



Five Rules for Discovery of Electronically Stored Information

Eastern North Carolina Inn of Court Spring Meeting
New Bern, NC
May 17, 2012

MARK SCRUGGS
CLAIMS COUNSEL
LAWYERS MUTUAL

What is ESI? "Information stored in electronic form."

What are some examples?

- E-mail messages and attachments
- Instant messages, text messages, web log ("blog") postings, social media postings
- Word-processed documents
- Calendar entries and address book listings
- Photographs and images
- Video and audio recordings, including voicemail
- Databases, spreadsheets, presentations

Where might ESI be found?

- Home and office laptops
- Home and office desktops
- Network servers
- Cell phones, smart phones, PDAs, iPads, tablet computers
- CDs, DVDs
- Hard drives, thumb drives or flash drives, backup tapes

What's the problem with ESI?

ESI can be easily changed, overwritten or deleted, even without the user's knowledge; and native formats sometimes can be read only by systems that created them. In other words, ESI is not static like a physical document is. ESI can be accessed, moved, copied, altered or deleted at any time by any number of persons, exposing litigants to possibility of sanctions for spoliation of evidence.

The Federal Rules of Civil Procedure were amended on 2006 to deal specifically with ESI, including Rules 16, 26, 33, 34, 37 and 45.

In 2008, Congress enacted Federal Rule of Evidence 502 to address concerns about waiver of attorney-client privilege and work-product privilege when dealing with discovery of ESI.

In October 2011, the North Carolina Rules of Civil Procedure were amended to address discovery of ESI specifically. Rules 26, 33, 34, 37 and 45 of the North Carolina Rules of Civil Procedure were amended to govern and guide the discovery of Electronically Stored Information (ESI) in civil litigation in our state courts. The amendments became effective October 1, 2011 and apply to actions filed on or after that date.

Discovery Conference and Discovery Plan (Rule 26(f)) – Amended Rule 26 requires a discovery meeting and subsequent order setting forth a discovery plan, if any party or party’s lawyer requests such a meeting.

Other Changes to Rule 26 – The amended rule now provides more guidance concerning E-Discovery and expressly acknowledges that ESI is discoverable and is the subject of the discovery rules. Rule 26 addresses the following subjects:

- Without a court order or consent order, one can obtain only the following metadata from an electronic document or file: date sent, date received, author and recipients. (Rule 26(b)(1)).
- A court can specify conditions of ESI, including allocation of costs of such discovery. (Rule 26(b)(3)).
- A party withholding information otherwise discoverable by claiming a privilege or work product must now provide more specificity regarding the nature of the material not disclosed, so that the other parties can assess the claim.
- If items claimed to be protected by a privilege or work product doctrine are inadvertently produced, there is a “claw back” provision that allows the producing party to get back the inadvertently produced protected documents.
- A party may seek a protective order to avoid producing ESI, if the information is not reasonably accessible because of undue burden or cost.

Rule 33 (Interrogatories) – Rule 33 was clarified to highlight the importance of ESI, and to make clear that ESI was included in the option permitted under prior Rule 33(c) for a responding party to not provide specific information asked by an interrogatory, but rather to specify the records from which the responding party can ascertain the information. This option can be used when the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served. In addition, the response shall be in sufficient detail to permit the interrogating party to locate and identify, as readily as can the party served, the records from which the answer can be derived. The Comment suggests that the responding party should consider using the system on which the ESI is housed to generate summary reports that can be produced as the kind of “compilation, abstract or summary” contemplated by subsection (c). Such reports can be particularly helpful when they are the same kind of reports that the producing party uses in making decisions or tracking information. Subsection (c) also provides that the responding party must give the interrogating party a “reasonable opportunity to examine, audit, or inspect” the information. Depending on the circumstances,

the responding party may be required to provide some combination of technical support, information on application software, or other assistance.

Rule 34 (Document Requests) – Subsection (a) is amended to confirm that discovery of ESI stands on equal footing with discovery of paper documents. The change recognizes that ESI may exist in dynamic databases and other forms far different from fixed expression on paper. Thus, Rule 34 applies to information that is fixed in tangible form and to information that is stored in a medium from which it can be retrieved and examined.

Revisions to Rule 34 include the following:

- A party may object to producing ESI on the basis that such information is from a source “not reasonably accessible” because of undue burden or cost, and the objecting party has the burden of showing that the basis for the objection exists. Rule 34(b) (and Rule 37(a)(2)).
- A party responding to discovery may object to the form for producing ESI as requested by the other party, and if the responding party objects to the requested form, or if no form is specified in the request, the responding party must state the form or forms it intends to use. Rule 34(b).
- In the absence of a stipulation by the parties or a court order, a party must (1) produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request, (s) if a request does not specify a form from producing the ESI, a party must produce it in a reasonably usable form or forms, and (3) a party need not produce the same ESI in more than one form. Rule 34(b).

