

ELECTRONIC DISCOVERY AND OTHER PROBLEMS

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I. PRE-LITIGATION PRESERVATION

Uncertainty is expensive.

An accident happens. Parties begin to have issues under a contract. An employee is terminated. A product malfunctions. A letter with a pointed inquiry is received. A dispute arises.

Precisely when, in the absence of litigation, is the duty to preserve evidence triggered? Once triggered, just what must be preserved? How far does the duty extend? What time period is covered? To whom does it attach? How long does it last?

The duty to preserve evidence, like many common law duties, is well settled in concept but fuzzy in application. The mere existence of a dispute does not necessarily trigger the duty to preserve evidence.¹ The duty is triggered by “pending or reasonably foreseeable litigation.”² Pending litigation is easy to identify. “Reasonably foreseeable litigation” often is not. It is

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¹ See, e.g., *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 371 (S.D.N.Y. 2006) (“the mere existence of a dispute between Mr. Treppel and Biovail in early 2002 did not mean that the parties should reasonably have anticipated litigation at that time and taken steps to preserve evidence”); *Goodman v. Praxair Servs., Inc.*, No. MJG-04-391, 2009 U.S. Dist. LEXIS 58263 (D. Md. July 7, 2009) (“The mere existence of a dispute does not necessarily mean that parties should reasonably anticipate litigation or that the duty to preserve arises”) (citing *Treppel*).

² See, e.g., *Allstate v. Hamilton Beach/Proctor Silex, Inc.*, 473 F.3d 450, 457 (2d Cir. 2007) (“Spoliation is the destruction or significant alteration of evidence, or failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation”) (citation omitted).

always judged after the fact, verbal formulations vary, and judicial identification of a trigger date is frequently unpredictable.³

Prospective litigants are at serious risk of committing spoliation — passively, actively, unintentionally — before litigation commences (if it ever does) because they have no codified benchmarks to which to conform their behavior. Third parties associated with prospective litigants — such as employers, parent companies and affiliates — are also at risk when they receive pre-litigation preservation demands, which are sometimes extensive.

Electronically-stored information (“ESI”) is commonly the most nettlesome and expensive part of the -preservation problem.⁴ The volume of data stored by organizations is staggering.⁵ There are the data themselves, and there are data about the data.⁶ There are many

³ See, e.g., *Dong Ah Tire & Rubber Co., Ltd. v. Glasforms, Inc.*, 2009 U.S. Dist. LEXIS 62668 (N.D. Cal. July 2, 2009) (“As an initial matter, the operative date for when Taishan can be deemed to have reasonably anticipated litigation must be identified.... The Ninth Circuit has not expressly defined the term ‘anticipated litigation,’ ... and trial courts have crafted various formulations of when a party ‘should know’ that the evidence may be relevant to future litigation.... [See, e.g.,] *Hynix Semiconductor Inc. v. Rambus, Inc.*, 591 F. Supp. 2d 1038, 1061 (N.D. Cal. 2006) (determining that future litigation is probable when it is ‘more than a possibility’); *Ameripride Servs., Inc. v. Valley Indus. Serv., Inc.*, No. CIV S-00-113 LKK/JFM, 2006 WL 2308442, at *4 (E.D. Cal. Aug. 9, 2006) (placing the anticipated litigation date to when a potential claim was identified); *Hynix Semiconductor Inc. v. Rambus, Inc.*, No. C-00-20905 RMW, 2006 WL 565893, at *21, 24 (N.D. Cal. Jan. 5, 2006) (finding that litigation became ‘probable’ when counsel was selected). Regardless of the precise terminology employed, each of these decisions recognizes that once a potential dispute matures to the point that litigation may well follow, relevant evidence should be preserved.”).

⁴ See Report of the Civil Rules Advisory Committee to the Standing Committee on Rules of Practice and Procedure, at 10 (May 27, 2005; as amended July 25, 2005) (“electronically stored information is retained in exponentially greater volume than hard-copy documents; electronically stored information is dynamic, rather than static; and electronically stored information may be incomprehensible when separated from the system that created it.”) (available at http://www.uscourts.gov/rules/supct1105/Excerpt_CV_Report.pdf).

