. I would like to thank Washington & Lee for generous grant assistance that enabled this research. I would also like to thank those who were able to give helpful comments on the piece, including Judge Shira Scheindlin, Professor Richard Marcus, and Thomas Allman.

1. 685 F. Supp. 2d 456 (S.D.N.Y. 2010).
2. 220 F.R.D. 212, 214 (S.D.N.Y. 2003).
3. *Pension Committee*, 685 F. Supp. 2d at 463–72.
4. 688 F. Supp. 2d 598 (S.D. Tex. 2010).
5. *Id.* at 611–20.
6. *See infra* text accompanying note 11.

Given this state of affairs, the time is ripe for a uniform federal approach to the pre-litigation duty to preserve and sanctions for spoliation. After reviewing the existing frameworks for determining the duty to preserve and imposing sanctions that prevail among the federal courts, this Article explores how the Federal Rules of Civil Procedure (the Rules) might be amended to define and enforce pre-action preservation obligations more effectively and consistently across jurisdictions.

## I. THE PRE-LITIGATION PRESERVATION OBLIGATION

### A. *The Duty To Preserve*

Although the duty to preserve evidence can arise from specific regulatory,<sup>7</sup> statutory,<sup>8</sup> or court-ordered<sup>9</sup> admonitions to preserve documents or information,<sup>10</sup> the ordinary pre-litigation duty to preserve is a consequence of the inherent authority of courts to sanction parties who culpably permit the loss or destruction of relevant evidence prior to the

7. For example, a particular regulation states:

Any personnel or employment record made or kept by an employer (including but not necessarily limited to requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later.

29 C.F.R. § 1602.14 (1991).

8. The Private Securities Litigation Reform Act provides as follows:

During the pendency of any stay of discovery pursuant to this paragraph, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

15 U.S.C. § 78u-4(b)(3)(C)(i) (2006).

9. A federal district court may impose sanctions under Federal Rule of Civil Procedure (Rule) 37(b) when a party spoliates evidence in violation of a court order. *See* FED. R. CIV. P. 37(b)(2).

10. *See id.* 37(f) advisory committee note (“A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case.”). Some states also recognize a common law tort of spoliation:

(1) A cause of action exists in tort for interference with or destruction of evidence; (2a) the elements of a claim for interference with or destruction of evidence are (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff’s case, (4) disruption of the plaintiff’s case, and (5) damages proximately caused by the defendant’s acts.

*Smith v. Howard Johnson Co.*, 615 N.E.2d 1037, 1038 (Ohio 1993).

Other states do not recognize a separate spoliation tort but permit spoliation to be actionable as a type of negligence. *See, e.g.*, *Borsellino v. Goldman Sachs Grp., Inc.*, 477 F.3d 502, 509–10 (7th Cir. 2007) (“The Supreme Court of Illinois has emphasized, however, that the state does not recognize a tort of intentional spoliation of evidence, and that negligent spoliation is not itself an independent tort but rather a type of negligence.” (citing *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267, 269–70 (Ill. 1995))).

initiation of an action.<sup>11</sup> Specifically, most courts describe the preservation obligation as a duty to preserve information because one knows or should know that it is relevant to future litigation.<sup>12</sup> Two key parameters of the duty to preserve exist: the trigger for the duty and its scope. The *trigger* refers to the point in time at which an individual or entity can be said to be under the duty to preserve. *Scope* refers to the identification of materials and information that must be preserved pursuant to the duty and to whom the duty attaches. Each of these two concepts are discussed in turn.

### 1. Triggering the Preservation Obligation

As just mentioned, courts tend to describe the trigger for the duty to preserve—prior to the initiation of litigation<sup>13</sup>—as the point at which a party “reasonably anticipates litigation”<sup>14</sup> or “should have known that the evidence may be relevant to future litigation.”<sup>15</sup> The question is—when

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11. See *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) (“The right to impose sanctions for spoliation arises from a court’s inherent power to control the judicial process and litigation, but the power is limited to that necessary to redress conduct ‘which abuses the judicial process.’” (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991))); see also *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 611 (S.D. Tex. 2010) (“Allegations of spoliation, including the destruction of evidence in pending or reasonably foreseeable litigation, are addressed in federal courts through the inherent power to regulate the litigation process if the conduct occurs before a case is filed . . .”).

12. See, e.g., *John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008) (indicating that the duty to preserve evidence is triggered when a “party has notice that the evidence is relevant to litigation or . . . should have known that the evidence may be relevant to future litigation” (internal quotation marks omitted)); *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007) (“A spoliation sanction is proper where (1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence.”); *Silvestri*, 271 F.3d at 591 (“The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.”).

13. Once litigation has been instituted, notice of the litigation certainly places a party under a duty to preserve. See, e.g., *Cache La Poudre Feeds, L.L.C. v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 622 (D. Colo. 2007) (“Cache La Poudre initiated legal action against Land O’Lakes on February 24, 2004 with the filing of its initial Complaint. As of that date, Defendants clearly had an obligation to preserve relevant evidence.”). However—as is being discussed in the main text—such a duty often can arise prior to the institution of an action. See, e.g., *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998) (“This obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation—most commonly when suit has already been filed, providing the party responsible for the destruction with express notice, but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation.”). This Article focuses exclusively on the duty to preserve that arises prior to the filing of a complaint.

14. *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).

15. *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001); see also *O’Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 587 (6th Cir. 2009) (“[T]he issue here concerns *when* the defendant was or should have been on notice that litigation requiring the missing reports as evidence might ensue.”); *Goetz*, 531 F.3d at 459 (“[I]t is beyond question that a party to civil litigation has a duty to preserve relevant information, including [electronically stored information (ESI)], when that party ‘has notice that the evidence is

can a party be said to have met either of those criteria? A generalized concern about litigation<sup>16</sup> or the mere existence of a dispute<sup>17</sup> does not suffice to trigger the duty. Rather, the prospect of litigation must at least be an anticipated or foreseeable possibility,<sup>18</sup> with some courts having required future litigation to be probable to provide the requisite notice that triggers the duty to preserve.<sup>19</sup> Although whether a party should have anticipated litigation is a subjective consideration and inevitably a fact-specific inquiry,<sup>20</sup> it is possible to set forth some conditions under which courts are likely to find that the potential for future litigation is sufficiently foreseeable so as to trigger the duty to preserve.

*a. Letters from Prospective Adversaries*

If a party receives a pre-litigation hold request<sup>21</sup> or some variation of a pre-litigation demand letter<sup>22</sup>—such as a notice-of-breach letter,<sup>23</sup> a cease-

relevant to litigation or . . . should have known that the evidence may be relevant to future litigation.” (quoting *Fujitsu*, 247 F.3d at 436)).

16. See *Realnetworks, Inc. v. DVD Copy Control Ass’n*, 264 F.R.D. 517, 526 (N.D. Cal. 2009) (“A general concern over litigation does not trigger a duty to preserve evidence. Real had no duty to preserve relevant documents or evidence until a potential claim was identified or future litigation was probable.” (citations omitted)); cf. *AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 445 (2007) (noting, in the work-product protection context, that “in anticipation of litigation” under “Rule 26(b)(3) requires a more immediate showing than the remote possibility of litigation. Litigation must at least be a real possibility at the time of preparation or, in other words, the document must be prepared with an eye to some specific litigation” (quoting *Energy Capital Corp. v. United States*, 45 Fed. Cl. 481, 485 (2000))).

17. See, e.g., *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 510 (D. Md. 2009) (“The mere existence of a dispute does not necessarily mean that parties should reasonably anticipate litigation or that the duty to preserve arises.”).

18. See, e.g., *Jain v. Memphis Shelby Cnty. Airport Auth.*, No. 08-2119-STA-dkv, 2010 WL 711328, at \*3 (W.D. Tenn. Feb. 25, 2010) (“The first counsel retained by Plaintiff then sent a demand letter on September 21, 2007, that is, about ten days after the accident putting Defendant MSCAA on further notice of the possibility of legal action.”); *Samsung Elecs. Co. v. Rambus, Inc.*, 439 F. Supp. 2d 524, 568 (E.D. Va. 2006) (“[T]he point at which litigation becomes probable does not necessarily correspond with when a party anticipated, or reasonably should have anticipated, litigation.”), *vacated on other grounds*, 523 F.3d 1374 (Fed. Cir. 2008).

19. See *Hohider v. United Parcel Serv., Inc.*, 257 F.R.D. 80, 82 (W.D. Pa. 2009) (“A duty to preserve is an affirmative obligation, which arises when the party in possession of the evidence knows that litigation by the party seeking the evidence is pending or probable . . . .” (quoting *Kounelis v. Sherrer*, 529 F. Supp. 2d 503, 518 (D.N.J. 2008) (internal quotation marks omitted))), *rev’d and remanded on other grounds*, 574 F.3d 169 (3rd Cir. 2009); see also *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1068 (N.D. Cal. 2006) (“The future litigation must be ‘probable,’ which has been held to mean ‘more than a possibility.’” (quoting *Hynix Semiconductor, Inc. v. Rambus, Inc.*, 591 F. Supp. 2d 1038, 1061 (N.D. Cal. 2006))); *Henkel Corp. v. Polyglass USA, Inc.*, 194 F.R.D. 454, 456 (E.D.N.Y. 2000) (finding the duty to preserve arises when litigation is “‘likely to be commenced’” (quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 73 (S.D.N.Y. 1991))).

20. See *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (“[D]etermin[ing] when a duty to preserve arises in a particular case and the extent of that duty requires careful analysis of the specific facts and circumstances.”).

21. See, e.g., *Wiginton v. Ellis*, No. 02 C 6832, 2003 WL 22439865, at \*4 (N.D. Ill. Oct. 27, 2003) (speaking of a post-complaint but pre-service hold letter sent to the defendant and holding that such letter triggered the defendant’s duty “to preserve evidence that it had notice would likely be the subject of discovery requests”).

and-desist letter,<sup>24</sup> or a cure notice<sup>25</sup>—courts have found that the receiving party was on notice of the litigation, and thus, had a duty to preserve relevant material. It appears, however, that such communications must give sufficient certainty of impending litigation and fairly apprise recipients of its likely scope.<sup>26</sup> Thus, in *AAB Joint Venture v. United States*,<sup>27</sup> for example, a letter from a contractor to the U.S. government explaining that site conditions varied from those represented in the government’s geotechnical report and reserving the right to seek an equitable adjustment for the costs associated with “present and future unanticipated subsurface conditions” was deemed insufficient to trigger the government’s duty to preserve, while the actual filing of the requests for equitable adjustment was treated as sufficient.<sup>28</sup> Although demand letters need to be explicit about the possibility of litigation to trigger the duty to preserve, courts have not

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22. See, e.g., *Cache La Poudre Feeds, L.L.C. v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 623 (D. Colo. 2007) (“[A] demand letter alone may be sufficient to trigger an obligation to preserve evidence and support a subsequent motion for spoliation sanctions.”).

