

## **A DUTY EVERLASTING: THE PERILS OF APPLYING TRADITIONAL DOCTRINES OF SPOILIATION TO ELECTRONIC DISCOVERY**

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Cite as: Michael R. Nelson and Mark H. Rosenberg, *A Duty Everlasting: The Perils of Applying Traditional Doctrines of Spoliation to Electronic Discovery*, 12 RICH. J.L. & TECH. 14 (2006), <http://law.richmond.edu/jolt/v12i4/article14.pdf>.

[1] Amendments to the Federal Rules of Civil Procedure regarding electronic discovery are expected to take effect on December 1, 2006.<sup>2</sup> These amendments are designed to alleviate the burden, expense and uncertainty that has resulted from the application of traditional discovery principles in the electronic age.<sup>3</sup> These principles worked well in an era where discovery was primarily limited to the production of paper documentation, but have proved unworkable when applied to the discovery of electronic data, particularly in the “corporate world,”<sup>4</sup> where even the most routine business discussions are captured in electronic format.<sup>5</sup> That world has been burdened with broad obligations to preserve and produce vast amounts of arguably relevant electronic data. Those

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<sup>2</sup> See generally JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (2005), <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf> [hereinafter JUDICIAL CONFERENCE REPORT].

<sup>3</sup> See generally *id.*, at App. C-18.

<sup>4</sup> See *id.*

<sup>5</sup> See David K. Isom, *Electronic Discovery for Judges*, 2005 FED. CTS. L. REV. 1, 1 (2005).

responsibilities may include the imposition of significant costs on the corporate litigant.<sup>6</sup>

[2] Electronic discovery obligations are further complicated by the fact that much of the discovery is at once temporal and permanent. For example, electronic mail messages are often of no long-term importance to employees, and are therefore deleted shortly after receipt and review. Nevertheless, in many cases these e-mails do not immediately disappear. Deleted data remains on a computer's hard drive until the space on the drive is overwritten by newly generated files.<sup>7</sup> It is possible to recover this data after deletion, although such efforts typically require the retention of a forensic computer professional.<sup>8</sup> Similarly, deleted e-mails are quite often preserved on back-up tapes automatically generated by a business' information technology system. On a periodic basis, these tapes generate a "snapshot" of the business' computer system for the purpose of disaster recovery in the event of a widespread loss of data.<sup>9</sup> It therefore follows that these tapes may contain the only copies of otherwise deleted e-mails or files. As these back-up tapes are typically not formatted to allow for the retrieval of separate files,<sup>10</sup> retrieval of these files again will require a

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<sup>6</sup> See Sasha K. Danna, *The Impact of Electronic Discovery on Privilege and the Applicability of the Federal Communications Privacy Act*, 38 LOY. L.A. L. REV. 1683, 1688–89 (2005) (“[c]onsidering that production of documents can be extremely time consuming and expensive particularly in the context of electronic discovery, discovery requests seeking electronic data are more likely to be unduly burdensome than those seeking paper documents”).

<sup>7</sup> See Brian Organ, *Discoverability of Electronic Evidence*, 2005 SYRACUSE SCI. & TECH. L. REP. 5 (2005).

<sup>8</sup> See, e.g., *Alexander v. Fed. Bureau of Investigation*, 188 F.R.D. 111, 116–17 (D.D.C. 1998) (discussing process of restoring deleted files).

<sup>9</sup> See Lisa M. Arent, Robert D. Brownstone & William A. Fenwick, *Essay: Discovery Preserving, Requesting & Producing Electronic Information*, 19 SANTA CLARA COMPUTER & HIGH TECH L.J. 131, 143–44 (2002).

<sup>10</sup> See *Rowe Entertainment, Inc. v. William Morris Agency*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (“[t]he data on a back-up tape are not organized for retrieval of individual documents or files, but for wholesale, emergency uploading onto a computer system. Therefore, the organization of the data mirrors the computer's structure, not the human records management structure, if there is one”) (citation omitted).

forensic computer professional, resulting in a significant expense to the corporate client.<sup>11</sup>

[3] Undeterred, plaintiffs routinely assert wide-ranging requests for electronic discovery.<sup>12</sup> Either expressly or implicitly, these requests often incorporate demands for material from “inaccessible” sources such as those identified above, as well as numerous other sources of electronic data. Indeed, even a simple request for “electronic records” may be reasonably interpreted to encompass a demand for “voice mail, e-mail, deleted e-mail, data files, program files, back-up files, archival tapes, temporary files, system history files, web site information in textual, graphical or audio format, web site files, cache files, ‘cookies’ and other electronically stored information.”<sup>13</sup> These requests are often intended to accomplish little more than to raise the cost of defense in an attempt to compel settlement.

[4] These requests often set the stage for charges of spoliation. Electronic data is routinely deleted from a business’ “active” computer system. Even when the data is preserved on back-up tapes, these tapes are routinely deleted, typically through an automatic operation executed after the next back-up tape is generated; only the most recent tape will serve the purpose of restoring (as closely as possible) the data that was on the system at the time of the loss.<sup>14</sup> The very nature of electronic data generated in the corporate world will compel the routine deletion of much of this data. As set forth below, the current state of the law with regard to discovery could be argued to support charges of spoliation in such circumstances, even in the complete absence of any intent to destroy information relevant to litigation.

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<sup>11</sup> See Arent, Brownstone & Fenwick, *supra* note 9, at 148 (“[a]lthough the cost of back-up tapes themselves is relatively small, the cost of restoring, reviewing, and extracting responsive information from back-up tapes can run into tens of thousands of dollars”).

<sup>12</sup> Indeed, courts have recognized as early as 1985 that “[c]omputers have become so commonplace that most court battles now involve discovery of some type of computer-stored information.” *Bills v. Kennecott*, 108 F.R.D. 459, 462 (D. Utah 1985).

<sup>13</sup> *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 219 F.R.D. 93, 96 (D. Md. 2003); see also *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 652 (D. Minn. 2002) (“it is a well accepted proposition that deleted computer files, whether they be e-mails or otherwise, are discoverable”).

<sup>14</sup> See, e.g., *Linnen v. A. H. Robins Co.*, No. 97-2307, 1999 WL 462015, at \*9 n.7 (Mass. Super. June 16, 1999) (demonstrating the recycling of back-up tapes every three months).

[5] This concern is heightened by the recognition of most courts that the duty of preservation does not simply attach when an action is filed, but commences whenever circumstances may place a litigant on reasonable notice of an action.<sup>15</sup> As set forth below, today's litigious culture creates the likelihood that many corporate activities will eventually be the subject of litigation, even if performed in the good faith belief that the activities are within the scope of the law. Given this potential, many corporations are faced with the Hobson's choice of either preserving vast quantities of electronic data without any indication that the data will ever be relevant to litigation or deleting such data while running the risk of potential spoliation sanctions.

[6] This article will explain how the development of case law has led to this potential, while also looking at the real-world implications that this has upon litigants in the corporate realm. This article will also address why the pending amendments to the Federal Rules of Civil Procedure, although very helpful, fail to thoroughly address the problem of spoliation. Finally, this article will suggest ways in which the law of spoliation may be modified to reflect the electronic discovery age and ensure that the benefits of preserving relevant evidence are carefully balanced against the burdens of limitless retention periods.

