



2008

Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions

Paul W. Grimm

Judge, United States District Court for the District of Maryland

Michael D. Berman

Rifkin, Weiner, Livingston, Levitan & Silver, LLC

Conor R. Crowley

UBS Investment Bank

Leslie Wharton

U.S. Securities & Exchange Commission

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ublr>



Part of the [Law Commons](#)

Recommended Citation

Grimm, Paul W.; Berman, Michael D.; Crowley, Conor R.; and Wharton, Leslie (2008) "Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions," *University of Baltimore Law Review*: Vol. 37: Iss. 3, Article 5.

Available at: <http://scholarworks.law.ubalt.edu/ublr/vol37/iss3/5>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

PROPORTIONALITY IN THE POST-HOC ANALYSIS OF PRE-LITIGATION PRESERVATION DECISIONS

The Honorable Paul W. Grimm†

Michael D. Berman††

Conor R. Crowley†††

Leslie Wharton††††

† The Honorable Paul W. Grimm is the Chief United States Magistrate Judge for the United States District Court for the District of Maryland. He was appointed to the court in February 1997. Judge Grimm received an A.B. degree, *summa cum laude*, from the University of California, Davis, and graduated *magna cum laude* from the University of New Mexico School of Law. Judge Grimm retired as a Lieutenant Colonel in the U.S. Army Reserve. He has written numerous books and articles on evidence, procedure, and trial practice, and is an adjunct faculty member at the University of Baltimore and University of Maryland Schools of Law. Judge Grimm has published a number of opinions on electronically stored information.

†† Michael D. Berman is Counsel to Rifkin, Livingston, Levitan & Silver, LLC. He received a B.A., from the University of Wisconsin, an M.A. from the University of Maryland at College Park, and graduated from the University of Maryland School of Law. Mr. Berman previously served as the Deputy Chief of Litigation at the Maryland Attorney General's Office and also practiced civil litigation as a partner in two Baltimore law firms. Mr. Berman clerked for The Honorable R. Dorsey Watkins, United States District Judge, served as a Captain in the United States Army, was Chair of the MSBA Litigation Section Council, and was Co-Chair of the Federal Court Liaison Committee of the State and Federal bar associations. He is an Adjunct Professor at the University of Baltimore School of Law.

††† Conor R. Crowley, a former litigator, is a Managing Director and Associate General Counsel for DOAR Consulting in New York. He is a member of the Steering Committee for The Sedona Conference Working Group on Best Practices for Electronic Document Retention and Production and a Senior Editor of The Sedona Principles (Second Edition): Best Practices Recommendations & Principles for Addressing Electronic Document Production, and The Sedona Conference Commentary on Legal Holds. Mr. Crowley is also a member of the Advisory Board of Georgetown University Law Center's Advanced e-Discovery Institute.

†††† Leslie Wharton is Senior Counsel to the law firm Arnold & Porter LLP practicing in its Washington, D.C. office. In addition to her substantive focus on complex commercial, securities, regulatory, and product liability litigation, she brings to her clients skill and experience in the strategic management and defense of the heart of a client's case—its documents and electronic information. To her expertise in the area of e-discovery, she adds considerable experience in protecting and defending privilege and work-product claims honed through more than five years of litigating privilege, waiver, crime-fraud, and other challenges in federal and state courts around the country.

TABLE OF CONTENTS*

I.	Introduction.....	382
	A. Source of the Duty to Preserve.....	384
	B. Scope of the Duty to Preserve.....	385
	C. When Courts Evaluate Pre-Litigation Conduct Using Their Inherent Powers, the Federal Rules of Civil Procedure Do Not Directly Apply to That Conduct.....	386
	D. Practical Ramifications of the Preservation Dilemma	386
	E. Proposed Solution	387
II.	Source of the Duty to Preserve and Its Choice- of-Law Implications.....	388
III.	Scope of the Duty to Preserve.....	392
IV.	The Federal Rules of Civil Procedure Do Not Apply Before an Action Is Commenced by the Filing of a Complaint; However, the Duty to Preserve May Arise Before a Complaint Is Filed.....	397
V.	Courts May Evaluate Preservation Actions Occurring Before Litigation Is Commenced by Using Their Inherent Powers, Not the Federal Rules, and, in So Doing, They Should Recognize Limitations on the Scope of the Duty to Preserve by Analogy to Federal Rules of Civil Procedure 26(b)(2)(C) and 37(e).....	399
	A. When Courts Evaluate Pre-Litigation Preservation Decisions, They Do So Under Their Inherent Power.....	399
	B. Courts Should Use Analogous Provisions of the Federal Rules of Civil Procedure to Guide the Exercise of Their Inherent Powers to Evaluate Pre- Litigation Preservation Decisions	402
VI.	Conclusion	411

I. INTRODUCTION

“Clearly, one person’s trash is another’s treasure.”¹ Although “e-discovery” may be viewed by many as a new,² and vexing problem, it

* The opinions expressed herein are solely those of the authors and not necessarily of the organizations mentioned.

1. Maria Perez Crist, *Preserving the Duty to Preserve: The Increasing Vulnerability of Electronic Information*, 58 S.C. L. REV. 7, 9 (2006); accord *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 258 (2007).

2. Problems associated with the preservation of electronic materials are not new. Professor Marcus has noted: “Preservation of discoverable material has always been a serious concern. Since Rose Mary Woods became famous [in 1973] due to her reported role in creating an 18 minute gap on a Watergate tape, the risks that

may also be the forward edge of a digital litigation revolution that will result in a more efficient process.³ The Federal Rules of Civil Procedure (Federal Rules or Rules) and common-law principles, combined with electronic information, present creative litigators with tools and opportunities to solve litigation problems presented by the technological revolution, and establish a framework for the just, speedy, and inexpensive resolution of disputes.⁴ Nevertheless, adapting to change is not problem-free. It requires new approaches to dynamic issues: "It was neither a comet nor a dramatic climactic change that killed off the dinosaurs. They perished because they could not adapt to the digital age."⁵

The Rules Enabling Act⁶ imposes limitations on the scope of the Federal Rules, creating a gap between the protections the Rules provide to litigants, and the protections afforded certain litigation-related actions that often must take place before litigation is instituted. Because the duty to preserve electronically stored information (ESI) may arise before a lawsuit is filed, decisions regarding the scope of that preservation duty may have to be made in the absence of a clear standard providing practicable guidance regarding what a court subsequently would require to be preserved, simply because the Federal Rules of Civil Procedure, which regulate the discovery process, are applicable only to pending lawsuits.⁷

technologically stored information might be lost have been clear." Richard L. Marcus, *E-Discovery & Beyond: Toward Brave New World or 1984?*, 25 REV. LITIG. 633 (2006), reprinted in 236 F.R.D. 598, 614 (2006). In fact:

[T]he process of adapting to discovery of electronically stored information has gone on for a generation. More than thirty-five years ago, Rule 34 was amended in expectation that discovery of this material would become important. More than twenty-five years ago, major decisions on how to handle discovery of this material began to occur.

Id. at 618.

3. Marcus, *supra* note 2, at 603. Another writer has noted that: "E-discovery presents marvelous opportunities to minimize the cost and disruption of traditional forms of discovery." Steven C. Bennett, *Electronic Materials and Other Discovery Considerations*, in INSURANCE COVERAGE 2006: CLAIM TRENDS AND LITIGATION 111, 117-18 (PLI Litig. & Admin. Practice, Course Handbook Series No. 8412, 2006), WL 742 PLI/Lit 111.
4. See FED. R. CIV. P. 1.
5. Martin A. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 563 (2001) (quoting Jerold S. Solovy & Robert L. Byman, *Digital Discovery*, NAT'L L.J., Dec. 27, 1999, at A16).
6. 28 U.S.C. § 2072 (2000).
7. See, e.g., FED. R. CIV. P. 26(d), (f); see *infra* Part IV.

While Federal Rule of Civil Procedure 1 calls for the interpretation of the rules of procedure to achieve the just, speedy, and inexpensive resolution of disputes,⁸ the inapplicability of the Rules to pretrial activity of the party that bears the obligation to preserve suggests that prudent counsel and cautious litigants may feel compelled to expend enormous sums to preserve ESI that need not be preserved, will never be produced in discovery,⁹ and that may greatly exceed the economic value of the claims presented.

This article suggests a mechanism for narrowing the gap between protections the Federal Rules provide to litigants, and the current state of uncertainty regarding the scope of the pretrial duty to preserve ESI that currently plagues potential litigants before litigation is instituted.¹⁰ It proposes that both procedural and conflict-of-law issues are best resolved by applying by analogy the protections of Federal Rules of Civil Procedure 26(b)(2)(C) and 37(e) (or comparable state-law provisions) to guide preservation efforts before a lawsuit is commenced.¹¹

A. *Source of the Duty to Preserve*

The duty to preserve relevant information may arise from the common-law duty to avoid spoliation of discoverable information, or by statute, regulation, agreement, or court order.¹² In instances that are not pertinent here, it may also arise from criminal law.¹³

8. “[The Rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” FED R. CIV. P. 1.

9. This article does not address the duty to produce ESI.

[I]t does not follow from a duty to preserve that the preserved information is automatically subject to production without regard to issues of burden and relevance. All that preservation does is to ensure that a judge will be able to make that determination at a time when it can be put into effect if the justification for production seems sufficient.

Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-discovery*, 73 FORDHAM L. REV. 1, 14 (2004).

10. *See id.* at 17.

11. *See infra* Part V.

12. *See infra* Part II.

13. *See, e.g.*, N.Y. PENAL LAW § 215.40 (McKinney 1998). The statute provides:

A person is guilty of tampering with physical evidence when:

1. With intent that it be used or introduced in an official proceeding or a prospective official proceeding, he (a) knowingly makes, devises or prepares false physical evidence, or (b) produces or offers such evidence at such a proceeding knowing it to be false; or

B. Scope of the Duty to Preserve

“Perhaps the most vexing issues in electronic discovery, and the issues that grab the most headlines, are the issue of data preservation and its flip side, spoliation.”¹⁴ This article suggests that the pre-litigation common-law duty to preserve, especially in the context of ESI, should be guided by the same factors that limit the scope of discovery and sanctions that may be imposed by the court in litigation.¹⁵ Specifically, although the duty to preserve often arises before litigation is commenced, the cost-benefit factors in Federal Rule of Civil Procedure 26(b)(2)(C) do not directly apply before a complaint is filed.¹⁶ Because the scope of the duty to preserve is defined by the scope of discovery, and because the duty to preserve is neither absolute,¹⁷ nor intended to cripple organizations,¹⁸ the Rules-based limitations on the scope of discovery should provide analogous limits on the scope of the pre-litigation duty to preserve.

