Best Practices: Litigation Holds and Resolving Spoliation Motions

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By Sonny Haynes

Understanding how to advise clients on developing document retention policies and defend against spoliation motions, as well as the future of ESI discovery under proposed FRCP amendments, is critical.

Spoliation motions in civil lawsuits are on the rise as businesses continue to create and manage electronically stored information (ESI) at increasing rates. E-mail continues to be a target for e-discovery and the implications of ESI preservation will only become more important. In 2013, business e-mail accounts accounted for only 24 percent of all worldwide e-mail accounts, but accounted for the majority of e-mail traffic with over 100 billion e-mails sent and received each day. Email Statistics Report, 2013-2017, The Radicati Group (April 2013). E-mail remains the predominant form of communication in the business space. This trend is expected to continue and business e-mail is projected to account for over 132 billion e-mails sent and received each day by the end of 2017. Id. The accessibility of data on mobile devices means that counsel representing business clients must also consider other sources of ESI, such as client business records saved at an employee’s home, text messages, voice mail messages, social media, storage devices such as flash drives, cloud data, metadata, and even Global Positioning Systems (GPS) inside electronic devices. Many of the technology tools and social media platforms that are typically associated with individuals—“tweeting,” “snapchatting,” and “facebooking”—can become part of the discovery process when representing businesses. Any form of ESI storage,
media, or data used for business purposes can become subject to claims of spoliation if it is destroyed, lost, or altered.

This article provides practical advice to help litigators advise clients on developing document retention policies and highlights best practices regarding litigation holds. The article also addresses defending spoliation motions and the future of ESI discovery under the proposed amendments to Rule 37(e) of the Federal Rules of Civil Procedure.

**Spoliation in the Era of Technology**

“Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *West v. The Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (citing Black’s Law Dictionary 1401 (6th ed. 1990)). In one of the most cited cases on spoliation, U.S. District Court Judge Shira Scheindlin began her opinion with a quotation by Mason Cooley: “documents create a paper reality we call proof.” *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 214 (S.D.N.Y. 2003) (*Zubulake IV*). In this era of modern technology, “proof” is increasingly created with ESI. As ESI becomes more and more a part of the way that business is done, it also increases the danger that clients can unwittingly become subject to spoliation motions for the inadvertent loss or alteration of ESI. To be sure, electronic data “is much more susceptible to unintentional destruction than hard copy documents.” Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 Mich. Telecomm. L. Rev. 71, 71 (Fall 2004). The concept of spoliation is not a new one, but advances in technology and the prevalence of ESI at home and in the workplace mean that defense attorneys have to think about document preservation requirements in a new and expanded way for matters large and small. Indeed,
documents now create both a paper and electronic reality for counsel defending spoliation motions.

Given the prevalence of ESI and the rise in spoliation motions lodged against parties, defending against a spoliation motion can become a costly and time-intensive endeavor. Spoliation claims and other ESI issues have assumed a level of prominence in civil litigation that warrants special attention by every litigator. Courts are placing the responsibility on counsel to coordinate a client’s discovery efforts. Although Judge Scheindlin noted that a party “acts at its own peril” if it takes actions in a manner contrary to counsel’s instructions, counsel must still be able to show that he or she took reasonable and diligent steps to ensure preservation. *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422, 436 (S.D.N.Y. 2004) (*Zubulake V*). Staying current on issues involving ESI will help defense counsel advise clients on best practices regarding retention policies and litigation holds to mitigate risk during the discovery process.

**Developing Sound Document Retention Policies**

The federal common law duty to preserve documents arises when there is pending or anticipated litigation. If a client ever faces a spoliation motion, a retention policy can help create the paper trail that demonstrates an effort to preserve documents relevant to the litigation. It can also limit the amount of information that must be searched and preserved because the duty only arises after the party is on notice of pending or anticipated litigation. Thus, if documents are routinely destroyed under a retention policy before receiving notice of the litigation, a party will not be held liable for their destruction.

Retention policies should achieve the goal of mitigating risk without over-preserving documents. Even parties in continuous litigation are not expected or required to preserve “every
shred of paper, every e-mail or electronic document, and every backup tape.” Zubulake IV, 220 F.R.D. at 217. However, the retention and destruction policy should be executed consistently.

There are several key questions to ask when advising clients regarding retention policies:

- What types of documents will be covered by the policy?
- Is there a legal requirement for the length of time documents must be retained?
- Where are the documents covered by the policy stored?
- Who will be responsible for auditing and enforcing the policy?
- Who can an employee contact with questions about retention and disposal of documents?
- How often will the policy be audited?
- What actions must be taken in the event litigation is pending or threatened?