23. See *Realnetworks, Inc. v. DVD Copy Control Ass’n*, 264 F.R.D. 517, 520, 526–27 (N.D. Cal. 2009) (when defendants “formally advised Real that it was in violation of the [license agreement,] . . . Real was on notice that litigation was probable and a potential claim was identifiable”).

24. See, e.g., *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 430 (S.D.N.Y. 2009) (“Where copyright infringement is alleged, and a cease and desist letter issues, such a letter triggers the duty to preserve evidence, even prior to the filing of litigation.” (citing *Fox v. Riverdeep, Inc.*, No. 07 Civ. 13622, 2008 WL 5244297, at \*7 (E.D. Mich. Dec. 16, 2008); *Google Inc. v. Am. Blind & Wallpaper Factory*, No. 03 Civ. 5340(JF)(RS), 2007 WL 1848665, at \*1 (N.D. Cal. June 27, 2007))).

25. See *Renda Marine, Inc. v. United States*, 58 Fed. Cl. 57, 62 (2003) (finding, in a dispute between a contractor and the government over differing site conditions, that the government “reasonably should have known of a potential litigation claim . . . when it issued a cure notice” to the plaintiff regarding its performance at the site at issue).

26. See *Asher Assocs., L.L.C. v. Baker Hughes Oilfield Operations, Inc.*, No. 07-cv-01379-WYD-CBS, 2009 WL 1328483, at \*8 (D. Colo. May 12, 2009) (“While the [September 1] letter had not specifically threatened litigation, the September 8 correspondence adopted a decidedly different and emphatic tone. . . . The September 8[] letter demanded an ‘immediate payment’ and imposed a five-day deadline for making that payment.”); *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 511 (D. Md. 2009) (“It may be that a letter that merely identifies a dispute but expresses an invitation to discuss it or otherwise negotiate does not trigger the duty to preserve evidence, but where, as here, the letter openly threatens litigation, then the recipient is on notice that litigation is reasonably foreseeable and the duty to preserve evidence relevant to that dispute is triggered.”); *Cache La Poudre Feeds*, 244 F.R.D. at 623 (“[A] letter must be more explicit and less equivocal [than] *Cache La Poudre*’s 2002 and 2003 correspondence with *Land O’Lakes*. . . . Although [the letter] noted the potential for customer confusion and alluded to *Land O’Lakes*’ possible ‘exposure,’ [the] letter did not threaten litigation and did not demand that *Land O’Lakes* preserve potentially relevant materials. Rather, *Cache La Poudre* hinted at the possibility of a non-litigious resolution.”).

27. 75 Fed. Cl. 432 (2007).

28. *Id.* at 441–42 (“The letter did not provide Defendant with the requisite certainty or specificity of impending litigation, nor did it apprise Defendant of the scope of the claims which would be filed. The Court agrees with Defendant that the duty to preserve evidence did not attach until July 2002, when the REAs were filed and when Defendant could reasonably have anticipated the instant litigation.”). *But see* *Renda Marine, Inc. v. United States*, 58 Fed. Cl. 57, 62 (2003) (“Plaintiff’s purported oral communication in October 1999 with defendant concerning the alleged differing site condition, if proven to have occurred, could be construed as notice to defendant that a potential litigation claim existed.”).

found it necessary that such letters specify and describe an attendant preservation obligation, even though including such a preservation request might be wise practice for counsel.<sup>29</sup>

*b. Notice of an Incident*

When an accident occurs that results in or has the potential to result in serious harm, mere notice of the accident itself can make litigation reasonably foreseeable.<sup>30</sup> For example, in an action by an airport slip-and-fall victim against the airport authority and the maintenance company, the court held that because airport police immediately completed an incident report that alerted them to the seriousness of the plaintiff's injury, "almost from the moment the accident occurred, [the airport authority] had a duty to preserve the video."<sup>31</sup> On the other hand, accidents that result in minor or initially imperceptible harm may be viewed as not having put a party on notice of potential litigation.<sup>32</sup> Other types of incidents, such as workplace harassment, may in and of themselves yield less certainty regarding the likelihood of litigation, although if a substantial number of key personnel are aware of the matter and of an employee's related dissatisfaction with the employer's response, such awareness should put the employer on notice of the possibility of litigation against it as a result.<sup>33</sup>

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29. *See Cache La Poudre Feeds*, 244 F.R.D. at 623 (acknowledging that "the common-law obligation to preserve relevant material is not necessarily dependent upon the tender of a 'preservation letter'" but advising that "prudent counsel would be wise to ensure that a demand letter sent to a putative party also addresses any contemporaneous preservation obligations" (citing *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 219 F.R.D. 93, 100 (D. Md. 2003))); *Thompson*, 219 F.R.D. at 100 ("While a litigant certainly may request that an adversary agree to preserve electronic records during the pendency of a case, or even seek a court order directing that this happen, it is not required, and a failure to do so does not vitiate the independent obligation of an adverse party to preserve such information."). There are risks to sending a preservation request letter; if the letter does not include reference to certain items, the adversary may subsequently be able to defend itself against a spoliation accusation based on its failure to preserve the unrequested material or information. *See, e.g., Swofford v. Eslinger*, 671 F. Supp. 2d 1274, 1287 (M.D. Fla. 2009) ("Neither preservation letter and no other notice to Defendants suggested that the uniforms should be preserved. . . . [T]he Court cannot find that Defendants were on notice that the uniforms worn by the Officers on the night of April 20, 2006, needed to be preserved . . .").

30. *See, e.g., Houlihan v. Marriott Int'l, Inc.*, No. 00 Civ. 7439(RCC), 2003 WL 22271206, at \*2 (S.D.N.Y. Sept. 30, 2003) ("Where a hotel guest is injured in a hotel room, there is a strong likelihood that such injury will be the subject of future litigation.").

31. *Jain v. Memphis Shelby Cnty. Airport Auth.*, No. 08-2119-STA-dkv, 2010 WL 711328, at \*3 (W.D. Tenn. Feb. 25, 2010).

32. *See, e.g., Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 722 (Tex. 2003) ("[T]his particular investigation revealed that Johnson had not been seriously injured and never indicated that he might seek legal relief. We agree that nothing about the investigation or the circumstances surrounding the accident would have put Wal-Mart on notice that there was a substantial chance that the Johnsons would pursue a claim.").

33. *See Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) ("Merely because one or two employees contemplate the possibility that a fellow employee might sue does not generally impose a firm-wide duty to preserve. But in this case, it appears that almost everyone associated with Zubulake recognized the possibility that she might sue.").

*c. Duties of Prospective Plaintiffs*

Prospective plaintiffs inevitably must anticipate the litigation they institute at some point prior to the filing of a complaint.<sup>34</sup> Retaining or consulting with counsel<sup>35</sup> or experts<sup>36</sup> are indicia of anticipating litigation as a plaintiff, as is documenting and estimating the cause<sup>37</sup> or extent of the loss incurred as the result of an incident or malfunction of some kind.<sup>38</sup> Indeed, the plaintiff's experience or discovery itself of the harmful incident, malfunction, or other problem may trigger the duty to preserve material relevant to future litigation surrounding the incident.<sup>39</sup> When the losses associated with an incident are substantial from the victim's perspective, plaintiffs can be expected to have anticipated litigation as well.<sup>40</sup> In sum, all of these factors should make it apparent to the plaintiff that litigation is sufficiently probable that all relevant information should be preserved.<sup>41</sup>

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34. *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) ("A plaintiff's duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation.").

35. *See, e.g., Innis Arden Golf Club v. Pitney Bowes, Inc.*, 257 F.R.D. 334, 340 (D. Conn. 2009) (holding that prospective plaintiff anticipates litigation when counsel is retained in the matter). Labeling material as work-product protected may also serve as evidence that a prospective plaintiff (or defendant) anticipates litigation. *See, e.g., Crown Castle USA, Inc. v. Fred A. Nudd Corp.*, No. 05-CV-6163T, 2010 WL 1286366, at \*10 (W.D.N.Y. Mar. 31, 2010) ("I find that the duty actually arose as early as August 2004—when several Crown employees, including in-house counsel, considered filing a notice of claim with Nudd's insurance carrier and instituted a practice of labeling Nudd-related communications as privileged under the work product doctrine . . .").

36. *See Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) ("The reason why [counsel] was retained and why he promptly retained reconstruction experts was to collect evidence before it was lost. The relevance of the evidence and the type of lawsuit to file became clear when Silvestri's experts conducted their inspection and concluded that the 'failure by the airbag to deploy in this accident must be considered a defect that unnecessarily added to Mr. Silvestri's injuries.'").

37. *See id.* (finding that the plaintiff could have anticipated litigation once plaintiff's experts concluded that a product defect caused additional injury to the plaintiff).

38. *See Chrysler Realty Co. v. Design Forum Architects, Inc.*, No. 06-CV-11785, 2009 WL 5217992, at \*5 (E.D. Mich. Dec. 31, 2009) (finding that the plaintiff should have anticipated litigation against the designer of a malfunctioning HVAC system on the date when it hired a repairman to report on the problems with the system and repair them); *Wade v. Tiffin Motorhomes, Inc.*, 686 F. Supp. 2d 174, 194 (N.D.N.Y. 2009) ("[T]he Court finds that Plaintiff had a duty to preserve all evidence regarding the RV [because, among other reasons,] . . . Plaintiff Motorists attempted to document the damage through photographs and reports [and] the person hired by Plaintiff Motorists to document the damage was an 'expert' fire investigator.").

39. *See Chrysler Realty*, 2009 WL 5217992, at \*5 n.1 ("Plaintiff probably should have reasonably anticipated litigation even before it hired [the repairman]—when the newly-installed HVAC system stopped working properly.").

40. *See Wade*, 686 F. Supp. 2d at 194 (citing that "the magnitude of the losses was significant" as a factor supporting the finding that the plaintiff had a duty to preserve).

