

3-20-2018

Sometimes, Old Rules Know Best: Returning to Common Law Conceptions of the Duty to Preserve in the Digital Information Age

Robert Keeling

Follow this and additional works at: <https://scholarship.law.edu/lawreview>



Part of the [Civil Procedure Commons](#)

Recommended Citation

Robert Keeling, *Sometimes, Old Rules Know Best: Returning to Common Law Conceptions of the Duty to Preserve in the Digital Information Age*, 67 *Cath. U. L. Rev.* 67 (2018).

Available at: <https://scholarship.law.edu/lawreview/vol67/iss1/7>

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

Sometimes, Old Rules Know Best: Returning to Common Law Conceptions of the Duty to Preserve in the Digital Information Age

Cover Page Footnote

Robert Keeling is a Partner at Sidley Austin LLP whose practice focuses on electronic discovery issues. He would like to thank Chris Eiswerth, Grady Nye, Nate Wright, and Lizzy MacGill for their research and contributions to this Paper.

SOMETIMES, OLD RULES KNOW BEST:
RETURNING TO COMMON LAW CONCEPTIONS OF
THE DUTY TO PRESERVE IN THE DIGITAL
INFORMATION AGE

Robert Keeling⁺

I. ZUBULAKE IV: THE MODERN UNDERSTANDING OF THE SPOILIATION	
DOCTRINE.....	73
A. <i>When the Duty to Preserve Attaches</i>	73
B. <i>The Scope of the Duty to Preserve ESI</i>	74
C. <i>The Culpability Standard for Imposing Sanctions</i>	74
D. <i>The Post-Zubulake IV Era</i>	75
II. THE DUTY TO PRESERVE AT COMMON LAW	78
A. <i>Common Law Understandings of the Duty to Preserve</i>	80
B. <i>Attachment of the Duty</i>	82
III. SANCTIONS FOR SPOILIATION.....	85
IV. ZUBULAKE IV’S FOUNDATION OF SAND	89
A. <i>Venturing into Unchartered Territory: Adams v. Dan River Mills,</i> <i>Inc.</i>	90
B. <i>Triggering the Duty to Preserve</i>	91
C. <i>Scope of the Duty to Preserve</i>	94
D. <i>The Culpability Standard</i>	96
V. SPOILIATION UNDER THE REVISED RULE 37(E)	99
VI. CONCLUSION.....	102

Today, businesses generate massive and ever-increasing quantities of data. When faced with the prospect of litigation, current rules force businesses to assume significant costs to store and maintain data that may relate to that litigation. Recent revisions to the Federal Rules of Civil Procedure codified a modern approach to preserving electronic data in the event a company might face litigation in the future. The drafters proposed amendments, knowing that modern rules were not working. While designed to address this concern, the revisions largely left untouched the primary drivers of preservation costs. The revisions leave unclear: 1) when the duty to preserve attaches, 2) what material must be preserved, and 3) the culpability standard for imposing sanctions when information is lost. Many commentators believe these deficiencies are the result of rules failing to keep pace with the explosion of modern technology. But the opposite may be true. Ambiguity in the modern construction was not inevitable.

⁺ Robert Keeling is a Partner at Sidley Austin LLP whose practice focuses on electronic discovery issues. He would like to thank Chris Eiswerth, Grady Nye, Nate Wright, and Lizzy MacGill for their research and contributions to this Paper.

Under the traditional common-law approach, there were clear answers to these questions that would dramatically lessen the burden to businesses if applied to the present day. Rather than continue trying to play catch-up through indirect measures, it is time to return to the historical, common-law standard.

At the time, it was a routine contract dispute. Today, it would be viewed as an anomaly. In 1947, the Louisiana Supreme Court considered a claim for \$3,600 for unpaid labor as part of a construction contract.¹ At the core of the litigation was the question of how the court should handle the destruction of certain “job cards” from a machine shop.² These job cards were used to track a worker’s hours.³ A job card was given to the employee who punched it at a time clock when he began and completed working.⁴ The superintendent collected these job cards and made up “job sheets” that collectively included the hours worked by each employee on a particular job.⁵ After the information from the job cards was added to the job sheets, company practice was to destroy the job cards.⁶ As one superintendent explained, the job cards became old and greasy from the hands of the workers and, once the information had been copied into permanent records, they served no further purpose.⁷

As the plaintiff completed work on the defendant’s projects, the job sheets were used to generate invoices.⁸ Rather than pay the invoices, the defendants sent an auditor to verify them.⁹ The auditor demanded to see “original records.”¹⁰ The plaintiff refused, claiming he would not change his system of record keeping to accommodate the defendants as the work was “practically over.”¹¹ Soon thereafter, the plaintiff filed suit, offering the job sheets as evidence of labor performed.¹² Defense counsel objected, claiming the plaintiff destroyed the job cards after the auditor requested to review the original records, and subsequently sought to exclude the job cards as a spoliation sanction.¹³

The court sided with the plaintiffs, finding the destruction of these job cards, which were largely duplicative and inconvenient to maintain, was not done “with the intention of giving [the] plaintiff an unfair advantage over the defendants.”¹⁴ And so it was at the common law. Intentional destruction of

-
1. Crosby v. Little River Sand & Gravel Dev., 31 So. 2d 226, 226–27 (La. 1947).
 2. *Id.* at 227–28.
 3. *Id.*
 4. *Id.* at 227.
 5. *Id.* at 228.
 6. *Id.*
 7. *Id.*
 8. *Id.*
 9. *Id.*
 10. *Id.*
 11. *Id.*
 12. *Id.* at 226–27.
 13. *Id.* at 229.
 14. *Id.* at 228.

material evidence once litigation commenced (or was imminent) might give rise to an inference that the evidence was adverse to the interest of the party who destroyed it. The theory was that a party, conscious of a weakness in their claim, might be more willing to destroy adverse evidence.¹⁵ But, the scope of this doctrine was limited. By and large, litigants had a duty to preserve only those pieces of evidence that directly related to litigation, and that duty started only upon the filing of the action between the two parties (or once it was clearly imminent).¹⁶ Then, even if evidence were destroyed, courts would impose sanctions as part of their inherent powers only after the opposing party showed that the spoliator had intentionally destroyed the documents in an effort to frustrate the litigation.¹⁷

The courts' inherent power to sanction spoliation finds support in English common law and the early cases in the United States.¹⁸ For centuries, those courts balanced the equities, ensuring that both sides in a dispute had access to the necessary documents and that neither side bore a disproportionate share of the discovery burden.

Three decades later, neither discovery practices nor the doctrine remains the same. For modern businesses, the explosion of electronically stored information (ESI), which has revolutionized commerce, has also imposed significant costs.¹⁹ These costs are far above and beyond those associated with the storage of job cards, given that litigation now requires the implementation of information holds and the suspension of document-retention policies.²⁰ Storage alone is costly.²¹

15. See Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 421 (2010).

16. See Nicole D. Wright, Note, *Federal Rule of Civil Procedure 37(e): Spoliation the Spoliation Doctrine*, 38 HOFSTRA L. REV. 793, 797 (2009).

17. *Id.* at 795.

18. See, e.g., *Warren v. Crew*, 22 Iowa 315 (1867); *Armory v. Delamirie*, 93 Eng. Rep. 664 (K.B. 1721); see also Scott S. Katz & Anne Marie Muscaro, *Spoliation of Evidence: Crimes, Sanctions, Inferences, and Torts*, 29 TORT & INS. L.J. 51 (1993).

19. Dennis R. Kiker, *Defensible Data Deletion: A Practical Approach to Reducing Cost and Managing Risk Associated with Expanding Enterprise Data*, 20 RICH. J.L. & TECH., no. 2, 2014, at 3, <http://jolt.richmond.edu/v20i2/article6.pdf> (citing Peter Lyman & Hal R. Varian, *How Much Information 2003?*, <http://www.sims.berkeley.edu/research/projects/how-much-info-2003/>) (“The worldwide production of original information as of 2002 was roughly . . . equal to all the words ever spoken by human beings.”); EMC Digital Universe Report, with Research and Analysis by IDC (April 2014), <http://www.emc.com/leadership/digital-universe/2014iview/executive-summary.htm> (explaining that every two years since 2002 the digital universe has doubled in size, until in 2013, the universe consisted of 4.4 zettabytes (or 4.4 trillion gigabytes), and is estimated to 44 zettabytes by 2020).

20. FED. R. CIV. P. 26(b)(1). Under the Federal Rules of Civil Procedure, parties must preserve “any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.” *Id.*

21. See Nicholas M. Pace & Laura Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, RAND INSTITUTE FOR CIVIL JUSTICE at 80 (2012), <https://www.rand.org/pubs/monographs/MG1208.html> (explaining that although the cost

When stored documents and data are reviewed in the course of litigation, prices skyrocket. According to one conservative estimate, the total cost of reviewing only a 15% sample of the documents on a small ten-custodian matter adds up to \$476,902—without any input from outside counsel.²² Unfortunately, these facts of modern commerce have worsened due to recent developments in legal doctrine, which have led to corporate defendants being forced to shoulder an unfair portion of the discovery burden.²³

During the last third of the twentieth century, courts—without explanation—began moving away from the time-tested formulation of the common-law’s spoliation doctrine.²⁴ This movement came to a head with the Southern District of New York’s decision in *Zubulake v. UBS Warburg LLC (Zubulake IV)*.²⁵ In that case, an equities trader had lodged a complaint with the Equal Employment Opportunity Commission (EEOC) against UBS in August 2001 and filed a federal suit in February 2002, alleging multiple forms of discrimination.²⁶ UBS’s counsel supposedly ordered all documents related to *Zubulake* to be retained upon the filing of the EEOC charge, but—even after *Zubulake*’s counsel in August 2002 specifically requested that all e-mails and backup tape be retained—several backup tapes were destroyed without explanation.²⁷

In a landmark opinion, Judge Scheindlin considered whether she would give an adverse inference instruction to the jury, meaning that she would allow the jury to conclude that the destroyed evidence “would have been favorable to *Zubulake* and harmful to UBS.”²⁸ Judge Scheindlin relied upon her inherent powers, powers supposedly governed by the common-law spoliation doctrine. However, Judge Scheindlin’s approach deviated in two important ways from the common-law approach.

First, the court determined that a duty to preserve attaches not just when a suit is filed, but “[o]nce a party reasonably anticipates litigation.”²⁹ Thus, on the chance that litigation may occur, the parties must impose litigation holds to prevent the routine destruction of evidence. Second, the requirement of bad faith was abandoned. The court was willing to impose spoliation sanctions—

of servers may not be substantial, when “associated expenses for network connections, maintenance, redundancy, development, security, and backup, are factored in, all resource associated with a single terabyte of preserved data were said to cost in excess of \$100,000”).

22. Comment of Patrick Oot and the Electronic Discovery Institute, USC-Rules-CV-2013-0002-1680, at 7 (Feb. 15, 2014).

23. Wright, *supra* note 16, at 809.

24. *See infra* Part II.

25. *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 431 (S.D.N.Y. 2003); *see Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2003) (adopting the same approach).

26. *Zubulake IV*, 220 F.R.D. at 215.

27. *Id.*

28. *Id.* at 219–20.

