

# EXPANDING PRE-SUIT DISCOVERY PRODUCTION AND PRESERVATION ORDERS

*Jeffrey A. Parness\* & Jessica Theodoratos\*\**

2019 MICH. ST. L. REV. 651

INTRODUCTION.....	652
I. CURRENT CIVIL PROCEDURE LAWS ON PRE-SUIT DISCOVERY.....	653
A. Perpetuating Witness Testimony via Deposition and Preserving Other Evidence .....	653
B. Identifying Potential Defendants.....	656
C. Identifying Potential Causes of Action .....	656
D. Post-suit Discovery Sanctions for Pre-suit Evidence Preservation Failures .....	658
1. <i>General Sanctioning Authority</i> .....	660
2. <i>Special Sanctioning Authority</i> .....	661
II. INADEQUATE DISCOVERY LAWS ON PRE-SUIT EVIDENCE PRESERVATION ORDERS .....	662
III. SUBSTANTIVE LAW CLAIMS FOR PRE-SUIT EVIDENCE SPOILIATION .....	665
A. Common Law Tort Law Claims.....	667
B. Common Law Agreement/Contract Claims .....	670
C. Statutory Claims.....	671
IV. COMMON ELEMENTS FOR PRE-SUIT EVIDENCE PRESERVATION ORDERS.....	674
A. Situs.....	674
B. Petitioners and Respondents.....	675
1. <i>Petitioners</i> .....	675
2. <i>Respondents</i> .....	676
C. Petition Contents .....	677
D. Proportionality.....	680
E. Meet and Confer.....	681
F. Available Forms of Relief .....	682
G. Cost Shifting and Sanctions .....	682
H. Appeals.....	684

---

\* Professor Emeritus, Northern Illinois University College of Law. Thanks to Deven Tlanda, Student, Northern Illinois University College of Law, for his help with the Article.

\*\* Student, Northern Illinois University College of Law.

I. Later Effects.....	684
CONCLUSION .....	685

## INTRODUCTION

There are now few written federal or state civil procedure laws broadly authorizing pre-suit discovery. Yet with the increasing amounts of electronically stored information (ESI) relevant to future civil litigation, the regularity of ESI loss/destruction, and the growing availability of substantive law claims involving pre-suit evidence spoliation, there is a compelling need for new written laws on pre-suit court orders involving evidence preservation.

Current written civil procedure laws generally authorize pre-suit discovery perpetuating witness testimony via depositions in order to prevent a failure of justice arising because a witness will likely be unavailable later. Fewer procedural laws authorize pre-suit discovery aimed at identifying potential defendants or potential causes of action. Virtually no current civil procedure laws address broader pre-suit court orders involving evidence preservation.<sup>1</sup> They should, moving such orders from the “fringes.”<sup>2</sup>

Pre-suit evidence preservation duties generally arise under two types of laws. One embodies post-lawsuit civil procedure laws on discovery sanctions for failure to produce evidence that should have been preserved, but was lost, pre-suit. The other encompasses substantive law claims for damages arising from pre-suit evidence losses.

New written civil procedure laws should authorize pre-suit court orders involving evidence preservation when the requested evidence is relevant to imminent civil litigation and will likely spoil otherwise. These new laws should originate in amendments to current written civil procedure laws on witness testimony perpetuation via deposition and not the laws on discovery sanctions as suggested by Professor A. Benjamin Spencer.<sup>3</sup> New laws should authorize information gathering

---

1. We employ, not unlike civil discovery laws on relevancy, as with FRCP 26(b)(1) where discoverability is not synonymous with admissibility, the phrase “evidence preservation” to encompass the nonprivileged information and materials available in civil litigation discovery. *See* FED. R. CIV. P. 26(b)(1).

2. *See generally* John Leubsdorf, *Fringes: Evidence Law Beyond the Federal Rules*, 51 *IND. L. REV.* 613 (2018) (noting that outside of civil procedure, as with evidence, important principles on litigation processes remain on the “fringes”).

