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Litigation Holds in Employment Lawsuits: Creating an Early and Effective Plan for Collecting and Preserving ESI

Best Practices to Reduce Risks, Manage Costs and Avoid Sanctions Under the Amended Federal Rules

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LITIGATION HOLDS IN EMPLOYMENT LAWSUITS:
Creating an Early and Effective Plan for Collecting and Preserving ESI[1]

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I. PRESERVATION TRIGGERS AND IMPLEMENTING HOLD NOTICES

A. When Does the Duty to Preserve Evidence Arise:

1. Duty to Preserve. An "obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation," including "when a party should have known that the evidence may be relevant to future litigation." *William Coale v. Metro-North Railroad Company*, No. 3:08-CV-01307 (CSH), 2016 WL 1441790, at *2 (D. Conn. Apr. 11, 2016) citing *Kronisch v. U.S.*, 150 F.3d 112, 126 (2d Cir. 1998).

2. Retention. Party's obligation to retain documents, including emails, is only triggered when litigation is "reasonably anticipated." *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, 736 F. Supp. 2d 1317, 2010 WL 3368654, at *6 (S.D. Fla. 2010).

3. When is litigation "reasonably anticipated?" The mere existence of a dispute does not necessarily mean that parties should reasonably anticipate litigation or that the duty to preserve arises. *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 371 (S.D.N.Y. 2006).

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[1] The following material is intended to provide information of a general nature concerning the broad topic of ethics and technology issues. The materials included in this paper are provided for informal use only. This material should not be considered legal advice and should not be used as such.

- *Southeastern Mechanical Services, Inc. v. Brody*, 2009 WL 2242395 (M.D. Fla. 2009). Court found that litigation was reasonably anticipated upon the sending of a demand letter to defendants.

- *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, 736 F. Supp. 2d 1317, 1327 (S.D. Fla. 2010). The court found that upon defendant's letter to plaintiff stating defendant's position with respect to plaintiff's violation of an exclusivity position in a professional services agreement, plaintiff was on notice that evidence related to its compliance would be relevant; yet plaintiff failed to impose a litigation hold on that evidence for another four months.

- *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003). Duty to preserve electronic evidence was triggered when plaintiff filed an EEOC charge.

- *Goodman v. Praxair Services, Inc.*, 632 F. Supp. 2d 494, 510 (D. Md. 2009). Duty to preserve arose upon defendant receiving letter from plaintiff stating plaintiff had consulted two attorneys in the matter and made reference to plaintiff being "forced to litigate."

- *But see Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 622 (D. Colo. 2007). No duty to preserve arose upon defendant receiving demand letter to determine "whether this situation can be resolved without litigation."

4. State Law. State law may provide different standards as to when the duty to preserve arises. For example, under Florida law, the duty to preserve can arise by contract, by statute, or by a properly served discovery request after a lawsuit has already been filed. *See Royal & Sunalliance v. Lauderdale Marine Ctr.*, 877 So. 2d 843, 845 (Fla. 4th DCA 2004).

B. Issuing a Litigation Hold.

1. Definition. A "litigation hold" is a notice issued in anticipation of a lawsuit or investigation, ordering employees to preserve documents and other materials relevant to that lawsuit or investigation. Black's Law Dictionary (9th ed.) (2009).

2. Duty to Preserve. "Once a party reasonably anticipates litigation, then it 'must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents.'" *Point Blank Solutions, Inc. v. Toyobo America, Inc.*, 2011 WL 1448137, at *11 (S.D. Fla. April 5, 2011), citing *Pension Committee v. Banc of America Securities, LLC*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010); *See Apple Inc. v. Samsung Elecs. Co.*, 881 F. Supp. 2d 1132, 1137 (N.D. Cal. 2012) ("when a company or organization has a document retention policy, it 'is obligated to suspend' that policy and 'implement a 'litigation hold' to ensure the preservation of relevant documents' after the preservation duty has been triggered").

a. This includes instructing clients to suspend cleaner programs that are designed to purge information like internet history and downloaded files. Examples of these types of programs are Evidence Eliminator or C-Cleaner.

Many of these information purging programs leave evidence that they were used.

3. Compliance. It is the duty of legal counsel to ensure that the proper people receive and abide by the litigation hold. *Swofford v. Eslinger*, 671 F. Supp. 2d 1274, 1282 (M.D. Fla. 2009).

4. Reminders. It is also important to send out reminder and/or updated litigation holds throughout a case. *See Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422, 433 (S.D.N.Y. 2004) ("The litigation hold should be periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees.").