29. *Id.* at 218.

including giving an adverse inference instruction to the jury³⁰—because a party was merely negligent in failing to preserve ESI.³¹

These two requirements in combination have led to the over-preservation of ESI, which comes at a heavy cost, and gives an *in terrorem* effect to discovery for defendants.³² More importantly, even though an adverse inference was not given in *Zubulake IV*, Judge Scheindlin’s opinion has led to an increase in plaintiff-friendly discovery rulings that lead further away from the common-law conception of a judge’s inherent power to sanction spoliation offenses.³³

In recent years, this imbalance and unfairness has become clear, and as a result, Federal Rule of Civil Procedure 37(e) was revised in an attempt to limit judges’ inherent powers.³⁴ These revisions—which took effect on December 1, 2015—undid part of *Zubulake IV*’s standard by limiting extreme spoliation sanctions, such as the invocation of an adverse inference, to parties that “act with the intent to deprive another party of the information’s use.”³⁵ However, the revisions left untouched Judge Scheindlin’s formulation of the duty to preserve and her decision on when that duty attaches.³⁶

Proposed changes to Rule 37(e) were heavily debated during the public comment period.³⁷ Ultimately, the Advisory Committee on Civil Rules significantly rewrote the text of the rule, but declined to republish it for public comment.³⁸ In its accompanying commentary, the Committee recognized the problem of “massive and costly over-preservation” of ESI, including where litigation is never brought, but declined to “establish detailed preservation guidelines.”³⁹ Surveying the current “range of cases,” the Committee found that preservation standards were “too broad and too diverse to permit . . . specific

30. This instruction would inform the jury that “it can infer from the fact that UBS destroyed certain evidence that the evidence, if available, would have been favorable to Zubulake and harmful to UBS.” *Id.* at 219.

31. *Id.* at 220.

32. See Wright, *supra* note 16, at 809 (noting that *Zubulake IV*’s requirements impose significant burdens on corporate defendants in practice).

33. FED. R. CIV. P. 37(e); see also *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422, 439–40 (S.D.N.Y. 2004) (entering severe sanctions—including attorney’s fees and an adverse inference—against the defendants for failing to retain all relevant emails); see generally Dan H. Willoughby, Jr., Rose Hunter Jones & Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 790 (2010) (reviewing 230 sanctions awards related to e-discovery in 401 federal court cases).

34. See COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., REPORT OF ADVISORY COMM. ON CIVIL RULES, Summary of Rule 37(e) Comments 27 (May 2, 2014).

35. FED. R. CIV. P. 37(e)(2).

36. FED. R. CIV. P. 37(e).

37. See COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., REPORT OF ADVISORY COMM. ON CIVIL RULES, I.B. Rule: 37(e): Failure to Preserve ESI 35 (May 2, 2014).

38. *Id.*

39. *Id.* at 35–36.

guidelines.”⁴⁰ The Committee thus “chose instead to pursue a different approach that addresses court actions in response to a failure to preserve information.”⁴¹ One important aspect of that approach was abandoned between the public comment and the final version: the requirement that the loss be the result of bad faith.⁴²

Some argue that the revisions do not go far enough and that defendants are still placed in an unfair position.⁴³ Others contend that the revisions permit defendants—specifically, corporations—to destroy information essential to plaintiffs’ cases.⁴⁴ Both camps, however, fight over whether the new rule is workable and whether it is fair; hardly anyone looks to whether the rule fits with our legal traditions and whether it represents a stark deviation from the common law of discovery. Many commentators assume that part of the reason that discovery is such a nasty and costly process is because our legal doctrines have not adapted fast enough to the ESI revolution.⁴⁵ In actuality, the reverse may be true: in the face of the ESI revolution, courts have abandoned the common law and adopted the *Zubulake IV* approach without regard to its effects or its relationship to precedent.

At common law, parties generally had no preservation obligations until they had notice that a lawsuit had been filed (or, at most, that a lawsuit was imminent). Once the suit was active, litigants would be required to retain only those documents that were likely to play a key role in determining the outcome of the case. For centuries, this framework deterred unfair litigation tactics without resulting in widespread over-preservation.

This article advocates for a return to the common-law standards for preserving evidence. It proceeds in four parts. First, it sets out the current state of the law, which is largely found in the *Zubulake IV* standard. Second, it reviews the common-law understanding of the spoliation doctrine and demonstrates how far the *Zubulake IV* standard has strayed from the common law. Third, it tries to explain how *Zubulake IV* lost its way, in part by failing to consider fully the common-law precedent. Finally, it evaluates the recent revisions to Rule 37(e) in light of these legal traditions. It concludes that reverting to the common-law approach—requiring preservation only after litigation is filed or is imminent—

40. *Id.* at 36.

41. *Id.*

42. *Id.*

43. ASS’N OF CORP. COUNSEL, PUBLIC COMMENT OF THE ASS’N OF CORP. COUNSEL TO THE ADVISORY COMMITTEE ON CIVIL RULES CONCERNING THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 17 (Feb. 14, 2014).

44. *See, e.g.,* Zach Hutchinson, *License to Kill (Data): The Danger of an Empowered Rule 37(e)*, 27 GEO. J. LEGAL ETHICS 569, 579–80 (2014).

45. *See* COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., REPORT OF ADVISORY COMM. ON CIVIL RULES, Summary of Rule 37(e) Comments (May 2, 2014).

would do more to address the problems of over-preservation than the recent changes to the Federal Rules of Civil Procedure.

I. *ZUBULAKE IV*: THE MODERN UNDERSTANDING OF THE SPOILIATION DOCTRINE

This section discusses how the law currently governs preservation and discovery of ESI as articulated in *Zubulake IV*, one of the most frequently cited cases on the preservation and spoliation of ESI. *Zubulake IV* is most commonly cited for its articulation of two significant issues: 1) the trigger date of the duty to preserve ESI, and 2) the scope of duty to preserve ESI. Although *Zubulake IV* endorses a minority position on the culpability standard for imposing sanctions for spoliation of evidence, the opinion's high profile merits discussion of that issue as well. Finally, this section demonstrates how this new schema of discovery law is at the root of today's broken system.

A. *When the Duty To Preserve Attaches*

Zubulake IV stands for the proposition that the duty to preserve ESI arises when at least one of two conditions is met: "when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."⁴⁶ At this point, the party "must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."⁴⁷ The inherent uncertainty of this standard is reflected by its application to *Zubulake IV*'s own facts. Judge Scheindlin begins by writing that "the duty to preserve evidence arose, at the latest, on August 16, 2001, when [the plaintiff] filed her EEOC charge. . . . [b]ut the duty to preserve may have arisen even before the EEOC complaint was filed."⁴⁸ At least one employee of the defendant admitted in a deposition that the possibility of being sued was "in the back of my head" in April of the same year.⁴⁹ But Judge Scheindlin balked at imposing a duty to preserve at such a low threshold, writing that contemplation of litigation by one or two employees "does not generally impose a firm-wide duty to preserve."⁵⁰ Instead, Judge Scheindlin asserted that "it appears that almost everyone associated with [the plaintiff] recognized the possibility that she might sue," and the duty to preserve attached when "the relevant people at UBS anticipated litigation."⁵¹

46. *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (quoting *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001)).

47. *Id.* at 218.

48. *Id.* at 216.

49. *Id.* at 217.

50. *Id.*

51. *Id.*

Apart from the practical difficulties of attributing a small group of relevant employees' knowledge or anticipation of litigation to a company, the *Zubulake IV* standard fails to define who the relevant employees are and how many of them must anticipate litigation before the duty to preserve attaches to the entire company. The relevant employees in *Zubulake IV* included at least two of the plaintiff's co-workers, the plaintiff's supervisor and supervisor's supervisor, and the plaintiff's former supervisor.⁵² The court made no effort to explain which, or how many, of those employees would have been sufficient to attribute anticipation of litigation to the firm. The uncertainty of this *de jure* standard, combined with the threat of sanctions, creates a harsher *de facto* standard than Judge Scheindlin likely intended. In practice, if a company anticipates litigation, it should consider issuing a litigation hold because the risk of sanctions is too costly.

B. *The Scope of the Duty To Preserve ESI*

Zubulake IV also stands for the proposition that potential litigants "must not destroy unique, relevant evidence that might be useful to an adversary."⁵³ More specifically, the scope of the duty to preserve includes what the potential litigant "knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request."⁵⁴ This includes all information that may support the claims or defenses of any party, and all documents prepared for any individuals likely to have relevant information.⁵⁵

Judge Scheindlin posits that "the broad contours of the duty to preserve are relatively clear."⁵⁶ However, such clarity can only be practically achieved at great expense. Corporate litigants must either preserve everything prepared by or for all individuals likely to have relevant information in their possession, or they must prematurely make significant legal expenditures in order to sift out the irrelevant information and return it to its place so that it may be deleted in accordance with the firm's document retention policy. Many firms choose the former course of action as the less disruptive and risky choice. However, under the broad scope of the duty imposed by *Zubulake IV*, the expense of document preservation is still a significant problem.

C. *The Culpability Standard for Imposing Sanctions*

According to *Zubulake IV*, a spoliation sanction can be imposed upon establishing "the following three elements: (1) that the party having control over

52. *Id.*

53. *Id.* at 217.

54. *Id.* (quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991)).

55. *Id.* at 217–18.

56. *Id.* at 217.

the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a ‘culpable state of mind’ and (3) that the destroyed evidence was ‘relevant’ to the party’s claim or defense.”⁵⁷ Notably, Judge Scheindlin explains that the Second Circuit includes ordinary negligence as a culpable state of mind for the purpose of spoliation sanctions.⁵⁸ While the majority of courts still reject this position in its broadest form, the inclusion of ordinary negligence as a culpable state of mind for spoliation sanctions has gained wider acceptance,⁵⁹ adding to the cost and administrative burden of complying with *Zubulake IV*’s expansive e-discovery regime.

D. The Post-Zubulake IV Era

Zubulake IV has become one of the most commonly cited cases on questions of discovery. Westlaw Next shows 3,582 total citing references, including 531 cases, to *Zubulake IV*.⁶⁰ However, the numbers alone insufficiently demonstrate how *Zubulake IV* has influenced modern discovery law. The cases themselves paint a more vivid picture of how the *Zubulake IV* doctrine has warped discovery of ESI into the unmanageable problem it has become.

In another case decided in the Southern District of New York shortly after *Zubulake IV*, the court, despite finding no evidence the defendant acted in bad faith, allowed the plaintiff to present arguments for negative inferences when the defendant merely failed to suspend its normal document retention policy.⁶¹ The plaintiff, MasterCard, brought copyright infringement claims against the defendant, owners of a website, for use of its “Priceless” trademark, its “Priceless” ad campaign, and the MasterCard trademark and logo.⁶² In discovery, MasterCard sought all documents that the defendants received concerning their website.⁶³ The defendant’s server routinely eliminated all email received from the public after a twenty-one day period, and the defendant failed to suspend this policy for a period of about four months after the complaint was filed.⁶⁴ MasterCard argued that the emails would have demonstrated either confusion by the public as to whether MasterCard approved of the defendant’s

57. *Id.* at 220.

58. *Id.*

59. Lauren R. Nichols, Note, *Spare the Rod, Spoil the Litigator? The Varying Degrees of Culpability Required for an Adverse Inference Sanction Regarding Spoliation of Electronic Discovery*, 99 KY. L.J. 881, 885–87 (2010).

60. As of a search conducted on January 2, 2017.

61. *MasterCard Int’l, Inc. v. Moulton*, 2004 U.S. Dist. LEXIS 11376, at *14–16 (S.D.N.Y. June 22, 2004). Although the court in *MasterCard* does not cite *Zubulake IV*, Judge Dolinger recognizes an equally broad interpretation of the spoliation doctrine. *Id.* (citing *Kronisch v. United States*, 150 F.3d 112, 128 (2d Cir. 1998)).

62. *Id.* at *3–4.

63. *Id.* at *5–6.