⁵ See Shira Ann Scheindlin, Daniel J. Capra, *et ano.*, ELECTRONIC DISCOVERY & DIGITAL EVIDENCE at 41 (2009) (“In the three year period from 2004 to 2007, the average amount of data in a Fortune 1000 corporation grew from 190 terabytes to one thousand terabytes (one petabyte). Over the same time period, the average data sets at 9,000 American, midsize companies grew

types of electronically stored information⁷ and endless new devices and platforms on which ESI is maintained.⁸

There are no rules or statutes that define, circumscribe, offer guidance about or afford any safe harbor for pre-litigation⁹ handling, or neglect, of evidence, with one limited exception. The

from two terabytes to 100 terabytes.”). A terabyte is a measure of computer storage capacity that is 2 to the 40th power or more than a trillion bytes or a thousand gigabytes. “A terabyte is roughly the equivalent of the contents of books made from 50,000 trees. The books in the U.S. Library of Congress contain a total of approximately 20 terabytes of text.” See Linus Information Project at <http://www.lininfo.org/index.html>.

⁶ See, e.g., *Aguilar v. Immigration & Customs Enforcement Div.*, 2008 U.S. Dist. LEXIS 97018, at *11-12 (S.D.N.Y. Nov. 20, 2008) (“Metadata, frequently referred to as ‘data about data,’ is electronically-stored evidence that describes the ‘history, tracking, or management of an electronic document.’ ... [T]here are at least several distinct types, including substantive (or application) metadata, system metadata, and embedded metadata”) (citations omitted).

⁷ Typical varieties include email (and attachments); word processing documents; spreadsheets; presentation documents (e.g., Power Point, Corel); graphics; animations; images; audio, video and audiovisual recordings; voicemail — and metadata associated with each. See American Bar Association Civil Discovery Standard 29(a)(i) (2004) (available at <http://www.abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf>).

⁸ These include databases; networks; computer systems, including legacy systems (hardware and software); servers; archives; back up or disaster recovery systems; tapes, discs, drives, cartridges and other storage media; laptops; personal computers; internet data; personal digital assistants; handheld wireless devices; firewalls; mobile telephones; paging devices; and audio systems, including voicemail. See American Bar Association Civil Discovery Standard 29(a)(ii) (2004) (available at <http://www.abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf>).

⁹ The term “pre-litigation” is not exactly right because litigation may never eventuate, and the costs (other than spoliation sanctions) are incurred in either event. But it seems better than the obvious alternative, “extrajudicial,” which does not work because sanctionable extrajudicial misconduct can occur before or after the litigation has begun. See, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 57 (1991) (a “party may be sanctioned for abuses of process occurring beyond the courtroom such as disobeying the court’s orders”); *FDIC v. Bender*, 182 F.3d 1, 4, 7 (D.C. Cir. 1999) (FDIC’s filing of inappropriate lien in District of Columbia land records, and refusal to lift it after judgment was satisfied, constituted bad faith and was sanctionable under the inherent power, requiring remand to allow district court to explain its failure to sanction); *Greviskes v. Univs. Research Ass’n*, 417 F.3d 752, 759 (7th Cir. 2005) (litigant sanctioned for sending fraudulent faxes and forgeries to the corporate defendant to obtain the personnel file of a witness, among other misconduct); *Wallace v. Kelley*, 2007 U.S. Dist. LEXIS 56472 (D. Neb.

2006 electronic discovery amendments to the Federal Rules of Civil Procedure (the “2006 Amendments”) include the hastily-drafted Rule 37(e), which provides:

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.

This language, which was never circulated for public comment, affords a safe harbor from “sanctions under these rules” for certain conduct that may occur before or during litigation, and thereby offers guidance as to extrajudicial (including pre-litigation) conduct. The phrase “under these rules” is somewhat peculiar because the Civil Rules do not address spoliation except indirectly, as a function of the certifications and representations required by Rule 26(g) and the penalties imposed by Rule 37(c)(1) for non-disclosure or non-production.¹⁰ The principal sanctions power available to punish spoliation is the common-law inherent power of the court.¹¹

There is no reason why the Civil Rules cannot dictate the *sanctions* consequences in federal civil litigation of spoliative conduct, regardless of when the conduct occurs. Whether or not a *sanction* may be imposed by a trial judge in a civil action is a matter of “the procedure in all civil actions and proceedings in the United States district courts,” within FED.R.CIV.P. 1.¹²

Aug. 1, 2007) (litigant sanctioned for wrongfully filing a notice of *lis pendens* in the county land records after the district court had dismissed the noticed action); *Synergetics, Inc. v. Hurst*, 2007 U.S. Dist. LEXIS 61286 (E.D. Mo. Aug. 21, 2007) (party sanctioned in Lawsuit 1 for settling Lawsuit 2 in a way that precluded counterparty from testifying in Lawsuit 1).

¹⁰ Joseph, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE §§ 48(E)(3)(b), 58 (4th ed. 2008).

¹¹ *Id.* at § 26(E)(3).