3. *See* A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 *FORDHAM L. REV.* 2005,

during pre-suit discovery, as well as pre-suit orders, declaring a lack of any preservation duty where a pre-suit evidence preservation demand has been made, is disputed, and warrants immediate judicial attention. The availability of more expansive pre-suit orders under written civil procedure laws will promote greater uniformity among the trial courts,<sup>4</sup> prompt more informed settlement talks, and enhance accuracy in later litigation factfinding.<sup>5</sup>

## I. CURRENT CIVIL PROCEDURE LAWS ON PRE-SUIT DISCOVERY

### A. Perpetuating Witness Testimony via Deposition and Preserving Other Evidence

Federal and state civil procedure laws authorizing pre-suit discovery have several distinct purposes. One purpose, widely pursued, involves evidence preservation for foreseeable civil actions via depositions of witnesses who may not be available later.<sup>6</sup> Federal Civil Procedure Rule (FRCP) 27, substantially replicated in many states, authorizes testimony perpetuation via deposition “about any matter cognizable in a United States court” where the “petitioner expects to be a party to an action” in a U.S. court but “cannot presently” sue.<sup>7</sup> Under this rule, a deposition can only be ordered to

---

2022–24 (2011). We respectfully disagree with Professor Spencer’s thoughtful suggestion on adding new pre-suit evidence preservation duties to the general civil procedure laws on post-suit discovery sanctions.

4. See Joshua M. Koppel, *Federal Common Law and the Courts’ Regulation of Pre-Litigation Preservation*, 1 STAN. J. COMPLEX LITIG. 101, 121 (2012) (supporting federal court use of state pre-suit discovery standards, especially when actual or possible state law claims or defenses are in play). We generally support independent federal judicial rulemaking regarding pre-suit discovery orders authorized by federal district courts relevant to both federal and state law claims and defenses.

5. These goals may also be achieved through greater use of equitable bills of discovery, undertaken in the absence of written discovery laws. See, e.g., Rupert F. Barron, Annotation, *Existence and Nature of Cause of Action for Equitable Bill of Discovery*, 37 A.L.R. 5th 645 (1996) (collecting and analyzing cases since 1950). Our preference is for written standards guiding judicial discretion. Written laws should reflect more precisely when pre-suit discovery methods may be used (e.g., only when a petitioner cannot presently bring a civil action), what discovery methods are available (e.g., deposition only), and for what purposes they may be employed (e.g., only to perpetuate testimony).

6. See, e.g., FED. R. CIV. P. 27(a)(1)(A).

7. *Id.*; see also ALASKA R. CIV. P. 27(a)(1); ARIZ. R. CIV. P. 27(a)(1)(A); ARK. R. CIV. P. 27(a)(1); CONN. GEN. STAT. § 52-156a(a)(1)(A) (2019); MISS. CODE ANN. § 13-1-227(a)(1) (2019); S.D. CODIFIED LAWS § 15-6-27(a)(1)(A) (2019); NEB.

“prevent a failure or delay of justice.”<sup>8</sup> Through the use of such a deposition, a prudent petitioner can request that the deponent produce documents and other tangible things at the deposition or submit to a physical or mental examination.<sup>9</sup> A deposition to perpetuate testimony “does not limit a court’s power to entertain an action to perpetuate testimony,” a power substantially defined by “the former equitable bill in equity to perpetuate testimony.”<sup>10</sup> Such a bill predates the FRCP and is generally read similarly to the current FRCP requirements on testimony perpetuation.<sup>11</sup>

An Illinois Supreme Court rule is somewhat similar but different in important aspects.<sup>12</sup> The rule authorizes testimony perpetuation via deposition regarding any matter that may be cognizable not only in any court but also in any proceeding.<sup>13</sup> There is no need under the Illinois rule to show the petitioner cannot presently sue.<sup>14</sup> One condition for a pre-suit deposition, fixed by the authorizing court, can be the production of “documents or tangible things” containing matters within the scope of the permitted examination.<sup>15</sup>

A New York statute on pre-suit evidence preservation orders differs from the federal and Illinois provisions, as it expressly covers varying disclosure devices, including depositions, interrogatories, physical and mental examinations, and requests for admission.<sup>16</sup> A New Jersey court rule authorizes “[a] person who desires to . . . preserve any evidence or to inspect documents or property or copy documents” to petition for pre-suit discovery; yet, the petitioner must be “presently unable to bring” a suit or cause it to be brought.<sup>17</sup>

---

CT. R. DISCOVERY § 6-327(a)(1)(i); S.C. R. CIV. P. 27(a)(1); W. VA. R. CIV. P. 27(a)(1).