64. *Id.* at *5–8.

use of the trademark, or that the trademark was “diluted and tarnished” by its association with the defendant’s website.⁶⁵

The defendant testified that he had not suspended his document retention policy because he had not understood that he was required to produce the emails in question.⁶⁶ The court did not doubt his sincerity:

As for culpability, we are not persuaded that defendants acted in bad faith, that is, for the express purpose of obstructing the litigation. They appear simply to have persevered in their normal document retention practices, in disregard of their discovery obligations. The absence of bad faith, however, does not protect defendants from appropriate sanctions . . .⁶⁷

The court then explained that MasterCard demonstrated a variety of ways in which the emails may have been relevant, and that the showing of relevance was “adequate for the purpose of establishing spoliation.”⁶⁸ As a result, the court permitted MasterCard to argue to the trier of fact that the documents’ destruction warranted the inference that the public was confused about MasterCard’s association with the website, and that MasterCard’s trademarks had been tarnished and diluted.⁶⁹

The *MasterCard* opinion is emblematic of the post-*Zubulake IV* tendency to focus on spoliation at the expense of prudence and the efficient disposition of cases. Even accepting that post-complaint destruction of the documents by the defendant was negligent, such negligence should not have been determinative. The court itself acknowledged doubts regarding the ultimate salience of the spoliation issue, noting that, notwithstanding the potential relevance of the missing emails, “the potential prejudice to plaintiff as a result of their loss is at least open to question. The missing e-mails presumably reflected some of the content of the website, although plaintiff already has a substantial selection of such material.”⁷⁰ The court brushes away its recitation of doubts and ends its analysis with the circular reasoning that the relevance is sufficient to show spoliation, and that negligent destruction of the emails is sufficient to show relevance:

Plaintiff’s showing on relevance is adequate for the purpose of establishing spoliation. While the record does not strongly suggest that MasterCard is likely to have been seriously hampered in the presentation of its case by the failure of the defendants to preserve the missing e-mails, we nonetheless recognize that the very fact that the e-mails are missing leaves us in the realm of speculation as to what

65. *Id.* at *8–9.

66. *Id.* at *8.

67. *Id.* at *11.

68. *Id.* at *12–14.

69. *Id.* at *16.

70. *Id.* at *12.

they contained and in what manner they might have assisted plaintiff in litigating its claims.⁷¹

Just as the *MasterCard* court erred by causing the court and the parties to spend time and money on a largely immaterial instance of spoliation, other courts have erred by punishing spoliation so excessively that over-preservation has been incentivized. In *United States v. Philip Morris USA, Inc.*, eleven employees failed to comply with Philip Morris's document retention policy causing some emails to be lost, and as a result, the company lost a motion for evidentiary sanctions in a civil suit brought by the federal government.⁷² The court granted the government's request that the individuals who failed to comply with the retention policy and discovery order were prevented from testifying for the defense.⁷³ Additionally, the court imposed a monetary sanction on Philip Morris of \$2,750,000, plus the government's costs associated with a deposition on email destruction issues.⁷⁴ The court justified the substantial amount of the fine by explaining that there was "no way of knowing what, if any, value those destroyed emails had to Plaintiff's case; because of that absence of knowledge, it was impossible to fashion a proportional evidentiary sanction that would accurately target the discovery violation."⁷⁵ The court also argued that the fine was necessary for deterrence, so that "the corporate and legal community understand that such conduct will not be tolerated"⁷⁶ and Philip Morris could be punished.⁷⁷

While deterrence has some generally accepted value, the court in this case neglected to consider the fact that some document destruction—even for sophisticated litigants and *especially* for large litigants like Philip Morris—cannot be deterred, no matter how steep the fine. Instead, exorbitant fines lead to inefficient over-preservation of documents of low importance by companies with no need to hide them. Further, the costs of industry-wide over-preservation are beginning to cripple the litigation system.

The excessive sanctions and myopic focus on spoliation in the post-*Zubulake IV* era of e-discovery have resulted in doctrinal implications that stretch the limits of practicality. For example, in *In re Actos (Pioglitazone) Products Liability Litigation*, the court imposed sanctions on the defendant for deleting the emails of employees who no longer worked at the company, in violation of a hold issued more than a decade previously for a different set of claims related to the same drug.⁷⁸ In essence, the court punished the defendant for its broad

71. *Id.* at *14 (citing *Kronisch v. United States*, 150 F.3d 112, 128 (2d Cir. 1998)).

72. *United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 21, 23–24 (D.D.C. 2004).

73. *Id.* at 25.

74. *Id.* at 26.

75. *Id.*

76. *Id.*

77. *Id.*

78. *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 6:11-md-2299, 2014 U.S. Dist. LEXIS 86101, at *120–21, *225–31 (W.D. La. June 23, 2014).

efforts to preserve potential evidence by making the law coextensive with the defendant's broad hold notice, which asked employees to preserve "any and all documents and electronic data which discuss, mention or relate to [the drug at issue]." ⁷⁹ Like in the *MasterCard* case, the court allowed all evidence relating to the company's conduct as to documents and electronic data destruction to go before the finder of fact. ⁸⁰ Given that such arguments by the plaintiff's counsel on destruction of evidence are likely to prejudice the jury more than the facts warrant, *In re Actos* demonstrates the unfair prejudice any litigant may face given the impracticality of preserving one hundred percent of documents that may be construed as relevant. Failing to effectuate a broad hold notice may result in sanctions, just as failing to issue a broad hold notice may also result in sanctions.

II. THE DUTY TO PRESERVE AT COMMON LAW⁸¹

Today, *Zubulake IV* has resulted in a discovery regime in which one side generally bears the burden and risk of the discovery process. With the adoption of new rules, there is an implication that the current state of discovery is outdated and over-protective because the federal courts have failed to adapt to the technological changes. In fact, the problem is that the courts have deviated too far from the common law, and in doing so, have upset the traditional balance and equity in discovery. This section discusses how the common law, prior to the introduction of ESI, dealt with spoliation. Specifically, it tracks the early American formulation of the duty to preserve and the culpability standard for spoliation.

Any discussion of the origin of the duty to preserve begins with the English case *Armory v. Delamirie*.⁸² There, "a chimney sweeper's boy found a jewel

79. *Id.* at *129.

80. *Id.* at *225–26.

81. Historically, discovery was available only for suits in equity; actions at law depended upon oral testimony and, thus, it was generally unnecessary. See John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 531 (2012). If discovery was needed in an action at common law, a litigant needed to file a bill of discovery to compel production of documents. See, e.g., *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689, 691 (1933). The bill of discovery "enabled [him or her] (1) to obtain sworn responses from an opposing litigant; (2) to require nonparty witnesses to answer interrogatories on oath; and (3) to compel the production of relevant documents." Langbein, *supra*, at 540. With the adoption of the Federal Rules of Civil Procedure in 1938, law and equity merged, and all suits and actions in federal court could invoke equity's fact-finding tools. See FED R. CIV. P. 2, 26; Langbein, *supra*, at 544–53. Despite this bifurcated history, for simplicity's sake, this article refers to pre-1972 conceptions of discovery as the "common-law understanding" of the duty to preserve and the doctrine of spoliation. After all, when the Federal Rules "ma[d]e available three main forms of discovery: documents (now including electronic records), interrogatories, and depositions," they did not necessarily displace the governing rules and traditions from the chancery courts. Langbein, *supra*, at 545. Rather, they incorporated them, making them part of the "law." See *id.*

82. *Armory v. Delamirie*, 93 Eng. Rep. 664 (K.B. 1721); see David A. Bell, Margaret M. Koesel & Tracey L. Turnbull, *Let's Level the Playing Field: A New Proposal for Analysis of*

and carried it to the defendant's shop (who was a goldsmith) to know what it was" and its value.⁸³ The goldsmith, a noted ne'er-do-well,⁸⁴ gave the jewel to his apprentice for appraisal.⁸⁵ Rather than inspect the jewel and quote a price, the apprentice removed the stones from their setting and offered the boy a cut-rate price.⁸⁶ When the boy refused to sell, the goldsmith—or his apprentice—returned the setting to the boy without the stones.⁸⁷

The boy brought an action in trover to recover the value of the jewel.⁸⁸ In defense, the goldsmith refused to produce—or could no longer produce, having sold—the stones.⁸⁹ The Chief Justice, refusing to oblige this tactic, "directed the jury, that unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages."⁹⁰ And, of course, the jury did so.⁹¹

On its face, this case speaks neither of a duty to preserve nor of the doctrine of spoliation. Yet, in its resolution of the affair, it necessarily decided two—if not three—of the same questions addressed by *Zubulake IV*. For instance, the court must have recognized that a duty to preserve physical evidence attaches at some point; otherwise, there would have been no order to produce the jewel for inspection after the goldsmith denied having possession. This is particularly so when one considers the common law's favoritism of oral testimony in jury trials.⁹² The court must also have determined that the goldsmith acted with the requisite state of mind in order to invoke the adverse inference that the jewel was of the "finest water."⁹³ Given the case report's discussion of the apprentice's actions in bad faith—without noting that even less was sufficient⁹⁴—it may be fair to assume that the doctrine of spoliation requires as much.

This section traces the evolution of these concepts—the duty to preserve and the doctrine of spoliation—from the days of *Armory* to the rise of ESI. It focuses upon what the duty to preserve entails and when it attaches, and examines the

Spoliation of Evidence Claims in Pending Litigation, 29 ARIZ. ST. L.J. 769, 772–73 (1997) (concluding that the duty to preserve dates from *Armory v. Delamirie*); Jason A. Pill & Derek E. Larsen-Chaney, *Litigating Litigation Holds: A Survey of Common Law Preservation Duty Triggers*, 17 J. TECH L. & POL'Y 193, 197–99 (2012) (concluding the same).

83. *Armory*, 93 Eng. Rep. at 664.

84. Pill & Larsen-Chaney, *supra* note 82, at 198.

85. *Armory*, 93 Eng. Rep. at 664.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. See Langbein, *supra* note 81, at 534 (describing the value of orality in early Anglo-American trials).

93. *Armory*, 93 Eng. Rep. at 664.

94. See *id.*

mental state necessary to impose spoliation sanctions, particularly the invocation of the adverse inference.

A. *Common Law Understandings of the Duty to Preserve*

In the decades and centuries following the decision of *Armory* in the King's Court, English and American courts elaborated upon the contours of the duty to preserve. Generally, as explained below, these courts agreed that the duty to preserve extended only to information and documents that would be direct evidence in litigation—not, as *Zubulake IV* found, to information and documents that *could lead* to admissible evidence.

On this point, *In re Eno's Will*⁹⁵—a probate case—is a prime example. By 1915, Amos F. Eno was seventy-eight years old, and his only living brother and sister had passed away the year before.⁹⁶ As a result, Mr. Eno directed the law firm of Lord, Day & Lord to prepare a new will by which he would leave about half of his rather sizable fortune to different members of his family and about half of it to various charitable institutions, including the Metropolitan Museum of Art, the American Museum of Natural History, and Columbia University.⁹⁷ Perhaps unsurprisingly, when Mr. Eno passed away, different members of his family—unhappy with their unexpectedly reduced inheritance—contended that Mr. Eno was “suffering from senile dementia,” as evidenced by his “growing penuriousness” in his later years, when he executed this final will.⁹⁸ Accordingly, they claimed that he lacked testamentary capacity and that the previous will—the one that dispersed Mr. Eno's estate only to members of the family—should govern.⁹⁹

Relevant to the discussion here, after Mr. Eno expired, a clerk at Lord, Day & Lord was sent to Mr. Eno's residence to account for his possessions in accordance with the 1915 will.¹⁰⁰ There, the clerk “ordered a number of old letters to be burned.”¹⁰¹ According to the testimony of the clerk and Mr. Eno's housekeeper, who had read the documents, they “were social letters, invitations, acknowledgments of gifts, and other unimportant matters of that nature.”¹⁰² Nonetheless, the unsatisfied heirs claimed that these letters contained evidence that Mr. Eno had grown senile.¹⁰³

The state court rejected this argument and held that any unfavorable “presumption does not arise from the mere destruction of documents.”¹⁰⁴

95. 187 N.Y.S. 756 (N.Y. App. Div. 1921).

96. *Id.* at 760.

97. *Id.* at 760–61.

98. *Id.* at 765–66.

99. *Id.* at 765.

100. *Id.* at 760, 778.

101. *Id.* at 778.