A retention policy should address all of these questions and should be flexible enough to be suspended when a litigation hold must be put in place. However, when litigation is imminent or has already commenced, a party cannot blindly destroy documents and expect to be shielded by a document retention policy. Thus, as one district court explained, the mere existence of a procedure is insufficient to satisfy obligations to preserve discoverable evidence if it does not actually preserve evidence. Fidelity Nat. Title Ins. Co. v. Captiva Lake Inv., LLC, 2015 WL 94560 (E.D. Mo. Jan. 7, 2015).
Implementing Litigation Holds

When a party reasonably anticipates litigation, the best practice is to suspend its routine retention policy and implement a litigation hold. The purpose of drafting and disseminating a litigation hold letter is to stop the destruction of documents that would be relevant to pending or anticipated litigation. Although some courts have held that the absence of a litigation hold is not, by itself, dispositive in a spoliation dispute, it is generally the best practice to implement one as soon as practicable after the duty to preserve is triggered. See Chin v. Port Authority of New York & New Jersey, 685 F.3d 135, 162 (2d Cir. July 10, 2012) (lack of written litigation hold notice is not gross negligence per se, but one factor to consider in imposing sanctions); De Espana v. Am. Bureau of Shipping, 2007 WL 1686327, at *4 (S.D.N.Y. June 6, 2007) (no finding of gross negligence where the party breached its obligations to adequately preserve records and did not establish a timely formal litigation hold—even where some e-mails were destroyed—because the party took steps to preserve some documents).

The “duty to preserve” trigger is not always as clear as a demand letter or being served with a complaint. When it is unclear whether the duty has been triggered, counsel should be guided by a careful consideration of whether a court may look back on the totality of the circumstances and decide that there was sufficient information to believe that litigation was reasonably anticipated. Reasonable anticipation speaks to probability and not possibility. The mere possibility of a lawsuit does not generally impose a duty to preserve. Zubulake IV, 220 F.R.D. at 217.

Counsel must be aware that “a party’s obligations do not end with the implementation of a ‘litigation hold’— to the contrary, that’s only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party’s efforts to retain and produce relevant documents.”
In re Seroquel, 244 F.R.D. 650, 663 (M.D. Fla. 2007). A litigation hold should not be a one-time e-mail or oral communication. Counsel should put the litigation hold in writing and follow up with a client to ensure that it is properly implemented and followed. It is counsel’s responsibility to provide oversight so that a client and its employees act competently, diligently, and ethically to comply with their duty to preserve. Counsel may periodically reissue the initial litigation hold letter without making substantive changes as a reminder of a client’s preservation responsibilities. If the issues involved in a case change, counsel may need to revise the litigation hold letter to reflect the expanded or narrowed scope of preservation. Any change in preservation requirements should be communicated to a client as quickly as practicable.

Some courts hold that when the duty to preserve arises, a party’s obligations go beyond concluding that the party does not own, possess, or control the evidence. The United States Court of Appeals for the Fourth Circuit has stated that “if a party cannot fulfill this duty to preserve because he does not own or control the evidence, he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence.” Silvestri v. General Motors, Corp., 271 F.3d 583, 591 (4th Cir. 2001). District courts in the First and Sixth Circuits follow the same rule. See Velez v. Marriott PR Management, Inc., 590 F. Supp. 2d 235, 258 (D.P.R. 2008); Jain v. Memphis Shelby County Airport Auth., 2010 WL 711328 (W.D. Tenn. Feb. 25, 2010). Thus, it is not always sufficient to disregard potentially relevant evidence simply because it is not within a client’s possession or control.

The Anatomy of a Litigation Hold Letter

Before drafting a litigation hold letter, counsel should understand how a client stores information, whether physically or electronically. Contacting the IT department to investigate
how ESI is stored may be a necessary step, but counsel should have familiarity with ESI and IT systems to perform an early data assessment and gather information to comply with the early disclosure requirements. Although mapping a client’s ESI is often delegated to others, counsel must be able to communicate about ESI throughout the discovery process. This becomes important when explaining the scope of evidence relevant to the issues involved in the litigation to opposing counsel. Put simply, if counsel does not understand the “what,” “when,” “where,” and “how” of a client’s ESI storage, he or she cannot effectively advocate for narrowing or broadening the parameters of ESI discovery.

