SUPPLEMENTAL MEMORANDUM TO:
THE EVIDENCE & CIVIL PRO. COMMITTEE RE SPOLIATION

TO: TOM SHRINER

FROM: BILL GLEISNER

DATE: OCTOBER 31, 2013

RE: MORE REGARDING SPOLIATION

INTRODUCTION

This is intended as a supplement to my October 4, 2013 memorandum to the Evid. & Civ. Pro. Committee concerning spoliation. In this memo I will 1) review the current work of the Advisory Committee of the U.S. Judicial Conference, 2) discuss further the concept of spoliation and 3) review in greater detail the law on spoliation in Wisconsin.

I. THE WORK OF THE ADVISORY COMMITTEE

In Appendix A to this memorandum is the most current communication from the Advisory Committee of the U.S. Judicial Conference concerning spoliation. The discussion in the attached is a summary of various proposals and a request for comments concerning same. Comments are due by February 15, 2014. In brief, the Advisory Committee appears poised to generally adopt the Seventh Circuit's standard for the imposition of sanctions for spoliation, namely a finding of bad faith. I would suggest that the Evid. & Civ. Pro. Committee consider providing comments to the Advisory Committee by the due date.

II. THE OTHER SIDE OF THE COIN

With the advent of ESI (electronically stored information), cases involving spoliation have been sprouting like the proverbial crowd of daffodils on a hill in springtime. But a charge of spoliation presupposes a duty to preserve. And in this section I wish to discuss that duty and related concepts.

Fulfilling the duty of preservation, and avoiding spoliation, can be tricky, and the consequences for failing to do so can be severe. What follows in this

section are perspectives on identifying preservation obligations, alerting clients and adversaries to their duties, and court procedures for enforcement.

A. 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.

Here is some basic authority concerning preservation. "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, "Sanctions for E-Discovery Violations: By The Numbers," 60 Duke Law Journal 789 (December, 2010).

B. Spoliation and Preservation

The preservation duty works hand-in-hand with the doctrine of spoliation. Spoliation is the "intentional destruction, mutilation, alteration, or concealment of evidence." 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).

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).

C. 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 regarding or preparation of internal memoranda regarding potential dangers posed product even if the retention or memoranda predate injuries by many years;
- 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.

D. "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).

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).

E. 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.

F. 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.

1. 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.

2. 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.

III. Wisconsin Sanction Law

A. Criminal Spoliation

Actually, spoliation has had expressions in both a criminal and civil context over the years in Wisconsin. It is important to note first the criminal expression of the concept:

Wis. Stat. § 946.60 Destruction of documents subject to subpoena.

(1) Whoever intentionally destroys, alters, mutilates, conceals, removes, withholds or transfers possession of a document, knowing that the document has been subpoenaed by a court or by or at the request of a district attorney or the attorney general, is guilty of a Class I felony.

(2) Whoever uses force, threat, intimidation or deception, with intent to cause or induce another person to destroy, alter, mutilate, conceal, remove, withhold or transfer possession of a subpoenaed document, knowing that the document has been subpoenaed by a court or by or at the request of a district attorney or the attorney general, is guilty of a Class I felony.

(3) It is not a defense to a prosecution under this section that:

(a) The document would have been legally privileged or inadmissible in evidence.

(b) The subpoena was directed to a person other than the defendant.

Wis. Stat. § 946.65 Obstructing justice.

(1) Whoever for a consideration knowingly gives false information to any officer of any court with intent to influence the officer in the performance of official functions is guilty of a Class I felony.

(C) "Officer of any court" includes the judge, reporter, bailiff and district attorney.

Only conduct that involves a 3rd-party contracting with another to give false information to a court officer in an attempt to influence the performance of the officer's official function is proscribed by this section. State v. Howell, 141 Wis. 2d 58, 414 N.W.2d 54 (Ct. App. 1987).

Wis. Stat. § 943.70 Computer Crimes

(C) Offenses against computer data and programs.