Rule 37 (Sanctions for Failure to Provide Discovery) – Rule 37(b) was amended to establish a baseline that generally would not punish a party for deleting ESI if done so under good faith circumstances. Rule 37(b1) states that “absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide ESI lost as a result of routine, good-faith operation of an electronic information system.” The Comment points out that good faith in the routine operation of an information system may involve a party’s intervention to modify or suspend certain features of that routine operation to prevent the loss of ESI, if that ESI is subject to a preservation obligation. A party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue so that ESI that the party is required to preserve will be destroyed.

Rule 45 (Subpoenas) – Rule 45 is amended to recognize that ESI also can be sought by subpoena. Revisions to Rule 45 include the following:

- A subpoena may specify the form or forms in which the ESI is to be produced. Rule 45(a)(2). If the subpoena does not specify a particular form in which the ESI is to be produced, the party producing the ESI must produce it in a form or forms in which it ordinarily is maintained or in a reasonably useable form or forms. Rule 45(d)(2).
- A party responding to a subpoena is not required to provide discovery of ESI from sources “not reasonably accessible” because of undue burden or cost. Rule 45(d)(4). When faced with a motion to compel, or when seeking a protective order, the objecting party has the burden of showing that the requested information is not readily accessible because of undue burden or cost. Even if such a showing is made, if the requesting party shows good cause, the court has the authority to order discovery nonetheless after the court considers imposing various limitations, such as requiring the parties to share the cost of locating, preserving, collecting and producing the ESI.
- A party responding to a subpoena is not required to produce the same ESI in more than one form. Rule 45(d)(4).

FIVE RULES FOR DISCOVERY OF ELECTRONICALLY STORED INFORMATION

1. Remember the Scout Motto: BE PREPARED
2. Use "Litigation Holds"
3. Collaborate Early on a Discovery Plan
4. Agree on a Process for dealing with Privilege and Waiver Claims
5. Don't Let "Spoliation" spoil your day!

RULE NUMBER 1 – BE PREPARED!

Don't wait until litigation to discuss ESI with your clients. BEING PREPARED requires the lawyer to have a thorough understanding of all aspects of the client's ESI, from its creation, to its content, to its storage, and to its destruction.

Make sure the client has a retention and destruction policy in place and that it carries out its policy consistently.

Having an ESI management policy in place before litigation might provide a safe harbor from sanctions related to failure to produce ESI due to loss or destruction under Rule 37(e). However, note that the safe harbor as to ESI destroyed by a routine destruction policy only applies to destruction that occurs before the duty to preserve arises.

Advance preparation can greatly ease the burdens and risk of inaccuracy inherent in efforts to respond to requests for ESI. A good ESI management system will include policies and procedures for preserving and producing potentially relevant information, and will establish processes for identifying, locating, preserving, retrieving and producing information that may be relevant or required for initial mandatory disclosures.

You should ask the client at a minimum what, where, who and how. Does your client outsource any of its ESI functions, such as accounting, payroll, web hosting, etc. or share ESI with third parties? They will need to be in the litigation hold recipient list.

RULE NUMBER 2 – USE “LITIGATION HOLD ” NOTICES

“The duty to preserve is generally enforced in the breach.”

The first and often the best defense against spoliation sanctions is the litigation hold.

A “litigation hold” is a communication to appropriate persons to take reasonable steps to preserve information that may be relevant to an existing or pending lawsuit or investigation. It’s the suspension of deletion habits and practices of relevant information. (Sedona Principles)

When is the duty to preserve ESI triggered?

Once a party reasonably determines that ESI in its custody or control may be relevant to pending or reasonably foreseeable litigation, the party should take reasonable steps to preserve that ESI.

Note that the duty to preserve potentially relevant ESI attaches when litigation is reasonably anticipated – not just when litigation is initiated. “The duty to preserve evidence arises not only during litigation but also extends to that period before litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.” Silvestri v. GMC, 271 F.3d 583, 591 (4th Cir. 2001).

“Reasonably foreseeable” is not a bright-line standard. Counsel should work with clients to develop documentation as to what will constitute “triggering events.” This will prevent clients from making ad hoc decisions that may prove costly in the future.