¹² Thus, the Supreme Court has held that FED.R.CIV.P. 11 and FED.R.APP.P. 38 are “procedural” within the meaning of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), in *Business Guides, Inc. v. Chromatic Commc’ns Enters.*, 498 U.S. 533 (1993) and *Burlington N. R.R. v. Woods*, 480 U.S. 1 (1987), respectively. *Business Guides*, like the Supreme Court’s earlier decision in *Willy v Coastal Corp.*, 503 U.S. 131 (1992), rejected a Rules

Further, the inherent power pursuant to which spoliation sanctions are imposed does not create rights in individuals — it is an attribute of the judicial function.¹³ Therefore, a Rule affecting spoliation sanctions otherwise available under the inherent power does not abridge, enlarge or modify any substantive right, within 28 U.S.C. § 2072(b). The inherent power of the court generally defers to the Civil Rules, when the Rules directly address a matter.¹⁴ That means that

Enabling Act challenge to FED.R.CIV.P. 11. *Burlington* similarly rejected a Rules Enabling Act challenge to FED.R.APP.P. 38.

¹³ “[I]nherent powers of federal courts are those which ‘are necessary to the exercise of all others.’” *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980), quoting *United States v. Hudson*, 11 U.S. 32, 34, 3 L. Ed. 259 (1812). See also, e.g., *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 562-63 (3d Cir. 1985); *In re Stone*, 986 F.2d 898, 901-02 (5th Cir. 1993).

¹⁴ See, e.g., *Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 900 (8th Cir. 2009) (“In general, then, courts first should turn to specific rules tailored for the situation at hand, such as Rule 37, to justify sanctions. Then, as an alternative basis for support or in circumstances where specific rules are insufficient, i.e., when ‘there [is] a need,’ it may be appropriate to invoke their inherent authority”) (citing *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 207 (1958) and *Chambers v. NASCO*, 501 U.S. 32, 49 (1991)); *Fidelity Nat’l Title Ins. Co. v. Intercounty Nat’l Title Ins. Co.*, 412 F.3d 745, 752 (7th Cir. 2005) (“when a domain of judicial action is covered by an express rule, such as Rules 26 and 37 of the civil rules, the judge will rarely have need or justification for invoking his inherent power”); *In re Prudential Ins. Co. Am. Sales Practice Litig. Actions*, 278 F.3d 175, 189 (3d Cir. 2002) (“Although a court retains the inherent right to sanction when rules of court or statutes also provide a vehicle for sanctioning misconduct, resort to these inherent powers is not preferred when other remedies are available. Moreover, the analysis in *Chambers* ‘leads to the conclusion that if statutory or rules-based sanctions are entirely adequate, they should be invoked, rather than the inherent power.’”) (citation omitted); *Kovilic Constr. Co. v. Missbrenner*, 106 F.3d 768, 772-773 (7th Cir. 1997) (“The ‘supersession’ clause of the Rules Enabling Act, 28 U.S.C. § 2072(b) ... suggests that exercises of inherent powers may also not directly conflict with the national procedural rules [citing Rule 83(b)]. This Court has recognized the need to be cautious when resorting to inherent powers to justify an action, particularly when the matter is governed by other procedural rules, lest (even in the absence of a direct conflict) the restrictions in those rules become meaningless.... Sanctions authorized only by the inherent power of the court are therefore available only when no direct conflict with laws or national rules of procedure would arise. Even then, they must be used only with great caution”); *United States v. One 1987 BMW 325*, 985 F.2d 655, 661 (1st Cir. 1993) (“there are limits to a court’s inherent powers, particularly in instances where the Civil Rules are on all fours. When, as in this case, the Civil Rules limit the nature of the sanction that can be imposed, a court may not use its inherent powers to circumvent the Rules’ specific provisions.”).

legislation (akin to FED. R. EVID. 502) should not be required. Moreover, Rules regulating the *sanctions* consequences of spoliative conduct in federal civil litigation will have no impact on rights under state tort law for spoliation¹⁵ any more than the common law inherent power doctrine of spoliation does so.

The cost burdens associated with electronic discovery cannot be solved unless pre-litigation conduct relating to the preservation of evidence is regulated in a clear and comprehensive way. Every day, organizations — private and public— make pre-litigation judgments about preservation of evidence, or fail to make judgments, or are found in hindsight to have made the wrong judgments. With no certainty that litigation will ever ensue, costs incurred include:

- deciding whether a duty to preserve has been triggered;
- deciding what must be preserved — including relevant types of data, dates, custodians, locations, and platforms;
- deciding if third parties must in turn be notified to preserve ESI — such as former employees; agents, consultants and professionals; affiliates; business partners; and contractors.
- gathering the data, with implications for operations;