5. Supplement. Upon discovering new evidence (for example through deposition testimony), it is important to send follow-up letters requesting that documents or electronically stored information ("ESI") related to the newly discovered issue be preserved. For example, if you learn that the case may be a class action, you want to advise the other side as soon as possible to ensure proper preservation for potential class members.

6. Failure to Issue. "[F]ailure to implement a litigation hold at the outset of litigation amounts to gross negligence." *Thurmond v. Bowman*, No. 14-CV-6465W, 2016 WL 1295957, at *8 (W.D.N.Y. Mar. 31, 2016) citing *Toussie v. County of Suffolk*, 2007 WL 4565160, *8 (E.D.N.Y. 2007).

7. Who Should Receive the Litigation Hold?

   a. Plaintiff(s).

   b. Third Party Providers to Maintain.

   c. Defense.

   d. IT Department.

      - Each employee who may be involved in the case
      - Start with the potential plaintiff's computer files
      - Need to consider computer files that support "legitimate non-discriminatory reason" for conduct (could be work files or other files)

- Supervisors and other obvious employees

8. How Do You Ensure Compliance With the Litigation Hold?

   - Send out a litigation hold letter to each person; have them sign the letter; and regularly review.

   - Educate the supervisors, HR and other employees on the importance of document retention.

   - Remind them that the issue may be far worse than whatever is in the documents.

When representing a client, provide written instruction to the client not to destroy information and have the client sign an acknowledgment of his or her duty to preserve evidence.

C. Other Times When Preservation Should be Addressed:

1. Informal Discussions. At the earliest point of contact with the opposing party even before litigation has commenced, it is important to discuss the preservation of any specific types of electronic documents, such as emails, text messages, social media, which may be pertinent to the claims.

   - Many employees keep emails, notes, calendars and other information on company computers. If the employee turned the computer in upon leaving the company, consider expressly requesting that the employee's computer be preserved.

2. Formal Letter to the Opposing Party. Send a preservation letter to the opposing party at the onset of your representation of a client outlining what needs to be preserved based on your client's claim(s) or defense(s):

   - Broad statement of the need to preserve electronic data related to the claims and/or defenses.

   - Identify specific individuals or custodians of ESI and the electronic sources and/or data used by those individuals that require preservation (i.e. email, text messages). For example, in a sexual harassment case, the emails or personal text messages of the perpetrator and the victim.

   - If contemplating a class action, make it clear in the letter that there are others similarly situated and request preservation of evidence related to potential class members.

   - Provide a time-frame for the preservation of the requested records.

- Other types of electronic records. Examples include:

    - Payroll and/or time records
    - Personnel records
    - Comparator records
    - Security footage or video evidence
    - Investigative records and witness statements
    - Records stored on specific electronic devices, such as thumb drives, external hard drives

Avoid including the preservation letter with a confidential demand letter or settlement proposal so that it can be admitted as evidence later if needed in support of spoliation motions. The letter will likely be an exhibit to the spoliation motion and needs to be written for the judge.

3. Conference of the Parties. When litigating in federal court, Rule 26(f) of the Federal Rules of Civil Procedure requires the parties to meet and discuss a discovery plan, which includes ESI issues and preservation. *See* Fed. R. Civ. P. 26(f)(3)(C) ("a discovery plan must state the parties views and proposals on…any issues about disclosure, discovery or **preservation** of electronically stored information…"). The following are areas of topics that should be discussed with respect to ESI and preservation.

    - Discuss places where potential ESI may be stored to ensure proper preservation.

    - Employee often knows where specific evidence important to his or her claim may be. Identify each such source and document that you have done so.

    - Seek an agreement on preservation procedures, such as whether back-up tapes will be preserved.

    - Confirm that a litigation hold has been issued to proper individuals and request the identity of the recipients of the notice.

    - Confirm the suspension of routine document retention/destruction measures.

    - Agree to a time-frame for preservation of data, i.e. before and after. This date should be broader than dates for production of relevant documents.

    - Identify third parties who may have ESI or discoverable information that needs preserving. *See Jain v. Memphis Shelby County Airport Auth.*, 2010 U.S. Dist. LEXIS 16815 (W.D. Tenn. Feb. 24, 2010) (the scope of the duty to preserve includes a duty to notify the opposing party of evidence in the hands of third parties).

<u>BRING YOUR EXPERT</u>. To get a better understanding of the types of ESI available in the case, the parties' respective computer experts should attend the meeting of the parties to discuss how the information is maintained and/or how it is being preserved as well as to address any issues or questions regarding any retention policies or the parties' systems and/or databases.