2. Believing that certain physical evidence is about to be produced or used in an official proceeding or a prospective official proceeding, and intending to prevent such production or use, he suppresses it by any act of concealment, alteration or destruction, or by employing force, intimidation or deception against any person.

Tampering with physical evidence is a class E felony.

Id.

14. Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, 188 (2006).
15. *See infra* Part V.
16. *See, e.g.*, Withers, *supra* note 14, at 177–78; *see infra* Part IV.
17. Daniel Renwick Hodgman, Comment, *A Port in the Storm?: The Problematic and Shallow Safe Harbor for Electronic Discovery*, 10 NW. U. L. REV. 259, 268 n.60 (2007); *see* *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003); *see also* THE SEDONA CONFERENCE WORKING GROUP ON ELECTRONIC DOCUMENT RETENTION & PRODUCTION, THE SEDONA CONFERENCE COMMENTARY ON LEGAL HOLDS: THE TRIGGER AND THE PROCESS 2 n.8 (draft ed. 2007), available at http://www.thosedonaconference.org/content/miscFiles/Legal_holds.pdf [hereinafter LEGAL HOLDS] (stating that “it is ‘unreasonable to expect parties to take every conceivable step to preserve potentially relevant data’” (quoting THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION ii, princ. 5 (2d ed. 2007), available at http://www.thosedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf).
18. *See Zubulake IV*, 220 F.R.D. at 217.

C. *When Courts Evaluate Pre-Litigation Conduct Using Their Inherent Powers, the Federal Rules of Civil Procedure Do Not Directly Apply to That Conduct*

The Federal Rules of Civil Procedure do not directly apply to actions that occur before a lawsuit is commenced.¹⁹ Nevertheless, courts are often presented with sanctions motions based on pre-litigation conduct.²⁰

Courts may sanction parties for failure to preserve potentially responsive information, even if that failure to preserve pre-dates the filing of the complaint.²¹ The court's inherent power is the source of the power to sanction violations of the pre-litigation duty.²² In short, if a litigant breaches a common-law preservation duty before a lawsuit is commenced, and therefore before the Federal Rules of Civil Procedure are applicable, the Federal Rules are not the source of a trial court's power to punish that litigant for acts that occurred before the court obtained jurisdiction.

D. *Practical Ramifications of the Preservation Dilemma*

Although at first blush it may seem that this issue is nothing more than an academic distinction, it has enormous practical significance for litigants. For example, assume an organization—whether governmental or private—recognizes the occurrence of an event that triggers the substantive duty to preserve ESI, but no lawsuit has been filed. Assume further that reasonable minds could differ about just what should be preserved. It may be that there is no known attorney for a potential plaintiff who could be contacted with an eye toward reaching an agreement about what should be preserved; or it may be that an attorney is known, but he or she demands more expansive and expensive preservation than the organization feels is called for. Assume further that the cost of “preserving everything,” even from sources that are not readily accessible because of undue burden or cost,²³ greatly exceeds the realistic evaluation of the economic value of the case. What should the organization do? Must it preserve everything, regardless of cost or degree of relevancy, or may it make good-faith decisions regarding what it believes is reasonable under the circumstances, even if this means that some ESI that may fit

19. See *infra* Part IV.

20. See, e.g., *Silvestri v. GMC*, 271 F.3d 583, 591 (4th Cir. 2001); *Zubulake IV*, 220 F.R.D. at 216.

21. See, e.g., *Zubulake IV*, 220 F.R.D. at 216.

22. *Id.*

23. FED. R. CIV. P. 26.

within the low threshold of potentially relevant information may be lost or destroyed? Further, assuming the organization does make a decision to preserve less than all potentially relevant ESI, because the cost of preserving all ESI would be unreasonable given the potential value of the claim that foreseeably could be brought, or because its relevance is marginal or it is viewed as duplicative, what would be the consequences to it if litigation is brought, and the court ultimately determines that the organization failed to preserve unique ESI that was relevant, indeed essential, to the plaintiff's case? May the organization be sanctioned for its pre-litigation failure to preserve and, if so, what sanctions could the court impose?

E. Proposed Solution

In light of the significant sanctions that courts may impose because of a pre-litigation failure to preserve ESI,²⁴ the contours of limitations on the pre-litigation duty to preserve need to be clear and capable of being articulated by counsel to clients, so that informed judgments may be made and presented to the reviewing courts with detailed support and analysis, guided by a body of developing case law. Furthermore, those limitations should parallel the Federal Rules that will apply after litigation is commenced.

It is suggested that application by analogy of the protections afforded in Rules 26(b)(2)(C) and 37(e) is the mechanism to provide those contours. In the ESI context, the cost-benefit protections of Rule 26(b)(2)(C) and Rule 37(e)'s "safe harbor"²⁵ should apply by analogy to define pre-litigation preservation conduct that is not directly governed by those Rules.²⁶ It would, for example, be anomalous to conclude that a good-faith failure to preserve information after a lawsuit is commenced should be afforded greater protection than an identical failure before suit is filed simply because

24. See *infra* Part V.

25. In brief summary, Rule 37(e) provides that a litigant may not be sanctioned under the Rules when ESI is lost due to the good faith, routine operation of an information technology system. FED. R. CIV. P. 37(e); see also *infra* Part IV. An amendment, effective Dec. 1, 2007, restyled the Federal Rules of Civil Procedure and relocated Rule 37(f) to 37(e), and Rule 37(g) to 37(f). See FED. R. CIV. P. 37 advisory committee's note to 2007 amendments. Thus, any reference in the main text of this article to the advisory committee's note to Rule 37(e) refers back the advisory committee's note to Rule 37(f). See *infra* notes 37, 51.

26. See *E.E.O.C. v. Jacksonville Shipyards, Inc.*, 690 F. Supp. 995, 997 (M.D. Fla. 1988); see also Thomas Y. Allman, *Rule 37(f) Meets Its Critics: The Justification for a Limited Preservation Safe Harbor for ESI*, 5 NW. J. TECH. & INTELL. PROP. 1 (2006), <http://www.law.northwestern.edu/journals/njtip/v5/n1/1/>.

the Rule 37(e) “safe harbor” cannot apply prior to litigation. It would be equally anomalous to sanction a party because it failed to preserve information that, under Rule 26(b)(2)(C), is later determined by the court not to be discoverable.

II. SOURCE OF THE DUTY TO PRESERVE AND ITS CHOICE-OF-LAW IMPLICATIONS

Absent some countervailing factor, there is no general duty to preserve documents, things, or information, whether electronically stored or otherwise.²⁷ “The duty to preserve electronic data can arise

-
27. Clark v. City of Chi., No. 97 C 4820, 2000 WL 875422, at *12 (N.D. Ill. June 28, 2000); Commercial Bank v. Breedlove (*In re Breedlove*), No. 04-11096-R, 2007 WL 2034143 (Bankr. N.D. Okla. July 9, 2007) (“Moreover, unless a duty otherwise exists, a party has no duty to preserve evidence unless and until ‘he knows or should know [that the evidence] is relevant to imminent or ongoing litigation.’” (quoting *United States v. Krause* (*In re Krause*), 367 B.R. 740, 764 (Bankr. D. Kan. 2007) (alteration in original)); *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267, 270 (Ill. 1995) (“The general rule is that there is no duty to preserve evidence.”); see *Glotzbach v. Froman*, 854 N.E.2d 337, 340 n.1 (Ind. 2006) (applying Illinois law); PAUL R. RICE, ELECTRONIC EVIDENCE: LAW AND PRACTICE 52 (ABA 2005) (“In the absence of pending, or reasonably foreseeable, litigation, a party’s good faith discarding of evidence pursuant to a normal practice is not sanctionable.”); MICHAEL C. S. LANGE & KRISTIN M. NIMSGER, ELECTRONIC EVIDENCE AND DISCOVERY: WHAT EVERY LAWYER SHOULD KNOW 54 (ABA 2004) (stating that, if there is no statutory or regulatory duty to maintain information, the retention test is one of “reasonableness”); Roland C. Goss, *Hot Issues in Electronic Discovery: Information Retention Programs and Preservation*, 42 TORT TRIAL & INS. PRAC. L.J. 797, 819 (2007) (“Normally, there is no obligation to preserve documents that are unrelated to the litigation or the parties involved, and are routinely deleted.”).

This is not to say that all documents may be destroyed, even when litigation is not reasonably anticipated, because not every document management policy is valid. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704 (2005); *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988) (holding that document retention policy must be reasonable; a gun manufacturer “cannot blindly destroy documents” and still be protected “by a seemingly innocuous document retention policy”); *Broccoli v. Echostar Commc’ns Corp.*, 229 F.R.D. 506, 510 (D. Md. 2005) (permitting sanctions against corporate defendant whose record destruction policy was unreasonable). For a description of an improper document destruction scenario, see *In re Napster Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1073 (N.D. Cal. 2006) (“Indeed, Hummer’s representations regarding its document retention policy are muddled and inconsistent, and do not suggest an organized effort to maintain Napster-related communications as required.”).

Nevertheless, in one study, the researchers “did not discover a single case where a court sanctioned a party solely for following its document retention and recycling policy; there was always another consideration.” Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 MICH. TELECOMM. & TECH. L. REV. 71, 94 (2004), available at <http://www.mttl.org/>

from a wide variety of sources.”²⁸ It may arise from statutes,²⁹ regulations,³⁰ ethical rules,³¹ court orders,³² or the common law.³³ A duty to preserve may also arise through an agreement, a contract, or another special circumstance.³⁴ State or federal criminal law may also define a duty to preserve, within constitutional constraints.³⁵ “As noted in the September 2005 Report of the Standing Committee of the Judicial Conference recommending adoption of the 2006 Amendments, preservation obligations ‘arise from independent sources of law’ and are dependent upon ‘the substantive law of each

voleven/scheindlin.pdf; *accord* *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 747 (8th Cir. 2004).

