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IN THIS ISSUE

This article discusses how to use preservation of evidence issues offensively and defensively in your practice and how to avoid pitfalls that can come from a failure to preserve evidence.

Document Preservation and Litigation Holds

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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 descent into a world of ad hocery and half measures – and our civil justice system suffers.[1]

I. The Duty to Preserve

A. When does the duty arise?

Under Texas state law the duty to preserve evidence does not arise until a party knows or reasonably should know there is a substantial chance a claim will be filed, and such evidence is relevant and material.[2] Federal law is similar. A party has a duty to preserve evidence when (1) the party has noticed that the evidence is relevant to litigation or (2) when a party should have known that the evidence may be relevant in future litigation. The oft-quoted *Zubulake* case described the duty as arising "Once a party reasonably anticipates litigation it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."[3]

While the standard may be generally repeated throughout the caselaw, the application is not always clear-cut. Whether the duty to preserve evidence exists is extremely fact-intensive and differs based on the facts, the jurisdiction, and the judge. Cases do seem to agree that a duty to preserve exists once a lawsuit has been filed. However, the analysis is much more difficult before litigation has been filed. One case described the duty as arising when a party "has a certain type of negative interaction with its potential adversary.[4] The analysis can be so confusing that some courts have even determined that the question of when the duty to preserve has been triggered should not be decided by a non-lawyer.[5]

The duty to preserve can be understood in the analogous context of pre-litigation privileges. It follows that if a party has created documents in anticipation of litigation, it can certainly be argued that such documents (and other relevant documents) should be preserved. To determine whether a party creates documents "in anticipation of litigation," two elements must be met: (1) a reasonable person would have concluded from the totality of the circumstances that there was a substantial chance that litigation would ensue, and (2) the party believed in good faith that there was a substantial chance

[1] *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 259 (Fed. Cl. 2007).
[2] *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 722 (Tex. 2003).
[3] *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).
[4] *Philmar Dairy, LLC v. Armstrong Farms*, 18-CV-0530 SMV/KRS, 2019 WL 3037875, at *3 (D.N.M. July 11, 2019).
[5] *See, e.g.*, *Clark Constr. Group, Inc. v. City of Memphis*¸229 F.R.D. 131, 136 (W.D. Ten. March 14, 2005) (holding that project manager should not have been permitted to determine whether documents were "relevant" before destruction).

that litigation would ensue.[6] A "substantial chance of litigation" does not meant a statistically significant chance.[7] Courts instead look to the severity of the damages and the totality of the circumstances to determine if a defendant anticipated litigation.

A formal or informal letter from an opposing attorney warning of potential future litigation is likely enough to trigger the duty to preserve, and the strategy in sending these letters is discussed *infra*.[8] Some courts have even held that a letter giving notice of an opportunity to cure a breach of contract may trigger a preservation of evidence duty.[9] In some cases, courts have held that parties are on notice of the likelihood of litigation when an accident occurs that results in severe death or injuries.[10] Other, even more extreme cases, have even held that an accident with minor injuries can put a defendant on notice of future litigation.[11] Even an accident without any personal injury can put a party on notice of potential litigation depending on the "sheer magnitude of the losses."[12] This is especially true when a defendant has investigated and documented the incident thoroughly. In other words, prelitigation investigations conducted by a party may lead a court to find that there is a duty to preserve evidence. This is especially true when such investigations are outside the normal course of business.

B. What must be preserved?

Parties do not have to preserve "everything." However, parties should take care, under both Texas and federal rules, that data relevant to the litigation (or potential litigation) be preserved. It is best practice to ensure that evidence that (1) is reasonably calculated to lead to the discovery of admissible evidence, (2) is reasonably likely to be requested during discovery, or (3) is the subject of a pending discovery motion should be preserved.

C. Who must preserve?

The "party" with possession, custody, or control of the evidence should ensure it is preserved. While this is often straight-

[6] *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193 (Tex. 1993).

[7] *Id.* at 204*; see also id.* at 215 (J. Doggett, concurring and dissenting).

[8] *See, e.g.*, *Tex. Elec. Coop. v. Dillard*, 171 S.W.3d 201, 209 (Tex. App. – Tyler 2005, no pet.) (defendant was on notice of potential claim and the evidence's potential relevance when it received a letter from the dead employee's attorney and confirmed receipt of the letter).

[9] *Renda Marin, Inc. v. United States*, 58 Fed. Cl. 57, 61-62 (Fed. Cl. 2003) (government was on reasonable notice of litigation when a contract dispute arose and the government's officer sent a cure notice to plaintiff).