#### I. A BRIEF OVERVIEW OF SPOILIATION

[7] Spoliation is “[t]he intentional destruction, mutilation, alteration, or concealment of evidence, usu. a document.”<sup>16</sup> Spoliation may result in a variety of sanctions, including the imposition of default judgment in the rare situation in which lesser sanctions would prove ineffective.<sup>17</sup> However, “the oldest and most venerable remedy” for the spoliation of evidence is the “adverse inference” instruction.<sup>18</sup> When this instruction is

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<sup>15</sup> See *infra* note 24, at 216.

<sup>16</sup> BLACK'S LAW DICTIONARY, 1437 (8th ed. 2004).

<sup>17</sup> See, e.g., *Advantacare Health Partners v. Access IV*, No. C 03-04496 JF, 2004 WL 1837997, at \*4 (N.D. Cal. Aug. 17, 2004).

<sup>18</sup> Jonathan Judge, Comment, *Reconsidering Spoliation: Common-Sense Alternatives to the Spoliation Tort*, 2001 WIS. L. REV. 441, 444 (2001).

issued, the jury is permitted to infer that the destroyed evidence would have been favorable to the opposing side's position.<sup>19</sup>

[8] In analyzing whether sanctions are appropriate for the spoliation of evidence, most courts focus upon the culpability of the conduct and the relevance of the destroyed evidence to the underlying litigation. A number of jurisdictions have limited the application of an adverse inference instruction to cases in which litigants have intentionally suppressed or destroyed evidence.<sup>20</sup> In addition to situations in which litigants have destroyed evidence with the purpose of preventing its disclosure, intentional conduct has also been deemed to include situations of "willful blindness," in which a litigant is aware of the existence of discoverable information yet allows for its destruction.<sup>21</sup>

[9] A significant minority of jurisdictions has held that the negligent loss of evidence can support an adverse inference instruction.<sup>22</sup> As a determination of negligence is necessarily dependent upon the facts of an individual case, there are few hard-and-fast rules to inform litigants on the type of conduct that may warrant spoliation sanctions under this standard.<sup>23</sup> In recent years, however, a number of courts have held that negligent spoliation may result from the failure to modify established business practices in response to litigation.<sup>24</sup> This issue presents perhaps the most significant concern for corporate litigants with regard to the potential spoliation of electronic discovery.

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<sup>19</sup> *Id.*

<sup>20</sup> *See, e.g.*, *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 550 (Del. 2006); *Taylor Steel, Inc. v. Keeton*, 417 F.3d 598, 607–08 (6th Cir. 2005) (citing Ohio law); *Gribben v. Wal-Mart Stores, Inc.*, 824 N.E.2d 349, 351 (Ind. 2005); *Ward v. Consol. Rail Corp.*, 693 N.W.2d 366, 371 (Mich. 2005).

<sup>21</sup> Rene Durrant, *Spoliation of Discoverable Electronic Evidence*, 38 LOY. L.A. L. REV. 1803, 1819 (2005).

<sup>22</sup> *See, e.g.*, *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002); *MOSAID Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 338 (D.N.J. 2004); *Thomas v. Isle of Capri Casino*, 781 So. 2d 125, 134 (Miss. 2001); *Mead v. Papa Razzi Rest.*, 840 A.2d 1103, 1109 (R.I. 2004).

<sup>23</sup> *See Durrant, supra* note 21, at 1817–18.

<sup>24</sup> *See, e.g.*, *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 221 (S.D.N.Y. 2003).

[10] Most jurisdictions also condition spoliation sanctions upon the relevance of the destroyed evidence.<sup>25</sup> Other jurisdictions condition sanctions not simply upon the relevance of the evidence, but the prejudice to the opposing party resulting from the destruction of the evidence.<sup>26</sup> Other jurisdictions have indicated that the willful or bad faith destruction of evidence will merit sanctions even in the absence of relevance or prejudice.<sup>27</sup>

[11] Of course, a finding of spoliation is necessarily contingent upon the determination that a litigant had the duty to preserve the documents in question. In this regard, numerous courts have recognized the “fundamental principle of law” that the duty to preserve relevant evidence does not merely attach when a suit is filed, but rather when a party “reasonably anticipates litigation.”<sup>28</sup>

## II. APPLICATION OF SPOILIATION PRINCIPLES TO ELECTRONIC DISCOVERY

[12] It should be no surprise that many of the recent cases pertaining to spoliation have concerned the destruction of otherwise discoverable electronic data. Some of these cases have concerned matters in which the circumstances indicate intentional efforts to delete discoverable electronic data.<sup>29</sup> The issues addressed in the majority of electronic discovery cases are far less clear. Quite often, electronic discovery spoliation matters have concerned the impact of pending litigation (or the threat of same) on

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<sup>25</sup> See, e.g., *MOSAID*, 348 F. Supp. 2d at 336; *Abraham v. Great W. Energy, LLC*, 101 P.3d 446, 455–56 (Wyo. 2004) (citations omitted); *Bohlmann v. Printz*, 96 P.3d 1155, 1158 (Nev. 2004); *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004) (citations omitted); *Mead*, 840 A.2d at 1108 (citations omitted).

<sup>26</sup> See, e.g., *Ellicott Mach. Corp. Int'l v. Jesco Constr. Corp.*, 199 F. Supp. 2d 290, 293 (D. Md. 2002) (citations omitted); *Bolling v. Montgomery Ward & Co., Inc.*, 930 F. Supp. 234, 237 (W.D.Va. 1996).

<sup>27</sup> See, e.g., *Zubulake*, 220 F.R.D. at 221.

<sup>28</sup> *Tracy ex rel. Tracy v. Cottrell*, 524 S.E.2d 879, 887 (W.Va. 1999); see also *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001); *Perez-Velasco v. Suzuki Motor Co.*, 266 F. Supp. 2d 266, 268 (D.P.R. 2003) (citing *Silvestri*, 271 F.3d at 591); *Baliotis v. McNeil*, 870 F. Supp. 1285, 1290 (M.D. Pa. 1994) (citing *Hirsch v. Gen. Motors Corp.*, 628 A.2d 1108, 1122 (N.J. Super. 1993)).

<sup>29</sup> See, e.g., *Kucala Enters. v. Auto Wax Co.*, No. 02 C 1403, 2003 WL 21230605, at \*8 (N.D. Ill. May 27, 2003) (recommending sanctions in light of plaintiff’s use of a program known as “Evidence Eliminator” to delete electronic files after commencement of suit).

standard document retention policies. As the United States Supreme Court has recently acknowledged, it is “not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.”<sup>30</sup> The question that has faced many courts is when and how these “ordinary circumstances” become the type of circumstances that should compel a litigant to modify a document retention policy in order to preserve documents. In so doing, electronic discovery spoliation cases frequently challenge courts to attempt to strike a balance between the general duty to preserve discovery and the impracticality of preserving even a fraction of the vast amount of electronic data generated daily by a business of even moderate size. Given the need to perform such balancing tests, “[c]ourts have found it increasingly difficult to reconcile the unique nuances of electronic discovery with the existing federal rules.”<sup>31</sup>

[13] At first, courts addressing these issues tended to apply an expansive and arguably overbroad interpretation of these preservation obligations. For example, in *Linnen v. A.H. Robins Co.*, a Massachusetts trial court approved an “adverse inference” sanction for a corporation’s failure to preserve back-up tapes containing electronic mail messages that were potentially relevant to the litigant’s claim.<sup>32</sup> While the company had continued the routine destruction of such tapes despite a court order expressly mandating their preservation, the trial court also held the duty to preserve such tapes continued after the order had been vacated, based upon a discovery request served by the plaintiff defining the term “document” to include “any record or compilation of information of any kind or description, however made . . . or stored.”<sup>33</sup> The plaintiff also sought “any documents in the form of computer memory or computer disk.”<sup>34</sup> Despite the fact that the discovery request made no express request for information stored on back-up tapes or other forms of archival media, the Court concluded that “[t]he language of the document request makes it clear that the plaintiffs sought the production of items such as the

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<sup>30</sup> *Arthur Andersen LLP v. United States*, 544 U.S. 696, 696 (2005).

