Preservation Duties in the Era of Electronic Discovery

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Introduction

> Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence. Our adversarial process is designed to tolerate human failings - erring judges can be reversed, uncooperative counsel can be shepherded, and recalcitrant witnesses compelled to testify. But, when critical documents go missing, judges and litigants alike descend into a world of *ad hocery* and half measures and our civil justice system suffers. To guard against this, each party in litigation is solemnly bound to preserve potentially relevant evidence.

United Medical Supply Co. v. United States,
77 Fed. Cl. 257, 258-59 (Fed. Cl. 2007).

In the electronic age, storing information is easier than ever with sources such as word-processing documents, spreadsheets, electronic mail, voice mail, text messages, website posts, logs, photos, etc. The same is true of information about the information – when the information was created, when it was modified, with whom it was shared and when, etc. (the so-called metadata). Computers effortlessly create and store both kinds of information.

With equal effortlessness, however, computers also alter this information. Every time a computer is booted up, shut down or merely operated, the computer is altering information stored on it. For example, computer systems commonly delete information on an ongoing, prescheduled basis to prevent overloading the system. They archive data, delete it, or overwrite it. They recycle back-up tapes and purge eMails. They alter metadata.

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[1] This paper was originally presented in connection with a presentation to the State Bar on May 7, 2011 by Attorney Gleisner, Marquette Law Professor Jay Grenig, Judge Ed Leineweber, Judge Richard Sankovitz and Attorney April Southwick. Attorney Gleisner and Professor Jay Grenig published a multi-volume treatise in 2005 entitled *e-Discovery & Digital Evidence*, which remains the flagship publication of Thomson Reuters Company.

These dynamics raise a concern because information stored on a computer or computer media – "electronically stored information," or ESI – may constitute *evidence,* and therefore the routine operation of the computer may result in the destruction of evidence. (And deliberate destruction of evidence can be a concern, too.) The law responds with the duty of *preservation.* This duty operates hand-in-hand with the doctrine of spoliation.

Fulfilling the duty of preservation, and avoiding spoliation, can be tricky, and the consequences for failing to do so can be severe. This paper offers practical perspectives on identifying preservation obligations, alerting clients and adversaries to their duties, and court procedures for enforcement.

The Duty to Preserve ESI

The fundamental rule is much easier to state than it is to fulfill: When litigation reasonably may be anticipated, a party has an affirmative duty to preserve ESI. This rule applies to all discovery, but with particular significance for electronic discovery because of the automatic processes at work in computers.

"Every party or potential litigant is duty-bound to preserve evidence essential to a claim that will likely be litigated." *American Family Mutual Insurance Co. v. Golke,* 2009 WI 81, ¶ 21, 319 Wis. 2d 397, 768 N.W.2d 729 *citing Sentry Ins. v. Royal Ins. Co. of Am.*, 196 Wis. 2d 907, 918, 539 N.W.2d 911 (Ct. App. 1995). The duty is addressed in a multitude of decisions that, while not binding on a state court in Wisconsin, may nevertheless be persuasive. *See, e.g., Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. Feb 19, 2010); *Pension Committee of Univ. Montreal Pension Plan v. Banc of Am. Sec. LLC*, 2010 WL 184312 (S.D. N.Y. Jan. 15, 2010); *Treppel v. Biovail Corp.*, 249 F.R.D. 111, 121 (S.D. N.Y. 2008); *Cache La Poudre Fees, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 627-28 (D. Colo. 2007).

The duty must be taken seriously. In a recent prominent study of electronic discovery abuses, the authors studied 230 cases between 2006 and 2009 in which sanctions were awarded and found that the most common misconduct was failure to preserve ESI, which was the sole basis for sanctions in 90 cases. The most common preservation lapse consisted of failing to suspend the automatic deletion of ESI. Willoughby, Jones, Antine, "Sanctions for E-Discovery Violations: By The Numbers," 60 Duke Law Journal 789 (December, 2010).