4. <u>Rule 26(a) - Initial Disclosures</u>. Rule 26(a)(1)(A)(ii) requires the parties to provide a copy or a description by category of all documents, **electronically stored information**, and tangible things that the disclosing party has in its possession, custody or control and may use to support its claims or defenses.

    - The opposing party's initial disclosures could identify categories of documents that may require preservation of ESI that may not have originally been contemplated.

II. WHERE TO LOOK, WHAT TO PRESERVE

A. Plaintiff's Perspective.

1. <u>Initial Inquiry</u>. Review with your client the types of documents the plaintiff may have in his or her possession.

Do not leave it up to your client to determine what is potentially relevant and/or what sources that need to be preserved. Consider having a checklist to go through with your client or a questionnaire for your client to complete that asks about the many different sources in which ESI or other tangible evidence in their possession may be located.

2. <u>Types of Documents that a Plaintiff May Possess</u>:

    - Hard copy
    - Employment records
    - Pictures
    - Pay records
    - Computers, laptop, external hard drives, thumb drives, cloud based storage
    - Personal and work emails
    - Social Media
    - Calendar programs (such as Outlook)
    - Smart phones and cellular phones
    - Appointment books/calendars
    - Text messages and/or SMS messages
    - GPS records

A defendant may call information or documents, such as those used in the ordinary course of the plaintiff's employment, saved onto external media as "stolen." So, an employee needs to catalog all external media that was

connected to a company computer, as forensics can determine if external media was connected and if files were downloaded.

3. Third Parties. Consider whether there may be records that third parties may have relevant to the claims and request that the third parties preserve ESI in their possession.

> FOR EXAMPLE: Service providers for cell or text records to the extent that such records may no longer be maintained on the plaintiff's personal devices.

4. How to Preserve.

   a. *Litigation Hold*. As discussed above, issue a litigation hold and instruct the plaintiff not to destroy any evidence and to turn off cleaners or other features that may purge data from electronic devices.

   b. *Collaborate*. Consult with IT experts or employ IT personnel that are familiar with the processes for preserving electronically stored information and social media. Experts can preserve social media, text and SMS records, emails, photos and other potential electronic information stored on electronic devices.

      - This includes making a mirror image of your client's personal devices to avoid inadvertent destruction, lost or stolen devices, or the risk of data loss from malfunctioning equipment, viruses or malware.

      - A party may also need to consider whether to preserve metadata of electronically stored information. The Advisory Committee Notes to Rule 26(f) define metadata as "information describing the history, tracking or management of an electronic file."

   c. *Obtain Social Media Archives*. Check to see if the social media network provides for a do-it-yourself function for preserving and saving the social media content.

      i. **Facebook**®. Facebook® has a feature called "Download Your Information." This feature vows to allow a Facebook® user to download everything the user ever posted to Facebook®, including all messages, posts, pictures, status updates, etcetera. However, it is not advisable for lawyers to rely exclusively on this feature as some experimenting with the program uncovered that this feature does not go back and capture things that have previously been deleted or removed.

      ii. **LinkedIn**®. LinkedIn® allows the profile owner to request an archive of their profile. Lawyers will need to work with clients to obtain the file using this function because once the archive is generated it is emailed to

the client directly.

iii. **Twitter.** Twitter's website also allows the user or profile owner to request an archive of their Twitter account. Instructions for how to obtain the archive are available at https://support.twitter.com/articles/20170160.

For the best practices of preserving electronic evidence, lawyers should refer to The Sedona Conference® publication, The Sedona Principles: Best Practices Recommendations and Principles Addressing Electronic Document Production. https://thesedonaconference.org/publication/The%20Sedona%20Principles.

B. Defense Perspective.

1. Understanding Plaintiff's Claims. Review all of the claims asserted by a plaintiff and determine what potential sources may contain data related to plaintiff's claims and/or the defendant's defenses.

   - Inquire with the plaintiff's supervisor, human resources, other individuals involved in the alleged conduct, any witnesses, IT professionals and any other employees who may have information about the claims to assist in identifying all the types of data that may need preservation.

   - If the case involves a class action or has the potential for a class action, such as an overtime lawsuit, try to identify who could be part of the class and consider preserving records related to potential class members.

2. Types of Documents that a Defendant May Possess.

   a. *Hard Copy*.

      - Employment file
      - Manager's desk files
      - Time cards
      - Employee handbooks and policies
      - Other "hard" documents

   b. *Computer*.

      i. Emails/Outlook files/Calendar Programs/Contacts (including metadata)

         - Plaintiff
         - Supervisors
         - Related employees

      ii. Employee work on computers

- If the employer's "legitimate non-discriminatory reason" is based on computer records, those records will need to be preserved.