28. Dale M. Cendali et al., *Potential Ethical Pitfalls in Electronic Discovery*, in ETHICS IN CONTEXT 2007: ETHICS AND ELECTRONIC DISCOVERY 111, 113 (PLI N.Y. Practice Skills, Course Handbook No. 10960, 2007), WL 171 PLI/NY 105.
29. *Id.* (citing 15 U.S.C. § 78u-4(b)(3)(C)(i) (2006)). Sarbanes-Oxley is another important statutory source of a duty to preserve. *Id.* at 113. No effort is made in this article to exhaustively list statutory or regulatory sources of a duty to preserve information.
30. “[T]he rules of both the National Association of Securities Dealers and the Securities and Exchange Commission require the preservation for three years of instant messages involving securities trading activities.” Goss, *supra* note 27, at 821.
31. Cendali et al., *supra* note 28, at 113 (“According to ABA Model Rule of Professional Conduct 3.4, which governs fairness to the opposing party and counsel, ‘a lawyer shall not unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.’”).
32. *Id.* at 114 (citing *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 651–52 (D. Minn. 2002) (issuing a preservation order to guard against the loss of data)).
33. *Id.* (citing *Zubulake IV*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)); LEGAL HOLDS, *supra* note 17, at 1 (“The duty to preserve typically arises from the common law duty to avoid spoliation of relevant evidence for use at trial; the inherent power of the courts; and court rules governing the imposition of sanctions.”).
34. *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267, 271 (Ill. 1995) (“[A] duty to preserve evidence may arise through an agreement, a contract, a statute or another special circumstance. Moreover, a defendant may voluntarily assume a duty by affirmative conduct.” (citations omitted)). A preservation letter is not a necessary predicate to triggering the duty. *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 219 F.R.D. 93, 100 (D. Md. 2003). Further, a preservation letter that is watered down as a settlement proposal may not trigger the duty. *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 623 (D. Colo. 2007).
35. This article is limited to the duty to preserve in connection with civil claims and actions. The prosecution’s duty to preserve evidence in criminal cases involves different principles. *See, e.g., California v. Trombetta*, 467 U.S. 479, 488–89 (1984). Similarly, a target’s duty may involve different principles. *E.g., Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

jurisdiction.”³⁶ The duty was not created by the Federal Rules of Civil Procedure or the Federal Rules of Evidence.³⁷

Regardless of its source, the existence of the duty is well-established.³⁸ In some instances, the duty to preserve is governed by state law; in others, by federal law.

36. Thomas Y. Allman, *Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments*, 13 RICH. J.L. & TECH. 9, ¶ 1 (2007), <http://law.richmond.edu/jolt/v13i3/article9.pdf> (quoting REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE Rules-Pages 32, 34 (2005), available at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf> [hereinafter JUDICIAL CONFERENCE COMMITTEE]).

37. See FED. R. CIV. P. 37(e) and accompanying advisory committee's note to the 2006 amendments. See *supra* note 25.

38. See, e.g., Crist, *supra* note 1, at 13 n.24. Professor Crist noted that:

All circuits recognize the duty to preserve information relevant to anticipated or existing litigation. See *Vazquez-Corales v. Sea-Land Serv., Inc.*, 172 F.R.D. 10, 11 (D.P.R. 1997) (citing *Baliotis v. McNeil*, 870 F. Supp. 1285, 1290 (M.D. Pa. 1994); *Allstate Ins. Co. v. Creative Env't Corp.*, 28 Fed. R. Serv. 3d (West) 1352, 1358 (D.R.I. 1994)); *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001) (citing *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)); *In re Wechsler*, 121 F. Supp. 2d 404, 415 (D. Del. 2000); *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (citing *Kronisch*, 150 F.3d at 126); *Williams v. Briggs Co.*, 62 F.3d 703, 708 (5th Cir. 1995); *Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546, 552 (6th Cir. 1994) (citing *Taylor v. Medtronics, Inc.*, 861 F.2d 980, 985 (6th Cir. 1988)); *Cooper v. United Vaccines, Inc.*, 117 F. Supp. 2d 864, 874 (E.D. Wis. 2000) (citing *Sentry Ins. v. Royal Ins. Co. of Am.*, 539 N.W.2d 911, 916 (Wis. Ct. App. 1995)); *Concord Boat Corp. v. Brunswick Corp.*, No LR-C-95-781, 1997 WL 33352759, at *4 (E.D. Ark. Aug. 29, 1997) (citing *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991)); *Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 556-57 (N.D. Cal. 1987) (quoting *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984)); *Procter & Gamble Co. v. Haugen*, 179 F.R.D. 622, 631 (D. Utah 1998), *rev'd on other grounds sub nom. Procter & Gamble Co. v. Haugen*, 222 F.3d 1262 (10th Cir. 2000) (citing *Gen. Nutrition*, 593 F. Supp. at 1455); *Fla. Evergreen Foliage v. E.I. DuPont De Nemours & Co.*, 336 F. Supp. 2d 1239, 1272 (S.D. Fla. 2004) (citing *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1308-09 (11th Cir. 2003)); *Holmes v. Amerex Rent-A-Car*, 180 F.3d 294, 296 (D.C. Cir. 1999).

Id.

Several Maryland sanction decisions implicate that duty. See, e.g., *Weaver v. ZeniMax Media, Inc.*, 174 Md. App. 16, 43, 923 A.2d 1032, 1048 (2007) (noting that

In *Zubulake v. UBS Warburg LLC (Zubulake I)*, for example, the plaintiff asserted federal and state claims;³⁹ however, the court had no need to specify the fundamental source of the duty to preserve ESI.⁴⁰ In state courts, and in federal courts exercising diversity jurisdiction, the rule appears to be that state law governs the pre-litigation duty to preserve,⁴¹ while federal rules govern the procedure of a case after it is commenced in federal court.⁴² Where a federal court exercises federal subject-matter jurisdiction, however, the duty to preserve appears to be governed entirely by federal law.⁴³ For example, where federal regulations apply, they may define the duty.⁴⁴

The impact of the conflict-of-laws issue on a pre-litigation assessment of both the source and scope of the duty to preserve illustrates the need for clear guidance to litigants attempting to

spoliation occurs when the filing of a suit is fairly imminent and evidence is intentionally destroyed).

39. *Zubulake v. UBS Warburg LLC (Zubulake I)*, 217 F.R.D. 309, 311 (S.D.N.Y. 2003).
40. *Id.* at 316–17.
41. *State Farm Fire & Cas. Co. v. Broan Mfg. Co.*, No. CV-06-889-PHX-SMM, 2007 WL 3390882, at *1 (D. Ariz. Nov. 13, 2007); *Lawrence v. Harley-Davidson Motor Co.*, No. 99 C 2609, 1999 WL 637172, at *2 (N.D. Ill. Aug. 12, 1999); *Thomas v. Bombadier-Rotax Motorenfabrik, GmbH*, 869 F. Supp. 551, 553–54 (N.D. Ill. 1994); *State Farm Fire & Cas. Co. v. Frigidaire*, 146 F.R.D. 160, 163 (N.D. Ill. 1992) (applying *Erie* doctrine); *see Allstate Ins. Co. v. Sunbeam Corp.*, 53 F.3d 804, 806 (7th Cir. 1995) (recognizing a state duty of preservation by agreement of parties); *Ward v. Tex. Steak Ltd.*, No. Civ.7:03 CV 00596, 2004 WL 1280776, at *2 (W.D. Va. May 27, 2004); JUDICIAL CONFERENCE COMMITTEE *supra* note 36, at Rules-Page 34 (recommending adoption of the 2006 amendments and stating that preservation obligations are dependent upon “the *substantive* law of each jurisdiction” (emphasis added)); *contra St. Cyr v. Flying J, Inc.*, No. 3:06-cv-13-33TEM, 2007 WL 1716365, at *3 (M.D. Fla. June 12, 2007).
42. *See, e.g., Thomas*, 669 F. Supp. at 553 (citing *Hanna v. Plumer*, 380 U.S. 460, 465 (1965)).
43. *Doctor John’s, Inc. v. City of Sioux City*, 486 F. Supp. 2d 953, 954 (N.D. Iowa 2007) (“Indeed, both state and federal law require just the opposite, retention of evidence potentially relevant to pending or reasonably anticipated litigation.”); *Floeter v. City of Orlando*, No. 6:05-cv-400-Orl-22KRS, 2007 WL 486633 (M.D. Fla. Feb. 9, 2007) (applying federal law in lawsuit asserting Title VII and state claims, but using Florida law for guidance); *see also Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2007 WL 2900537, at *1 (S.D. Cal. Sept. 28, 2007) (“Initially, the Court finds that federal common law governs the privilege issues in the instant dispute because the underlying case involves federal questions of law, specifically patent law.”), *enforced*, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), *vacated and remanded in part*, No. 05CV1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008); LEGAL HOLDS, *supra* note 17, at 1 (referring to a “federal common law of spoliation”).
44. *Estate of LeMay v. Eli Lilly & Co.*, 960 F. Supp. 183, 186 (E.D. Wis. 1997).

preserve ESI prior to litigation. Consider a hypothetical Maryland corporation with ESI physically located on servers and workstations in Maryland and Delaware. Assume that the corporation receives a notice of a lawsuit presenting state and federal claims from a Virginia plaintiff⁴⁵ regarding a series of events, meetings, or transactions that occurred in the District of Columbia, Virginia, and Maryland, and via email to locations in Colorado and Georgia, with a possible filing in federal or state court in any of three fora. The corporation's duty to preserve may arise under the laws of the various states, under federal law, or both. Unless there are clear and universal proportionality guidelines applicable to the pre-litigation duty to preserve, the potential defendant must be prepared to comply with the duty to preserve as it may be defined in at least three federal circuits, four federal districts, and four state courts. If a federal forum is selected, absent uniformity, a federal court hearing federal and supplemental state claims could reach differing results regarding a breach of the pre-litigation duty to preserve.⁴⁶ In short, because the pre-litigation duty to preserve does not spring from the Federal Rules of Civil Procedure or the Federal Rules of Evidence, it cannot be directly limited by those rules. Absent a meaningful and uniform ability to predict the scope of the duty to preserve based on the kind of cost-benefit analysis articulated in the Federal Rules, a preserving litigant may be unfairly exposed to excessive costs or, alternatively, a motion for the imposition of sanctions, even if the entity acted in good faith.