Spoliation

The preservation duty works hand-in-hand with the doctrine of spoliation. Spoliation is the "intentional destruction, mutilation, alteration, or concealment of evidence." *American Family v. Golke,* 2009 WI 81, ¶ 21, *quoting* Black's Law Dictionary 1409 (7th ed. 1999). Spoliation sanctions "serve two main purposes: '(1) to uphold the judicial system's truth-seeking function and (2) to deter parties

from destroying evidence.'" *Id., quoting Insurance Co. of N. Am. v. Cease Elec. Inc.*, 2004 WI App 15, ¶ 16, 269 Wis. 2d 286, 674 N.W.2d 886.

In disputes over spoliation of ESI, the cases seem to pivot on two central issues:

- Is the loss of ESI prejudicial? In other words, did the lost information have any material value to the party seeking it? Is it available from another source (say, at the expense of the person who lost it)?

- How foreseeable and avoidable was the loss of the information? In Wisconsin, serious sanctions, such as dismissal or directed verdict, are appropriate only if a party acts egregiously, "that is, in a conscious effort to affect the outcome of litigation or in flagrant, knowing disregard of the judicial process." *American Family v. Golke*, 2009 WI 81, ¶ 5. *See also City of Stoughton v. Thomasson Lumber Co.*, 2004 WI App 6, ¶ 39, 269 Wis. 2d 339, 675 N.W.2d 487, *Garfoot v. Fireman's Fund Insurance Co.*, 228 Wis. 2d 707, 599 N.W.2d 411 (Ct. App. 1999), *Sentry Insurance v. Rural Insurance Co. of North America*, 196 Wis. 2d 907, 539 N.W.2d 911 (Ct. App. 1995), *Milwaukee Constructors II v. Milwaukee Metropolitan Sewerage District*, 177 Wis. 2d 523, 502 N.W.2d 881 (Ct. App. 1993); *Jagmin v. Simonds Abrasive Co.*, 61 Wis. 2d 60, 80-81, 211 N.W.2d 810 (1973).

In egregious circumstances, a court may order a claim dismissed or judgment in favor of the party seeking the lost information. When the circumstances are not egregious, lesser remedies will suffice. *See, e.g., In re Estate of Jane Neumann*, 2001 WI App 61, ¶ 80, 242 Wis. 2d 205, 626 N.W.2d 821 ("Courts have fashioned a number of remedies for evidence spoliation. The primary remedies used to combat spoliation are pretrial discovery sanctions, the spoliation inference, and recognition of independent tort actions for the intentional and negligent spoliation of evidence. . . . Wisconsin has recognized the first two remedies"), *Sentry Ins. v. Royal Ins. Co.*, 196 Wis. 2d 907, 918-19, 539 N.W.2d 911 (Ct. App. 1995) (exclusion of evidence).

In certain circumstances, the destruction of ESI may not merit a sanction at all. In particular, if ESI is altered or destroyed by the routine, good faith operation of a computer system, a court is barred from imposing sanctions otherwise available under the rules of civil procedure. In 2010, the Supreme Court created a new safe harbor rule that parallels the provision of Fed. R. Civ. P. 37(f). The rule provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide [ESI] lost as a result of the routine, good-faith operation of an electronic information system." WIS. STAT. § 804.12(4m).

Proving ESI spoliation can be challenging. For an interesting discussion of how it can be accomplished, see *In re Telxon Corp. Sec. Litigation*, No. 5:98CV2876, 1:01CV1078, 2004 WL 3192729 (N.D. Ohio July 16, 2004).

Events that trigger the duty to preserve

The duty to preserve information is triggered when a party learns or should know that it possesses or controls information relevant to existing litigation or an investigation, or to reasonably anticipated future litigation or an investigation. *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2nd Cir. 2001)("The obligation to preserve evidence arises when the party has notice that the evidence is relevant to the litigation or when a party should have known that the evidence may be relevant to future litigation"); *John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008); *see also Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216-18 (S.D.N.Y. 2003).

A "trigger event" refers to an event that triggers the duty to preserve information, including electronically store information. Examples of trigger events can include:

- Pre-litigation discussions, correspondence, demands, and agreements;
- The creation of a list of potential opponents before filing a lawsuit;
- Notice provided to an insurance carrier;
- Claims filed with administrative agencies;
- Substantive conversations with supervisors and others about a potential lawsuit;
- Retention of counsel or experts;
- Imminent appearance of a lawsuit or other red flags;
- Partial settlement of claim;
- Circulation of internal "document hold" memoranda; and
- Severity of injuries combined with the totality of circumstances.