¹⁵ Some states impose tort liability for spoliation of evidence, either (1) by directly recognizing a tort of spoliation (*see, e.g., Williams v. Great West. Cas. Co.*, 2009 U.S. Dist. LEXIS 46247 (N.D.W.Va. June 1, 2009) (setting forth elements of the tort of spoliation under West Virginia law); *see generally* Joseph, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 56 (4th ed. 2008)), or (2) by recognizing a fraud or other tort claim premised on spoliation. *See, e.g., IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 2009 NY Slip Op 5253, 2009 N.Y. App. Div. LEXIS 5167 (1st Dept. June 25, 2009) (recognizing claims for fraudulent misrepresentation and fraudulent concealment based on intentional spoliation of evidence by third-party subpoena recipient, even though New York does not recognize an independent tort of spoliation); *Rosenblit v. Zimmerman*, 766 A.2d 749, 757 (N.J. 2001) (while spoliation of evidence is not recognized as intentional tort in New Jersey, the tort of fraudulent concealment is an available remedy for spoliation).

- preventing routine deletion, including computer recycling, with sometimes significant cost or operational repercussions, for an indefinite period of time;
- storing the data securely for an indefinite period of time; and
- deciding how long to continue collection and preservation activities.

If litigation does materialize, pre-litigation conduct imposes costs that include litigating, among other things:

- whether a duty existed;
- the scope of that duty;
- whether the steps taken were reasonable in the circumstances; and
- whether unpreserved data, the substance of which may only be surmised, was relevant and its loss prejudicial.

Proposal 1. Rules¹⁶ are needed to define and circumscribe the pre-litigation duty to preserve electronically stored information. The rules should:

- a. be clear and specific, and they should insulate those who adhere to them from subsequent sanctions or liability;
- b. specify a duration during which preservation must continue in the absence of suit;
- c. require subjective bad faith as a prerequisite for pre-litigation spoliation sanctions; and
- d. provide for cost-shifting when a notice to preserve is issued to a third party against whom litigation is not threatened. Consideration should also be given to mandating cost-shifting whenever a prelitigation preservation notice is issued.

¹⁶ As used in this paper, the word “rules” is not limited to those generated by the rule-making process but is intended to encompass legislation as well.

All rules are not created equal.

A rule that merely parrots the nebulous standard of the common law — “reasonably foreseeable litigation” — does not meaningfully inform the prospective litigant whether or when a duty has been triggered. Nor does it assist a third party against whom litigation is not threatened but who receives a demand that it preserve ESI for a prospective litigation against someone else. The “reasonably foreseeable litigation” standard is nebulous, creates uncertainty, imposes needless costs, and should be abandoned. Concrete benchmarks should be substituted.

Rules should clearly articulate (i) what triggers the duty to preserve, and (ii) the extent of efforts needed to satisfy the duty, including (iii) the duration of those efforts. Limits should be specified and, if honored, should insulate the preserving party from subsequent penalties. Cost-shifting for prelitigation preservation should be implemented whenever a preservation notice is served on a third party (*i.e.*, a party that is not a prospective litigant) and should be considered for implementation whenever a preservation notice is issued. Automatic cost-shifting is not unfair when it can be obviated by filing suit so that a judge can address the issue in context.

Trigger. Rules should specify what does and does not constitute a written notice sufficient to trigger the duty to preserve and provide that, if the notice is faulty, it does not trigger the duty. A rule could set forth the essential elements of a certification (on the order of, *e.g.*, Federal Rules of Evidence 911 and 912), or include a form setting forth the essential elements of such a notice, along the lines of the forms appended to the Federal Rules of Civil Procedure. That should help to minimize, if not eliminate, litigation over whether a pre-litigation letter was sufficient to trigger a duty on the part of the recipient of the letter — litigation of a sort currently

not uncommon.¹⁷ The rule should also specify that the issuance of a notice triggers a duty to preserve on the part of the issuer.¹⁸

Written notice aside, concrete examples of what does and does not trigger a duty are needed. For example, these might include:

- preparing an incident report or other steps taken in the ordinary course of business in anticipation of potential litigation;
- notifying an insurance company or indemnitor of a potential liability;
- hiring an investigator or photographer;
- retaining or instructing counsel;
- engaging experts;
- breaching a contractual, regulatory or statutory duty to preserve or produce specific data;
- issuing an oral or written notice to preserve, or taking steps to draft one;
- filing a complaint with a regulator;
- sending a prelitigation notice that is prerequisite to filing suit or advising that litigation is contemplated;
- conducting destructive testing (not an ESI issue, but important in other types of cases).