[10] *See, e.g.*, *Stevenson v. Union Pac. Ry. Co.*, 354 F.3d 739, 747-48 (8th Cir. 2004); *Aggrey v. Stop & Shop Supermarket Co.*, No. 00 Vic. 7999(FM), 2002 WL 432388 at **1, 5 (S.D.N.Y. Mar. 19, 2002) (mem.).

[11] *See, e.g.*, *Houlihan v. Marriott Int'l, Inc.*, No. 00 Civ. 7439(RCC), 2003 WL 22271206, at *2 (S.D.N.. Sept. 30, 2003) (holding in case where hotel guest was injured in a room and a hotel employee was sent out to do an investigation that "Because Defendant made attempts to prepare for litigation itself, the Court finds that it had a duty to preserve evidence in its possession for use by the opposing party."); *but see Wal-Mart Stores*, 106 S.W.3d 718 (determining in case where plaintiff was hit in head by a falling decorative reindeer that the defendant was not on notice of a substantial chance of litigation because the plaintiff had reported he was not injured and did not threaten to sue or request that the defendant pay medical bills or other damages).

[12] *See Indem. Ins. Co. of N. Am. V. Liebert Corp*, No. 96 CIV.6675(CV), 1998 WL 363834, *4 n.3 (S.D.N.. June 29, 1998).

forward for smaller companies and individuals, there are some pitfalls that you should be aware of. Large corporations should particularly be careful that evidence is preserved in all departments, divisions, and related entities as well as with all potential custodians of record who may have the evidence. And, as the duty to preserve is often described along the lines of what would need to be produced in discovery – whatever is in the party's "possession, custody, or control." This duty could extend to ensuring that third parties such as vendors, accountants, payroll providers, security companies, and the like preserve evidence.[13]

II. Failure to Preserve

In both Texas and federal courts, the destruction of evidence can lead to sanctions ranging from monetary sanctions to an instruction to the jury that missing evidence was destroyed in bad faith because it would have reflected negatively on the spoliator. "Trial judges have broad discretion to take measures ranging from a jury instruction on the spoliation presumption to, in the most egregious case, death penalty sanctions."[14] The principle behind this is that if evidence is destroyed there can be a manifest unfairness and injustice because it increases the risk of an erroneous decision on the merits of the underlying cause of action.

Decisions on the failure to preserve evidence are within the discretion of the trial court and are extremely difficult to overturn on appeal.[15] When considering the appropriate remedy for spoliation a trial court should consider whether there was a duty to preserve, whether the alleged spoliator negligently or intentionally spoliated the evidence, and whether the spoliation prejudiced the opposing party's ability to present their case.

While sanctions are intended to be remedial rather than punitive, the failure to preserve evidence can lead to harsh consequences at trial. The spoliation instruction to the jury is generally only available in bad faith cases. Typically a spoliation instruction is not allowed when documents were destroyed under routine policy, but such harsh penalties may be imposed if the party should have initiated (and followed) a litigation hold before the data's destruction. It is important to note that penalties can be levied even against attorneys because it is the lawyer's responsibility to ensure that their clients do in fact retain all available information.

New Mexico courts also allow sanction remedies for spoliation, but go a step further in recognizing a cause of action for the tort of intentional spoliation of evidence.[16] The elements for the cause of action are: (1) the existence of a potential lawsuit; (2) the defendant's knowledge of the potential

[13] *See Marshall v. DentFirst, P.C.*, 313 F.R.D. 691, 697 (N.D. Ga. 2016); WAGSTAFFE PRAC. GUIDE: FED. CIV. PROC. BEFORE TRIAL § 33-IV[C][10]).

[14] *Trevino v. Ortega*, 969 S.W.2d 950, 953 (Tex. 1998) (citing *Watson v. Brazos Elec. Power Coop., Inc.*, 918 S.W.2d 639, 643 (Tex. App. – Waco 1996, writ denied); *Ramirez v. Otis Elevator Co.*, 837 S.W.2d 405, 412 (Tex. App. – Dallas 1992, writ denied)).

[15] *See id.*

[16] *Coleman v. Eddy Potash, Inc.*, 905 P.2d 185, 189 (1995) *overruled on other grounds*, *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NM-034, 131 N.M. 272.

lawsuit; (3) the destruction, mutilation, or significant alteration of potential evidence; (4) intent on the part of the defendant to disrupt or defeat the lawsuit; (5) a causal relationship between the act of spoliation and the inability to prove the lawsuit; (6) damages.[17] The intentional act of the defendant is an essential element; there is no recognized tort for the negligent destruction of evidence.

