ADVISORY GROUP TO THE NEW YORK STATE-FEDERAL JUDICIAL COUNCIL

September 2010

Harmonizing the Pre-Litigation Obligation to Preserve Electronically Stored Information in New York State and Federal Courts

Executive Summary

The Advisory Group has analyzed whether New York State and federal courts treat pre-litigation conduct regarding the creation, retention and destruction of electronically stored information ("ESI") in a consistent and harmonious manner. This report contains the Group's findings regarding the similarities and differences between current New York State and federal law governing the pre-litigation duty to preserve ESI, whether the differences may lead to inconsistent obligations in State and federal courts and the possible ways to resolve such inconsistencies.

The report begins with a discussion of the current law in New York State and federal courts regarding the pre-litigation duty to preserve ESI, with a focus on the attachment of the duty, scope of the duty and the consequences for breach of the duty. Next, it analyzes the differences in State and federal law and discusses several ways that New York State and federal courts could reach inconsistent results regarding the violation of the pre-litigation duty to preserve ESI. Then, the report identifies three separate mechanisms through which potential conflicts could be addressed, and possibly resolved: (1) exercising judicial discretion and respect for the other system by considering the separate bodies of law when deciding specific cases; (2) adopting procedural rules requiring deference by one court system to the other system's law governing the pre-litigation duty to preserve ESI; or (3) determining whether the pre-litigation duty to preserve ESI is a matter of substantive law under the *Erie* doctrine.

In conclusion, the report makes the following recommendations:

1.) that New York State and federal courts should be made aware of the actual and potential inconsistencies between State and federal law addressing the pre-litigation duty to preserve ESI in New York State;

2.) that New York State and federal courts should be reminded of their role in effectuating consistency for attorneys and potential litigants in New York State;

3.) that federal courts in New York State should consider the potential issue under *Erie* when deciding cases addressing the pre-litigation duty to preserve ESI; and

4.) that the Council disseminate this report to the appropriate persons or groups with authority to address the possible inconsistencies and potential solutions discussed herein, including current New York State and federal judges, the Federal Rules Committee, the New York State Office of Court Administration, and the New York State Legislature.

TABLE OF AUTHORITIES

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I. Introduction

Electronically stored information ("ESI") is a fundamental part of life in today's world, and millions of people each day rely on computers to create, transmit, retain and destroy ESI. As the use of ESI has become a fixture in the daily conduct of personal and business affairs, courts and legislatures have issued a flurry of opinions and rules attempting to adapt the existing legal landscape to address the massive volume of ESI and the reality that computers, instead of people, are responsible for managing ESI through largely automated programs and processes that are constantly evolving. Thus, as ESI increasingly takes center stage in litigation as relevant or even dispositive evidence, courts and legislatures are faced with identifying and articulating the legal responsibilities for dealing with ESI.[1]

In view of this developing legal landscape, attorneys and clients in New York State are faced with a seemingly simple question with an uncertain answer: Will my pre-litigation conduct regarding the creation, retention and destruction of ESI be treated the same in New York State and federal courts? The good news is that New York State already has a comprehensive body of case law addressing the pre-litigation destruction of evidence, and federal courts in New York have been at the forefront of analyzing the complex issues associated with preservation of ESI. Nevertheless, there is no express procedural rule or other definitive and comprehensive statement of what the pre-

[1] In August 2010, New York State amended the Uniform Rules for Trial Courts (22 NYCRR) § 202.12(b) to address the difficulties associated with ESI by adding the following provision: "Where a case is reasonably likely to include electronic discovery, counsel for all parties who appear at the preliminary conference must be sufficiently versed in matters relating to their clients' technological systems and to discuss competently all issues relating to electronic discovery; counsel may bring a client representative or outside expert to assist in such e-discovery discussions." *See also* Uniform Rules for Trial Courts (Rules of Practice for the Commercial Division) Rule 1(b). The 2006 Advisory Committee notes concerning Fed. R. Civ. P. 37(f) also recognize this issue stating, "It [Fed. R. Civ. P. 37(f)] focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use…As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part." *See also* Report of the Association of the Bar of the City of New York, Joint Committee on Electronic Discovery, "Explosion of Electronic Discovery in All Areas of Litigation Necessitates Changes in CPLR," August 2009 (noting the issues with preservation of evidence and proposing amendments to the CPLR); The New York State Unified Court System, "A Report to the Chief Judge and Chief Administrative Judge: Electronic Discovery in the New York State Courts," February 2010 (detailing the explosive growth of ESI in litigation and the multiple issues it has created).

litigation preservation obligations are in either jurisdiction, and it is not clear that the articulation of the pre-litigation duty by federal courts is in full accord with New York State spoliation law.

The lack of a clear answer to the obligation in federal courts has resulted in calls to amend the Federal Rules of Civil Procedure yet again to address this issue. *See, e.g.,* Thomas Y. Allman, *Preservation and Spoliation Revisited: Is it Time for Additional Rulemaking?* (presented at 2010 Litigation Review Conference at Duke Law School, May 10-11, 2010). There also have been amendments to (and calls to amend) the CPLR to provide greater clarity and specific rules on preservation. *See, e.g.*, 22 NYCRR § 202.12(b); Report of the Association of the Bar of the City of New York, Joint Committee on Electronic Discovery, "Explosion of Electronic Discovery in All Areas of Litigation Necessitates Changes in CPLR," August 2009. In the meantime, because there are no express rules governing this pre-litigation conduct in either jurisdiction, courts have been forced to deal with the duty on a case-by-case basis.[2]

For this report, we accept that there is a pre-litigation duty to preserve evidence, including ESI. The report begins by outlining how New York State and federal courts have defined that duty, analyzed the pre-litigation conduct of parties, and assessed the consequences of inappropriate pre-litigation conduct. Next, it analyzes whether or not there are potential or actual conflicts between the State and federal jurisprudence, and whether such conflicts could lead to uncertainty for attorneys and litigants in New York State. Lastly, it discusses possible solutions to the potential or existing conflicts between the two legal systems, and provides recommendations for how New York State and federal courts can work toward a consistent approach so that lawyers and potential litigants will have clear and uniform guidance in this area.

[2] *See e.g. Victor Stanley, Inc. v. Creative Pipe, Inc.*, 2010 WL 3530097, *17 (D. Md. Sept. 9, 2010) ("When the spoliation involves ESI, the related issues of whether a party properly preserved relevant ESI and, if not, what spoliation sanctions are appropriate, have proven to be one of the most challenging tasks for judges, lawyers, and clients"). The original filed opinion is 89 pages plus a 12 page appendix which is a chart describing the different standards used in the different circuits.

II. Current New York State and Federal Law

If parties have a duty to preserve evidence, including ESI, that is relevant to a legal dispute, then the breach of that duty is referred to as spoliation, which, as explained by numerous courts, "is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999); *see also Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170, 173 (1st Dep't 1997) ("Spoliation is the destruction of evidence…Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence…before the adversary has an opportunity to inspect them"). Assuming, as we are, that there is a duty to preserve ESI, and that this duty covers the pre-litigation conduct of parties, we can discuss its three basic components as follows: (1) when the duty attaches; (2) what is necessary to fulfill the duty; and (3) how courts deal with a breach of the duty.

a. Attachment of Duty

i. *Federal Courts*

There is no Federal Rule of Civil Procedure, or any other act of Congress, that creates a general pre-litigation duty to preserve ESI. *See* 28 U.S.C. § 2701 ("The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business…"); Fed. R. Civ. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding"); *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F.Supp.2d 548, 568 (S.D.N.Y 2008) ("In this situation, the sanctions available under the Federal Rules of Civil Procedure are not directly applicable, since Brenner's misconduct occurred prior to the filing of the litigation and outside the normal discovery process, and did not violate any court orders"). Instead,

federal courts have referenced a "common law" rule from which the spoliation doctrine arises. *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC,* 685 F.Supp.2d 456, 466 (S.D.N.Y. 2010) ("The common law duty to preserve evidence relevant to litigation is well recognized").[3]

Under this common law rule, the pre-litigation duty to preserve evidence attaches "when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." *Fujitsu Ltd. v. Fed. Express Corp.,* 247 F.3d 423, 436 (2d Cir. 2001). Notably, this rule references both active litigation as well as potential future litigation. The reference to active litigation is relatively straightforward and generally seen as the latest time at which the duty to preserve attaches. *See Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 430 (S.D.N.Y. 2009) ("In the usual case the duty to preserve evidence arises no later than on the date the action is initiated"); *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 193 (S.D.N.Y. 2007). However, the idea that the duty is triggered when "a party reasonably anticipates litigation" is subject to varying interpretations depending on a lawsuit's unique facts, requiring a case-by-case analysis. *Pension Comm.*, 685 F.Supp.2d at 469; *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998) ("This obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation—most commonly when suit has already been filed…but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation").