41. As Judge Denny Chin stated,

I find that the following factors demonstrate that plaintiff was on notice that a lawsuit was likely so as to trigger a duty to preserve the evidence: (1) the sheer magnitude of the losses; (2) that plaintiff attempted to document the damage through photographs and reports; and (3) that it immediately brought in counsel as

## 2. Scope of the Pre-Litigation Preservation Obligation

It is often said that the “duty to preserve potentially discoverable information does not require a party to keep every scrap of paper” in its file.<sup>42</sup> Rather, courts generally describe the scope of the duty to preserve as extending to all unique, reasonably accessible information or tangible things that are relevant to prospective litigation.<sup>43</sup> The information must be within the scope of discovery under Rule 26(b) in its broadest sense, meaning it would be relevant not just to a claim or defense in future litigation, but to the subject matter of the prospective litigation.<sup>44</sup> Subject matter relevance is the proper scope not only because at the pre-litigation stage one lacks information regarding specific claims or defenses, but more importantly because such material may be subject to discovery on a court order if good cause is shown; such an order would be moot if there was not a duty to preserve material to that extent.<sup>45</sup> Information beyond that scope would not be subject to the duty to preserve.<sup>46</sup> Attorneys, not laypersons, should make the relevancy determination, since non-lawyers are likely to be unfamiliar with the broad meaning of legal relevance under Rule 26(b) as including information likely to lead to the discovery of admissible evidence in a case.<sup>47</sup> There is no duty to preserve multiple copies of the same material or information.<sup>48</sup>

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well as experts to assess the damage and attempt to ascertain its likely causes in anticipation of litigation.

*Indem. Ins. Co. of N. Am. v. Liebert Corp.*, No. 96 CIV. 6675(DC), 1998 WL 363834, at \*4 n.3 (S.D.N.Y. June 29, 1998).

42. *In re Old Banc One S’holders Sec. Litig.*, No. 00 C 2100, 2005 WL 3372783, at \*3 (N.D. Ill. Dec. 8, 2005); *see also* *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (“Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, ‘no.’”).

43. *See, e.g., Zubulake*, 220 F.R.D. at 217 (“[A]nyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary.”).

44. FED. R. CIV. P. 26(b); *see, e.g., Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 339 (M.D. La. 2006) (“The duty also extends to documents prepared *for* those individuals and to information that is relevant to the claims and defenses of *any* party, or which is ‘relevant to the subject matter involved in the action.’” (quoting *Zubulake*, 220 F.R.D. at 218)); *Broccoli v. Echostar Commc’ns Corp.*, 229 F.R.D. 506, 510 (D. Md. 2005) (“Any information relevant to the claims or defenses of any party, or which is relevant to the subject matter involved in the litigation, is covered by the duty to preserve.”).

45. Judge Shira A. Scheindlin was so kind as to emphasize this latter point to me in a conversation about this piece.

46. *See, e.g., Paul v. USIS Commercial Servs., Inc.*, No. 04-cv-01384-REB-CBS, 2007 WL 2727222, at \*1 (D. Colo. Sept. 17, 2007) (“A demand that information not subject to discovery be preserved does not trigger a duty to preserve that information.”).

47. *See, e.g., Clark Constr. Grp., Inc. v. City of Memphis*, 229 F.R.D. 131, 136–37 (W.D. Tenn. 2005) (“[T]he decision as to what was potentially relevant should not have been left to Webber’s sole discretion. Webber is not a lawyer . . . . [W]hat might be potentially relevant to a person trained in law might not be relevant to a lay person.”).

48. *Zubulake*, 220 F.R.D. at 218 (“A party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter.”).

The scope of a prospective party's preservation obligation bears some relationship to the time and expense associated with preserving all relevant information that would otherwise be subject to the duty to preserve. Extraordinary or cost-prohibitive efforts should not be expected in any but the most high-stakes litigation.<sup>49</sup> Thus, there is ordinarily no duty to preserve "inaccessible" information such as that contained on backup tapes used for disaster recovery purposes,<sup>50</sup> because, as Rule 26(b)(2)(B) recognizes, preserving such material may be unduly burdensome.<sup>51</sup> However, if the expense associated with electronically stored information derives more from the cost of its translation and production rather than its preservation, there would be less justification for excluding such material from the scope of the preservation obligation. Additionally, inaccessible information on backup tapes used for emergency recovery may fall within the duty to preserve if it is identified as containing the documents of "key players" in the prospective litigation and if such information is not available from a more accessible source.<sup>52</sup> Transitory information that is not typically retained does not fall within the duty to preserve until a party is given more certainty regarding whether the adverse party will consider the information relevant.<sup>53</sup>

Prospective parties must exercise their preservation obligations with respect to all information and material under their control; however, if the material is not in their control, they must at least inform potential adversaries of the availability of access to such material and of any threat of its destruction.<sup>54</sup> When relevant information is in the hands of third parties,

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49. See *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) ("Whether 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 . . .").

50. See *Zubulake*, 220 F.R.D. at 218 ("As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (i.e., actively used for information retrieval), then such tapes *would* likely be subject to the litigation hold.").

51. FED. R. CIV. P. 26(b)(2)(B) ("A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.").

52. *Zubulake*, 220 F.R.D. at 218.

53. As held in *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409 (S.D.N.Y. 2009):

Some of the other evidence at issue in the instant motion, such as Usage Logs and Music Files contained on Defendants' servers, is transitory in nature, is not routinely created or maintained by Defendants for their business purposes, and requires additional steps to retrieve and store. Arguably, Defendants may not have had an obligation to preserve such evidence until placed on notice that Plaintiffs considered it relevant and were requesting it.

*Id.* at 431.

54. In *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001), the court stated:

If a party cannot fulfill this duty to preserve because he does not own or control the evidence, he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence.

*Id.* at 591.

a prospective party would have a duty to preserve that information only if the party has control of the information, meaning it has “the right, authority, or practical ability to obtain the documents from a non-party to the action.”<sup>55</sup>

### B. Sanctioning Breaches of the Duty To Preserve

If information subject to the duty to preserve is altered, lost, or destroyed, the issue of sanctions comes into the picture. When determining the appropriate sanction or remedy for spoliation, there are two relevant parameters: culpability and prejudice.<sup>56</sup> That is, the appropriate response to spoliation depends on the degree of the spoliator’s *culpability* and the extent of the *prejudice* caused to the adverse party.<sup>57</sup> Each of these two concepts will be reviewed below, followed by a discussion of the range of available sanctions that courts have imposed for breaches of the pre-litigation duty to preserve.

#### 1. Culpability

Culpability refers to the degree of fault that may be attributed to a spoliator’s breach of the duty to preserve. Some fault on the part of the spoliator is necessary before sanctions of any kind become appropriate, although severe prejudice caused by inadvertent or faultless loss of relevant information might still be remedied in other ways.<sup>58</sup> The range of culpability that may attend any loss of relevant evidence may fall anywhere “along a continuum of fault—ranging from innocence through the degrees of negligence to intentionality.”<sup>59</sup>

*Negligence.* Negligence describes information losses that result from poorly designed litigation hold instructions or insufficient or inept preservation efforts. Thus, there is some effort to preserve relevant information, but the effort is ultimately inadequate in ways that more

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55. *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 515 (D. Md. 2009) (internal quotation marks omitted) (quoting *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007)).

56. THE SEDONA CONFERENCE WORKING GRP. ON ELEC. DOCUMENT RETENTION & PROD., THE SEDONA PRINCIPLES, SECOND EDITION: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, Principle 14, at 70 (2007), available at [http://www.thosedonaconference.org/content/miscFiles/TSC\\_PRINCP\\_2nd\\_ed\\_607.pdf](http://www.thosedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf) (“Sanctions, including spoliation findings, should be considered by the court only if it finds that there was a clear duty to preserve, a culpable failure to preserve and produce relevant electronically stored information, and a reasonable probability that the loss of the evidence has materially prejudiced the adverse party.”).

57. *See Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (“Determining whether sanctions are warranted and, if so, what they should include, requires a court to consider both the spoliating party’s culpability and the level of prejudice to the party seeking discovery.”).

58. *See id.* (“[E]ven if there is an inadvertent loss of evidence but severe prejudice to the opposing party, that too will influence the appropriate response, recognizing that sanctions (as opposed to other remedial steps) require some degree of culpability.”).

59. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) (quoting *Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir. 1988)).

diligence and competence would have avoided. For example, a preservation effort may omit custodians who were likely to have discoverable information or may neglect to refer to the full range of search terms or topics that would identify material that should fall within the scope of the duty to preserve.<sup>60</sup> Because greater care and thoroughness would have averted the spoliation, fault is attributable to the spoliating party, but only at the level of negligence.

*Gross Negligence or Recklessness.* Gross negligence mainly characterizes the failure to undertake any preservation efforts with respect to the material in question once the duty to preserve arises.<sup>61</sup> The failure to issue a litigation hold at all,<sup>62</sup> or the complete lack of a document retention policy,<sup>63</sup> are more substantial deviations from the standard of conduct expected of prospective parties in the face of litigation than mere negligence.<sup>64</sup> Because the ultimate loss of evidence is the consequence of unpardonable neglect rather than merely insufficient preservation efforts, the level of fault under such circumstances is described as recklessness or gross negligence.<sup>65</sup>

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60. See, e.g., *Treppel v. Biovail*, 249 F.R.D. 111, 121 (S.D.N.Y. 2008) (describing the defendant's efforts to preserve the ESI of key executives as negligent because the defendant did not go beyond simply instructing those executives to preserve the information).

61. See, e.g., *Doe v. Norwalk Cmty. Coll.*, 248 F.R.D. 372, 380 (D. Conn. 2007) (finding gross negligence where there was "no evidence that the defendants did anything to stop the routine destruction of the backup tapes after [their] obligation to preserve arose").

62. See *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d. 456, 465 (S.D.N.Y. 2010) ("[T]he failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.").

63. For example, see *Keithley v. Home Store.com, Inc.*, No. C-03-04447 SI (EDL), 2008 WL 3833384 (N.D. Cal. Aug. 12, 2008):

The facts—specifically that Defendants have no written document retention policy nor was there a specific litigation hold put in place, that at least some evidence was destroyed when the Development Computer failed, that Defendants made material misrepresentations to the Court and Plaintiffs regarding the existence of reports, and that Defendants have produced an avalanche of responsive documents and electronically stored information only after the Court informed the parties that sanctions were appropriate—show a level of reckless disregard for their discovery obligation and for candor and accuracy before the Court sufficient to warrant severe monetary and evidentiary sanctions.