III. How to Draft a Document Retention Policy

While document retention policies are not required, many clients will want them because they help decrease the amount of data storage and because some documents are required to be maintained for certain periods of time under federal or state law. Document retention policies are also advisable because they can be a defense to document destruction in the face of a motion to compel or a motion for sanctions.

When crafting a document retention policy, you should always keep in mind how the policy will look to a judge down the road. Craft policies that you could defend with a straight face to a judge. Always use common sense and do what is (more than) reasonable.

A. What data is created in the first place

A little work on the front end can prevent major problems in the future. While you are reviewing a client's document retention policies, some related policies should be instigated.

For example, companies should have policies and routine training on proper email and document creation. This will make searching for emails and other documents much easier when a litigation hold does need to be put in place. You could also consider requiring employees to follow naming procedures when saving documents and providing subject lines for emails to make them easier to search. All data should be stored on one place – i.e. the company's server. Require that temporary copies (such as data saved to a personal hard drive, flash drive, or CD) be deleted after use.

Employees should also be well-informed on avoiding emails like "Let's go ahead and do x even if our lawyer doesn't like it." or "We're in breach of the agreement. Let's discuss." Companies should create policies that encourage face to face or telephone communications. Employees should be encouraged to "think before they write." Employees should not criticize coworkers in emails and avoid being informal in emails. It is a good idea to require that personal emails should be sent from personal email accounts hosted by an outside server and ban work-related instant messaging such as Twitter or Facebook. These things can help make your document retention and litigation hold policies much easier to manage in the long run. Settings should also be changed to limit employees' ability to permanently delete and archive emails.

B. Identify where the data is located

A first step is to identify the data and where it is located. You should meet with the IT department to determine what data is out there, where it is stored, and also what software and hardware will be necessary to

[17] *Myers v. Rogers Trucking Co., Inc.*, CV07-833 JH/ACT, 2009 WL 10696290, at *3 (D.N.M. Mar. 6, 2009).

access that data. With ever-changing computer and electronic data storage, it is increasingly difficult to keep up with technologies. Your client should also make sure that they maintain computers and other equipment needed to access old software programs. You should also think about data that is contracted out to other companies like a payroll firm or an accounting firm that would still be within your client's control.

C. Think through how the policy will be implemented

It is not enough to have a policy – it will need to be carefully implemented and enforced. It is probably worse to have a policy that is regularly violated than to not have a policy. For example, think through, with your client's input:

- Will you use software to track electronic information and help with document retention and destruction?
- What do you do when an employee leaves?
- How long will you keep the data that is identified?
- How will records be destroyed?
- Who is responsible for destroying the data?
- What exceptions apply to data destruction?
- In what cases will the policies be suspended?

It is imperative for an effective document retention policy that your IT people believe in your policy. IT people are notorious data hoarders. There have been stories of them saving data in odd places (such as their home or garage!) because they thought data might be needed some day. Let the IT people know that it is okay to delete data within the confines of the document retention policy. Existing data that *should* have been destroyed is still discoverable.

D. Enforce the policies

For an effective document retention policy, it is crucial that you enforce the policy. You should have set penalties, and follow them. You should also review the policy periodically to ensure that it still makes sense with the way the business is run and the technology is used. Consider having regular internal audits to ensure that employees are complying with the policy.

IV. Instituting Internal Litigation Holds

"Litigation holds are the single most challenging, time consuming, and important aspect of document retention."[18] The litigation hold should be thought out for each case as opposed to sending a "form" letter that is the same in each matter. Initiating a litigation hold is tied closely to the duty to preserve evidence, but the common-sense approach is to implement a litigation hold when it is "reasonable." You should note that every court's interpretation of when this point in time will be is different and work to protect your client (and yourself) by starting early and documenting the reasons for starting when you did.

[18] Kelsheimer and Rodriguez in "Document Retention: 800 Pound Gorilla."

A. What to save

The question of what to save is a more difficult one. The "save everything" approach is often unwieldy and very expensive. You will need to carefully tailor a document hold that captures the relevant data, but still allows irrelevant data to be destroyed within the routine policies. You should save the data that is known to be relevant, reasonably should be known to be relevant, reasonably calculated to lead to the discovery of admissible evidence, reasonably expected to be requested, and subject to an existing request.

To institute a litigation hold, you must first investigate. You should determine who is potentially involved and interview them. They will help you answer the next sets of questions. Be sure that the persons you interview are aware they should not destroy data (including data on their home computers, external hard drives, and cell phones). You should also think about interviewing outside third parties such as IT companies, vendors, accountants, payroll companies, auditors, and the like.[19]

These people can help you determine what the relevant data is, what is available, and where and how it is saved. Think about what information the other side will want (and you will want), and make sure that it is saved. Err on the side of too much data rather than too little data. A lot of discovery disputes arise when, for example, backups of data are destroyed. Also don't forget drafts of documents, shadow files, and paper documents. Think through when the dispute arose and how far back you should go back to preserve data.