- Despite employer policies, employees often use company email for personal business:

  - Improper use of computer in violation of company policy
  - Review of emails to look for potential trade secret violations
  - After-acquired evidence

iii. Computerized time keeping

- Electronic time cards
- Key card entry log into building or parking lot

iv. Video evidence (surveillance camera tapes)

- Does employer have the information?

- If not, may need to request that the security company and/or landlord preserve the information and/or provide a copy.

v. Voice mail and other telephonic information

vi. Alarm records

vii. Database information

- If employee improperly accessed the database information prior to employment ending, it may give rise to potential trade secret theft and/or breach of confidentiality agreement cross-claims.

3. <u>Determining Possession, Custody and/or Control.</u>

   a. Does employer have all of its employees' files on a server?

   b. Do employees keep information on local devices (smart phones; computers)?

   c. Learn the employer's computer system to find out where the ESI might be, then contact the employees and make sure they are preserving documents.

   d. If the budget allows, make forensic mirror images of all potential sources' computers, smart phones and tablets.

4. <u>Reviewing and Analyzing Client's Systems for Collecting Data</u>.

5. Creating an Effective Compliance System.

    a. Need a general compliance system.

    b. Case-specific compliance system to make sure potential litigation data is preserved

Document your plan and systems. Create documents that you will show the Court if a spoliation motion is brought that defendant took its obligations seriously and acted reasonably to protect relevant ESI.

    c. Requesting That Former Employees Retain Documents

- Personal computer
- Company documents
- Smart phones
- Social media

Keep in mind that the duty to preserve is not the same as what must be produced in a case. The parties may preserve more data than what is actually produced in the case. However, the cost of failing to preserve enough data could warrant some type of sanction, even where inadvertent.

III. ELEMENTS OF A LITIGATION READINESS AND DOCUMENT PRESERVATION PLAN

A. Implementation. This should start long before a lawsuit or dispute is at issue.

B. Elements. Companies should have a clear document retention (i.e., destruction) plan:

1. In writing.

2. Reasonable.

3. Specific time tables.

4. Ensure it complies with law regarding maintenance of records.

    a. It is beyond a human resources issue and should have broad application to all types of records the company is required to keep (environmental, tax, etcetera).

5. Follow up – Follow up – Follow up.

6. Update regularly.

C. Case-Specific Plan.

1. Respond to issues raised in Plaintiff's counsel's letter.

2. As a lawyer, need to understand client's systems.

3. Preserve the workstation/laptop or other computerized information that the plaintiff used.

Send a preservation letter to plaintiff's counsel.

D. IT Department Meeting. Make sure to meet with client's IT department early in the process to ensure:

1. Suspension of features of the company's routine operation of its computer system to prevent the loss of potentially relevant ESI that may be subject to preservation obligations;

2. Institute, if necessary, an ad hoc back-up system;

3. Understand the framework in which computer users are supposed to manage and store their ESI;

4. Understand special jargon, terms or computer applications that are specific to the client;

5. Identify the administrators (or sub-administrators) who control the relevant databases and applications; and

6. Determine whether any third parties host data for the company (i.e., cloud computing), need to be contacted and told to preserve data.

Don't rely on the employer's in-house counsel or client contact. The in-house lawyer needs to understand the limits of the system and be personally involved in ensuring compliance.

E. BYOD Data

1. Many companies have instituted a variety of *Bring Your Own Device* ("BYOD") policies.

2. Workers are allowed to use their own smart phones, tablets and laptops to access company data.

- If the device is used for work purposes, some courts have found that the employer has an obligation to preserve the data. *See, e.g.*, *Small v. Univ. Med. Ctr. of S. Nev.*, No. 2:13-cv-00298-APG-PAL, 2014 WL 4079507 (D. Nev. Aug. 18, 2014) (holding that the defendant had an affirmative duty to preserve information on personal mobile phones used for work).

3. Determine if device's data (which could include text messages, GPS or other data) is backed up on the company's main servers and, if so, how often.

4. If a company has a BYOD policy, may need to take custody of relevant employees' devices to ensure all appropriate information is saved.[2]

Defense counsel need to think through this issue and how it impacts a potential case. First, the employer should have a BYOD policy. Second, since information on an employee's personal device can be so easily lost or destroyed, this issue must be considered as part of the litigation hold process.