"Reasonably Anticipated Litigation"

While "reasonably anticipated" is the consensus standard that is emerging from the case law and commentary, there is no bright-line rule indicating when a party should reasonably anticipate a lawsuit or investigation. Cases discussing a pre-litigation duty to preserve are generally fact-driven. One case went so far as to find that a duty to preserve arose eight years before suit was filed! *Phillip M. Adams & Associates, L.L.C., v. Dell, Inc.*, 2009 WL 910801 (D. Utah March 30, 2009). Whole treatises have been written on how to make the often difficult determination regarding the point at which a party should have foreseen litigation.

This section of the paper presents some common scenarios in which litigation was reasonably anticipated, triggering a duty to preserve information:

1. Facts Suggest That Litigation Will Likely Arise

Disputes of the sort that tend to lead to litigation will trigger the obligation to preserve. Examples found in the cases often involve current or former employees claiming employment discrimination. *Capellupo v. FMC Corporation*, 126 F.R.D. 545 (D. Minn. 1989) (employer's knowing and intentional destruction of documents warranted order requiring employer to reimburse employees for twice resulting expenditures); *Leon v. IDX Systems Corp.* 2004 WL 5571412, 5 (W.D. Wash. Sept. 30, 2004) (plaintiff ordered to pay $65,000.00 in litigation costs to defendant); *Scalera v. Electrograph Sys., Inc.*, 262 F.R.D. 162 (E.D.N.Y. 2009)(duty to preserve relevant e-mails arose when employer received employee's EEOC charge); *Byrnie v. Town of Cromwell Bd. of Educ.*, 243 F.3d 93, 108 (2nd Cir. 2001) (indicating that defendant should have anticipated suit when a rejected job applicant filed a complaint with human rights agency); *Zubulake v. UBC Warburg LLC*, 220 F.R.D. 212, 216 (S.D. N.Y.2003) (defendant should have reasonably anticipated litigation five months before the filing of the EEOC action based on emails from several employees revealing that they knew that the plaintiff intended to sue).

Likewise, knowledge of an incident involving a potentially serious injury can also trigger a pre-litigation duty to preserve. *Stevenson v. Union Pac. R. Co.*, 354 F.3d 739, 748 (8th Cir. 2004)(after a vehicle collided with a train; videotape destroyed pursuant to document retention policy; court upheld sanction of adverse inference instruction); *Rattray v. Woodbury County, Iowa*, 2010 WL 5437255 (N.D. Iowa Dec. 27, 2010) (sanction of adverse inference instruction permitted regarding pre-litigation destruction of video recording in action alleging strip search violated Fourth Amendment).

Specific or repeated verbal inquires or complaints about an incident may also trigger the need to consider whether a litigation hold should be issued. *In re Napster, Inc. Copyright Litigation*, 462 F. Supp. 2d 1060, 1068 (N.D. Cal. 2006) (duty to preserve triggered by oral threats of litigation); *Blinzler v. Marriott Int'l Inc.*, 81 F.3d 1148 (1st Cir. 1996)(plaintiff's repeated questions regarding the timing of an emergency call should have put hotel on notice that litigation was likely regarding a medical emergency that result in her husband's death); *Computer Assoc. Int'l v. American Fundware, Inc.*, 133 F.R.D. 166, 168-69 (D. Colo. 1990)(finding that where one software company made it explicitly clear to another in a pre-litigation meeting that it believed the second company was copying its source code, the second company was put on notice that litigation was reasonably foreseeable and it had a duty to preserve the code).

When a contract was terminated by one party during a dispute (the facts of which suggested that litigation was probable), a court held that an adverse inference instruction might issue because the defendant erased files relevant to the work

done under the contract. In *ABC Home Health Servs. v. IBM Corp.*, 158 F.R.D. 180 (S.D. Ga. 1994), IBM destroyed computer files that it should have known might be relevant to a possible litigation, where its employees had consulted with in-house attorneys regarding communications it received from the plaintiff. However, the court refused to enter a default judgment against IBM who acknowledged destroying the relevant project files.