8. FED. R. CIV. P. 27(a)(3).

9. *See id.* (referencing FED. R. CIV. P. 34 and 35).

10. FED. R. CIV. P. 27(c); *Shore v. Acands*, 644 F.2d 386, 389 (5th Cir. 1981).

11. *See, e.g., Shore*, 644 F.2d at 389; *see also* *Lubrin v. Hess Oil V.I. Corp.*, 109 F.R.D. 403, 405 (D.V.I. 1986) (most cases find “independent action to obtain discovery” is similar “to the antiquated instrument called an equitable bill of discovery”).

12. *See* ILL. SUP. CT. R. 217.

13. *See id.* 217(a)(1).

14. *Id.*; *see also* MD. R. 2-404(a)(2); 9 R.I. GEN. LAWS § 9-18-12 (2019); WIS. STAT. ANN. § 804.02(1)(a) (West 2019).

15. ILL. SUP. CT. R. 204(a)(1).

16. N.Y. C.P.L.R. 3102(a), (c) (McKinney 2011) (pre-suit “disclosure to aid in bringing an action, to preserve information, or to aid in arbitration”).

17. N.J. CT. R. 4:11-1(a); *see also* *Liberty Mut. Ins. Co. v. Borgata Hotel Casino & Spa*, 195 A.3d 538, 542 (N.J. Super. Ct. Law Div. 2017) (extending N.J. CT. R. 4:11-1 to pre-suit petitions to insurance companies of insureds who receive

Pre-suit witness testimony perpetuation is sometimes addressed in special laws, which may not differ much from general laws. In Montana, there is not only a court rule similar to FRCP 27, but there is also a similar court rule benefitting a “person who desires to perpetuate testimony regarding the historical beneficial use of any water right claim.”<sup>18</sup> In Missouri, a statute covers pre-suit witness depositions “to perpetuate testimony” where “the object is to perpetuate the contents of any lost deed or other instrument of writing, or the remembrance of any . . . matter . . . necessary to the recovery . . . of any estate or property . . . or any other personal right.”<sup>19</sup>

Beyond certain depositions, written civil procedure laws generally fail to address pre-suit judicial orders on preserving other evidence. An equitable bill in discovery occasionally is employed to preserve other evidence. In 2012 in Chicago, a state trial court ordered, via an “emergency bill,” a medical facility to preserve and release documents related to the failure by its refrigeration machines to maintain sperm samples.<sup>20</sup> And after being involuntarily removed from a United Airlines plane on April 9, 2017, Dr. David Dao secured from a Chicago trial court, via an “emergency bill,” a pre-suit order.<sup>21</sup> On April 11, 2017, Dr. Dao requested the preservation and protection of, *inter alia*, a surveillance video, the passenger and crew lists, personnel files, the protocol on passenger removal, and all incident reports.<sup>22</sup> A bill was granted on April 17, 2017, per party agreement.<sup>23</sup> The range of such bills on preserving nondeposition evidence remains unclear, however. As will soon be demonstrated, Illinois courts do recognize a common law tort for pre-suit negligent spoliation of evidence.<sup>24</sup> Yet, that duty seemingly did not arise in the two aforementioned emergency discovery bill cases.

---

notices of possible later lawsuits); *In re Kemmerer*, No. OCN-L-1815-18, 2019 WL 1494788, at \*1, \*2 (N.J. Super. Ct. Law Div. 2019) (citing *In re Hall ex rel. Hall*, 688 A.2d 81 (N.J. 1997)).

18. MONT. R. WATER ADJ. R. 28; *see* MONT. R. CIV. P. 27.

19. MO. REV. STAT. § 492.420 (1939).

20. *See Doe v. Nw. Mem’l Hosp.*, 19 N.E.3d 178, 184–85 (Ill. App. Ct. 2014) (noting the grant followed an “agreement of the parties”); *In Court*, CHICAGO DAILY L. BULL., July 19, 2012, at p. 2, col. 5-6.

21. *See* 735 ILL. COMP. STAT. ANN. 5/2-402 (West 2006).