(a) Whoever willfully, knowingly and without authorization does any of the following may be penalized as provided in pars. (b) and (c):

1. Modifies data, computer programs or supporting documentation.

2. Destroys data, computer programs or supporting documentation.

3. Accesses computer programs or supporting documentation.

4. Takes possession of data, computer programs or supporting documentation.

5. Copies data, computer programs or supporting documentation.

6. Discloses restricted access codes or other restricted access information to unauthorized persons.

C. Civil Spoliation

I noted a number of Wisconsin cases on spoliation in my introduction to my October 4, 2013 memorandum to the Committee. There are a number of

cases that have touched on this subject to a greater or lesser degree, including the following:

Morrison v. Rankin, 2007 WI App 186, 305 Wis. 2d 240, 738 N.W.2d 588:

> In order to determine whether a party has engaged in spoliation, Wisconsin courts must find:
>
> > (1) that the party responsible for the destruction of evidence knew or should have known at the time it destroyed the evidence that litigation was a "distinct possibility"; and
> >
> > (2) that the party destroyed evidence which it knew or should have known would constitute relevant evidence in the pending or potential litigation.
>
> Dismissal is available as a sanction for spoliation but only where the party responsible for the destruction has acted egregiously or in bad faith. When the destroying party has acted egregiously or in bad faith, the court may impose the sanction of dismissal, even if the destruction of evidence did not impair the opposing party's ability to present a claim or defense.

Maciolek v. Ross, 2010 WI App 1, 778 N.W.2d 171:

> Trial court refused to give a spoliation instruction regarding notes taken summarizing conversations with the defendant. After the lawsuit began, an employee of plaintiff compiled a summary of the notes into one document prepared on her computer and disposed of the actual notes. Trial court's denial of the requested spoliation instruction was upheld because the defendant failed to provide clear, satisfactory and convincing evidence that plaintiff intentionally destroyed or fabricated evidence. In any event, any error was harmless because defendant was still permitted to argue that the missing notes damaged the plaintiff's case.

S.C. Johnson & Son, Inc. v. Morris, 2010 WI App 6, 779 N.W.2d 19:

> The issue was whether trial court gave a "draconian spoliation instruction." Trial court decided that there was clear and convincing evidence, almost overwhelming inference to be drawn that the original bank ledgers were intentionally destroyed at some point when their importance and significance to contemplated or pending litigation would have been known. Appellate court noted that the party that destroyed the documents did not know why they were missing and made inconsistent statements as to why documentation was missing. Appellate court held that defendant did

not meet its burden of proving why the trial court's inference was unreasonable.

Cody v. Target Corp., 2013 WI App 94, 2011AP2831 (June 27, 2013):

Target destroyed evidence consisting of an air mattress box that personal injury plaintiff had returned to the store. Plaintiff contended the box had been sold by Target with noxious ant and roach poison in it instead of the Eddie Bauer air mattress it was supposed to have in it. Plaintiff alleged that a day or two after returning the box members of her family became ill. She called the store to complain and a customer service person made notes about the call and her complaints, noting she was very upset. Some days after that call, the store loss prevention manager placed the box in a return goods chargeback area, and afterwards Target disposed of the box and its contents.

The trial court determined that the box was destroyed at a time when Target should have been aware that litigation was a distinct possibility and that the box was relevant to that potential litigation. Because of the spoliation, the trial court imposed a discovery sanction of taking away any defense causation argument. The trial court also dismissed all co-defendants, leaving Target as the only defendant. The Court of Appeals affirmed, and held that a finding of egregious conduct was not a prerequisite for entering this form of statutory discovery sanction, and that the sanction was appropriate given the circumstances. A petition for review has been filed.

See also Biskupic v. Cicero, 2007AP2314, 2008 WI App 117.

Bill

It would be possible to impose a duty of cooperation by direct rule provisions. The provisions might be limited to the discovery rules alone, because discovery behavior gives rise to many of the laments, or could apply generally to all litigation behavior. Consideration of drafts that would impose a direct and general duty of cooperation faced several concerns. Cooperation is an open-ended concept. It is difficult to identify a proper balance of cooperation with legitimate, even essential, adversary behavior. A general duty might easily generate excessive collateral litigation, similar to the experience with an abandoned and unlamented version of Rule 11. And there may be some risk that a general duty of cooperation could conflict with professional responsibilities of effective representation. These drafts were abandoned.

What is proposed is a modest addition to Rule 1. The parties are made to share responsibility for achieving the high aspirations expressed in Rule 1: "[T]hese rules should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." The Note observes that most lawyers and parties conform to this expectation, and notes that "[e]ffective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure."