<sup>31</sup> *See Durrant, supra* note 21, at 1806.

<sup>32</sup> *Linnen*, 1999 WL 462015, at \*11.

<sup>33</sup> *Id.* at \*10 (citations omitted).

<sup>34</sup> *Id.*

system back-up tapes and, after receiving this request, the defendants had an obligation to preserve any such documents or materials.”<sup>35</sup>

[14] *Linnen* suggests that a plaintiff may impose potentially unreasonable preservation requests on a corporate defendant simply through the mechanism of a broad discovery request. This analysis is also apparent in the case of *Wiginton v. Ellis*.<sup>36</sup> In *Wiginton*, the United States District Court for the Northern District of Illinois held that an obligation to preserve relevant electronic mail messages and back-up tapes was triggered upon receipt of a letter by the plaintiff directing the corporate defendant to preserve a wide variety of relevant data (including back-up tapes).<sup>37</sup> Noting that “a party must preserve evidence that it has notice is reasonably likely to be the subject of a discovery request even before a request is actually received,”<sup>38</sup> the court held that the corporate defendant was required to perform a search of electronic data (including back-up tapes) for relevant material before deleting the information.<sup>39</sup> The court observed that the fact that the electronic data was destroyed pursuant to routine document retention procedures was no excuse, observing that “once a party is on notice that specific relevant documents are scheduled to be destroyed according to a routine document retention policy, and the party does not act to prevent that destruction, at some point it has crossed the line between negligence and bad faith.”<sup>40</sup> Accordingly, the court held that the litigant’s “complete failure to perform any search rises above the level of mere negligence” as well as its “willful blindness in the context of the facts surrounding the destruction of the documents” compelled the court’s conclusion “that the documents were destroyed in bad faith.”<sup>41</sup> As some back-up tapes had been retained, the court denied the motion for sanctions with leave to renew the motion if relevant evidence was discovered on the tapes.<sup>42</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> *Wiginton v. Ellis*, No. 02 C 6832, 2003 WL 22439865 (N.D. Ill. Oct. 27, 2003).

<sup>37</sup> *Id.* at \*4.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at \*6.

<sup>40</sup> *Id.* at \*7.

<sup>41</sup> *Id.*

<sup>42</sup> *Wiginton*, 2003 WL 22439865, at \*8.



[15] Other courts have favored more reasoned approaches to the preservation obligation. For example, in *Concord Boat Corp. v. Brunswick Corp.*, the United States District Court for the Eastern District of Arkansas held that while a corporate defendant was obliged to preserve all relevant electronic mail messages once the lawsuit had been filed, the defendant was under no such duty to preserve such messages prior to the institution of litigation, even if the messages were potentially relevant to future litigation.<sup>43</sup> The court observed that “to hold that a corporation is under a duty to preserve all e-mail potentially relevant to any future litigation would be tantamount to holding that the corporation must preserve all e-mail,” since “most e-mails, excluding purely personal communications, could fall under the umbrella of ‘relevant to potential future litigation.’”<sup>44</sup> Noting that “corporations [spend] enormous amounts of money to preserve business-related and financial data (the information that is really of the most value in determining the issues in this case), they should not be required to preserve every e-mail message at significant additional expense.”<sup>45</sup> Furthermore, the court observed that corporate employees “are in no position to evaluate the potential relevance of a given e-mail to future litigation.”<sup>46</sup> Employees therefore routinely discard electronic mail messages that could have potential relevance to future litigation. The court held that it would be inappropriate “to sanction these individuals and their employers for such benign actions.”<sup>47</sup> Consequently, the court declined to impose an adverse inference sanction on the defendants for the deletion of e-mail prior to litigation.<sup>48</sup>

[16] The court also declined to impose sanctions for the deletion of certain e-mail messages following the receipt of the complaint.<sup>49</sup> Noting that “[i]mmediately upon receipt of the complaint,” the corporate defendant “took steps to apprise all relevant personnel of the obligation” to preserve materials relevant to the litigation and frequently reminded employees of the preservation obligation, the court held that “[t]he fact

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<sup>43</sup> *Concord Boat Co. v. Brunswick Co.*, No. LR-C-95-781, 1997 WL 33352759, \*5 (E.D. Ark. Aug. 29, 1997).

<sup>44</sup> *Id.* at \*4.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at \*5.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Concord*, 1997 WL 33352759, at \*8.

that [the corporation] allowed individual employees to use discretion whether to retain e-mail is simply not indicative of bad faith” and therefore did not warrant an adverse inference instruction.<sup>50</sup>

[17] As illustrated by *Concord Boat*, an analysis of whether sanctions should be imposed for the destruction of documents often focuses upon the steps taken by a corporate defendant to communicate a preservation obligation to its employees. For example, in *Keir v. UnumProvident Corp.*, a corporate defendant was criticized for failing to clearly communicate the specific obligations created by a preservation order to information technology staff and an outside vendor, which resulted in the failure to create several back-up tapes required by the preservation order.<sup>51</sup> Similarly in *United States v. Koch Industries*, a corporate defendant was criticized for senior management’s negligence in “failing to determine which [back-up] tapes in the tape library contained information relevant to imminent and ongoing litigation and in failing to communicate clear guidelines regarding the preservation of information related to imminent and ongoing litigation to [the defendant’s] data processing personnel and computer tape librarian.”<sup>52</sup> The court observed that the corporation’s negligence created “an environment that led to the destruction by computer personnel of computer tapes that should have been preserved as evidence potentially relevant to imminent or ongoing litigation.”<sup>53</sup> While holding that the imposition of an adverse inference sanction was inappropriate, as the destruction of the tapes was not in bad faith, the court did allow the plaintiffs to “[inform] the jury as to which relevant computer tapes were destroyed and the impact that the destruction has had on Plaintiffs’ proof.”<sup>54</sup>

[18] In *GFTM, Inc. v. Wal-Mart Stores, Inc.*, sanctions were imposed on the corporate defendant for counsel’s misrepresentation of its ability to retrieve certain data.<sup>55</sup> By the time it was determined that the defendant

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<sup>50</sup> *Id.* at \*6.

<sup>51</sup> *Keir v. UnumProvident Corp.*, No. 02 Civ. 8781 (DLC), 2003 WL 21997747, \*7–8 (S.D.N.Y. Aug. 22, 2003).