¹⁷ See, e.g., *Cache Poudre Feeds, LLC v. Land O'Lakes Inc.*, 244 F.R.D. 614 (D. Colo. 2007) (letter that (i) warned that the defendant's use of trademark "may become a very serious problem," (ii) explicitly "put [defendant] on notice of our client's trademark rights" and defendant's "exposure," and (iii) sought "to determine whether this situation can be resolved without litigation" — but did not explicitly demand that evidence be preserved — held insufficient to trigger a duty to preserve); *Goodman v. Praxair Servs., Inc.*, No. MJG-04-391, 2009 U.S. Dist. LEXIS 58263 (D. Md. July 7, 2009) (holding that a November 1999 email and December 2000 telephone conversation did not trigger the duty but a January 5, 2001 letter did so; distinguishing *Cache*).

¹⁸ See, e.g., *See, e.g., Allstate Ins. Co. v. Gonyo*, 2009 U.S. Dist. LEXIS 56790 (N.D.N.Y. July 1, 2009).

Catch-alls, including nebulous standards (“reasonably foreseeable litigation”), should be avoided. They introduce uncertainty. The only way to provide certainty and to cabin expense is to be exhaustive, not illustrative. The drafters should attempt to be comprehensive but should not be off put by the fact that the rules may be subject to manipulation. Manipulation is the obverse side of certainty. Moral hazard is implicit in any set of rules; the point is to perfect the rules, not impose the cost of uncertainty on those who adhere to them. Nebulous standards may permit perfect justice before fair judges, but a perfect world is an extremely expensive world. Another compelling vision of justice is simply the even-handed application of objective criteria.

Scope. Once triggered, the scope of the duty to preserve must be specified. The scope need not be the same pre-litigation as once the litigation has commenced. Clear limits need to be set, even if they are effectively arbitrary. Limits might take the form of:

- not extending the duty to persons that are not prospective parties;
- setting a specific number of “key players” that must be contacted and whose data must be preserved (somewhat analogous to the 10-deposition limit of Rule 32(a)(1)(A)(i));
- permitting a specified number of keyword searches to satisfy the duty;
- authorizing the use of search technology other than keyword searches to satisfy the duty;
- specifying types of data or platforms that must be secured;
- stating an amount of money that must be expended to satisfy the duty;
- creating a window — a discrete period of time before and after a salient event — within which data must be searched and preserved;
- barring a party who has issued a preservation demand from asserting claims of spoliation for failure to preserve data not demanded;

Or limits could take another form altogether. The point is that it is not unreasonable to require a plaintiff to bring suit (or reach an accommodation with a prospective defendant) if it wants more than the limits provide.

The spoliation doctrine exists to prevent one side from denying such an opportunity to the other by destroying or altering material evidence. It does not, however, permit a party to avoid the contest by defaulting the other side through playing a game of “gotcha” instead of seeking to develop its own case in a timely and appropriate manner.

Calipine Corp. v. AP&M Field Servs., Inc., No. 07 Civ. 9911 (GEL), 2008 U.S. Dist. LEXIS 99178 (S.D.N.Y. Dec. 9, 2008).

Duration. Persons should be permitted to cease preservation activities if suit is not brought within a specified period following a preservation demand or other triggering event. The duration should be uniform, and not fluctuate with the statute of limitations for the ultimately-selected cause of action and jurisdiction. The rules should be clear that they do not exonerate failure to abide by other contractual, regulatory or statutory duty.

Bad Faith Standard of Care. The rules should clearly articulate a bad faith requirement before sanctions may be imposed for pre-litigation spoliation. To the extent that the inherent power of the court regulates spoliation, this is presumably required by *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). Because negligence is sufficient to trigger spoliation sanctions in some Circuits once litigation has commenced,¹⁹ and because negligent destruction of ESI while on notice of *potential* relevance to a forthcoming litigation has been deemed to be willful

¹⁹ See, e.g., *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002); *Velez v. Marriott PR Mgmt., Inc.*, 2008 U.S. Dist. LEXIS 103484 (D.P.R. Dec. 22, 2008) (“Applicable caselaw in the First Circuit has clearly established that ‘bad faith or comparable bad motive’ is not required for the court to exclude evidence in situations involving spoliation”) (quoting *Trull v. Volkswagen of Am., Inc.*, 187 F.3d 88, 95 (1st Cir. 1999)).

spoliation,²⁰ a subjective bad faith standard of care should be codified. Satisfaction of the requirements of the rule should be deemed to establish *prima facie* the absence of bad faith.

Cost-Shifting. Demands to preserve ESI are sometimes sent to third parties — parent companies, affiliates, and employers are common examples. If a subpoena were served after litigation commenced, the cost-shifting protections of FED.R.CIV.P. 45 would apply. Pre-litigation demands should be subject to similar, or more rigorous, cost-shifting requirements. This will create drafting issues, as there will presumably not be a court to which to resort to resolve disputes. A fixed cost-shifting rule, absent which compliance and preservation are forgiven, is an alternative the drafters should consider.