102. *Id.*

103. *Id.* at 779.

104. *Id.*

Rather, “[i]t must appear that the documents were written evidence *relevant* to the i[s]sues, or at least the documents should by notice be required to be produced upon trial.”¹⁰⁵ In this case, “[n]o such evidence was given [that the documents were relevant], nor was any notice given or other demand made to produce any letter or paper, which was refused on the grounds of its destruction.”¹⁰⁶ The court determined “[f]rom all that . . . appear[ed] [in the record]” that “the papers written by others to the testator would have no relevancy or materiality on the sole issue submitted to the jury—the testamentary capacity of the testator at the time the will was executed.”¹⁰⁷

Notably missing from the court’s lengthy opinion is any discussion of whether the destroyed documents *could have* led to admissible evidence. The court, instead, focused upon whether the letters and acknowledgments were direct evidence of Mr. Eno’s supposed mental infirmity. Because there was no evidence that those social letters touched upon the subject matter of the dispute, the court held that the clerk had no duty to preserve them.¹⁰⁸

The focus upon a direct link between the documents withheld or destroyed and the subject matter in dispute allowed courts—and litigants—to identify the relevant pieces of evidence easily. Because these documents could be easily identified, litigants were on notice of which limited set of documents needed to be preserved, and the cost of preserving them was necessarily a fraction of the cost of today’s preservation.

Moreover, this narrow doctrine finds expression in other contemporaneous cases as well. For instance, in *Estate of Holmes v. Boyle*, the Colorado Supreme Court framed the spoliation question as whether “[t]he failure or refusal to produce a *relevant* document, or the destruction of it, is evidence from which alone its contents may be inferred to be unfavorable to the possessor.”¹⁰⁹ One niece was alleged to have written her uncle, alerting him to the death of the uncle’s sister, which prompted the uncle to rewrite his will and leave everything to the writing niece (and another niece).¹¹⁰ When the uncle died, the writing niece traveled immediately to Fairplay, Colorado and, apparently, destroyed all of the uncle’s correspondence with other parties alleged to have an interest in the estate.¹¹¹ When the uncle’s sister, who was alive and had been left out of an inheritance, contested the will, the writing niece “admitted the destruction” of letters written to her uncle when “she was cleaning up the house after the funeral.”¹¹²

105. *Id.* (emphasis added) (citation omitted).

106. *Id.*

107. *Id.*

108. *Id.* at 773, 779.

109. *Estate of Holmes v. Boyle*, 56 P.2d 1333, 1336 (Colo. 1936) (emphasis added).

110. *Id.* at 1335.

111. *Id.*

112. *Id.* at 1336–37.

In this case, the court found that the “letters to him were of the utmost importance as evidence in the will contest,” given that the writing niece’s fraudulent statements would have been contained in the now-destroyed letters.¹¹³ Because the uncle’s sister had produced other circumstantial evidence of the niece’s fraud, the court permitted the jury “to infer that the letters, if produced, would have supported the case of the contester.”¹¹⁴

While the court gave the adverse inference instruction, it is important to note that the court stressed that the letters were material to the case.¹¹⁵ At that time, they would likely have been the only evidence of the niece’s deceit.

These cases and this doctrine stood on a firm foundation. In *Warren v. Crew*, the Supreme Court of Iowa upheld the invocation of an adverse inference in a breach-of-contract action where one of the parties destroyed the contract in question.¹¹⁶ Similarly, in *Hudson v. Hudson*, the Supreme Court of Illinois framed the rule as, “everything will be presumed against the despoiler. Where a party to a suit has intentionally destroyed material evidence in a case every presumption will be indulged against him.”¹¹⁷ Finally, the U.S. Supreme Court noted that:

[t]he conduct of the party in omitting to produce that evidence in elucidation of the *subject-matter in dispute*, which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice.¹¹⁸

It is important to note that there are few—if any—pre-1972 opinions suggesting that the duty to preserve evidence includes documents that *might relate* to admissible evidence regarding one party’s claims or defenses. Rather, the cases indicate that discovery disputes and spoliation charges turned on the destruction of evidence central to a cause of action. Just as the missing jewel in *Armory* sparked the invocation of an adverse inference, the early American courts likewise appeared concerned with requiring parties to preserve the documents central to a dispute.

B. Attachment of the Duty

Having determined the rough outlines of the common-law duty to preserve evidence, the question naturally arises: when does the duty attach? *Zubulake*

113. *Id.*

114. *Id.*

115. *See id.* at 1336 (“[T]heir letters to him were of the utmost importance as evidence.”).

116. *Warren v. Crew*, 22 Iowa 315, 322–23 (1867).

117. *Hudson v. Hudson*, 122 N.E. 497, 501 (Ill. 1919); *cf. Mastin v. Noble*, 157 F. 506, 513 (8th Cir. 1907) (“There is no showing that any of these letters, checks, or other papers were destroyed in anticipation of litigation in which they *might serve as evidence.*”) (emphasis added).

118. *Kirby v. Tallmadge*, 160 U.S. 379, 383 (1896) (emphasis added) (internal quotation marks omitted).

IV's answer is "at the time that litigation [is] reasonably anticipated."¹¹⁹ Under the common law, however, courts were much slower to impose preservation requirements, waiting to require retention only once litigation began (or was imminent).

The case of *Berthold-Jennings Lumber Co. v. St. Louis, Iron Mountain & Southern Railway Co.* clearly demonstrates the common-law position.¹²⁰ In 1905, Missouri passed the Maximum Freight Acts, which limited the rates that railroads could charge for the transportation of certain goods.¹²¹ Before these rate limits even went into effect, though, the railroads filed suit, seeking an injunction.¹²² The federal district court granted the railroads' request,¹²³ but the Supreme Court ultimately overturned the injunction in 1913.¹²⁴ During the intervening eight years the railroads continued collecting higher rates.¹²⁵ Eventually, many shippers—including the Berthold-Jennings Lumber Co.—applied for reimbursement.¹²⁶ In proceedings before a special master, it became clear that the railroad had given the shippers receipts, which stated the rate charged and the amount of cargo, and that the railroad had kept a copy of these receipts for a period of time.¹²⁷ When the shippers went to review the railroad's records, however, they discovered that the waybills covering their shipments had been destroyed "in the normal course of clearing their files."¹²⁸

Had the shippers in this case filed suit against the railroad while the receipts remained intact, the Eighth Circuit indicated that the railroad would have had a duty to preserve those documents.¹²⁹ But the parties in *Berthold-Jennings* had not been parties to the earlier suit, and the federal courts had not ordered the railroad to preserve all receipts during the pendency of the challenge to the Missouri Maximum Freight Rate Acts.¹³⁰ As a result, the Court determined that the railroad was under no duty to preserve the records, which had been destroyed between 1914 and 1917—even though it was clear that further litigation would

119. *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

120. *Berthold-Jennings Lumber Co. v. St. Louis, Iron Mountain & S. Ry. Co.*, 80 F.2d 32, 34 (8th Cir. 1935).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 35.

127. *Id.* at 41–42.

128. John MacArthur Maguire & Robert C. Vincent, *Admissions Implied from Spoliation or Related Conduct*, 45 YALE L.J. 226, 231, 231 n.18 (1935) (citing unpublished records from the district court).

129. *Berthold-Jennings Lumber Co.*, 80 F.2d at 41 (stating that "[t]he temporary injunctive order only required preserving waybills pending the further hearing and determination of the case in the trial court, and in the absence of any further injunction or command, the destruction of the waybills after entry of final decree was not a violation of any order of the court").

130. *Id.*

result from the Supreme Court's decision in 1913.¹³¹ In addition, the Court refused to apply spoliation sanctions—even if the duty had arisen—because there was no evidence that the railroad had “any intent or desire to destroy evidence.”¹³²

Conversely, courts would sanction a party who destroyed evidence after a suit commenced. The case of *Pomeroy v. Benton* is illustrative.¹³³ In that case, two partners were engaged in the dry goods business, but after Benton bought out Pomeroy, Pomeroy discovered that his partner had been using the partnership's funds to purchase whisky and wine to sell on the side.¹³⁴ This side business was profitable, but Pomeroy never saw a dime of the revenue.¹³⁵

During the litigation, it came to light that Benton had kept a private accounting book, which detailed the precise amount of profits.¹³⁶ But, when Pomeroy sought discovery of the book and the court ordered disclosure, Benton reported that he had destroyed the book after Pomeroy filed suit.¹³⁷

In response, the court found that the “defendant destroyed that book *after suit* [was] *brought*, for the deliberate and sole purpose of cutting off investigation into the magnitude of his operations in whisky.”¹³⁸ Because Benton “ha[d] endeavored by all these means to baffle inquiry and shut out investigation,” the court held that “nothing remain[ed] . . . but to apply to the defendant [sic] the stern rule recognized alike in equity and at law embodied in the maxim *omnia praesumuntur in odium spoliatoris*.”¹³⁹ Thus, the court required the jury to “presume that the evidence destroyed would establish the plaintiff's demand to be just.”¹⁴⁰

Certainly, this case is an extreme example of violating the duty to preserve. Nonetheless, the court's focus on the fact that Benton destroyed the whisky accounts *with the purpose of stopping investigation* suggests that regular destruction—as in *Berthold-Jennings*—would not give rise to such an extreme sanction.¹⁴¹ In fact, the Supreme Court of Arkansas interpreted *Pomeroy* in a

131. *Id.* at 42.

132. *Id.*

133. *Pomeroy v. Benton*, 77 Mo. 64 (Mo. 1882).

134. Maguire & Vincent, *supra* note 128, at 240–41 (recounting facts of case unexplained in the court's opinion).

135. *Pomeroy*, 77 Mo. at 80.

136. *Id.* at 85.

137. *Id.*

138. *Id.* (emphasis added).

139. *Id.* at 85–86. Loosely translated, this maxim means that all things will be presumed against the despoiler.

140. *Id.* at 87.

141. See MARGARET M. KOESEL & TRACEY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 5–6 (Daniel F. Gourash, ed., 2d. ed. 2006) (stating that “[g]enerally, no duty to preserve evidence arises before litigation is filed, threatened, or reasonably foreseeable . . . [a]bsent notice of litigation, or another source of a duty to preserve evidence, a company or individual generally has the right to dispose of

similar fashion.¹⁴² In that case, the plaintiff's allegations "[were] not sufficiently definite and specific to carry knowledge to [the defendant] that the books and papers then in its possession were the only documents from which an account might be stated," and the court—citing *Pomeroy*—held that "the evidence falls short of showing that [the defendant] or its officers intentionally destroyed the papers and records in question for the purpose of preventing them from being used as evidence."¹⁴³

As with the general duty to preserve, it is important to understand what the cases do not say about these doctrines. On this point, the common law contemplates the duty to preserve attaching only after litigation begins (or is imminent between the parties).¹⁴⁴ And there is very little—if anything—in the historical record to support *Zubulake IV*'s understanding of the duty as attaching when a party reasonably anticipates litigation.

What makes the common-law view entirely rational is that, for the most part, there is a clear starting point that is not open to debate: the filing of the litigation between the parties. This clarity not only puts the parties on notice of a duty to preserve, but it also cuts down on discovery disputes over when the duty to preserve started. It answers a serious problem that many companies express about the challenges and costs of preserving data, which they see as more concerning than responding to discovery requests.¹⁴⁵ In addition, the rule was not so inflexible as to allow a party to burn all of the relevant evidence the night before litigation began. Rather, as *Pomeroy* demonstrated,¹⁴⁶ courts could look into the parties' intentions in the rare case that a close look was necessary.

III. SANCTIONS FOR SPOILIATION

However fuzzy the historical treatment of the duty to preserve's contours may be, the case law governing when spoliation sanctions are appropriate,

his own property, including documents and tangible objects, without liability"); *see also id.* at 6 (detailing certain circumstances under which litigation is foreseeable).