<sup>52</sup> *United States v. Koch Industries.*, 197 F.R.D. 463, 486 (N.D. Okla. 1998).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *GMTEF, Inc. v. Wal-Mart Stores, Inc.*, No. 98 CIV. 7724 RPP., 2000 WL 335558, \*2-3 (S.D.N.Y. Mar. 30, 2000).

could retrieve data from the past 12 months (rather than the five weeks originally claimed), over a year had passed, resulting in the permanent loss of a substantial amount of data.<sup>56</sup> Although counsel's original representations were in good faith and based upon the assertions of a corporate executive, the court faulted counsel for not communicating with IT personnel that would have provided accurate information at the outset regarding the capacities of the corporation's computer systems.<sup>57</sup> Accordingly, the court ordered the defendant to pay attorney's fees and costs resulting from the misrepresentation.<sup>58</sup>

[19] Sanctions for failure to effectively communicate a preservation obligation have not been limited to corporate defendants. Applying a standard that "good faith" requires parties to take all reasonable steps to comply with a court's order, in *Landmark Legal Foundation v. Environmental Protection Agency*, the United States District Court for the District of Columbia imposed a contempt sanction on the Environmental Protection Agency (EPA) for failing to take reasonable steps to prevent the reformatting of hard drives and erasure of back-up tapes in violation of an injunction mandating the preservation of such data.<sup>59</sup> The court faulted the EPA for limiting its efforts to preserve the data to the distribution of a single electronic mail message notifying employees of the injunction, which was sent a full week after the injunction was entered and was not sent to information technology personnel responsible for the maintenance of the tapes.<sup>60</sup>

[20] As is suggested by *Concord Boat*, a company that provides proper notification to its employees of a preservation obligation and takes steps to ensure that the obligation is carried out may receive some protection from sanctions, even if employees delete some documents.<sup>61</sup> However, the decision of *United States v. Philip Morris USA, Inc.*, demonstrates that the mere implementation of document retention procedures is often insufficient to avoid sanctions.<sup>62</sup> In *Philip Morris*, the cigarette

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<sup>56</sup> *Id.* at \*2.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at \*3.

<sup>59</sup> *Landmark Legal Found. v. EPA*, 272 F. Supp.2d 70, 73, 79 (D.D.C. 2003).

<sup>60</sup> *Id.* at 78–79.

<sup>61</sup> *Concord*, 1997 WL 33352759, at \*8.

<sup>62</sup> *United States v. Philip Morris USA, Inc.*, 327 F. Supp.2d 21 (D.D.C. 2004).

manufacturer was fined over two million dollars for the destruction of electronic mail messages following the entry of a preservation order, which resulted in large part from the failure of employees to follow the company's own internal document retention procedures.<sup>63</sup> Emphasizing Philip Morris' status as a sophisticated corporate defendant that has been involved in many lawsuits, as well as the fact that many high ranking executives failed to follow the retention procedures, the court condemned Philip Morris for its "reckless disregard and gross indifference . . . toward [its] discovery and document preservation obligations."<sup>64</sup> In addition to imposing monetary sanctions, the court also precluded Philip Morris from offering the testimony of any employee who had violated the company's document retention procedures.<sup>65</sup>

[21] As illustrated by the cases set forth above, many courts have not been hesitant to impose severe sanctions on corporate defendants for the destruction of electronic discovery, even when the loss of discovery is clearly the result of carelessness rather than a desire to hide the truth. Yet, most of these decisions have been fact-specific and focused upon the obligation to preserve electronic discovery after the entry of a preservation order. Relatively few courts have analyzed the obligation to preserve electronic discovery in the absence of an order and even fewer courts have attempted to promulgate broadly applicable standards to guide corporations regarding the specific nature of their responsibilities to preserve electronic discovery, due to the impracticalities of preserving all electronic data with even a slim possibility of relevance.

[22] However, in the fourth of a series of at least seven opinions for the case of *Zubulake v. UBS Warburg LLC*,<sup>66</sup> Judge Scheindlin of the United States District Court for the Southern District of New York provided helpful guidance as to the extent of a corporate defendant's electronic discovery preservation obligations, regardless of whether a specific order has been imposed.<sup>67</sup> The *Zubulake* cases concern an employment discrimination dispute in which several employees deleted electronic mail

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<sup>63</sup> *Id.* at 23, 26.

<sup>64</sup> *Id.* at 26.

<sup>65</sup> *Id.*

<sup>66</sup> *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) [hereinafter *Zubulake IV*].

<sup>67</sup> *See id.* at 216–22.

messages despite instructions from both in-house and outside counsel to preserve the messages.<sup>68</sup> While providing these instructions to numerous employees, counsel failed to take steps to preserve back-up tapes until such tapes were expressly referenced in one of plaintiff's discovery requests.<sup>69</sup>

[23] *Zubulake IV* focused upon the scope of a corporate defendant's duty to preserve. The court's analysis began by noting that this duty attaches when litigation is reasonably anticipated, observing that litigation may be reasonably anticipated if numerous employees recognize the possibility of a lawsuit.<sup>70</sup> Notably, the court acknowledged that the reasonable anticipation of litigation does not create an obligation to preserve all electronic data, noting that "[s]uch a rule would cripple large corporations . . . that are almost always involved in litigation."<sup>71</sup> In fact, the court stated that "a party need not preserve all back-up tapes even when it reasonably anticipates litigation."<sup>72</sup> The court did, though, make clear that "anyone 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."<sup>73</sup> The court thus held that a litigant did have the obligation to preserve any documents made by or for "individuals 'likely to have discoverable information that the disclosing party may use to support its claims or defenses.'"<sup>74</sup> These individuals, in other words, are the "key players" in the case.<sup>75</sup> The court also stated that the litigant "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."<sup>76</sup>

[24] Taking all of these factors into consideration, the court set forth the following standards for the scope of a corporation's preservation obligation: "[o]nce a party reasonably anticipates litigation, it must

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<sup>68</sup> *See, e.g., id.* at 215.

<sup>69</sup> *Id.* at 219.

<sup>70</sup> *Id.* at 216–17.

<sup>71</sup> *Id.* at 217.

<sup>72</sup> *Zubulake IV*, 220 F.R.D. at 217.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 218 (quoting FED. R. CIV. P. 26(a)(1)(A)).

<sup>75</sup> *Zubulake IV*, 220 F.R.D. at 218.

<sup>76</sup> *Id.*

suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”<sup>77</sup> The court held that this “litigation hold” did *not* apply to back-up tapes that were “inaccessible,” such as tapes that were produced for the sole purpose of disaster recovery (rather than information retrieval).<sup>78</sup> The court held that such tapes could be recycled in the ordinary course of business.<sup>79</sup> In doing so, the court created one exception to this rule, noting that “[i]f a company can identify where particular employee documents are stored on back-up tapes, then the tapes storing the documents of ‘key players’ to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available.”<sup>80</sup>

[25] In a subsequent opinion, the court imposed an adverse inference sanction due to the loss of electronic evidence that resulted from several communication breakdowns between counsel and its corporate client, counsel’s failure to accurately ascertain the corporation’s document management habits, and the deletion of electronic mail messages by several employees after being made aware of their preservation obligation.<sup>81</sup> While the court ultimately determined the defendant’s conduct in the deletion of electronic data to be willful,<sup>82</sup> the court observed that even the negligent destruction of data could result in sanctions (up to and including an adverse instruction sanction) so long as the destroyed data was relevant to the litigation.<sup>83</sup> Ms. Zubulake ultimately recovered a \$29.2 million jury verdict.<sup>84</sup>

[26] The *Zubulake* court expressed the belief that the development of “national standards” would place “parties and their counsel . . . fully on notice of their responsibility to preserve and produce electronically stored

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422, 436, 440 (S.D.N.Y. 2004) [hereinafter *Zubulake V*].

<sup>82</sup> *Id.* at 436.

<sup>83</sup> *Id.* at 431.

<sup>84</sup> Eduardo Porter, *UBS Ordered to Pay \$29 Million in Sex Bias Lawsuit*, N.Y. TIMES, Apr. 7, 2005, at C4.

information.”<sup>85</sup> The *Zubulake* opinions represented an important step toward the promulgation of these “national standards,” most notably through their clarification of litigants’ preservation obligations with regard to back-up tapes, as well as their detailed explanation of the implementation of a “litigation hold.”<sup>86</sup>

[27] However, the *Zubulake* opinions left a number of important questions unanswered. Most notably, the opinions failed to provide detailed guidance on the circumstances that should cause a party to reasonably anticipate litigation and place a “litigation hold” upon relevant documents. Rather than providing an identification and discussion of the types of events that should place a party upon notice of its preservation obligations, the *Zubulake* opinions appear to favor a fact-specific approach that offers little assistance to corporate litigants who are continually faced with the potential of litigation.