IV. SPOLIATION MOTIONS

A. Triggers for Bringing Such Motions.

1. Discovery Uses to Uncover Spoliation.

   a. *Fed. R. Civ. P. 26(b)* (amended effective December 1, 2015). Tighten scope of discovery to any non-privileged, relevant matter that is "**proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit**".

      i. Factors now needed to show when obtaining discovery:

         - [u]nder Rules 26(b)(1) and 26(b)(2)(C)(iii), a court can – and must – limit proposed discovery that it determines is not proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit – and the court must do so even in the absence of a motion.

[2] *See* Richter, "*Bring Your Own Device" Programs: Employer Control Over Employee Devices In the Mobile E-Discovery*, 82 Tenn. L. Rev. 443 (2015).

Orchestratehr, Inc. v. Trombetta, --- F. Supp. 3d ---, 2016 WL 1555784, * 23 (N.D. Tex. April 18, 2016)

ii. In resisting discovery under the new rule, a party must show the following:

- the importance of the issues at stake in the action, the amount in controversy,
- the parties' relative access to relevant information,
- the parties' resources,
- the importance of the discovery in resolving the issues, and
- whether the burden or expense of the proposed discovery outweighs its likely benefit.

Id. at *23; Other courts have held that the new standard does not substantively change things. *See Robertson v. People Magazine*, 2015 WL 9077111 at *2 (S.D.N.Y. Dec. 16, 2015) (Crotty, D.J.) (noting that proportionality has been a limit on discovery since the 1983 amendments to Rule 26 stating that "the 2015 amendment [to Rule 26] does not create a new standard; rather it serves to exhort judges to exercise their preexisting control over discovery more exactingly."). Recently, in *Sibley v. Choice Hotels International*, 2015 WL 9413101 (E.D. N.Y. 2015), the court noted that the revisions to the Federal Rules are designed to ensure that there is more judicial involvement in discovery issues).

b. *Request for Production*. There are certain types of documents to request in every case which may be relevant to potential spoliation issues:

- IT policies and/or retention policies, including BYOD policies or policies on use of removable media; back-up policies for relevant time periods.
- Litigation hold notices.[3]
- Contracts between third-party vendors who maintain a party's data, such as cloud storage, webhosting, email hosting, etcetera.
- Metadata (if not previously requested and produced) regarding the documents at issue.

[3] Many employers will argue that the litigation hold letters are privileged work product or attorney-client material. Since an employer may need to defend the hold, the litigation hold letter should be drafted with the presumption that it will either not be privileged or the employer may want to waive the privilege as to the letter.

FOR EXAMPLE: If you have an email that appears to have been altered, you should request the metadata for the record to determine when it was created, the author, what modifications were made, and when it was saved.

c. *Interrogatories*. Ask the opposing party the following:

- Identity of persons responsible for maintaining computers or other devices for the key individuals involved.
- Identity of third-party vendors that may provide cloud-based storage, host emails and/or text messages.
- Inquire about the relevant programs used by the opposing party to store data, such as the operating system, email programs, database software.
- Identification of all email accounts, cell phone numbers or other electronic sources used by relevant individuals to the case.
- Identification of any matter, files, or data that were deleted and whether it was lost pursuant to retention or destruction policies.

d. *Depositions*.

i. Who to depose:

- IT employees
- Decision makers
- Rule 30(b)(6) - Related to the company's policies, information technology systems, databases, etcetera.

ii. What to ask:

- Inquire about the ability of recovery of the deleted files.
- Inquire as to the reason for any destruction or alteration.
- Determine the intent or culpability of the spoliating party:
  - Did they review the documents before it was destroyed?
  - Awareness of claims or litigation hold notices when destruction/altercation was made.

        - Intentional destruction or alteration.

    - Inquire about the chain of custody of the document and/or files at issue from the initial communication of the discovery request, the litigation hold to the search for responsive documents and who located the ESI at issue.

    - Was the information destroyed in accordance with retention and/or destruction policies:

        - What did to gather the information requested?

        - Were given training on how to preserve?

        - Who did you provide the information to once collected?

        - Was this handled in the same manner as been handled in the past?

e. *Subpoena Third-Party Vendors*. Third parties may have the data in its original, unedited form or backed up if dealing with spoliated and/or altered evidence.

f. *Experts*. Retain a good expert that can assist with analyzing ESI and help determine whether files have been destroyed or altered and/or recoverable.

B. Standard for Spoliation of ESI. Prior to the amendments to Rule 37(e), the standard for establishing spoliation depended on the jurisdiction as there is a split between the Circuits on whether "bad faith" or "negligence" was the proper standard. However, the recent amendments to Rule 37(e) were enacted to provide a national standard for how courts should approach the failure by a party to preserve ESI.

1. The changes were designed to address the disparity among courts on the effects of failing to preserve ESI, as well as the risks parties face with spoliation sanctions.