One court held that Wal-Mart had “institutional notice” of possible legal claims when a truck driver who was injured in a fall while making a delivery at the store made statements to a store employee that he was going to sue Wal-Mart and his statement of an intent to sue was recorded in an internal memo prepared by Wal-Mart.

In another case, the court found that the defendant’s duty to preserve potentially relevant records arose before the plaintiff-employee filed her initial EEOC claim. The court pointed to evidence that almost everyone associated with the plaintiff recognized the possibility that she might sue and relevant people at the defendant anticipated litigation prior to the filing of the EEOC claim.

Once the duty to preserve is triggered, one must determine the scope of the litigation hold.

A party is only obligated to preserve “unique, relevant evidence that might be useful to an adversary.” Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

“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.” Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2004).

The duty to preserve evidence includes any relevant evidence over which the non-preserving entity had control and reasonably knew or could reasonably foresee was material to a potential legal action.” China Ocean Shipping Co. v. Simone Metals, Inc., 1999 WL 966443 (N.D. Ill. 1999).

Describe the types of information that must be preserved with as much detail as is necessary to enable the recipient to initiate the hold. Focus on the content not the form. Instructing litigation hold recipients to preserve emails will not be very helpful. If defending a case, think about the ESI that will be needed to defend the client’s position. Then switch hats and think about what ESI the plaintiff will be looking for.

Certain types of ESI are particularly susceptible to inadvertent destruction: test messages, voicemail, social media postings and the like require prompt action once the duty to preserve is triggered.

Remember to retain Metadata (“Data about data”)

Who should get the Litigation Hold?

Does your client outsource any of its ESI functions, such as accounting, payroll, web hosting, etc. or share ESI with third parties? They will need to be on the litigation hold recipient list.

Make sure the person responsible for implementing the hold gets a copy of the litigation hold letter. Not just the client’s contact person who may be managing the litigation.

Make sure your clients IT person(s) and HR person(s) are on the recipient list. It might be a good idea to make the IT professional the “point person” on all

litigation holds, since this is the person who manages most of the functions that could have an impact on the preservation, collection and production of ESI.

The litigation hold should be in writing and should require the recipient to acknowledge receipt. This will provide some protection if a custodian inadvertently destroys ESI after being instructed to preserve it. Counsel should include his or her contact information on the litigation hold and solicit any questions or concerns.

Counsel should send reminders to the recipients so long as the litigation hold remains in place. Litigation can drag on for years and the litigation hold be forgotten. Litigation holds may need to be updated periodically, depending on the progress of the litigation. For example, complaints can be amended to add new counts, or the litigation can be narrowed by motions to dismiss, summary judgment, etc.

Remember to remove the litigation hold as soon as it is no longer necessary, so that the custodian and other affected employees can get back to business as usual. Draft every litigation hold with the thought that it will be read by the other side. It would normally be protected from discovery, but if a dispute arises and spoliation is an issue, counsel will most likely want to waive the attorney-client privilege and work-product immunity, to defend against sanctions for spoliation.

A similar letter should be sent to the other side putting it on notice of its duty not to alter or destroy evidence.

RULE NUMBER 3 – COLLABORATE EARLY ON A MUTUALLY AGREEABLE DISCOVERY PLAN

Develop a plan in conjunction with opposing party for production of ESI

Discovery Plan

Rule 26(f)(3), both Federal and North Carolina, issues involving ESI must be addressed. Issues like the media form, format or procedures by which such information shall be produced, the allocation of costs of preservation and production of ESI, and the method of asserting or preserving claims of privilege or of protection of ESI as trial preparation material.

Hopefully, through discussions with your client, and a ESI management policy in place, you will have an inventory if the client's ESI.

Try to get the same type of inventory from the other side.

Having a good inventory will permit both sides to make an educated and reasonable ESI discovery request.

Be careful what you ask for – you may have to do the same thing. ESI can be very expensive. Tailor your request for ESI to the issues necessary to resolve the case. Avoid a "document dump." Instead of requesting broad categories, such as "all emails," narrow your request to target particular ESI that you contend is important to resolve the case.

Agree on the form or forms in which the ESI should be produced.

For example, requesting documents as image files such as a pdf will exclude any metadata ("data about the data") contained in the native file format.

Agree that emails will be produced with the attachments that were included in the original email.

Other issues that should be addressed:

1. Whether to limit discovery to ESI created during a particular time frame.
2. Whether software necessary to read ESI will be provided, perhaps by a limited license.