A litigation hold letter should notify a client that litigation is underway or that litigation is anticipated. In the event litigation is anticipated, the letter should generally state the matter and the claims expected. Given recent case law on the discoverability of litigation hold letters, counsel should be careful about including information regarding the merits of a case. However, including general information about the pending or anticipated claims can help clients identify which individuals within an organization may have relevant information. A letter may also identify the likely sources of relevant information (e-mails, text messages, voice mail messages, or other documents) and their locations (desktop computers, laptop computers, and mobile devices).

Counsel should always explain the duty to preserve and the consequences of failure to comply with the litigation hold. Time is of the essence when the duty to preserve is triggered. Failure to impose and comply with a litigation hold quickly can result in a variety of court-imposed sanctions, which courts have broad authority to craft.

A letter should recommend selecting a person who will be responsible for preserving all potentially relevant evidence. The organization should also contact any former employees who
may have relevant information regarding the litigation. Former employees must understand their
duty to preserve all potentially relevant evidence. Finally, counsel should advise clients to err on
the side of preservation.

Counsel should consider responding to receipt of a litigation hold letter from an opposing
party in writing. The response is an opportunity to establish the scope of the evidence that
counsel considers relevant to the issues in a case. Reaching an agreement with opposing counsel
about the preservation parameters of relevant evidence can greatly mitigate the risk of defending
a spoliation motion later in discovery.

Safeguarding Attorney-Client Privilege and Work Product Protection

Litigation hold letters are communications from counsel to a client regarding document
preservation and thus are generally protected from disclosure by attorney-client privilege and the
However, a recent case departed from the general rule that litigation holds are privileged and
provides a cautionary tale to counsel drafting litigation hold letters.

20, 2014), involved a qui tam action against Kellogg Brown & Root Services, Inc., KBR
Root International, Inc., and Halliburton Company (collectively, KBR). KBR’s CEO and vice
president of the Legal Department sent litigation hold notices to large groups of individuals,
characterized essentially as “[a]ll KBR employees,” instructing them to preserve documents in
documents, KBR moved for a protective order for the litigation holds.
The court first recognized the general rule that litigation hold letters are privileged and protected. However, the court also observed that in the corporate context, preserving attorney-client privilege requires that internal communications be shared no more widely than necessary to implement the lawyer’s advice. *Id.* The court wrote, “sharing of otherwise confidential information within a corporation—even if the sharing is only with employees—can result in loss of the privilege if the sharing goes beyond a ‘need-to-know limitation.’” *Id.* A header describing the litigation hold notices as “Privileged & Confidential” did not convince the court that the attorney-client privilege covered the litigation hold letters. The court ultimately concluded that KBR failed to demonstrate its intent to keep the litigation hold notices confidential, and the attorney-client privilege did not apply. *Id.* at *5.*

Finding that the documents were similarly unprotected by the attorney work product doctrine, the court found that the litigation hold notices contained information about steps that KBR took to comply with government-issued subpoenas. *Id.* This was information that the court held would likely to lead to the discovery of admissible evidence under Rule 26 of the Federal Rules of Civil Procedure, distinguishing the notices from “generic” litigation holds. *Id.*

*Barko* illustrates that counsel should be conscientious when drafting litigation hold letters. Although litigation hold letters may not generally be sent to all of a client’s employees, counsel often advise clients to distribute them broadly to avoid court sanctions and to ensure that all relevant data is retained. In light of *Barko*, counsel should identify the key “need-to-know” players who should receive a litigation hold letter because broad dissemination could destroy confidentiality. The relevant IT representative should always be on the “need-to-know” list. Counsel should consider including a warning that a litigation hold letter should not be
disseminated more widely than necessary. It would also be prudent to advise litigation hold letter recipients not to discuss the litigation hold outside the company.

Perfunctory headers, such as “Privileged and Confidential,” are not enough to demonstrate intent to keep the litigation hold letter confidential under *Barko*. To help demonstrate that counsel intended the litigation hold letter to be kept confidential, the notice should contain a detailed explanation that the notice, its language, and its instructions are confidential and should not be shared with anyone inside or outside of the organization without express approval.

Counsel should keep in mind that a litigation hold letter needs to include adequate information to inform a client of the nature of the case and include instructions about preservation. However, given the decision in *Barko*, counsel should also be mindful not to disclose confidential information that would be damaging if a court ever ordered production.