2. According to the Advisory Committee's Note, "due to the ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible" and that the amended rule "does not call for perfection."

C. Threshold Requirements for Spoliation Remedies Under the New Rule

1. <u>Failure to take Reasonable Steps</u>.

    a. "Reasonable steps to preserve" will be sufficient under Rule 37(e). Thus the rule is inapplicable when loss results despite reasonable steps to preserve the information. Advisory Committee Note (2015).

b. The Advisory Committee Notes contain a few examples when such circumstances may be met, e.g. the loss of preserved evidence due to acts of nature, the failure of a "cloud" service or malware attacks on information systems.

c. A party's good-faith adherence to its retention and destruction policies and practices may support a finding of reasonable steps to avoid a spoliation motion. *See e.g.,* The Sedona Conference® *Commentary on Legal Holds: The Trigger and the Process*, 11 Sedona Conf. J. 265, 270 (2010) (providing best practices for litigation hold policies).

2. Loss of the ESI.

a. Rule 37(e) is only applicable where the ESI is actually lost and cannot be restored or replaced through additional discovery. Fed. R. Civ. P. 37(e), Advisory Committee Notes (2015); *see also Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd.*, Case No. 14-CV-62216-MARRA/MATTHEWMAN, 2016 WL 1105297 (S.D. Fla. Mar. 22, 2016) (acknowledging that Rule 37(e) only applies where ESI is lost and were not replaced or able to be recovered through additional discovery).

b. Loss from one source may be harmless if substitute information is elsewhere. Fed. R. Civ. P. 37(e), Advisory Committee Notes (2015).

- No entitlement to the remedies or measures provided under Rule 37(e) if they can be restored or replaced with additional discovery. *Id*.

- If you can obtain the information through other means, even if it was spoliated in another format, this will not support a basis for a remedy under Rule 37(e). *Id*.

c. ESI may be deemed unable to be restored or replaced through additional discovery where the non-offending party serves non-party subpoenas to attempt to obtain the information from another source, but that source is unable to provide additional information or the requested ESI. *See Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd*., Case No. 14-CV-62216-MARRA/MATTHEWMAN, 2016 WL 1105297 (S.D. Fla. Mar. 22, 2016).

D. Remedies. When the thresholds have been met under Rule 37(e), the court is limited to the following remedies:

1. Prejudice.

a. Where prejudice to another party from loss of the information is proven, the court may order no greater measures than necessary to cure the prejudice;

- This prong of the Rule does not require the finding of culpable intent causing the loss. Appears to address when spoliation occurs due to negligence.

- Prejudice requires an "evaluation of the information's importance in the litigation." Fed. R. Civ. P. 37(e)(1), Advisory Committee Notes (2015).

- The rule does not place the burden of showing prejudice on either party. Instead, it is left to the discretion of the court to best assess prejudice on a case by case basis. *Id.*

- Recent Case. *See Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd*., Case No. 14-CV-62216-MARRA/MATTHEWMAN, 2016 WL 1105297 (S.D. Fla. Mar. 22, 2016) (no finding of prejudice where the plaintiff only made conclusory statements to establish prejudice and did not show any direct nexus between the missing ESI and the claims).

b. Examples of curative measures:

- Admission of evidence and argument about spoliation

- Preventing spoliating party from putting on certain evidence

- An instruction to the jury about the loss (not an inference about the lost evidence being unfavorable, etcetera).

- Monetary sanctions, including attorney's fees

NOTE: Under this prong of the rule, an inappropriate measure would be striking pleadings or preventing a party from presenting evidence central to a claim or defense in the case. *See* Fed. R. Civ. P. 37(e)(1), Advisory Committee Notes (2015).

2. Intent to Deprive/Culpable Intent.

a. Where can prove the intent to deprive another party of the information's use in the litigation, the court may:

- Presume that the lost information was unfavorable to the party;

- Instruct the jury that it may or must presume the information was unfavorable to the party; or

- Dismiss the action or enter a default judgment.

See Fed. R. Civ. P. 37(e)(2).

b. Rejects cases allowing for severe/harsh sanctions for spoliation that is merely negligent. *See CAT3, LLC v. Black Lineage, Inc.*, --- F. Supp. 3d --- (2016), 2016

WL 154116 (S.D.N.Y. Jan. 12, 2016) (noting the Advisory Committee's rejection of imposing severe sanctions for negligent conduct).

c. Does not require any further finding of prejudice (it is assumed by an adverse inference).

d. *Court Discretion*. The courts are not required to adopt the measures in this section. The Advisory Committee Notes suggest that the remedy should fit the wrong and the court need not impose these more severe sanctions if there are other means or measures that can redress the loss. *See* Fed. R. Civ. P. 37(e)(2), Advisory Committee Notes (2015); *see also CAT3, LLC v. Black Lineage, Inc.*, --- F.Supp.3d --- (2016), 2016 WL 154116 (S.D.N.Y. Jan. 12, 2016) (noting that the relief provided under Rule 37(e)(2) are not mandatory).