RULE NUMBER 4 – AGREE ON A PROCESS FOR DEALING WITH WAIVER AND PRIVILEGE CLAIMS

Because production of ESI normally requires reviewing large quantities of data, there is an increased risk of inadvertently producing privileged information.

Have a Non-waiver Agreement with a “claw-back” provision allowing the producing party to “claw back” or undo the production of privileged information. Federal Rule 26(b)(5) sets forth a default “claw back” procedure that can be used in the absence of an separate agreement between the parties.

Even if you get the information back, have you now waived the attorney-client privilege as to other information? Federal Rule of Evidence 502 provides that in a Federal proceeding an inadvertent disclosure of privileged information does not constitute a waiver as long as the holder took reasonable steps to prevent disclosure and acted promptly to retrieve the mistakenly disclosed information.

RULE NUMBER 5 – DON'T LET SPOILIATION SPOIL YOUR DAY

“Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” Silvestri v. GMC, 271 F.3d 583, 590 (4th Cir. 2001).

What are the potential consequences of Spoliation?

If spoliation occurs during the pendency of the lawsuit or as a result of the non-compliance with a discovery order, sanctions may be imposed under Civil Procedure Rule 37. Sanctions can be wide-ranging running the gamut between a verbal or written reprimand and default judgment or dismissal of your case.

Also within the courts’ authority under Rule 37 is the adverse inference jury instruction, through which the court instructs the jury that it is permitted, but not required, to assume that evidence lost due to spoliation would have been unfavorable to the party responsible for its destruction.

Some courts require a showing of the party’s willful intent to destroy the relevant documents before providing an adverse inference instruction. See e.g., Hodge v. Wal-Mart Stores, Inc., 360 F.3d 446, 450 (4th Cir. 2004), while other courts require only a showing of negligent destruction of relevant documents.

In Victor Stanley, Inc. v. Creative Pipe, Inc., Civil No. MJG-06-2662, 2010 WL 3703696 (D. Md. Sept. 9, 2010), the magistrate judge issued a number of sanctions against the defendant for spoliation, including an order that defendants’ acts of spoliation be considered contempt of court. The court ordered that the corporate defendant’s President, also a named defendant, be imprisoned for a period not to exceed two years, unless and until he pays to plaintiff the attorney’s fees and costs that will be awarded.

What practical steps can be taken to avoid spoliation?

1. Develop and Implement a Records Management Policy and Retention Schedule.
2. Develop Practices to Foster Quick Recognition and Response to the Duty to Preserve Potentially Relevant Records.
3. Take Care When Determining Whether a Threat of Litigation Gives Rise to a Duty to Preserve Records.
4. Consider Reaching Agreements with Opposing Parties Limiting the Duties to Preserve Records.
5. Modify the Scope of Records Being Preserved to Reflect the Realities of the Litigation.

MEMORANDUM - SAMPLE FORM

To:

From:

Date:

RE: Litigation hold – (case name)

As you are aware, your former client *insert name* has brought a malpractice claim against you in connection with your representation of *him/her* in *type of case against insert defendant's name*.

Accordingly, and as we have discussed, you must preserve all documents and records related in any way *claimant's name* or your representation of him/her (the “_____ representation”). To do this, you must preserve any and all physical and electronic data in your possession, custody, or control that is in any way related to the _____ representation.

The purpose of this request is to ensure that no evidence, or potential evidence, relating to the matters that might be relevant in any foreseeable litigation is lost, altered, or destroyed. As you may be aware, the law requires that once litigation is reasonably foreseeable, all parties must maintain and not destroy any potentially relevant documents, even if that means holding documents well beyond minimum periods set out by law or company record retention policies. Destruction, loss or significant alteration of evidence can cause parties to lose possible defenses or subject the parties to civil and criminal penalties.

“Physical and electronic data” as used here means:

- All hard copy documents.
- Audio recordings, videotape, e-mail, and instant messages.
- Word processing documents, spreadsheets, databases.
- Calendars and telephone logs.
- All other electronically stored information maintained created, received, and/or maintained on your computer.

Sources of the physical and electronic data include:

- All hard copy files.
- Computer hard drives and removable media (e.g. CDs, DVDs, and flash drives).
- Laptop computers, PDAs, Blackberry devices, cell phones.
- Personal computers you use or have access to at home, or other locations that may be sources of the above-mentioned sources of relevant information.
- Inaccessible storage media, such as back-up tapes which may contain relevant electronic information that does not exist in any other form.
- Any other locations where you have stored hard copy or electronic data.

