

# Commentary

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## Avoiding The Byte From The New E-Discovery Rules

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The 2006 Amendments to the Federal Rules of Civil Procedure officially ushered the Rules into the electronic age. The amendments to Rules 16, 26, 33, 34, 37, and 45 expressly cover electronically-stored information ("ESI"). Because of the transient nature of ESI, litigants and litigation counsel should be aware

of precautions that should be taken to preserve ESI and the consequences for failing to do so. This article will explore how courts have interpreted the duty to preserve ESI, and offer suggestions for practicing under the new Rules.

### Duty To Preserve

The duty to preserve evidence, including ESI, attaches when a party knows of, or reasonably anticipates, litigation involving identifiable parties and identifiable facts.<sup>1</sup> Exactly when this duty arises is a fact-specific inquiry over which many courts differ. For example, some courts have found the duty arises due to pre-complaint communications between the parties. The District Court for the Middle District of Louisiana found that the duty to preserve evidence attached when the defendant sent a demand letter to the plaintiff, even though the plaintiff did not file suit until over one year later.<sup>2</sup> Similarly, although the actual litigation was not filed until three years later, the District Court for the Northern District of California held that the duty to preserve emails arose when a plaintiff company's CEO threatened suit against one of defendant's officers.<sup>3</sup>

Other courts have applied a narrower approach, finding the duty to preserve potentially relevant evidence does not attach until the complaint is filed, despite the existence of pre-complaint communications between the parties. The District Court for Colorado ruled that a defendant's duty to preserve information was not triggered by plaintiff's demand letter sent

two years before the complaint was filed, reasoning that the letter did not threaten litigation or request preservation of evidence.<sup>4</sup> The District Court for the Northern District of California held that the defendant's duty to preserve certain input files related to a sustained yield plan (SYP) in connection with the sale of property was not triggered until plaintiff sent a letter to defendants expressly requesting preservation of evidence.<sup>5</sup> Although the same SYP was the subject of a different administrative proceeding involving the defendant seven years earlier,<sup>6</sup> the Court found that the specific input files to the SYP were not at issue in that earlier proceeding, and thus did not trigger the duty to preserve them.<sup>7</sup>

The difficulty in determining exactly when the duty to preserve arises is perhaps best exemplified by two patent infringement cases filed in the District Court for the District of Delaware and the District Court for the Northern District of California each involving Rambus, Inc.<sup>8</sup> Rambus had established a licensing and litigation strategy for licensing, and possibly enforcing, its patents.<sup>9</sup> As part of its strategy, Rambus implemented a document retention policy that included periodically destroying documents, including documents questioning the patentability of the technology Rambus was attempting to license.<sup>10</sup> The California Court held that Rambus did not reasonably anticipate litigation, and therefore had no duty to preserve evidence, until licensing negotiations failed and Rambus decided to hire litigation counsel.<sup>11</sup> The Delaware Court reached a different conclusion, finding that Rambus' document retention policy was part of an overall litigation strategy, and that Rambus reasonably anticipated litigation at the time it implemented its licensing and litigation strategy.<sup>12</sup> As a result, the Delaware Court held Rambus' patent unenforceable because Rambus had destroyed documents after the duty arose.<sup>13</sup>

As set forth above, there is an apparent inconsistency in the case law concerning when the duty to preserve evidence arises. This raises some interesting questions. When a potential plaintiff sends a demand letter to a potential defendant, does the letter necessarily have to threaten litigation or expressly demand document preservation to trigger the duty to preserve? In those cases where the duty to preserve information arose from prior litigation, how long is a party to the prior litigation expected to preserve documents for

subsequent litigation? With respect to the California Rambus case, could a party destroy relevant documents while engaging in nominal licensing negotiations, knowing that the negotiations would likely be unsuccessful and lead to litigation? These cases demonstrate that the duty to preserve information varies on a case-by-case basis, and sometimes courts differ even over apparently similar facts.