*Id.* at \*16.

64. Not all courts treat the lack of a document retention policy or litigation hold as automatically indicative of sanctionable wrongdoing. See, e.g., *Haynes v. Dart*, No. 08 C 4834, 2010 WL 140387, at \*4 (N.D. Ill. Jan. 11, 2010) ("The 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." (citing *Danis v. USN Commc'ns, Inc.*, No. 98 C 7482, 2000 WL 1694325, at \*39 (N.D. Ill. Oct. 23, 2000))). Others treat the lack of a retention policy as merely negligent. See, e.g., *In re Old Banc One S'holders Sec. Litig.*, No. 00 C 2100, 2005 WL 3372783, at \*4 (N.D. Ill. Dec. 8, 2005) ("While the loss of several categories of documents reflects poor judgment, and the failure to create and disseminate a comprehensive document retention policy constitutes negligence on the part of Bank One[,] there is no evidence that Bank One willfully destroyed any documents.").

65. In *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598 (D.N.J. 1997), the court stated:

Over 9,000 files were cleansed. Prudential is unable to specify what documents were taken from files, nor is it able to identify the files from which the documents

*Willfulness and Bad Faith.* Bad faith involves the intentional destruction of information with the purpose of thwarting the adversary's ability to make its case, while willful destruction—a separate category recognized in some jurisdictions—is merely deliberate without such intent.<sup>66</sup> A finding of bad faith implies dishonesty, with the spoliator's motive being its own self-interest in avoiding a finding of liability.<sup>67</sup> Behavior of this kind is the most egregious, representing an overt affront to the judicial process, and thus, can inspire the most severe sanctions.

## 2. Prejudice

Sanctions are warranted for spoliation only if the innocent party has been prejudiced by the loss of information, something that is possible only if “the destroyed evidence was ‘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.”<sup>68</sup> In other words, although information that is responsive to a document request is within the scope of material that must be preserved

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were taken. Because the prejudice to affected party opponents is so substantial, Prudential's consistent pattern of failing to curb document destruction, which at the very least was grossly negligent conduct, merits sanctions, despite the Court's finding that Prudential's conduct was not willful.

*Id.* at 616 (demonstrating the seriousness with which courts regard spoliation that is the product of gross negligence, albeit in the context of the violation of a court order to preserve). The court in *Prudential* imposed a \$1 million fine as sanctions for the loss of information. *Id.* at 617; *see also* *United States v. Phillip Morris USA, Inc.*, 327 F. Supp. 2d 21, 26 (D.D.C. 2004) (declining to impose an adverse inference instruction but imposing a nearly \$3 million fine and precluding the testimony of multiple defense witness for “the reckless disregard and gross indifference displayed by Philip Morris and Altria Group toward their discovery and document preservation obligations”).

66. Bad faith should be distinguished from “willful” destruction, which is defined as destruction that is “deliberate or intentional,” but not necessarily done with the intent to harm the case of the adversary. *See, e.g.*, *Powell v. Town of Sharpsburg*, 591 F. Supp. 2d 814, 820–21 (E.D.N.C. 2008) (noting Fourth Circuit case law indicating that “destruction can be willful when done through an organization’s document retention policy” and finding the defendant’s destruction of documents pursuant to such a policy willful, but not in bad faith (referencing *Buckley v. Mukasey*, 538 F.3d 306, 322–23 (4th Cir. 2008))). As noted, not all jurisdictions recognize willfulness as an intermediate and distinct category lying somewhere between negligence and bad faith. *See, e.g.*, *Krumwiede v. Brighton Assocs., L.L.C.*, No. 05 C 3003, 2006 WL 1308629, at \*8 (N.D. Ill. May 8, 2006) (“Once a party is on notice that files or documents in their possession are relevant to pending litigation, the failure to prevent the destruction of relevant documents crosses the line between negligence and bad faith, even where the documents are destroyed according to a routine document retention policy.” (citing *Wiginton v. CB Richard Ellis*, No. 02 C 6832, 2003 WL 22439865, at \*7 (N. D. Ill. Oct. 23, 2003))).

67. *See, e.g.*, *United States v. Heiser*, No. 4:04-CR-270, 2006 WL 1149254, at \*11 (M.D. Pa. Apr. 28, 2006) (holding that “‘bad faith’ with respect to destruction of evidence requires more than mere negligence, it requires ill-will towards [the defendant] or a conscious effort to frustrate his defense”); *Attorneys Title Guar. Fund v. Goodman*, 179 F. Supp. 2d 1268, 1277 (D. Utah 2001) (“‘Bad faith’ is the antithesis of good faith and has been defined in the cases to be when a thing is done dishonestly and not merely negligently. It is also defined as that which imports a dishonest purpose and implies wrongdoing or some motive of self-interest.” (quoting *Sugarhouse Fin. Co. v. Zions First Nat’l Bank*, 440 P.2d 869, 870 (Utah 1968))).

68. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002).

during pending litigation, the imposition of sanctions for spoliation requires a showing that the missing information actually would have been helpful to the innocent party in establishing one of its claims or defenses.<sup>69</sup> Once relevance in this sense is shown, prejudice is established, although the extent of the prejudice depends on the degree of impairment to the innocent party's ability to litigate its case; "[p]rejudice can range along a continuum from an inability to prove claims or defenses to little or no impact on the presentation of proof."<sup>70</sup> The degree of prejudice is lessened, if not eliminated, when there is other evidence available to support the adverse party's claim or defense.<sup>71</sup> Absent any impairment, courts may decline to impose sanctions.<sup>72</sup>

Parties seeking spoliation sanctions carry the burden of proof on this point, meaning they have to demonstrate that the lost information would have supported one of their claims or defenses and that the loss was prejudicial. Some courts presume relevance and prejudice when bad faith or gross negligence is shown, while others seem to keep the burden on the movant regardless of the degree of the spoliator's culpability.<sup>73</sup>

### 3. Appropriate Sanctions

The level of the spoliator's culpability and the degree of prejudice to the innocent party both guide a court in its determination of the appropriate sanction or remedy for a breach of the duty to preserve. As with other instances of a court's sanctioning authority, the appropriate sanction for

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69. See *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec. L.L.C.*, 685 F. Supp. 2d 456, 467 (S.D.N.Y. 2010); *Sampson v. City of Cambridge*, 251 F.R.D. 172, 183 (D. Md. 2008) ("Because plaintiff has not established that access to Pritchett's emails would have produced evidence which a reasonable factfinder could conclude supported her claims, plaintiff's Motion to Sanction Defendant for Spoliation of Evidence . . . is denied.").

70. *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010).

71. See, e.g., *Pension Comm.*, 685 F. Supp. 2d at 478 ("While many of these documents may be relevant, the Citco Defendants suffered no prejudice because all were eventually obtained from other sources."); *Wilson v. Wal-Mart Stores, Inc.*, No. 5:07-cv-394-Oc-10GRJ, 2008 WL 4642596, at \*3 (M.D. Fla. Oct. 17, 2008) ("[T]he memo is not critical to Plaintiff's ability to prove her case because there is other evidence potentially available to Plaintiff to prove her claim.").

72. See *Jackson v. AFSCME Local 196*, No. 3:07CV0471 (JCH), 2010 WL 864509, at \*4 (D. Conn. Mar. 10, 2010) (denying the plaintiff's motion for an adverse inference sanction because "[p]laintiff has not demonstrated, on this record, that their ability to litigate this case has been substantially impaired").

73. See, e.g., *Residential Funding*, 306 F.3d at 109 ("[W]here a party seeking an adverse inference adduces evidence that its opponent destroyed potential evidence (or otherwise rendered it unavailable) in bad faith or through gross negligence . . . , that same evidence of the opponent's state of mind will frequently also be sufficient to permit a jury to conclude that the missing evidence is favorable to the party . . . ."); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003) ("[W]hen the destruction is negligent, relevance must be proven by the party seeking the sanctions.").

spoliation is left to the broad discretion of the courts<sup>74</sup> based on their judgment—on a case-by-case basis<sup>75</sup>—of what sanctions would best serve the deterrence, punitive, and remedial interests that sanctions are supposed to serve.<sup>76</sup> The range of possible remedies or sanctions was helpfully laid out by Judge Scheindlin in *Pension Committee*: “The choices include—from least harsh to most harsh—further discovery, cost-shifting, fines, special jury instructions, preclusion, and the entry of default judgment or dismissal (terminating sanctions).”<sup>77</sup> Special jury instructions range from informing the jury that certain facts are deemed to be true, to mandating or simply permitting the jury to presume that the lost evidence is both relevant and favorable to the innocent party.<sup>78</sup>

Because sanctions are a discretionary matter, most courts do not adhere to any rigid rules regarding what sanctions require which levels of culpability. However, there is a split of authority on what degree of culpability is required for the most severe sanctions. In some circuits, all sanctions are available so long as there is culpability of some kind,<sup>79</sup> while other circuits require a showing of bad faith before harsh sanctions such as dismissal and spoliation instructions may be imposed.<sup>80</sup> Dismissal is

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74. See *Reilly v. NatWest Mkts. Grp., Inc.*, 181 F.3d 253, 267 (2d Cir. 1999) (“Whether exercising its inherent power, or acting pursuant to Rule 37, a district court has wide discretion in sanctioning a party for discovery abuses and for the spoliation of evidence.”).

75. See *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001) (“The determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the trial judge and is assessed on a case-by-case basis.” (citing *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999); *United States v. Grammatikos*, 633 F.2d 1013, 1019–20 (2d Cir. 1980))).

76. The court in *West v. Goodyear Tire & Rubber Co.* expressed that [t]he sanction should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore “the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.” *West*, 167 F.3d at 779 (quoting *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)); see also *Reilly*, 181 F.3d at 267 (“Trial judges should have the leeway to tailor sanctions to insure that spoliators do not benefit from their wrongdoing—a remedial purpose that is best adjusted according to the facts and evidentiary posture of each case.”).

77. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 469 (S.D.N.Y. 2010).

78. See *id.* at 470.

79. See, e.g., *Crown Castle USA, Inc. v. Fred A. Nudd Corp.*, No. 05-CV-6163T, 2010 WL 1286366, at \*10 (W.D.N.Y. Mar. 31, 2010) (“A finding of bad faith or intentional misconduct is not a *sine qua non* to sanctioning a spoliator. Rather, a finding of gross negligence will satisfy the culpable state of mind requirement, as will knowing or negligent destruction of evidence.” (internal quotation marks omitted) (citing *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002); *Reilly*, 181 F.3d at 268)); see also *Residential Funding*, 306 F.3d at 108 (“The 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.”).