In order to complete with this request, you should immediately:

- Suspend deletion, overwriting, or any other possible destruction or modification of relevant physical and electronic data.
- Suspend any current document destruction policy.
- Gather and account for all physical files (onsite and offsite) pertaining to the aforementioned and store in a secure area.

Electronically stored data is an important and irreplaceable source of discovery and/or evidence in this matter. You must take every reasonable step to preserve this information until further notice. Failure to do so could result in severe litigation penalties against you.

Please be mindful that there may be others who might have records, documents, or information relevant to the _____ representation. If you know of any employees who may have relevant records, information, and documents, but who did not receive this memorandum, please provide those names to us so that we can send this notice. If you or an employee having relevant information are (or plan to be) leaving the employ or your law firm (e.g., retirement, resignation), please contact us to ensure that any relevant information in your possession is preserved prior to departing the firm.

Thank you for your cooperation and assistance in this matter. If you have any questions about your obligations in connection with this memorandum, please contact me at *insert email address* or *insert phone number*.

LITIGATION HOLD NOTICE [PLAINTIFF SAMPLE]

To: [KEY CUSTODIANS]

From: [LEGAL/OFFICER]

Date:

Re: **Litigation Hold Notice – Effective Immediately**
[CASE NAME]

[CLIENT] has recently filed a civil lawsuit against [DEFENDANT] in the [COURT]. We have retained counsel to prosecute the case and are being represented by [ATTORNEY(S)], who can be contacted at [CONTACT INFO].

[CLIENT] asserts [GENERAL DESCRIPTION]. Specifically, [DESCRIBE EACH COUNT]. We have a legal duty to preserve all documents (paper and electronically stored information, or ESI) and other evidence that are, or may be, relevant to this dispute. For this reason, it is essential that you immediately preserve and retain all potentially relevant evidence.

You are receiving this Notice because we believe you may have potentially relevant evidence. The purpose of this Notice is to instruct you on the preservation process. *These instructions supersede any other record retention policy. The relevant documents MUST be preserved, even if [CLIENT]'s record-keeping guidelines (formal or informal) otherwise would allow you to delete or otherwise destroy material.*

General Instructions re: Preservation

Preservation should be interpreted broadly to accomplish the goal of identifying all potentially relevant documents, maintaining the integrity of the documents as they currently exist and **ensuring that they are not altered, deleted, destroyed or otherwise modified**. If you have any doubt as to whether a document or category of documents is covered by this Notice, please err on the side of preservation. Among other things, saving these documents will assist [CLIENT] in its prosecution of this case against [DEFENDANT]. Your obligation to preserve extends to all potentially relevant documents in your possession, custody or control. Examples of documents that are not in your possession or custody, but remain subject to your control, include documents in the possession or custody of employees who report to you, or documents in the possession or custody of third parties such as contractors or advisers hired to do work for [CLIENT].

At this time, this Notice requires only that you preserve potentially relevant documents. You should NOT copy, move, forward or otherwise collect potentially relevant documents unless directed to do so by our attorneys. This is especially critical for ESI, as there is electronic information called “metadata” that does not appear on the printed version of an electronic

document, but provides critical information about the data and must be preserved, along with any directory and/or folder information about where the data is stored.

What to Preserve

Until further written notice from counsel or from me, you must not alter, delete, destroy or otherwise modify potentially relevant documents. Please note that you must preserve all non-identical copies of potentially relevant documents, so if one copy contains handwritten notes and the other does not, both should be preserved. Similarly, drafts of potentially relevant documents, to the extent they exist, should be preserved. **Unless otherwise stated, the relevant time period begins on [DATE], and continues into the future.**

Potentially relevant documents include but are not limited to the following categories:

- * [INSERT SPECIFIC CATEGORIES]

Where Are the Documents Located?

While it generally is easy to locate and preserve potentially relevant paper records, potentially relevant electronically stored information may exist in many different forms and be found in a variety of locations. The following, while not exhaustive, should be considered as sources of potentially relevant ESI:

1. Email messages and their attachments, including messages in your “Inbox,” “Sent Items,” and “Deleted Items” folders, in any personal folders, “archives” or PSTs you have created, and in any other email accounts you may use, including personal accounts (*e.g.*, Gmail, Yahoo, Facebook, etc);
2. Word processing documents, spreadsheets, analyses and presentations, including items stored in your “My Documents” folder, in shared folders, on network drives, on the home drive of your company desktop/laptop, or on your personal or home computer;
3. Any of the above stored in common locations (such as Intranet or SharePoint sites); on portable electronic devices (such as a BlackBerry or other SmartPhone or cell phone); or on external storage devices (such as CDs, DVDs, external hard drives, flash drives);

[ONLY INCLUDE FOLLOWING IF CASE WARRANTS]

4. Electronic calendars, diaries, notes and/or tasks;
5. Databases;
6. Websites/Social Media sites;
7. Voicemail;

8. Legacy Equipment (equipment [CLIENT] no longer uses in the normal course of business); and
9. Former Employees' Computers: Take any necessary steps to preserve information from computers or other devices with potentially relevant information of former employees or other equipment no longer in use but still within [CLIENT]'s possession or control.