III. SCOPE OF THE DUTY TO PRESERVE⁴⁷

In *Zubulake v. UBS Warburg LLC (Zubulake IV)*,⁴⁸ the court noted: "The broad contours of the duty to preserve are relatively clear."⁴⁹ On a more detailed level, however, Judge Scheindlin, the author of

45. In *Zubulake I*, for example, Ms. Zubulake asserted both federal and state claims against UBS Warburg LLC. 217 F.R.D. 309, 311 (S.D.N.Y. 2003).

46. Spoliation, as opposed to breach of the duty to preserve, has been held to be a matter of the substantive federal law of evidence. See, e.g., *State Farm Fire & Cas. Co. v. Broan Mfg. Co.*, 2007 WL 3390882, at *1 (finding that state law governed the duty to preserve; however, federal law governed sanctions for the breach); *St. Cyr*, 2007 WL 1716365, at *3; *Nichols v. Steelcase, Inc.*, No. Civ.A. 2:04-0434, 2005 WL 1862422, at *8 (D. W.Va. Aug. 4, 2005).

47. This article does not specifically address the scope of the duty to preserve communications with experts who will be called to testify as witnesses at trial. See, e.g., *Univ. of Pittsburgh v. Townsend*, Nov. 3:04-cv-291, 2007 WL 1002317, at *4 (E.D. Tenn. Mar. 30, 2007) (finding that e-mails between counsel and expert were discoverable).

48. 220 F.R.D. 212 (S.D.N.Y. 2003).

49. *Id.* at 217.

the *Zubulake* opinions, has noted: “The obligation to preserve relevant evidence cannot be defined with precision.”⁵⁰ Just as they did not create the duty to preserve, the Federal Rules of Civil Procedure do not define the scope of the pre-litigation duty to preserve.⁵¹ The preservation of ESI presents special concerns,

-
50. SHIRA A. SCHEINDLIN, *MOORE’S FEDERAL PRACTICE E-DISCOVERY: THE NEWLY AMENDED FEDERAL RULES OF CIVIL PROCEDURE* 7 n.28 (2006); accord GEORGE L. PAUL & BRUCE A. NEARON, *THE DISCOVERY REVOLUTION: E-DISCOVERY AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE* 35 (ABA 2006) (“While it is fairly simple to articulate a party’s duty to preserve electronic evidence generally, it is substantially more complicated to outline the scope of that duty.”); LEGAL HOLDS, *supra* note 17, at 2 (“The basic principle that an organization has a duty to preserve relevant information in anticipation of litigation is easy to articulate. However, the precise application of that duty can be elusive.”).

While there is general agreement that the duty to preserve is only a “reasonable” duty, see discussion *infra* Part III, there is not unanimity in describing what the reasonable limits to the scope of the duty to preserve are. For example, in 2001, one commentator noted:

Simply turning on a personal computer might destroy some such data, so one could insist that once litigation commences, or when the prospect appears on the horizon, no personal computer of a party or potential party should be turned on. That sort of overbroad preservation idea suggests the magnitude of the new spoliation concern.

Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, 64 L. & CONTEMP. PROBS. 253, 268 (2001) (footnote omitted). One year later, a federal district court noted its concern that routine use of a personal computer might result in the loss of relevant information and ordered preservation of the computer. *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645 (2002). The court wrote:

Accordingly, we conclude that the Defendants may have relevant information, on their computer equipment, which is being lost through normal use of the computer, and which might be relevant to the Plaintiff’s claims, or the Defendants’ defenses. This information may be in the form of stored or deleted computer files, programs, or e-mails, on the Defendants’ computer equipment.

Id. at 651–52. The court then ordered that the computer be imaged. *Id.* at 653. In short, what initially appeared to be an overbroad preservation obligation was required in an actual case shortly thereafter. While the court’s holding and the commentator’s conclusions are not necessarily inconsistent, they illustrate the difficulty that preserving litigants and counsel face in predicting the scope of the duty to preserve information.

51. Hodgman, *supra* note 17, at 281. It has recently been noted that: “Given the inconsistent case law and local rules, companies must approach the issue of preserving electronic data on a case-by-case basis.” Jeffrey S. Follett, *Hold Everything? Litigation Response in the Electronic Age*, in *ELECTRONIC DISCOVERY*

including the dynamic, often ephemeral nature of some ESI.⁵² For example, Sedona Guideline No. 7 provides: “In determining the scope of information that should be preserved, the nature of the issues raised in the matter, experience in similar circumstances and the amount in controversy are factors that may be considered.”⁵³

The scope of the duty to preserve information was described in *Zubulake v. UBS Warburg LLC (Zubulake V)*,⁵⁴ where the court noted: “[A] party and her counsel must make certain that all sources of potentially relevant information^[55] are identified and placed ‘on hold,’ to the extent required in *Zubulake IV*.”⁵⁶ In *Zubulake IV*, the court held:

At the same time, 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. “While a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, *is reasonably calculated to lead to the discovery*⁵⁷ of

-
- AND RETENTION GUIDANCE FOR CORPORATE COUNSEL 2006 237, 249 (PLI Litig. & Admin. Practice, Course Handbook Series No. 9006, 2006), WL 747 PLI/Lit 237. The Advisory Committee Notes to Rule 37(f) state that the duty to preserve “depends on the circumstances of each case.” FED. R. CIV. P. 37(e) and accompanying advisory committee’s note to the 2006 amendments. *See supra* note 25.
52. *See* Conor R. Crowley, *A Shifting View of Preservation: How Ephemeral Are Current Views on Shifting the Costs of Preservation*, Digital Discovery & E-Evidence Rep. (BNA) 1, 2–4 (Jan. 1, 2008).
53. LEGAL HOLDS, *supra* note 17, at 3. The duty to preserve extends only to “unique” information. *Id.* at 12. It is, however, difficult to determine what information is “unique” prior to preserving it for examination.
54. 229 F.R.D. 422 (S.D.N.Y. 2004).
55. On occasion, the duty is described as a duty to preserve relevant “evidence.” *China Ocean Shipping Group v. Simone Metals Inc.*, No. 97 C 2694, 1999 WL 966443, at *3 (N.D. Ill. Sept. 30, 1999). The *Zubulake IV* court, however, described the duty in terms of “relevant information,” 220 F.R.D. at 218, and the Sedona Conference stated: “[I]t is important to recognize that the duty to preserve extends only to relevant information.” LEGAL HOLDS, *supra* note 17, at 11. The word “information” may lead to different conclusions than the word “evidence,” and the former is likely the more accurate term. *See* FED. R. CIV. P. 26(b)(1) (“Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”). Thus, the Sedona Conference stated, “[T]he [preserving] organization should identify what *information* should be preserved.” LEGAL HOLDS, *supra* note 17, at 12 (emphasis added).
56. *Id.* at 432.
57. The scope of *discovery* is set forth in FED. R. CIV. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and

*admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.*⁵⁸

Similarly, in *In re Napster, Inc. Copyright Litigation*,⁵⁹ the district court ruled that the duty encompassed all material that the party “knows or reasonably should know is relevant to the action.”⁶⁰ Descriptions of the scope of the common-law duty to preserve are virtually coextensive with the scope of discovery.⁶¹ For example, one

location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).” Rule 26(b)(1) sets a minimal threshold for discovery. *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 219 F.R.D. 93, 97 (D. Md. 2003).

Special circumstances may provide justification for narrowing the amount of discovery. See *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1966–67 (2007) (considering cost of discovery in antitrust action); *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 385, 388 (2004) (holding that respect for the Executive Office informs the “entire proceeding”); *Clinton v. Jones*, 520 U.S. 707 (1997); *Hoffman LaRoche, Inc. v. Sperling*, 493 U.S. 165, 179 (1989) (citing FED. R. CIV. P. 26(b)); *Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340, 351–52 (1978).

58. *Zubulake IV*, 220 F.R.D. at 217 (emphasis added) (citing *Turner v. Hudson Trans. Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991)).
59. 462 F. Supp. 2d 1060, 1067 (N.D. Cal. 2006), *rev’d*, 479 F.3d 1078 (9th Cir. 2007), *vacated*, Nos. C-MDL-00-1369(MHP), C-04-1166 (MHP), 2007 WL 844551 (N.D. Cal. Mar. 20, 2007).
60. *Id.*; accord *Thompson*, 219 F.R.D. at 100 (quoting *Zubulake IV*, 220 F.R.D. at 216 (noting that a litigation hold applies to “relevant” documents)).
61. *Hynix Semiconductor, Inc. v. Rambus, Inc.*, No. C-00-20905 RMW, 2006 WL 565893, at *27 (N.D. Cal. Jan. 5, 2006) (finding that duty does not extend beyond what is relevant and material); *Broccoli v. Echostar Commc’ns Corp.*, 229 F.R.D. 506, 510 (D. Md. 2005) (“The duty to preserve encompasses any documents or tangible items authored or made by individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses.” (citing *Zubulake IV*, 220 F.R.D. at 217–18)); *China Ocean Shipping Group v. Simone Metals Inc.*, No. 97 C 2694, 1999 WL 966443, at *3 (N.D. Ill. Sept. 30, 1999) (holding there is a duty to preserve relevant evidence); *Goss*, *supra* note 27, at 818 (“Generally, a party is bound to preserve all information that one might reasonably anticipate to be discoverable in an action.”); *Hodgman*, *supra* note 1717, at 268 (noting that if a party had notice of relevance of information, it had a duty to preserve it). See *Larson v. Bank One Corp.*, No. 00 C 2100, 2005 WL 4652509, at *10 (N.D. Ill. Aug. 18, 2005) (“Under the Federal Rules, parties to any litigation have the duty to preserve documents commensurate with the scope of discovery allowed under Fed.R.Civ.P. 26.” (footnote omitted)); *Danis v. USN Commc’ns, Inc.*, No. 98 C 7482, 2000 WL 1694325, at *32 (N.D. Ill. Oct. 23, 2000) (“The scope of the duty to

commentator asked: “What [m]ust [b]e [r]etained and [p]reserved? The simple answer is potentially relevant evidence. This includes any evidence that could be helpful in proving or disproving a claim or defense.”⁶² In short, the link between the scope of the duty to preserve and the scope of discovery is clear: “Preservation duties do not exist in the abstract, but to serve a purpose: that is, to ensure that discoverable documents are available to be produced.”⁶³

Under the Federal Rules of Civil Procedure, however, the scope of discovery cannot be definitively ascertained before suit is commenced. For example, although the December 2007 amendments limit discovery to matters related to the parties’ “claims or defenses,” the court has discretion to expand discovery to all facts related to the “subject matter involved in the action.”⁶⁴ Counsel faced with determining the scope of the pre-litigation duty to preserve cannot know which discovery standard will subsequently apply. While prudence may suggest application of the broader standard, doing so may unnecessarily increase the cost of preservation of ESI.