[28] If the *Zubulake* opinions can be read to provide any guidance with regard to this issue, they reflect an extremely broad approach to preservation. In *Zubulake IV*, the court determined that the duty to preserve attached in April 2001.<sup>87</sup> The court reached this conclusion based upon the fact that an internal e-mail regarding the plaintiff’s employment was marked with a statement of attorney-client privilege<sup>88</sup> and based upon a statement by the plaintiff’s supervisor that the potential for litigation was “in the back of [his] head” by April.<sup>89</sup> Based upon nothing more than these two pieces of evidence, the *Zubulake* court determined that the duty to preserve attached approximately four months before the litigant filed a complaint with the Equal Employment Opportunity Commission and approximately ten months before the lawsuit was filed.<sup>90</sup>

[29] Therefore, if the *Zubulake* opinions can be said to stand for any principle with regard to the triggering of a preservation obligation, they appear to suggest that such an obligation is triggered at the moment in

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<sup>85</sup> *Zubulake V*, 229 F.R.D. at 440.

<sup>86</sup> *See, e.g., id.* at 431–36.

<sup>87</sup> *Zubulake IV*, 220 F.R.D. at 216–17.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 217.

<sup>90</sup> *See id.* at 215–17.

which a litigant begins to consider the possibility of litigation. Such a rule fails to reflect the constant threat of litigation facing corporate America.

[30] During the past ten years, the filing of putative class actions has more than tripled.<sup>91</sup> These cases have provided plaintiff's attorneys with ample opportunities to challenge a myriad of corporate practices and procedures. The recent spate of actions filed against the insurance industry provides an effective example. These actions have addressed a wide variety of topics such as the designation of non-original equipment manufacturer parts in the repair of insured vehicles,<sup>92</sup> the contention that first-party automobile policyholders are entitled to compensation for post-repair "diminished value" to the vehicles,<sup>93</sup> the use of "direct" or "preferred" repair shops in the repair of insured vehicles,<sup>94</sup> the contention that homeowners' insurers are required to provide compensation for contractors' "overhead and profit" (regardless of whether this amount was actually charged to the policyholder),<sup>95</sup> the use of "credit scoring" in the review of insurance policy applications,<sup>96</sup> and the enforcement of standard flood exclusions in the handling of homeowners' claims arising from Hurricane Katrina and other recent storms.<sup>97</sup> Indeed, it is difficult to think of an insurance claims handling practice or procedure that has not been challenged through litigation in recent years.

[31] Of course, challenges to corporate practices and procedures through the class action mechanism are not limited to the insurance industry. One may only look to recent well-publicized actions concerning topics such as

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<sup>91</sup> John H. Beisner, Matthew Shors, & Jessica Davidson Miller, *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1445 (2005).

<sup>92</sup> See, e.g., *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005) (reversing a \$1.18 million verdict entered on behalf of a 48-state class).

<sup>93</sup> See, e.g., *Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d 243 (Ind. 2005) (affirming dismissal of putative class action).

<sup>94</sup> See, e.g., *Gaston v. Founders Ins. Co.*, ---N.E.2d ---, 2006 WL 618815 (Ill. App. Ct. Mar. 13, 2006) (affirming dismissal of the case).

<sup>95</sup> See, e.g., *Melot v. Okla. Farm Bureau Mut. Ins. Co.*, 87 P.3d 644 (Okla. Civ. App. Div. 4 2003) (affirming certification of "overhead and profit" class).

<sup>96</sup> See, e.g., *Dehoyos v. Allstate Ins. Co.*, 345 F.3d 290 (5th Cir. 2003) (affirming denial of motion to dismiss putative class action).

<sup>97</sup> See, e.g., *Chehardy v. Wooley*, No. 05-CV-01140-FJP-CN (M.D. La. filed Sept. 30, 2005).



the nutritional content of fast-food cuisine<sup>98</sup> or the purportedly deceptive designation of cigarettes as “light” or “low tar”<sup>99</sup> to realize that the intent of many plaintiffs (or, more accurately, their attorneys) is to convert the slightest bit of controversy or doubt regarding corporate conduct into the next wave of class action litigation. The Enron and WorldCom corporate scandals have helped ensure that the scrutiny of plaintiffs’ attorneys will not be limited to the products or services created by the entity, but will also extend to corporate governance practices.<sup>100</sup>

[32] Nor are broad challenges to corporate practices and procedures limited to putative class actions. One of the best-known examples of such an approach was seen in the landmark United States Supreme Court decision of *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>101</sup> In this case, a plaintiff obtained a \$145 million punitive damages award in an insurance bad faith case, which was based in part upon evidence of the defendant insurer’s claims handling practices, many of which had no relevance to the instant case.<sup>102</sup> In vacating the punitive damages verdict, the Court held that a “defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.”<sup>103</sup> The Court did nonetheless indicate that an award of punitive damages could be based in part upon evidence of “prior transgressions” that replicate the conduct at issue, or other past conduct that has a connection to the harm purportedly suffered by the plaintiff.<sup>104</sup> Thus, while *Campbell* placed significant limits upon the ability to utilize an individual action as a quasi-referendum upon a corporation’s general practices and procedures, litigants remain free to utilize an individual claim as a springboard to a general attack upon a particular corporate policy or procedure that is alleged to have occurred in the instant case.

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<sup>98</sup> See, e.g., *Pelman ex rel. Pelman v. McDonald’s Corp.*, 396 F.3d 508 (2d Cir. 2005) (applying New York law and reversing in part dismissal of putative class action by trial court).

<sup>99</sup> See, e.g., *Price v. Philip Morris, Inc.*, No. 96326, 2005 WL 3434368 (Ill. Dec. 15, 2005) (reversing \$10.1 billion verdict entered on behalf of national class).

<sup>100</sup> See generally Dana M. Muir & Cindy M. Schiapani, *New Standards of Director Loyalty and Care in the Post-Enron Era: Are Some Shareholders More Equal than Others?*, 8 N.Y.U. J. LEGIS. & PUB. POL’Y 279 (2004–05).

<sup>101</sup> *State Farm Mut. Auto. Co. v. Campbell*, 538 U.S. 408 (2003).

<sup>102</sup> *Id.* at 415, 420.

<sup>103</sup> *Id.* at 422.

<sup>104</sup> *Id.* at 423.

[33] Where does all of this leave a potential corporate defendant? As commentators have observed, a company of any reasonable size is faced with a continuous barrage of lawsuits, all of which taken together may substantially magnify preservation obligations that appear reasonable when applied on a case-by-case basis.<sup>105</sup> These obligations become even greater given case law suggesting that parties may be required to implement a “litigation hold” on the mere suspicion of litigation.<sup>106</sup> In an era in which plaintiff’s attorneys are continually searching for the next corporate practice upon which to base a wave of litigation, sophisticated corporations may be aware of numerous policies, procedures, or other courses of conduct that could become the subject of future litigation, whether justified or not. Under the *Zubulake* approach, these corporations would arguably be required to preserve every scrap of “active” electronic data pertaining to these courses of conduct from the time of implementation.<sup>107</sup> This duty would attach regardless of whether the corporation had the good faith belief that the course of conduct in question was in full compliance with the law. At minimum, this duty would remain until the termination of the course of conduct, and possibly until the expiration of any limitations period pertaining to a cause of action. Based upon this formula, it is reasonable to foresee a “litigation hold” for some corporate defendants in perpetuity.<sup>108</sup> As such, court imposed preservation obligations could prove to be enormous.