Please note that these lists are not all-inclusive, but simply represent our best assessment at this time of (i) what categories of information might be relevant and (2) where documents might be located. Please interpret these lists broadly and err on the side of preservation.

We will continue to work with our attorneys and our IT staff to determine the most reasonable and least disruptive way to identify and preserve potentially relevant documents. I will contact you if any additional steps should be taken to review, segregate, or collect any paper documents or ESI. **For now, there is no need for you to take any steps other than continuing to make sure you do not alter, delete, destroy or otherwise modify potentially relevant documents.**

[CLIENT] takes its preservation obligations very seriously. **The procedures described in this Notice override any routine retention or destruction policies that you currently follow. If you have any questions regarding any aspect of the Notice or the preservation process, please err on the side of caution and contact counsel or me.** Thank you for your cooperation with respect to this important matter.

ACKNOWLEDGMENT

I have reviewed the above Notice and agree to follow the preservation instructions in that Notice.

Signature: _____

Name (printed): _____

Date: _____

PLEASE RETURN THIS SIGNED DOCUMENT TO [SENDER] BY [DATE]

DISTRIBUTION LIST

[INSERT KEY CUSTODIANS]

[INSERT IT REPRESENTATIVE]

[INSERT HR REPRESENTATIVE]

LITIGATION HOLD NOTICE [DEFENDANT SAMPLE]

To: [KEY CUSTODIANS]

From: [LEGAL/OFFICER]

Date:

Re: **Litigation Hold Notice – Effective Immediately**
[CASE NAME]

[CLIENT] has been named a defendant in a civil lawsuit filed by [OPPOSING PARTY] in the [COURT]. We have retained counsel to defend the case and are being represented by [ATTORNEY(S)], who can be contacted at [CONTACT INFO].

The Plaintiff alleges [GENERAL DESCRIPTION]. Specifically, the Plaintiff claims [SPECIFIC DESCRIPTION OF EACH COUNT]. We have a legal duty to preserve all documents (paper and electronically stored information, or ESI) and other evidence that are, or may be, relevant to this dispute. For this reason, it is essential that you immediately preserve and retain all potentially relevant evidence.

You are receiving this Notice because we believe you may have potentially relevant evidence. The purpose of this Notice is to instruct you on the preservation process. ***These instructions supersede any other record retention policy. The relevant documents MUST be preserved, even if [CLIENT]'s record-keeping guidelines (formal or informal) otherwise would allow you to delete or otherwise destroy material.***

General Instructions re: Preservation

Preservation should be interpreted broadly to accomplish the goal of identifying all potentially relevant documents, maintaining the integrity of the documents as they currently exist and **ensuring that they are not altered, deleted, destroyed or otherwise modified**. If you have any doubt as to whether a document or category of documents is covered by this Notice, please err on the side of preservation. Among other things, saving these documents will assist [CLIENT] in its defense against the Plaintiff's claims. Your obligation to preserve extends to all potentially relevant documents in your possession, custody or control. Examples of documents that are not in your possession or custody, but remain subject to your control, include documents in the possession or custody of employees who report to you, or documents in the possession or custody of third parties such as contractors or advisers hired to do work for [CLIENT].

At this time, this Notice requires only that you preserve potentially relevant documents. You should NOT copy, move, forward or otherwise collect potentially relevant documents unless directed to do so by our attorneys. This is especially critical for ESI, as there is electronic information called "metadata" that does not appear on the printed version of an electronic

document, but provides critical information about the data and must be preserved, along with any directory and/or folder information about where the data is stored.

What to Preserve

Until further written notice from counsel or from me, you must not alter, delete, destroy or otherwise modify potentially relevant documents. Please note that you must preserve all non-identical copies of potentially relevant documents, so if one copy contains handwritten notes and the other does not, both should be preserved. Similarly, drafts of potentially relevant documents, to the extent they exist, should be preserved. **Unless otherwise stated, the relevant time period begins on [DATE], and continues into the future.**

Potentially relevant documents include but are not limited to the following categories:

- * [INSERT SPECIFIC CATEGORIES]

Where Are the Documents Located?