80. See, e.g., *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.”); *Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1220 (10th Cir. 2008) (“[C]ourts require evidence of intentional destruction or bad faith before a litigant is entitled to a spoliation instruction.”); *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007) (“A spoliation-of-

typically reserved for spoliation that is the product of bad faith, but it need not be so if the degree of prejudice is substantial.<sup>81</sup> For some courts, to support the sanction of dismissal, the prejudice to the innocent party must be severe and there must be no lesser alternative sanction capable of achieving the goals of deterrence, placing the risk of an erroneous judgment on the spoliator, and remedying the prejudice suffered by the innocent party.<sup>82</sup>

## II. STANDARDIZING THE PRE-LITIGATION PRESERVATION OBLIGATION

Because the policing of parties' pre-litigation duty to preserve is rooted in the inherent authority of the federal courts, important aspects of the duty—including its trigger and scope—and components of the sanctioning authority—including the degree of culpability required, the burden of demonstrating relevance and prejudice, and the appropriate remedy or sanction under the circumstances—can vary across jurisdictions. Although the variation is not extreme, it leaves prospective litigants less certain about their obligations once litigation is anticipated, and results in wasteful and time-consuming satellite litigation over whether the duty to preserve was breached and if so, what sanction or remedy is appropriate.<sup>83</sup> Standardization of the rules regarding pre-litigation preservation obligations and related sanctions would be a welcome development that would give prospective litigants a much clearer sense of their preservation obligations—at least in relation to the federal courts.

### A. Inspiration from Current Federal Rules

Could an addition to the Federal Rules of Civil Procedure possibly address *pre*-litigation preservation obligations and sanctions for the breach thereof? Although the Rules largely govern matters taking place in the context of a pending action that has been commenced by the filing of a complaint, there are several instances in which pre-filing matters are

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evidence sanction requires a finding of intentional destruction indicating a desire to suppress the truth.” (internal quotation marks omitted) (citing *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746 (8th Cir. 2004); *Richter v. City of Omaha*, 729 N.W.2d 67, 71–73 (Neb. 2007)); *Condrey v. SunTrust Bank of Ga.*, 431 F.3d 191, 203 (5th Cir. 2005) (“The Fifth Circuit permits an adverse inference against the destroyer of evidence only upon a showing of ‘bad faith’ or ‘bad conduct.’”); *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))).

81. See *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”).

82. See *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779–80 (2d Cir. 1999).

83. See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 533 (D. Md. 2010) (“The different approaches among the Circuits regarding the level of culpability that must be shown to warrant imposition of severe sanctions for spoliation is another reason why commentators have expressed such concern about the lack of a consensus standard and the uncertainty it causes.”).

addressed: the duty to conduct a reasonable pre-filing inquiry under Rule 11,<sup>84</sup> the availability of a pre-filing order to perpetuate testimony under Rule 27,<sup>85</sup> and the provision for an ex parte application for a temporary restraining order under Rule 65.<sup>86</sup> Indeed, each of these provisions offers some guidance on how a Federal Rule might regulate prospective litigants' pre-litigation preservation obligations.

### 1. The Pre-Filing Inquiry of Rule 11

Rule 11 demonstrates that sanctions can be imposed—under the Rules—for duty breaches that occur prior to the filing of an action, specifically, the failure to conduct a reasonable pre-filing inquiry.<sup>87</sup> Further, judicial experience in sanctioning under Rule 11 for breaches of the duty to conduct a reasonable pre-filing inquiry illustrates how sanctions might similarly be imposed for breaches of a pre-filing duty to preserve relevant information. When the Rule 11 pre-filing investigation is at issue, courts evaluate the precise nature and scope of the party's investigation to assess its sufficiency.<sup>88</sup> Courts engage in a similar investigation when a breach of the duty to preserve is at issue, determining whether and to what extent a party undertook to protect information subject to the duty to preserve. Thus, it may be possible to regulate the pre-filing duty to preserve in the same manner as the pre-filing inquiry is regulated under Rule 11.

### 2. Pre-Action Deposition Orders Under Rule 27

Rule 27 is instructive for our present purposes because it specifically deals with the preservation of relevant information prior to the filing of an action, albeit in the form of testimony rather than documentary or tangible evidence. Under Rule 27, persons who anticipate filing an action in federal court may petition the court for an order authorizing a deposition for the purpose of perpetuating testimony, provided the court is satisfied that doing so “may prevent a failure or delay of justice.”<sup>89</sup> The duty to preserve relevant information prior to litigation is similarly rooted in a concern with preventing a failure or delay of justice in the event that such information was lost or destroyed. Might a rule be devised that would permit courts to be similarly petitioned to obtain pre-filing preservation orders in aid of a

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84. FED. R. CIV. P. 11(b) (requiring certification that a filing was made “after an inquiry reasonable under the circumstances”).

85. *Id.* 27(a) (indicating that before filing an action “[a] person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides”).

86. *Id.* 65 (b)(1) (providing that a “court may issue a temporary restraining order without written or oral notice to the adverse party” under certain circumstances).

87. *Id.* 11; *see* L.F. v. Hous. Indep. Sch. Dist., No. H-08-2415, 2009 WL 3073926, at \*23–24 (S.D. Tex. Sept. 21, 2009) (finding that the plaintiff “did not make a reasonable pre-filing inquiry” and thus “[t]he record provides a basis to sanction [the plaintiff]”).

88. *See, e.g.*, Eon-Net L.P. v. Flagstar Bancorp, No. C05-2129RSM, 2010 WL 2026756, at \*5 (W.D. Wash. May 17, 2010) (excerpting colloquy between the court and the attorney regarding the nature and extent of the latter's pre-filing inquiry).

89. FED. R. CIV. P. 27(a)(3).

prospective litigant's interest in preserving material that might support claims or defenses to be raised in the expected action?

### 3. Temporary Restraining Orders Under Rule 65

Finally, the *ex parte* temporary restraining order permitted under Rule 65 is a classic device enabling a person in jeopardy of some immediate and irreparable harm to petition the court for an order compelling an adversary to forbear from engaging in the feared conduct. The doctrine surrounding the duty to preserve and attendant sanctioning authority is similarly aimed at compelling adversaries to forbear from certain potentially harmful conduct—the destruction of relevant evidence. Thus, the temporary restraining order example shows that courts have experience acting *ex parte*, before an adversary has received notice of litigation, to preserve the status quo in an effort to avert anticipated harm. Similarly, a Federal Rule could address how courts might act—on an *ex parte* basis—to impose an express duty to preserve on prospective parties, the breach of which would subject them to sanctions in subsequent related litigation.

### 4. Towards a Rule Governing Pre-Action Preservation Obligations

Drawing inspiration from these three sources in the Federal Rules, we can begin to imagine what a rule governing the pre-filing duty to preserve might look like. The rule could permit prospective parties to seek preservation orders from the court prior to the commencement of an action and authorize sanctions for violations of such orders. A key question would remain, however. Should the rule recognize a duty to preserve that may arise prior to and independent of a court's preservation order? That is, should the rule attempt to codify the current law governing when a duty to preserve is triggered, or should it rely simply on court preservation orders as the trigger?

If such a rule defined the duty to preserve as only arising upon the issuance and receipt of a court preservation order, there would remain a time period during which prospective litigants would be able to anticipate litigation but would not yet be subject to a preservation order. Because courts would not wish to permit prospective litigants to destroy evidence with impunity during this gap period, courts would likely continue to use their inherent power to impose a duty to preserve during that time. That being the case, any rule that seeks to regulate pre-litigation preservation obligations should attempt to address the obligations that arise even in the absence of a court preservation order, at least if the goal is to eliminate some of the variation and unpredictability that attends the current inherent power-based preservation doctrine. In addition to making an attempt to define the preservation obligation, a revised rule could require certification that a document production is not tainted by a failure to fulfill the duty to preserve.

Apart from the challenges associated with codifying the appropriate trigger for the pre-litigation duty to preserve, the other elements of the

duty—its scope and the circumstances warranting sanctions—are relatively simple matters to address by rule. Rule 26 already defines the scope of information potentially subject to discovery, while Rule 34 limits a litigant’s responsibility for producing information to materials that are within its custody or control. Rules 26(g) and 37 address a court’s ability to impose sanctions for discovery misconduct.<sup>90</sup> These provisions would be able to accommodate the addition of language imposing preservation obligations, perhaps with only a few tweaks being necessary to address sanctions for the breach thereof.

*B. Proposed Amendments Addressing the Pre-Litigation Preservation Obligation*

With these thoughts in mind, what follows are proposed amendments to Rules 26 and 37 intended to address the preservation obligations of existing and prospective parties to a federal civil action. The amendment to Rule 26 imposes an additional certification on litigants who respond to discovery requests—that their responses are not missing any material or information due to a breach of the duty to preserve (the proposed new language is italicized):

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) Signature Required; Effect of Signature. . . . By signing, an attorney or party certifies that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry:

. . .

*(C) with respect to a production of documents, electronically stored information, and tangible things, it is not incomplete due to the failure to preserve material or information in violation of Rule 37(e).*

The proposed amendment to Rule 37(e), below, establishes the preservation obligation itself by authorizing courts to sanction discovery responses that are incomplete due to the failure to preserve information in anticipation of litigation. It also affirms the existence of a duty to preserve once litigation commences and in the face of discovery requests, and provides for the ability of courts to issue preservation orders prior to the commencement of an action:<sup>91</sup>

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90. Thomas Y. Allman has previously suggested that preservation obligations could be addressed by an amendment to Rule 37, although his suggestions entail more modest amendments that incorporate references to “preservation obligations” without getting into details regarding the trigger for or nature of these obligations as does the amendment proposed herein. See THOMAS Y. ALLMAN, PRESERVATION AND SPOILIATION REVISITED: IS IT TIME FOR ADDITIONAL RULEMAKING? 24 (2010).

91. The entirety of what appears here, except for what appears under subparagraph (5), reflects the proposed new language.

Rule 37(e). Failure to Produce Documents, Electronically Stored Information, or Tangible Things.