Drafters should also consider ordering cost-shifting whenever a prelitigation preservation notice is served on a prospective party. This cost can be avoided if suit is filed (even if it is a declaratory judgment action filed by the defendant), at which point the Court is in a position to control ESI and other preservation costs.

²⁰ See, e.g., *Ripley v. District of Columbia*, 2009 U.S. Dist. LEXIS 56230 (D.D.C. July 2, 2009) (“Defendant had notice of the litigation, yet failed to properly protect material evidence from destruction.”)

II. POST-COMMENCEMENT PRESERVATION AND PRODUCTION

Proposal 2. Rules are needed to define and circumscribe the duty to preserve, search and produce electronically stored information once litigation has commenced.

- a. The rules should be clear, specific, should insulate those who adhere to them from subsequent sanctions or liability.
- b. Electronically stored information, even reasonably accessible ESI, need not be treated, for preservation and production purposes, like all other evidence.
- c. All types of ESI need not be treated the same.
- d. Quantitative limits should be imposed.
- e. Categories should be placed off limits except on a showing of exceptional circumstances, not merely good cause.
- f. Relevance/admissibility, not discoverability, should be the standard for some or all ESI.
- g. Cost shifting should be automatic in some circumstances.

A. Preservation

The preservation duty clearly attaches on service of the summons, but spoliation issues frequently arise because loss of ESI may result from decisions made well before a judicial officer can address discoverability issues. The preservation duty should be codified. Its contours must parallel discovery obligations. After litigation has commenced, the contours of the duties to preserve, search and produce coalesce.

Current rules do not adequately address the practicalities of post-commencement preservation duties for three reasons. First, in complex cases, in which ESI tends to be most

expensive, there are almost invariably preliminary motions that delay attention to discovery. Under the Private Securities Litigation Reform Act, for example, there is an automatic stay of discovery pending a motion to dismiss (coupled with a broad statutory obligation to preserve).²¹ In the wake of *Twombly*²² and *Iqbal*,²³ many types of cases are now considered not to be ripe for discovery — or for very much discovery — until after dismissal motions have been decided and the case has been preliminarily shaped by the Court.²⁴ Yet, and judgments must be made, with spoliation/preservation consequences, immediately.

Second, even in the absence of a dismissal motion, it is at least many weeks, if not months, before the initial pretrial conference, at which the issue of ESI preservation are generally presented to a judicial officer.²⁵ The issue may not even be addressed by the Court at the initial conference or in the initial scheduling order.²⁶

Third, simply providing that the preservation duty is coextensive with existing discovery obligations would not solve the problem. The Rules, including the 2006 Amendments, are drafted to preserve maximum judicial flexibility, which may produce the fairest results but also

²¹ 15 U.S.C.S. § 78u-4(b)(3)(B)-(C).

²² *Bell Atl. Corp. v. Twombly*, 554 U.S. 544 (2007).

²³ *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

²⁴ *See, e.g., Coss v. Playtex Prods., LLC*, 2009 U.S. Dist. LEXIS 42933 (N.D. Ill. May 21, 2009) (“If the complex case is one susceptible to the burdensome and costly discovery contemplated by *Bell Atlantic* and *Iqbal*, the district court should limit discovery once a motion to dismiss for failure to state a claim has been filed”).

²⁵ Fed.R.Civ.P. 16(b)(2) (scheduling order must issue “within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared”).

²⁶ The 2006 Amendments mandate that ESI and spoliation be discussed by the parties at the Rule 26(f) conference, but these topics need not be the subject of the initial scheduling order. *Compare* Fed.R.Civ.P. 26(f)(3)(C) *with* Rule 16(b)(3)(B)(iii).

comes at a high cost because it produces great uncertainty as to what will later be ordered to be produced. Uncertainty propels cost as conservative approaches lead to over-inclusiveness in preservation and production. The issues are generally negotiated, not litigated. Litigation over discovery is expensive, uncertain, and generally unwelcome. Judges expect lawyers to act professionally and resolve discovery disputes, and understandably express exasperation when that does not occur, particularly when ESI is at issue. Lawyers negotiate resolutions at the margins. The more discretionary, and wide open, discovery remains under the Rules, the more discovery that will be agreed to. It is necessary to shrink the perimeter of discoverability with concrete rules.²⁷

B. PRODUCTION

“Red Light” Rules. Rules with concrete, objective, quantitative contours are needed. Traffic signals are rules. The light is red, you stop. The light is green, you go. Rule 26 is all yellow. Messrs. Solovy and Byman have captured this notion with their inimitable light touch:

We call them rules, but come on. “No spitting allowed” is a rule. “One to a customer” is a rule. Rules resolve things; they prevent controversy. But if you have come to believe that the ... Federal Rules of Civil Procedure are rules, you should ask for a refund on your law school tuition. We call them Federal Rules, but in large measure they can be interpreted in myriad ways. They often provide no clear cut answers.... These rules do not rule.