3. Illustrative Cases.

a. *Denying Sanctions under New Rule*.

- *Accurso v. Infra-Red Services, Inc. et. al.*, Case No. 13-7509, 2016 WL 930686 (E.D. Pa. Mar. 11, 2016) (denying motion for adverse inference where the moving party failed to present any evidence that "there was actual suppression or destruction of evidence, let alone that the plaintiff was responsible for the suppression or destruction of this evidence, that this evidence cannot be obtained from other sources or that the [the plaintiff] acted with the intent to deprive the Defendants of access to the information.").

- *Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd*., Case No. 14-CV-62216-MARRA/MATTHEWMAN, 2016 WL 1105297 (S.D. Fla. Mar. 22, 2016) (refusing to impose an adverse inference instruction or other severe sanction where the conduct was negligent at best and there was no evidence presented to show that the deletion was done with the intent to deprive the plaintiff of the information for use in the litigation).

b. *Granting Sanctions under New Rule*.

- *CAT3, LLC v. Black Lineage, Inc.*, --- F. Supp. 3d --- (2016), 2016 WL 154116 (S.D.N.Y. Jan. 12, 2016) (finding that the alteration or fabrication of ESI meets the thresholds under subsections 1 and 2 of Rule 37(e) and ordering preclusion of the offending party from relying on specific evidence at trial and the payment of the moving party's attorneys' fees and costs in establishing the party's misconduct and securing relief).

EXCEPTION: These remedies are limited to the destruction of electronically stored information. Thus, the new amendments do not disturb the court's inherent authority to sanction the destruction of tangible evidence. *See William Coale v. Metro-North Railroad Company*, No. 3:08-CV-01307 (CSH), 2016 WL 1441790,

at *8, n.7 (D. Conn. Apr. 11, 2016) (recognizing that the new amendments to Rule 37(e) only apply to ESI and does not impact the court's authority to sanction when the destruction of tangible evidence is at issue); *CAT3, LLC v. Black Lineage, Inc.*, --- F. Supp. 3d --- (2016), 2016 WL 154116 (S.D.N.Y. Jan. 12, 2016) (finding that irrespective of Rule 37(e), court has inherent authority to order sanctions for falsification of evidence and attempted destruction, even where no destruction actually occurred).

E. Defense to Spoliation Motions.

1. Defense focuses on defeating each elements of a spoliation claim:

   a. The missing evidence existed at one time.

      - In many cases, there may have been a loss of files, but that's it – no loss of actual evidence. If the alleged ESI never existed, that is a defense.

   b. Alleged spoliator had a duty to preserve the evidence.

      - If the facts allow it – argue that the "trigger" to preserve the evidence had not yet happened

   c. The evidence was crucial to the movant being able to prove its prima facie case or defense and, Again, argue that the allegedly missing evidence is not essential to the plaintiff's claims.

   d. The spoliator acted in bad faith.[4]

2. Evidence.

[4] "[A] finding of bad faith or intentional misconduct is not a *sine qua non* to sanctioning a spoliator." *Reilly v. NatWest Mkts. Grp. Inc.*, 181 F.3d 253, 268 (2nd Cir. 1999). Rather, a finding of gross negligence will satisfy the "culpable state of mind" requirement, as will knowing or negligent destruction of evidence. *Id.*; *Residential Funding Corp. v. DeGeorge Fin. Corp.*,306 F.3d 99, 108 (2nd Cir. 2002) ("[t]he sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence"), superseded by rule as recognized by *CAT3, LLC v. Black Lineage, Inc.*, 2016 WL 154116, *4 (S.D.N.Y. 2016); *Zubulake*, 220 F.R.D. at 220 ("a 'culpable state of mind' for purposes of a spoliation inference includes ordinary negligence"). "[F]ailure to implement a litigation hold at the outset of litigation amounts to gross negligence.") *Toussie v. County of Suffolk*, 2007 WL 4565160, *8 (E.D.N.Y. 2007); *see also Chan v. Triple 8 Palace, Inc.*, 2005 WL 1925579, *7 (S.D.N.Y. 2005) ("the utter failure to establish any form of litigation hold at the outset of litigation is grossly negligent"); *Zubulake*, 220 F.R.D. at 220-21 ("[o]nce the duty to preserve attaches, any destruction of evidence is, at a minimum, negligent"; failure to preserve backup tapes following initiation of lawsuit was grossly negligent); *Barsoum v. NYC Hous. Auth.*, 202 F.R.D. 396, 400 (S.D.N.Y. 2001) (loss of tape recording of conversation was grossly negligent). In contrast, where the document destruction is accidental or without fault, courts have found mere negligence. *See, e.g., Port Auth. Police Asian Jade Soc'y of N.Y. & N.J. Inc. v. Port Auth. of N.Y. & N.J.*, 601 F. Supp. 2d 566, 570 (S.D.N.Y. 2009) (destruction of documents following September 11, 2001 terrorist attacks was negligent); *Davis v. Speechworks Int'l, Inc.*, 2005 WL 1206894, *4 (W.D.N.Y. 2005) (no culpability where documents were lost during a move).