(1) In General. A court where the action is pending may, on motion and after giving an opportunity to be heard, order sanctions if:

(A) a party fails to produce requested documents, electronically stored information, or tangible things falling within the scope of discovery as defined by Rule 26(b), including material relevant to the subject matter involved in the action if discovery of such material has been ordered;

(B) the failure is due to that party's negligent, reckless, knowing, or intentional alteration, destruction, mutilation, concealment, or falsification of such material or information; and

(C) that party

(i) had notice of the commencement of the action or discovery requests in the action;

(ii) could reasonably anticipate the pending action before the action was filed at the time of such alteration, destruction, mutilation, concealment, or falsification occurred; or

(iii) was subject to a statutory or regulatory duty to preserve the material or information.

(2) Knowledge of Prospective Litigation. A person may be deemed to have reasonably anticipated the pending action if, prior to its commencement, the party:

(A) received a court order to preserve material or information relevant to the pending action;

(B) received—no more than 60 days prior to the commencement of the pending action—an initial written notice from a party in the pending action raising the prospect of the action or requesting the preservation of the lost or altered material or information;

(C) had notice of an act, omission, transaction, or occurrence underlying a claim in the pending action and notice of resulting harm of sufficient magnitude to make related litigation probable; or

(D) took steps in anticipation of asserting or defending against a claim in the pending action.

(3) Pre-Action Preservation Orders.

(A) *Petition*. A person who wants to preserve documents, information, or tangible objects relevant to a matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides or may be found. The petition must ask for an order requiring the named persons to preserve all documents, information, or tangible objects relevant to an action the petitioner expects to bring in a United States court. The petition must be titled in the petitioner's name and must show:

(i) that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought;

(ii) the subject matter of the expected action and the petitioner's interest;

(iii) the facts that the petitioner wants to establish by reference to the preserved material; and

(iv) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known.

(B) *Order*. If satisfied that preserving the material may prevent a failure or delay of justice, the court must issue an order requiring the prospective adverse parties to preserve all documents, information, or tangible objects relevant to the expected action described in the petition.

(C) *Motion To Dissolve or Modify the Order*. On 2 days' notice to the party who obtained the order, the prospective adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(D) *Attorneys' Fees, Costs & Expenses*. If the petitioner fails to bring the expected action in any court within 60 days of the issuance of the order, no court may sanction the prospective adverse party for not complying with the order and the court issuing the order may order the petitioner to pay costs, reasonable expenses, and attorneys' fees incurred by the prospective adverse party associated with responding to the petition and complying with the preservation order.

(4) Sanctions. Unless the failing party demonstrates that the failure was substantially justified or harmless, the sanctions the court may impose include:

(A) the payment of reasonable expenses, including attorney's fees, caused by the failure;

(B) informing the jury of the party's failure; and

(C) any other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)–(vi).

(5) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.<sup>92</sup>

### C. Commentary

Together, the proposed rules address all of the key components of the preservation obligation—its trigger and scope—and the factors relevant to determining sanctions for its breach—culpability, prejudice, and remedies. The proposed amendments attempt to embrace the views currently held by courts on these matters and to resolve disagreements among the courts. This section will comment on each aspect of the rule and offer insight into what motivated the choices made.

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92. Hereinafter Proposed Rule 37(e).

### 1. Trigger

Regarding the trigger of the duty to preserve, the common law standard imposing a duty once litigation is reasonably foreseeable is adopted, in addition to the duty to preserve that attaches once litigation is commenced or that derives from separate statutory or regulatory requirements. However, rather than simply relying on the common law understanding of the concept of reasonably anticipating litigation, the pre-litigation standard for anticipating litigation is given further definition by reference to a discrete list of circumstances in which it would be appropriate to impute knowledge of prospective litigation to the spoliator: a court order, an initial<sup>93</sup> notice from a party, notice of an incident and resulting substantial harm, and actions by the spoliating party in anticipation of litigation.<sup>94</sup> The list is meant to be exclusive, limiting courts to finding reasonable anticipation of litigation only under the enumerated circumstances.

The choice to define the circumstances in which litigation is reasonably foreseeable was made in an attempt to constrain discretion under the rule<sup>95</sup> with the aim of improving prospective litigants' ability to predict when courts will deem them to have been under the duty to preserve. These

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93. The proposed rule indicates that a notice from a prospective plaintiff only is effective to impose a preservation obligation for sixty days. *See supra* note 92 and accompanying text, at 37(e)(2)(B). If the threatened litigation has not commenced within that time, the prospective adversary cannot be deemed to have been able to anticipate litigation in the matter *on the basis of such notice*, though other triggers may apply under the facts of any given case. A successive notice threatening litigation by the prospective plaintiff would not revive the effect of such notice under the proposed rule because the rule refers to an "initial written notice." *See supra* note 92 and accompanying text, at 37(e)(2). This language is used to prevent prospective plaintiffs from using successive notices of potential litigation at the end of expiring sixty-day periods to keep prospective adversaries under an ongoing preservation obligation for litigation that has been promised but not delivered.

94. *See supra* note 92 and accompanying text, at 37(e)(2).

95. Notwithstanding these limitations, courts will always be free, to some extent, to go beyond these constraints if they impose sanctions not under the rule but under their inherent authority. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45 (1991) (holding that federal courts have the inherent power to "fashion an appropriate sanction for conduct which abuses the judicial process"). However, a district court's ability to do so may be quite limited if the exclusivity of the proposed rule is interpreted as precluding any other bases for finding that the preservation obligation has been triggered, as the inherent power may not be exercised in a manner that is inconsistent with the Federal Rules. *See* FED. R. CIV. P. 83, at 1985 advisory committee notes ("In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act."). As the U.S. Court of Appeals for the Seventh Circuit explained,

Obviously, the district court, in devising means to control cases before it, may not exercise its inherent authority in a manner inconsistent with rule or statute. As we stated in *Strandell v. Jackson County*, 838 F.2d 884, 886 (7th Cir. 1988), such power should "be exercised in a manner that is in harmony with the Federal Rules of Civil Procedure." This means that "where the rules directly mandate a specific procedure *to the exclusion of others*, inherent authority is proscribed."

*G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 652 (7th Cir. 1989) (quoting *Landau & Cleary, Ltd. v. Hribar Trucking, Inc.*, 867 F.2d 996, 1002 (7th Cir. 1989); *Strandell v. Jackson County*, 838 F.2d 884, 886 (7th Cir. 1988)).

specific triggers were selected because they reflect the circumstances courts have tended to recognize as placing one on notice of probable future litigation and because they offer a relative level of precision in fixing the time at which litigation will be deemed foreseeable. Court orders and letters from adversaries will have fixed dates, while discovery can reveal when a party took steps to prepare for the pending action<sup>96</sup> or had notice of the events and harm that form the basis for the pending action. Whether the harm was sufficiently substantial to put the party on notice that litigation is likely is left to the judgment of the court. This is ultimately a subjective determination, but one that courts already make pursuant to their inherent power over pre-litigation spoliation.<sup>97</sup>

The provision for pre-action court orders to preserve relevant material and information is new. Currently, courts do not have the authority to issue orders to preserve information prior to the commencement of an action.<sup>98</sup> Although courts have the authority to issue temporary restraining orders,<sup>99</sup> the proposed amendment does not seek to mirror the injunctive standard. Rather, the model is Rule 27, which permits courts to order depositions prior to the commencement of an action.<sup>100</sup> Under the proposal, no immediate or irreparable harm must be shown, nor must the petitioner demonstrate a likelihood of success. Instead, once the court is satisfied that

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96. *See, e.g.,* *Wade v. Tiffin Motorhomes, Inc.*, 686 F. Supp. 2d 174, 194 (N.D.N.Y. 2009) (“[T]he Court finds that Plaintiff had a duty to preserve all evidence regarding the RV [because, among other reasons,] . . . Plaintiff Motorists attempted to document the damage through photographs and reports [and] the person hired by Plaintiff Motorists to document the damage was an ‘expert’ fire investigator.”). Looking at the dates of materials for which the spoliating party has asserted work-product protection would be informative of when litigation was anticipated, since the standard for being able to claim such protection is also connected with the anticipation of litigation. *See AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 445 (2007) (“It would be incongruous for the Court to find that Defendant had a duty to preserve documents for discovery because of impending litigation, yet could not assert the work product doctrine to protect documents prepared in anticipation of that litigation.”).

97. *See, e.g.,* *Jain v. Memphis Shelby Cnty. Airport Auth.*, No. 08-2119-STA-dkv, 2010 WL 711328, at \*3 (W.D. Tenn. Feb. 25, 2010) (holding that the discovery, during the completion of an incident report, of the serious nature of the victim’s injuries should have put the defendant on notice that litigation over the incident was likely); *Wade*, 686 F. Supp. 2d at 194 (citing the fact that “the magnitude of the losses was significant” as a factor supporting the finding that the plaintiff had a duty to preserve).

98. *See, for example, Keeling v. Damiter*, No. 4:09-CV-0147, 2010 WL 3167525 (M.D. Pa. Aug. 10, 2010):

[B]ecause spoliation motions necessarily involve an assessment of whether “the evidence destroyed or withheld was relevant to claims or defenses [in a lawsuit]; and . . . [whether] it was reasonably foreseeable that the evidence would later be discoverable [in that lawsuit],” such motions cannot be addressed in the abstract, but only can be considered in the context of a pending lawsuit. In this case, Keeling has no litigation pending relating to these alleged incidents . . . . Moreover, these incidents which are separate in time and place from the claims set forth in the instant lawsuit, are not properly part of this lawsuit. Therefore, his spoliation motion, which proceeds [sic] any lawsuit relating to these alleged incidents, is entirely premature.

*Id.* at \*2.

99. *See* FED. R. CIV. P. 65(b).