While it generally is easy to locate and preserve potentially relevant paper records, potentially relevant electronically stored information may exist in many different forms and be found in a variety of locations. The following, while not exhaustive, should be considered as sources of potentially relevant ESI:

1. Email messages and their attachments, including messages in your “Inbox,” “Sent Items,” and “Deleted Items” folders, in any personal folders, “archives” or PSTs you have created, and in any other email accounts you may use, including personal accounts (*e.g.*, Gmail, Yahoo, Facebook, etc);
2. Word processing documents, spreadsheets, analyses and presentations, including items stored in your “My Documents” folder, in shared folders, on network drives, on the home drive of your company desktop/laptop, or on your personal or home computer;
3. Any of the above stored in common locations (such as Intranet or SharePoint sites); on portable electronic devices (such as a BlackBerry or other SmartPhone or cell phone); or on external storage devices (such as CDs, DVDs, external hard drives, flash drives);

[ONLY INCLUDE FOLLOWING IF CASE WARRANTS]

4. Electronic calendars, diaries, notes and/or tasks;
5. Databases;
6. Websites/Social Media sites;
7. Voicemail;

8. Legacy Equipment (equipment [CLIENT] no longer uses in the normal course of business); and
9. Former Employees' Computers: Take any necessary steps to preserve information from computers or other devices with potentially relevant information of former employees or other equipment no longer in use but still within [CLIENT]'s possession or control.

Please note that these lists are not all-inclusive, but simply represent our best assessment at this time of (i) what categories of information might be relevant and (2) where documents might be located. Please interpret these lists broadly and err on the side of preservation.

We will continue to work with our attorneys and our IT staff to determine the most reasonable and least disruptive way to identify and preserve potentially relevant documents. I will contact you if any additional steps should be taken to review, segregate, or collect any paper documents or ESI. **For now, there is no need for you to take any steps other than continuing to make sure you do not alter, delete, destroy or otherwise modify potentially relevant documents.**

[CLIENT] takes its preservation obligations very seriously. **The procedures described in this Notice override any routine retention or destruction policies that you currently follow. If you have any questions regarding any aspect of the Notice or the preservation process, please err on the side of caution and contact counsel or me.** Thank you for your cooperation with respect to this important matter.

ACKNOWLEDGMENT

I have reviewed the above Notice and agree to follow the preservation instructions in that Notice.

Signature: _____

Name (printed): _____

Date: _____

PLEASE RETURN THIS SIGNED DOCUMENT TO [SENDER] BY [DATE]

DISTRIBUTION LIST

[INSERT KEY CUSTODIANS]

[INSERT IT REPRESENTATIVE]

[INSERT HR REPRESENTATIVE]

[DATE]

PRESERVATION NOTICE [THIRD PARTY]

[NAME]
[ADDRESS]

Re: Preservation Notice – Effective Immediately

Dear [NAME]:

I am writing to you on behalf of my client, [CLIENT]. As you may know, [CLIENT] is engaged in a lawsuit with [OPPONENT] regarding [BRIEF DESCRIPTION OF LAWSUIT]. As a party to this suit, [CLIENT] is obligated to take steps to preserve all potentially relevant evidence. This can include evidence in the possession, custody or control of third parties like [RECIPIENT].

Accordingly, please take all necessary steps to preserve any documents or electronically stored information (ESI) that could be considered relevant to this dispute. All emails and ESI should be preserved in electronic form. Specifically, please preserve [DESCRIPTION]. To the extent that you have any other emails, ESI or documents that may be relevant, please preserve those as well. I will follow up with you as the case progresses to determine how best to retrieve what you are preserving.

I appreciate your prompt attention to this matter. Please do not hesitate to contact me if you have any questions.

Sincerely,

[COUNSEL]