In judging when a corporation has acquired enough information to trigger a duty to preserve, the corporation is generally deemed to know when its representatives know. *Zubulake IV*, 220 F.R.D. at 217 (identifying the document preservation trigger date when plaintiff's grievances were communicated to her supervisors); *Broccoli v. Echostar Communications Corp.*, 229 F.R.D. 506, 511 (D. Md. 2005) (employee's verbal and email communications with supervisors regarding potentially illegal behavior triggered duty to preserve).

2. Written Claim or Letter

Receipt of a written claim or letter that expressly and credibly threatens suit can be the trigger event. *See Fujitsu Ltd. v. FedEx I*, 247 F.3d 423 (2d Cir. 2001); *see also* Shira A. Scheindlin, Daniel J. Capra & The Sedona Conference, Electronic Discovery and Digital Evidence: Cases and Materials 106 (2008); *Goodman v. Praxair Services, Inc.*, 632 F. Supp. 2d 494, 511 (D. Md. 2009)(letter that openly threatens litigation puts the recipient on notice that litigation is reasonably foreseeable and the duty to preserve evidence relevant to that dispute is triggered); *Washington Alder LLC v. Weyerhaeuser Co.*, 2004 WL 4076674 (D. Or. 2004)(finding that a letter threatening to sue for antitrust violations put Weyerhaeuser on notice of possible litigation and triggered a duty to preserve documents).

Not all complaints constitute a trigger event. For example, a letter that only vaguely references a possible lawsuit or simply brings a matter to the company's attention may not require action. *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 622 (D. Colo. 2007)(defendants' duty to preserve evidence was not triggered by pre-filing correspondence from plaintiff's counsel because it did not threaten litigation); *Huggins v. Prince George's County, Md.*, 08:07-CV-825-AW, 2010 WL 4484180 (D. Md. Nov. 9, 2010)(clause in settlement agreement stating that plaintiff does not waive the right to file future unrelated actions was not sufficient to trigger an obligation to preserve). The determining factor is whether or not the allegations expressed in the correspondence are credible and suggest that litigation is reasonably anticipated.

3. Decision to File Suit

The defendant is not the only party subject to pre-litigation preservation obligations. Courts have held it to be improper for a plaintiff to destroy materials in the period after the decision is made to file suit but before the complaint is actually filed. *Struthers Patent Corporation v. Nestle Co.*, 558 F. Supp. 747, 758-

59, 765 (D. N.J. 1981). When determining whether to apply sanctions the court evaluates whether the party in question "knew or should have known" at the time of destruction that litigation was a "distinct possibility." *Id.* at 756. *See also Citizens for Consume v. Abbott Laboratories,* 1:01-CV-12257, 2007 WL 7293758 (D. Mass. Mar. 26, 2007) (contemplating litigation triggers an obligation to begin preservation); *Johnson v. Waterford Hotel Group, Inc.*, 3:09-CV-800 VLB, 2011 WL 87288 (D. Conn. Jan. 11, 2011)(plaintiff sanctioned for destruction of her journal after filing charge with human rights agency but prior to filing suit).

4. Receipt of Summons and Complaint

In many instances, a summons and complaint is received with no warning whatsoever. In such cases, service of the summons and complaint may constitute the first notice to the company, and it will trigger a duty to preserve. *Mosaid Tech. Inc. v. Samsung Electronics Co.*, 348 F. Supp. 2d 332 (D. N.J 2004) (court granted sanctions in the form of an adverse inference and monetary sanctions because "the duty to preserve exists as of the time the party knows or reasonably should have known that litigation is foreseeable . . . At the latest, in this case, that time was . . . when Mosaid filed and served the complaint.").

5. Protective/Preservation Order

A court order is another type of trigger event. A court has broad discretion in determining whether to enter a protective/preservation order to prevent the destruction of evidence. However, the issuance of a preservation order is by no means automatic, even in a complex case. *United States ex rel. Smith v. Boeing Co.*, 2005 WL 2105972, at 2 (D. Kan. Aug. 31, 2005) ("a specific order from the court directing one or both parties to preserve evidence is not ordinarily required"). Nevertheless, such orders "are increasingly routine in cases involving electronic evidence, such as e-mails and other forms of electronic communication." *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 136 (Fed. Cl. 2004).

Practical Considerations Relating to Preservation

1. Guiding a client's preservation efforts

These are the tasks seasoned counsel usually consider and/or undertake in guiding a client's efforts to preserve ESI:

- Advise clients about effective and reasonable retention policies and how to construct them in such a way that they can be managed in the event of a litigation hold.

- Learn from the client's information officers and managers the architecture, administration and dynamics of the client's information system, to know where pertinent information is located, how it is

stored, how it is accessed and what retention policies are in place and functioning.

- Counsel the client when litigation may be foreseen.

- Advise the client how to implement a litigation hold (more on this subject below). *See, e.g., Pension Committee of Univ. Montreal Pension Plan v. Banc of Am. Sec. LLC*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).

- Affirmatively and repeatedly communicate litigation holds to all affected parties and monitor compliance on an ongoing basis.

- Document and demonstrate efficacy of the preservation process, in the event that information is lost or good faith is ever questioned.

- Help the client determine which departments, locations, offices, employees, etc. may have generated information that needs to be preserved.

- Help the client determine whether pertinent ESI exists in the possession of third parties (*e.g.*, former employees, internet service providers, vendors, agents, professionals such as accountants or lawyers, directors, consultants, etc.).

- Supervise the suspension of the client's retention and backup processes.

- Deploy litigation specialists to prevent the client's IT functionaries from naively securing or investigating the client's information systems.

- Supervise the quarantine of data storage (*e.g.*, backup tapes) or hardware (*e.g.*, a particular employee's laptop or smart phone) or computer functions (*e.g.*, segregating personal from business, or in-house from exterior, eMail) in order to preserve ESI. Quarantining hardware and media may be more effective than attempting to quarantine ESI itself, because manipulating the files containing ESI risks altering the metadata.

- Supervise the imaging of computer systems or components, or other evidentiary copying, in the event that preservation calls for such measures.

- Supervise the protection of trade secrets and other privileged information contained in ESI that has been preserved for possible production in anticipated discovery.

- Negotiate with counsel for an adverse party to determine the scope of a litigation hold or a preservation order. (Preservation orders may be sought unilaterally, but, as pointed out above, preservation orders are not the norm. Courts demand a particularized showing of a need for such an order. *See, e.g., Valdez v. Town of Brookhaven,* 2007 WL 1988792 (E.D.N.Y. 2007); *Treppel v. Biovail Corp.*, 233 F.R.D. 363 (S.D.N.Y. 2006).)

- Seek clarification from a court as to disputed aspects of a litigation hold.

2. Guiding an adverse party's preservation efforts

A key step in preserving evidence that may exist among an opponent's ESI is the service of a litigation hold notice, also known as a preservation letter. A litigation hold notice is sent whenever a party expects an opposing party to have ESI that is relevant to an anticipated lawsuit. The letter is not just a professional courtesy, nor is it a discovery request. It serves notice that if relevant ESI is lost, sanctions or other relief will be sought. If ESI is lost, an effective litigation hold letter will help the court judge an opponent's claim that the information was lost in good faith, and set up a claim for spoliation remedies. (Recall that in judging whether a party has acted in good faith, a court may consider whether the party was on notice of a duty to preserve certain information and whether the party modified or suspended certain features of the computer system accordingly.)

The litigation hold letter should:

- clearly identify the relationship between the parties;

- clearly define the anticipated dispute;

- clearly identify materials to be protected (documents, electronic mail, databases, audio files, etc.) and suggest where the information may be found;

- advise the adverse party to suspend its regular information retention policies;

- advise the adverse party not to install new software that may destroy or alter the operation of software which created the ESI of concern to the dispute;

- advise the adverse party to distribute the notice to all persons with the organization who are known or suspected to have relevant information in their control, and seek their acknowledgement that they have received and understand the notice;

- if justified, invite the party immediately to make an evidentiary copy of the requested information;

- invite the adverse party to negotiate an acceptable search protocol, as a precursor to discovery; and

- explain the consequences of failing to preserve the evidence.

Although serving a litigation hold letter is not a formal component of the discovery process in Wisconsin, newly adopted Wis. Stat. § 804.01(2)(e) requires parties to confer regarding preservation of ESI prior to serving discovery seeking ESI. A well-written litigation hold letter will frame the agenda for such discussions. It also serves as actual notice that litigation is anticipated, constituting a trigger event.