As amended, Rule 1 will encourage cooperation by lawyers and parties directly, and will provide useful support for judicial efforts to elicit better cooperation when the lawyers and parties fall short. It cannot be expected to cure all adversary excesses, but it will do some good.

Package

These proposals constitute a whole that is greater than the sum of its parts. Together, these proposals can do much to reduce cost and delay. Still, each part must be scrutinized and stand, be modified, or fall on its own. The proposals are not interdependent in the sense that all must be adopted to achieve meaningful gains.

* * * * *

B. RULE 37(e): ACTION TO RECOMMEND PUBLICATION OF REVISED RULE 37(e)

The Civil Rules Advisory Committee began working on preservation and sanctions shortly after the May 2010, Duke Conference. During that conference, the E-Discovery Panel recommended adoption of rule provisions to address these concerns. That work has involved one full-day conference, repeated discussions during Advisory Committee meetings, and approximately twenty lengthy conference calls by the Advisory Committee's Discovery Subcommittee. At its November 2012, meeting the Advisory Committee voted to recommend that the Standing Committee approve the resulting draft amendment to Rule 37(e) for publication in August 2013, in conjunction with the expected publication of the package of case-management and related proposals presented in Part I.A. The Standing Committee considered Rule 37(e) at its January, 2013, meeting and preliminarily approved publication subject to consideration of several issues raised during that meeting. The Advisory Committee reviewed those issues and made several modifications to the draft amendment. The revised draft was presented to the Standing Committee at its June 2013, meeting and approved for publication for public comment.

This section of the report provides background on the proposed amendment and identifies several questions on which the Advisory Committee particularly invites public comment.

Need for Action

The Advisory Committee was first advised of the emerging difficulties presented by discovery of electronically stored information in 1997, but the nature of those problems and the ways in which rules might respond productively to them remained uncertain for some time. Eventually, about a decade ago, it decided to proceed to try to draft rule amendments that addressed a variety of issues on which concern had then focused, leading to the 2006 E-Discovery amendments to the Civil Rules.

One of those amendments was a new Rule 37(e), which provided protection against sanctions "under these rules" for loss of electronically stored information due to the "routine, good-faith operation of an electronic information system." The Committee Note to that rule observed that the routine operation might need to be altered due to the prospect of litigation, and mentioned that a "litigation hold" would sometimes be needed.

The amount and variety of digital information has expanded enormously in the last decade, and the costs and burdens of litigation holds have escalated as well. On December 13, 2011, the House Judiciary Committee held a hearing on the costs of American discovery that largely focused on the costs of preservation. Those costs warrant attention.

The Discovery Subcommittee developed three general models of possible rule-amendment approaches which it presented to the participants in its full-day mini-conference in September, 2011, and summarized as follows:

> Category 1: A preservation rule incorporating considerable specificity about when and how information must be preserved in anticipation of litigation. Submissions the Committee received from various interested parties provided a starting point in drafting some such specifics. A basic question is whether a single rule with very specific preservation provisions could reasonably apply to the wide variety of civil cases filed in federal court. A related issue is whether changing technology would render such a rule obsolete by the time it became effective, or soon thereafter. Even worse, it might be counter-productive. For example, a rule triggering a duty to preserve when a prospective party demands that another prospective party begin preservation measures (among the triggers suggested) could lead to overreaching demands, counter-demands, and produce an impasse that could not be resolved by a court because no action had yet been filed.
>
> Category 2: A more general preservation rule could address a variety of preservation concerns, but only in more general terms. It would, nonetheless, be a "front end" proposal that would attempt to establish reasonableness and proportionality as touchstones for assessing preservation obligations. Compared to Category 1 rules, then, the question would be whether something along these lines would really provide value at all. Would it be too general to be helpful?

Category 3: This approach would address only sanctions, and would in that sense be a "back end" rule. It would likely focus on preservation decisions, making the most serious sanctions unavailable if the party who lost information acted reasonably. In form, however, this approach would not contain any specific directives about when a preservation obligation arises or the scope of the obligation. By articulating what would be "reasonable," however, it might cast a long shadow over preservation without purporting directly to regulate it. It could also be seen as offering "carrots" to those who act reasonably, rather than relying mainly on "sticks," as a sanctions regime might be seen to do.