Even if the governing standard was fixed, the volume and complexity of discovery disputes presented to courts for resolution⁶⁵

preserve is a broad one, commensurate with the breadth of discovery permissible under Fed.R.Civ.P. 26.”); *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984) (stating that a duty includes what “is reasonably likely to be requested during discovery. . . .”); *Cendali et al.*, *supra* note 28, at 115; *Crist*, *supra* note 1, at 19 (“The scope of the duty to preserve within the context of civil litigation is framed by the relevance provisions within the Federal Rules of Evidence and the discovery provisions within the Federal Rules of Civil Procedure.”); Alan M. Anderson, *Issuing and Managing Litigation Hold-Notices*, 64 BENCH & BAR OF MINN. 20, 20 (2007), available at http://www2.mnbar.org/benchandbar/2007/aug07/litigation_held.htm (stating that an entity “is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request”).

62. RICE, *supra* note 27, at 66.

63. *Danis*, 2000 WL 1694325, at *33.

64. FED. R. CIV. P. 26(b)(1).

65. In one study analyzing the discovery process, forty percent of attorneys surveyed “reported unnecessary discovery expenses due to discovery problems.” Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 532 (1998). The complexity is demonstrated by *Smith v. Café Asia*, 246 F.R.D. 19 (D.D.C. 2007), where the court was faced with a motion to compel production of images stored on a cell phone. The court noted: “As such, the question of discoverability is inseparable from admissibility, and a determination is necessary of whether, under *Federal Rules of Evidence* 403 and 412(b)(2), the probative value of the images substantially outweighs their prejudice.” *Id.* at 20. Because the duty to preserve is coextensive

demonstrates that its application to specific factual situations remains open to debate. In order to comply with the pre-litigation duty to preserve, a litigant must predict what will be discoverable before receiving a lawsuit or discovery request.

IV. THE FEDERAL RULES OF CIVIL PROCEDURE DO NOT APPLY BEFORE AN ACTION IS COMMENCED BY THE FILING OF A COMPLAINT; HOWEVER, THE DUTY TO PRESERVE MAY ARISE BEFORE A COMPLAINT IS FILED

The duty to preserve may arise long before litigation commences, and continues throughout the course of litigation. If the duty is breached after the commencement of a lawsuit, that breach, and any applicable sanction, will be governed by the Federal Rules of Civil Procedure.⁶⁶ A more difficult issue arises when the duty to preserve is violated before a lawsuit is commenced by the filing of a complaint.⁶⁷

Federal Rule of Civil Procedure 1 provides: “These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81.”⁶⁸ It is immediately apparent that the Rules apply “in” the courts, not to matters that predate initiation of litigation.⁶⁹

The Federal Rules of Civil Procedure are promulgated under the Rules Enabling Act.⁷⁰ That statute provides that: “The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.”⁷¹ It states that the rules may not abridge, enlarge, or modify any substantive right.⁷² Again, the statute provides that

with discoverability, this decision illustrates the difficulty in determining what needs to be preserved.

66. See, e.g., FED. R. CIV. P. 3, 37(e).

67. See FED. R. CIV. P. 3 (stating that an action is commenced by the filing of a complaint).

68. FED. R. CIV. P. 1.

69. See generally 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1012 (2002) (“[T]he language of Rule 1 limits the applicability of the federal rules to the United States district courts”); PAUL W. GRIMM & MICHAEL BERMAN, MARYLAND’S DISCOVERY PROTOCOL 4 (LexisNexis 2007).

70. 28 U.S.C. § 2072 (2000).

71. *Id.* § 2072(a).

72. *Id.* § 2072(b). In the September 2005 Report of the Standing Committee of the Judicial Conference recommending adoption of the 2006 amendments, the drafters

Rules may be prescribed “for cases in” court, and not prior to the commencement of cases.⁷³ A lawsuit or action is commenced when a complaint is filed.⁷⁴

It is well-accepted that the Federal Rules do not directly govern pre-litigation conduct. For example, in connection with the sanctions rule: “Rule 37 does not, by its terms, address sanctions for destruction of evidence prior to the initiation of a lawsuit or discovery requests.”⁷⁵ This limitation was likely a jurisdictional constraint imposed on the drafters: “The Advisory Committee on Civil Rules debated whether it could specify preservation obligations in the Federal Rules of Civil Procedure but ultimately decided it could not do so.”⁷⁶ In fact, “[a] major criticism of Rule 37(f) [now, Rule 37(e)] is that it addresses only sanctions under the federal rules, which generally do not apply prior to commencement of litigation.”⁷⁷

A similar conclusion should be reached in connection with Federal Rule of Civil Procedure 26(b)(2)(C). The entire structure of that Rule is directed toward events occurring during litigation. For example, the title of Rule 26 is “General Provisions Governing Discovery; Duty of Disclosure.”⁷⁸ Rule 26(b) is captioned “Discovery Scope and Limits.”⁷⁹ Also, Rule 26(b)(2)(C) addresses the “frequency or extent of discovery otherwise allowed by these rules.”⁸⁰ The term “discovery” refers to a process that begins, at the earliest, with the

wrote that preservation obligations are dependent upon the “*substantive* law of each jurisdiction.” See JUDICIAL CONFERENCE COMMITTEE, *supra* note 36, at Rule-Page 34 (emphasis added). Courts sitting in diversity have held that the duty to preserve is “substantive,” not “procedural.” See, e.g., *Thomas v. Bombardier-Rotax*, 869 F. Supp. 551, 553 (N.D. Ill. 1994); *State Farm Fire & Cas. Co. v. Frigidaire*, 146 F.R.D. 160, 163 (N.D. Ill. 1992). If the duty to preserve is substantive, the Federal Rules of Civil Procedure may not abridge, enlarge, or modify it. See § 2072(b).

73. § 2072(a).

74. FED. R. CIV. P. 3.

75. *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 550–51 (D. Minn. 1989) (citing *EEOC v. Jacksonville Shipyards, Inc.*, 690 F. Supp. 995, 997–98 (M.D. Fla. 1988) (emphasis omitted)); *ABC Home Health Servs., Inc. v. Int’l Bus. Machs.*, 158 F.R.D. 180, 182 (S.D. Ga. 1994) (“Rule 37 of the Federal Rules of Civil Procedure authorizes a court to impose sanctions for discovery abuses. In this case, Rule 37 does not directly apply because the alleged destruction of documents took place before the action was filed and before discovery began.” (citation omitted) (emphasis omitted)); see *Hodgman*, *supra* note 17, at 261.

76. LEGAL HOLDS, *supra* note 17, at 5 n.13.

77. *Allman*, *supra* note 26, at ¶ 43. It should be noted that criticism cannot be directed at the drafters of the Rule, because the drafters were limited by the Rules Enabling Act. *Id.* ¶ 45.

78. FED. R. CIV. P. 26.

79. *Id.*

80. *Id.*

filing of a complaint.⁸¹ By its express terms, Rule 26(b)(2)(C) applies only after a lawsuit is commenced.⁸²

The duty to preserve may, and often does, arise before commencement of a case, because litigation is often “reasonably anticipated” before it occurs.⁸³ In that event, neither the cost-benefit protections of Rule 26(b)(2)(C) nor the “safe harbor” of Rule 37(e) directly apply to the person or entity that is attempting to comply with its preservation obligation, even though that obligation may be defined by the scope of discovery that will apply the moment after litigation is commenced, and even though those Rules will apply after litigation is commenced in federal courts.

The pre-litigation implications are clear. A person or entity faced with a duty to preserve prior to litigation must preserve potentially relevant information. If ESI is destroyed by the routine, good-faith operation of a computer system prior to litigation, the preserving party cannot ascertain whether or not it is protected from sanctions.

V. COURTS MAY EVALUATE PRESERVATION ACTIONS OCCURRING BEFORE LITIGATION IS COMMENCED BY USING THEIR INHERENT POWERS, NOT THE FEDERAL RULES, AND, IN SO DOING, THEY SHOULD RECOGNIZE LIMITATIONS ON THE SCOPE OF THE DUTY TO PRESERVE BY ANALOGY TO FEDERAL RULES OF CIVIL PROCEDURE 26(b)(2)(C) AND 37(e)

A. *When Courts Evaluate Pre-Litigation Preservation Decisions, They Do So Under Their Inherent Power*

If Rule 26(b)(2)(C)’s cost-benefit protections and Rule 37(e)’s “safe harbor” are to be applied to pre-litigation events, it is necessary to examine the source of a federal court’s power to exercise jurisdiction over events that occurred before the action was filed. The Supreme Court has recognized that courts have inherent power to reach some pre-litigation activity.⁸⁴ That power, although broad, is not unlimited.⁸⁵

81. See *B & C Tire Co. v. IRS*, 376 F. Supp. 708, 712, 714 (N.D. Ala. 1978) (stating general rule; yet, noting exception for discovery to perpetuate evidence); *In re Royal Bank of Can.*, 33 F.R.D. 296, 299, 302 (S.D.N.Y. 1963).

82. See FED. R. CIV. P. 26(b)(2)(C) (listing aspects of the discovery process and/or discovery request that the court shall consider in relation to the facts of a particular case to determine whether to limit the scope of discovery).