142. *Gallup v. St. Louis, Iron Mountain & S. Ry. Co.*, 215 S.W. 586 (Ark. 1919).

143. *Id.* at 588 (dispute arising out of overcharges in rail shipping rates); *see also* *Davis v. Teachout's Estate*, 85 N.W. 475, 475 (Mich. 1901) ("Miles himself destroyed the instrument—if it was destroyed—at a time when none of the parties had reason to think it necessary to preserve it.").

144. *See, e.g., Berthold-Jennings Lumber Co. v. St. Louis, Iron Mountain & S. Ry. Co.*, 80 F.2d 32, 42 (8th Cir. 1935) (noting that some litigation was imminent, but refusing to attach the duty to preserve because the railroad could not know that litigation was guaranteed between itself and those particular shippers).

145. *See* *Pace & Zakaras*, *supra* note 21, at 85; Robert D. Owen, *Restoring the Balance: An Expanded Proposal Concerning Preservation*, DIGITAL DISCOVERY & E-EVIDENCE (BNA), Nov. 11, 2011, at 4 ("If the trigger for preservation were actual notice of a filed complaint or a formally commenced administrative proceeding, the scope of preservation including the number of custodians placed on hold could be more precisely determined by reference to the plaintiff's own recitation of his allegations.").

146. *Pomeroy v. Benton*, 77 Mo. 64 (Mo. 1882); *see also* *Concord Boat Corp. v. Brunswick Corp.*, No. LR-C-95-781, 1997 WL 33352759 (E.D. Ark. Aug. 29, 1997).

particularly the invocation of an adverse inference, is relatively clear. Pre-1972 courts generally required a showing that the spoliator acted with bad faith or intent to obstruct litigation before giving an adverse inference instruction to the jury.¹⁴⁷

Here, the place to begin is *Pizarro*¹⁴⁸ in which the Supreme Court addressed for the first time whether spoliation automatically gave rise to an adverse inference instruction. In this prize case, an American privateer sailing from Liverpool captured the Spanish ship *Pizarro*.¹⁴⁹ After capture—and during the voyage to Savannah, Georgia—a package containing certain papers related to the ship’s cargo “was thrown overboard by the advice and assent of the master and supercargo.”¹⁵⁰ When prize proceedings were instituted, two merchants from Amelia Island in present-day Florida contended that the *Pizarro* and the cargo were their property and that, under a 1795 treaty with Spain, they were entitled to restitution.¹⁵¹

The privateers argued for an adverse inference, claiming that the destruction of the papers by the claimants’ agents precluded the merchants from introducing evidence in support of restitution.¹⁵² Writing for the Court, Justice Story stated:

Concealment, or even spoliation of papers, is not of itself a sufficient ground for condemnation in a prize court. It is, undoubtedly, a very awakening circumstance, calculated to excite the vigilance, and justify the suspicions of the court. But it is a circumstance open to explanation, for it may have arisen from accident, necessity, or superior force; and if the party in the first instance fairly and frankly explains it to the satisfaction of the court, it deprives him of no right to which he is otherwise entitled. If, on the other hand, the spoliation be unexplained, or the explanation appear weak and futile; if the cause

147. See, e.g., *Bingham v. Keylor*, 64 P. 942, 948 (Wash. 1901) (“The fraud was premeditated, the spoliation willfully made to conceal it, and we would not disturb a verdict or report which did not at the first blush appear to have debited the complainant with items in support of which there was no evidence, conducing to make out the charge.”); *Askew v. Odenheimer*, 2 F. Cas. 31, 35 (C.C.D. Pa. 1831) (“Where papers are destroyed or suppressed by a party with a deliberate design to defraud or injure another, the presumptions of law are very strong against him.... Courts of law are very severe in punishing fraud, but when it is aggravated by the destruction or suppression of papers or books which would, if produced, be the means of detecting it, courts of equity will go beyond, and even contrary to the rules of law, and presume most liberally, in odium spoliatoris.” (citations omitted)); *Barton v. Rushton*, 4 S.C. Eq. (4 Des.) 373, 379 (S.C. Eq. 1813) (“The evidence of George Kelly shews, that his intention was to defeat the execution, by some means, without positively contradicting his answer; and taken as an independent fact, this testimony goes the length to raise a presumption of spoliation; and this is all that is necessary. For the fact of destruction, from the nature of the thing, can only, and therefore is required only, to be made out upon grounds of strong inference and probability.”).

148. 15 U.S. (2 Wheat.) 227 (1817).

149. *Id.* at 228.

150. *Id.*

151. *Id.* at 228, 238–39.

152. *Id.* at 230–38.

labour under heavy suspicions, or there be a vehement presumption of bad faith, or gross prevarication, it is made the ground of a denial of farther proof, and condemnation ensues from defects in the evidence which the party is not permitted to supply.¹⁵³

Even though the Court affirmed the lower court's decision not to use the inference to bar further testimony, two key points came from this passage: 1) the fact that relevant papers were destroyed is not, in and of itself, enough to justify invoking an adverse inference; and 2) the proper standard for doing so is "bad faith or gross prevarication."¹⁵⁴

These well-established¹⁵⁵ points make the spoliation doctrine coherent. Judges give an adverse inference instruction, permitting the jury to assume that the destroyed information would harm the destroyer's case, on two related bases: 1) there is the logical thought that a person would not violate the duty to preserve unless it was to destroy damning evidence; and 2) a person should be punished for violating court-imposed duties.¹⁵⁶ For either of these reasons to hold water, there must be an intent requirement. Consider the first basis—if a person carelessly destroys evidence, there is no guarantee that the evidence was damning. A negligent person may very well destroy the best evidence for his case. The point is that one does not know, and thus, the adverse inference loses its tie to logic. Likewise, the second basis requires a finding of intent. Some might argue that heavy sanctions will force litigants to be more careful in preserving documents and that this heightened care will improve the operation of the courts. But at what cost? An adverse inference essentially ends the case; thus, punishing a negligent litigant.¹⁵⁷ This runs the risk of elevating respect of court-imposed duties over the adjudicatory function of the courts, particularly when it is not clear that the documents would have helped the opposing party. Therefore, in a common-law system, heavily influenced by equitable principles, it is logical that these cases would impose an intent requirement before a court used its inherent powers to sanction.

153. *Id.* at 241.

154. *Id.*

155. For instance, in *Askew v. Odenheimer*, the Circuit Court for the District of Pennsylvania applied the adverse inference presumption in a case "[w]here papers are destroyed or suppressed by a party with a deliberate design to defraud or injure another." 2 F. Cas. 31, 35 (C.C.D. Pa. 1831); see also *Pomeroy v. Benton*, 77 Mo. 64, 85–86 (Mo. 1882) (applying adverse inference when the defendant destroyed evidence "for the deliberate and sole purpose of cutting off investigation"). Black's Law Dictionary defines "spoliation" as "[t]he intentional destruction, mutilation, alteration, or concealment of evidence." BLACK'S LAW DICTIONARY 1531 (9th ed. 2009). Professor John MacArthur Maguire and Robert C. Vincent—the foremost experts on spoliation in the early twentieth century—argued that the use of a presumption or adverse inference required an intent requirement as a logical matter. Maguire & Vincent, *supra* note 128, at 235; *id.* at 231–35 (collecting cases).

156. Maguire & Vincent, *supra* note 128, at 257–58.

157. See, e.g., *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 219 (S.D.N.Y. 2003) ("In practice, an adverse inference instruction often ends litigation—it is too difficult a hurdle for the spoliator to overcome.").

Zubulake IV and its progeny's willingness to consider and impose an adverse inference upon a finding of negligence is a drastic departure from this standard. The gap is made more apparent by the fact that a variety of courts at common law explicitly refused to give an adverse inference instruction upon a mere showing of negligence. In *Knapp v. Edwards*, a case involving an incapable bookkeeper, the Supreme Court of Wisconsin refused to apply the maxim *omnia praesumuntur contra spoliatorem*, stating, "[w]e think this is not a proper case for the application of so severe a rule. The rule in all its rigor is for *wrongdoers*—for those who have been guilty of fraud or willful disregard of duty, rather than those who have failed in capacity to perform their undertakings."¹⁵⁸ Likewise, in *In re Horigan Supply Co.*, the Eighth Circuit refused to grant an adverse inference instruction when a bankruptcy trustee sold certain papers to a junk dealer.¹⁵⁹ The plaintiff had argued that this sale "was extremely negligent" and that "this circumstance should be strongly construed against [the trustee]."¹⁶⁰ The court held that "the loss was purely accidental and entirely without the knowledge" and that "[u]nder such circumstances, there is no presumption allowable concerning the contents of the books."¹⁶¹ To apply sanctions, the plaintiff needed to show that the destruction happened "under circumstances revealing a purpose to prevent the use of such as evidence."¹⁶²

Despite this consistent run of cases demanding a showing of bad faith or willfulness, one decision potentially supports the *Zubulake IV* standard: *Escallier v. Baines*.¹⁶³ The case involved the dissolution of a partnership in which one partner, Escallier, contributed \$5,000 in capital and the other partner, Baines, ran the business with exclusive possession and control of the accounting books.¹⁶⁴ A month after the partnership began, Escallier asked for an accounting and dissolution of the partnership.¹⁶⁵ Shortly thereafter, he discovered that Baines had utterly failed to keep the books, but instead produced a statement that only approximately \$4,000 was left of Escallier's capital.¹⁶⁶ Given the complete failure to account for money spent and taken in, the lower court found that Baines had committed constructive fraud and awarded Escallier all of the funds held in receivership.¹⁶⁷

The lower court's rulings were based on the maxim "[o]mnia praesumuntur contra spoliatorem,"¹⁶⁸ and Baines objected, arguing that "the maxim should be

158. *Knapp v. Edwards*, 15 N.W. 140, 142 (Wisc. 1883) (emphasis added).

159. *In re Horigan Supply Co.*, 2 F.2d 791, 792–93 (8th Cir. 1924).

160. *Id.*

161. *Id.* at 793.

162. *Id.*

163. *Escallier v. Baines*, 82 P. 181 (Wash. 1905).

164. *Id.* at 182.

165. *Id.*

166. *Id.*

167. *Id.* at 183–84.

168. *Id.* at 182.

applied only in cases of wrongdoers who have actually destroyed or suppressed evidence of their wrongdoing.”¹⁶⁹ The Supreme Court of Washington disagreed and affirmed the lower court.¹⁷⁰ Importantly, the court narrowly read *Knapp* to apply only “where the failure to perform a duty is due solely to incapacity.”¹⁷¹ It relied instead on *Bingham v. Keylor* for the proposition that the spoliation inference applies whenever “no books of account at all are kept, or if they are so kept as to be unintelligible, or if they are destroyed or wrongfully withheld.”¹⁷²

If this case was correct, there would at least be some historical support for imposing an adverse inference on a finding of mere negligence, but *Bingham*—the case cited by *Knapp*—does not go so far as the latter opinion asserted.¹⁷³ In *Bingham*, the bookkeeping partner had actually kept some system of records, but these memoranda “were found, torn in pieces, in the waste basket of the defendant, by the attorney for the plaintiff, the night before [the] action was commenced.”¹⁷⁴ The Supreme Court of Washington reviewed the case law on spoliation, including *Askew* and *Armory*, and concluded that where “[t]he fraud was premeditated, the spoliation willfully made to conceal it,” an adverse inference is appropriate.¹⁷⁵ Thus, *Bingham* actually contradicts *Knapp*’s holding—and significantly undercuts its historical importance, given that it is premised on a misreading of a four-year-old controlling precedent.

Though the historical record lacks long explanations of the intricacies of the duty to preserve and the doctrine of spoliation, it is possible to glean three significant points from the cases available. One, the common-law duty to preserve generally required only that parties not destroy evidence directly related to litigation. Two, this duty attached only upon the filing of a suit (or, possibly, when the filing of the suit between the actual litigants was imminent). And three, even if documentary evidence was destroyed after the duty attached, an adverse inference instruction was appropriate only if there was a showing of bad faith or willfulness on the part of the despoiler.