22. *See* Elliot C. McLaughlin, “Man Dragged Off United Flight Has Concussion, Will File Suit, Lawyer Says,” CNN (Apr. 14, 2017), <https://www.cnn.com/2017/04/13/travel/united-passenger-pulled-off-flight-lawsuit-family-attorney-speak/index.html>.

23. *See id.*

24. *See infra* Part III.

## B. Identifying Potential Defendants

Less frequent in the United States are written civil procedure laws authorizing pre-suit discovery seeking to identify potential defendants. There is no explicit written FRCP. But such discovery is sometimes available in state trial courts where there are civil actions already pending, meaning one or some but not all defendants have been identified. For example, the Illinois statute on respondents in discovery says that a plaintiff “in any civil action may designate as respondents in discovery . . . those individuals or other entities, other than the named defendants, believed by the plaintiff to have information essential to the determination of who should properly be named as additional defendants in the action.”<sup>25</sup> Information can be secured from nonparty respondents as from defendants.<sup>26</sup>

Other civil procedure laws authorize pre-suit discovery aimed at identifying potential defendants though there is no pending, related civil action. In Illinois, beyond the respondent in discovery law, there is a court rule on an “independent action” pursued by a potential claimant for “the sole purpose of ascertaining the identity of one who may be responsible in damages.”<sup>27</sup> In New York, a statute authorizes pre-suit discovery “to aid in bringing an action.”<sup>28</sup> In Ohio, a civil procedure rule allows pre-suit discovery “necessary to ascertain the identity of a potential adverse party.”<sup>29</sup>

## C. Identifying Potential Causes of Action

Related to the laws on identifying potential defendants, there are some pre-suit civil discovery laws aiding petitioners seeking to

---

25. 735 ILL. COMP. STAT. ANN. 5/2-402.

26. *See id.*

27. ILL. SUP. CT. R. 224(a)(1).

28. N.Y. CIV. PRACTICE LAW § 3102(c) (McKinney 2011); *see also* Lucas v. Neidlinger, 81 S.E.2d 825, 828 (Ga. 1954) (describing pre-suit discovery where information “peculiarly within the knowledge” of others).

29. OHIO CIV. R. 34(D)(3)(a)–(b); *see also* Bay EMM Vay Store, Inc., v. BMW Fin. Servs. N.A., 116 N.E.3d 858, 861 (Ohio Ct. App. 2018) (petitioner must also be “otherwise unable to bring the contemplated action”); White v. Equity, Inc., 899 N.E.2d 205, 208 (Ohio Ct. App. 2008) (explaining that the rule may be employed even where any later claim would be subject to contractual arbitration); Benner v. Walker Ambulance Co., 692 N.E.2d 1053, 1054 (Ohio Ct. App. 1997) (explaining how the rule supplements, and was promulgated in response to a case interpreting, the statute on pre-suit discovery aimed at identifying potential causes of action).

identify potential causes of actions.<sup>30</sup> Here potential defendants may be known, but their roles—if any—in causing harm is unknown and may not become known without pre-suit discovery (i.e., *res ipsa loquitur* scenarios). Illustrative is a Texas Civil Procedure rule allowing a petition seeking deposition authorization in order “to investigate a potential claim or suit,” including judicial authority where there is only an “anticipated suit.”<sup>31</sup> Under this rule a petitioner must demonstrate that the deposition order “may prevent a failure or delay of justice” or that “the likely benefit” of the deposition “outweighs the burden or expense of the procedure.”<sup>32</sup> Authorized depositions are governed by “the rules applicable to depositions of nonparties in a pending suit.”<sup>33</sup> Thus, document or ESI production can be sought.<sup>34</sup>

A New York statute is broader, as it authorizes varying pre-suit discovery devices, including depositions, interrogatories, physical and mental examinations, and requests for admission “to aid in bringing an action.”<sup>35</sup> An Ohio statute allows “a person claiming to have a cause of action” who is “unable to file his complaint” without discovery “from the adverse party” to “bring an action for discovery . . . with any interrogatories . . . that are necessary to procure the discovery sought.”<sup>36</sup>

---

30. See Scott Dodson, *Federal Pleading and State Pre-suit Discovery*, 14 LEWIS & CLARK L. REV. 43, 43 (2010) (advocating for greater pre-suit discovery in order to assist aspiring claimants to secure information needed under heightened pleading standards); Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Pre-suit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 217 (2007) (advocating for expanding such laws in order to promote greater access to justice for those with claims but limited resources).