All three categories were presented during the September, 2011, mini-conference on preservation and sanctions. This conference gathered together about 25 practicing lawyers and judges from around the country with extensive experience on these topics. Building on that knowledge, the Subcommittee decided to focus on the Category 3 approach. The Category 1 approach was too rigid, and failed to take account of the wide variety of litigation in federal courts. The Category 2 approach could produce the problems that result from rigid rules, but provide no certitude about what would be "enough" preservation.

A central objective of the proposed new Rule 37(e) is to replace the disparate treatment of preservation/sanctions issues in different circuits by adopting a single standard. In addition, the amended rule makes it clear that — in all but very exceptional cases in which failure to preserve "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation" — sanctions (as opposed to curative measures) could be employed only if the court finds that the failure to preserve was willful or in bad faith, and that it caused substantial prejudice in the litigation. The proposed rule therefore rejects *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002), which stated that negligence is sufficient culpability to support sanctions.

The proposed amendment seeks to further uniformity in another way. Current Rule 37(e) only precludes "sanctions under these rules." It does not address resort to inherent power. Because the proposed amendment affirmatively provides authority for sanctions for failure to preserve discoverable information, it should remove any occasion to rely on inherent power. Similarly, there would be no need to worry under the amended rule about whether the failure to retain information violated a court order even though Rule 37(b) sanctions ordinarily can be imposed only for violation of an order. Finally, unlike current Rule 37(e), the proposed amendment applies to all discoverable information, not just electronically stored information.

Another central focus of the proposed amendment is to encourage use of curative measures. Thus, Rule 37(e)(1)(A) authorizes a variety of measures to reduce or cure the consequences of loss of information, and the Committee Note repeatedly recognizes that those measures should be preferred to imposing sanctions if they can substantially undo the litigation harm resulting from the failure to preserve.

Required Finding of Willfulness or Bad Faith

Rule 37(e)(1)(B)(i) provides a uniform national standard permitting a court to impose sanctions or give an adverse inference jury instruction only on a finding that the party to be sanctioned has acted willfully or in bad faith. It should provide significantly more protection than has been true in some circuits.

Some thought was given to whether it would be helpful to try in the Note to define willfulness or bad faith, but the conclusion was that it would not be useful. The courts have considerable experience dealing with these concepts, and efforts to capture that experience in Note language seemed more likely to produce problems than provide help. As noted below, the Committee invites public comments on whether an effort should be made to provide a definition of these terms, and if so what that definition should include.

Even if the court finds willfulness or bad faith, the rule permits sanctions only if the loss caused "substantial prejudice" in the litigation. This prejudice need not be as cataclysmic as the prejudice that would justify sanctions under (B)(ii) in the absence of willfulness or bad faith, but it is still a significant additional finding the court must make before imposing a sanction. As pointed out in the Committee Note, using alternative sources of information or other curative measures may often reduce any prejudice sufficiently to preclude sanctions. Another question on which the Committee invites public comment is whether an additional definition of "substantial prejudice" would be helpful, and if so what it should say.

Sanctions in Absence of Willfulness or Bad Faith

In a very narrow group of cases, Rule 37(e)(1)(B)(ii) permits sanctions in the absence of a finding of willfulness or bad faith. The stimulus behind this provision is that there is a body of cases that appear to support such sanctions in exceptional circumstances. *See, e.g., Flury v. Daimler Chrysler Corp.*, 427 F.3d 939 (11th Cir. 2005) (reversing district court's failure to dismiss action after plaintiff disposed of allegedly defective car before defendant could examine it); *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001) (affirming dismissal of action because plaintiff failed to retain allegedly defective air bag to permit defendant to examine it).

Rule 37(e)(1)(B)(ii) permits sanctions when the loss of information "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation." That is a more demanding requirement than the "substantial prejudice" that must be found to justify sanctions under (B)(i) when willfulness or bad faith is proved. The rule is further narrowed by the requirement that the court look to all the claims or defenses in the actions; such a crippling loss of evidence justifies sanctions only if the affected claim or defense was central to the litigation.

Finally, the rule focuses on whether the catastrophic loss was caused by "the party's actions." If the loss occurs even though the party took reasonable steps to preserve information, due perhaps to a natural disaster or malicious action of a third person, curative measures may be warranted but sanctions are not.

As noted below, one question on which the Committee invites public comment is whether this provision should be retained in the rule. Removing (B)(ii) from the rule would likely prevent sanctions in the absence of a finding of willfulness or bad faith, even in cases like the ones cited above. Limiting the rule to electronically stored information might lessen that effect.