IV. ZUBULAKE IV’S FOUNDATION OF SAND

How did *Zubulake IV* end up so far from the common law? The common law is designed to be flexible enough to apply to new facts without losing its fundamental character. In other words, the common law should bend, but never break. However, the modern law of e-discovery under *Zubulake IV* has broken in more ways than one: discovery costs have grown to levels grossly disproportionate to the value of litigants’ claims; the scope of the duty to

169. *Id.*

170. *Id.* at 184.

171. *Id.* at 182 (citing *Knapp v. Edwards*, 15 N.W. 140, 142 (Wisc. 1882)).

172. *Id.* at 183 (internal quotations and citations omitted).

173. *Bingham v. Keylor*, 64 P. 942, 948 (Wash. 1901).

174. *Id.* at 947.

175. *Id.* at 948 (quoting *Askew v. Odenheimer*, 2 F. Cas. 31, 36 (C.C.D. Pa. 1831)).

preserve ESI dwarfs the scope of admissible documents, or even the range of useful documents; and finally, the modern cases on discovery do not rest on a sound interpretation of the common law. Despite the fact that *Zubulake IV* is one of the most frequently cited cases on the preservation and spoliation of ESI, a closer look at its claims to precedential authority demonstrate that it has little—if any—basis in the common law. Instead, *Zubulake IV* sets forth a new discovery regime that breaks from the common sense and accumulated wisdom of courts before it.

A. *Venturing into Unchartered Territory: Adams v. Dan River Mills, Inc.*

In order to understand how *Zubulake IV* strayed so far from the common law, it is helpful to look more closely at the point where courts began to take a wrong turn. One of the earliest electronic discovery cases to be disposed of in court provides an illuminating example. In a 1972 discriminatory employment practices case, *Adams v. Dan River Mills, Inc.*, the plaintiff requested the production of the defendant's computerized master payroll file and computer print-outs of W-2 forms as far back as the employer had retained them.¹⁷⁶ When the defendant failed to produce the documents, the plaintiff filed a motion to compel.¹⁷⁷ The plaintiff argued that the information sought was “vital and relevant” to proving his allegation of discriminatory employment practices; the defendant, on the other hand, argued that the request was “too broad, [and] that much of the information sought [was] repetitive and irrelevant.”¹⁷⁸

Both sides had reasonable arguments to support their positions. The plaintiff argued that the information was needed “to prepare accurate, up-to-date statistics which will be relevant in determining whether or not discriminatory practices [had] occurred.”¹⁷⁹ Computerized data is comprehensive and reliable, and statistical analysis is significantly easier and less expensive to conduct with electronic data.¹⁸⁰ The defendant countered that the plaintiff had already been given the information they requested on computer printouts, so producing the computer master file was repetitive.¹⁸¹ The defendant also argued that the rules of discovery did not require the production of documents in any specific form.¹⁸² Lurking behind the arguments of both sides was also the issue of cost: who should be required to bear the cost of producing and making use of the information that the plaintiff was seeking?

Responding to each side's arguments, the district court judge observed that the notes of the Advisory Committee for Rule 34 of the Federal Rules of Civil

176. *Adams v. Dan River Mills, Inc.*, 54 F.R.D. 220, 221 (W.D. Va. 1972).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 222.

Procedure demonstrated that the rule contemplated the need for electronic discovery.¹⁸³ However, this need was limited: the notes only addressed the occasional need for defendants to produce otherwise inaccessible computerized information in a usable form, and they also explained that courts have ample power to “protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs.”¹⁸⁴

Recognizing the limited scope of electronic discovery contemplated by the Committee, the court nonetheless concluded that the rule “does not appear to preclude the production of computer input information such as computer cards or tapes. Likewise, the court is aware of no reason why documents of this nature should not be subject to discovery.”¹⁸⁵ The court displayed a similar permissive attitude toward the issue of cost: “[b]ecause of the accuracy and inexpensiveness of producing the requested documents in the case at bar, this court sees no reason why the defendant should not be required to produce the computer cards or tapes and the W-2 printouts to the plaintiffs.”¹⁸⁶ Oddly, and despite the court’s assertion that the requested discovery was inexpensive, the court ordered the plaintiff to bear the cost of producing the information¹⁸⁷—perhaps an unconscious apologetic gesture for expanding the scope of electronic discovery in a way that would saddle future defendants with burdens that the court could not yet foresee.

The *Adams* court should not be blamed for the current state of e-discovery law; after all, the court’s decision was not unreasonable based on the facts before it and the technological landscape that existed in 1972. But the permissive approach of *Adams* is emblematic of the shift away from the traditional common-law approach and toward the burgeoning e-discovery regime enshrined in *Zubulake IV*. Courts began to focus on the technology instead of precedent, and in time the doctrine’s connection with precedent weakened substantially.¹⁸⁸ The subsections that follow will demonstrate how *Zubulake IV*’s claims of precedential support for each prong of its spoliation doctrine evaporate upon closer examination.

B. Triggering the Duty to Preserve

In addition to its practical shortcomings, the *Zubulake IV* standard for triggering the duty to preserve is not based in a sound interpretation of the common law.¹⁸⁹ In support of its proposition that the duty to preserve arises

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. Mark D. Robins, *Computers and the Discovery of Evidence – A New Dimension to Civil Procedure*, 17 J. MARSHALL J. COMPUT. & INFO. L. 411, 412 (1999).

189. Since the 2015 Amendment to Rule 37(e) did not provide much guidance on when the duty to preserve attaches, courts have continued to use *Zubulake*’s overly broad “reasonableness”

when a party reasonably anticipates litigation, *Zubulake IV* cites three cases,¹⁹⁰ two of which rely on the third, *Kronisch v. United States*.¹⁹¹ And upon closer examination, *Kronisch* does not bear the weight of the proposition *Zubulake IV* placed upon it.

In *Kronisch*, only five years prior to *Zubulake IV*, the Second Circuit framed the trigger of the duty to preserve with a different emphasis.¹⁹² *Kronisch* observed that the:

obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation—*most commonly* when suit has already been filed, providing the party responsible for the destruction with express notice, but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation.¹⁹³

Although the difference between *Zubulake IV*'s statement of the rule and the one found in *Kronisch* appears to turn only on the question of frequency, the court in *Kronisch* may have qualified its statement for two reasons: 1) the case law does not support a wholesale expansion of the rule, and 2) the court was considering a motion for summary judgment and, therefore, presumed “that defendants had an obligation to preserve the files.”¹⁹⁴

Kronisch cites two cases for the idea that the duty to preserve may occasionally arise when a party should have known that the evidence would be relevant to future litigation.¹⁹⁵ These cases cite others, some of which cite one another and some of which give differing variations of the rule.¹⁹⁶ While it would be tedious in this space to trace each of the wandering trails of precedent to the point where it goes cold, a short example may demonstrate how far *Zubulake IV* has strayed from the traditional common-law approach.

One commonly cited case is *Bowmar Instrument Corp. v. Texas Instruments, Inc.*, decided in 1977.¹⁹⁷ In *Bowmar*, the court refused to sanction the defendant for destroying documents at the direction of its legal department prior to litigation, because “it is quite impossible to find that the defendant’s actions constituted the willful destruction of evidence” without a showing that “those responsible for the document destruction were aware at the time it took place

standard. *See* Storey v. Effingham Cty., No. CV415-149, 2017 WL 2623775, at *3–4 (S.D. Ga. June 16, 2017).

190. *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

191. *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).

192. *Id.* at 126–27.

193. *Id.* at 126 (emphasis added).

194. *Id.* at 116, 127.

195. *Id.* at 126–27.

196. *See* Skeete v. McKinsey & Co., No. 91-Civ.-8093 (PKL), 1993 WL 256659, at *1–8 (S.D.N.Y. July 7, 1993); *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68 (S.D.N.Y. 1991).

197. *Bowmar Instrument Corp. v. Texas Instruments, Inc.*, No. F. 74-137, 1977 WL 22799 (N.D. Ind. May 2, 1977).

that this litigation was a serious threat.”¹⁹⁸ Although the plaintiff furnished deposition testimony of two employees who had heard rumors that the plaintiff intended to sue, the court determined that “a rumor circulated in the offices of a large corporation . . . is too slim a reed to support the plaintiff’s charges.”¹⁹⁹ The court also faulted the plaintiff for failing to make an attempt to show when the threat of litigation became known to the legal department, which was responsible for document destruction.²⁰⁰ Different from the *Zubulake IV* standard, which would impose sanctions on a litigant when it reasonably should have anticipated the possibility of litigation, *Bowmar* refused to impose sanctions because the plaintiff could not make “a clear showing of this knowledge” of “the threat of litigation.”²⁰¹

Courts seeking to support the *Zubulake IV* standard for the duty to preserve often cite the following statement from *Bowmar*, which articulated a need for “some duty” to be imposed prior to litigation:

It has long been recognized that sanctions may be proper where a party, before a lawsuit is instituted, willfully places himself in such a position that he is unable to comply with a subsequent discovery order. Although a potential litigant is under no obligation to preserve every document in its possession, whatever its degree of relevance, prior to the commencement of a lawsuit, some duty must be imposed in circumstances such as these lest the fact-finding process in our courts be reduced to a mockery.²⁰²

The context of this statement gives it greater meaning. The plaintiff in *Bowmar* alleged that the defendant had engaged in the wholesale destruction of documents relevant to the case. In response, the defendant argued “the court is powerless to punish the wholesale, willful destruction of relevant evidence where the destruction takes place prior to a specific court order for their production.”²⁰³ Although the court rejected the defendant’s argument,²⁰⁴ the boldness of the defendant’s legal position reveals that the law at the time reflected a much more limited duty to preserve than the broad standard created by *Zubulake IV*. Rather than showing support for the *Zubulake IV* rule, *Bowmar* is an example of restraint for refusing to sanction a defendant who was accused of intentionally destroying relevant evidence wholesale.

This interpretation of *Bowmar* as an example of judicial restraint is further supported by its citations to *United States v. International Business Machines*

198. *Id.* at *1.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*; see *United States v. Int’l Bus. Machs. Corp. (IBM)*, 66 F.R.D. 189, 194 (S.D.N.Y. 1974); cf., *Societe Internationale v. Rogers*, 357 U.S. 197, 208–09 (1958).

203. *Bowmar*, 1977 WL 22799 at *1.

204. *Id.*

*Corp (IBM)*²⁰⁵ and *Societe Internationale v. Rogers*,²⁰⁶ neither of which endorses the broad duty to preserve articulated by *Zubulake IV*. In *IBM*, the government instituted an antitrust action against IBM, and IBM later claimed that the government destroyed documents prior to the entry of a pretrial order.²⁰⁷ While the court held that the government, who initiated the litigation, did have an “obligation to preserve all documents specifically requested that were relevant to this litigation,” there is no statement from the court indicating that such a duty also exists for the defendants who should have reasonably anticipated litigation.²⁰⁸

Under the traditional common-law approach, the duty to preserve ought to be triggered at the filing of the complaint, or on occasion, when the plaintiff can convincingly demonstrate that the defendant knew that an action would be filed.²⁰⁹ This standard would preserve a better balance between litigants, prevent flagrant abuse of discovery rules, and maximize the efficient disposition of claims by minimizing litigation costs.