[34] For example, a manufacturer of products arguably prone to product liability litigation may be required to preserve all “active” data pertaining to the design of the product, including countless internal E-mails, memoranda and data compilations reflecting every step of the design process.<sup>109</sup> Given the post-Enron scrutiny of corporate governance practices, any large public company could conceivably be required to preserve all “active” electronic data pertaining to the process of internal

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<sup>105</sup> See Andrew M. Scherffius, Thomas Y. Allman, Stephen G. Morrison, Laura Lewis Owens, & Anthony Tarricone, *Panel Four: Rule 37 and/or a New Rule 34.1: Safe Harbors for E-Document Preservation and Sanctions*, 73 FORDHAM L. REV. 71, 79 (2004).

<sup>106</sup> *Zubulake V*, 229 F.R.D. at 431.

<sup>107</sup> *Zubulake v. UBS Warburg*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003) [hereinafter *Zubulake I*].

<sup>108</sup> *Zubulake V*, 229 F.R.D. at 431.

<sup>109</sup> *Zubulake I*, 217 F.R.D. at 318.

decision making, on the grounds that any such entity could reasonably expect litigation in this area.<sup>110</sup>

[35] The *Zubulake* court recognized the risk that a rule requiring the preservation of all forms of electronic data “would cripple large corporations . . . that are almost always involved in litigation.”<sup>111</sup> While the *Zubulake* court’s proposed solution of limiting the duty to preserve “inaccessible” electronic data<sup>112</sup> is certainly better than nothing, it fails to address the seemingly limitless obligation to preserve “active” data. As long as *Zubulake* retains its perception in the legal community as the leading standard for the spoliation of electronic discovery,<sup>113</sup> cautious corporations may have little choice but to preserve vast amounts of electronic data for years to come.

[36] In the less than two years since the release of *Zubulake IV*, numerous courts have adopted its recognition of a litigant’s duty to impose a “litigation hold” to prevent the deletion of relevant electronic data.<sup>114</sup> However, the decisions in the months following *Zubulake* have been less than consistent in determining precisely when the preservation obligation attaches. Some courts have taken a narrower approach to this question than the *Zubulake* court took. For example, in *Treppel v. Biovail Corp.*,<sup>115</sup> the United States District Court for the Southern District of New York held that a party’s preservation obligations attached when the party became aware of the filing of a complaint, while noting that “the mere existence of a dispute between Mr. Treppel and Biovail in early 2002 did

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<sup>110</sup> *Id.*

<sup>111</sup> *Zubulake IV*, 220 F.R.D. at 217.

<sup>112</sup> *Id.*

<sup>113</sup> See Sharon D. Nelson & John W. Simek, *Spoliation of Electronic Evidence: This Way Be Dragons*, 68 TEX. B.J. 478, 478 (2005) (noting that the effects of the *Zubulake* spoliation decisions “have rippled through the legal profession”).

<sup>114</sup> See, e.g., *MOSAID*, 348 F. Supp. at 339 (holding that “[w]hen the duty to preserve is triggered, it cannot be a defense to a spoliation claim that the party inadvertently failed to place a ‘litigation hold’ or ‘off switch’ on its document retention policy to stop the destruction of [potentially relevant] evidence”); see also *Pelman*, 396 F.3d at 508; *Campbell*, 538 U.S. at 408.

<sup>115</sup> 233 F.R.D. 363 (S.D.N.Y. 2006).

not mean that the parties should reasonably have anticipated litigation at that time and taken steps to preserve evidence.”<sup>116</sup>

[37] Other courts have taken a broader approach to preservation that is similar to that of the *Zubulake* court. For example, in *Broccoli v. Echostar Communications Corp.*, the United States District Court for the District of Maryland held that a corporate defendant’s preservation obligation in a sexual harassment matter attached when the plaintiff employee began to complain of the harassment to his supervisors: nearly 11 months before the plaintiff was fired from the company and 14 months before the plaintiff filed a complaint with the EEOC.<sup>117</sup> Furthermore, citing the defendant’s “status as a large public corporation with ample financial resources and personnel management know-how,” the court concluded that the defendant “clearly acted in bad faith in its failure to suspend its email and data destruction policy or preserve essential personnel documents in order to fulfill its duty to preserve the relevant documentation for purposes of potential litigation.”<sup>118</sup>

[38] Some courts have attempted to mitigate the impact of broad electronic discovery preservation obligations by conditioning the standards for spoliation sanctions upon the time of destruction. For example, in *E\*Trade Securities LLC v. Deutsche Bank AG*, the United States District Court for the District of Minnesota held that “[t]he obligation to preserve evidence begins when a party knows or should have known that the evidence is relevant to future or current litigation.”<sup>119</sup> However, the court also stated that “[i]f destruction of relevant information occurs before any litigation has begun,” spoliation sanctions would be conditioned upon a showing of bad faith.<sup>120</sup> Although the court indicated that “[b]ad faith need not directly be shown but can be implied by the party’s behavior,”<sup>121</sup> the court did not follow some of the decisions

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<sup>116</sup> *Id.* at 371; *see also* *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 176 (S.D.N.Y. 2004) (implicitly recognizing that preservation obligation attaches upon filing of complaint).

<sup>117</sup> 229 F.R.D. 506, 510–11 (D. Md. 2005).

<sup>118</sup> *Id.* at 512.

<sup>119</sup> 230 F.R.D. 582, 588 (D. Minn. 2005) (citing *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746 (8th Cir. 2004)).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

set forth above suggesting that the mere failure to implement a “litigation hold” at the slightest threat of litigation would be indicative of bad faith. Rather, the court observed that, in order to determine whether sanctions are warranted for the loss of evidence due to the operation of a document retention system prior to litigation, courts must examine ““(1) whether the retention policy is reasonable considering the facts and circumstances surrounding those documents, (2) whether lawsuits or complaints have been filed frequently concerning the type of records at issue, and (3) whether the document retention policy was instituted in bad faith.””<sup>122</sup> However, the court cautioned that, if “the destruction of evidence occurs after litigation is imminent or has begun, no bad faith need be shown by the moving party” to justify spoliation sanctions, as ““a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy.””<sup>123</sup>

[39] At the present time, no court appears to have held that a duty to preserve documents attaches upon the reasonable belief within a corporation that a corporate practice or procedure may one day become the subject of litigation. However, for the reasons set forth above, such a holding may be the inevitable result of *Zubulake* and its progeny. Even if such a broad interpretation of a corporation’s electronic discovery preservation obligations is never accepted by a jurisdiction, the mere threat of such a decision may be enough to compel many corporations to undertake the significant burden and expense of retaining vast amounts of electronic data for indeterminate periods of time. Such a result is only encouraged by the increasing tendency of many courts (as reflected above) to impose significant sanctions for the spoliation of electronic evidence without regard to the intent of the litigants in destroying the evidence. It is understandable that a potential litigant would err on the side of extreme caution in a climate where a defense strategy may be severely hampered, if not undone, by a simple judgment call with regard to the preservation of discovery.

[40] The problems resulting from the recognition of overbroad preservation obligations in *Zubulake* and its progeny were foreshadowed in a prescient article prepared by Professor Martin Redish before most of

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<sup>122</sup> *Id.* at 588–89 (quoting *Stevenson*, 354 F.3d at 747–48).