²⁷ Some states whose rules are patterned after the Federal Rules of Civil Procedure do address post-commencement spoliation. *See, e.g.*, Tennessee Rule of Civil Procedure 37A:

34A.01 Testing of Tangible Things.

Before a party or an agent of a party, including experts hired by a party or counsel, conducts a test materially altering the condition of tangible things that relate to a claim or defense in a civil action, the party shall move the court for an order so permitting and specifying the conditions. Rule 37 sanctions may be imposed on an offending party.

34A.02 Other Spoliation.

Rule 37 sanctions may be imposed upon a party or an agent of a party who discards, destroys, mutilates, alters, or conceals evidence. .

Solovy and Byman, *If Rules Only Ruled*, NAT'L L. J., April 1, 2002, at B11.

This is the nature of a Rolls Royce system of justice. It turns out an incredible product, but it does so at a steep price.²⁸ Rule 26(b)(2)(B), for example, focuses on whether ESI is “reasonably accessible,” which it defines in terms of “undue burden and cost.”²⁹ That affords maximum judicial discretion but minimal predictability, except at the extremes. One judge’s “undue” is another’s “due.” The well thought-out *Zubulake* factors provide a framework within which to decide whether cost-shifting is appropriate,³⁰ but that just determines who bears some of the cost (both sides have to review and assimilate the data), and the litigation over discoverability is something of a kabuki dance.³¹ Moreover, if the Court decides that the producing party should have been aware that a duty to preserve was triggered before rendering

²⁸ Joseph, *Federal Litigation: Where Did It Go Off Track?*, 34 LITIGATION No. 4 at 5 (2008).

²⁹ Fed.R.Civ.P. 26(b)(2)(B) (“the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost”).

³⁰ See *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003) (“(1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data; (5) the relative benefits to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party.”).

³¹ The threshold issue is undue burden (burden of proof on the producing party); the second issue is good cause to overcome it (burden of proof on the requesting party); the third issue is cost-shifting (burden of proof on the producing party). See, e.g., *Fendi Adele S.R.L. v. Filene’s Basement, Inc.*, 2009 U.S. Dist. LEXIS 32615, *27-28 (S.D.N.Y. Mar. 24, 2009) (“When a party requests the production of electronic data that the responding party has determined to be overly burdensome to produce, the requesting party must show good cause to overcome the difficulties entailed in producing it” — at which point the eight-factor *Zubulake* test “is commonly used to determine whether it is appropriate to shift discovery-related costs to the requesting party in cases where the burden of producing the documents is high”).

the ESI no longer reasonably accessible, it may jettison the “undue burden” limitation altogether.³²

More concrete rules are necessary. Some options:

Quantitative Limits. Akin to the 25-interrogatory and 10-deposition presumptive limitations of Rules 33(a)(1) and 30(a)(2)(A)(i), limits be applied to certain categories of ESI, or they might take the form of the number of custodians from whom ESI must be gathered or the types of data or platforms from which data must be secured.

Categories Off Limits. Certain categories of ESI — *e.g.*, metadata (application, system, embedded) — should be discoverable only on a showing of exceptional circumstances.³³ That is a strict standard that lawyers understand and on which make preservation decisions on every day. For example, no one preserves communications with non-testifying experts because, unlike testifying experts, discovery is permitted only on a showing of exceptional circumstances,³⁴ and that standard is only rarely satisfied. The rule should also provide that preservation is presumptively not expected so that, if the standard is met, the adversary is not subject to immediate spoliation sanction. If categories of ESI are presumptively not producible, little

³² See, *e.g.*, *Disability Rights Council v. Washington Metropolitan Transit Auth.*, 242 F.R.D. 139, 147 (D.D.C. 2007) (“While the newly amended Federal Rules of Civil Procedure initially relieve a party from producing electronically stored information that is not reasonably accessible because of undue burden and cost, I am anything but certain that I should permit a party who has failed to preserve accessible information without cause to then complain about the inaccessibility of the only electronically stored information that remains. It reminds me too much of Leo Kosten’s definition of chutzpah: ‘that quality enshrined in a man who, having killed his mother and his father, throws himself on the mercy of the court because he is an orphan.’”).