100. *Id.* 27.

issuing the order will prevent a failure or delay of justice, the order may be issued.<sup>101</sup> The safeguards against unwarranted or overbroad preservation orders include a swift, post-order hearing of the party subject to the order,<sup>102</sup> the requirement that the anticipated action actually be commenced within 60 days of the order before sanctions for violating the order may be imposed, and the requirement that the petitioner cover the costs, attorneys' fees, and expenses incurred by the adversary in the event the threatened action is not filed.<sup>103</sup>

## 2. Scope

Under the proposed amendment to Rule 37, the scope of the duty to preserve extends to all materials and information—within the “party’s possession, custody, or control”<sup>104</sup>—falling within the scope of potentially discoverable material as defined by Rule 26(b).<sup>105</sup> This means, as indicated in the proposed amendment, material relevant to the subject matter of the prospective litigation would be subject to the duty to preserve. Left to the judgment of preserving parties would be the extent to which material within one of the limits on discovery prescribed in Rule 26(b) must be preserved. For example, if it would be unduly burdensome to preserve electronically stored information because of the labor or expense associated with such an effort, parties need not ordinarily provide discovery of such information, although it is possible that the court will order discovery of the material for good cause shown.<sup>106</sup> More generally, only reasonable preservation efforts need to be undertaken, meaning that preservation efforts whose costs are out of proportion with what is likely to be at stake in the dispute may be unwarranted as well.<sup>107</sup> Thus, a preserving party might opt not to preserve such information, causing a dispute to arise regarding the alleged spoliator’s judgment on these matters. In that event, the court would—under the

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101. See *supra* note 92 and accompanying text, at 37(e)(3)(B).

102. See *supra* note 92 and accompanying text, at 37(e)(3)(C). Pre-order notice is not chosen out of a concern that such notice might enable the prospective adversary to spoliage evidence prior to the issuance of the order. However, were pre-order notice provided for in the rule, such notice itself would enable a prospective adversary to anticipate litigation, thereby subjecting it to the common law duty to preserve. Thus, pre-order notice of a hearing on the order and the order itself would ultimately have the same effect. As a result, a prompt post-order hearing is chosen as the best means of enabling the prospective adversary to challenge the order without pre-empting the effect of an order with advance notice. Further, the prospective adversary will be entitled to an additional hearing prior to any imposition of sanctions.

103. See *supra* note 92 and accompanying text, at 37(e)(3)(D).

104. FED. R. CIV. P. 34(a)(1).

105. See *supra* note 92 and accompanying text, at 37(e)(1)(A).

106. FED. R. CIV. P. 26(b)(2)(B).

107. See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 533 (D. Md. 2010) (concluding, in light of the limitations imposed by Rule 26(b)(2), that “assessment of reasonableness and proportionality should be at the forefront of all inquiries into whether a party has fulfilled its duty to preserve relevant evidence”); *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (“Whether 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 . . .”).

proposed rule—be able to resolve the dispute at the hearing on the motion for sanctions, where the court could consider whether the loss of the information was “substantially justified.”<sup>108</sup> Finally, although information pertaining to the subject matter of the prospective action falls within the duty to preserve, the failure to preserve such material becomes sanctionable only in the event that the court issues an order<sup>109</sup> broadening discovery to the subject matter of the dispute under Rule 26(b)(1).<sup>110</sup>

Connecting the scope of the obligation with Rule 26(b) should protect against overly broad preservation requests by prospective plaintiffs, as prospective adverse parties will be able to evaluate such requests against the relevant-to-the-subject-matter standard. Further, limiting the ability of litigant preservation requests to trigger a preservation obligation to a sixty-day period should offer some protection against preservation requests that are not promptly followed up by the actual filing of the threatened action. Otherwise, prospective litigants might be able to get prospective adverse parties to preserve—for an open-ended period of time—material that turns out to be relevant only to an action that the requesting party ultimately never files or files too belatedly.

### 3. Culpability

The proposed amendment simplifies the culpability analysis by requiring fault on the part of the spoliator, but opting against connecting the various degrees of culpability with a determination of the availability and propriety of any given sanction as some courts have done.<sup>111</sup> Unless the spoliation was harmless or excusable, all levels of culpability will render the spoliator sanctionable at the court’s discretion.<sup>112</sup> This feature reflects the view that the appropriate remedy has more to do with the degree of harm, or prejudice, to the innocent party than with the level of culpability of the

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108. *See supra* note 92 and accompanying text, at 37(e)(4). Certainly, producing parties bear some risk of exposing themselves to sanctions if they are mistaken in their judgment that they are “substantially justified” in having failed to preserve certain material because of the associated cost or burden. When pre-litigation preservation orders are issued, courts should be sensitive to such issues, and producing parties should be able to raise these concerns in the context of the post-issuance hearing that is available under the proposed rule. However, when the pre-litigation preservation obligation arises outside of an order, preserving parties’ concerns over the scope and burden of the obligation would have to be resolved either in the context of the hearing on a motion for sanctions, or a prompt motion for a protective order once litigation ensues. Admittedly, however, in the meantime, parties under the duty to preserve would be advised to preserve information that might ultimately be protected from discovery lest they are later held to have not been justified in its spoliation.

109. FED. R. CIV. P. 26(b)(1) (“For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.”).

110. *See supra* note 92 and accompanying text, at 37(e)(1)(A).

111. *See, e.g.*, *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, No. 09-60351-CIV, 2010 WL 3368654, at \*4 (S.D. Fla. Aug. 23, 2010) (“[A] party’s failure to preserve evidence rises to the level of sanctionable spoliation only where the absences [sic] of that evidence is predicated on bad faith, such as where a party purposely loses or destroys relevant evidence.” (quoting *Walter v. Carnival Corp.*, No. 09-20962-CIV, 2010 WL 2927962, at \*2 (S.D. Fla. July 23, 2010)) (internal quotation marks omitted)).

112. *See supra* note 92 and accompanying text, at 37(e)(4).

spoliator. Degrees of culpability can relate to the court's determination of whether the lost information would have been helpful to the innocent party's case, as is currently the approach in many courts. But as to the issue of whether *vel non* sanctions are appropriate for the loss of materials or information, fault of any kind will suffice under the proposed rule.

#### 4. Prejudice & Relevance

As discussed previously, courts have generally held that sanctions for spoliation are only appropriate if the lost information would have aided the innocent party in establishing a claim or defense.<sup>113</sup> When lost information is relevant in this more narrow sense, its loss is prejudicial to the innocent party. Establishing relevance and prejudice of this kind typically is the burden of the innocent party, although some courts have presumed relevance in the face of intentional spoliation.<sup>114</sup> Judge Scheindlin in *Pension Committee* indicated that gross negligence would also be a sound basis for presuming relevance and prejudice,<sup>115</sup> while Judge Rosenthal in *Rimkus* made clear that the Fifth Circuit had not endorsed such a presumption under any circumstances.<sup>116</sup>

The proposed rule amendment takes an entirely distinct approach: once culpability of any kind is established on the part of the producing party, relevance and prejudice are presumed and it is the spoliator's burden to rebut that presumption.<sup>117</sup> This approach acknowledges the difficulty an innocent party faces when attempting to establish the substance of missing information it has not had the opportunity to review. Although it is certainly possible for the innocent party to meet such a burden under the right circumstances, there will clearly be instances when expecting the innocent party to establish the nature of missing information will be too much to ask. As Judge Scheindlin has acknowledged, placing too heavy a

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113. *See Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 467 (S.D.N.Y. 2010) ("It is not enough for the innocent party to show that the destroyed evidence would have been responsive to a document request. The innocent party must also show that the evidence would have been helpful in proving its claims or defenses . . ."); *Sampson v. City of Cambridge*, 251 F.R.D. 172, 180 (D. Md. 2008) ("The burden is on the aggrieved party to establish a reasonable possibility, based on concrete evidence rather than a fertile imagination, that access to the lost material would have produced evidence favorable to his cause." (quoting *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 167 F.R.D. 90, 104 (D. Colo. 1996))).

114. *See, e.g., Sampson*, 251 F.R.D. at 179 ("A failure to preserve documents in bad faith, such as intentional or willful conduct, alone establishes that the destroyed documents were relevant." (citing *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 219 F.R.D. 93, 101 (D. Md. 2003))).

115. *Pension Comm.*, 685 F. Supp. 2d at 467 ("Relevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner.").

116. *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 617–18 (S.D. Tex. 2010) ("The 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.").

117. *See supra* note 92 and accompanying text, at 37(e)(4).

burden on innocent parties to demonstrate prejudice “would . . . allow parties who have . . . destroyed evidence to profit from that destruction.”<sup>118</sup>

That said, Judge Scheindlin also cautioned that permitting a presumption of prejudice to exist in all cases of spoliation would turn litigation into a “gotcha” game where the “the incentive to find such error and capitalize on it would be overwhelming.”<sup>119</sup> This might be true if no finding of fault of any kind were required. But inadvertent or excusable loss of evidence will not be subject to sanctions under the proposed rule. Further, the rule simply establishes a rebuttable presumption of prejudice rather than conclusively establishing it, affording the spoliator the opportunity to demonstrate that the loss of information was harmless.<sup>120</sup> Because the spoliator is in a better position to know the substance of the missing information, it makes sense for that party to bear the initial burden of showing its irrelevance.

Finally, because of the connection between prejudice and fixing appropriate sanctions, there is little to no risk that spoliators will be subject to penalties of any kind, let alone severe sanctions, if the court has determined that the resulting prejudice was slight or nonexistent. In sum, spoliating parties shown to have acted culpably—even if only negligently—are at fault and should bear the burden of showing that the material or information they lost was not relevant to a claim or defense of their adversary. Creating such a presumption even in the case of negligent spoliation will strengthen prospective litigants’ incentive to engage in a thorough preservation effort that will protect them from a finding of fault should some loss of evidence occur.

### 5. Appropriate Sanctions

Under the proposed amendment, courts would impose sanctions consistent with the manner in which they have heretofore imposed sanctions under Rules 26(g) and 37. The proposed amendment to Rule 37(e) does not connect the appropriate sanction with culpability but simply requires fault and prejudice. Courts are then free to craft the appropriate remedy or sanction based on the degree of prejudice and on whether such prejudice can somehow be lessened or eliminated by the remedy. For example, in *Multiservice Joint Venture, LLC v. United States*<sup>121</sup> the court was unable to establish the content of missing notes made by a witness for the spoliating party, making the degree of prejudice unclear.<sup>122</sup> Rather than presume the worst, the court declined to give an adverse inference instruction, opting instead to preclude the spoliating party from calling that witness to testify at trial as the best means of making the innocent party

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118. *Pension Comm.*, 685 F. Supp. 2d at 468 (alteration in original) (quoting *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 109 (2d Cir. 2002)) (internal quotation marks omitted).

119. *Id.*

120. *See supra* note 92 and accompanying text, at 37(e)(4).

121. 85 Fed. Cl. 106 (2008).