With respect to potential future litigation, the primary factors for determining when the duty to preserve attaches are *what* a party knew and *when* the party knew it. For example, in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003) ("*Zubulake IV*") Judge Scheindlin found

[3] Reference to a "common law" rule may raise certain concerns under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), which will be addressed in Section IV.

that the defendant reasonably anticipated litigation when relevant e-mails were exchanged, including an e-mail from plaintiff's co-worker labeled "attorney client privil[e]ge" that was sent to plaintiff's supervisor and the supervisor's supervisors. *See also Crown Castle USA Inc. v. Fred A. Nudd Corp.*, 2010 WL 1286366, *6 (W.D.N.Y. Mar. 31, 2010). Similarly, in *Arista Records LLC v. Usenet.com, Inc.*, Magistrate Judge Katz found, "Where copyright infringement is alleged, and a cease and desist letter issues, such a letter triggers the duty to preserve evidence, even prior to the filing of litigation." 608 F. Supp. 2d at 430.

Courts must also consider *who* had knowledge of potential future litigation to determine if such knowledge is imputed to a principal under agency law. In *Zubulake IV*, Judge Scheindlin, in determining when the duty arises, explained, "Merely because one or two employees contemplate the possibility that a fellow employee might sue does not generally impose a firm-wide duty to preserve." 220 F.R.D. at 217. Instead, the Court found that the duty attached when "the *relevant people*…anticipated litigation…." *Zubulake IV*, 220 F.R.D. at 217 (emphasis added).

In addition to this common-law duty, the Second Circuit has noted that substantive federal laws and regulations "may supply the duty to preserve records," independently from a party's knowledge of future litigation. *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 108-109 (2d Cir. 2001). In *Byrnie*, the Court held that "a regulation," including regulations implementing Title VII and the Americans with Disabilities Act ("ADA") requiring the retention of records pertaining to employment decisions, "can create the requisite obligation to retain records, even if litigation involving the records is not reasonably foreseeable…[but] the party seeking the inference [of spoliation] must be a member of the general class of persons that the regulatory agency sought to protect in promulgating the rule." Similarly, in *Scalera v. Electrograph Sys., Inc.*, 262 F.R.D. 162, 173-174 (E.D.N.Y. 2009), Magistrate Judge Tomlinson found that in a discrimination suit under the ADA, the defendant was required to preserve certain documents pursuant to federal records-

retention regulations, including 29 C.F.R. § 1602.14. However, any duty arising from substantive federal laws and regulations would extend only to the specific documents or ESI addressed in the law or regulation. *Id.*

Therefore, in the Second Circuit, it appears that the duty to preserve ESI could arise either under the common law or pursuant to substantive federal laws and regulations regarding specific types of ESI.

ii. *New York State Courts*

New York State has a well-developed body of law dealing with issues of spoliation. *See Ortega v. City of New York*, 9 N.Y.3d 69 (N.Y. 2007); *Bleecker v. Johnston*, 24 Sickles 309, 311 (N.Y. 1877). State courts look to both CPLR 3126 and New York State common law as the basis for sanctions in spoliation matters (and there have been calls to amend the CPLR to provide more specific rules). Even though CPLR 3126[4] does touch on this issue, however, as with the federal system, the contours of a party's pre-litigation duty to preserve evidence generally, and ESI in particular, are articulated only in case law. And, as in the federal system, there are three general triggers to a party's obligation to preserve evidence: (i) pending litigation; (ii) notice of the possibility of a specific claim; and (iii) certain regulatory requirements.

New York courts have held that a party will not be sanctioned if it discards items in good faith and pursuant to its normal business practices "in the absence of pending litigation or notice of a specific claim." *Conderman v. Rochester Gas & Elec. Corp.*, 262 A.D.2d 1068 (4th Dep't 1999); *see also Smith v. New York City Health & Hospitals Corp.*, 284 A.D.2d 121 (1st Dep't), *lv. denied*, 97 N.Y.2d 607 (2001) (denying spoliation sanctions where the defendant hospital disposed of the subject blood donor records in a manner consistent with regulatory requirements, pursuant to

[4] CPLR 3126, titled "Penalties for Refusal to Comply with Order or To Disclose," is a procedural rule allowing sanctions for discovery abuses in the context of active litigation. It reads, in part, "If any party, or a person . . . refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just…"

business routine and before plaintiff's negligent screening theory was in issue); *Roberts v. Consolidated Edison of New York*, 273 A.D.2d 369 (2d Dep't 2000) (denying sanctions where there was no evidence that party's practice of routinely destroying its work records was either spoliation or an effort to frustrate discovery).

Of course, pending litigation gives rise to the duty to preserve relevant evidence. *See, e.g., Penofsky v. Alexander's Dep't Stores of Brooklyn, Inc.*, 11 Misc.3d 1052(A) at *1 (Sup. Ct. Kings Co. Feb. 14, 2006). Additionally, the duty to preserve can be triggered by being placed on notice "that the evidence might be needed for future litigation." *Lovell v. United Skates of Am., Inc.*, 28 A.D.3d 721 (2d Dep't 2006); *Fitzpatrick v. Toy Indus. Assoc., Inc.*, 2009 NY Slip Op 30083(U) (Sup. Ct. N.Y. Co. Jan. 5, 2009) ("where a party has notice of a specific claim, appropriate sanctions may be called for if a party destroys evidence prior to becoming a party or receiving a notice or order to produce, if the party is on notice that the evidence might be needed"); *Adrian v. Good Neighbor Apartment Assoc.*, 277 A.D.2d 146 (1st Dep't 2000) ("The fact that children in the premises had been diagnosed with lead poisoning, and that an abatement order was lifted only after a second inspection was conducted, should have been enough of an indication for defendants to preserve [the radiator covers] for a reasonable period of time").

A number of courts also have noted that the violation of a regulation requiring the preservation of documents may warrant an imposition of sanctions. For example, in *Coleman v. Putnam Hosp. Ctr.*, 2010 NY Slip Op 05352 (2d Dep't June 15, 2010), the court held that sanctions were appropriate where the hospital failed to offer any excuse for its failure to preserve a patient's fetal monitor records in violation of regulations. *See also Smith*, 284 A.D.2d 121 (finding fact that the destroyed records in question were disposed of in a manner consistent with regulatory preservation requirement was a factor in rejecting sanctions).

Much like the federal rubric, the New York State courts focus on the reasonable expectations of the parties regarding the possibility of future litigation. Provided the party had no notice (either actual or imputed) that the ESI might be needed for future litigation and the materials were not required to be maintained by a statutory or regulatory requirement, both New York State and federal courts seem to agree that the accidental or intentional destruction of that ESI should not result in sanctions.

b. Fulfilling the Duty

i. *Federal Courts*

Once the duty to preserve attaches, a person must determine *what* information should be preserved as well as *how* the preservation efforts will occur. In the Second Circuit, a party is required to ensure the preservation of ESI that is relevant and within the party's possession, custody or control. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002); *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. at 195 ("documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action") (citation omitted).[5] Relevance in this context means more than basic relevancy under Fed. R. Evid. 401. *Residential Funding*, 306 F.3d at 108-109 ("our cases make clear that 'relevant' in this context means something more than sufficiently probative to satisfy Rule 401 of the Federal Rules of Evidence"); *see also Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 431 (S.D.N.Y. 2004) ("*Zubulake V*") ("the concept of 'relevance' encompasses not only the ordinary meaning of the term, but also that the destroyed evidence would have been favorable to the movant"). Yet, a few courts have ruled that the duty to preserve is defined by the broader

[5] In contrast, the Fourth Circuit has held that a party may have a duty to share information regarding the location or possible destruction of ESI that is outside the party's control. *See Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) ("If a party cannot fulfill this duty to preserve because he does not own or control the evidence, he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence").

discoverability standard under Fed. R. Civ. P. 26, including information that "is reasonably calculated to lead to the discovery of admissible evidence, [and/or] is reasonably likely to be requested during discovery…" *Passlogix, Inc. v. 2FA Tech., LLC*, --- F.Supp.2d ---, 2010 WL 1702216 (S.D.N.Y. Apr. 27, 2010); *see also Arista Records LLC*, 608 F.Supp.2d at 433.

Although the Second Circuit has not established specific procedures for fulfilling the pre-litigation duty to preserve ESI, Judge Scheindlin has described preservation as a two-part process: prohibiting destruction *and* monitoring the preservation efforts. *Pension Comm.*, 685 F.Supp.2d at 464-465; *Zubulake V*, 229 F.R.D. at 432. The first step in fulfilling this duty is the timely issuance of a written litigation hold notice directing the party and its agents or employees to preserve information that may be relevant to the pending or future litigation. *Pension Comm.*, 685 F.Supp.2d at 465; *Zubulake IV*, 220 F.R.D. at 218. This litigation hold must be sent to all persons who possess relevant information, *i.e.*, the "key players." *In re NTL*, 244 F.R.D. at 194; *see Zubulake IV*, 220 F.R.D. at 217-218 (requiring the preservation of documents from both key players, as well as anyone possessing documents prepared for key players).

In conjunction with the issuance of a proper litigation hold, a party "must suspend its routine document retention/destruction policy…to ensure the preservation of relevant documents." *Zubulake IV*, 220 F.R.D. at 218; *see also In re Kessler*, 2009 WL 2603104 (E.D.N.Y. Mar. 27, 2009) (holding party had obligation to suspend its automated document management system the same day as the accident because the system automatically deleted video surveillance files every 24 hours); *ACORN (New York Ass'n of Cmty. Org. for Reform Now) v. County of Nassau*, 2009 WL 605859, *3 (E.D.N.Y. Mar. 9, 2009). Some courts in the Second Circuit have suggested that a party's duty to "alter its document retention policy" is not satisfied simply by prohibiting the deletion of ESI, but may require the party to change the process by which ESI is stored "to insure the availability of relevant discovery." *Toussie v. County of Suffolk*, 2007 WL 4565160, *7

(E.D.N.Y. Dec. 21, 2007) (imposing sanctions when, among other things, "the County continued to save electronic data in a virtually inaccessible format").

The second step in fulfilling the duty to preserve described by Judge Scheindlin is the monitoring of preservation efforts.[6] *Zubulake V*, 229 F.R.D. at 432 ("In short, it is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched"); *see also Treppel v. Biovail Corp.*, 249 F.R.D. 111, 118 (S.D.N.Y. 2008). The person who is responsible for monitoring the preservation efforts should have sufficient knowledge of the party's document retention policies as well as the breadth of documents in the party's possession. *Zubulake V*, 229 F.R.D. at 432 ("To do this, counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture"); *see also Pastorello v. City of New York*, 2003 WL 1740606, *12 (S.D.N.Y. Apr. 1, 2003) ("Defendants' ignorance of their own reporting and record keeping procedures is not only insufficient to disavow culpability, it is in and of itself culpable").

For example, the Court in *Pastorello* found that where defendants made no efforts to uncover the existence of potentially relevant records, they had breached the "duty to undertake with some degree of care the process of discovering the existence of such record-keeping procedures." 2003 WL 1740606 at *11. Likewise, in *Pension Comm.*, the Court found that the party breached its duty where the employee responsible for monitoring preservation efforts had no experience doing so, had never been trained, and was never supervised or instructed by counsel on how to do so, thus rendering the employee "ill-equipped to handle [the party's] discovery obligations." 685 F.Supp.2d at 483.

[6] According to *Pension Comm.*, a proper litigation hold must "direct employees to *preserve* all relevant records-both paper and electronic," and "create a mechanism for *collecting* preserved records so that they can be searched by someone other than the employee." 685 F.Supp.2d at 473. This definition, however, has not been adopted by the Second Circuit.

Finally, federal courts have acknowledged that both the client and counsel are obligated to ensure the preservation of ESI. *In re NTL*, 244 F.R.D. at 198-199 ("The preservation obligation runs first to counsel, who has a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction. Where the client is a business, its managers, in turn, are responsible for conveying to the employees the requirements for preserving evidence") (internal quotations omitted).

ii. *New York State Courts*

Although New York State has a wealth of case law dealing with the spoliation doctrine, there are few cases specifically addressing the pre-litigation preservation of ESI, and most of them borrow heavily from recent opinions of federal courts. But, it appears that the process a party does institute must be undertaken in a manner that is reasonably calculated to be effective. For example, in *Ahroner v. Israel Discount Bank of New York*, though defendant timely initiated a hold and appeared to make some efforts to follow up on that hold, those efforts were insufficient to meet pre-litigation preservation duties, absent actual oversight of compliance with the hold and monitoring of the party's effort to retain relevant documents. 2009 NY Slip Op 31526(U) at *19 (Sup. Ct. N.Y. Co. July 9, 2009). In contrast, in *Fitzpatrick*, the preservation steps taken were deemed sufficient where the defendant had sent a preservation notice to all persons identified as potentially having documents relating to plaintiff's claim and had numerous follow-up communications regarding preservation obligations with various employees and members of its board and Executive Committee. In addition, counsel instructed management of its preservation obligations, and management instructed key employees to preserve evidence after plaintiff filed the first EEOC complaint, notwithstanding the company's document retention/destruction policy, and taught staff how to archive e-mails. The defendants also made copies of the plaintiff's immediate supervisor's

mailbox, mirrored his hard drive, and, at some point, obtained his laptops. *Fitzpatrick*, 2009 NY Slip Op 30083(U).

In cases dealing with ESI, New York courts have noted a distinct lack of guidance from the CPLR. *See Lipco Elec. Corp. v. ASG Consulting Corp.*, 4 Misc. 3d 1019(A) (Sup. Ct. Nassau Co. 2004) ("Electronic discovery raises a series of issues that were never envisioned by the drafters of the CPLR. Neither the parties nor the Court have been able to find any cases decided by New York State Courts dealing with the issue of electronic discovery"). Accordingly, a number of New York trial-level courts have analyzed ESI preservation issues by adopting federal precedent. *See, e.g.*, *Einstein v. 357 LLC*, 2009 NY Slip Op 32784(U) (Sup. Ct. N.Y. Co. Nov. 12, 2009) (applying federal preservation case law); *Ahroner*, 2009 NY Slip Op 31526(U), *17 ("In view of the paucity of New York case law specifically addressing issues arising from the alleged destruction of electronic evidence, New York courts examining the issue have relied to some extent on precedent from federal courts in deciding these issues").

For example, in *Ahroner*, the Court found that defendant failed to meet its preservation duty in certain respects in connection with its failure to preserve the hard drive from plaintiff's supervisor's computer in an employment case. Plaintiff was terminated on November 8, 2002. On November 18, 2002, plaintiff's counsel wrote to defendant and stated that he was investigating claims that plaintiff was wrongfully terminated. The letter specifically informed defendant of its duty to preserve evidence. In analyzing the spoliation claims that arose in connection with ESI, the Court looked to *Zubulake IV* to address the issue. Although the Court found that defendant had issued timely litigation holds, the Court determined that there was no evidence of proper monitoring and compliance with those holds. It was only on the day before a scheduled inspection of the hard drive of a key witness that defendant informed plaintiff that the drive was no longer available. Applying the factors articulated by Judge Scheindlin, the Court held that the destruction of the hard

drive was done in bad faith or at least the result of gross negligence. However, since plaintiff was unable to show that the lost information was "crucial" to his case or that the loss was "prejudicial," the Court issued sanctions in the form of an adverse inference charge rather than striking defendant's responsive pleading. 2009 N.Y. Slip Op. 31526(U) at *22.

Those cases, however, are outliers, and New York State courts seem to adopt a case-by-case approach to the situation, primarily focusing on the prejudice the innocent party suffers from the loss of the evidence – effectively conflating the issue with determining whether to impose sanctions and what sanctions to impose.

Regarding *what* must be maintained, relying on CPLR 3126, the New York Court of Appeals has noted that a court may impose sanctions for the "*willful*" destruction of evidence that "ought to have been disclosed." *See Ortega*, 9 N.Y.3d at 76. But, as noted in Point II(c)(ii), below, the touchstone for actually imposing sanctions, and at what level, is guided by the prejudice the party suffers as a result of not having the evidence available, thus providing a real-world limit on the scope of a party's preservation obligations, even under CPLR 3126. Accordingly, New York courts have described what must be preserved as "key evidence" or, at times, "relevant evidence." *See Huezo v. Silvercrest*, 68 A.D.3d 820, 821 (2d Dep't 2009) ("key evidence"); *Ahroner*, 2009 NY Slip Op 31526(U), at *11 ("relevant documents").

c. Determining Consequences

i. *Federal Courts*

In the Second Circuit, a party may be sanctioned for the breach of the duty to preserve documents or tangible things upon a showing:

> (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed "with a culpable state of mind"; and (3) that the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002). The first element is a restatement of the need for there to be an actual duty and a breach of that duty by the party to be sanctioned. It is the second and third elements that deal with determining whether and to what extent sanctions are appropriate.

Sanctions for spoliation of evidence should be carefully tailored to deter parties from engaging in spoliation, place the risk of a false judgment on the spoliating party, and restore the prejudiced party as if no spoliation had occurred. *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (explaining that the "spoliation doctrine" is underpinned by "prophylactic, punitive and remedial rationales"). Again, however, there are no steadfast rules for determining an appropriate sanction in any given case, and "[t]rial judges should have the leeway to tailor sanctions to ensure that spoliators do not benefit from their wrongdoing—a remedial purpose that is best adjusted according to the facts and evidentiary posture of each case." *Reilly v. Natwest Mkts. Group Inc.*, 181 F.3d 253, 267 (2d Cir. 1999); *see also Fujitsu*, 247 F.3d at 436 ("The determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the trial judge, and is assessed on a case-by-case basis") (citations omitted). Sanctions range in degree and severity, including further discovery, cost-shifting, fines, adverse inferences, preclusion of evidence, and even dismissal. *Pension Comm.* at 469.

Regarding the third element, the party seeking to prove prejudice caused by the breach of the duty to preserve bears a heavy burden in showing that the missing evidence was relevant to her case and that its absence is prejudicial. As explained by Judge Scheindlin, "It is often impossible to know what lost documents would have contained," making proof of relevancy and prejudice by direct evidence difficult. *Pension Comm.*, 685 F.Supp.2d at 465. Accordingly, federal courts have employed two evidentiary methods for establishing relevance and prejudice in spoliation cases: (1) "the moving party may submit extrinsic evidence tending to demonstrate that the missing evidence

would have been favorable to it"; or (2) "relevance may be inferred if the spoliator is shown to have a sufficiently culpable state of mind." *Scalera v. Electrograph Sys., Inc.*, 262 F.R.D. 162, 178 (E.D.N.Y. 2009) *quoting Chan v. Triple 8 Palace, Inc.*, 2005 WL 1925579, *8 (S.D.N.Y. Aug. 11, 2005).

The first evidentiary device simply states that an innocent party may show, by secondary evidence, that the destroyed ESI was relevant to the factual issues in the particular case and that the destruction somehow prejudices the innocent party. In contrast, the second device utilizes a series of legal presumptions and adverse inferences based on the conduct of the spoliator. Courts will measure the spoliator's culpability against "a continuum of fault-ranging from innocence through the degrees of negligence to intentionality." *Residential Funding*, 306 F.3d at 108 *quoting Reilly*, 181 F.2d at 267. Where a party's actions are particularly egregious, including intentional bad-faith conduct, courts may impose the most drastic sanction of dismissal; however dismissal "should be imposed only in extreme circumstances, after consideration of alternative, less drastic solutions." *West*, 167 F.3d at 779 *quoting John B. Hull, Inc. v. Waterbury Petroleum Prod., Inc.*, 845 F.2d 1172, 1179 (2d Cir. 1988). In such circumstances, courts will accept proof of the bad faith conduct as sufficient evidence that the missing ESI was, in fact, relevant and unfavorable to the breaching party. *Residential Funding*, 306 F.3d at 109 ("Where a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party"); *Pension Comm.*, 685 F.Supp.2d at 467.

In addition, courts may issue a jury instruction mandating or permitting the presumption of relevance and prejudice as a sanction where the spoliating party acted in bad faith, or in a willful or grossly negligent manner. *Pension Comm.*, 685 F.Supp.2d at 470 ("The harshness of the instruction should be determined based on the nature of the spoliating party's conduct—the more egregious the

conduct, the more harsh the instruction"). In cases where the spoliating party acted willfully, the court can instruct the jury to deem certain facts as admitted and accepted as true. *Id.* As a lesser sanction, the court can impose varying rebuttable presumptions allowing the trier of fact to find that the evidence was "both relevant and favorable to the innocent party." *Id.* In *Pension Comm.*, the Court distinguished mandatory presumptions, where the jury is instructed to presume both relevance and prejudice, and permissive instructions, where the jury is allowed to presume that the evidence was relevant. *Id.* Notably, both mandatory and permissive presumptions of relevance and prejudice are rebuttable by the spoliating party:

> When the spoliating party's conduct is sufficiently egregious to justify a court's *imposition* of a presumption of relevance and prejudice, or when the spoliating party's conduct warrants *permitting* the jury to make such a presumption, the burden then shifts to the spoliating party to rebut that presumption.

Id. at 468-469.

There appears to be some uncertainty regarding the use of jury instructions and presumptions in cases of simple negligence. *Reilly*, 181 F.3d at 267 ("The law in this Circuit regarding the level of fault necessary to justify an adverse inference instruction is unsettled"). In several opinions from the Second Circuit on this topic, it seems that the Court has held that an adverse inference is permissible based *solely* on a finding of negligence, thus allowing a jury to find relevance and prejudice without any secondary proof thereof; however, those opinions could also be read as deciding the availability of the inference separately from the need for independent evidence of relevance. In *Residential Funding*, the Court held, "The sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence." 306 F.3d at 108. The Second Circuit further explained:

> [The] sanction [of an adverse inference] should be available even for the negligent destruction of documents if that is necessary to further the remedial purpose of the inference. It makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently. The adverse inference provides the necessary mechanism for restoring the evidentiary balance. The

> inference is adverse to the destroyer not because of any finding of moral culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss.

Id. quoting Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 75 (S.D.N.Y. 1991)[7]; *see also Port Auth. Police Asian Jade Soc. of New York & New Jersey Inc. v. Port Auth. of New York & New Jersey*, 601 F. Supp. 2d 566, 570 (S.D.N.Y. 2009) ("Whether an instance of gross or simple negligence merits the same inference depends on the circumstances of the particular case") *citing Residential Funding*, 306 F.3d at 108 and *Reilly*, 181 F.3d at 267.

At the very least, it is clear that in *Reilly* the Second Circuit refused to create any absolute rule regarding the use of an adverse inference instruction. 181 F.3d at 267. Instead, the Court found, "Our case-by-case approach to the failure to produce relevant evidence seems to be working," and, "[t]rial judges should have the leeway to tailor sanctions to insure that spoliators do not benefit from their wrongdoing—a remedial purpose that is best adjusted according to the facts and evidentiary posture of each case." *Id.* The Court then concluded, "As other Circuits have recognized, it makes little sense to confine promotion of that remedial purpose to cases involving only outrageous culpability, where the party victimized by the spoliation is prejudiced irrespective of whether the spoliator acted with intent or gross negligence." *Id.* at 267-268, *citing Pressey v. Patterson*, 898 F.2d 1018, 1023-1024 (5th Cir. 1990) ("The evidence certainly supports an inference that the City was negligent or even reckless in failing to take sufficient measures to retain the tapes; based on this, the trial court may wish to sanction the City by deeming the facts reported in the Post article admitted by the City"); *see also Fujitsu*, 247 F.3d at 436 ("The determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the trial judge, and is assessed on a case-by-case basis").

[7] *See* note 20, *infra.* Interestingly, the Court in *Turner* found that the defendant's conduct in that case was reckless, and not simply negligent. 142 F.R.D. at 76 ("although [defendant] did not intentionally destroy evidence, its reckless conduct did result in loss of the records").

Many lower courts have ruled that a finding of negligence does not, by itself, justify an adverse inference of relevance and prejudice by the jury. The Court in *Pension Comm.* explained that "when the spoliating party was merely negligent, the innocent party must prove both relevance and prejudice in order to justify the imposition of a severe sanction." 685 F.Supp.2d at 467-468; *see also Arista Records LLC*, 608 F.Supp.2d at 439 ("By contrast, when the destruction of evidence is negligent, relevance must be proven through extrinsic evidence"); *Treppel*, 249 F.R.D. at 122; *Turner*, 142 F.R.D. at 77. Likewise, in *Scalera v. Electrograph Sys., Inc.*, the Court found that although defendants "unquestionably breached a duty to preserve e-mails," plaintiff's motions for sanctions in the form of an adverse inference instruction should be denied where plaintiff "has ultimately failed to demonstrate that any destroyed emails would have been favorable to her position." 262 F.R.D. at 179. And in *Zubulake IV*, the Court found that although the duty to preserve was breached, it was inappropriate to give an adverse inference instruction to the jury without a demonstration that the lost evidence would have supported the innocent party's claims. 220 F.R.D. at 221-222.

Finally, separate from sanctions expressly addressing the relevance of the lost information, courts will also impose sanctions addressing the need for further discovery, including cost-shifting, fines and other monetary sanctions. *Pension Comm.*, 685 F.2d at 469-471. In fact, monetary sanctions including costs associated with motion practice and appeals are permissible where the spoliating party acted with a culpable state of mind, even if there was no prejudice to the innocent party. *Residential Funding Corp.*, 306 F.3d at 112-113.

While federal courts have addressed the differences between negligent and grossly negligent conduct on a case-by-case basis, it appears that some general rules have emerged among the federal district courts in the Second Circuit. In *Zubulake IV*, the Court found, "Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent," including destruction by

"inadvertence, thoughtlessness, inattention, and the like." 220 F.R.D. at 220, n 46. In *Pension Comm.*, Judge Scheindlin articulated the following rules regarding willful, negligent and grossly negligent conduct:

- "the intentional destruction of relevant records, either paper or electronic, after the duty to preserve has attached, is willful" (685 F.Supp.2d at 464);

- "failure to collect information from the files of former employees that remain in the party's possession, custody or control after the duty to preserve has attached" is gross negligence (685 F.Supp.2d at 465);

- "failure to assess the accuracy and validity of selected search terms" is negligence (*id.*); and

- "failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information" (*id.*; *see also Crown Castle USA*, 2010 WL 1286366 at *13).[8]

Accordingly, Judge Scheindlin ruled in *Pension Comm.* that certain parties were grossly negligent where they failed to institute timely written litigation holds, conducted severely deficient searches for relevant documents, failed to collect or preserve any electronic documents until four years after the duty to preserve attached, continued to delete electronic documents after the duty to preserve arose, did not request documents from key players, delegated search efforts without any supervision from management, destroyed backup data potentially containing relevant ESI that was not otherwise available, and/or submitted misleading or inaccurate declarations regarding preservation efforts. 685 F.Supp.2d at 479. In contrast, the Court in *Pension Comm.* found that certain parties were merely negligent where they did not clearly instruct employees to preserve and collect all relevant records. *Id.* at 488. *See also Pastorello*, 2003 WL 1740606 at *11 (finding party grossly negligent for loss of data resulting from supervising employee's unfamiliarity with record-keeping policy).

[8] *C.f. Siani v. State Univ. of New York at Farmingdale*, CV09-407 JFB WDW, 2010 WL 3170664, *8 (E.D.N.Y. Aug. 10, 2010) ("The fact that they delayed the hold for months past the time when they could reasonably have anticipated the litigation does not per se amount to gross negligence").

ii. *New York State Courts*

New York law provides several potential remedies to a party harmed by the destruction of evidence. For example, under CPLR 3126, which addresses the spoliation of evidence in the context of pending litigation, if a court finds that a party willfully destroyed evidence that "ought to have been disclosed…the court may make such orders with regard to the failure or refusal as are just." In interpreting that power, the Court of Appeals has noted that courts have broad discretion to provide proportionate relief to the party deprived of the lost evidence, including: (1) precluding proof favorable to the spoliator to restore balance to the litigation; (2) requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence; (3) employing an adverse inference instruction at the trial of the action; and (4) dismissing the action or striking responsive pleadings. *Ortega*, 9 N.Y.3d at 79.

Courts in New York State have taken two routes in determining whether and to what extent sanctions may be appropriate in a case. In some circumstances, like the federal courts, New York State courts look to the culpability level of the spoliator. The basic articulation found in CPLR 3126 is whether the party seeking sanctions can demonstrate that the conduct of the spoliator was "willful, contumacious, or in bad faith." *See Jenkins v. Proto Prop. Servs., LLC*, 54 A.D.3d 726, 726-27 (2d Dep't 2008) ("The Supreme Court providently exercised its discretion in denying that branch of the plaintiff's motion which was pursuant to CPLR 3126 to strike the defendants' answer since 'the drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith'").[9] Thus, under CPLR 3126, the burden is upon the party seeking sanctions to prove that the conduct at issue rose to the level of willful, contumacious or in bad faith. *Einstein v. 357 LLC*, 2009 NY Slip Op 32784(U).

[9] Although the cases applying CPLR 3126 talk of sanctions being appropriate for "willful, contumacious, or bad faith" destruction of evidence, courts customarily also take into account the prejudice flowing to the innocent party as a result of the loss of the evidence in question. In part, that likely arises from the fact that courts routinely consider CPLR 3126 and common law in tandem.

Under the New York common law of spoliation, which has been used to address the pre-litigation destruction of evidence, the real "lynchpin for spoliation sanctions under New York law, is prejudice," *Fitzpatrick v. Toy Indus. Assoc., Inc.*, 2009 NY Slip Op 30083U at *9-10, and the level of prejudice to the innocent party is the determinant in imposing sanctions. *See Scarano v. Bribitzer*, 56 A.D.3d 750 (2d Dep't 2008) ("The common-law doctrine of spoliation allows for sanctions when a party negligently disposes of evidence; however, the court must consider prejudice resulting from spoliation in determining what type of sanction, if any, is warranted as a matter of fundamental fairness"). Thus, where a party destroys key evidence in a case, the most extreme sanctions, up to and including striking pleadings, are appropriate. *See, e.g., Squitieri v. City of New York*, 248 A.D.2d 201, 202 (1st Dep't 1998) (finding city's third-party claims were appropriately dismissed where city destroyed the street sweeper in which the accident occurred before a third-party defendant was given access to it). If the destruction of the evidence is not fatal to the opposing party's case, but still causes some disadvantage, a lesser sanction, like an adverse inference, might be imposed. *See Coleman v. Putnam Hosp. Ctr.*, 2010 NY Slip Op 5352, *2-3; *Tapia v Royal Tours Serv., Inc.*, 67 A.D.3d 894 (2d Dep't 2009) (holding answer could not be stricken because destruction of evidence did not leave plaintiff "prejudicially bereft" of the means for prosecuting claims, but plaintiff was entitled to an adverse inference charge); *Marro v. St. Vincent's Hosp. & Med. Ctr. of New York*, 294 A.D.2d 341, 342 (2d Dep't 2002) ("a less drastic sanction than dismissal of the responsible party's pleading may be imposed where the loss does not deprive the nonresponsible party of the means of establishing his or her claim or defense"); *Ahroner*, 2009 NY Slip Op 31526(U) (finding adverse inference charge rather than striking defendants' responsive pleading appropriate, because there was no showing that the lost emails were critical or of severe prejudice as to the e-mails lost). In *Fossing v. Townsend Manor Inn, Inc.*, 72 A.D.3d 884 (2d Dep't 2010), striking the pleadings was unnecessary, because the destruction of

the subject boat did not leave the opposing party "prejudicially bereft" of the means of prosecuting its claim. However, not being able to inspect the boat did place the opposing party at a disadvantage in proving a defect in the boat. Thus, the trial court should have granted the lesser sanction of directing the party to disclose all of the information he had regarding the subject boat, including any tests or analysis, precluded the party from arguing or presenting evidence at trial that the subject boat was not the cause of the fire at issue, and directed an adverse inference charge as to the defective condition of the boat.

Further illustrating the central nature of the prejudice inquiry, even in situations where there is no question that relevant evidence has been destroyed, if the innocent party suffered no prejudice as a result, no sanctions are appropriate. *See, e.g., Deer Park Enter., LLC. V. AIL Sys., Inc.*, 2010 NY Slip Op 30881(U) (Sup. Ct. Nassau Co. Apr. 14, 2010).

Since prejudice is the touchstone (and not necessarily the culpability level of the offender), even the negligent loss of key evidence will result in the full range of potential sanctions, including dismissal, since negligent loss of key evidence may be as fatal to an opposing party's claim or defense as intentional destruction. *See Squitieri*, 248 A.D.2d 201; *Fitzpatrick*, 2009 NY Slip Op 30083(U); *see also Einstein*, 2009 NY Slip Op 32784(U); *Kirkland*, 236 A.D.2d at 175.

However, even where a party makes a *prima facie* showing that it is entitled to sanctions for spoliation (whether due to culpability or prejudice), the burden then shifts to the responsible party to demonstrate that it has a reasonable excuse for the loss of the evidence. *See, e.g., Palmenta v. Columbia Univ.*, 266 A.D.2d 90, 91 (1st Dep't 1999); *Einstein*, 2009 NY Slip Op 32784(U). This requirement is recognized in the New York Pattern Jury Instructions, which provide a defense to the imposition of sanctions where the spoliating party can offer a "reasonable explanation" for the destruction of evidence. *See* New York Pattern Jury Instruction 1:77.1.

III. Potential Conflicts between New York State and Federal Law

The question remains as to whether the differences between the treatment of pre-litigation destruction of ESI in New York State and federal courts could lead to different rulings in the separate jurisdictions, thereby creating uncertainty for lawyers and *potential* litigants in New York State and increased litigation costs. It seems that there are at least three ways that New York State and federal courts *could* reach inconsistent opinions regarding the pre-litigation duty to preserve ESI: (1) operation of courts in a federal system under an abuse-of-discretion standard; (2) the creation of rules imputing levels of culpability as a matter of law, *e.g.*, a finding of gross negligence under certain circumstances; and (3) the creation of the pre-litigation duty to preserve ESI by reference to statutes and regulations, not the knowledge of a party. This is not to say that such conflicts *will* arise; however, these are potential conflicts.

The first potential conflict is a direct consequence of our federal system. Stated simply, there are two separate court systems, and two independent appellate courts, currently asserting jurisdiction over the same area of conduct, *i.e.*, the pre-litigation preservation of ESI. Moreover, the decisions of both New York State and federal trial courts are reviewed, in their respective systems, under an abuse-of-discretion standard. *West*, 167 F.3d at 779 ; *Steuhl v. Home Therapy Equip., Inc.*, 23 A.D.3d 825 (3d Dep't 2005) ("A trial court has broad discretion to determine the appropriate sanction for spoliation of evidence, which determination will be disturbed only upon a clear abuse of that discretion"). Therefore, when *stare decisis* is applied in the respective New York State and federal trial courts, coupled with the review of those courts' opinions by independent courts of appeals for abuse of discretion, it is possible that competing decisional law will develop in the separate jurisdictions addressing the same conduct.

For example, it could be argued that the Southern District has ruled, as a matter of law, that "failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to

result in the destruction of relevant information." *Pension Comm.*, 685 F. Supp. 2d at 465. However, a jury in New York State court could find that similar conduct is reasonably excusable, and, therefore, not sanctionable. Then, because the New York State and federal appellate courts employ an abuse-of-discretion standard in their respective jurisdictions, if differing trial court opinions are affirmed, two competing bodies of jurisprudence addressing the exact same conduct in the exact same location could emerge.

The potential impact of the abuse-of-discretion standard on the development of competing New York State and federal case law could be compounded by the fact that New York State and federal courts have applied differing legal concepts when measuring the scope of the duty to preserve ESI. For example, New York State courts have ruled that the pre-litigation duty to preserve ESI extends to "key" or "relevant" evidence, and that destruction is sanctionable only when it is prejudicial to the innocent party's ability to prove its case or defense.[10] In contrast, some federal courts have held that the duty to preserve evidence extends to all discoverable information under Fed. R. Civ. P. 26, and that destruction is sanctionable where the spoliator possesses the requisite level of culpability, *i.e.* gross negligence as a matter of law. Likewise, New York State courts likely will apply State agency principles to determine when ESI is within a party's "control," which may not be required in the federal system. This, too, could lead to uncertainty for potential litigants in New York State.

The second potential conflict stems from the attempts by a limited number of federal trial courts to create *per se* rules for determining a litigant's state of mind as a matter of law rather than analyzing culpability on a case-by-case basis. *See Zubulake IV*, 220 F.R.D. at 220, n 46 ("Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent"); *Pension*

[10] Recall that under CPLR 3126, New York State courts may sanction a party that "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article…" *See Ortega*, 9 N.Y.3d at 76. CPLR 3126, however, does not define the scope of the common law pre-litigation duty to preserve ESI, nor does it allow sanctions for negligent or grossly negligent pre-litigation conduct.

Comm., 685 F.Supp.2d at 465 ("failure to issue a *written* litigation hold constitutes gross negligence"), *c.f. Siani v. State Univ. of New York at Farmingdale*, 2010 WL 3170664, *8 (E.D.N.Y. Aug. 10, 2010) ("The fact that they delayed the hold for months past the time when they could reasonably have anticipated the litigation does not per se amount to gross negligence"). In New York State, however, it appears that courts continue to analyze the culpability of a litigant on a case-by-case basis. *See Deer Park Enter., LLC v. All Sys., Inc.*, 2010 NY Slip Op 30881(U) (despite failure to institute litigation hold, Court examined the particular circumstances of the case and refused to grant sanctions because the e-mails were ultimately recovered and none of them seemed to hamper the opposing party's ability to proceed with the litigation); *Ecor Solutions, Inc. v. State of New York*, 17 Misc. 3d 1135(A) (Ct. of Claims 2007) (to same effect).

If, for example, the manager of a small business in New York State verbally instructs his employees to preserve e-mails regarding a potential lawsuit, and some e-mails are inadvertently destroyed as the result of routine computer operations, it seems that under the rule in *Pension Comm.*, such conduct would be grossly negligent. *Pension Comm.*, 685 F.Supp.2d at 465. If, however, the suit is brought in New York State court, the conduct would be measured according to a simple reasonableness standard, such as the one found in New York State Pattern Jury Instruction 1:77.1:

> If you find that (plaintiff, defendant) destroyed a *[identify item destroyed]* that relates in an important way to the question of *[identify issue]*, and that no reasonable explanation for such destruction has been offered, you may, although you are not required to, infer that the destruction of the *[identify item destroyed]* had a fraudulent purpose and that if produced the *[identify item destroyed]* would have been against (plaintiff's, defendant's) interest. Moreover, such destruction casts doubt upon (plaintiff's, defendant's) position and may be considered against (his, her, its) case as such. If you find that the destruction of *[identify item destroyed]* was without a reasonable explanation, that does not, however, in and of itself, mean that the (plaintiff, defendant) is entitled to win. You may give the fact of such destruction the weight you think proper under all the circumstances; you may consider it decisive with respect to (plaintiff's claim, defendant's defense), you may ignore it altogether, or you may give it weight between those extremes you determine appropriate.

In fact, the New York State Pattern Jury Instruction allows an adverse inference only where "no reasonable explanation for such destruction has been offered." Thus, it is possible that a federal judge would find the party's conduct grossly negligent as a matter of law and impose sanctions, while a judge in New York State court would leave the entire analysis for the jury, or find that there was a reasonable explanation for the inadvertent destruction of the e-mails.

Finally, regarding the third potential conflict, it seems that both New York State and federal courts look to statutes and/or regulations to determine if the pre-litigation duty to preserve arises as a matter of law, separate from the party's actual or constructive knowledge of potential litigation. *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d at 109 (holding that specific regulations, including regulations implementing Title VII and the ADA requiring the retention of records pertaining to employment decisions, "can create the requisite obligation to retain records, even if litigation involving the records is not reasonably foreseeable"); *Coleman v Putnam Hosp. Ctr.*, 2010 NY Slip Op 05352 (holding trial court should have directed an adverse inference charge where hospital offered no excuse for its failure to preserve the fetal monitor strips in violation of regulation). Thus, to the extent that State and federal laws and regulations address (or fail to address) the same conduct, it is possible that the same conduct could be judged differently by State and federal courts.[11]

For example, assume that a temporary employee from Florida has claims against a corporate defendant in New York State under both Title VII and the New York City Human Rights Law ("NYCHRL"). If the corporate defendant were sued in federal court, under *Byrnie*, the defendant's

[11] As discussed below, the *Erie* doctrine, if applicable, could resolve this third potential conflict by requiring federal and New York State courts to apply all relevant federal laws and regulations requiring the preservation of specific ESI. If a federal law or regulation specifically addresses the pre-litigation preservation of ESI, then the destruction of such ESI would be governed under that federal law or regulation. Accordingly, states would be bound to apply the federal law or regulation when addressing the pre-litigation destruction of that federally-regulated ESI, thus removing any potential inconsistencies regarding the destruction of the federally-regulated ESI.

duty to preserve ESI could arise from the federal laws and regulations, and separate from any actual or imputed knowledge. Thus, if the defendant destroyed ESI in violation of the federal laws and regulations, but prior to having notice of reasonably foreseeable litigation, a federal court could find that the defendant breached its pre-litigation duty to preserve ESI and impose sanctions. Alternatively, if the defendant were sued in New York State court under the NYCHRL, it is possible that the State court would find that the defendant had no duty to preserve the ESI until litigation was reasonably foreseeable, and therefore the destruction would not be sanctionable. It would be even more confusing if the defendant were sued in federal court under both statutes, and the Title VII claim was dismissed but the NYCHRL claim remained.[12] Would the defendant still have a duty to preserve arising from the federal regulatory scheme? If so, then the federal court would seem to be imposing a duty arising under a federal statute or regulation on conduct governed by New York State substantive law, which a New York State court might not impose.

IV. Resolving Potential Conflicts

To the extent these potential conflicts exist between New York State and federal law governing the pre-litigation preservation of ESI, this report recommends that courts work toward achieving clarity, consistency and certainty for potential litigants and lawyers in New York State. There appear to be three separate mechanisms through which these potential conflicts can be addressed, and possibly resolved: (1) exercising judicial discretion and respect for the other system by considering the separate bodies of law when deciding specific cases; (2) adopting procedural rules requiring deference by one court system to the other system's spoliation law governing the pre-litigation duty to preserve ESI; or (3) determining whether the pre-litigation duty to preserve ESI is a matter of substantive law under the *Erie* doctrine.

[12] Under *Zakrzewska v. The New School*, 14 N.Y.3d 469 (N.Y. 2010), the *Faragher-Ellerth* affirmative defense does not apply to claims brought under NYCHRL, making it possible for a Title VII claim to be dismissed while a NYCHRL claim would survive summary judgment.

a. Mutual Awareness and Cooperation of State and Federal Courts

As discussed above, New York State and federal courts comprise two separate legal systems, which, in cases of pre-litigation destruction of ESI, can issue conflicting opinions regarding the very same conduct. These courts, however, may limit the proliferation of conflicting decisions and the concomitant obligations on litigants through judicial self-restraint and mutual respect of the other system's developing body of law. State and federal courts can work toward harmonizing the pre-litigation obligation to preserve ESI by taking conscious steps to consider the entire body of State and federal case law when deciding any individual case. Accordingly, future courts can look to the number of existing State and federal decisions in this area when handling individual cases, and attempt to decide new cases in a consistent manner.

This has been done to a certain extent already in that, as explained above, some State courts have recognized that the federal courts have been at the forefront of handling ESI issues and seemed to follow that lead. *See e.g. Einstein v. 357 LLC*, 2009 NY Slip Op 32784(U); *Ahroner v. Israel Discount Bank of N.Y.*, 2009 NY Slip Op 31526(U). Moreover, federal courts in other circuits have looked to underlying state law when addressing the pre-litigation spoliation of ESI. *See Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005) ("our opinion is also informed by Georgia law"); *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) (recognizing New York law).

If State and federal courts pursue this pragmatic approach to achieving consistency, they must recognize that the creation and use of steadfast rules in place of traditional notions of reasonableness by either State or federal courts could undermine the attempt to achieve certainty and consistency for potential litigants. If the State or federal courts independently attempt to manufacture a precise system of rules governing the pre-litigation preservation of ESI, the other courts would be required either to yield to those rules or to risk creating a competing system of

conflicting obligations. In other words, if State and federal courts are to achieve consistency on a practical and case-by-case basis, neither system should position itself as the commanding authority on the pre-litigation destruction of ESI.

b. New Procedural Rules

Harmony between the State and federal systems may also be achieved through the enactment of procedural rules requiring one court system to give deference to the other jurisdiction's existing spoliation law. Through the use of such procedural rules, either the State or federal courts could effectively eliminate any potential conflict by prohibiting their own ability to create conflicting rules governing the pre-litigation conduct of parties. Notably, similar procedural rules of deference have been enacted in Fed. R. Evid. 302 and 501.

Currently, the procedural rules addressing ESI do so in the context of active litigation; none independently address the pre-litigation duty to preserve ESI. *See* CPLR 3126; 22 NYCRR § 202.12(b); Fed. R. Civ. P. 26(b)(2)(B), 37(e). And if there were non-deferential State or federal rules defining the contours of the pre-litigation duty to preserve ESI, those rules, unless they adopted the exact same standards, could allow potential conflicts by institutionalizing unique rules in one court system but not the other. Without taking a position regarding the advisability of a new federal or State rule of procedure, if one is enacted, it seems that a rule of deference would be the appropriate mechanism to expressly resolve conflicts between the treatment of pre-litigation conduct by State and federal courts.

There are, however, two impediments to using procedural rules to harmonize the pre-litigation obligations regarding ESI. First, some would argue that procedural rules, by definition, cannot address pre-litigation conduct. *See* 28 U.S.C. § 2071, *et seq.*; Thomas Y. Allman, *The*

Sedona Principles after the Federal Amendments: The Second Edition (2007)[13]; *c.f.* Gregory P. Joseph, *Electronic Discovery and Other Problems*, 5. Second, as a practical matter, there would seem to be no reason why either the State or federal court system should be more or less likely to defer to the other.

c. Application of New York State Law under the Erie Doctrine

The potential inconsistencies between New York State and federal law governing the pre-litigation duty to preserve ESI might also be resolved through the application of the *Erie* doctrine. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state….There is no federal common law"); *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) ("Erie recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs").

Under the *Erie* doctrine, unless there is an express federal law or regulation addressing the retention and/or destruction of particular ESI, the only available law governing the pre-litigation duty to preserve ESI would be the substantive law of the forum state. Therefore, if *Erie* were to apply, the general pre-litigation duty to preserve ESI would be governed by New York State common law, including the scope and attachment of the duty, as well as the breach of the duty and imposition of sanctions. But, where a federal law or regulation creates a duty to preserve specific ESI, such as the duty to preserve ESI under Title VII or the ADA, that federal law or regulation would determine the scope and attachment of the duty as to such ESI.[14]

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[13] At http://www.thesedonaconference.org/content/MiscFiles/2007SummaryofSedonaPrinciples2ndEditionAug17assentforWG1.pdf.

[14] Where the duty to preserve specific ESI is created by substantive federal laws and regulations, and such laws and regulations do not address the consequences for the breach of that duty, it seems that federal courts could develop federal common law in that area. This would accord with the Second Circuit's reasoning in *Byrnie*, 243 F.3d at 109

The Supreme Court has not rendered an opinion regarding the application of *Erie* to the pre-litigation[15] duty to preserve ESI, and there appears to be some disagreement among the federal circuits on that issue. *See Adkins v. Wolever*, 554 F.3d 650, 651 (6th Cir. 2009) ("We now recognize—as does every other federal court of appeals to have addressed the question—that a federal court's inherent powers include broad discretion to craft proper sanctions for spoliated evidence"); *c.f. Allen v. LTV Steel Co.*, 68 F. App'x. 718, 722 (7th Cir. 2003) ("The district court also properly applied Indiana's law regarding 'spoliation of evidence' claims…")[16] (unreported); *Allstate Ins. Co. v. Sunbeam Corp.*, 53 F.3d 804 (7th Cir. 1995) *aff'g Allstate Ins. Co. v. Sunbeam Corp.*, 865 F.Supp. 1267, 1278 (N.D.Ill. 1994) ("this is a substantive rule binding on a federal court in a diversity case to be decided under Illinois law"); *MacNeil Auto. Prod., Ltd. v. Cannon Auto. Ltd.*, --- F.Supp.2d ---, 2010 WL 2136661 (N.D.Ill. May 25, 2010) ("pre-suit duty to preserve material evidence is substantive and, as such, Illinois law governs"); *Thomas v. Bombardier-Rotax Motorenfabrik, GmbH*, 909 F. Supp. 585 (N.D. Ill. 1996)[17]; James T. Killelea, Note, *Spoliation of*

("Although a regulation may supply the duty to preserve records, a party seeking to benefit from an inference of spoliation must still make out the other usual elements of a spoliation claim"). *But see Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988); Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 Nw. U. L. Rev. 585, 646 (2006) ("The question remains, though, what the substance of the federal common law rule should be. To answer that question, we must ask and answer another: Can federal courts create federal common law rules without reference to the state law that the federal common law is displacing, or should they instead incorporate the state law into the federal rule?").

[15] However, there is a discussion of the ability to sanction prelitigation conduct in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 61 (1991) ("The extension of inherent authority to sanction a party's prelitigation conduct subverts the American Rule and turns the *Erie* doctrine upside down by punishing petitioner's primary conduct") (Kennedy, J., dissenting).

[16] The Seventh Circuit, in *Allen v. LTV Steel Co.*, 68 F. App'x. 718, 723 (7th Cir. 2003), further explained:

> The Indiana Supreme Court quoted *Black's Law Dictionary* in defining "spoliation of evidence" as consisting of "[t]he intentional destruction, mutilation, alteration, or concealment of evidence, usually a document. If proved, spoliation may be used to establish that the evidence was unfavorable to the party responsible." *Cahoon*, 734 N.E.2d at 545.

[17] In *Thomas v. Bombardier-Rotax Motorenfabrik, GmbH*, 909 F. Supp. 585, 589 (N.D. Ill. 1996), the Court analyzed the pre-litigation duty to preserve evidence as follows:

> *Guaranty Trust* was not the last word from the Supreme Court about the *Erie* doctrine. Subsequent cases, such as *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958); *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965); and

Evidence Proposals for New York State, 70 Brook. L. Rev. 1045, 1053 (2005). Similarly, as discussed below, the Second Circuit has never opined on the application of the *Erie* doctrine to the law governing the pre-litigation duty to preserve ESI.

Fundamentally, the general pre-litigation duty to preserve ESI is a creature of English common law. The Second Circuit has acknowledged the common-law origin as follows:

> The principle that an adverse inference may be drawn against a party responsible for the loss or destruction of evidence is often associated with the famous common-law case of *Armory v. Delamirie*, 1 Strange 505, 93 Eng. Rep. 664 (K.B.1722), in which a chimney sweep who found a jewel sued a jeweler for the loss of the jewel, and was entitled, based on the jeweler's return of the ring without the stone, to an inference that the stone was "of the finest water." *See Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir.1988); *Nation-Wide Check*, 692 F.2d at 218.

Kronisch v. United States, 150 F.3d 112, 126 n 11 (2d Cir. 1998); *see also Pension Comm.*, 685 F.Supp.2d at 466 ("The common law duty to preserve evidence relevant to litigation is well recognized"). If this general pre-litigation obligation arises under the common law, it is possible that *Erie's* oft-cited maxim, "There is no federal general common law," would be dispositive. *Erie*, 304 U.S. at 78.[18] Therefore, in the absence of an express federal law governing the pre-litigation preservation of ESI, one might argue that the "common law" to be applied is that of New York

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> *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1, 107 S.Ct. 967, 94 L.Ed.2d 1 (1987), have prompted considerable judicial and scholarly discussion-and confusion-about the present reach of the *Erie* doctrine. The post-*Guaranty Trust* balancing tests appear to apply only, or virtually only, to cases not specifically governed by controlling federal procedural or appellate rules or statutes. Perhaps in those cases not governed by specific federal rules or statutes, outcome determinative state law controls unless there is an overriding federal interest. *See* Chemerinsky, *Federal Jurisdiction*, § 5.3.5 at 301-302 (1994). Perhaps in those cases the outcome determinative factor (with the inevitable forum shopping if that factor does not control) must be balanced against federal and state interests. *See* Redish & Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 Harv.L.Rev. 356 (1977). Perhaps a somewhat different analysis should prevail. But here no federal rule specifically governs, there is no apparent significant federal interest, Illinois does have a significant interest in influencing conduct, and reliance upon Illinois law is in fact (and not just possibly or perhaps) outcome determinative. In those circumstances we believe Illinois law controls, regardless of the legal formulation.

[18] *See also* Tidmarsh & Murray, 100 Nw. U. L. Rev. at 630 ("Federal common law can be created only when there exists a legitimate concern that, if state law were created to deal with the dispute, state lawmakers likely would discriminate in a systematic and pervasive way in favor of the state or its citizens, and against outsiders whose interests are not likely to be protected in the lawmaking process").

State.[19] Conversely, where a federal statute or regulation expressly requires the preservation of specific ESI, *i.e.* the ADA, federal law would control.

Moreover, the pre-litigation preservation of ESI arguably falls within the definition of substantive conduct found in Justice Harlan's concurring opinion in *Hanna v. Plumer*: "the primary activity of citizens," and "those primary decisions respecting human conduct which our constitutional system leaves to state regulation." 380 U.S. at 474, 475 (Harlan, J., concurring). *See also* Gregory P. Joseph, *Electronic Discovery and Other Problems*, n. 9 ("The term 'pre-litigation' is not exactly right because litigation may never eventuate, and the costs (other than spoliation sanctions) are incurred in either event"). The New York State Court of Appeals consistently has described the duty to preserve evidence as one between individuals, the breach of which is a form of tortious conduct, even if it is not a separate actionable tort. *Bleecker v. Johnston*, 24 Sickles 309, 311 (N.Y. 1877); *see also Ortega*, 9 N.Y.3d 69. Similarly, numerous federal courts have acknowledged the similarities between the spoliation doctrine and the law of torts. *See e.g. Pension Comm.*, 685 F.Supp.2d at 463 ("While many treatises and cases routinely define negligence, gross negligence, and willfulness in the context of tortious conduct, I have found no clear definition of these terms in the context of discovery misconduct").[20] This also suggests that the law governing

[19] *See Erie*, 304 U.S. at 79 (emphasis added):

> The fallacy underlying the rule declared in Swift v. Tyson is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts "the parties are entitled to an independent judgment on matters of general law":
> "But law in the sense in which courts speak of it today does not exist without some definite authority behind it. *The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else*. * * *
> "The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word."

[20] In fact, the Second Circuit has explained the spoliation doctrine in terms that are very similar to those used by Justice Holmes to describe the law of torts. *Compare Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998):

the pre-litigation conduct of all people (everyone is a potential litigant) may be substantive and subject to *Erie*.

While it appears that the Second Circuit has not opined on the application of the *Erie* doctrine to the pre-litigation duty to preserve ESI, beginning with *West v. Goodyear Tire & Rubber Co.*, the Court has held that courts possess *power* to sanction spoliation stemming from their inherent authority to manage their own affairs, citing *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). 167 F.3d at 779 ("Even without a discovery order, a district court may impose sanctions for spoliation, exercising its inherent power to control litigation"); *see also Residential Funding Corp.*, 306 F.3d at 106-107. Then, following *West*, other federal circuits have ruled that "[t]he right to impose sanctions for spoliation arises from a court's inherent power to control the judicial process and litigation." *Silvestri*, 271 F.3d at 590 (4th Cir. 2001); *see also Flury*, 427 F.3d at 944 (11th Cir. 2005); *Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009). Indeed, following the Second Circuit's opinion in *West*, the Fourth and Sixth Circuits reversed their prior opinions that the law of spoliation was a substantive matter under *Erie*. *See Cole v. Keller Indus., Inc.*, 132 F.3d 1044, 1047

> It is a well-established and long-standing principle of law that a party's intentional destruction of evidence relevant to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction. This adverse inference rule is supported by evidentiary, prophylactic, punitive, and remedial rationales. The evidentiary rationale derives from the common sense notion that a party's destruction of evidence which it has reason to believe may be used against it in litigation suggests that the evidence was harmful to the party responsible for its destruction. The prophylactic and punitive rationales are based on the equally commonsensical proposition that the drawing of an adverse inference against parties who destroy evidence will deter such destruction, and will properly "plac[e] the risk of an erroneous judgment on the party that wrongfully created the risk." Finally, courts have recognized a remedial rationale for the adverse inference-namely, that an adverse inference should serve the function, insofar as possible, of restoring the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.

with Oliver Wendell Holmes, Jr., *The Common Law*, 153 (Kaplan ed. 2009):

> Be the exceptions more or less numerous, the general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation, or estate, at the hands of his neighbors, not because they are wrong, but because they are harms. The true explanation of the reference of liability to a moral standard, in the sense in which has been explained, is not that it is for the purpose of improving men's hearts, but that it is to give a man a fair chance to avoid doing the harm before he is held responsible for it. It is intended to reconcile the policy of letting accidents lie where they fall, and the reasonable freedom of others with the protection of the individual from injury.

n 1 (4th Cir. 1998) (applying Virginia law in *dicta*) *overruled by Silvestri, supra*; *Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir. 1988) (applying Kentucky law) *overruled by Adkins, supra*.

Despite this trend, there is a lack of uniformity among the courts regarding whether they may use "inherent power" to sanction pre-litigation conduct generally, and negligent or grossly negligent conduct more specifically. First, according to Justice Kennedy's dissenting opinion in *Chambers*, a court's inherent power should not extend over any prelitigation conduct:

> The majority, perhaps wary of the District Court's authority to extend its inherent power to sanction prelitigation conduct, insists that "the District Court did not attempt to sanction petitioner for breach of contract, but rather imposed sanctions for the fraud he perpetrated on the court and the bad faith he displayed toward both his adversary and the court throughout the course of the litigation." *Ante*, at 2138 (footnote omitted). Based on this premise, the Court appears to disclaim that its holding reaches prelitigation conduct. *Ante*, at 2138, and nn. 16-17.

501 U.S. at 72 (Kennedy, J., dissenting). Second, there appears to be a split of authority among the circuits regarding the ability to sanction negligent or grossly negligent pre-litigation conduct, and not simply bad-faith conduct, pursuant to a court's inherent authority. *See Gomez v. Vernon*, 255 F.3d 1118, 1134 (9th Cir. 2001) ("We held that *Roadway* and *Chambers* require that inherent-power sanctions be preceded by a finding of bad faith, or conduct tantamount to bad faith")[21]; Gregory P. Joseph, *Electronic Discovery and Other Problems*, 11 ("The rules should clearly articulate a bad faith requirement before sanctions may be imposed for pre-litigation spoliation. To the extent that the inherent power of the court regulates spoliation, this is presumably required by *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991)"); *Victor Stanley, Inc.*, 2010 WL 3530097, *19 ("However, the

[21] *Roadway* refers to *Roadway Exp., Inc. v. Piper*, 447 U.S. 752 (1980), which was cited in *Chambers* for the general rule that courts have certain inherent powers. *See Chambers*, 501 U.S. at 43. In *Roadway*, however, the Court did not address the pre-litigation conduct of parties, but instead considered "the question whether federal courts have statutory or inherent power to tax attorney's fees directly against counsel who have abused the processes of the courts." *Roadway*, 447 U.S. at 754.

court's inherent authority only may be exercised to sanction 'bad-faith conduct,' *Chambers*, 501 U.S. at 50, 44").[22]

Other courts have addressed the *Erie* concern by characterizing the spoliation doctrine, including the pre-litigation duty to preserve ESI, as a matter of evidence governed by the Federal Rules of Evidence. *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004) ("spoliation is not a substantive claim or defense but a 'rule of evidence,' and thus is 'administered at the discretion of the trial court'"). However, as the Second Circuit has acknowledged, spoliation encompasses a range of legal concepts beyond mere evidence, and "is supported by evidentiary, prophylactic, punitive, and remedial rationales." *Kronisch*, 150 F.3d at 126. *See also Nation-Wide Check Corp., Inc. v. Forest Hills Dist., Inc.*, 692 F.2d 214, 218 (1st Cir. 1982) ("the inference was designed to serve a prophylactic and punitive purpose and not simply to reflect relevance").

Even if sanctioning the pre-litigation destruction of ESI is a matter of evidence, Fed. R. Evid. 302 may still require the application of New York State spoliation law.[23] *See also Cole*, 132 F.3d at 1047 n 1 ("when a State decides that a presumption arises…Federal Rule of Evidence 302 was applied to state law….to avoid different results depending on whether state or federal law applied, and no federal rule intervened, precedent would seem to indicate that [state] law should apply") (dicta); *see also Welsh*, 844 F.2d at 1246 *overruled by Adkins*, *supra*.

Therefore, to the extent that the Supreme Court has yet to rule on the issue, and to the extent that the application of *Erie* would resolve the potential conflicts identified in Section III, above, it

[22]The Court in *Victor Stanley* did not, however, exercise its "inherent authority" to sanction defendants' pre-litigation conduct; sanctions were imposed only for conduct *after* litigation had commenced pursuant to Fed. R. Civ. P. 37. 2010 WL 3530097, *20.

[23] Fed. R. Evid. 302 states, "In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law." The New York Court of Appeals has held that such a presumption is allowed under the spoliation doctrine. *Bleecker v. Johnston*, 24 Sickles 309, 311 (N.Y. 1877) ("If a party by his own tortious act withhold the evidence by which the nature of the case would be made manifest, a presumption to his disadvantage may be indulged by the jury").

would seem that federal courts in New York State might consider the applicability of *Erie* in cases dealing with the pre-litigation duty to preserve ESI.

V. Conclusions and Recommendations

This report set out to answer the following question on behalf of litigants in New York State and federal courts: Will my pre-litigation conduct regarding the creation, retention and destruction of ESI be treated the same by New York State and federal courts? After a comparison of the current case law in New York State and federal courts, it appears that there are potential inconsistencies between the State and federal law governing the pre-litigation duty to preserve ESI and, therefore, the consequences of the breach of that duty. Furthermore, it seems that these inconsistencies may lead to different outcomes for litigants depending on whether the lawsuit is pending in State or federal court. As such, a potential litigant's conduct may, in fact, be treated differently in State and federal courts.

Once the potential conflicts were identified, the report proposed the following three separate methods for State and federal courts to harmonize the pre-litigation obligations of potential litigants: (1) the decision by State and federal courts to recognize and consider each other's existing bodies of law when deciding specific cases; (2) the adoption of a New York State or federal procedural rule requiring deference to the other system's spoliation law governing the pre-litigation duty to preserve ESI; and (3) the application of the *Erie* doctrine to determine whether pre-litigation conduct is a matter of state substantive law.

Therefore, we recommend that New York State and federal courts should be made aware that there are actual and potential inconsistencies among State and federal decisions addressing the pre-litigation duty to preserve ESI in New York State. We also recommend that New York State and federal courts should be reminded of their continuing role in effectuating consistency for potential litigants in New York State. Furthermore, we recommend that State and federal courts

should consider each of these potential remedies as they continue to address the pre-litigation duty to preserve evidence, including ESI, and, in particular, that the Second Circuit and federal courts in New York State should acknowledge the potential issue under *Erie* when deciding cases addressing the pre-litigation duty to preserve ESI. Lastly, we recommend that the Council disseminate this report to the appropriate persons or groups with authority to address the possible inconsistencies and potential solutions discussed herein, including current New York State and federal judges, the Federal Rules Committee, the New York State Office of Court Administration, and the New York State Legislature.

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* Members of the Advisory Group who drafted this report. The Advisory Group thanks James M. Paulino II of Ward Greenberg Heller & Reidy LLP and Lynnette Nogueras-Trummer of Nixon Peabody LLP for their invaluable assistance in researching and drafting this report.