If the opposing party is a corporation and it is not known who represents it, consider sending the letter to several individuals, including the chief executive officer, general counsel, director of information technologies and the registered agent for service of process. Also consider sending a copy of the letter to relevant department heads or key management personnel. The goal is to ensure that the letter reaches people with the authority to take action to preserve evidence, as well as individuals in possession of information that might otherwise be destroyed.

The Role of the Courts

Courts serve three vital roles in preservation disputes:

- Reminding parties of their preservation duties, in order to help them avoid dragging the court into protracted and time-consuming disputes over lost evidence;

- Guiding parties to balance their need to preserve relevant information with the need to continue routine computer operations; and

- Imposing sanctions when rules are broken.

There are three typical junctures in a case in which a court is presented with the opportunity to fulfill these roles:

- At the initial scheduling conference;

- When considering and approving a preservation order; and

- When hearing and ruling on discovery motions.

Scheduling Conferences and Discovery Motion Hearings

Recent rule changes have been designed to raise the consciousness of parties and courts to the challenges of electronic discovery. An amendment to Wis. Stat. § 802.10(3) specifically directs the parties to discuss electronic discovery at the scheduling conference. An amendment to Wis. Stat. § 804.01(2) requires parties, before embarking on electronic discovery, to discuss a host of issues, specifically including preservation. Section 804.01(2)(e) also provides that if a party fails or refuses to cooperate in the pre-discovery conference, the other party may seek an order to compel, or may seek an order limiting electronic discovery. Enforcement motions like these present an opportunity for the court to ensure that, among other things, parties are attending to their preservation duties.

Preservation Orders

Because a blanket preservation order may unduly interfere in a party's day-to-day business operations and may be prohibitively expensive, the order should be narrowly drawn. Unless the parties have stipulated to the terms of the order, the court first should discuss with the parties whether an order is needed and, if so, the scope and duration of the order together with its particular logistics (in particular, whether it calls for the responding party to make an evidentiary copy of ESI, or merely suspend routine retention policies).

In crafting the order, it is important to know from the responding party what data management systems are routinely used, the volume of data affected, and the costs and technical feasibility of implementing the order. The order should specifically address how and when a party is permitted to destroy or alter ESI while the order is in effect. For example specified categories of documents or data may be exempted if the cost of preservation substantially outweighs their relevance, and particularly if the information can be obtained from other sources. As issues in the case are narrowed, the court should reduce the scope of the order.

Spoliation Sanctions

A range of sanctions is available:

- Dismissal
- Default judgment
- Issue preclusion
- Excluding evidence or testimony (particularly when the information that was destroyed is critical to rebutting such evidence or testimony)
- Adverse inference jury instruction (*i.e.,* instructing the jury that it may infer from the destruction of ESI that information contained in it would have

been unfavorable to the party that destroyed it; depending on the circumstances, the instruction might provide that the inference is rebuttable)

- Additional discovery at the expense of the spoliator

- Other monetary sanctions

The law is not yet settled as to which sanction to apply. Factors which courts consider include:

- the extent to which the information that was destroyed is available from other sources;

- the extent of the prejudice suffered by the party seeking to discover the information;

- whether the evidence was destroyed intentionally, *see, e.g., Stevenson v. Union Pac. R.R. Co.,* 354 F.3d 739 (8th Cir. 2004); *Morris v. Union Pac. R.R.*, 373 F.3d 896 (8th Cir. 2004);

- even if the evidence was not destroyed intentionally, whether its destruction was nevertheless the result of bad faith or willful conduct, *see, e.g., Mosaid Techs. Inc. v. Samsung Electronics Co.*, 348 F. Supp. 2d 332 (D. N.J. 2004);

- ordinary negligence, *see Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002); and

- the extent to which the information was destroyed as a result of a routine application of a reasonable records management policy.

Conclusion

When considering the advance of technology in the field of litigation and the array of information systems at our fingertips, we hear the ongoing debate between those who believe that we were never better off than we are now, against those who believe we would have been better off if none of it had ever been invented. One can imagine which side of the debate is taken up by those who have employed electronic discovery effectively, and which is taken up by those who have been burned by a failure to observe the duty to preserve.

Because there is no going back, competent litigation counsel must master and be able to communicate to clients the duty to preserve, a sound understanding of when the duty is triggered, practical considerations in fulfilling the duty, and the role courts can play.