Although courts may disagree as to when the duty to preserve information attaches, they do generally agree upon the first step that needs to be done. A "litigation hold" should be implemented in order to preserve evidence that may be relevant to pending or reasonably anticipated litigation.<sup>14</sup> Most courts take a broad view of what material must be preserved under a litigation hold.<sup>15</sup> Some courts, however, have found that particular types of information need not be preserved. For example, courts have found that inaccessible backup tapes (such as those maintained solely for the purpose of disaster recovery)<sup>16</sup> need not be the subject of litigation holds, as well as drafts of expert reports absent a clear discovery request or subpoena seeking them.<sup>17</sup> These exclusions, however, appear to be more the exception than the rule. The general rule is that courts require broad litigation holds to comply with the duty. Litigation holds must not only prevent manual document deletion, but also require that a party suspend any automatic document destruction policies or software that may be in place.<sup>18</sup> Rule 37(f) provides a safe harbor from sanctions when ESI is lost as a result of the routine, good faith operation of an electronic information system.<sup>19</sup> But, the safe harbor provision does not apply when a party fails to prevent its system from destroying or altering information, even if such destruction would normally occur in the regular course of business.<sup>20</sup>

In addition, Courts require counsel to closely supervise their client's document preservation and production efforts. It is not sufficient for counsel simply to instruct their client to preserve all relevant documents.<sup>21</sup> Rather, counsel must specifically define which documents are relevant and follow-up with those individuals responsible for preserving or producing them.<sup>22</sup> In a product liability case, the District Court for the District of Kansas found that defense counsel was insufficiently diligent in supervising its client's document production where the defendant's paralegal responsible for gathering responsive

documents was unaware that certain documents were stored on computers in defendant's accounting department.<sup>23</sup> The Court held that counsel has an obligation to communicate with in-house counsel to identify the persons having responsibility for the matters that are the subject of the document requests and to identify all employees likely to have been authors, recipients, or custodians of documents falling within the request.<sup>24</sup> Other courts have gone even further, requiring counsel to become familiar with their client's electronic storage architecture to ensure that all potential sources of ESI are searched.<sup>25</sup> The District Court for the Southern District of New York found gross negligence by counsel who took the client's word that there were no computers containing responsive information, and failed to inquire as to the client's electronic storage structure<sup>26</sup>

The duty to preserve evidence is not necessarily limited to the named litigants. Many courts have expanded the scope of a party's duty to preserve information to include documents and materials of third parties to the extent they are in the party's possession, custody, or control.<sup>27</sup> For example, the District Court for the Middle District of Tennessee found that a defendant was required to produce documents kept by defendant's agent because a contract required the agent to make the responsive documents available.<sup>28</sup> In another case, the District Court for the Northern District of California ruled that spoliation occurred where the Defendant's husband destroyed ESI when the party had access to or indirect control over such evidence.<sup>29</sup> This ruling apparently expands the duty to preserve to cover evidence that is not directly within the party's control. Courts have also imposed sanctions where a defendant's employee destroyed evidence relating to the employee's personal email account.<sup>30</sup>

In general, however, courts have taken a less expansive view of a party's duty to preserve information that is in the possession of third parties. For example, courts have held that a party that preserved e-mails containing hyperlinks is not required to preserve images that are associated with those hyperlinks, when those images are stored on a remote third-party server.<sup>31</sup> In another case, the District Court for the District of Maryland found that a party's duty to preserve does not extend to third-party consultants when the party does not have the right, authority, or practical

ability to obtain the documents from the third-party consultants.<sup>32</sup>

Although the case law varies from jurisdiction to jurisdiction, courts generally require parties and their counsel to preserve a vast amount of information, possibly including information kept by third parties and employees' personal computers. An especially high burden is placed on counsel to achieve a comprehensive understanding of their clients' computer systems and data storage procedures to ensure that all potential sources of relevant information are preserved in anticipation of litigation.

### Sanctions

A party or counsel's failure to satisfy the duty to preserve could result in a variety of sanctions under Rule 37 or under the court's inherent authority.<sup>33</sup> Such sanctions include awards of attorney fees and costs<sup>34</sup>, an adverse inference that the destroyed evidence would have been unfavorable to the party who destroyed the evidence,<sup>35</sup> and even granting dispositive motions, such as dismissing the complaint or granting default judgment.<sup>36</sup> As one would expect, the severity of an imposed sanction depends, at least partially, on the party's culpability, with dismissals and defaults generally granted only in particularly egregious cases.<sup>37</sup> Generally, default judgments and dismissals are only imposed upon a finding of bad faith or willful misconduct.<sup>38</sup> For example, a default judgment has been granted where a defendant destroyed information on her hard drive despite a court order to allow plaintiff's access to the hard drive.<sup>39</sup>

Although dispositive sanctions are relatively rare, granting an adverse inference against the party who failed to preserve evidence is more common. Courts generally consider three factors in determining whether an adverse inference is appropriate: (1) whether the party having control over the evidence had an obligation to preserve it when it was destroyed; (2) whether the destruction or loss was accompanied by a "culpable state of mind;" and (3) whether the lost evidence was relevant to the injured party's claims or defenses and would have been favorable to the injured party.<sup>40</sup>