B. How to save it.

Send a litigation hold letter to the relevant records custodians. A good litigation hold letter should be very clear and straightforward as to what the dispute is about so that the custodians can determine what information is relevant and should be saved. Do not leave them to guess. It should also explain *how* the information should be saved – placed in a central repository, flagged in emails, or other methods. The letter should set out reasons why the information is important and the potential consequences of failing to preserve it. Be specific in the types of data that should be saved and the types of automatic document destruction or data deletion policies that should be suspended. Invite recipients to ask questions about the hold or how to implement it.

Next you should actually collect the data, again erring on the side of too much rather than too little. Create repositories for paper and electronic copies of documents. Collect documents from the outside parties that you have identified such as the IT companies, vendors, accountants, payroll companies, auditors, and the like. Be sure that you and the IT people you are working with are communicating clearly what data needs to be saved, and what does not need to be saved. Run searches of key words and people through emails and other databases, and make sure that the documents are preserved. As the case progresses, follow up on the litigation hold and the categories of

[19] Care should be exercised, as communications with these persons may not be privileged, and the sharing of a litigation hold letter with them may destroy the privilege, as discussed *infra*.

documents that should be preserved. It might be possible that the developments of the matter or suit could affect the categories of documents that need to be saved.

C. Working with the other side

When litigation is filed, talk with the other side early if it looks like electronic discovery is going to be voluminous. Many federal courts require the parties to discuss, at the 26(f) conference, how electronic evidence will be stored, produced, and maintained, but it is a good rule of thumb for any case. It is a good idea to, when possible, reach an agreement with the opposing counsel regarding what will be preserved, how it will be preserved, the date range of preservation, and what search terms will be. If you do this, (1) you will allow your client to delete data outside of the scope that is agreed to, (2) you will force your opposing party to be responsible for electronic documents that they have, and (3) it will provide certainty to your obligations.

V. Are Litigation Hold Notices Privileged?

Generally, litigation hold notices are privileged.[20] Courts will usually allow the date of the letter, the recipients, and steps taken to preserve evidence to be discoverable, but limit the discovery of the letters themselves as they typically include attorney-client privileged information.[21] This rule is not absolute. In one case, a court held litigation notice were not privileged. The court considered that the hold notices did not advise employees to keep them confidential, and in fact instructed recipients to share the letter with others who did not receive it.[22] In another case, a court held that when a party had a duty to preserve evidence beginning in one year but did not send the litigation hold letter out until much later, the hold letters were discoverable.[23]

VI. Preservation Letters

Think of a preservation letter as a litigation hold that is sent to the other side. While there are some similarities, there are some unique issues that arise with preservation letters. The goal of a preservation letter is to remind your (potential) opponent to preserve evidence, to make sure the evidence does not disappear, and to serve as a key piece of its own evidence if there is a subsequent claim of spoliation. While a preservation letter does not automatically create a duty to preserve evidence, it is good evidence to argue that the duty to preserve has arisen, and that subsequent document destruction was in bad faith. In other words, sending this letter before documents are destroyed gives you the "I told you so" argument.

A. Do you want to send one?

If considering sending a preservation letter, think very carefully about whether you want to do it. A preservation letter is not specifically sanctioned by the Rules of Civil Procedure, so it may not have the privileges

[20] *See Gibson v. Fort Motor Co.*, 510 F. Supp. 2d 1116, 1123 (N.D. Ga. 2007); *Muro v. Target Corp.*, 250 F.R.D. 350, 360 (N.D. Ill. 2007).
[21] *See Cannata v. Wyndham Worldwide Corp.*, No. 2:10-cv-00068-PMP-VCF (D. Nev. Aug. 16, 2012).
[22] *United States ex rel. Barko v. Halliburton Co.*, No. 1:05-CV-12796 (D.D.C. Nov. 20, 2014).
[23] *Major Tours Inc. v. Colorel*, No. 05-3091 (D. N.J. Aug. 4, 2009).

that other discovery has. Using a preservation letter to put pressure upon, for example, lost customers or other third parties may set you and your client up for a counterclaim based on libel or tortious interference. It may also highlight to the recipient that they have potential claims that they might not have otherwise considered or felt compelled to move forward on or cause them to consider filing a declaratory judgment action, giving them a chance to choose venue. This is not to say not to send the letter, but you should be aware of potential negative consequences and help your client make an informed decision.