Spoliation Sanctions by Circuit

| | Scope of Duty to Preserve | Can conduct be culpable per se without consideration of reasonableness | Culpability and Prejudice Requirements | | | | What constitutes prejudice | Culpability and corresponding jury instructions |
|----------------|---|---|---|--|--|---|---|---|
| | | | For sanctions in general | For dispositive sanctions | For adverse inference instructions | For rebuttable presumption of relevance | | |
| Fourth Circuit | <p>Documents that are potentially relevant to likely litigation "are considered To be under a party's control," such that the duty to preserve them, "when that party has 'the right authority or practical ability to obtain the documents from a non-party to the action.'" <i>Goodman v. Praxair Servs., Inc.</i>, 632 F. Supp. 2d 494, 523 (D. Md. 2009) (citation omitted).</p> <p>It is also a duty to notify the opposing party of evidence in the hands of third parties. <i>Silvestri v. Gen.Motors Corp.</i>, 271 F.3d 583. 593 (4th Cir. 2001).</p> <p>Duty extends to key players. <i>Goodman</i>, 632 F, Supp. 2d at 512.</p> | <p>The U.S. District Court for District of Maryland has quoted <i>Zubiliake IV</i>. 220 ("Once the duty to preserve Attaches, any destruction of documents is, at a minimum, negligent."). See <i>Sampson v. City Cambridge</i>, WDQ-Q6-1819, 2008 WL 7514364, at *8 (D. Md. May 1, 2008) (finding defendant's conduct negligent); <i>Pandora Jewelry, LLC v. Chamilia, LLC</i>, No. CCB-Q6-3041. WL 4533902, at *9 (D. Md. Sept. 2008) (finding defendant's conduct grossly negligent): <i>cf. Goodman</i>, 632 F. Supp 2d . at 522, (stating that defendant, "much like defendants in <i>Sampson</i> and <i>Pandora</i>, "'as dearily negligent" because it failed to implement a litigation hold, but explaining why such action was negligent).</p> | <p>"only a showing of fault with the degree of fault impacting the severity of sanctions" <i>Sampson v. City Cambridge</i>, 251 F.R.D. 172. 180(D. Md. 2008) (using "fault" to describe conduct ranging from bad faith destruction to ordinary negligence).</p> | <p>The Court must "be able to conclude either (1) that the was egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim." <i>Silvestri v. Gen.Motors Corp.</i>, 271 F.3d 583. 593 (4th Cir. 2001).</p> | <p>The court "must only find that spoliator acted willfully in destruction of evidence." <i>Goodman v. Praxair Servs., Inc.</i>, 632 F. Supp. 2d 494, 523 (D. Md. 2009).</p> | <p>Willful behavior <i>Sampson v. City Cambridge</i>, 251 F.R.D. 172. 180(D. Md. 2008).</p> | <p>When spoliation substantially denies a party the ability to support or defend tile claim <i>Goodman v. Praxair Servs., Inc.</i>, 632 F. Supp. 2d 494, 523 (D. Md. 2009): <i>Sampson v. City Cambridge</i>, 251 F.R.D. 172. 180(D. Md. 2008).</p> | <p>Willful spoliation; adverse jury instruction, but not "the series of fact-specific adverse jury instructions" that the plaintiff requested <i>Goodman v. Praxair Servs., Inc.</i>, 632 F. Supp. 2d 494, 523 (D. Md. 2009).</p> |

READING LIST:

"e-Discovery 101." North Carolina State Bar. Available at:

http://www.ncbar.gov/journal/archive/journal_16,3.pdf

"e-Discovery and the North Carolina Amendend Rules of Civil Procedure: Some Clarity in the Electronic Age." North Carolina Bar Association. Available at:

<http://litigation.ncbar.org/newsletters/thelitigatorfebruary2012/ediscovercivilprocedures.aspx>

"e-Discovery: What Litigation Lawyers Need to Know." Lawyers Mutual. Available at:

<http://files.www.lawyersmutualinc.com/risk-management-resources/risk-management-handouts/e-discovery-what-litigation-lawyers-need-to-know/eDiscovery.pdf>

"Electronic Discovery in North Carolina: A Guide for Public Sector Entities to the Rules and Tools for Litigating in the Digital Age." University of North Carolina. Available at:

<http://sogpubs.unc.edu/electronicversions/pdfs/ediscovery09.pdf>

"Ethics and the Discovery of Electronically Stored Information." American Bankruptcy Institute. Available at:

http://www.abiworld.org/committees/newsletters/ethics/vol6num1/Ethics_and_the_Discovery_of_Electronically_Stored_Information.pdf

"Metadata 101: Beware Geeks Bearing Gifts." North Carolina State Bar. Available at:

http://www.ncbar.gov/journal/archive/journal_16,1.pdf

"A New Year's e-Resolution: Sending Safe e-Mail." K&L Gates. Available at:

<http://www.klgates.com/a-new-years-e-resolution-sending-safe-e-mail-12-16-2008/>

"The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production." The Sedona Conference. Available at:

<https://thesedonaconference.org/download-pub/99>

SEE ALSO:

Electronic Discovery Law blog by K&L Gates at www.ediscoverylaw.com

Zubulake v. UBS, (I-IV)