With respect to the first factor, courts often differ on when the party's duty to preserve evidence arises, and when the party has control over the evidence. In order to grant an adverse inference, the court must find

that the party against whom sanctions are sought had control over the evidence, and was under a duty to preserve the evidence when it was destroyed.<sup>41</sup>

Regarding the second factor, courts require that the party destroyed or lost evidence with a "culpable state of mind". To show this state, courts have required a showing of bad faith, knowing destruction, gross negligence, and even ordinary negligence by the party who failed to preserve the evidence.<sup>42</sup> For example, courts have held that the failure to establish any form of litigation hold at the outset of litigation is grossly negligent, and thus establishes a culpable state of mind for purposes of an adverse inference.<sup>43</sup> In another case, a culpable state of mind was found where a defendant was only negligent for failing to realize that its monthly and daily backup systems resulted in some daily records being erased before they were copied to a monthly backup tape.<sup>44</sup>

Other courts have declined to impose an adverse inference based on ordinary negligence. The United States Court of Appeals for the Eighth Circuit refused to impose sanctions absent a finding of intentional destruction indicating a desire to suppress the truth.<sup>45</sup> Similarly, the United States Court of Appeals for the Fifth Circuit permits an adverse inference sanction only upon a showing of "bad faith" or "bad conduct."<sup>46</sup> Thus, although courts generally require a "culpable state of mind" to impose adverse inference sanctions, jurisdictions differ on what conduct meets this standard.

The third factor courts consider in granting adverse inference sanctions is whether the lost evidence would have been relevant to the injured party's claims or defenses, and whether it would have been favorable to the injured party.<sup>47</sup> Relevance can be shown in two ways. First, relevance may be inferred if the spoliator is shown to have a sufficiently culpable state of mind.<sup>48</sup> Courts have generally held that bad faith or gross negligence qualifies as a sufficiently culpable state of mind to meet the relevance prong.<sup>49</sup> Merely negligent destruction of evidence is generally not sufficient to establish relevance.<sup>50</sup> Second, the moving party may submit extrinsic evidence tending to demonstrate that the missing evidence would have been favorable to it.<sup>51</sup>

In addition to these three factors, courts also look at the prejudice to the party moving for sanctions caused

by the destroyed evidence. Some courts refuse to impose sanctions absent a clear finding of prejudice to the opposing party.<sup>52</sup> For example, the District Court for the District of Colorado did not impose sanctions where the plaintiff could not provide evidence of prejudice, but did grant additional limited discovery to determine if specific relevant documents were destroyed that would prejudice the plaintiff.<sup>53</sup> On the other hand, courts have imposed sanctions even where the allegedly prejudiced party was able to rely on evidence other than the destroyed evidence to support its position. The District Court for the District of New Jersey imposed an adverse inference sanction due to a defendant's failure to produce electronic snapshots of the defendant's Web site, which plaintiff argued contained particular statements.<sup>54</sup> In that case, the Court granted the adverse inference even though the defendant admitted in deposition testimony that the Web site contained the statements.<sup>55</sup> Thus, some courts appear to require a showing of prejudice by the moving party as a fourth factor, while other courts have imposed sanctions without evidence of prejudice.

### Practical Implications

The preservation of evidence, and particularly ESI, has many aspects that practitioners should consider. Although courts differ on many of the issues associated with preservation of ESI and spoliation, courts generally do agree that a litigation hold should be put into place as soon as litigation is reasonably anticipated. It is unclear exactly when this duty arises, and the timing will vary with the facts of each case, and perhaps the jurisdiction. Prudent parties and their counsel should err on the side of early preservation to avoid possible spoliation allegations.

The courts have also generally required counsel to take an active role in supervising the preservation and production of ESI. The case law suggests that counsel should obtain a working knowledge of their client's computer storage systems, specifically identify which information should be preserved, and work closely with the individuals responsible for maintaining them to identify all possible sources of evidence. Counsel should understand what ESI is stored, where it is stored, if any procedures are in place for automatically deleting ESI and how to suspend them, whether files can be stored on employees' individual computers or removable media, and if any third parties are involved in maintaining

or destroying the client's ESI. Counsel should also preserve communications with the client regarding preservation efforts to establish diligence and good faith to combat any potential motion for sanctions.