B. Scope

In writing a preservation letter, do not be overly cryptic in your description of what kinds of documents and evidence you are looking for. All you are trying to do is keep the other side from destroying relative evidence. As with the litigation hold letter, the preservation letter should be "reasonable," understandable, and well thought out.

Watch out for phrases like "any and all" with respect to electronic evidence in particular. It is impossible for a company to save any and all electronic evidence. For example, electronic communications would include phone calls. If what you are really looking for is emails, then say that. If you really want recorded phone calls, say that. Other types of evidence you might seek to preserve include text messages, temporary files, deleted files, and archival tapes. Be specific as to the types of files you are looking for, and also where such files may be located (such as desktop computers, mainframes, mobile phones, flash drives, etc.).

If you know which specific persons, divisions, or departments have relevant data, include their names specifically. Consider sending the letter to them as well as to the officers of the company, the head of the IT department, the registered agent, and the insurance adjuster. On top of that, you should include a request that the preservation letter be sent to all records custodians, including third party vendors who may be in possession of relevant data.

C. Educate your opponent

To be effective, you need to educate your opposing party on what the evidence is, how it might be deleted or overwritten if they don't take steps to stop it, and who some of the identified key players are. A good preservation letter should halt routine business practices geared toward the destruction of potential evidence. Educate your opponent on stopping server backup tape rotation, electronic data shredding, scheduled destruction of backup media, re-imaging of drives, and the like.

If the letter is pre-suit, spell out the nature of the claim in detail so that your opponents know what the claim is about and can better identify what information might need to be retained. As much as possible, be fact specific. Name specific persons, dates, business units, office locations, events, etc. Do not forget to request that physical documents also be maintained. At the same time, you should not ask your opponent to keep more information than your client would reasonably keep. Your request might well be flipped back on you.

It is also a good idea to include a paragraph that states if the recipient does not understand that letter to contact you. State your willingness to meet and confer with the recipient regarding your notice.

D. When to send (and when not to send)

A key point in a successful preservation letter is thinking about when you want to send it. Usually, you will want to send it as soon as you can identify who the potential defendants and what the possible claims are. You should keep in mind, however, that just sending a letter does not create any legal rights or obligations and does not change the rules of procedure. It is generally a good idea to send a preservation letter when there is evidence you think would be destroyed otherwise, whether maliciously or innocently. The letter will also put the putative defendant on notice that they are about to be embroiled in a lengthy, costly, and complicated discovery battle, and it can help support an argument later that the defendant was warned from the beginning to preserve evidence.

There are some occasions that you will want to delay sending a preservation letter. For example, if you think the defendant will not hesitate to destroy evidence, it might be more effective to seek a TRO, or include the preservation letter with your petition. If you want information to be destroyed in the normal course of business because it would be unfavorable to your position, it would not do much good to send a letter to the other side to preserve that evidence. Another time you might not want to send a preservation letter is if it would cause the other side to hire a lawyer and explore their own claims. If you have not sent a preservation letter prior to filing the lawsuit, consider including a preservation section in your petition or complaint.

E. Don't forget third parties.

The preservation letter may also need to be sent to an accountant, banker, or another third party, if you believe that they have documents that are relevant to the dispute and not likely to be preserved. Alternatively, you could request in your preservation letter to the other party that they contact those third parties directly. This will depend on the dynamics of your specific situation.

VII. How to Respond to a Preservation Letter

When you receive a preservation letter, be sure that your client contacts their insurer. Review the preservation letter carefully to understand the scope of what it is requesting, the personnel involved, and the types of evidence that might be at issue. Do not assume that your client is automatically preserving the relevant evidence. Instead, interview relevant employees of your client, including IT personnel when available, so that you understand what data exists, where it is located, and how it can be preserved. Think about whether third parties have relevant information that should be gathered now. Give your client and its employees specific instruction in document preservation, and have them document the steps that have been taken to preserve the relevant evidence.

If you believe the scope of the preservation letter is overly broad, write a letter back explaining why you think so, what the proper

scope of the preservation should be, what steps your client is taking, and why these steps are reasonable. This will put the proverbial ball back in your opponent's court to explain why you are acting unreasonably. And, if your client violates the original preservation letter, but you have informed your opponent of such concerns, it will look better in front of a judge.

VIII. Conclusion

With the volume of data that is created every day, it is important that clients understand what data should be kept and what can be deleted. Carefully crafted document creation policies, document retention policies, and litigation holds will help your client be prepared for litigation and avoid costly discovery disputes. By the same token, understanding the issues of your case and where documents may be stored will help you craft reasonable preservation letters to ensure that your opponent has preserved relevant evidence, or set your client up for success if he has not.

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