**Defending Against a Spoliation Motion**

The stakes can be high when defending against spoliation motions, which is one very good reason to have structured plans for both document preservation and destruction before the duty to preserve arises. Courts have recognized that resolving spoliation motions is a fact-intensive task. As one court observed, spoliation motions often require a court to assess when the duty to preserve commenced, whether the party accused of spoliation properly complied with its preservation duty, the degree of culpability involved, the relevance of the lost evidence to the case, and the concomitant prejudice to the party that was deprived of access to the evidence because it was not preserved. *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 506 (D. Md. 2009). Before ruling on a spoliation motion, a court may have to hold a hearing, and if the court finds that spoliation happened, an appropriate remedy can involve determinations that may end
the litigation or severely alter its course by striking pleadings, precluding proof of facts, foreclosing claims or defenses, or even granting a default judgment. *Id.* When missteps result in the loss of relevant evidence, spoliation motions become not only a fact-intensive task for a court, but also a time-consuming and potentially costly endeavor for the litigants that can divert attention away from the merits of the case.

When bringing a motion for spoliation sanctions, the movant must prove that the party having control over the evidence had an obligation to preserve it when it was destroyed or altered and that the evidence that was destroyed or altered was “relevant” to the claims or defenses of the party that sought the discovery of the spoiled evidence. *Zubulake IV*, 220 F.R.D. at 220.

The destruction or loss must be accompanied by a “culpable state of mind” that can range from negligent to willful. *Id.* Over recent years, preservation of ESI has become a major issue confronting parties and courts, and loss of ESI has produced a significant split in the circuits regarding the range of culpability. Some circuits hold that the serious sanction of an adverse inference jury instruction can be imposed for the negligent loss of ESI. Other circuits require a showing of bad faith. Case law defines three possible states of mind for culpability: (1) bad-faith destruction, (2) gross negligence, and (3) ordinary negligence. *Sampson v. City of Cambridge, Md.*, 251 F.R.D. 172, 179 (D. Md. 2008). Generally, when evidence is destroyed intentionally or willfully, it is presumed that relevancy is satisfied. *Id.* When the destruction is negligent, the moving party must prove relevance.

The trigger for the duty to preserve is reasonable anticipation of litigation. Reasonable anticipation refers to the likelihood or the probability of litigation, not the possibility. Not even the existence of a dispute necessarily means that parties should reasonably anticipate litigation or

Imposing spoliation sanctions requires a finding that the lost, destroyed, or altered evidence was “relevant” to the claims or the defenses of the party that sought discovery of the evidence. The relevancy factor involves not only relevancy, but also “whether the non-destroying party has suffered prejudice from the destruction of the evidence.” Consol. Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335, 346 (M.D. La. 2006). Put another way, finding “relevance” for purposes of spoliation sanctions is a two-pronged finding of relevance and prejudice. Generally, courts find prejudice when a party’s ability to present its case or to defend is compromised. See, e.g., Silvestri, 271 F.3d at 593–94. Mere inability to present evidence likely to affect a jury’s verdict in light of all the other evidence admitted during a trial may be enough to establish prejudice. Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 112 (2d Cir. 2002).

One of the most commonly requested spoliation sanctions is an adverse inference instruction. An adverse inference is “a detrimental conclusion drawn by the fact-finder from a party’s failure to produce evidence that is within the party’s control.” Black’s Law Dictionary (9th ed. 2009). To receive an adverse inference jury instruction, the movant must demonstrate not only that the opposing party destroyed relevant evidence as that term is ordinarily understood under Rule 401 of the Federal Rules of Evidence, but also that the destroyed evidence would have been favorable to him or her. Zubulake IV, 220 F.R.D. at 221. To do this, “[t]he party seeking an adverse inference must adduce sufficient evidence from which a reasonable trier of fact could infer that ‘the destroyed or unavailable evidence would have been of the nature alleged by the party affected by its destruction.’” Residential Funding, 306 F.3d at 108–09. This means that the sponsor of the inference must proffer evidence sufficient to permit the trier of fact
to find that the document had potential relevance to the claim. One court has required that the movant must produce some “not insubstantial” direct or circumstantial evidence that the destroyed evidence could have been relevant to the contested issues in the case. *Kronisch v. United States*, 150 F.3d 112, 128 (2d Cir. 1998). Implicit in this standard is that the information would have been admissible. *De Espana*, 2007 WL 1686327, at *7.