C. Scope of the Duty to Preserve

Just as it does in other areas, *Zubulake IV* strays from the traditional common-law scope of the duty to preserve just far enough to cause an imbalance between discovery obligations and the ultimate aims of the litigation process. *Zubulake IV* itself contains a kernel of the old doctrine; in describing the scope of the duty to preserve, Judge Scheindlin explained that the duty to preserve only extends to “those employees likely to have relevant information—the ‘key players’ in the case.”²¹⁰ This “key players” standard for custodians is a conspicuously uneven match with the broad standard for evidence, which includes all relevant evidence, or even evidence reasonably calculated to lead to the discovery of admissible evidence. The expansion of the standard for preservation of evidence to include the whole universe of discoverable information is ultimately a major source of the problems that currently complicates the process of e-discovery. Just like the standard for custodians, the standard for preservation of evidence ought to apply only to “key” evidence—evidence that is likely to be essential to a particular party’s claims in the case.

The key evidence standard, in practice, is what the courts have most frequently applied—regardless of how they state the law. For example, *Zubulake IV* quotes

205. 66 F.R.D. 189 (S.D.N.Y. 1974).

206. *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958).

207. *IBM*, 66 F.R.D. at 190–91.

208. *Id.* at 194.

209. *Bowmar*, 1977 WL 22799 at *1; Owen, *supra* note 145, at 9 (“The duty to preserve material would be triggered when a defendant or respondent receives actual notice that a complaint or petition has been duly filed against it, or a formal administrative claim that is a statutory prerequisite to filing a complaint in a U.S. District Court has been duly commenced.”).

210. *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

Wm. T. Thompson Co. v. General Nutrition Corp., Inc. for its broad statement of the law; but when the *Wm. T. Thompson* court applied law, the court held that “GNC is subject to sanctions . . . for knowingly and purposefully permitting its employees to destroy key documents and records.”²¹¹

The *Wm. T. Thompson* case is also cited by *Turner v. Hudson Transit Lines, Inc.* for the same broad statement of the law used in *Zubulake IV*.²¹² However, in application, the evidence at issue in *Turner* fits the key evidence standard.²¹³ In a personal injury action where the complaint charged “the bus lacked good and sufficient brakes,” the court held that “at least by the time the complaint was served, Hudson Transit was on notice that maintenance records should be preserved.”²¹⁴ In this case, the maintenance records for the bus are a good example of key evidence. A court applying the key evidence standard would have been reasonable to conclude that maintenance records for the bus involved in the accident are likely to be essential to the plaintiff’s claim.

Another case demonstrates the same pattern of applying a key evidence standard despite a broad statement of the law. In *Computer Associations International, Inc. v. American Fundware, Inc.*, the court cites *Wm. T. Thompson*’s standard but goes on to conclude that the defendant was subject to sanctions for destroying source code despite its knowledge of the “crucial importance of the source code as evidence.”²¹⁵ Consistent with other cases that have been examined here, the court imposed the duty to preserve old versions shortly after the complaint was filed.²¹⁶ The court resorted to sanctions after concluding that the defendant:

intentionally destroyed portions of the source code not only after being served in this action and thus put on notice that the source code was irreplaceable evidence, but even after the request for production and motion to compel had dramatically and specifically emphasized the significance of the code versions being destroyed as evidence.²¹⁷

211. *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984) (citing *In re “Agent Orange” Prod. Liab. Litig.*, 506 F. Supp. 750, 752 (E.D.N.Y. 1980) (signifying a willingness to entertain additional proposed preservation orders, but refusing to postpone the date for filing motions for summary judgment because “the key documents are either in the files of the parties or readily available to them.”)).

212. *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72–73 (S.D.N.Y. 1991) (“[A litigant] is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.”).

213. *Id.* at 73.

214. *Id.*

215. *Comput. Assoc. Int’l, Inc. v. Am. Fundware, Inc.*, 133 F.R.D. 166, 168–69 (D. Col. 1990) (citing *W.M. Thompson Co.*, 593 F. Supp. at 1455–56).

216. *Id.* at 169.

217. *Id.*

The fact that the evidence was key to the plaintiff's case was the motivating factor behind imposing the sanctions.²¹⁸

As these cases illustrate, the broad statement of law endorsed by *Zubulake IV* does not accurately reflect the scope of the duty to preserve. On the contrary, *Zubulake IV* abandons common-law applications of the rule in favor of a new regime that encourages over-preservation of documents and increased litigation expenses.²¹⁹ By returning to a status quo that matches the traditional common-law interpretation of the scope of the duty to preserve evidence, courts and litigants will be more capable of keeping e-discovery in its rightful place as an appendage to dispute resolution, and not the bully of dispute resolution.²²⁰

D. The Culpability Standard

The willingness of the Second Circuit and *Zubulake IV* to impose sanctions for negligent destruction of evidence is also at odds with the common law, which generally imposed spoliation sanctions—and particularly adverse inference instructions—only for bad faith.²²¹ Demonstrating the confusion that has resulted from abandoning the common-law position, courts split on whether an adverse inference was warranted in the absence of bad faith.²²² While about half of the circuits maintained the common-law standard of bad faith for imposing adverse inferences, the ordinary negligence position of *Zubulake IV* garnered some qualified support in the other circuits, some of which have mixed the standards into varying balancing tests. In the Fifth,²²³ Seventh,²²⁴ Tenth,²²⁵ and Eleventh²²⁶ Circuits, an adverse instruction required a showing of bad

218. *Id.* at 167–70.

219. *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

220. *See, e.g.*, Comment of Hon. Jon Kyl & Prof. E. Donald Elliott, USC-Rules-CV-2013-0002-0630 (Feb. 6, 2014) (arguing revisions to the Federal Rules of Civil Procedure should go further to “address underlying incentives that cause litigants to use the costs of discovery to bludgeon their adversaries into settlements regardless of the merits of the dispute”).

221. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 113 (2d Cir. 2002); *Zubulake IV*, 220 F.R.D. at 220.

222. *Residential Funding Corp.*, 306 F.3d at 113; *Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1156 (7th Cir. 1998).

223. *Clayton v. Columbia Cas. Co.*, 547 Fed. Appx. 645, 652 (5th Cir. 2013); *Condrey v. Suntrust Bank of Ga.*, 431 F.3d 191, 203 (5th Cir. 2005); *see also King v. Ill. Cent. R.R.*, 337 F.3d 550, 556 (5th Cir. 2003).

224. *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681 (7th Cir. 2008); *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008).

225. *Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1220 (10th Cir. 2008); *see also Turner v. Public Serv. Co.*, 563 F.3d 1136, 1149 (10th Cir. 2009). Note, however, that the Tenth Circuit permits the imposition of lesser sanctions absent a finding of bad faith. *See, e.g., Henning*, 530 F.3d at 1220.

226. *SEC v. Goble*, 682 F.3d 934, 947 (11th Cir. 2012); *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997).

faith.²²⁷ Similarly, although the Eighth Circuit did not specifically use the words “bad faith,” it did require a finding of “intentional destruction of evidence indicating a *desire to suppress the truth*” before an adverse instruction is justified.²²⁸ This requirement was similar in its effect to the Seventh Circuit’s definition of bad faith, which it defined as “destruction for the *purpose of hiding adverse information*.”²²⁹

The Third and Fourth Circuits did not require a showing of bad faith, but they typically did require that the destruction of evidence be willful or deliberate, as opposed to merely negligent.²³⁰ The First, Ninth, and D.C. Circuits employ a balancing approach that considered bad faith and prejudice to the non-spoliator in determining the appropriate sanction.²³¹ It appears that only the Second Circuit explicitly endorsed the use of adverse inference instructions for

227. The Sixth Circuit has stopped short of adopting this approach in the past, but appears to be more open to it after the 2015 Amendments to Rule 37. *Compare* *Adkins v. Wolever*, 554 F.3d 650, 652–53 (6th Cir. 2009) (holding that district courts have broad discretion to impose spoliation sanctions, including for negligence) *with* *Applebaum v. Target Corp.*, 831 F.3d 740, 745 (6th Cir. 2016) (holding that after the 2015 Amendment to Rule 37, “[a] showing of negligence or even gross negligence will not” justify “an adverse inference instruction for spoliation of electronic information.”).

228. *Strutton v. Meade*, 668 F.3d 549, 559 (8th Cir. 2012) (emphasis added) (quoting *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007)).

229. *Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1155 (7th Cir. 1998) (emphasis added).

230. *See* *Gumbs v. Int’l Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983) (explaining that “it must appear that there has been an actual suppression or withholding of the evidence; no unfavorable inference arises when the circumstances indicate that the document or article in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for”); *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450–51 (4th Cir. 2004) (“[A]n adverse inference . . . ‘cannot be drawn [against a party] merely from his negligent loss or destruction of evidence; the inference requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction.’” (quoting *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155–57 (4th Cir. 1995))); *see also* *Montgomery v. Iron Rooster-Annapolis, LLC*, No. RDB-16-3760, 2017 WL 1902699, at *2 (D. Md. May 9, 2017) (finding no “intent to deprive” but leaving the door open for instructing the jury to draw an adverse inference).

231. *See* *United States v. Lovellette*, 472 Fed. Appx. 593, 595 (9th Cir. 2012) (to receive an adverse inference instruction, the party must demonstrate that “the evidence was lost in bad faith or that [the party] was prejudiced by the loss” (citing *United States v. Artero*, 121 F.3d 1256, 1259 (9th Cir. 1997))); *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 447 (1st Cir. 1997) (“Certainly bad faith is a proper and important consideration in deciding whether and how to sanction conduct resulting in the destruction of evidence. But bad faith is not essential. If such evidence is mishandled through carelessness, and the other side is prejudiced, we think that the district court is entitled to consider imposing sanctions, including exclusion of the evidence.”); *Bonds v. District of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996) (“The choice of sanction should be guided by the ‘concept of proportionality’ between offense and sanction.... In determining whether a severe sanction is justified, the district court may consider the resulting prejudice to the other party, any prejudice to the judicial system, and the need to deter similar misconduct in the future.”).

negligence alone.²³² This abandonment of the traditional common-law standard of bad faith not only caused unpredictability and confusion, it may have also been at odds with statements of the U.S. Supreme Court cautioning limited use of the courts' inherent power.²³³ Courts that impose sanctions for spoliation do it in one of two ways: 1) pursuant to Rule 37,²³⁴ which grants courts authority to sanction litigants who fail to comply with a discovery order; or 2) pursuant to the court's inherent power to protect against litigation abuses.²³⁵ By definition, any spoliation that occurs prior to the commencement of litigation or entry of a discovery order can only be sanctioned through the court's inherent power.²³⁶ However, the inherent power is a limited one—and the Second Circuit's adoption of the negligence standard for spoliation sanctions may have stretched that power too far.

The inherent powers of federal courts “are necessary to the exercise of all others.”²³⁷ However, because they are shielded from democratic controls, the courts' inherent powers “must be exercised with restraint and discretion.”²³⁸ In the context of awarding attorney's fees, the U.S. Supreme Court has indicated that sanctions under a court's inherent authority should be limited to bad faith or willful abuses of the judicial process.²³⁹ Remanding a case in which the district court awarded attorney's fees to the opposing party, the Supreme Court explained that “the trial court did not make a specific finding as to whether counsel's conduct in this case constituted or was tantamount to bad faith, a finding that would have to precede any sanction under the court's inherent powers.”²⁴⁰ The Fifth Circuit applied the same limitation specifically to use of the court's inherent power to impose spoliation sanctions, noting that the circuit has “confined sanctions under the district court's inherent power to instances of

232. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 101 (2d Cir. 2002). The 2015 Amendment to Rule 37(e) should supersede *Residential Funding's* holding. The Second Circuit has since followed the amended rule but has yet to explicitly acknowledge the change. *See, e.g., Mazzei v. Money Store*, 656 Fed. Appx. 558 (2d Cir. 2016) (noting that under “the current Rule 37(e)(2) . . . an adverse inference instruction may be given for failure to preserve electronically stored information ‘only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation.’” (quoting FED. R. CIV. P. 37(e)(2)(B))).

233. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991); *Zubulake v. UBS Warburg LLC (Zubulake IV)* 220 F.R.D. 212, 216 (S.D.N.Y. 2003); *see also* Chief Justice Roberts' 2015 Year-End Report on the Federal Judiciary 8 (Dec. 31, 2015) (specifying that under the amended Rule 37(e), “adverse jury instruction[s]” might be appropriate only “if the loss of ESI is the result of one party's intent to deprive the other of the information's use in litigation”).

234. FED. R. CIV. P. 37(b)(2)(A).

235. *See Chambers*, 501 U.S. at 56–58.

236. *See id.* at 42, 44.

237. *See Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764 (1980).

238. *Id.* at 764–65.

239. *See id.* at 764–66 (considering a district court's award of attorney's fees).

240. *Id.* at 767.

bad faith or willful abuse of the judicial process.”²⁴¹ While the Second Circuit recognized the principle in general and has applied the Supreme Court’s bad faith requirement to use the inherent power to sanction attorney conduct,²⁴² it made no effort to explain why its inherent power to impose spoliation sanctions should not have also been constrained.

Ultimately, widespread confusion about the culpability standard for imposing spoliation sanctions and dissatisfaction with the current e-discovery regime led the Advisory Committee on Civil Rules to consider many of these issues in the context of revising Rule 37(e).²⁴³ The new text attempts to find common ground between a standard requiring bad faith and one based solely on negligence.²⁴⁴ By failing to draw a clear line, it is uncertain whether the new Rule 37(e) will have its intended effect of limiting “massive and costly over-preservation” and establishing “greater uniformity” in the standards for preserving ESI.²⁴⁵

V. SPOILIATION UNDER THE REVISED RULE 37(E)

On December 1, 2015, a revised Rule 37(e) took effect.²⁴⁶ It is the product of several years of discussion regarding the inefficiencies of the judicial system and the financial pressures facing businesses because of the preservation of ESI.²⁴⁷ Compared to the slow pace that usually characterizes legal innovations, the speed with which the Advisory Committee on Civil Rules moved to address the explosion of ESI over the past fifteen years demonstrated an urgent need for reform. At the same time, the Discovery Subcommittee admitted that its proposed changes to Rule 37(e) do not adequately address the full scope of the problem:

241. *Pressey v. Patterson*, 898 F.2d 1018, 1021 (5th Cir. 1990) (explaining that “in the context of the federal court’s inherent power, ‘bad faith’ is judged by ‘necessarily stringent’ standards”). Although the court in *Pressey* held that striking the city’s pleadings was an abuse of discretion by the trial court, it did note that the court could consider less severe sanctions due to the fact that the city “unquestionably behaved improperly.” *Id.* at 1023–24.

242. *United States v. Int’l Bhd. of Teamsters*, 948 F.2d 1338, 1345 (2d Cir. 1991).

243. Scott M. O’Brien, *Analog Solutions: E-Discovery Spoliation Sanctions and The Proposed Amendments To FRCP 37(E)*, 65 DUKE L.J. 151, 169 (2015) (stating that “confusion over sanctions standards was among the most pressing issues facing the Advisory Committee”).

244. See Neil E. Aresty, *The 2015 Amendment to Federal Rule of Civil Procedure 37(e)*, ABA SECTION OF LITIGATION (Nov. 3, 2015), <https://apps.americanbar.org/litigation/committees/commercial/articles/fall2015-1115-2015-amendment-federal-rule-civil-procedure-37e.html> (stating that a Judge Rosenthal decision distinguished negligence from bad faith).

245. COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., REPORT OF ADVISORY COMM. ON CIVIL RULES. I.B. Rule: 37(e): Failure to Preserve ESI 35 (May 2, 2014) [hereinafter JUDICIAL CONFERENCE REPORT].

246. Michael J. Miles, *Discovery Sanctions under Amended Rule 37(e): A Safe(r) Harbor*, ABA SECTION OF LITIGATION (Aug. 30, 2016), <http://apps.americanbar.org/litigation/committees/pretrial/articles/summer2016-0816-discovery-sanctions-under-amended-rule-37e-safer-harbor.html>.

247. Daniel M. Braude, *Will Changes to Federal Rules Reduce Scope of Discovery?*, LAW360 (Dec. 11, 2015), <https://www.law360.com/articles/736030>.

An accumulation of information from many sources, including detailed examples provided in the public comments and testimony, persuasively supports the proposition that great costs are often incurred to preserve information in anticipation of litigation, including litigation that never is brought. Given the many other influences that bear on the preservation of ESI, however, it is not clear that a rule revision can provide complete relief on this front.²⁴⁸

In an effort to unify the legal landscape around one spoliation sanction standard, the new Rule 37(e) permits courts to take only proportional, remedial action in response to spoliation that causes prejudice to another party.²⁴⁹ Specifically, the rule is only triggered when “electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery.”²⁵⁰ Thus, not all losses of ESI will implicate the rule, which calls for “reasonable steps, not perfection.”²⁵¹ Where ESI was lost because “reasonable steps were not taken . . . the next focus should be on whether the lost information can be restored or replaced through additional discovery.”²⁵² If the ESI can be restored or replaced, sanctions are not warranted.

Where these threshold findings for applicability are crossed, Rule 37(e) allows for more severe sanctions only “upon finding that a party acted with the intent to deprive another party of the information’s use in the litigation.”²⁵³ In articulating this standard, the Advisory Committee believed the requirement of “bad faith” adopted in numerous circuits to be “too restrictive.”²⁵⁴ The Committee also rejected the Second Circuit’s position that “negligence” or

248. Discovery Subcommittee, Advisory Committee on Civil Rules, *Report of the Discovery Subcommittee on Action Item: Recommend Adoption of Rule 37(e)*, at 369 (April 10, 2014).

249. As revised, Rule 37(e) reads, “[i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it . . . the court [may]: (1) upon finding prejudice to another party from the loss of the information, [order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent” use other forms of sanctions. FED. R. CIV. P. 37. A committee note on the proposed amendments to Rule 37(e) highlights this point further, noting, “[e]xcept in very rare cases in which a party’s actions cause the loss of information that irreparably deprives another party of any meaningful opportunity to present or defend against the claims in the litigation, sanctions for loss of discoverable information may only be imposed on a finding of willfulness or bad faith, combined with substantial prejudice.” Advisory Committee on Civil Rules, *Published Rule 37(e) Amendment Proposal*, at 395 (April 10-11, 2015).

250. FED. R. CIV. P. 37(e).

251. JUDICIAL CONFERENCE REPORT, *supra* note 245, at 40.

252. *Id.* at 41; *see also* GN Netcom, Inc. v. Plantronics, Inc., No. CV-12-1318-LPS, 2016 WL 3792833, at *1–2 (D. Del. July 12, 2016).

253. FED. R. CIV. P. 37(e)(2).

254. JUDICIAL CONFERENCE REPORT, *supra* note 245, at 38.

“gross negligence” was enough for severe sanctions.²⁵⁵ Between the two standards, the Advisory Committee’s notes leave some ambiguity as to what will count as enough. For example, despite numerous comments questioning whether recklessness would be sufficient under the rule, the Committee remained silent.²⁵⁶

Where “intent to deprive” is found, the court may: 1) “presume that the lost information was unfavorable to the party;” 2) “instruct the jury that it may or must presume the information was unfavorable to the party;” or 3) “dismiss the action or enter default judgment.”²⁵⁷ While negligence may not be a sufficient standard for these more severe sanctions, it may still warrant proportional sanctions. Rule 37(e) also provides for sanctions upon a finding of “prejudice to another party from loss of the information.”²⁵⁸ Then, a court may “order measures no greater than necessary to cure the prejudice.”²⁵⁹ While the more severe sanctions reserved for “intent to deprive” are not included as possible measures, the extent of the court’s authority is unclear.

Other than attempting to create uniformity, the Subcommittee shied away from making any further changes to ESI discovery rules. The Subcommittee recognized that tinkering with sanctions is unlikely to drastically alter the ESI preservation landscape, explaining:

The Subcommittee felt that reducing the risk of sanctions would correspondingly reduce the incentives for over-preservation. The Subcommittee continues to believe that this is a worthwhile goal, but has realized that the savings to be achieved from reducing over-preservation are quite uncertain. Many who commented noted their high costs of preservation, but none was able to provide any precise prediction of the amount that would be saved by reducing the fear of sanctions. . . . So the potential savings from reducing over-preservation, although still worth pursuing, are too uncertain to justify seriously limiting trial court discretion.²⁶⁰

A fundamental reason for the inability of the new rule to address the rising costs of ESI preservation and discovery is the Subcommittee’s unwillingness to directly address the scope of the duty of preservation. The Subcommittee made clear that it would leave it to the courts to develop the tests that determine whether ESI should have been preserved in the anticipation or conduct of litigation.²⁶¹ Although the Subcommittee was correct to conclude that

255. *Id.* at 39; *see also* *Living Color Enter., Inc. v. New Era Aquaculture, Ltd.*, No. 14-CV-62216, 2016 WL 1105297, at *6 (S.D. Fla. Mar. 22, 2016).

256. JUDICIAL CONFERENCE REPORT, *supra* note 245, at 44.

257. FED. R. CIV. P. 37(e)(2)(A)–(C).

258. FED. R. CIV. P. 37(e)(1).

259. *Id.*

260. Discovery Subcommittee, Advisory Committee on Civil Rules, *Report of the Discovery Subcommittee on Action Item: Recommend Adoption of Rule 37(e)*, at 372 (Apr. 10, 2014).

261. *Id.* at 372.

determining what should be preserved is a highly case-specific inquiry, it overlooked an opportunity to curb the source of rapidly inflating discovery costs by adopting what it views as the “well developed and fairly consistent” case law on the scope of discovery.²⁶² As a consequence, the revised rule is unlikely to have a substantial effect on the major problems plaguing e-discovery, even if it changes the language that courts use when imposing sanctions.

VI. CONCLUSION

Under modern standards, the loss of the job cards in the machine shop likely would have resulted in a different outcome.²⁶³ The machine shop would be saddled with the burden of storing and maintaining these cards even after they had outlived their business purpose because failing to do so might render them unable to recover any non-payments. While this burden may not seem particularly onerous, imagine that the pile of job cards is growing exponentially each year and the machine shop must dedicate significant resources to purchasing storing space and maintaining these business cards regardless of whether they might ever be useful in litigation. This is where the modern construction of a company’s obligation to preserve ESI has led. And while the revised Rule 37(e) was designed to help address this problem of over-preservation, it does so by restricting when and how harm may be visited on a company that loses some job cards. It leaves untouched the questions of when the duty to preserve arises and what material it covers.

A return to the traditional common-law standards would mean that parties generally have no duties to preserve documents until the actual filing of a lawsuit—or, at most, when litigation is imminent. Once litigation has officially commenced, parties would then have a better idea of which custodians are truly likely to have access to relevant documents and records. By instituting preservation obligations at this stage, litigants can ensure a fair discovery process without spending exorbitant sums on maintaining and reviewing documents that will never be relevant to an actual lawsuit.

Many commentators believe the modern construction of preservation obligations is the result of failing to keep up with the digital age.²⁶⁴ But the opposite may be true. While articulated before the onslaught of ESI, the common-law approach to preservation offers more clarity on when a duty to preserve arises and what materials must be protected.²⁶⁵ As such, a return to these common-law standards would offer significant relief to the burdens of over-preserving ESI. Moreover, there is little reason to retain the modern

262. *Id.*

263. *Crosby v. Little River Sand & Gravel Dev.*, 31 So. 2d 226, 228 (La. 1947).

264. Daniel B. Garrie & Daniel K. Gelb, *E Discovery in Criminal Cases: A Need For Specific Rules*, 43 SUFFOLK L. REV. 393, 412 (2010).

265. Wright, *supra* note 16, at 794.

standards. They rely on dubious interpretations to reach a conclusion that significantly diverges from prior precedent, and even those tasked with improving them recognize their limited efficacy to keep up with the digital age. It is time to look back in order to move forward.