122. *Id.* at 114.

whole.<sup>123</sup> On the other hand, when prejudice to the innocent party is substantial and cannot be remedied by less drastic sanctions, dismissal of the action would be an available and potentially appropriate response.<sup>124</sup> A district judge in Montana aptly summarized some of the considerations courts use to determine an appropriate sanction as follows:

Ultimately, the court should fashion a sanction that:

- (1) sufficiently penalizes the spoliating party[,]
- (2) has a sufficient deterrent value to the immediate spoliating party and future litigants[,]
- (3) sufficiently cures any prejudice to an affected party by restoring that party to the position it would have been in but for the spoliation[,]
- (4) sufficiently restores the accuracy of the fact-finding process[,] and
- (5) places the risk of an erroneous judgment on the spoliating party.<sup>125</sup>

These considerations would not change under the proposed rule, nor would the scope of a court's discretion in fashioning appropriate relief. The bulk of what the rule accomplishes is the standardization of the duty to preserve and of the prerequisites to the availability of sanctions for spoliation. The range of available sanctions and their propriety under the circumstances remains within the discretion of the judge on a case-by-case basis.

#### D. *The Validity of the Proposed Amendments to Rules*

As a final note, it is worth mentioning that the current regime of regulating pre-litigation preservation obligations via the inherent power of the courts raises issues under the doctrine of *Erie Railroad Co. v. Tompkins*,<sup>126</sup> which held that “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.”<sup>127</sup> Although the idea that *Erie* constrains the ability of

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123. *See id.* (“Without knowing exactly what Mr. Tolson’s notations may have said, it is difficult to define what an adverse inference should be. . . . Rather than attempting to define at trial whether Mr. Tolson might be testifying in support of Plaintiff’s claim or in defense of Defendant’s counterclaim, the simpler and more rational approach is to rule that Mr. Tolson will not testify . . . .”); *see also* FED. R. CIV. P. 37(b)(2)(A)(ii) (permitting courts to “prohibit[] the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence”); *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1066 (N.D. Cal. 2006) (“[A] court can exclude witness testimony proffered by the party responsible for destroying the evidence and based on the destroyed evidence.”).

124. FED. R. CIV. P. 37(b)(2)(A)(v) (permitting dismissal of “the action in whole or in part”); *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001) (“[D]ismissal may be necessary if the prejudice to the [nonspoliating party] is extraordinary, denying it the ability to adequately defend [or prosecute] its case.”).

125. *Peschel v. City of Missoula*, 664 F. Supp. 2d 1137, 1143 (D. Mont. 2009) (citations omitted).

126. 304 U.S. 64 (1938).

127. *Id.* at 78. These issues were highlighted in a recent report. *See* ADVISORY GRP. TO THE N.Y. STATE-FED. JUDICIAL COUNCIL, HARMONIZING THE PRE-LITIGATION OBLIGATION TO PRESERVE ELECTRONICALLY STORED INFORMATION IN NEW YORK STATE AND FEDERAL

federal courts to regulate pre-litigation preservation obligations has not been embraced by the federal courts,<sup>128</sup> the promulgation of a Federal Rule on the subject would cause this *Erie* question to be supplanted<sup>129</sup> by the question central in *Hanna v. Plumer*<sup>130</sup>—whether such a Federal Rule would be consistent with the limits of the Rules Enabling Act.<sup>131</sup> That statute provides that federal rules may not “abridge, enlarge, or modify” substantive rights.<sup>132</sup> Do the rule amendments proposed above run afoul of that restriction?

As Justice Scalia recently emphasized in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*:<sup>133</sup>

The test is not whether the rule affects a litigant’s substantive rights; most procedural rules do. What matters is what the rule itself regulates: If it governs only “the manner and the means” by which the litigants’ rights are “enforced,” it is valid; if it alters “the rules of decision by which [the] court will adjudicate [those] rights,” it is not.<sup>134</sup>

Applying that test to a rule permitting the imposition of sanctions for spoliation of discoverable material, such a rule seems valid. The proposed amendments do not alter the rules of decision by which litigants’ rights will be adjudicated. Rather, the revised rule as proposed regulates how rights are enforced in litigation: it permits the imposition of sanctions that may alter the parties’ respective evidentiary burdens or their opportunity to present proof in support of their case; shifts the responsibility for the costs of discovery from one party to another; instructs the jury to regard evidentiary matters in a certain light; or—in extreme cases—permits the dismissal of an action or entry of judgment on a claim due to the impact that spoliation has on a court’s ability to provide a fair process for innocent

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COURTS 31 (2010) (“The Supreme Court has not rendered an opinion regarding the application of *Erie* to the pre-litigation duty to preserve ESI, and there appears to be some disagreement among the federal circuits on that issue.”).

128. Compare *Silvestri*, 271 F.3d at 590 (“[F]ederal law of spoliation applies because, as we note below, the power to sanction for spoliation derives from the inherent power of the court, not substantive law.”), with *Ward v. Tex. Steak Ltd.*, No. Civ. 7:03 CV 00596, 2004 WL 1280776, at \*2 (W.D. Va. May 27, 2004) (“Recognizing that it is a court of limited jurisdiction, this court concludes that when spoliation of evidence does not occur in the course of pending federal litigation, a federal court exercising diversity jurisdiction in which the rule of decision is supplied by state law is required to apply those spoliation principles the forum state would apply.” (citing *State Farm Fire & Cas. Co. v. Frigidaire*, 146 F.R.D. 160, 162 (N.D. Ill. 1992) (“[W]e can only conclude that the issue of State Farm’s pre-suit duty to preserve material evidence is substantive and, as such, Illinois law governs.”))).

129. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (“*Erie* involved the constitutional power of federal courts to supplant state law with *judge-made* rules.” (emphasis added)).

130. 380 U.S. 460 (1965); see *Shady Grove*, 130 S. Ct. at 1442 (“[*Erie*] is not the test for either the constitutionality or the statutory validity of a Federal Rule of Procedure.”).

131. 28 U.S.C. § 2072(a) (2006).

132. *Id.*

133. 130 S. Ct. 1431 (2010).

134. *Id.* at 1442 (citing *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 445 (1946)).

parties.<sup>135</sup> Notably and deliberately absent from the list of permissible sanctions in the proposed amendment to Rule 37(e) is a contempt of court finding under Rule 37(b)(2)(A)(vii), which—if included in the rule—might get it nearer to imposing substantive penalties for primary, pre-litigation conduct and make the *Hanna* question a closer matter. But as it stands, the proposal only empowers courts to alter the “manner and means” by which litigants’ rights are enforced in court, keeping the amendments within the limits prescribed by the Rules Enabling Act as interpreted by the Court in *Shady Grove*.<sup>136</sup>

#### CONCLUSION

Revising the Federal Rules in the way proposed above certainly will yield more predictability in the area of pre-litigation preservation duties and spoliation sanctions. Clear and discrete categories defining when the duty to preserve is triggered will help make the determination surrounding the anticipation of litigation less subjective and more consistently assessed across jurisdictions. Aligning the Rule 26 scope of discovery—including its attendant limitations—with the scope of the preservation obligation strikes the right balance between retaining all relevant information and subjecting parties only to proportionate, not unduly burdensome preservation obligations, and does so in a way that provides clearer and more consistent guidance than would a distinctive standard. Simplifying the culpability analysis to fault or no fault, with a concomitant elimination of the link between degrees of culpability and the selection of proper

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135. See *supra* note 92 and accompanying text, at 37(e)(4) (permitting cost shifting and special jury instructions as sanctions and incorporating the sanctions indicated in Federal Rule 37(b)(2)(A)(i)–(vi)).

136. I will note here my view that even when pre-litigation preservation obligations are regulated pursuant to the inherent authority of the federal courts, the *Erie* principle is not violated. The judge-made rules that currently govern preservation obligations and sanctions for the breach thereof primarily impact the process by which litigants’ rights are adjudicated. It is not likely that prospective litigants would choose state versus federal court based solely on differences in their respective attendant preservation obligations, nor would differential litigant access to state and federal court and their differing preservation obligations result in the inequitable administration of the laws. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (“The ‘outcome-determination’ test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.”). The variation between litigation in the two systems resulting from differing preservation obligations would not be sufficiently “substantial” to cause concern under *Erie*. *Id.* (“Not only are nonsubstantial, or trivial, variations not likely to raise the sort of equal protection problems which troubled the Court in *Erie*; they are also unlikely to influence the choice of a forum.”). However, even if one might disagree as to whether either of *Erie*’s “twin aims” is implicated under an inherent-power based regulation of pre-litigation preservation obligations, the federal courts have a substantial countervailing interest in regulating abuse of the judicial process and in maintaining the ability to provide a fair adjudication of the cases before them. See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 (1996) (“In [*Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958)] the Court said that the *Guaranty Trust* ‘outcome-determination’ test was an insufficient guide in cases presenting countervailing federal interests.”). Thus, federal courts should be seen as free to follow judge-made rules governing sanctions for failures to preserve certain material in the face of reasonably foreseeable litigation.

sanctions removes much of the source of variability among jurisdictions in these two areas. Finally, presuming prejudice in the face of a culpable loss of relevant information properly places the burden of demonstrating the harmlessness of the loss on the producing party, who is the party responsible for the problem and the party in the best position to guard against spoliation.

All of these simplifying reforms offer greater consistency and predictability without inviting excessive or reflexive sanctions motions or depriving judges of the discretion they have to tailor appropriate remedies based on the circumstances of each case. Indeed, minimizing the role that levels of culpability have heretofore played in the determination of proper sanctions will focus courts on the consideration that should matter most to that decision: the degree of harm to the innocent party, which includes an assessment of the probative value of the missing information and the availability of alternate methods of offering similar proof. The prejudice analysis will also serve as a bulwark against frivolous or strategic motions over *de minimis* or technical violations of the rule, provided that judges take the analysis seriously. Hopefully, the federal rulemakers will seize the opportunity to reform the rules to address pre-litigation preservation and spoliation, as so many have called for,<sup>137</sup> rather than continuing to leave the matter in the hands of courts exercising their inherent authority in varying ways across jurisdictions. Prospective litigants of all stripes deserve the greater clarity and predictability that would ensue.

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137. *See, e.g.*, ALLMAN, *supra* note 90, at 22 (“A uniform federal preservation rule—provided it is practical and effective—might help unlock the full potential of voluntary agreements and, over time, reduce the burden of collateral disputes on both the judiciary and the litigants.”); CIVIL LITIG. CONFERENCE E-DISCOVERY PANEL, ELEMENTS OF A PRESERVATION RULE 1 (“The E-Discovery Panel . . . holds the consensus view that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules of Civil Procedure.”).