<sup>123</sup> *Id.* at 589 (quoting *Stevenson*, 354 F.3d at 749).

the above opinions were issued.<sup>124</sup> Professor Redish observed that “[a]t some point, society must be willing to cut back on the search for truth to take account of other values the litigation matrix serves, including the utilitarian concern for efficiency, the need to preserve the procedural-substantive balance, and the need to provide predictable standards of primary behavior.”<sup>125</sup> Professor Redish noted that “[a]n absolute strict liability retention standard” for electronic discovery that is “triggered by the mere potential of suit” would “severely threaten attainment of all three goals” by requiring “commercial enterprises that face the constant threat of litigation” to “constantly review its back-up tapes for documents that could, at some later point in the litigation process, be deemed relevant,” with the threat of sanctions if these enterprises “predicted incorrectly.”<sup>126</sup> As Professor Redish commented,

[t]he only realistic alternative to such a burden would be a policy of total retention indefinitely – a practice that, given the geometric increases in document volume in the electronic age, could lead to the physical overrunning of a company with electronic equipment and severe retrieval burdens if and when the documents actually were needed in litigation.<sup>127</sup>

[41] Since Professor Redish’s article, *Zubulake* and other decisions have placed reasonable limits upon the duty to preserve back-up tapes or other forms of “inaccessible” media.<sup>128</sup> However, this provides little comfort in light of the adoption of preservation standards in *Zubulake* and other cases that approach the “strict liability” standard foreshadowed by Professor Redish. The promulgation of such broad preservation standards demonstrates the reasons for which serious consideration must be given to Professor Redish’s call to “[reconsider] spoliation standards in light of the modern technology of electronic storage.”<sup>129</sup>

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<sup>124</sup> Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561 (2001).

<sup>125</sup> *Id.* at 623.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Zubulake IV*, 220 F.R.D. at 218; *see also Thompson*, 219 F.R.D. at 100.

<sup>129</sup> Redish, *supra* note 124, at 623.

[42] As noted at the outset of this article, the Judicial Conference of the United States has responded to these concerns by recommending that the United States Supreme Court adopt amendments to the Federal Rules of Civil Procedure regarding electronic discovery, including preservation obligations.<sup>130</sup> The Court approved these amendments in April 2006, who then forwarded the amendments to the United States Congress.<sup>131</sup> Unless Congress takes the highly unlikely step of enacting legislation to modify or nullify these amendments, they will take effect on December 1, 2006.<sup>132</sup> The following section of this Article provides a summary and analysis of pertinent amendments and demonstrates the reasons for which these amendments, although well-intentioned, fail to fully address the preservation problem.

### III. THE ELECTRONIC DISCOVERY AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: A NEW REVOLUTION OR MORE OF THE SAME?

[43] The proposed amendments represent a wide-ranging effort to conform the Federal Rules of Civil Procedure to the digital age. For example, the proposed amendment to Federal Rule of Civil Procedure 26(b)(2)(B) expressly provides that absent a showing of good cause, “[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.”<sup>133</sup> Furthermore, in order to address the enhanced risk of the inadvertent inclusion of privileged material in the production of voluminous amounts of electronic discovery, a proposed amendment to Federal Rule of Civil Procedure 26(b)(5)(B) establishes a procedure for the post-production assertion of privilege.<sup>134</sup>

[44] Two of the proposed amendments specifically deal with electronic discovery preservation requirements. First, a proposed amendment to Federal Rule of Civil Procedure 26(f) expressly provides that the pre-trial discovery conference mandated by the current form of the rule should incorporate a discussion of “any issues relating to disclosure or discovery

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<sup>130</sup> See JUDICIAL CONFERENCE REPORT, *supra* note 2.

<sup>131</sup> See 28 U.S.C. §§ 2074–75 (2004) (describing process for enactment of revisions to the Federal Rules of Civil Procedure).

<sup>132</sup> See *id.*

<sup>133</sup> JUDICIAL CONFERENCE REPORT, *supra* note 2, at C-51–52.

<sup>134</sup> See *id.* at C-62.

of electronically stored information, including the form or forms in which it should be produced.”<sup>135</sup> The amendment also requires parties to “discuss any issues relating to preserving discoverable information” during the course of the conference.<sup>136</sup>

[45] If enacted, this proposed amendment will go a long way toward minimizing the potential of spoliation disputes resulting from the deletion of electronically stored material *after* a lawsuit has been filed. By requiring parties to discuss the preservation of both electronic and non-electronic materials at the outset of litigation, the amendment should help to ensure that all parties are on notice as to the precise scope of their preservation obligations. It may also encourage the parties to strike reasonable compromises with regard to these obligations, in accord with the proposed Committee Note’s statement that “[t]he parties’ discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities.”<sup>137</sup>

[46] However, this amendment does little to avoid spoliation disputes that may arise from the pre-complaint destruction of evidence. Indeed, by alerting parties to spoliation issues at the outset of litigation, the amendment could encourage some litigants to seek sanctions for the pre-complaint spoliation of electronic evidence.

[47] The second, and most significant, revision to the Federal Rules of Civil Procedure pertaining to preservation obligations will establish a new rule codified as Federal Rule of Civil Procedure 37(f). This rule will provide that “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”<sup>138</sup>

[48] At first glance, this rule would appear to resolve many of the problems set forth above. By offering protection from sanctions for the

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<sup>135</sup> *Id.* at C-39.

<sup>136</sup> *Id.* at C-38.

<sup>137</sup> *Id.* at C-34.

<sup>138</sup> *Id.* at C-86.



loss of data due to the good faith operation of a computer system, the rule suggests that sanctions should only be imposed for the willful or wanton destruction of electronic discovery. However, the Committee Note indicates that the new rule does not extend nearly as far. Rather, the Note states that “[g]ood faith in the routine operation of an information system may involve a party’s intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation.”<sup>139</sup> The Note further indicates that “[a] preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case.”<sup>140</sup> Indeed, the Note expressly states that a duty to preserve requiring the implementation of a “litigation hold” may attach “because of pending or reasonably anticipated litigation.”<sup>141</sup> The Note does not limit the potential duty to implement a “litigation hold” to “accessible” data. It indicates that “depend[ing] upon the circumstances of each case,” a party may be required to preserve inaccessible data (such as back-up tapes), particularly if “the information on such sources is likely to be discoverable and not available from reasonably accessible sources.”<sup>142</sup>

[49] While seemingly an important step in the ongoing effort to reflect the impact of electronic discovery upon a litigant’s preservation obligations, proposed Rule 37(f) will have little, if any, practical impact upon these obligations. The Committee Note makes it clear that the extent of a party’s preservation obligations with regard to electronic discovery will remain dependent upon pre-existing common law. Therefore, the proposed Rule will continue to provide courts with significant discretion in which to make after-the-fact determinations of when a party was required to place a “litigation hold” on the destruction of electronic discovery. The Committee Note also makes clear that courts will continue to have significant discretion to impose sanctions for a “wrong guess” as to the precise moment when a litigation hold should be implemented. Indeed, the proposed Rule appears to accomplish little more than

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<sup>139</sup> *Id.* at C-87.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

authorizing the general use of electronic document retention systems: a point that has never been seriously challenged by any jurisdiction.<sup>143</sup>

[50] Therefore, proposed Rule 37(f), while well-intentioned, fails to accomplish its apparent goal of ensuring that preservation obligations address the unique aspects of electronic discovery. Indeed, with regard to the preservation of “inaccessible” electronic data, proposed Rule 37(f) arguably represents a step backward. As noted above, the *Zubulake* court placed strict limitations on a litigant’s duty to preserve inaccessible data, holding that this duty extended only to the preservation of back-up tapes of “key players” containing data that was otherwise unavailable.<sup>144</sup> The *Zubulake* court therefore indicated that the destruction of “inaccessible” data in the ordinary course of business will only warrant sanctions if the data is both unavailable from other sources and highly relevant. As set forth in the Committee Note, proposed Rule 37(f) appears to broaden this standard to require the preservation of “inaccessible” data that is merely discoverable, so long as the data is unavailable from other sources. In so doing, the Rule suggests a return to the pre-*Zubulake* era, in which a number of courts recognized a broad duty to preserve back-up tapes.<sup>145</sup>

[51] By failing to provide guidance as to the precise extent of a litigant’s preservation obligations, proposed Rule 37(f) does little to re-assure litigants who now see little choice but to preserve vast quantities of information on the mere suspicion that it may become relevant in future litigation. Given the current interest in re-examining the impact of the electronic age upon traditional principles of discovery, now is the time to promulgate a rule that will provide clear and unambiguous standards with regard to the preservation obligation.

#### IV. CLARIFYING THE ELECTRONIC DISCOVERY PRESERVATION OBLIGATION

[53] Throughout the process of developing the proposed electronic discovery amendments to the Federal Rules of Civil Procedure, many commentators have offered a variety of suggestions in order to mitigate

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<sup>143</sup> See *Arthur Andersen*, 125 S.Ct. 2129, 2135 (recognizing the permissibility of document retention systems).

<sup>144</sup> *Zubulake IV*, 220 F.R.D. at 218.

<sup>145</sup> See *Linnen*, 1999 WL 462015, at \*6; *Wiginton*, 2003 WL 22439865, at \*6.

the risk of spoliation sanctions from the ordinary maintenance of document retention systems. A number of legal commentators have suggested that the Rules should contain express language providing that “parties should not be required to suspend the normal operation of reasonable document destruction without prior court orders.”<sup>146</sup> However, the Civil Rules Advisory Committee has acknowledged concerns that making specific reference to court orders in the context of an electronic discovery preservation rule “would promote applications for preservation orders as a way to defeat application of the proposed rule.”<sup>147</sup>

[54] Others have suggested conditioning electronic discovery spoliation sanctions upon intentional or reckless conduct.<sup>148</sup> In responding to this suggestion, the Advisory Committee reflected concerns that proof that “a litigant acted intentionally or recklessly in permitting the regular operation of an information system to continue might prove quite difficult and require discovery and fact-finding that could involve inquiry into difficult subjective issues,” and may also “insulate conduct that should be subject to sanctions.”<sup>149</sup>

[55] Regardless of what one may think of these concerns, it remains clear that the proposed amendments fail to provide litigants with the necessary guidance concerning the precise extent of electronic discovery preservation obligations. One potential way of providing such notice is to incorporate (either in the Committee Note or the Rule itself) fair and equitable bright-line standards for the preservation of electronic discovery. These standards should establish that a party is under no obligation to place a “litigation hold” upon electronic discovery (or discovery in general) unless, and until, the party has been placed on actual notice of a litigant’s intention to file suit, or actual notice of any legal challenge to the conduct at issue in the litigation.

[56] The Committee Note should provide examples of the type of conduct that would ordinarily be deemed to place a party on such notice. Of

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<sup>146</sup> *E.g.*, Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 68 DEF. COUNS. J. 206, 209 (2001).

<sup>147</sup> JUDICIAL CONFERENCE REPORT, *supra* note 2, at C-84.

<sup>148</sup> *See id.*

<sup>149</sup> *Id.*

course, the filing of a complaint itself is clearly sufficient notice that should invoke a “litigation hold.” Notice could also be established by a written or oral statement from the litigant, or his or her counsel, stating an intention to file suit in the near future. Furthermore, notice could be established by the commencement of an investigation by a regulatory authority with regard to the conduct at issue.

[57] It is important to recognize that the adoption of these standards would not represent a sea change with regard to the law of electronic discovery spoliation. Indeed, the vast majority of reported decisions in which sanctions have been imposed concern the destruction of electronic evidence *after* a complaint has been filed. Therefore, the adoption of bright-line standards would not significantly conflict with current case law, but would simply guard against the risk of judicial over-reaching. By eliminating this risk, the adoption of these standards would provide litigants with the genuine assurance that the good faith operation of routine data retention systems will not lead to unexpected sanctions.

[58] The adoption of these standards would admittedly create a small risk that litigants would engage in “file cleansing” to eliminate evidence of wrongful conduct on the suspicion of future litigation. To guard against this potential problem, any attempt to promulgate bright-line standards for the preservation of electronic discovery should also indicate that regardless of these standards, any intentional destruction of electronic data for the purpose of concealing evidence in future litigation may warrant spoliation sanctions. The Committee Note could explain that such a standard may be satisfied by the creation of a document storage system that is calculated to minimize the discovery of potentially harmful electronic discovery. For example, a litigant may be sanctioned for the implementation of a document storage system that automatically deletes files containing certain words and phrases,<sup>150</sup> or the implementation of a data storage system that erases electronic data after an unreasonably short period of time.

[59] Although any investigation of the intentional nature of file deletion may necessarily require discovery and fact-finding, this should not be a

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<sup>150</sup> See Daniel B. Garrie et al., Comment, *Hiding the Inaccessible Truth: Amending the Federal Rules to Accommodate Electronic Discovery*, 25 REV. LITIG. 115, 128 (2006).

major concern given the rare nature of such conduct. Indeed, those legal commentators who have raised concerns regarding the need for discovery in determining the intentional nature of a litigant's conduct overlook the fact that in most matters concerning spoliation of electronic discovery, extensive discovery will be necessary to determine the extent of a litigant's compliance with a "litigation hold."

[60] Finally, any amendment to Federal Rule of Civil Procedure 37 should place strict limitations on preservation obligations for "inaccessible" electronic data. This could be accomplished by revising the Committee Note to proposed Rule 37(f) to provide that even if discoverable material contained on "inaccessible" media is not available on "active" electronic media, litigants are under no duty to place a litigation hold on such media unless it contains information directly relevant to the claims or defenses at issue.

[61] The adoption of these standards would strike a necessary balance between the need to preserve relevant electronic evidence and the burden and expense of complying with seemingly endless preservation obligations. In so doing, these revisions to proposed Rule 37(f) would help ensure that the Rule more fully serves its intended purpose of providing a "safe harbor" for the routine operation of electronic information systems.

## V. CONCLUSION

[62] Although the electronic discovery amendments to the Federal Rules of Civil Procedure are almost certain to be enacted as written, the Judicial Conference has never been hesitant to modify rules that have been proven unworkable.<sup>151</sup> The years following the implementation of the amendments will determine the ultimate outcome of these provisions. If courts apply the amended version of Federal Rule of Civil Procedure 37 in a fair and equitable manner to create a true "safe harbor" for the routine operation of electronic data retention systems, no further revisions may be necessary. However, if courts interpret preservation obligations so broadly as to overwhelm the purpose of the Rule, the Judicial Conference

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<sup>151</sup> See FED. R. CIV. P. 11 (Committee Note to 1993 amendment) (discussing the need to revise the amendment to address perceived inadequacies).

is likely to act swiftly to correct these problems. By doing so, the Conference will ensure that the amended rule forwards the central goal of adopting longstanding principles of discovery to the electronic age.