³³ See, *e.g.*, *Dahl v. Bain Capital Partners, LLC*, 2009 U.S. Dist. LEXIS 52551, at *7 (D. Mass. June 22, 2009) (“case law shows wariness about metadata’s value in litigation. Many courts have expressed reservations about the utility of metadata, explaining that it does not lead to admissible evidence and that it can waste parties’ time and money”).

³⁴ FED.R.CIV.P. 26(b)(4)(B)(ii).

thought and time will be spent on them. Negotiations that start from a premise of presumptive non-production, if they occur, are entirely different than negotiations that start from a premise of presumptive producibility.

Relevance/Admissibility, Not Discoverability. One of the problems with discovery generally is that the 2000 amendment to FED.R.CIV.P. 26(b)(1) did effect anything approaching a sea change in discovery practice. Old habits die hard, and the penultimate sentence of Rule 26(b)(1) seems to dilute the definition of “relevant” that precedes it from admissibility to discoverability. Categories of ESI could be made available only on a showing of likely admissibility. As a drafting matter, the penultimate sentence of Rule 26(b)(1) need not apply to ESI.

Automatic Cost Shifting. If information has been produced in any usable form, requests for the same data in another form should be subject to automatic cost shifting. Broader automatic cost-shifting should be considered. The *Zubulake* factors are excellent but render cost-shifting highly unpredictable. That affects the results of negotiations over production. Changing the default rule would change what happens outside the purview of the court, which is where discovery should generally be handled.

III. THE MERITS SHOULD BE SUBJECT TO REVIEW AT THE OUTSET

Proposal 3. Litigants should be permitted to raise, and Courts should be permitted to consider, the merits of a complaint in a preliminary hearing based on reasonably available evidence, considering documents for their truth, and bearing in mind any imbalance of information in the possession of the parties.

The scope of discovery is determined by the viable claims and defenses. Putting aside their fidelity to the text of Rule 8, *Twombly* and *Iqbal* reflect a concern about the burdens of discovery that many share. They are the most recent manifestation of a long of judicial efforts to find ways to assess the merits of complaints up front and shape the case before discovery begins, despite the limitations of Rule 12(b)(6). *Iqbal* is a classic example of the use of judicial notice to undermine and reject the allegations of the complaint and the inferences it seeks to draw. The Supreme Court dismissed a complaint under Rule 12(b)(6), resting in part on a 2003 report of the Department of Justice unmentioned in the complaint but available on the internet³⁵ which the enterprising district court found and of which it took judicial notice.³⁶

³⁵ See *Iqbal*, 129 S. Ct. at 1937.

³⁶ See *Elmaghraby v. Ashcroft*, 2005 U.S. Dist. LEXIS 21434, at *7 n.4 (E.D.N.Y. Sept. 27, 2005) (“While motions to dismiss are evaluated based on facts alleged in the complaint, this does not mean that the complaint must be viewed in a factual vacuum. Following the attacks on September 11, 2001, the FBI immediately initiated a massive investigation into the attacks. See United States Department of Justice, Office of Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* 1 (April 2003)... Within 3 days, more than 4,000 FBI Special Agents and 3,000 support personnel were assigned to work on the investigation. *Id.* at 11-12. By September 18, 2001, the FBI had received more than 96,000 leads from the public. *Id.* at 12.”), *aff’d in part, rev’d in part, Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev’d, Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

Courts struggle to pierce the complaint to get to real facts through a variety of techniques in addition to (a) judicial notice, among them relying on (b) documents or information “integral” to the complaint, even though unmentioned; (c) documents or information of which plaintiffs have knowledge and on which plaintiffs relied in drafting the complaint; and (d) documents filed with the Securities and Exchange Commission and other agencies.³⁷ To the extent that the Court considers contents of at least some of these documents for their truth, that may convert the motion to dismiss into a motion for summary judgment — which may require denial of the motion for the simple reason that no discovery has yet been undertaken.

It is time to put aside the charade that courts do not and should not consider the merits at the outset of the case. Judges should be allowed to consider all reasonably available, reliable information, without going through the procrustean exercise of fitting every data point into an exception to Rule 12(b)(6). If *Twombly* and *Iqbal* teach anything, it is that the merits matter, and the more complicated the case — and, hence, the greater the discovery burden that the parties are likely to bear — the more interest the Court may have in assessing the merits early.

There is often, but not always, a profound imbalance of information. The Court should freely permit, and direct, discovery to address perceived weaknesses in the case. It may be time to accept that the trial should not occur only at the end of the case, but also, in a miniaturized version, at the beginning.

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³⁷ See, e.g., *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002); *Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997).