Important to the “relevance” prong of imposing an adverse inference instruction as a sanction is whether the missing evidence would have been favorable to the movant. In this regard, if the movant cannot sufficiently show that the missing evidence would be favorable to the moving party, then an adverse inference instruction is improper. *Simoes v. Target Corp.*, 2013 WL 2948083, at *7 (E.D.N.Y. June 14, 2013). This is also true when it is equally possible that the missing evidence would have been favorable to the destroying party. *Id.* A guiding principle when defending against a spoliation motion requesting an adverse inference instruction should be that “in all events, above all else[,] [a spoliation] instruction must make sense in the context of the evidence[.]” *U.S. v. Laurent*, 607 F.3d 895, 903 (1st Cir. 2010). Ordering an adverse inference instruction without showing that the missing evidence would be unfavorable to the destroying party would not make sense in the context of the evidence.

When defending against a motion for spoliation sanctions, consider the timing of a plaintiff’s motion, especially if it is lodged after the discovery period closes. District courts may deny spoliation motions as untimely. Spoliation arguments should be made by “appropriate discovery motion” and not in “opposition to summary judgment.” *Ferrone v. Onorato*, 2007 WL 2973684 (W.D. Pa. Oct. 9, 2007). When a plaintiff fails to raise any concerns “during the discovery phase or bring them to the attention of the” court, a finding of untimeliness is proper. *Glenn v. Scott Paper Co.*, 1993 WL 431161 (D.N.J. Oct. 20, 1993).
The Future of Rule 37(e) of the Federal Rules of Civil Procedure

The policy reasons for sanctioning evidence spoliation include enhancing truth determination, assuring fairness, and promoting the integrity of the judicial system. See David P. Leonard, The New Wigmore: A Treatise on Evidence: Selected Rules of Limited Admissibility § 2.7 at 233. Currently, Rule 37(e) is the so-called “safe-harbor” provision and reads:

   Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

   The current Federal Rule 37(e) balances the policy reasons behind sanctioning spoliation of evidence with the reality that parties cannot be expected to store massive amounts of ESI for indefinite periods of time. Although the current language of Rule 37(e) is a “safe harbor” because it recognized the practical need to store and manage ESI efficiently and cost-effectively, it did not eliminate the possibility of sanctions for negligent or inadvertent spoliation.

   The Advisory Committee to the Judicial Conference of the United States Committee on Rules of Practice and Procedure has proposed an amendment to Rule 37(e). The proposed amendment to Rule 37(e) is part of the “Duke Rules Package.” During the Advisory Committee’s May 2010 Conference on Civil Litigation held at Duke University School of Law, there was nearly unanimous agreement that the disposition of civil actions could be improved. The Advisory Committee formed a subcommittee to develop rules amendments consistent with the overarching goal of improving the disposition of civil cases by reducing the costs and the delays involved in civil litigation and increasing realistic access to the courts.

   Specifically, the Advisory Committee’s goal in amending Rule 37(e) is to convert the “safe-harbor” provision into a spoliation rule that reconciles the circuit split regarding the
requisite degree of culpability—negligent destruction versus bad faith, intentional spoliation—necessary for the imposition of sanctions.

The amended Rule 37(e) would read as follows:

Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve the information, and the information cannot be restored or replaced through additional discovery, the court may:

1. Upon a finding of prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice;

2. Only upon a finding that the party acted with the intent to deprive another party of the information’s use in the litigation,
   a) presume that the lost information was unfavorable to the party;
   b) instruct the jury that it may or must presume the information was unfavorable to the party; or
   c) dismiss the action or enter a default judgment.

The Judicial Conference approved the proposed amendment to Rule 37(e) on September 16, 2014, and the rule awaits U.S. Supreme Court review, which will occur before May 1, 2015. If the U.S. Supreme Court approves the amendment, it will become effective December 1, 2015, unless Congress enacts legislation to modify, reject, or defer the proposed rule.

**The Mechanics of the Amended Federal Rule 37(e)**

Similar to the current Federal Rule of Civil Procedure 37(e), the amended rule only applies to ESI, rather than to tangible evidence.
There is no strict liability for failure to preserve electronically stored information under the proposed rule. The “because a party failed to take reasonable steps” language of section (e) sets the stage for a factual finding of culpability, and thus there is no strict liability for inability to produce ESI. “Reasonable” is contextual and proportional to the circumstances, sophistication, and wherewithal of the party. Charles S. Fax, Less Is More: Proposed Rule 37(e) Strikes the Right Balance, ABA Litigation News.

The “through additional discovery” language of section (e) means that a court can order a producing party to attempt to locate duplicates of the requested ESI elsewhere.

The permissive language of the rule means that judges “may” but are not required to use this rule and have the ability to draw on the inherent power of the courts to address issues of spoliation.