83. LEGAL HOLDS, *supra* note 17, at 5.

84. *E.g.*, *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764–67, (1980); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 631–32 (1962); *Gumbel v. Pitkin*, 124 U.S. 131, 146–47

These principles are applicable to the sanctions rule. In the general Rule 37 context, courts have squarely held that, although the Rule does not directly apply to pre-litigation conduct, it may be applied by analogy. For example, it has recently been noted that:

Several courts have held that Rule 37 sanctions are available even where evidence is destroyed before the issuance of a discovery request, with a few going so far as to apply the rule to conduct that occurred before the lawsuit was filed, provided the party was on notice of a claim. But, the majority view—and the one most easily reconciled with the terms of the rule—is that Rule 37 is narrower in scope and does not apply before the discovery regime is triggered.⁸⁶

*Capellupo v. FMC Corp.*⁸⁷ is representative of the majority view.

Rule 37, Fed.R.Civ.P., is applicable to the “normal” disputes, delays, or difficulties occurring in civil litigation. Its sanctions are appropriate in instances of a litigant’s failure to make or cooperate in discovery. Rule 37 enables a court to punish the litigant who has not responded adequately to discovery requests of an opposing party or to orders of the court compelling discovery. Rule 37 does not,

(1888); Allman, *supra* note 26, at ¶ 44 (“Courts often cite their inherent powers to sanction when it is unclear that rule-based sanction authority exists.”).

85. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43–46 (1991) (“It has long been understood that ‘[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,’ powers ‘which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.’ These powers are ‘governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’ . . . Because of their very potency, inherent powers must be exercised with restraint and discretion. A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process. . . . [T]he inherent power extends to a full range of litigation abuses. At the very least, the inherent power must continue to exist to fill in the interstices.” (citations omitted)); *cf. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 207 (1958) (noting that Rule 37 is the sole source of sanctions in discovery disputes).

86. *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 268 (2007) (footnote omitted).

87. 126 F.R.D. 545 (D. Minn. 1989).

by its terms, address sanctions for destruction of evidence prior to the initiation of a lawsuit or discovery requests.⁸⁸

Courts like *Capellupo* have, however, looked to Rule 37 to guide their exercise of their inherent powers.⁸⁹

Thus, even though Rule 37 is not directly applicable to pre-litigation conduct, when sanctions are imposed, Rule 37 may guide the court's discretion:

Prior to the selection of sanction, if any, the Court notes the source of its authority. Defendant challenges the Court's power to impose sanctions pursuant to Fed.R.Civ.P. 37. EEOC agrees that Rule 37 does not directly apply, but insists that the rule is a guide for the exercise of the Court's inherent authority to deal with discovery abuses. The Court agrees with EEOC's analysis. Conduct of the kind which ordinarily would be sanctionable under Rule 37, but falls outside the express terms of the rule, can be sanctioned by proper exercise of this Court's inherent powers. Although Rule 37 does not apply by its terms, the Court looks to that rule as a guide to determine the proper level of response to defendant's offense. This reliance on the principles of Rule 37 is particularly appropriate in the light of the conduct at issue. Defendant destroyed records for which it was on notice that it had a legal duty to preserve, and that duty is imposed, in part, to ensure that those records are available for litigation of a discrimination charge. Rule 37 deals with similar conduct when the legal duty to preserve evidence is imposed in the course of a lawsuit. The present case logically extends Rule 37 principles to the situation in which the legal duty to preserve evidence arises by force of administrative regulation prior to the commencement of a lawsuit. Two of the policies underlying Rule 37—the elimination of profit from failure to comply with the legal duty to preserve evidence and the general deterrent effect that sanctions for an offense will have on the instant case and on other litigation—particularly justify the Court's

88. *Id.* at 551 n.14 (citing *EEOC v. Jacksonville Shipyards, Inc.*, 690 F. Supp. 995, 997–98 (M.D. Fla. 1988)).

89. *See State Farm Fire & Cas. Co. v. Frigidaire*, 146 F.R.D. 160, 163 (N.D. Ill. 1997); Hodgman, *supra* note 17, at 266; *cf. Weaver v. ZeniMax Media, Inc.*, 175 Md. App. 16, 28–31, 923 A.2d 1032, 1039–41, 1047 (2007) (prior to litigation, employee improperly obtained email from employer; trial court “has inherent authority to sanction conduct that occurred prior to the commencement of the litigation” (citing *Klupt v. Krongard*, 126 Md. App. 179, 728 A.2d 727 (1999))).

decision to extend Rule 37 principles to the present case. Encouraging compliance with the administratively imposed duty to preserve evidence in pending discrimination complaints shares these common goals with Rule 37 and therefore the Court should exercise its inherent powers to reach the case in which evidence is destroyed prior to trial in violation of 29 C.F.R. § 1602.14.⁹⁰

In short, courts have used their inherent powers to reach pre-litigation conduct and have informed their use of those powers by looking to the Federal Rules of Civil Procedure for guidance. There is no reason why courts could not do the same with the cost-benefit provisions of Rule 26(b)(2)(C) and the “safe harbor” of Rule 37(e).

B. Courts Should Use Analogous Provisions of the Federal Rules of Civil Procedure to Guide the Exercise of Their Inherent Powers to Evaluate Pre-Litigation Preservation Decisions

At present, there is no assurance⁹¹ that the pre-litigation common-law preservation standard is the same as the parallel discovery standard containing the added cost-benefit protections of Rule 26(b)(2)(C) and the “safe harbor” of Rule 37(e). If the common-law preservation standard were to differ from the litigation standard of Rule 37(e), anomalous results might occur. The absence of clear proportionality guidelines may permit coercive demands and settlements. This risk applies to both plaintiffs and defendants.⁹²

90. *Jacksonville Shipyards*, 690 F. Supp. at 997–98 (citations omitted). In short, the result should be identical regardless of whether conduct occurred before or during litigation. See *Danis v. USN Commc’ns, Inc.*, No. 98 C 7482, 2000 WL 1694325, at *30 (N.D. Ill. Oct. 23, 2000) (“Whether proceeding under Rule 37 of the Federal Rules of Civil Procedure or under a court’s inherent powers, the ‘analysis is essentially the same.’” (quoting *Cobell v. Babbit*, 37 F. Supp. 2d 6, 18 (D.D.C. 1999)) (citing *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 167 F.R.D. 90, 107 (D. Colo. 1996))); accord *Larson v. Bank One Corp.*, No. 00 C 2100, 2005 WL 4652509, at *8 (N.D. Ill. Aug. 18, 2005) (“[U]nder either Rule 37 or under the Court’s inherent authority, the analysis for imposing sanctions is essentially the same.”).

91. As recently as the fall of 2006, a leading commentator noted only that it was “unlikely” that courts would “invoke their inherent power in order to reach a different result on the same facts as would exist under Rule [37(e)].” Allman, *supra* note 26, at ¶ 45. Mr. Allman correctly suggests that, “the natural tendency of most courts will be to use Rule [37(e)] as a ‘guidepost’ or reference point in exercising their inherent powers.” *Id.* In view of the serious sanctions that may be imposed for breaching the duty to preserve, potential litigants need greater certainty.

92. The duty to preserve applies to plaintiffs. See, e.g., *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 592 (4th Cir. 2001); see also, LEGAL HOLDS, *supra* note 17, at 1 (“This duty [to preserve] arises . . . whether the organization is the initiator or the target of litigation.”).

Given the multiple uncertainties surrounding the duty to preserve, a potential civil litigant must guess⁹³ at the scope of the pre-litigation duty to preserve: “Not until after a court rules on the need to search and produce from the source, can or will, a party know if its initial preservation decisions were correct.”⁹⁴ It has recently been noted that “[a] producing party can face a Hobson’s choice between the burden and cost of preservation and the risk of sanctions for failing to do so.”⁹⁵ The party will not know if it made the correct choice until months later, when a court decides the issue.

That situation, however, is not consistent with the philosophy behind the Federal Rules of Civil Procedure.⁹⁶ In 1938, amendments to those Rules introduced the concepts of interrogatories and document requests to federal civil litigation.⁹⁷ From this modest start, the scope of discovery expanded to encompass the virtually open-ended discovery of all facts related to the “subject matter” of the litigation. In the 1990s, studies demonstrated that the costs attendant with such a standard had become prohibitive,⁹⁸ and the

-
93. “The ultimate protection for a party whose ‘guess’ turns out to be wrong is that the decisions were reasonable, made in good faith, and not intended to obstruct or prevent the discovery of relevant information.” See Allman, *supra* note 36, at ¶ 26 n.80.
94. *Id.* ¶ 25.
95. THE SEDONA CONFERENCE DRAFT WORKING GROUP I COMMENTARY ON PRESERVING AND MANAGING INFORMATION THAT IS NOT REASONABLY ACCESSIBLE 3 n.7 (drft. ed. 2008) (Draft cited with the permission of The Sedona Conference®. Working Group Commentaries are not publicly available until adopted by consensus and published on The Sedona Conference® web site, <http://thesedonaconference.org>; until then, the text is subject to change. Publication of this commentary is anticipated in the summer of 2008.) (unpublished commentary, on file with author) [hereinafter PRESERVING AND MANAGING INFORMATION].
96. FED. R. CIV. P. 1 provides: “[These rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”
97. For a discussion of the history of changes to the Federal Rules of Civil Procedure, see generally Joseph Gallagher, *E-Ethics: The Ethical Dimension of the Electronic Discovery Amendments to the Federal Rules of Civil Procedure*, 20 GEO. J. LEGAL ETHICS 613, 613; Hodgman, *supra* note 17, at 263–65; Marcus, *supra* note 50, at 255–57, 280 (noting that discovery rules have been amended more than other rules); Marcus, *supra* note 9, at 1–6; Redish, *supra* note 5, at 563.
98. See FED. R. CIV. P. 26(b)(1) advisory committee’s note to the 2000 amendments; see, e.g., ACF Indus., Inc. v. EEOC, 439 U.S. 1081, 1086 (1979) (“The extent of this [discovery] abuse has been of increasing concern. It was the subject of close attention at the Pound Conference held in St. Paul, Minn., in April 1976, and it was scrutinized further by the Pound Conference Follow-Up Task Force. The Task Force, chaired by then Judge Griffin B. Bell, recommended that the appropriate organizations of the bench and bar should ‘accord a high priority to the problem of

2000 amendments to the Federal Rules scaled back the scope to discovery pertaining to the claims and defenses in the action,⁹⁹ with judges being directed to take an active role in supervising the discovery process.¹⁰⁰ One purpose of the 2000 amendments was to emphasize the need for active judicial intervention to ensure the proportionality of discovery through Rule 26(b)(2).¹⁰¹

Then, in December 2006, new Federal Rules regarding ESI went into effect.¹⁰² There is no indication that the 2006 amendments were designed to undercut the philosophy behind the 2000 amendments. If the duty to preserve is coextensive with the party's discovery obligations, then it is logical to assert that the prudential limitations on discovery should be engrafted by analogy on the pre-litigation duty to preserve.

There is ample authority¹⁰³ that supports a proportionality¹⁰⁴ analysis in the context of the duty to preserve, but none has been found applying the cost-benefit limitations of Federal Rule of Civil Procedure 26(b)(2)(C)¹⁰⁵ or the "safe harbor" of Rule 37(e)¹⁰⁶ by

abuses in the use of pretrial procedures . . . with a view to appropriate action by state and federal courts." (footnotes omitted).

99. The Rules confer discretion to permit "subject matter" discovery. *See* FED. R. CIV. P. 26(b)(1) ("For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.").
100. *See* FED. R. CIV. P. 26 advisory committee's note (b)(1) to the 2000 amendments.
101. *See id.*
102. The Federal Advisory Committee began its work on electronically stored information in 1996. Marcus, *supra* note 9, at 6; *see* Marcus, *supra* note 2, at 604.
103. *See, e.g.,* Allman, *supra* note 36, at ¶ 26 ("However, just as the duty to produce is tempered by the principle of proportionality, so should courts take the same approach in regard to preservation decisions."); *see* Wiginton v. Ellis, No. 02 C 6832, 2003 WL 22439865 (N.D. Ill. Oct. 27, 2003); PAUL & NEARON, *supra* note 50, at 36 (describing the standard as one of "reasonableness"); LEGAL HOLDS, *supra* note 17, at 2 ("The keys to addressing these issues are reasonableness and good faith."); Goss, *supra* note 27, at 822; *see also* THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICE RECOMMENDATIONS FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, 3 (2003), available at <http://www.thesedonaconference.org/dltForm?did=SedonaPrinciples200303.pdf> ("However, this principle—that storing information in an electronic format does not exclude it from the realm of potential discovery—does not provide specific guidance on where courts and litigants should draw the lines in applying the proportionality test of Rule 26 to electronic discovery requests and disputes.").
104. The principle of proportionality is that the burdens imposed by the duty to preserve should be proportionate to what is at stake in the litigation. Proportionality is often stated in terms of the duty to preserve being one requiring only "reasonable" efforts. *See* Wiginton, 2003 WL 22439865, at *4. *See generally* Thompson v. U.S. Dep't of Hous. & Urban Dev., 219 F.R.D. 93, 97–99 (D. Md. 2003).
105. FED. R. CIV. P. 26(b)(2)(C) provides:

analogy.¹⁰⁷ The current thought process appears to be that potentially discoverable information must be preserved, although there is an implicit notion that the scope of preservation should somehow be proportional to the amount in controversy and the costs and burdens of preservation. This article suggests that the best mechanism for balancing discoverability and proportionality is the application, by analogy, of Federal Rules of Civil Procedure 26(b)(2)(C) and 37(e) to the pre-litigation duty to preserve.

The need for guidance is clear. For example, compare the principles regarding the duty to preserve backup tapes. It has recently been noted that “the parameters of [the duty to preserve’s] application to backup tapes have not yet been fully defined.”¹⁰⁸

On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Many states have rules similar to Federal Rule of Civil Procedure 26(b)(2)(C). See generally Thomas Y. Allman & Ashish S. Prasad, *The Forgotten Cousin: State Rulemaking and Electronic Discovery*, in ELECTRONIC DISCOVERY AND RETENTION GUIDANCE FOR CORPORATE COUNSEL 2007 317, 328, 335–38 app. (PLI Litig. & Admin. Practice, Course Handbook Series No. 11596, 2007) WL 766 PLI/Lit 317 (discussing state rules governing ESI). In Maryland, for example, Rule 2-402(b) is analogous. See MD. R. 2-402(b). Thus, even where the duty to preserve is governed by state law, the principles set out in this article may be applicable.

106. Rule 37(f) was moved to Rule 37(e) in December 2007, without substantive change. The Rule 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.” FED. R. CIV. P. 37(e).
107. In one decision, Rule [37(e)] was relied upon to excuse a failure to preserve. Allman, *supra* note 26, at ¶ 46 & n.110 (citing *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 177 (S.D.N.Y. 2004)). In an as-yet unpublished, April 22, 2008, draft Commentary, the Sedona Conference suggests applying Rule 26(b)(2)(C) factors to the pre-litigation duty to preserve. PRESERVING AND MANAGING INFORMATION, *supra* note 95, at 15–16.
108. Grant J. Esposito & Thomas M. Mueller, *Backup Tapes, You Can't Live with Them and You Can't Toss Them: Strategies for Dealing with the Litigation Burdens Associated with Backup Tapes Under the Amended Federal Rules of Civil Procedure*,

There is “generally” no duty to preserve such tapes;¹⁰⁹ however, if the backup tapes pertinent to key players can be identified, there may be a duty to preserve them.¹¹⁰ This creates a dilemma for a preserving party.¹¹¹

Consider also the preserving party’s choice-of-law dilemma. Faced with reasonably anticipated litigation and a duty to preserve, the preserving party’s decisions may be governed by the source of the duty. If the duty arises under statute, regulation, court order, or contract, the source document may define the duty. If the duty arises under common-law, the duty may be a state duty for state courts and diversity cases, or a federal one for federal-question cases. Where federal and supplemental state claims are joined in a single action,¹¹² there could be differing duties. And the consequence of a breach—

13 RICH. J.L. & TECH. 13, ¶ 10 (2007), <http://law.richmond.edu/jolt/v13i3/article13.pdf>; see also Withers, *supra* note 14, at 189. “In short, requesting parties consider backup tapes to be a wealth of information. Producing parties consider them to be the equivalent of a vast waste dump. Thus, not surprisingly, the courts have offered inconsistent guidance as to how they will be treated.” Bennett, *supra* note 3, at 133; see generally Kenneth J. Withers, *Computer-Based Discovery in Federal Civil Litigation*, 1 FED. CTS. L. REV. 65, 74–75 (2006) (noting unique problems presented by backup tapes).

109. *Zubulake IV*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

110. See *id.* at 217–18; see also *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, No. 04-cv-00329-WYD-CBS, 2007 WL 684001, at *623 n.10 (D. Colo. Mar. 2, 2007); Hodgman, *supra* note 17, at 271 (“Backup tapes probably fall under the litigation hold if they are accessible, not obsolete due to technological advances, and currently used to retrieve information.”); Withers, *Computer-Based Discovery*, *supra* note 108, at 71 (“In *Linnen v. A.H. Robins Co.*, the defendant faced sanctions in the form of costs and a spoliation inference stemming from counsel’s failure to completely investigate stored computer backup tapes, while representing to the court that all relevant computer files had been produced.” (footnote omitted)).

111. See Follett, *supra* note 51, at 248–50 (“One can question whether the *Zubulake IV* ‘exceptions’ swallow the rule. For example, backup tapes are always ‘accessible’ to some degree, and companies may use backup tapes (at least recent ones) for non-emergency document retrieval on occasion. Moreover, it is almost always possible for a company to ‘identify where particular employee documents are stored on backup tapes,’ provided it spends enough time and money to restore and search the tapes. . . . Recycling of backup tapes poses a trickier issue, [and it] is highly fact-specific . . .”).

It is important to note that the issue of inaccessible media is currently being addressed by the Sedona Conference. The Sedona Conference suggests that “[r]egardless of the accessibility of the source of potentially discoverable information, if the burdens and costs of preservation are disproportionate to the potential value of the information sought, it is reasonable to decline to preserve the source.” PRESERVING AND MANAGING INFORMATION, *supra* note 95, at 15.

112. See 28 U.S.C. § 1367 (2006); *Zubulake IV*, 220 F.R.D. at 216 (discussing generally the duty to preserve).

whether spoliation is a tort or an evidentiary doctrine—may differ depending on the forum. Absent clear guidance regarding limits on the scope of the duty to preserve, a party engaged in a good-faith effort to preserve evidence prior to litigation may prove the military maxim that any ship can be a minesweeper—once.¹¹³

Cases imposing substantial sanctions, including criminal prosecution, adverse inference instructions, restrictions on testimony, and monetary penalties, as well as the attendant ethical implications, demonstrate that a misstep in determining the scope of the duty may have serious consequences.¹¹⁴ The serious consequences may compel a risk-adverse potential litigant to exercise extraordinary care in preserving “everything” at enormous cost and effort, although such extraordinary effort is not required by law.¹¹⁵ Because the duty to preserve often arises before a lawsuit is filed, the duty may arise during a “free for all” period where there is no judicial umpire,¹¹⁶ no opposing counsel available or willing to negotiate the scope, no clear limitation based on practical realities of the business world, and no way to determine the applicable source of law, i.e., statutory, regulatory, federal, or state, and, if state, which one. While Federal Rule of Civil Procedure 1 calls for the just, speedy, and inexpensive resolution of disputes, this lack of guidance suggests that prudent counsel and cautious litigants may expend enormous sums to preserve ESI that need not be preserved, will never be produced in discovery,¹¹⁷ and that may exceed the economic value of the claims presented, in contravention of the fundamental principle underlying the Federal Rules.

Consider a hypothetical example. X purchases a used motor vehicle from Auto Dealer, Inc., for \$5,000. A dispute over the vehicle arises and X contends that two salespersons made misrepresentations, that Auto Dealer’s web site contained false statements, and that X saw the salespersons exchanging email or text messages during the purchase and sale negotiations. X, acting *pro se*,

113. Posting of Brian to <http://www.bimmerfest.com/forums/archive/index.php/t-53510.html> (Feb. 24, 2004, 06:35 EST) (quoting Anonymous).

114. See MODEL RULES OF PROF’L CONDUCT R. 3.4(a) (2008); PAUL & NEARON, *supra* note 50, at 46 (describing a range of available sanctions).