Applying to All Discoverable Information

Current Rule 37(e) is limited to loss of electronically stored information. The amended rule, however, applies to sanctions for loss of any discoverable information. As noted below, one issue on which the Committee invites public comment is whether it would be better to limit the rule's protections to loss of electronically stored information. If so, it might be possible to remove (B)(ii), which authorizes sanctions in the absence of a finding of willfulness or bad faith.

One argument for limiting the rule to electronically stored information is that the sort of catastrophic litigation effect that would warrant imposing sanctions in the absence of willfulness or bad faith usually occurs only with tangible evidence, such as the instrumentality that inflicted harm. But it is unclear whether that is universally true now, and whether that will continue to be true in the future. In addition, there could be substantial difficulties drawing a meaningful dividing line between electronically stored information and other discoverable information.

Replacing Current Rule 37(e)

When Rule 37(e) was added in 2006 to provide some protection against sanctions for failure to preserve, some objected that it would not provide significant protection. Since then, the rule has been invoked only rarely. Some say it has provided almost no relief from growing preservation burdens. The recommendation is to abrogate current Rule 37(e) and replace it entirely with the amended rule.

As pointed out in the Committee Note, the proposed amendment is designed to provide more protection against sanctions than current Rule 37(e). It should provide protection in any situation in which the current rule would provide protection. In addition, because it is not limited to "sanctions under these rules," the amended rule would protect against a wider variety of possible grounds for sanctions.

As noted below, one question on which the Committee invites comment is whether there is a reason to retain the provisions of current Rule 37(e) if proposed Rule 37(e) is adopted.

Guidance Regarding Preservation

As mentioned above, there was early consideration of rule provisions including precise directives about trigger, scope, duration and other aspects of preservation, but the difficulties of providing such specifics led to a rule proposal focusing on sanctions. The rule does not attempt to prescribe new or different rules on what must be preserved. As the Committee Note states, that obligation was not created by rule, but recognized by many court decisions. The amendment does not seek to change the obligation.

Rule 37(e)(2) does attempt, however, to provide general guidance for parties contemplating their preservation obligations. It lists a variety of considerations that a court should take into account in making a determination both about whether the party failed to preserve information "that should have been preserved" and also whether that failure was willful or in bad faith. One goal of Rule 37(e)(2) is to provide the parties with guidance on how to approach preservation decisions.

Invitation for Public Comment

The Committee looks forward to public comment on all aspects of the proposed amendment to Rule 37(e). It invites comments on the following questions:

1. Should the rule be limited to sanctions for loss of electronically stored information? Current Rule 37(e) is so limited, and much commentary focuses on the preservation problems resulting from the proliferation of such information. But the dividing line between "electronically stored information" and other discoverable matter may be uncertain, and may become more uncertain in the future, and loss of tangible things or documents important in litigation is a recurrent concern in litigation today.

2. Should Rule 37(b)(1)(B)(ii) be retained in the rule? This provision is focused on the possibility that one side's failure to preserve evidence may catastrophically deprive the other side of any meaningful opportunity to litigate, and permits imposition of sanctions even absent a finding of willfulness or bad faith. It has been suggested that limiting the rule to loss of electronically stored information would make (B)(ii) unnecessary. Does this provision add important flexibility to the rule?

3. Should the provisions of current Rule 37(e) be retained in the rule? As stated in the Committee Note, the amended rule appears to provide protection in any situation in which current Rule 37(e) would apply.

4. Should there be an additional definition of "substantial prejudice" under Rule 37(e)(1)(B)(i)? One possibility is that the rule could be augmented by directing that the court should consider all factors, including the availability of reliable alternative sources of the lost or destroyed information, and the importance of the lost information to the claims or defenses in the case.

5. Should there be an additional definition of willfulness or bad faith under Rule 37(e)(1)(B)(i)? If so, what should be included in that definition?

C. RULE 84: ACTION TO RECOMMEND PUBLICATION OF PROPOSED ABROGATION, AMENDMENT TO RULE 4(d)(1)(D)

The Committee recommends approval to publish for comment proposals that would abrogate Rule 84 and the Official Forms, amending Rule 4(d)(1)(D) to incorporate present Forms 5 and 6 as official Rule 4 Forms.