The vast amount of ESI involved in most cases and its dynamic nature make its maintenance and production a daunting task. Counsel who take a proactive and cooperative approach to work with their clients early on should, however, be able to satisfy the duty to preserve ESI.

## Endnotes

1. Kenneth J. Withers, Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure, 4 Nw. J. of Tech. & Intell. Prop. 171, 189 (2006).
2. See *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 342 (M.D. La. 2006); see also *Frey v. Gainey Transp. Servs., Inc.*, 2006 U.S. Dist. LEXIS 59316 at \*24-\*25 (N.D. Ga. Aug. 22, 2006) (holding that defendant's duty to preserve attached when defendant received pre-complaint letter from plaintiff's counsel advising defendant to preserve specific documents and materials).
3. See *In re Napster, Inc. Copyright Lit.*, 462 F. Supp. 2d 1060, 1068-69 (N.D. Cal. Oct. 25, 2006).
4. See *Cache La Poudre Feeds, LLC v. Land O' Lakes, Inc.*, 244 F.R.D. 614, 622-23 (D. Colo. Mar. 2, 2007).
5. See *U.S. v. Maxxam, Inc.*, 2009 U.S. Dist. LEXIS 30743 at \*34-\*39 (N.D. Cal. Mar. 27, 2009).
6. See *Id.*
7. See *Id.*
8. See *Hynix Semiconductor Inc. v. Rambus, Inc.*, 591 F. Supp. 2d 1038 (N.D. Cal. Jan. 5, 2006); *Micron Tech., Inc. v. Rambus, Inc.*, 255 F.R.D. 135 (D. Del. Jan. 9, 2009).
9. See *Hynix Semiconductor*, 591 F. Supp. 2d at 1045-53.
10. See *Micron Tech.*, 255 F.R.D. at 139-43.
11. See *Hynix Semiconductor*, 591 F. Supp. 2d at 1064.
12. See *Micron Tech.*, 255 F.R.D. at 150.
13. *Id.* at 150-51.
14. See *In re Flash Memory Antitrust Lit.*, 2008 WL 1831668 (N.D. Cal. Apr. 22, 2008).
15. See *Id.* (finding that a litigation hold includes preservation of writings, records, files, correspondence, reports, memoranda, calendars, diaries, minutes, electronic messages, voice mail, E-mail, telephone message records or logs, computer and network activity logs, hard drives, backup data, removable computer storage media such as tapes, discs and cards, printouts, document image files, Web pages, databases, spreadsheets, software, books, ledgers, journals, orders, invoices, bills, vouchers, check statements, worksheets, summaries, compilations, computations, charts, diagrams, graphic presentations, drawings, films, charts, digital or chemical process photographs, video, phonographic, tape or digital recordings or transcripts thereof, drafts, jottings and notes, studies or drafts of studies or other similar such material, and any information that serves to identify, locate, or link such material, such as file inventories, file folders, indices, and metadata).
16. See *Oxford House, Inc. v. City of Topeka*, 2007 U.S. Dist. LEXIS 31731 at \*11-\*12 (D. Kan. Apr. 27, 2007).
17. See *Univ. of Pittsburgh v. Townsend*, 2007 U.S. Dist. LEXIS 24620 at \*9-\*10 (E.D. Tenn. Mar. 30, 2007).
18. See *Samsung Elecs. Co., Ltd. v. Rambus, Inc.*, 439 F. Supp. 2d 524, 543 (E.D. Va. July 18, 2006) (citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)).
19. See *Fed. R. Civ. P. 37(f)*.
20. See *Doe v. Norwalk Community College*, 248 F.R.D. 372, 378 (D. Conn. July 16, 2007) (citing *Fed. R. Civ. P. 37(f)* at Advisory Committee Notes to 2006 Amendment).
21. See *Cardenas v. Dorel Juvenile Group, Inc.*, 2006 U.S. Dist. LEXIS 37465 at \*23 (D. Kan. June 1, 2006).