Spoliation can come in different forms. It “can occur as the result of actions by parties or by nonparties. It can be inadvertent or intentional. It can be the product of absolute good faith, the result of negligence or the exercise of consummate evil.” 10 Ill. Prac., Civil Discovery § 23:32 (2d ed.). Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99 (2d Cir. 2002), is a case in which ordinary negligence was a sufficiently “culpable state of mind” to impose spoliation sanctions. Residential Funding, 306 F.3d at 108. The court reasoned that “each party should bear the risk of its own negligence.” Id.

The “intent to deprive” language of Rule 37(e)(2) is designed to reject the negligence standard used in Residential Funding. The rule recognizes that there is a continuum of fault, but now requires more than ordinary negligence before imposing adverse inference instructions or dismissal as a spoliation sanction.

The amended rule outlines a three-part test for imposing spoliation sanctions:
1. The duty to preserve is triggered;
2. The party failed to take reasonable steps to preserve the ESI; and
3. The ESI cannot be restored or replaced.

If the above requirements are met, a court may order measures “no greater than necessary to cure the prejudice” upon finding such prejudice to the opposing party under subpart (e)(1). Measures that are “no greater than necessary to cure the prejudice” are meant to be remedial in nature and could include ordering further discovery, monetary sanctions, or excluding evidence. An order of “measures no greater than necessary to cure the prejudice” under subpart (e)(1) implies that a court may not order adverse inference instructions, dismissal, or the entry of default judgment under this subpart.

If a court finds “intent to deprive” the use of ESI, then the court can impose any of the sanctions enumerated in subpart (e)(2) of the rule. Although the new rule only applies to ESI, it is consistent with the idea that dismissal of an action is a particularly severe sanction and generally only warranted under certain extreme circumstances, as when spoliation denies a defendant access to “the only evidence from which it could develop its defenses adequately.” See Silvestri v. Gen. Motors Corp., 271 F.3d 583, 593–94 (4th Cir. 2001) (a case involving tangible evidence). Thus, the amendment demonstrates agreement that a sanction of dismissal is “usually justified only in circumstances of bad faith or other like action.” Id. at 593. The adverse inference instruction authorized under subpart (e)(2)(B) has also been described as a “drastic sanction.” Ziemkiewicz v. R+L Carriers, Inc., 996 F. Supp. 2d 378, 391 (D. Md. 2014).

The takeaway from the proposed amendments to Federal Rule 37(e) is that thinking ahead about sound retention policies and implementing litigation holds as soon as practicable will help counsel establish that a destroying party did not “fail to take reasonable steps” to preserve the destroyed, lost, or altered ESI. Some courts were already ahead of the curve in
considering the issuance of a litigation hold letter as but one factor to be considered in imposing spoliation sanctions. See, e.g., Chin v. Port Authority of New York & New Jersey, 685 F.3d 135, 162 (2d Cir. July 10, 2012). A properly crafted litigation hold letter that takes the decision in Barko into account should go a long way to establish the “reasonable steps” taken to preserve ESI. Counsel should be able to answer questions about who received a litigation hold letter, when the letter was updated or reissued, and what specific actions were taken to preserve ESI. Documentation will be key to demonstrating reasonable steps to preserve ESI.

The amended rule provides that a party may go back and attempt to restore or to replace lost ESI. Processes such as data mapping or working with a forensic expert to determine what can be restored or replaced may make a difference in the outcome of a spoliation motion under the proposed rule. Whether a party is prejudiced by the loss of information will likely be a hotly contested issue in legal proceedings and will still include familiar principles and an analysis to determine whether the evidence is “relevant” to a movant’s claims. To be sure, if a movant clears the precedent hurdles to establishing failure to preserve electronically stored information under amended Rule 37(e), the party defending the motion will be vigorously arguing that there was no “intent to deprive” the other party of information for use in the litigation.

Conclusion

E-discovery issues are on the rise and the proposed amendments to Federal Rule 37(e) will probably do little to make defending against spoliation motions any less costly, fact-intensive, or time-intensive. This article touches on just a few of the issues that have arisen and will continue to arise as technology plays an increasingly prominent role in civil litigation. However, if counsel has a high-level understanding of ESI, advises clients on best practices for retention
policies, and takes early responsibility for guiding clients through the litigation hold process, he or she will be in a much better position to defend against a spoliation motion down the road.

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*Middle market refers to companies earning annual revenues of $50 million to $2 billion. For more Middle Market Insights and to learn about Womble Carlyle’s Business Solutions for Middle Market companies, see: