

**ADMITTING ELECTRONIC EVIDENCE
IN FIDUCIARY LITIGATION**

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State Bar of Texas
FIDUCIARY LITIGATION TRIAL NOTEBOOK
December 16-17, 2010
Kerrville

CHAPTER 7

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I. INTRODUCTION

Fiduciary litigation is a practice fraught with hurdles and burdens nonexistent in other fields of practice. The pleading and trying of a case asserting a breach of a relationship of the utmost confidence imposes on the practitioner unique demands, and therefore demands unique practices. Nowhere is there a greater flexibility to establish a breach or a defense in the preparation and trial of a fiduciary litigation case than the discovery and admission of evidence. In today's digitized world, evidence predominantly means electronic evidence. As facsimile replaced mail, and electronic mail is largely replacing facsimiles, the documentation underlying a case is as evolutionary as the law dictating it. In fact, recent statistics indicate that 98% of all business records today are electronic, and 80% of them are never converted to paper or any other tangible form.¹ Additionally, as of 2006, the world was sending 60 billion emails per day.² While a fiduciary's liability may ultimately rest on whether one of the tenets of that relationship is breached, there is always the initial fact finding necessary to establish a fiduciary relationship.³ It is this initial fact finding where a uniquely tailored and technologically advanced electronic discovery, as suggested by this paper, can be the difference in a case. Furthermore, the discovery of the nonexistence or spoliation of evidence can impact a case before any evidence is even admitted.

II. WHAT IS ELECTRONIC EVIDENCE?

Electronic evidence is a broad category that can include many different categories of electronic data, including:

- Voice transmissions, including audio tape, cell phone transmissions, and voice mail;
- Computer-generated data, including spreadsheets, computer simulations, information downloaded from a GPS device, and emails;
- Information from portable sources such as PDAs and cellphones, including calendars,

text messages, notes, digital photos, and address books; and

- Video transmissions.

Computers can also contain a wealth of hidden information such as common websites visited and information downloaded from the internet. Data found on a computer may appear in one of the following forms:

- Live Data: Includes the currently-in-use data files and works in progress such as word processing documents, spreadsheets, and electronic calendars or address books.
- Replicant Data: Includes self-generated storage of documents such as information on the computer's hard drive.
- Archival or Backup Data: Includes information copied to removable media such as zip drives, jump or flash drives, and CD-ROM.
- Hidden Data or Metadata: Includes embedded logs with information about when, where, and who accessed the system, when a document was created, and a history of the edits to a document.
- Residual Data: Includes the remnants of deleted files or which the file reference has been removed from the directory listings making the information invisible to most programs.
- Internet Usage Data: Includes cache files that record internet addresses visited by the user and graphic elements of the web pages visited.

III. DISCOVERY OF ELECTRONIC DATA

Trial lawyers must develop a basic understanding of how electronic information is generated, transmitted, and stored to be able to know when, where, and how to find that information. It is particularly important that discovery strategies be developed early in a case so that crucial information is not overlooked or even destroyed. In addition, it is helpful to begin establishing, during the discovery phase of a case, the authenticity and reliability requirements necessary to admit the electronic evidence in court.

Preparing a discovery request for electronic information can be a delicate balancing act between being too specific resulting in a failure to obtain the necessary information, and being too broad and drawing objections. Although there is little case law on the subject, at least one Texas court has found a discovery order overbroad when it allowed the party to access a database without limit to time, place, or

¹ Losey, Ralph C., *e-Discovery: Current Trends and Cases*, ABA publishing, 2008, 33 (hereafter "Losey")

² Losey 33.

³ *Blieden v. Greenspan*, 751 S.W.2d 858 (Tex. 1988)

subject matter.⁴ On the other hand, “a party cannot be compelled to produce, or sanctioned for failing to produce, that which it has not been requested to produce.”⁵

A. Production Requests

As the saying goes, be careful what you ask for because you might actually get it. The Texas Rules of Civil Procedure provide a starting point regarding the discoverability of electronic evidence.

Rule 192.3(b) of the Texas Rules of Civil Procedure provides:

(b) Documents and tangible things. A party may obtain discovery of the existence, description, nature, custody, condition, location, and contents of documents and tangible things (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations) that constitute or contain matters relevant to the subject matter of the action. A person is required to produce a document or tangible thing that is within the person’s possession, custody, or control.⁶

Rule 196.4 of the Texas Rules of Civil Procedure provides:

Electronic or Magnetic Data. To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and **specify the form** in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot—through reasonable efforts—retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary

steps required to retrieve and produce the information.⁷

You should try to designate the format for production of electronic evidence. Your choice of format should factor in both the type of data being produced as well as the way in which you and your staff are capable of managing the evidence. In an ideal world, you would want everything in its native electronic format, but in the real world, you may lack the systems and software to deal with and preserve the evidentiary integrity of all native formats. Conversely, poorly defined production requests allow for those documents in your possession to be turned over in the manner most convenient and favorable for you and your staff.

A small matter with only routine issues may still be well served by a traditional paper production. In these situations, searching and volume are not a problem and paper is a good medium. But once the volume or complexity increases beyond that which you can easily manage by memory, you are better off insisting on production in electronically-searchable formats. Broad and voluminous reviews of necessary documents may be uploaded in .pdf format to an electronic reader such as an iPad, a practice that cuts down on review hours significantly as well as increases portability.

Also consider whether to request system and file metadata if it could be important to the issues in your case. Metadata is the computer-generated data about a file, including date, time, past saves, edit information, etc. For example, it is a good idea to require preservation and production of email metadata when it may impact issues in the case, particularly if there are questions concerning origin, fabrication, or alteration of email. Concerns about fabrication or manipulation of emails may be alleviated with metadata allowing you to “look behind the curtain” and see the history of that document’s creation. However, since metadata is normally hidden and usually not intended to be reviewed, several states have issued ethics opinions concluding that it is unethical to mine inadvertently-produced metadata.⁸ A few ethics opinions have held that mining metadata is not unethical.⁹ Texas does not yet have an ethics opinion directly on point.

⁴ See *In re Lowes Companies, Inc.*, 134 S.W.3d 876, 879 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

⁵ *In re Exmark Mfg. Co., Inc.*, 299 SW 3d 519, 531 (Tex. App.—Corpus Christi, 2009, no pet h.)

⁶ TEX. R. CIV. P. 192.3(B).

⁷ TEX. R. CIV. P. 196.4.

⁸ NY. Comm. On Prof’l Ethics, Op. 749 (1002); Prof’l Ethics of the Fla. Bar, Op. 06-2 (2006); Ala. State Bar office of the Gen. Counsel, Op. No. 2007-02 (2007); D.C. Bar, Op. 341.

⁹ Md. State Bar Ass’n, Comm. on Ethics, Op. 2007-092 (2006); ABA Formal Op. 06-442.

B. Production Responses

Texas Rules of Civil Procedure provide that a party responding to a request for production must either produce the documents or tangible things as they are kept in the usual course of business or organize and label them to correspond with the categories in the request. Production of electronic evidence may not fit within such easily defined categories. For example, when producing email, you must make decisions about the medium and format of production. For example, what container will be used for delivery? Hard copies? External hard drives? Electronic transmittal? Also consider which form of delivery will you use for the data files? Text files (.txt, .rtf)? Native files (.PST, .NSF)? Image files like PDF?¹⁰

It is inevitable that something will be overlooked or lost, but avoid sanctions by documenting diligence at every stage of the discovery effort. Keep a record of where the client looked and what was found, how much time and money was expended and what was sidelined and why.

C. Cost

The production, searching, and reviewing involved in electronic discovery requests often generate substantial costs. Specifically, the discovery of data on a backup system is usually a costly enterprise because these systems were not designed for easy access or for retrieving stored data. As these costs grow, the issue of who bears the burden of the increased expenses becomes the burning question. Texas Rule of Civil Procedure 196.6 indicates that the requesting party initially bears the burden of costly production:

Expenses of Production. Unless otherwise ordered by the court for good cause, the expense of producing items will be borne by the responding party and the expense of inspecting, sampling, testing, photographing, and copying items produced will be borne by the requesting party.

Texas Rule of Civil Procedure 196.4 allows for costs to be shifted to the requesting party after objection and subsequent production when “extraordinary steps” are necessary to retrieve and produce information. Little state case law exists on this issue, but under the federal statutes and case law,

however, courts have used their discretionary authority to shift the costs of electronic discovery.¹¹

To help determine whether an expense is “undue,” federal courts have adopted a different version of a balancing test that considers the following factors:

- (1) the specificity of the discovery requests;
- (2) the likelihood of discovering critical information;
- (3) the availability of such information from other sources;
- (4) the purposes for which the responding party maintains the requested data;
- (5) the relative benefit to the parties of obtaining the information;
- (6) the total cost associated with the production;
- (7) the relative ability of each party to control costs and its incentive to do so; and
- (8) the resources available to each party.¹²

D. The Use of Forensic Experts

If electronic evidence is going to be important to your case, it might be worthwhile to hire a professional to document the existence and form of the evidence, as well as preserve it for trial. Such an expert can provide assistance in a variety of ways, from helping to draft the appropriate discovery requests, to analyzing the responsive data. Other roles for an expert include reconstructing previously deleted files from the producing party’s system, and searching the producing party’s system for occurrences of particular terms and phrases. Companies specializing in data retrieval can search and seek all types of data from “deleted” information to broken hard drives.

Also, keep in mind that the very act of examining a drive invariably alters it. Many programs create temporary files that write over areas of the disk that

¹¹ *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422, 441 (S.D.N.Y. 2004) (the costs of producing digital data were shifted to the requesting party where the expense of production was “undue”); *Byers v. Ill. State Police*, 2002 WL 1264004, at *12 (N.D. Ill 2002) (holding that due to the cost of the proposed search and the plaintiffs’ failure to establish that the search will likely uncover relevant information, the plaintiffs are entitled to the archived e-mails only if they are willing to pay for part of the cost of production); *Rowe Entertainment Inc. v. William Morris Agency*, 2002 WL 975713 (S.D.N.Y. 2002) (shifting costs of email production to the plaintiffs).

¹² *See Medtronic Sofamor Danek, Inc. v. Michelson*, 553 229 F.R.D. 550 (W.D. Tenn. 2003) (court held that production of backup data as a whole would be burdensome to the plaintiff and, therefore, shifting a portion of the discovery costs to the defendant).

¹⁰ Craig Ball, *Discovery of E-Mail: The Path to Production* available at <http://www.craigball.com/articles.html>.

may have held important clues. The key is to have someone who knows what he or she is doing capture the exact state of the hard drive without altering it. There are software applications that operate below the level of the operating system to create a bit for bit copy. You will also want your expert to be able to explain how and when he created the copy to assure the court of the reliability of the data.

The best way to find a good computer forensic expert is to ask other lawyers and judges who to use and avoid, and delve into the professional literature to spot scholarship and leadership. Also consider contacting one of the professional associations, such as the High Technology Crime Investigation Association (www.HTCIA.org), for recommendations. Look for examiners with a background in law enforcement and military and ideally a background in litigation as well. Certification, membership in professional computer forensic associations, and formal training are all a plus. If you are trying to disqualify the opposing party's computer forensics expert, consider utilizing Chapter 1702 of the Texas Occupations Code which makes it a misdemeanor if a person contracts with a person who is required to hold a license, registration, certificate, or commission under the chapter knowing that the person does not hold the required license, registration, certificate, or commission.

IV. ADMISSIBILITY OF ELECTRONIC EVIDENCE

At least one federal district court judge has noted that:

[v]ery little has been written...about what is required to insure that [electronically stored information] obtained during discovery is admissible into evidence at trial...[t]his is unfortunate, because considering the significant costs associated with discovery of [electronically stored information], it makes little sense to go to all the bother and expense to get electronic information only to have it excluded from evidence or rejected from consideration during summary judgment because the proponent cannot lay a sufficient foundation to get it admitted.¹³

Electronic evidence is not inherently different than other evidence. Whether your electronic data is admissible into evidence is determined by a collection of evidence rules that act as a series of hurdles to be cleared by the proponent of the evidence. If the proponent fails to clear even one of the evidentiary hurdles, the evidence will not be admissible. While the Texas Rules of Evidence do not separately address the admissibility of electronic data, they are flexible enough to allow emails and other forms of electronic information to be authenticated within the existing framework.

Whenever electronic information is offered as evidence, either at trial or in summary judgment, the following evidentiary rules must be considered. First, is the electronic evidence relevant as determined by Texas Rule of Evidence (hereafter "TRE") 401 (does it have a tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be)? Next, if the data is relevant under TRE 401, is it authentic as required by TRE 901 (can the proponent show that the electronic data is what it purports to be)? Then, if the evidence is being offered for the truth of the matter it asserts, is it hearsay as defined by TRE 801, and, if so, is it covered by a hearsay exception (TRE 803-804)? After that, you must consider whether the form of the electronic evidence that is being offered is an original or duplicate and, if not, is there admissible secondary evidence to prove the content of the evidence (TRE 1002-1004)? Lastly, consider whether the probative value of the electronic information is substantially outweighed by the danger of unfair prejudice or one of the other factors found in TRE 403, such that it should be excluded despite its relevance. This paper will address each of these evidentiary issues in turn.

A. Relevance

Establishing that electronic evidence has some relevance is usually not difficult.¹⁴ It is important to articulate all of what might be multiple grounds of relevance. If you only stress one manner in which the evidence is relevant, you risk the evidence being excluded because the trial court views that single evidentiary argument as inapplicable.¹⁵ Rather, take the time to carefully identify each and every potential basis for your piece of evidence's admissibility.¹⁶

¹³ *Lorraine v. Markel Am. Insur. Co.*, 241 F.R.D. 534, 537-38 (D. Md. 2007). The authors rely heavily on Judge Grimm's thorough opinion, which reads much like a treatise on the admissibility of electronic evidence. Although Judge Grimm works within the federal rules of evidence, the authors found much of his commentary helpful for our state rules of evidence as well, especially

when considering the fact that the federal rules of evidence and the Texas rules of evidence are practically identical.

¹⁴ *Lorraine*, 241 F.R.D. at 541.

¹⁵ *Id.*

¹⁶ *Id.*

B. Authentication

The requirement of authentication or identification is a condition precedent to admissibility. This requirement is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.¹⁷ Unless the evidence sought to be admitted is self-authenticating under Tex. R. Evid. 902, extrinsic evidence must be adduced prior to its admission. Rule 901(b) contains a non-exclusive list of illustrations of authentication that comply with the rule. A frequently-cited federal case, *Lorraine v. Markel Am. Insur. Co.*, has become an authority on the application of the rules of evidence to electronically-stored information (ESI).¹⁸ This section quotes extensively from the case, including selections relevant to authenticating ESI:

1. Electronically Stored Information (ESI).

A party seeking to admit an exhibit need only make a prima facie showing that it is what he or she claims it to be. This is not a particularly high barrier to overcome. For example, in *United States v. Safavian*, the court analyzed the admissibility of e-mail, noting, the question for the court under Rule 901 is whether the proponent of the evidence has offered a foundation from which the jury could reasonably find that the evidence is what the proponent says it is. The Court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so.

The authentication requirements of Rule 901 are designed to set up a threshold preliminary standard to test the reliability of evidence, subject to later review by an opponent's cross-examination. Determining what degree of foundation is appropriate in any given case is in the judgment of the court. The required foundation will vary not only with the particular circumstances but also with the individual judge. Obviously, there is no "one size fits all" approach that can be taken when authenticating electronic evidence, in part because technology changes so rapidly that it is often new to many judges.

For example, in *In re F.P.*, the court addressed the authentication required to introduce transcripts of instant message conversations. In rejecting the defendant's challenge to this evidence, it stated:

"Essentially, appellant would have us create a whole new body of law just to deal with e-mails or instant messages. The argument is that e-mails or text messages are inherently

unreliable because of their relative anonymity and the fact that while an electronic message can be traced to a particular computer, it can rarely be connected to a specific author with any certainty. Unless the purported author is actually witnessed sending the e-mail, there is always the possibility it is not from whom it claims. As appellant correctly points out, anybody with the right password can gain access to another's e-mail account and send a message ostensibly from that person. However, the same uncertainties exist with traditional written documents. A signature can be forged; a letter can be typed on another's typewriter; distinct letterhead stationary can be copied or stolen. We believe that e-mail messages and similar forms of electronic communication can be properly authenticated within the existing framework of Pa.R.E. 901 and Pennsylvania case law ... We see no justification for constructing unique rules of admissibility of electronic communications such as instant messages; they are to be evaluated on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity."

Texas Note: One case addressed an online personal ad, and found that it was not necessary for authentication to show that the person placed the ad, only that the exhibit was an authentic copy of the actual online ad.¹⁹ Whether the party placed the ad did not go to the authenticity of the exhibit, but rather to the underlying issues in the case.

2. Stored versus Processed Data

In general, electronic documents or records that are merely *stored* in a computer raise no computer-specific authentication issues.²⁰ If a computer *processes* data rather than merely storing it, authentication issues may arise. The need for authentication and an explanation of the computer's processing will depend on the complexity and novelty of the computer processing. There are many stages in the development of computer data where error can be introduced, which can adversely affect the accuracy and reliability of the output. Inaccurate results occur most often because of bad or incomplete data inputting, but can also happen when defective

¹⁷ Tex. R. Evid. 901.

¹⁸ *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D.Md. 2007) (memo. op.).

¹⁹ *Musgrove v. State*, No. 03-09-00163-CR (Tex.App.—Austin 2009) (memo. op.).

²⁰ *Lorraine*, 241 F.R.D. at 543 (emph. added).

software programs are used or stored-data media become corrupted or damaged.

3. Email

There are many ways in which e-mail evidence may be authenticated.²¹ One well respected commentator has observed:

“[E]-mail messages may be authenticated by direct or circumstantial evidence. An e-mail message’s distinctive characteristics, including its ‘contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances’ may be sufficient for authentication. Printouts of e-mail messages ordinarily bear the sender’s e-mail address, providing circumstantial evidence that the message was transmitted by the person identified in the e-mail address. In responding to an email message, the person receiving the message may transmit the reply using the computer’s reply function, which automatically routes the message to the address from which the original message came. Use of the reply function indicates that the reply message was sent to the sender’s listed e-mail address. The contents of the e-mail may help show authentication by revealing details known only to the sender and the person receiving the message. However, the sending address in an e-mail message is not conclusive, since e-mail messages can be sent by persons other than the named sender. For example, a person with unauthorized access to a computer can transmit e-mail messages under the computer owner’s name. Because of the potential for unauthorized transmission of e-mail messages, authentication requires testimony from a person with personal knowledge of the transmission or receipt to ensure its trustworthiness.”

Courts also have approved the authentication of e-mail by the above described methods. *See, e.g.:*

Siddiqui, 235 F.3d at 1322–23 (E-mail may be authenticated entirely by circumstantial evidence, including its distinctive characteristics);

Safavian, 435 F.Supp.2d at 40 (recognizing that e-mail may be authenticated by

distinctive characteristics 901(b)(4), or by comparison of exemplars with other e-mails that already have been authenticated 901(b)(3));

Rambus, 348 F.Supp.2d 698 (Email that qualifies as business record may be self-authenticating under 902(11));

In re F.P., 878 A.2d at 94 (E-mail may be authenticated by direct or circumstantial evidence).

The most frequent ways to authenticate email evidence are:

901(b)(1) (person with personal knowledge),

901(b)(3) (expert testimony or comparison with authenticated exemplar),

901(b)(4) (distinctive characteristics, including circumstantial evidence),

902(7) (trade inscriptions), and

902(11) (certified copies of business record).

Texas Note: An email can be authenticated by testimony that the witness was familiar with the sender’s e-mail address and that she had received the e-mails in question from him.²² Another court enumerated several characteristics to consider when determining whether an e-mail has been properly authenticated, including:

- (1) consistency with the e-mail address on another e-mail sent by the defendant;
- (2) the author’s awareness through the e-mail of the details of defendant’s conduct;
- (3) the e-mail’s inclusion of similar requests that the defendant had made by phone during the time period; and
- (4) the e-mail’s reference to the author by the defendant’s nickname.²³

Texas Note: One Texas case has held that the reply-letter doctrine for authenticating letters applies to email.²⁴ Under this doctrine, a letter received in the

²² *Shea v. State*, 167 S.W.3d 98, 105 (Tex.App.—Waco 2005, pet. ref’d).

²³ *Massimo v. State*, 144 S.W.3d 210, 215 (Tex.App.—Fort Worth 2004, no pet.).

²⁴ *Varkonyi v. State*, 276 S.W.3d 27, 35 (Tex.App.—El Paso 2008, pet. ref’d).

²¹ *Lorraine*, 241 F.R.D. at 554-55.

due course of mail purportedly in answer to another letter is prima facie genuine and admissible without further proof of authenticity. A reply letter needs no further authentication because it is unlikely that anyone other than the purported writer would know of and respond to the contents of the earlier letter addressed to him. However, in that case, there was also another valid basis for authenticating the emails.

4. Internet Website Postings.

When determining the admissibility of exhibits containing representations of the contents of website postings of a party, the issues that have concerned courts include the possibility that third persons other than the sponsor of the website were responsible for the content of the postings, leading many to require proof by the proponent that the organization hosting the website actually posted the statements or authorized their posting.²⁵ See:

United States v. Jackson, 208 F.3d 633, 638 (7th Cir.2000) (excluding evidence of website postings because proponent failed to show that sponsoring organization actually posted the statements, as opposed to a third party);

St. Luke's, 2006 WL 1320242 (plaintiff failed to authenticate exhibits of defendant's website postings because affidavits used to authenticate the exhibits were factually inaccurate and the author lacked personal knowledge of the website);

Wady, 216 F.Supp.2d 1060.

One commentator has observed "[i]n applying [the authentication standard] to website evidence, there are three questions that must be answered explicitly or implicitly.

- (1) What was actually on the website?
- (2) Does the exhibit or testimony accurately reflect it?
- (3) If so, is it attributable to the owner of the site?"

The same author suggests that the following factors will influence courts in ruling whether to admit evidence of internet postings:

- the length of time the data was posted on the site;
- whether others report having seen it;

whether it remains on the website for the court to verify;

whether the data is of a type ordinarily posted on that website or websites of similar entities (e.g. financial information from corporations);

whether the owner of the site has elsewhere published the same data, in whole or in part;

whether others have published the same data, in whole or in part;

whether the data has been republished by others who identify the source of the data as the website in question?"

Counsel attempting to authenticate exhibits containing information from internet websites need to address these concerns in deciding what method of authentication to use, and the facts to include in the foundation.

The authentication rules most likely to apply, singly or in combination, are:

901(b)(1) (witness with personal knowledge),

901(b)(3) (expert testimony),

901(b)(4) (distinctive characteristics),

901(b)(7) (public records),

901(b)(9) (system or process capable of producing a reliable result), and

902(5) (official publications).

5. Text Messages and Chat Room Content.

Many of the same foundational issues encountered when authenticating website evidence apply with equal force to text messages and internet chat room content; however, the fact that chat room messages are posted by third parties, often using "screen names" means that it cannot be assumed that the content found in chat rooms was posted with the knowledge or authority of the website host.²⁶

One commentator has suggested that the following foundational requirements must be met to authenticate chat room evidence:

- (1) evidence that the individual used the screen name in question when participating in chat

²⁵ Lorraine, 241 F.R.D. at 555-56.

²⁶ Lorraine, 241 F.R.D. at 556.

- room conversations (either generally or at the site in question);
- (2) evidence that, when a meeting with the person using the screen name was arranged, the individual showed up;
 - (3) evidence that the person using the screen name identified himself as the person in the chat room conversation;
 - (4) evidence that the individual had in his possession information given to the person using the screen name; or
 - (5) evidence from the hard drive of the individual's computer showing use of the same screen name.

Courts also have recognized that exhibits of chat room conversations may be authenticated circumstantially.

For example, in *In re F.P.*,²⁷ the defendant argued that the testimony of the internet service provider was required, or that of a forensic expert. The court held that circumstantial evidence, such as the use of the defendant's screen name in the text message, the use of the defendant's first name, and the subject matter of the messages all could authenticate the transcripts.

Similarly, in *United States v. Simpson*,²⁸ the court held that there was ample circumstantial evidence to authenticate printouts of the content of chat room discussions between the defendant and an undercover detective, including use of the e-mail name of the defendant, the presence of the defendant's correct address in the messages, and notes seized at the defendant's home containing the address, e-mail address and telephone number given by the undercover officer.

Likewise, in *United States v. Tank*,²⁹ the court found sufficient circumstantial facts to authenticate chat room conversations, despite the fact that certain portions of the text of the messages in which the defendant had participated had been deleted. There, the court found the testimony regarding the limited nature of the deletions by the member of the chat room club who had made the deletions, circumstantial evidence connecting the defendant to the chat room, including the use of the defendant's screen name in the messages, were sufficient to authenticate the messages.

Based on the foregoing cases, the rules most likely to be used to authenticate chat room and text messages, alone or in combination, appear to be:

901(b)(1) (witness with personal knowledge) and

901(b)(4) (circumstantial evidence of distinctive characteristics).

Texas Note: While there is not yet much Texas law on the authentication of text messages, one court admitted them as party admissions, although the opinion does not address how they were authenticated.³⁰

6. Computer Stored Records and Data.

Given the widespread use of computers, there is an almost limitless variety of records that are stored in or generated by computers.³¹ As one commentator has observed "[m]any kinds of computer records and computer-generated information are introduced as real evidence or used as litigation aids at trials. They range from computer printouts of stored digital data to complex computer-generated models performing complicated computations. Each may raise different admissibility issues concerning authentication and other foundational requirements."

The least complex admissibility issues are associated with electronically stored records. In general, electronic documents or records that are merely stored in a computer raise no computer-specific authentication issues. That said, although computer records are the easiest to authenticate, there is growing recognition that more care is required to authenticate these electronic records than traditional "hard copy" records. Two cases illustrate the contrast between the more lenient approach to admissibility of computer records and the more demanding one:

In *United States v. Meienberg*,³² the defendant challenged on appeal the admission into evidence of printouts of computerized records of the Colorado Bureau of Investigation, arguing that they had not been authenticated because the government had failed to introduce any evidence to demonstrate the accuracy of the records. The Tenth Circuit disagreed, stating: "Any question as to the accuracy of the printouts, whether resulting from incorrect data entry or the operation of the computer program, as with inaccuracies in any other type of business records, would have affected only the weight of the printouts, not their admissibility." *See also:*

Kassimu, 2006 WL 1880335 (To authenticate computer records as business records did not require the maker, or even a custodian of the record, only a witness qualified to explain the

²⁷ 878 A.2d at 93–94.

²⁸ 152 F.3d at 1249.

²⁹ 200 F.3d at 629–31.

³⁰ *Lozano v. State*, No. 2-06-379-CR (Tex.App.—Fort Worth 2007) (memo. op.).

³¹ *Lorraine*, 241 F.R.D. at 556-59.

³² 263 F.3d at 1180–81.

record keeping system of the organization to confirm that the requirements of Rule 803(6) had been met, and the inability of a witness to attest to the accuracy of the information entered into the computer did not preclude admissibility);

Sea-Land Serv., Inc. v. Lozen Int'l, 285 F.3d 808 (9th Cir.2002) (ruling that trial court properly considered electronically generated bill of lading as an exhibit to a summary judgment motion. The only foundation that was required was that the record was produced from the same electronic information that was generated contemporaneously when the parties entered into their contact. The court did not require evidence that the records were reliable or accurate).

In contrast, in the case of *In re Vee Vinhnee*,³³ the bankruptcy appellate panel upheld the trial ruling of a bankruptcy judge excluding electronic business records of the credit card issuer of a Chapter 7 debtor, for failing to authenticate them. The court noted that “it is becoming recognized that early versions of computer foundations were too cursory, even though the basic elements covered the ground.” The court further observed that: “The primary authenticity issue in the context of business records is on what has, or may have, happened to the record in the interval between when it was placed in the files and the time of trial. In other words, the record being proffered must be shown to continue to be an accurate representation of the record that originally was created. Hence, the focus is not on the circumstances of the creation of the record, but rather on the circumstances of the preservation of the record during the time it is in the file so as to assure that the document being proffered is the same as the document that originally was created.” The court reasoned that, for paperless electronic records: “The logical questions extend beyond the identification of the particular computer equipment and programs used. The entity’s policies and procedures for the use of the equipment, database, and programs are important. How access to the pertinent database is controlled and, separately, how access to the specific program is controlled are important questions. How changes in the database are logged or recorded, as well as the structure and implementation of backup systems and audit procedures for assuring the continuing integrity of the database, are pertinent to the question of whether records have been changed since their creation.” In order to meet the heightened demands for authenticating electronic business records, the court adopted, with some modification, an eleven-step

foundation proposed by Professor Edward Imwinkelried, viewing electronic records as a form of scientific evidence:

1. The business uses a computer.
2. The computer is reliable.
3. The business has developed a procedure for inserting data into the computer.
4. The procedure has built-in safeguards to ensure accuracy and identify errors.
5. The business keeps the computer in a good state of repair.
6. The witness had the computer readout certain data.
7. The witness used the proper procedures to obtain the readout.
8. The computer was in working order at the time the witness obtained the readout.
9. The witness recognizes the exhibit as the readout.
10. The witness explains how he or she recognizes the readout.
11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact.

Although the position taken by the court in *In re Vee Vinhnee* appears to be the most demanding requirement for authenticating computer stored records, other courts also have recognized a need to demonstrate the accuracy of these records. *See, e.g.:*

State v. Dunn, 7 S.W.3d 427, 432 (Mo.Ct.App. 2000) (Admissibility of computer-generated records “should be determined on the basis of the reliability and accuracy of the process involved.”);

State v. Hall, 976 S.W.2d 121, 147 (Tenn. 1998) (“[T]he admissibility of the computer tracing system record should be measured by the reliability of the system, itself, relative to its proper functioning and accuracy.”).

As the foregoing cases illustrate, there is a wide disparity between the most lenient positions courts have taken in accepting electronic records as authentic and the most demanding requirements that have been imposed. Further, it would not be surprising to find that, to date, more courts have tended towards the lenient rather than the demanding approach. However, it also is plain that commentators and courts increasingly recognize the special characteristics of electronically stored records, and there appears to be a growing awareness, as expressed in the Manual for Complex Litigation, that courts “should consider the accuracy and reliability of computerized evidence” in

³³ 336 B.R. 437.

ruling on its admissibility. Lawyers can expect to encounter judges in both camps, and in the absence of controlling precedent in the court where an action is pending setting forth the foundational requirements for computer records, there is uncertainty about which approach will be required. Further, although “it may be better to be lucky than good,” as the saying goes, counsel would be wise not to test their luck unnecessarily. If it is critical to the success of your case to admit into evidence computer stored records, it would be prudent to plan to authenticate the record by the most rigorous standard that may be applied. If less is required, then luck was with you.

The methods of authentication most likely to be appropriate for computerized records are:

901(b)(1) (witness with personal knowledge),

901(b)(3) (expert testimony),

901(b)(4) (distinctive characteristics), and

901(b)(9) (system or process capable of producing a reliable result).

7. Digital Photographs.

Photographs have been authenticated for decades under Rule 901(b)(1) by the testimony of a witness familiar with the scene depicted in the photograph who testifies that the photograph fairly and accurately represents the scene.³⁴ Calling the photographer or offering expert testimony about how a camera works almost never has been required for traditional film photographs. Today, however, the vast majority of photographs taken, and offered as exhibits at trial, are digital photographs, which are not made from film, but rather from images captured by a digital camera and loaded into a computer. Digital photographs present unique authentication problems because they are a form of electronically produced evidence that may be manipulated and altered. Indeed, unlike photographs made from film, digital photographs may be “enhanced.” Digital image enhancement consists of removing, inserting, or highlighting an aspect of the photograph that the technician wants to change.

Some examples graphically illustrate the authentication issues associated with digital enhancement of photographs: Suppose that in a civil case, a shadow on a 35 mm photograph obscures the name of the manufacturer of an offending product. The plaintiff might offer an enhanced image, magically stripping the shadow to reveal the defendant’s name. Or suppose that a critical issue is the visibility of a highway hazard. A civil defendant

might offer an enhanced image of the stretch of highway to persuade the jury that the plaintiff should have perceived the danger ahead before reaching it. In many criminal trials, the prosecutor offers an ‘improved’, digitally enhanced image of fingerprints discovered at the crime scene. The digital image reveals incriminating points of similarity that the jury otherwise would never would have seen.

There are three distinct types of digital photographs that should be considered with respect to authentication analysis: original digital images, digitally converted images, and digitally enhanced images.

An original digital photograph may be authenticated the same way as a film photo, by a witness with personal knowledge of the scene depicted who can testify that the photo fairly and accurately depicts it. If a question is raised about the reliability of digital photography in general, the court likely could take judicial notice of it under Rule 201.

For digitally converted images, authentication requires an explanation of the process by which a film photograph was converted to digital format. This would require testimony about the process used to do the conversion, requiring a witness with personal knowledge that the conversion process produces accurate and reliable images, Rules 901(b)(1) and 901(b)(9)-the latter rule implicating expert testimony under Rule 702. Alternatively, if there is a witness familiar with the scene depicted who can testify to the photo produced from the film when it was digitally converted, no testimony would be needed regarding the process of digital conversion.

For digitally enhanced images, it is unlikely that there will be a witness who can testify how the original scene looked if, for example, a shadow was removed, or the colors were intensified. In such a case, there will need to be proof, permissible under Rule 901(b)(9), that the digital enhancement process produces reliable and accurate results, which gets into the realm of scientific or technical evidence under Rule 702. Recently, one state court has given particular scrutiny to how this should be done.

In *State v. Swinton*,³⁵ the defendant was convicted of murder in part based on evidence of computer enhanced images prepared using the Adobe Photoshop software. The images showed a superimposition of the defendants teeth over digital photographs of bite marks taken from the victim’s body. At trial, the state called the forensic odontologist (bite mark expert) to testify that the defendant was the source of the bite marks on the victim. However, the defendant testified that he was not familiar with how the Adobe Photoshop made the

³⁴ *Lorraine*, 241 F.R.D. at 561-62.

³⁵ 268 Conn. 781, 847 A.2d 921, 950-52 (2004).

overlay photographs, which involved a multi-step process in which a wax mold of the defendant's teeth was digitally photographed and scanned into the computer to then be superimposed on the photo of the victim. The trial court admitted the exhibits over objection, but the state appellate court reversed, finding that the defendant had not been afforded a chance to challenge the scientific or technical process by which the exhibits had been prepared. The court stated that to authenticate the exhibits would require a sponsoring witness who could testify, adequately and truthfully, as to exactly what the jury was looking at, and the defendant had a right to cross-examine the witness concerning the evidence. Because the witness called by the state to authenticate the exhibits lacked the computer expertise to do so, the defendant was deprived of the right to cross examine him.

Because the process of computer enhancement involves a scientific or technical process, one commentator has suggested the following foundation as a means to authenticate digitally enhanced photographs under Rule 901(b)(9):

- (1) The witness is an expert in digital photography;
- (2) the witness testifies as to image enhancement technology, including the creation of the digital image consisting of pixels and the process by which the computer manipulates them;
- (3) the witness testifies that the processes used are valid;
- (4) the witness testifies that there has been adequate research into the specific application of image enhancement technology involved in the case;
- (5) the witness testifies that the software used was developed from the research;
- (6) the witness received a film photograph;
- (7) the witness digitized the film photograph using the proper procedure, then used the proper procedure to enhance the film photograph in the computer;
- (8) the witness can identify the trial exhibit as the product of the enhancement process he or she performed.

The author recognized that this is an extensive foundation, and whether it will be adopted by courts in the future remains to be seen. However, it is probable that courts will require authentication of digitally enhanced photographs by adequate testimony that it is the product of a system or process that produces accurate and reliable results under Rule 901(b)(9).

8. Voicemail.

Rule 901(b)(5) provides that a voice recording may be identified by opinion based upon hearing the voice at anytime under circumstances connecting it with the alleged speaker. One Texas court has found that a voicemail was not properly authenticated when a witness testified that she recognized the voice as a party's but did not identify the recording or explain the circumstances in which it was made.³⁶

9. Conclusion on Authenticating ESI.

To prepare properly to address authentication issues associated with electronically generated or stored evidence, a lawyer must identify each category of electronic evidence to be introduced.³⁷ Then, he or she should determine what courts have required to authenticate this type of evidence, and carefully evaluate the methods of authentication identified in Rules 901 and 902, as well as consider requesting a stipulation from opposing counsel, or filing a request for admission of the genuineness of the evidence. An attorney could also ask authenticating questions about ESI during a deposition. An attorney could have the deponent log into various sites during the deposition and testify to the contents. In theory, this would be no different than having a deponent produce a diary and go through it.

With this analysis in mind, the lawyer then can plan which method or methods of authentication will be most effective, and prepare the necessary formulation, whether through testimony, affidavit, admission or stipulation. The proffering attorney needs to be specific in presenting the authenticating facts and, if authenticity is challenged, should cite authority to support the method selected.

C. **Hearsay**

Texas Rule of Evidence 801 defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Cases involving electronic evidence often raise the issue of whether electronic evidence constitutes a "statement" under TRE 801.³⁸ When the electronic writing is not assertive, or not made by a "person," courts have been reluctant to hold that the writing is hearsay as it is not

³⁶ *Miller v. State*, 208 S.W.3d 554, 566 (Tex.App.—Austin 2006, pet. ref'd).

³⁷ *Lorraine*, 241 F.R.D. at 562.

³⁸ *See Lorraine*, 241 F.R.D. at 564. TRE 801 defines a "statement" as (1) an oral or written verbal expression or (2) nonverbal conduct of a person, if it is intended by the person as a substitute for verbal expression.

a “statement.”³⁹ In addition, in analyzing electronic evidence, courts have also held that statements contained within such evidence fall outside the hearsay definition because the evidence is being offered for some purpose other than its substantive truth.⁴⁰ Lastly, do not forget about TRE 801(e)(2), wherein an admission by a party-opponent is considered not hearsay. As the *Lorraine* court noted, “[g]iven the near universal use of electronic means of communication, it is not surprising that statements

contained in electronically made or stored evidence often have been found to qualify as admissions by a party opponent if offered against that party.”⁴¹

Of course, TRE 803 includes twenty-four exceptions to the hearsay rule that should always be carefully considered when attempting to admit electronic evidence that you think might draw a hearsay objection from opposing counsel. For example, TRE 801(1) and (2) may provide hearsay exceptions for electronically stored communications containing either present sense impressions or excited utterances.⁴² Moreover, TRE 803(3) can be very helpful when trying to admit email, a type of communication that appears to be particularly prone to candid (perhaps too candid) statements of the declarant’s state of mind, feelings, emotions, or motives.⁴³

The business records exception, found in TRE 803(6) is one of the hearsay exceptions most discussed by courts when ruling on the admissibility of electronic evidence.⁴⁴ The reported decisions, from around the nation, run the gamut from cases where the court was very lenient in admitting electronic business records, to those in which the court took a very demanding approach and carefully analyzed every element of the exception.⁴⁵ Our own Fifth Circuit, in a memorandum opinion, took a very relaxed standard,

³⁹ *Id.* at 565-65 citing *United States v. Khorozian*, 333 F.3d 498, 506 (3d Cir.2003) (“[N]either the header nor the text of the fax was hearsay. As to the header, ‘[u]nder FRE 801(a), a statement is something uttered by “a person,” so nothing “said” by a machine ... is hearsay’ ”); *Safavian*, 435 F.Supp.2d at 44 (holding that portions of e-mail communications that make imperative statements instructing defendant what to do, or asking questions are nonassertive verbal conduct that does not fit within the definition of hearsay); *Telewizja Polska USA*, 2004 WL 2367740 (finding that images and text posted on website offered to show what the website looked like on a particular day were not “statements” and therefore fell outside the reach of the hearsay rule); *Perfect 10*, 213 F.Supp.2d at 1155 (finding that images and text taken from website of defendant not hearsay, “to the extent these images and text are being introduced to show the images and text found on the websites, they are not statements at all-and thus fall outside the ambit of the hearsay rule.”); *State v. Dunn*, 7 S.W.3d 427, 432 (Mo.Ct.App.2000) (“Because records of this type [computer generated telephone records] are not the counterpart of a statement by a human declarant, which should ideally be tested by cross-examination of that declarant, they should not be treated as hearsay, but rather their admissibility should be determined on the reliability and accuracy of the process involved.”); *State v. Hall*, 976 S.W.2d 121, 147 (Tenn.1998) (reviewing the admissibility of computer generated records and holding “[t]he role that the hearsay rule plays in limiting the fact finder’s consideration to reliable evidence received from witnesses who are under oath and subject to cross-examination has no application to the computer generated record in this case. Instead, the admissibility of the computer tracing system record should be measured by the reliability of the system, itself, relative to its proper functioning and accuracy.”).

⁴⁰ *Id.* at 566, citing *Siddiqui*, 235 F.3d at 1323 (e-mail between defendant and co-worker not hearsay because not offered to prove truth of substantive content, but instead to show that a relationship existed between defendant and co-worker, and that it was customary for them to communicate by e-mail); *Perfect 10*, 213 F.Supp.2d at 1155 (exhibits of defendant’s website on a particular date were not “statements” for purposes of hearsay rule because they were offered to show trademark and copyright infringement, therefore they were relevant for a purpose other than their literal truth); *State v. Braidic*, 119 Wash.App. 1075, 2004 WL 52412 at *1 (Jan. 13, 2004) (e-mail sent by defendant to victim not hearsay because they were not offered to prove the truth of the statements.).

⁴¹ *Id.* at 568 citing *Siddiqui*, 235 F.3d at 1323 (ruling that e-mail authored by defendant was not hearsay because it was an admission under FRE 801(d)(2)(A)); *Safavian*, 435 F.Supp.2d at 43-44 (holding that e-mail sent by defendant himself was admissible as non-hearsay because it constituted an admission by the defendant); *Telewizja Polska USA*, 2004 WL 2367740 (holding exhibits showing defendant’s website as it appeared on a certain day were admissible as admissions against defendant); *Perfect 10*, 213 F.Supp.2d at 1155 (admitting e-mail sent by employees of defendant against the defendant as admissions under FRE 801(d)(2)(D)).

⁴² *See id.* at 569 citing *United States v. Ferber*, 966 F.Supp. 90 (D.Mass.1997) (holding that e-mail from employee to boss about substance of telephone call with defendant in mail/wire fraud case did qualify as a present sense expression, but did not qualify as an excited utterance despite the language at the end of the e-mail “my mind is mush.”); *State of New York v. Microsoft*, 2002 WL 649951 (D.D.C. Apr.12, 2002) (analyzing the admissibility of series of exhibits including e-mail and e-mail “chains” under various hearsay exceptions, and ruling that an e-mail prepared several days after a telephone call that described the call did not qualify as a present sense impression because the requirement of “contemporaneity” was not met).

⁴³ *See id.* at 570.

⁴⁴ *See id.* at 572.

⁴⁵ *See id.*

establishing that the foundation for a computer generated business record did not require the maker of the record, or even a custodian, but only a witness qualified to explain the record keeping system of the organization.⁴⁶

Furthermore, the exemption for admissions by a party opponent is extremely useful in overcoming hearsay objections in texts, emails, Facebook wall posts, etc.⁴⁷ The *Massimo* case has a description of the authentication of a party's emails as well as a discussion of whether the emails meet the hearsay exemption for admission by party opponent or the hearsay exception for a statement against interest. A fairly recent Texas family case held that statements by a party on his MySpace page were non-hearsay as admissions by a party-opponent.⁴⁸

D. Best Evidence Rule

Under Texas's version of the best evidence rule, found in TRE 1001-1004, to prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required.⁴⁹ It is clear that the definition of "writing, recording, or photograph" includes evidence that is electronically generated and stored.⁵⁰ It is further apparent that under TRE 1001(c) the "original" of information stored in a computer is the readable display of the information on the computer screen, the storage source such as the hard drive, and any printout or output that may be read, as long as it accurately portrays the data.⁵¹ For illustration, in *Laughner v. State*, an Indiana Court of Appeals found that the content of internet chat room communications that one of the parties cut and pasted into a word processing document were originals under the state's version of the original writing rule.⁵²

Keep in mind that TRE 1004 lists four situations in which secondary evidence may be introduced instead of an original.⁵³ The first situation, when the

original is lost or destroyed, may be particularly relevant for electronic evidence, considering the vast ways that electronic evidence can be deleted, lost because of computer system failures, or purged as a result of routine maintenance.⁵⁴ In fact, at least one court has recognized that the "tenuous and ethereal nature of writing posted in internet chat rooms and message boards means that in all likelihood the exceptions [to the original writing rule that permit secondary evidence] would...[apply]."⁵⁵

E. Balancing the Probative Value Against the Danger of Unfair Prejudice Under TRE 403

After analyzing the issues associated with relevance, authenticity, hearsay, and the best evidence rule, the final step to consider with regard to electronically prepared or stored information is the need to balance its probative value against the potential for unfair prejudice or other harm under TRE 403. TRE 403 may be used in conjunction with any other evidentiary rule to determine the admissibility of electronic evidence.⁵⁶ As such, when you are analyzing the admissibility of electronic evidence, consider whether it would unfairly prejudice the opposing party, confuse or mislead the jury, unduly delay the trial, or interject collateral matters.⁵⁷ For example, one Texas federal district court, while not specifically referring to TRE 403, did express grave concerns regarding the reliability and accuracy of information posted on the internet, referring to it as "voodoo information."⁵⁸

V. DUTIES AND OBLIGATIONS SURROUNDING ELECTRONIC EVIDENCE AND DISCOVERY

Over the past few years, case and statutory law have begun to outline the duties and obligations of parties to litigation with respect to electronic discovery and evidence. Though fiduciary litigation, outside of closely held corporations, will largely be confined in discovery requests to the business data and hardware, do not automatically exclude the possibility of extraneous sources of electronic data, such as texts, facebook pages, blogs, or websites. The ever-developing case and statutory law provides important guidelines for any litigator to keep in mind when dealing with electronic evidence and discovery.

⁴⁶ *Id.* at 745 citing *United States v. Kassimu*, 2006 WL 1880335 (5th Cir. 2006).

⁴⁷ *Massimo v. State*, 144 SW3d 210, 215-17 (Tex. App.--Fort Worth 2004, no pet.).

⁴⁸ *In re TT*, 228 SW3d 312, 316-17 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

⁴⁹ TEX. R. EVID. 1002.

⁵⁰ *Lorraine*, 241 F.R.D. at 577.

⁵¹ *See id.* at 577-78; TEX. R. EVID. 1001(c).

⁵² *Laughner v. State*, 769 N.E.2d 1147, 1159 (Ind. Ct. App. 2002).

⁵³ (1) if the original has been lost or destroyed; (2) if the original is not obtainable; (3) if the original is outside the state; and (4) if the writing, recording or photograph is not closely related to a controlling issue. TEX. R. EVID. 1004.

⁵⁴ *Lorraine*, 241 F.R.D. at 580.

⁵⁵ *Id.* quoting *Bidbay.com, Inc. v. Spry*, 2003 WL 723297 (Cal. App. 2003) (unpublished opinion).

⁵⁶ *See id.* at 584.

⁵⁷ *See id.*

⁵⁸ *Id.* quoting *St. Clair v. Johnny's Oyster and Shrimp Inc.*, 76 F.Supp.2d 773 (S.D. Tex. 1999).

A. Zubulake

In a series of opinions culminating in what is commonly referred to as *Zubulake V*, Judge Schendlin of the Southern District of New York announced what have now become significant protocols for counsel's responsibilities surrounding electronic discovery and evidence.⁵⁹ One of the primary obligations the *Zubulake* opinions address is the duty to preserve electronic evidence when a party reasonably anticipates litigation.⁶⁰ *Zubulake V* provides three steps counsel should take to ensure compliance with a party's preservation obligation:

- 1) Counsel must issue a "litigation hold" at the beginning of litigation or whenever litigation is reasonably anticipated. The hold should be re-issued periodically so that new employees are aware of it and all employees are reminded of their duties.
- 2) Counsel should communicate directly with "key players" in the litigation (*i.e.* people identified in a party's initial disclosure and any supplemented disclosure).
- 3) Counsel should instruct all employees to produce electronic copies of their relevant active files and make sure that all backup media which the party has a duty retain is identified and stores in a safe place.⁶¹

A litigation hold notice should describe the matter at issue, provide specific examples of the types of information at issue, identify potential sources of information, and inform recipients of their legal obligations.⁶² Case law is clear that a party does not have to preserve information that is not relevant.⁶³

B. Sedona Guidelines

The Sedona Conference, a working group composed of lawyers, consultants, academics, and

jurists, has also published a series of articles on the management of and best practices regarding electronic evidence. Primarily aimed at organizations, the Sedona Conference published the following guidelines for managing electronic information and records:

- An organization should have reasonable policies and procedures for managing its information and records.
- An organization's information and records management policies and procedures should be realistic, practical and tailored to the circumstances of the organization.
- An organization need not retain all electronic information ever generated or received.
- An organization adopting an information and records management policy should also develop procedures that address the creation, identification, retention, retrieval and ultimate disposition or destruction of information and records.
- An organization's policies and procedures must mandate the suspension of ordinary destruction practices and procedures must mandate the suspension of ordinary destruction practices and procedures as necessary to comply with preservation obligations related to actual or reasonably anticipated litigation, government investigation or audit.⁶⁴

The Sedona Conference has also devised the following guidelines to determine when litigation is reasonably anticipated and when a duty to take affirmative steps to preserve relevant information has arisen:

- Reasonable anticipation of litigation arises when an organization is on notice of a credible threat it will become involved in litigation or anticipates taking action to initiate litigation.
- The adoption and consistent compliance with a policy defining a preservation decision-making process is one factor that demonstrates reasonableness and good faith in meeting preservation obligations.

⁵⁹*Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004); Losey, 53.

⁶⁰See *Zubulake V*, 228 F.R.D. 422; *The Sedona Conference Commentary on Legal Holds: The Trigger and The Process*, 1, (Conor R. Crowley et al. eds, The Sedona Conference 2007).

⁶¹See *Zubulake V*, 229 F.R.D. 422; *The Sedona Conference Commentary on Legal Holds*, 12.

⁶²*The Sedona Conference Commentary of Legal Holds*, 12.

⁶³See *Zubulake v. UBS Warburg (Zubulake IV)*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003)(stating, "Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic documents, and every backup tape? The answer is clearly, 'no.' Such a rule would cripple large corporations.")

⁶⁴*The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age*, iv-v (Charles R. Ragan et al. eds, The Sedona Conference 2005).

- The adoption of a process for the reporting a threat of litigation to a responsible decision maker is a factor that demonstrates reasonableness and good faith.
- The determination of whether litigation is reasonably anticipated should be based on good faith and reasonable evaluation of relevant facts and circumstances.
- Judicial evaluation of an organization's legal hold decision should be based on the good faith and reasonableness of the decision (including whether a legal hold is necessary and how the legal hold should be executed) at the time it was made.⁶⁵

C. Federal Rules of Civil Procedure

The Federal Rules of Civil Procedures were amended on December 1, 2006 to address the discovery of electronically stored information. Among the changes:

- Amended Rule 26(b)(2)(B) states that a party does not need to provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.
- Amended Rule 34 includes "electronically stored information" as a category for which any party may request any other party in an interrogatory to produce and inspect, copy, test or sample.
- Amended Rule 37(f) provides that, absent exceptional circumstances, a court may not impose sanctions on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

D. Other Rules involving Electronic Information

The Texas Rules of Civil Procedure have also recognized the increasing role electronic data plays in discovery. Texas Rule of Civil Procedure 196.4 provides that, in order to obtain the discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requested party would like it produced. The responding party must then produce the electronic or magnetic data that is responsive to

the request and reasonably available to the responding party in its normal course of business.⁶⁶ Rule 196.4 further provides that if the responding party cannot retrieve the data or information requested or produce it in the form requested through reasonable efforts, the responding party must object in compliance with the rules of civil procedure. If the court orders the responding party to comply with the request, the court must also order the requesting party to pay the reasonable expenses of the extraordinary steps required to retrieve and produce the information.⁶⁷

In August of 2007 the Uniform Law Commissioners adopted the Uniform Rules Relating to Discovery of Electronically Stored Information for use by state courts. A copy of these model rules can be found in the Appendix to this paper.

E. Recent Case law on Spoliation and Sanctions

Courts have indicated that there may be serious consequences for parties and their counsel for failing to preserve electronic evidence and to comply with the duties set forth in *Zubulake*. Possible sanctions include fines, attorney's fees and costs, as well as adverse-inference jury instructions. Additionally, in one new, important case regarding sanctions for willful spoliation, the judge threatened jail time for the actions of one party. Here are some recent examples:

In *Victor Stanley v. Creative Pipe*, 2010 WL 3530097 (D. MD. Sept. 9, 2010), already known as *Victor Stanley II*, the aptly named Judge Grimm of Maryland threatened jail time if the party who willfully destroyed evidence did not pay for the opposing party's fees and costs. While extreme in conduct and punishment, the most lasting takeaway from *Victor Stanley II* is Judge Grimm's 12 page circuit break down of spoliation criteria, caselaw, and sanctions, attached as Appendix A. Judge Grimm's sanctions and national survey of the caselaw were not done to further ESI sanctions, but rather to grasp the state of the law in order to stabilize it. As the judge stated in his opinion:

"the Court could be excused for simply acknowledging Defendants' concessions and applying the applicable law of the Fourth Circuit without considering the broader legal context in which preservation/spoliation issues are playing out in litigation across the country. While justified, such a narrow analysis would be of little use to lawyers and their clients who are forced, on a daily basis, to make important decisions in their cases regarding preservation/spoliation issues, and

⁶⁵*The Sedona Conference Commentary on Legal Holds*, 3.

⁶⁶TEX. R. CIV. P. 196.4.

⁶⁷TEX. R. CIV. P. 196.4.

for whom a more expansive examination of the broader issue might be of some assistance. Accordingly, I will attempt to synthesize not only the law of this District and Circuit, but also to put it within the context of the state of the law in other circuits as well. I hope that this analysis will provide counsel with an analytical framework that may enable them to resolve preservation/ spoliation issues with a greater level of comfort that their actions will not expose them to disproportionate costs or unpredictable outcomes of spoliation motions.”

In *Phoenix Four, Inc. v. Strategic Resources Corp.*, a law firm and its clients were sanctioned \$45,162 for the attorneys’ failure to personally investigate and understand that two of its client’s computer servers had hidden partitions containing discoverable electronic information.⁶⁸

The Southern District Court of New York in *Qualcomm Inc. v. Broadcom Corp.* found Qualcomm in violation of its discovery obligation for failing to produce over 200,000 pages of relevant e-mails, memoranda, and other company documents until four months after trial.⁶⁹ The court issued a show cause order which stated:

“this Court is inclined to consider the imposition of any and all appropriate sanctions on Qualcomm’s attorneys, including but not limited to, monetary sanctions, continuing legal education, referral to the California State Bar for appropriate investigation and possible sanctions, and counsel’s formal disclosure of this Court’s findings to all current clients and any courts in which counsel is admitted or has litigation currently pending.”⁷⁰

In *Teague v. Target Corp.*, the Western District Court of North Carolina found that plaintiff had a duty to preserve evidence, even though the suit had not been filed, because she had retained counsel and filed EEOC charges.⁷¹ Thus, plaintiff failed to comply with her duty to preserve relevant information when she

threw away her computer, which contained information relevant to the lawsuit.⁷² As sanctions, the court issued an adverse inference jury instruction.⁷³

VI. CONCLUSION

As technology pushes the electronic capture of our everyday lives into more and more areas, that information, for better or worse, becomes more lasting. The recording, destruction, production, and processing of that data is an evolving practice moving at a pace much faster and much more well informed than the law can hope to keep up with. Only by understanding the foundation of this frontier of evidence can you both utilize it to your advantage, and avoid being taken advantage of. Furthermore, with technology advancing further each day, your ability to discover and create new ways to utilize electronic data is limited only by your own ingenuity.

⁶⁸No. 05-CIV-4837, 2006 WL 1409413 (S.D.N.Y. May 22, 2006); Losey 58.

⁶⁹ No. 05-CV-1958-B(BLM) Doc. 593 (S.D. Cal. Aug. 6, 2007); Losey 114.

⁷⁰*Qualcomm*, No. 05-CIV-4837, 2006 WL 1409413 (S.D.N.Y. May 22, 2006); Losey 116.

⁷¹2007 WL 1041191 (W.D. N.C. April 4, 2007); Losey 150.

⁷²2007 WL 1041191 (W.D. N.C. April 4, 2007); Losey 150.

⁷³2007 WL 1041191 (W.D. N.C. April 4, 2007); Losey 151.

Spoliation Sanctions by Circuit

| Circuit Case law | Scope of Duty to Preserve | Can conduct be culpable per se without consideration of reasonableness? | Culpability and prejudice requirements | | | | Culpability and corresponding jury instructions | |
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| | | | For sanctions in general | for dispositive sanctions | for adverse inference instruction | for a rebuttable presumption of relevance | | |
| First | It is a duty to preserve potentially relevant evidence a party owns or controls and also a duty to notify the opposing party of evidence in the hands of third parties. <i>Velez v. Marriott PR Mgmt., Inc.</i> , 590 F. Supp. 2d 235, 258 (D.P.R. 2008). | This specific issue has not been addressed. | “The measure of the appropriate sanctions will depend on the severity of the prejudice suffered.” <i>Velez v. Marriott PR Mgmt., Inc.</i> , 590 F. Supp. 2d 235, 259 (D.P.R. 2008). “[C]arelessness is enough for a district court to consider imposing sanctions.” <i>Driggin v. Am. Sec. Alarm Co.</i> , 141 F. Supp. 2d 113, 123 (D. Me. 2000). | “severe prejudice or egregious conduct” <i>Driggin v. Am. Sec. Alarm Co.</i> , 141 F. Supp. 2d 113, 123 (D. Me. 2000). | “does not require bad faith or comparable bad motive” <i>Trull v. Volkswagon of Am., Inc.</i> , 187 F.3d 88, 95 (1st Cir. 1999); <i>Oxley v. Penobscot County</i> , No. CV-09-21-JAW, 2010 WL 3154975 (D. Me. 2010). | Whether relevance can be presumed has not been addressed. | When spoliation substantially denies a party the ability to support or defend the claim <i>Velez v. Marriott PR Mgmt., Inc.</i> , 590 F. Supp. 2d 235, 259 (D.P.R. 2008). | Intentional spoliation; permissive adverse inference if the jury finds that the spoliator knew of the lawsuit and the documents’ relevance when it destroyed them <i>Testa v. Wal-Mart Stores, Inc.</i> , 144 F.3d 173, 178 (1st Cir. 1998). |

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| <p>Documents that are potentially relevant to likely litigation “are considered to be under a party’s control,” such that the party has a duty to preserve them, “when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action.” <i>In re NTL, Inc. Sec. Litig.</i>, 244 F.R.D. 179, 195 (S.D.N.Y. 2007).</p> <p>The duty extends to key players. <i>Zubulake v. UBS Warburg LLC</i>, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).</p> | <p>Yes; specific actions, such as the failure “to issue a written litigation hold,” constitute gross negligence <i>per se</i>. <i>Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.</i>, 685 F. Supp. 2d 456, 471 (S.D.N.Y. 2010).</p> | <p>“[D]iscovery sanctions . . . may be imposed upon a party that has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence.” <i>Residential Funding Corp. v. DeGeorge Fin. Corp.</i>, 306 F.3d 99, 113 (2d Cir. 2002).</p> | <p>“willfulness, bad faith, or fault on the part of the sanctioned party” <i>Dahoda v. John Deere Co.</i>, 216 Fed. App’x 124, 125, 2007 WL 491846, at *1 (2d Cir. 2007) (quoting <i>West v. Goodyear Tire & Rubber Co.</i>, 167 F.3d 776, 779 (2d Cir. 1999)).</p> | <p>Gross negligence <i>Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.</i>, 685 F. Supp. 2d 456, 478-79 (S.D.N.Y. 2010).</p> <p>Negligence <i>Residential Funding Corp. v. DeGeorge Fin. Corp.</i>, 306 F.3d 99, 108 (2d Cir. 2002).</p> <p>Intentional conduct <i>In re Terrorist Bombings of U.S. Embassies in East Africa</i>, 552 F.3d 93, 148 (2d Cir. 2008).</p> | <p>Bad faith or gross negligence <i>Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.</i>, 685 F. Supp. 2d 456, 467 (S.D.N.Y. 2010).</p> | <p>When spoliation substantially denies a party the ability to support or defend the claim <i>Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.</i>, 685 F. Supp. 2d 456, 479 (S.D.N.Y. 2010).</p> | <p>Grossly negligent conduct; permissible inference of “the relevance of the missing documents and resulting prejudice to the . . . Defendants, subject to the plaintiffs’ ability to rebut the presumption to the satisfaction of the trier of fact.” <i>Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.</i>, 685 F. Supp. 2d 456, 478 (S.D.N.Y. 2010).</p> |
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Second

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| <p>Potentially relevant evidence; “it is essential that the evidence in question be within the party’s control.”” <i>Canton v. Kmart Corp.</i>, No. 1:05-CV-143, 2009 WL 2058908, at *2 (D.V.I. July 13, 2009) (quoting <i>Brewer v. Quaker State Oil Refining Corp.</i>, 72 F.3d 326, 334 (3d Cir. 1995))</p> | <p>No; conduct is culpable if “party [with] notice that evidence is relevant to an action . . . either proceeds to destroy that evidence or allows it to be destroyed by failing to take reasonable precautions” <i>Canton v. Kmart Corp.</i>, No. 1:05-CV-143, 2009 WL 2058908, at *3 (D.V.I. July 13, 2009) (quoting <i>Mosaid Techs., Inc. v. Samsung Elecs. Co.</i>, 348 F. Supp. 2d 332, 338 (D.N.J. 2004)) (emphasis added).</p> | <p>Bad faith <i>Bensel v. Allied Pilots Ass’n</i>, 263 F.R.D. 150, 152 (D.N.J. 2009).</p> | <p>The degree of fault is considered, and dispositive sanctions “should only be imposed in the most extraordinary of circumstances,” <i>see Mosaid Techs., Inc. v. Samsung Elecs. Co.</i>, 348 F. Supp. 2d 332, 335 (D.N.J. 2004), but a minimum degree of culpability has not been identified.</p> | <p>Negligence <i>Canton v. Kmart Corp.</i>, No. 1:05-CV-143, 2009 WL 2058908, at *2-3 (D.V.I. July 13, 2009). Intentional conduct <i>Brewer v. Quaker State Oil Refining Corp.</i>, 72 F.3d 326, 334 (3d Cir. 1995).</p> | <p>Whether relevance can be presumed has not been addressed.</p> | <p>Spoilation of evidence that would have helped a party’s case <i>In re Hechinger Inv. Co. of Del., Inc.</i>, 489 F.3d 568, 579 (3d Cir. 2007).</p> | <p>Intentional spoliation; permissible inference <i>Mosaid Techs., Inc. v. Samsung Elecs. Co.</i>, 348 F. Supp. 2d 332, 334 (D.N.J. 2004).</p> |
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Third

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| <p>Documents that are potentially relevant to likely litigation “are considered to be under a party’s control,” such that the party has a duty to preserve them, “when that party has ‘the right, authority, or practical ability to obtain the documents from a non-party to the action.’” <i>Goodman v. Praxair Servs., Inc.</i>, 632 F. Supp. 2d 494, 515 (D. Md. 2009) (citation omitted).</p> <p>It is also a duty to notify the opposing party of evidence in the hands of third parties. <i>Silvestri v. Gen. Motors Corp.</i>, 271 F.3d 583, 590 (4th Cir. 2001).</p> <p>Duty extends to key players. <i>Goodman</i>, 632 F. Supp. 2d at 512</p> | <p>The U.S. District Court for the District of Maryland has quoted <i>Zubulake IV</i>, 220 F.R.D. at 220 (“Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent.”). See <i>Sampson v. City of Cambridge</i>, No. WDQ-06-1819, 2008 WL 7514364, at *8 (D. Md. May 1, 2008) (finding defendant’s conduct negligent); <i>Pandora Jewelry, LLC v. Chamilla, LLC</i>, No. CCB-06-3041, 2008 WL 4533902, at *9 (D. Md. Sept. 30, 2008) (finding defendant’s conduct grossly negligent); cf. <i>Goodman</i>, 632 F. Supp. 2d at 522 (stating that defendant, “much like the defendants in <i>Sampson</i> and <i>Pandora</i>, was clearly negligent” because it failed to implement a litigation hold, but also explaining why such action was negligent).</p> | <p>“only a showing of fault, with the degree of fault impacting the severity of sanctions” <i>Sampson v. City of Cambridge</i>, 251 F.R.D. 172, 179 (D. Md. 2008) (using “fault” to describe conduct ranging from bad faith destruction to ordinary negligence).</p> | <p>The court must “be able to conclude either (1) that the spoliator’s conduct was so egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator’s conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim.” <i>Silvestri v. Gen. Motors Corp.</i>, 271 F.3d 583, 593 (4th Cir. 2001).</p> | <p>The court “must only find that spoliator acted willfully in the destruction of evidence.” <i>Goodman v. Praxair Servs., Inc.</i>, 632 F. Supp. 2d 494, 519 (D. Md. 2009).</p> | <p>Willful behavior <i>Sampson v. City of Cambridge</i>, 251 F.R.D. 172, 179 (D. Md. 2008).</p> | <p>When spoliation substantially denies a party the ability to support or defend the claim <i>Goodman v. Praxair Servs., Inc.</i>, 632 F. Supp. 2d 494, 519 (D. Md. 2009); <i>Sampson v. City of Cambridge</i>, 251 F.R.D. 172, 180 (D. Md. 2008).</p> | <p>Willful spoliation; adverse jury instruction, but not the “series of fact-specific adverse jury instructions” that the plaintiff requested <i>Goodman v. Praxair Servs., Inc.</i>, 632 F. Supp. 2d 494, 523 (D. Md. 2009).</p> |
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Fourth

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| <p>Party with control over potentially relevant evidence has a duty to preserve it; scope includes evidence in possession of “employees likely to have relevant information, i.e., ‘the key players’” <i>Tango Transp., LLC v. Transp. Int’l Pool, Inc.</i>, No. 5:08-CV-0559, 2009 WL 3254882, at *3 (W.D. La. Oct. 8, 2009).</p> | <p>No: “Whether preservation or discovery conduct is acceptable in a case depends on what is reasonable, and that in turn depends on whether what was done-or not done-was proportional to that case and consistent with clearly established applicable standards.” <i>Rimkus Consulting Group, Inc. v. Cammarata</i>, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010).</p> | <p>“some degree of culpability” <i>Rimkus Consulting Group, Inc. v. Cammarata</i>, 688 F. Supp. 2d 598, 614 (S.D. Tex. 2010).</p> | <p>Bad faith (and prejudice) <i>Rimkus Consulting Group, Inc. v. Cammarata</i>, 688 F. Supp. 2d 598, 617 (S.D. Tex. 2010).</p> | <p>Bad faith <i>Rimkus Consulting Group, Inc. v. Cammarata</i>, 688 F. Supp. 2d 598, 617 (S.D. Tex. 2010).</p> | <p>“The Fifth Circuit has not explicitly addressed whether even bad-faith destruction of evidence allows a court to presume that the destroyed evidence was relevant or its loss prejudicial.” <i>Rimkus Consulting Group, Inc. v. Cammarata</i>, 688 F. Supp. 2d 598, 617-18 (S.D. Tex. 2010).</p> | <p>When spoliation substantially denies a party the ability to support or defend the claim <i>Rimkus Consulting Group, Inc. v. Cammarata</i>, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010).</p> | <p>Willful spoliation; jury instruction would “ask the jury to decide whether the defendants intentionally deleted emails and attachments to prevent their use in litigation.” <i>Rimkus Consulting Group, Inc. v. Cammarata</i>, 688 F. Supp. 2d 598, 620, 646 (S.D. Tex. 2010).</p> |
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Fifth

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| <p>It is a duty to preserve potentially relevant evidence that a party owns or controls and to notify the opposing party of evidence in the hands of third parties. <i>Jain v. Memphis Shelby Airport Auth.</i>, No. 08-2119-STA-dkv, 2010 WL 711328, at *2 (W.D. Tenn. Feb. 25, 2010). Duty extends to key players <i>In re Nat'l Century Fin. Enters., Inc. Fin. Inv. Litig.</i>, No. 2:03-md-1565, 2009 WL 2169174, at *11 (S.D. Ohio July 16, 2009).</p> | <p>This specific issue has not been addressed. In <i>BancorpSouth Bank v. Herter</i>, 643 F. Supp. 2d 1041, 1061 (W.D. Tenn. 2009), the court quoted <i>Zubulake IV</i>, 220 F.R.D. at 220 (“Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent.”), but it also analyzed the defendant’s conduct to make the finding that it was “more than negligent.”</p> | <p>Bad faith (intentional) destruction, gross negligence, or ordinary negligence <i>In re Global Technovations, Inc.</i>, 431 B.R. 739, 780 (Bankr. E.D. Mich. 2010) (equating intentional and bad faith conduct).</p> | <p>willfulness, bad faith, or fault <i>In re Global Technovations, Inc.</i>, 431 B.R. 739, 779 (Bankr. E.D. Mich. 2010) (using “fault” to describe conduct ranging from intentional conduct to ordinary negligence). Other cases in circuit define “fault” as “objectively unreasonable behavior.” E.g., <i>BancorpSouth Bank v. Herter</i>, 643 F. Supp. 2d 1041, 1060 (W.D. Tenn. 2009); <i>Jain v. Memphis Shelby Airport Auth.</i>, No. 08-2119-STA-dkv, 2010 WL 711328, at *3 (W.D. Tenn. Feb. 25, 2010).</p> | <p>Bad faith <i>In re Global Technovations, Inc.</i>, 431 B.R. 739, 782 (Bankr. E.D. Mich. 2010). Bad faith not required <i>Miller v. Home Depot USA, Inc.</i>, No. 3-08-0281, 2010 WL 373860, at *1 (M.D. Tenn. Jan. 28, 2010). Ordinary negligence <i>Jain v. Memphis Shelby Airport Auth.</i>, No. 08-2119-STA-dkv, 2010 WL 711328, at *3 (W.D. Tenn. Feb. 25, 2010); <i>Forest Labs., Inc. v. Caraco Pharm. Labs., Ltd.</i>, No. 06-CV-13143, 2009 WL 998402, at *5-6 (E.D. Mich. Apr. 14, 2009).</p> | <p>“The spoliating party bears the burden of establishing lack of prejudice to the opposing party, a burden the Sixth Circuit has described as ‘an uphill battle.’” <i>Jain v. Memphis Shelby Airport Auth.</i>, No. 08-2119-STA-dkv, 2010 WL 711328, at *2 (W.D. Tenn. Feb. 25, 2010).</p> | <p>When spoliation substantially denies a party the ability to support or defend the claim <i>Jain v. Memphis Shelby Airport Auth.</i>, No. 08-2119-STA-dkv, 2010 WL 711328, at *4 (W.D. Tenn. Feb. 25, 2010).</p> | <p>Unintentional conduct; permissible inference <i>Jain v. Memphis Shelby Airport Auth.</i>, No. 08-2119-STA-dkv, 2010 WL 711328, at *4-5 (W.D. Tenn. Feb. 25, 2010).</p> |
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Sixth

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| <p>Duty to preserve potentially relevant evidence party has control over <i>Jones v. Bremen High Sch. Dist.</i> 228, No. 08-C-3548, 2010 WL 2106640, at *5 (N.D. Ill. May 25, 2010).</p> | <p>No: Breach is failure to act reasonably under the circumstances <i>Jones v. Bremen High Sch. Dist.</i> 228, No. 08-C-3548, 2010 WL 2106640, at *6-7 (N.D. Ill. May 25, 2010). “The failure to institute a document retention policy, in the form of a litigation hold, is relevant to the court’s consideration, but it is not <i>per se</i> evidence of sanctionable conduct.” <i>Haynes v. Dart</i>, No. 08 C 4834, 2010 WL 140387, at *4 (N.D. Ill. Jan. 11, 2010).</p> | <p>Willfulness, bad faith, or fault <i>Jones v. Bremen High Sch. Dist.</i> 228, No. 08-C-3548, 2010 WL 2106640, at *5 (N.D. Ill. May 25, 2010) (stating that fault is based on the reasonableness of the party’s conduct). Bad faith <i>BP Amoco Chemical Co. v. Flint Hills Resources, LLC</i>, No. 05 C 5, 2010 WL 1131660, at *24 (N.D. Ill. Mar. 25, 2010).</p> | <p>Willfulness, bad faith, or fault <i>In re Kmart Corp.</i>, 371 B.R. 823, 840 (Bankr. N.D. Ill. 2007) (noting that fault, while based on reasonableness, is more than a “slight error in judgment”) (citation omitted)</p> | <p>Bad faith <i>Faas v. Sears, Roebuck & Co.</i>, 532 F.3d 633, 644 (7th Cir. 2008).</p> | <p>Unintentional conduct is insufficient for presumption of relevance <i>In re Kmart Corp.</i>, 371 B.R. 823, 853-54 (Bankr. N.D. Ill. 2007).</p> | <p>When spoliation substantially denies a party the ability to support or defend the claim <i>Krumwiede v. Brighton Assocs., L.L.C.</i>, No. 05-C-3003, 2006 WL 1308629, at *10 (N.D. Ill. May 8, 2006). When spoliation substantially denies a party the ability to support or defend the claim OR delays production of evidence <i>Jones v. Bremen High Sch. Dist.</i> 228, No. 08-C-3548, 2010 WL 2106640, at *8-9 (N.D. Ill. May 25, 2010).</p> | <p>Grossly negligent conduct; jury instruction to inform the jury of the defendant’s duty and breach thereof <i>Jones v. Bremen High Sch. Dist.</i> 228, No. 08-C-3548, 2010 WL 2106640, at *10 (N.D. Ill. May 25, 2010).</p> |
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Seventh

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| Eighth | <p>Duty to preserve potentially relevant documents in party's possession <i>Dillon v. Nissan Motor Co.</i>, 986 F.2d 263, 267 (8th Cir. 1993).</p> | <p>Courts in the Eighth Circuit have not found conduct culpable without analyzing the facts, although reasonableness is not discussed.</p> | <p>Bad faith <i>Wright v. City of Salisbury</i>, No. 2:07CV0056 AGF, 2010 WL 126011, at *2 (E.D. Mo. Apr. 6, 2010).</p> | <p>Bad faith <i>Johnson v. Avco Corp.</i>, No. 4:07CV 1695 CDP, 2010 WL 1329361, at *13 (E.D. Mo. 2010); <i>Menz v. New Holland N. Am., Inc.</i>, 440 F.3d 1002, 1006 (8th Cir. 2006).</p> | <p>Bad faith <i>Greyhound Lines, Inc. v. Wade</i>, 485 F.3d 1032, 1035 (8th Cir. 2007); <i>Menz v. New Holland N. Am., Inc.</i>, 440 F.3d 1002, 1006 (8th Cir. 2006); <i>Stevenson v. Union Pac. RR</i>, 354 F.3d 739, 747 (8th Cir. 2004) (bad faith required if spoliation happens pre-litigation) Bad faith is not required to sanction for “the ongoing destruction of records during litigation and discovery.” <i>Stevenson</i>, 354 F.3d at 750; <i>MeccaTech, Inc. v. Kiser</i>, 2008 WL 6010937, at *8 (D. Neb. 2008) (same), <i>adopted in part</i>, No. 8:05CV570, 2009 WL 1152267 (D. Neb. Apr. 23, 2009).</p> | <p>This issue has not been addressed, but it has been stated that there is no presumption of irrelevance of intentionally destroyed documents. <i>Alexander v. Nat'l Farmers Org.</i>, 687 F.2d 1173, 1205 (8th Cir. 1982).</p> | <p>Destruction of evidence that “may have [been] helpful” <i>Dillon v. Nissan Motor Co.</i>, 986 F.2d 263, 268 (8th Cir. 1993). “irreparable injury to plaintiffs’ claims” <i>Monsanto Co. v. Woods</i>, 250 F.R.D. 411, 414 (E.D. Mo. 2008).</p> | <p>“destruction was not ‘willful’ or ‘malicious,’” but plaintiffs’ counsel should have known to preserve the evidence; jury was instructed that “an adverse inference may be drawn from plaintiffs’ failure to preserve the vehicle” <i>Bass v. Gen. Motors Corp.</i>, 929 F. Supp. 1287, 1290 (W.D. Mo. 1996), <i>aff’d on this ground</i>, 150 F.3d 842, 851 (8th Cir. 1998).</p> |
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| <p>Duty to preserve potentially relevant evidence in party's possession <i>Leon v. IDX Systems Corp.</i>, 2004 WL 5571412, at *3 (W.D. Wash. 2004), <i>aff'd</i>, 464 F.3d 951 (9th Cir. 2006).</p> <p>Duty extends to key players. <i>Hous. Rights Ctr. v. Sterling</i>, 2005 WL 3320739, at *3 (C.D. Cal. Mar. 2, 2005).</p> | <p>In <i>Hous. Rights Ctr. v. Sterling</i>, 2005 WL 3320739, at *3 (C.D. Cal. Mar. 2, 2005), the court quoted <i>Zubulake IV</i>, 220 F.R.D. at 220 (“Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent.”), and found that defendants’</p> <p>“[d]estruction of documents during ongoing litigation was, at a minimum, negligent.”</p> | <p>Bad faith not required <i>Dae Kon Kwon v. Costco Wholesale Corp.</i>, No. CIV. 08-360 JMSBMK, 2010 WL 571941, at *2 (D. Hawai'i 2010); <i>Carl Zeiss Vision Intern. GmbH v. Signet Armorlite, Inc.</i>, No. 07CV0894 DMS(POR), 2010 WL 743792, at *15 (S.D. Cal. Mar. 1, 2010), <i>amended on other grounds</i>, 2010 WL 1626071 (S.D. Cal. Apr 21, 2010).</p> | <p>Willfulness, bad faith, or fault <i>Dae Kon Kwon v. Costco Wholesale Corp.</i>, No. CIV. 08-360 JMSBMK, 2010 WL 571941, at *2 (D. Hawai'i 2010) (requiring that party “engaged deliberately in deceptive practices”)</p> <p>“[D]isobedient conduct not shown to be outside the control of the litigant” is all that is required to demonstrate willfulness, bad faith, or fault.” <i>Henry v. Gill Indus.</i>, 983 F.2d 943, 948 (9th Cir. 1993).</p> | <p>Bad faith or gross negligence <i>Karnazes v. County of San Mateo</i>, No. 09-0767 MMC (MEJ), 2010 WL 2672003, at *2 (N.D. Cal. July 2, 2010).</p> <p>Bad faith not required <i>Otsuka v. Polo Ralph Lauren Corp.</i>, No. C 07-02780 SI, 2010 WL 366653, at *3 (N.D. Cal. Jan. 25, 2010).</p> | <p>This issue has not been addressed.</p> | <p>When spoliation substantially denies a party the ability to support or defend the claim <i>Henry v. Gill Indus.</i>, 983 F.2d 943, 948 (9th Cir. 1993).</p> | <p>The Court's research has not located case in which the court granted an adverse inference instruction and stated what the instruction would be.</p> |
| Ninth | | | | | | | |