115. See, e.g., *Zubulake IV*, 220 F.R.D. at 217 (“Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, ‘no.’”).

116. See Bennett, *supra* note 3, at 127 (noting that the preservation obligation occurs before there is a chance for a “meet and confer” and before there is “a chance to approach the court for a ruling on the reasonableness of the preservation approach”).

117. See *supra* note 9.

sends a letter to Auto Dealer suggesting that a lawsuit will follow if \$5,000 is not paid immediately. X, a computer programmer, asks that Auto Dealer mirror image the salespersons' computers, PDAs, voicemails, cell phones, and network folders. X believes that the salespersons communicated electronically with a supervisor, and demands preservation and imaging of the unknown supervisor's ESI. X demands preservation of all of the vehicle's maintenance records and all ESI that refers or relates to Auto Dealer's acquisition of the auto. X demands that the current and past web pages be preserved. X also seeks preservation of ESI related to the salespersons' communications with other purchasers, asserting that the misrepresentations were part of a pattern. Finally, X also asks for preservation of all of the vehicle's manufacturer's recall ESI received by Auto Dealer. In the current marketplace, the cost to Auto Dealer of preserving the ESI would be greater than the cost of the claim. There is no judge to referee the dispute because suit has not been filed. There is no opposing attorney to negotiate with, because X is *pro se*. Because X likely has no ESI to preserve, there is no reciprocal interest—known during the Cold War as “mutually assured destruction” or the “balance of terror”—on X's part in reducing reliance on Auto Dealer's ESI. Absent a principled limit on the scope of the duty to preserve, Auto Dealer must either expend more than the claim is worth to preserve ESI, or fail to preserve discoverable ESI and risk an adverse inference instruction, order precluding testimony, default judgment, or monetary sanction. Auto Dealer's decision could be made even more complex if X were able to assert both federal and state claims, as well as regulatory claims.

How would the application of Rule 26(b)(2)(C) and 37(e) factors assist Auto Dealer? First, Auto Dealer would have a readily available source of guidance, the body of case law interpreting Rule 26(b)(2)(C) and its predecessor. Auto Dealer might assert that it would be reasonable to spend a specified number of hours and funds performing preservation tasks, and that any additional efforts would be undertaken only upon payment by the requesting person.¹¹⁸

118. See *Marens v. Carrabba's Italian Grill, Inc.*, 196 F.R.D. 35, 37–38 (D. Md. 2000) (“[Former] Rule 26(b)(2) of the Federal Rules of Civil Procedure 26 requires the court to balance various factors to determine just how much discovery is reasonable in a given case. This analysis is tailored to the particular needs of each case, and requires the court to consider both the importance of the discovery sought to the moving party, as well as the cost and burden to the producing party. The court is given great flexibility to order only that discovery that is reasonable for a case, and to adjust the timing of discovery and apportion costs and burdens in a way that is fair and reasonable. . . . Rule 26(b)(2) allows the Court to direct alternative methods of

Second, if ESI had been lost prior to notice of the claim, due to routine operation of the information system, Auto Dealer could seek protection under the Rule 37(e) “safe harbor.”¹¹⁹ Third, Auto Dealer could note that the extent of use of the discovery methods, including coextensive preservation efforts, shall be limited by the court under specific circumstances.¹²⁰ Auto Dealer might interview its employees, review its paper documents and active data, and determine that expensive preservation of deleted and fragmented data was unnecessary because “the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive,” thereby obviating a need for some costly electronic preservation.¹²¹ More significantly, Auto Dealer would be able to assert that “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”¹²² If Auto Dealer could determine that there was no need for metadata or deleted data because of the nature of the allegations or the information technology, it might be able to decide not to preserve some ESI because other data would provide X with “ample opportunity to obtain the information by discovery in the action.”¹²³ These Rule 26(b)(2)(C) and 37(e) factors provide Auto Dealer with substantially more guidance than the bare concept of “proportionality” or “reasonableness.” If Auto Dealer is subsequently faced with a spoliation motion for sanctions, it—and its counsel—

discovery, if they are more reasonable than that chosen by a party, and objected to by another. . . . Defendant will produce responsive documents prepared by general managers within its Virginia, Washington D.C. and Maryland restaurants for the five years preceding the termination of the plaintiff’s employment. The search time for this information will be included in the 40 hours referred to with respect to request no. 1, above. If, after review of the additional documents, plaintiff desires further discovery, he may file a motion requesting it, and if meritorious, further discovery will be allowed, subject to review by the Court to determine whether plaintiff should pay all or part of the cost of further discovery.” (citations omitted). The textual argument is not inconsistent with the presumption that the producing party bear the cost of producing active ESI, because it would be made in the pre-litigation context of a common-law duty to preserve, not to produce.

119. See FED. R. CIV. P. 37(e).

120. FED. R. CIV. P. 26(b)(2)(C).

121. FED. R. CIV. P. 26(b)(2)(C)(i).

122. FED. R. CIV. P. 26(b)(2)(C)(iii).

123. FED. R. CIV. P. 26(b)(2)(C)(ii).

will have, at a minimum, detailed standards on which to base their arguments.

To give one other example, assume that a potential litigant has four servers and twenty work stations, older legacy computers, plus backup tapes. Next, assume that litigation is reasonably anticipated, and that it will center on a commercial dispute over contract interpretation, with no allegations of fraud or dishonesty. Assume that the issue is whether A delivered conforming goods to B. Obviously, pertinent commercial documents, such as the orders, invoices, and contract should be preserved. The general duty to preserve may also include deleted data, data in slack spaces, backup tapes, legacy systems, and metadata, related to orders, invoices, shipping manifests, the contract, email, and correspondence, although there may be no need for this information, and it may be that the dispute can be resolved using basic email and word processing documents without resorting to more expensive-to-preserve-and-produce ESI sources.¹²⁴ Assume further that the opposing entity either refuses to negotiate a reasonable preservation regime or is not represented by counsel. Rather than pay tens of thousands of dollars to preserve deleted data and metadata, the preserving party could decide not to incur the high cost of preserving the data and, if later challenged, assert under Rule 26(b)(2)(C)(iii) that “the burden or expense of the proposed [preservation] outweighs its likely benefit, considering the needs of the case . . . and the importance of the discovery in resolving the issues.”¹²⁵ While the preserving party is still at risk if it chooses not to preserve the deleted data, absent application of Rule 26(b)(2)(C) by analogy, the preserving party could assert only a defense of “reasonableness” or “proportionality.”¹²⁶ Application of Rule 26(b)(2)(C) by analogy, while it provides imperfect protection, increases the level of protection and thereby effectuates the goal of “just, speedy, and inexpensive resolution[.]” of the forthcoming action.¹²⁷

124. See *Mich. First Credit Union v. Cumis Ins. Soc’y, Inc.*, No. 05-74423, 2007 WL 4098213, at *2 (E.D. Mich. Nov. 16, 2007) (stating that “most” metadata is “of limited evidentiary value” (citing *Wyeth v. Impax Labs., Inc.*, No. Civ.A. 06-222-JJF, 2006 WL 3091331, at *2 (D. Del. Oct. 26, 2006))); see also *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 651 (D. Kan. 2005) (stating “most of the metadata has no evidentiary value”). It is likely that the same could be said of much deleted data. The need for such data is generally fact-sensitive or case-specific.

125. FED. R. CIV. P. 26(b)(2)(C)(iii).

126. See *supra* note 104 and explanation therein.

127. 28 U.S.C. § 471 (2006); FED. R. CIV. P. 1.

It is recognized that the cost-benefit limits on discovery may be amorphous and difficult to apply to pre-litigation preservation decisions. Application of those concepts, however, will provide the most detailed standard to guide discretion, and may provide preserving parties with a good faith defense to spoliation claims, or alternatively, may strip them of an unreasonable defense. Application of the Rule's principles will permit parties to articulate reasoned bases for decisions to limit the scope of their preservation obligations or, alternatively, to challenge unreasonably limited efforts to preserve ESI. Faced with a spoliation motion,¹²⁸ for example, counsel may persuasively argue that the common-law duty to preserve ESI should not be interpreted to mandate that Auto Dealer spend \$25,000 preserving ESI to defend against a \$5,000 claim.¹²⁹ Similarly, faced with a \$15 million claim, a preserving party may find it difficult to assert that it was not required to expend \$100,000 to preserve ESI. If it is correct to state that "[t]he scope of the duty to preserve evidence is not boundless,"¹³⁰ Rule 26(b)(2)(C) should assist in defining the boundary.

VI. CONCLUSION

The uncertain scope of preservation obligations before litigation is filed, coupled with the risk of serious sanctions when relevant ESI is not preserved, encourages over-broad pre-litigation preservation efforts, resulting in the expenditure of vast sums to preserve ESI that need not be preserved. Given that a party is provided far more detail concerning the range of potentially discoverable information after litigation is commenced, a party's pre-litigation failure to preserve should not result in more onerous sanctions than a party's failure to preserve post-filing. Although not explicitly relevant pre-litigation, application by analogy of Federal Rules of Civil Procedure

128. The first element of a spoliation claim is that the allegedly spoliating party breached its duty to preserve information. *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267, 270 (Ill. 1995). If, under Rule 26(b)(2)(C)'s application by analogy, there was no duty to preserve, there has not been spoliation. *See Baugher v. Gates Rubber Co.*, 863 S.W.2d 905, 911–12 (Mo. Ct. App. 1993) (finding that, if common law elements of tort are not met, dismissal is appropriate).

129. "At some point the adversary system needs to say 'enough is enough' and recognize that the costs of seeking *every* relevant piece of discovery is not reasonable." *Esposito & Mueller*, *supra* note 108, at ¶ 28 n.88 (citing *Cognex Corp. v. Electro Scientific Indus. Inc.*, No. Civ.A. 01CV10287RCL, 2002 WL 32309413, at *5 (D. Mass. July 2, 2002)) (emphasis in original).

130. *RICE*, *supra* note 27, at 72. The writer made this comment in the context of assessing the duration of the duty to preserve.

26(b)(2)(C) and 37(e), to the pre-litigation duty to preserve provides the best mechanism for defining the limits of the duty to preserve and providing litigants with practical guidelines in a perilous area where a misstep could have significant ramifications.