22. See *Samsung Elecs. Co.*, 439 F. Supp. 2d at 565.
23. See *Cardenas*, U.S. Dist. LEXIS 37465 at \*23.
24. See *Id.*
25. See *Phoenix Four, Inc. v. Strategic Res. Corp.*, 2006 U.S. Dist. LEXIS 32211 at \*16-19 (S.D.N.Y. May 23, 2006).
26. See *Id.*
27. See *In re Flash Memory Antitrust Lit.*, 2008 WL 1831668 (N.D. Cal. Apr. 22, 2008).
28. See *John B. v. Goetz*, 2007 U.S. Dist. LEXIS 75457 at \*79-\*83 (M.D. Tenn. Oct. 10, 2007).
29. See *World Courier v. Barone*, 2007 U.S. Dist. LEXIS 31714 at \*2-\*3 (N.D. Cal. Apr. 16, 2007).
30. See *Easton Sports, Inc. v. Warrior LaCrosse, Inc.*, 2006 U.S. Dist. LEXIS 70214 at \*7-\*12 (E.D. Mich. Sept. 28, 2006).
31. See *Phillips v. Netblue, Inc.*, 2007 U.S. Dist. LEXIS 67404 at \*5-\*8 (N.D. Cal. Jan. 22, 2007).
32. See *Goodman v. Praxair Servs., Inc.*, 2009 U.S. Dist. LEXIS 58263 at \*49-\*60 (D. Md. July 7, 2009).
33. See *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006).
34. See generally *Finley v. Hartford Life and Acc. Ins. Co.*, 249 F.R.D. 329 (N.D. Cal. Feb. 22, 2008).
35. See generally *Babaev v. Grossman*, 2008 U.S. Dist. LEXIS 77731 (E.D.N.Y. Sept. 8, 2008).
36. See generally *Arista Records, L.L.C. v. Tschirhart*, 241 F.R.D. 462 (W.D. Tex. Aug. 23, 2006).
37. See *Teague v. Target Corp.*, 2007 U.S. Dist. LEXIS 25368 at \*4 (W.D.N.C. Apr. 4, 2007) (citing *Cole v. Keller Industries, Inc.*, 132 F.3d 1044, 1047 (4th Cir. 1998)).
38. See *Arista Records*, 241 F.R.D. at 464-65.
39. *Id.* at 464-66. See also *Krumwiede v. Brighton Assocs., L.L.C.*, 2006 U.S. Dist. LEXIS 31669 at \*22-\*33 (N.D. Ill. May 8, 2006) (granting default judgment of counterclaim where plaintiff destroyed computer files in bad faith after receiving notice of defendant's counterclaim).
40. See *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107-08 (2d Cir. 2002).
41. See *In re NTL, Inc. Sec. Lit.*, 244 F.R.D. 179, 192 (S.D.N.Y. Jan. 30, 2007).
42. See *Teague*, 2007 U.S. Dist. LEXIS 25368 at \*4 (citing *Residential Funding*, 306 F.3d at 108).
43. See *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. at 199 (citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 221 (S.D.N.Y. 2003)).
44. See *ACORN v. County of Nassau*, 2009 U.S. Dist. LEXIS 19459 at \*12-\*13 (E.D.N.Y. Mar. 9, 2009).
45. See *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007) (citing *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746 (8th Cir. 2004)).
46. See *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 340 (M.D. La. 2006) (citing *Condrey v. Sun Trust Bank of Georgia*, 431 F.3d 191 (5th Cir. 2005)).
47. See *Residential Funding*, 306 F.3d at 107-108.
48. See *County of Nassau*, 2009 U.S. Dist. LEXIS 19459 at \*14.
49. See *In re NTL, Inc. Sec. Lit.*, 244 F.R.D. at 199 (citing *Residential Funding*, 306 F.3d at 109); see also *Norwalk Community College*, 248 F.R.D. at 381.
50. See *Consol. Aluminum*, 244 F.R.D. at 340 (citing *Zubulake*, 220 F.R.D. at 220).
51. See *County of Nassau*, 2009 U.S. Dist. LEXIS 19459 at \*14.
52. See *Greyhound Lines*, 485 F.3d at 1035 (citing *Ste-*

- venson*, 354 F.3d at 748); *see also Ball v. Versar, Inc.*, at 2005 U.S. Dist. LEXIS 24351\*13 (S.D. Ind. Sept. 23, 2005) (declining to impose adverse inference sanction where defendant did not demonstrate any prejudice to defend itself at trial due to plaintiff's destruction of evidence).
53. *See Crandall v. City of Denver*, 2006 U.S. Dist. LEXIS 66958 at \*6-\*8 (D. Colo. Sept. 19, 2006).
54. *See Arteria Prop. Pty Ltd. v. Universal Funding V.T.O., Inc.*, 2008 U.S. Dist. LEXIS 77199 at \*14-\*15 (D.N.J. Oct. 1, 2008).
55. *See Id.* at \*4-\*5. ■