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| <p>Duty extends to key players <i>Pinstripe, Inc. v. Manpower, Inc.</i>, No. 07-CV-620-GKF-PJC, 2009 WL 2252131, at *1 (N.D. Okla. July 29, 2009).</p> <p>A party with possession of potentially relevant evidence has a duty to preserve it; even if the party relinquishes ownership or custody, it must contact the new custodian to preserve the evidence. <i>Jordan F. Miller Corp. v. Mid-Continent Aircraft Serv.</i>, 139 F.3d 912, 1998 WL 68879, at *5-6 (10th Cir. 1998).</p> | <p>No. <i>Procter & Gamble Co. v. Haugen</i>, 427 F.3d 727, 739 n.8 (10th Cir. 2005) (stating that district court must consider Rule 26(b)(2)(C)(iii), which requires the court to limit discovery if “the burden or expense of the proposed discovery outweighs its likely benefit”).</p> | <p>Bad faith not required <i>Hatfield v. Wal-Mart Stores, Inc.</i>, 335 Fed. App’x 796, 804 (10th Cir. 2009).</p> <p>Negligence <i>Pipes v. UPS, Inc.</i>, No. CIV.A.07-1762, 2009 WL 2214990, at *1 (W.D. La. July 22, 2009).</p> | <p>“willfulness, bad faith, or [some] fault” <i>Procter & Gamble Co. v. Haugen</i>, 427 F.3d 727, 738 (10th Cir. 2005) (using language originally in <i>Societe Internationale v. Rogers</i>, 357 U.S. 197, 212 (1958), which distinguished “fault” from a party’s inability to act otherwise).</p> | <p>Bad faith <i>Turner v. Pub. Serv. Co. of Colo.</i>, 563 F.3d 1136, 1149 (10th Cir. 2009).</p> <p>Neither bad faith nor intentionality required <i>Hatfield v. Wal-Mart Stores, Inc.</i>, 335 Fed. App’x 796, 804 (10th Cir. 2009); <i>Schrieber v. Fed. Ex. Corp.</i>, No. 09-CV-128-JHP-PJC, 2010 WL 1078463 (N.D. Okla. March 18, 2010).</p> | <p>Although this specific issue has not been addressed, the court declined to “create a presumption in favor of spoliation whenever a moving party can prove that records that might have contained relevant evidence have been destroyed” in <i>Crandall v. City & County of Denver, Colo.</i>, No. 05-CV-00242-MSK-MEH, 2006 WL 2683754, at *2 (D. Colo. Sept. 19, 2006).</p> | <p>Spoliation that impairs a party’s ability to support a claim or defense. <i>Pinstripe, Inc. v. Manpower, Inc.</i>, No. 07-CV-620-GKF-PJC, 2009 WL 2252131, at *2 (N.D. Okla. July 29, 2009).</p> | <p>Bad faith; adverse inference instruction <i>Smith v. Slifer Smith & Frampton/Vail Assocs. Real Estate, LLC</i>, No. CIV A 06CV02206-JLK, 2009 WL 482603, at *13 (D. Colo. Feb. 25, 2009).</p> |
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Tenth

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| <p>Duty to preserve potentially relevant evidence that party has “access to and control over” <i>Nat’l Grange Mut. Ins. Co. v. Hearth & Home, Inc.</i>, No. CIV.A. 2:06CV54WCO, 2006 WL 5157694 at * 5 (N.D. Ga. Dec. 19, 2006).</p> | <p>Courts in the Eleventh Circuit have not found conduct culpable without analyzing the facts, although reasonableness is not discussed.</p> | <p>Bad faith <i>Managed Care Solutions, Inc. v. Essent Healthcare, Inc.</i>, No. 09-60351-CIV, 2010 WL 3368654, at *4 (S.D. Fla. Aug. 23, 2010).</p> <p>Degree of culpability is weighed against prejudice caused by spoliation <i>Flury v. Daimler Chrysler Corp.</i>, 427 F.3d 939, 945 (11th Cir. 2005); <i>Brown v. Chertoff</i>, 563 F. Supp. 2d 1372, 1381 (S.D. Ga. 2008).</p> | <p>Bad faith <i>Managed Care Solutions, Inc. v. Essent Healthcare, Inc.</i>, No. 09-60351-CIV, 2010 WL 3368654, at *13 (S.D. Fla. Aug. 23, 2010).</p> | <p>Bad faith <i>Penalty Kick Mgmt. Ltd. v. Coca Cola Co.</i>, 318 F.3d 1284, 1294 (11th Cir. 2003); <i>Managed Care Solutions, Inc. v. Essent Healthcare, Inc.</i>, No. 09-60351-CIV, 2010 WL 3368654, at *8 (S.D. Fla. Aug. 23, 2010).</p> | <p>This issue has not been addressed.</p> | <p>Spoilation of evidence that was not just relevant but “crucial” to a claim or defense <i>Managed Care Solutions, Inc. v. Essent Healthcare, Inc.</i>, No. 09-60351-CIV, 2010 WL 3368654, at *8 (S.D. Fla. Aug. 23, 2010).</p> | <p>Negligence; jury to be instructed that the destruction raises a rebuttable inference that the evidence supported plaintiff’s claim <i>Brown v. Chertoff</i>, 563 F. Supp. 2d 1372, 1381 (S.D. Ga. 2008) (but other courts in Eleventh Circuit will not order any sanctions without bad faith)</p> |
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Eleventh

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| D.C. | <p>Duty to preserve potentially relevant evidence “within the ability of the defendant to produce it” <i>Friends for All Children v. Lockheed Aircraft Corp.</i>, 587 F. Supp. 180, 189 (D.D.C.), <i>modified</i>, 593 F. Supp. 388 (D.D.C.), <i>aff’d</i>, 746 F.2d 816 (D.C. Cir. 1984).</p> | <p>Courts in the D.C. Circuit have not found conduct culpable without analyzing the facts, although reasonableness is not discussed.</p> | <p>Case law addresses specific sanctions, rather than sanctions generally.</p> | <p>Bad faith <i>Shepherd v. Am. Broad Cos.</i>, 62 F.3d 1469, 1477 (D.C. Cir. 1995); <i>D’Onofrio v. SFX Sports Group, Inc.</i>, No. 06-687 (JDB/JMF), 2010 WL 3324964, at *5 (D.D.C. Aug. 24, 2010).</p> | <p>Negligent or deliberate <i>Mazloum v. D.C. Metro. Police Dep’t</i>, 530 F. Supp. 2d 282, 292 (D.D.C. 2008); <i>More v. Snow</i>, 480 F. Supp. 2d 257, 274-75 (D.D.C. 2007); <i>D’Onofrio v. SFX Sports Group, Inc.</i>, No. 06-687 (JDB/JMF), 2010 WL 3324964, at *10 (D.D.C. Aug. 24, 2010) (not for mere negligence unless “the interests in righting the evidentiary balance and in the deterring of others trumps the lacuna that a logician would detect in the logic of giving such an instruction”).</p> | <p>This issue has not been addressed.</p> | <p>Case law states that the spoliated evidence must have been relevant, i.e., information that would have supported a claim or defense, but it does not address prejudice.</p> | <p>“[A]ny adverse inference grounded in negligence would be considerably weaker in both language and probative force than an instruction regarding deliberate destruction.” <i>Mazloum v. D.C. Metro. Police Dep’t</i>, 530 F. Supp. 2d 282, 293 (D.D.C. 2008).</p> |
| Federal | <p>“In reviewing sanction orders, [the Federal Circuit] applies the law of the regional circuit from which the case arose.” <i>Monsanto Co. v. Ralph</i>, 382 F.3d 1374, 1380 (Fed. Cir. 2004). In <i>Consolidated Edison Co. of N.Y., Inc. v. United States</i>, 90 Fed. Cl. 228, 255 n.20 (Fed. Cl. 2009), the United States Court of Federal Claims observed that “the United States Court of Appeals for the Federal Circuit, has not definitively addressed whether a finding of bad faith is required before a court can find spoliation or impose an adverse inference or other sanction. Because many of the spoliation cases decided to date by the Federal Circuit have been patent cases in which the Federal Circuit applies the law of the relevant regional circuit, the Federal Circuit has not had the opportunity to announce a position binding on this court as to a possible ‘bad faith’ or other standard to trigger a spoliation of evidence sanction. Consequently, judges of the United States Court of Federal Claims have taken differing positions on the ‘bad faith’ requirement. Compare <i>United Med. Supply Co. v. United States</i>, 77 Fed. Cl. 257, 268 (2007) ([A]n injured party need not demonstrate bad faith in order for the court to impose, under its inherent authority, spoliation sanctions.’), with <i>Columbia First Bank, FSB v. United States</i>, 54 Fed. Cl. 693, 703 (2002) (noting findings of bad faith are required before the court can determine that there was spoliation).” (Citation omitted).</p> | | | | | | | |

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