a. No obligation to preserve the evidence claimed to have been destroyed.

b. Where there is an obligation, need to show that the documents at issue were not clearly or squarely covered.

c. Was the spoliated evidence "crucial" to the action. *Florida Evergreen Foliage v. E.I. DuPont De Nemours & Co.*, 165 F. Supp. 2d 1345, 1360 (S.D. Fla. 2001).

d. *Refute Awareness*. Spoliation requires **awareness** that the records destroyed were potentially relevant to litigation. Absent such awareness, there is no spoliation. *U.S. v. Kitsap Physicians Service*, 314 F.3d 995, 1001 (9th Cir. 2002). The future litigation must be "probable," which has been held to mean "more than a possibility." *Hynix Semiconductor Inc. v. Rambus, Inc.*, 2006 WL 565893 at *21 (N.D. Cal. 2006). *See, e.g., Arrowood Indem. Co. v. Bel Air Mart*, No. 2:11-CV-00976 JAM-AC, 2014 WL 841314, at *7 (E.D. Cal. Mar. 4, 2014) (no spoliation where "the contamination might have placed Bel Air on notice of a potential CERCLA action, but at the time the building was destroyed, it was not probable that the building would be relevant to an insurance coverage action.")

e. Show that the employer took all necessary and reasonable steps to protect the evidence. The defendant employer will need to present evidence to show what it did; when it did it; how it was implemented and what follow-up actions were taken.

F. First-Party Spoliation Claims. In addition to seeking spoliation sanctions, check your jurisdiction to determine whether there is an independent cause of action for spoliation.

1. Federal Law. "No federal law supports a freestanding lawsuit for spoliation." *Stevens v. United States*, No. 09-623C, 2010 WL 147918, at *1 (Fed. Cl. Jan. 7, 2010) citing *Lombard v. MCI Telecomms. Corp.*, 13 F. Supp. 2d 621, 628 (N.D. Ohio 1998) (entering judgment on "asserted claim for spoliation of evidence under federal law, because no such independent cause of action exists"). Rather, "federal law applies to the imposition of **sanctions** for the spoliation of evidence." *Carol O'Neal, as Pers. Representative of the Estate of Lanny O'Neal, Deceased, Plaintiff, v. Remington Arms Company, LLC, et al.*, No. 4:11-CV-04182-KES, 2016 WL 1465351, at *10 (D.S.D. Apr. 14, 2016); *see also Fodor v. E. Shipbuilding Grp.*, No. 5:12-CV-28-RS-CJK, 2014 WL 50783, at *1 (N.D. Fla. Jan. 7, 2014), appeal dismissed (May 20, 2014) ("There is no federal cause of action for "spoliation of evidence," there are only discovery sanctions").

2. State Law. Whether a party can bring an independent cause of action (tort) for spoliation is dependent upon state law. For example, Florida does not recognize an independent cause of action for spoliation. *See Martino v. Wal-Mart Stores, Inc.*, 908 So.2d 342 (Fla. 2005). However, Alaska, New Mexico, Ohio and West Virginia recognize a tort cause of action for spoliation of evidence by first parties and/or third

parties. *See Nichols v. State Farm & Cas. Co.*, 6 P.3d 300 (Alaska 2000)*; Coleman v. Eddy Potash, Inc.*, 905 P.2d 185, 189 (N.M. 1995); *Smith v. Howard Johnson Co., Inc.*, 615 N.E.2d 1037 (Ohio 1993); *Hannah v. Heeter*, 584 S.E.2d 560, 563-564 (W. Va. 2003).

3. Rule 37(e). The new amendments to Rule 37(e) do not "affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim." *See Advisory Committee Notes*, 2015 Amendment.