31. See TEX. R. CIV. P. 202.1 (describing conditions limiting post-lawsuit depositions can also limit pre-suit depositions); see also *In re Jorden*, 249 S.W.3d 416, 418 (Tex. 2008) (discussing a statute limiting discovery in health-care lawsuits (plaintiff must first serve an expert report applicable to pre-suit depositions)).

32. TEX. R. CIV. P. 202.4(a); see also *In re Hewlett Packard*, 212 S.W.3d 356, 361 (Tex. Ct. App. 2006) (benefits do not outweigh burdens, especially as trade secrets were involved).

33. TEX. R. CIV. P. 202.5.

34. See TEX. R. CIV. P. 176.2, 199.3 (stating that a subpoena for oral deposition can include command to “produce and permit inspection and copying of designated documents or tangible things”). The history behind the pre-suit discovery rule in Texas is reviewed in *In re Doe*, 444 S.W.3d 603, 605–08 (Tex. 2014).

35. N.Y. CIV. PRACTICE LAW § 3102(a), (c) (McKinney 2011); see also *Lucas v. Neidlinger*, 81 S.E.2d 825, 827 (Ga. 1954) (allowing pre-suit discovery on information that is “necessary” and “peculiarly within the knowledge” of others).

36. OHIO REV. CODE ANN. § 2317.48 (LexisNexis 2019). The statute “occupies a small niche between an unacceptable ‘fishing expedition’ and a short and

#### D. Post-suit Discovery Sanctions for Pre-suit Evidence Preservation Failures

Pre-suit evidence preservation duties are commonly enforced through post-suit discovery sanctions. Thus, federal and state civil procedure laws, sometimes very generally<sup>37</sup> and sometimes quite specially,<sup>38</sup> recognize possible post-suit discovery sanctions for certain pre-suit information losses that come to light when relevant information is not available yet is subject to a timely post-suit discovery request.<sup>39</sup> Additionally, in the absence of written civil procedure laws,<sup>40</sup> procedural common law rulings untethered to statutes sometimes employ *inherent* power when considering sanctions for information losses covered by a respondent's duty to preserve in anticipation of foreseeable litigation.<sup>41</sup> Whether discovery

---

plain statement of a complaint or a defense.” Poulos v. Parker Sweeper Co., 541 N.E.2d 1031, 1034 (Ohio 1989). The statute may be employed even where any later claim would be subject to contractual arbitration. See White v. Equity, Inc., 899 N.E.2d 205, 211 (Ohio Ct. 2008).

37. See ILL. SUP. CT. R. 219(c) (providing sanctions against parties who unreasonably refuse to comply with discovery rules); see also Shimanovsky v. Gen. Motors Corp., 692 N.E.2d 286, 290 (Ill. 1998) (“[A] potential litigant owes a duty to take reasonable [pre-suit] measures to preserve the integrity of relevant and material evidence.”).

38. See, e.g., FED. R. CIV. P. 37(e) (providing sanctions when unavailable ESI “cannot be restored or replaced through additional discovery” though it “should have been preserved in the anticipation . . . of litigation”); see also WYO. R. CIV. P. 37(e). Under FRCP 37(e), available sanctions vary dependent upon whether the lost evidence arose from negligent or grossly negligent conduct rather than bad faith acts. See Schmalz v. Vill. of N. Riverside, No. 13 C 8012, 2018 WL 1704109, at \*6 (N.D. Ill., Mar. 23, 2018).

39. See TENN. CIV. P. R. 34A.01 (stating that before expert testing that will materially alter relevant evidence, a “party” shall seek a court order and sanctions can follow for an “offending party”). Sometimes discovery sanction laws exclusively speak to post-suit information losses. See *id.*

40. See Unigard Sec. Ins. Co. v. Lakewood Eng. & Mfg. Corp., 982 F.2d 363, 368 (9th Cir. 1992) (stating that Rule 37 only permits sanctions for violations of an “order”). At times, written laws will be narrowly read, as when they include only certain sanctionable conduct. See *id.*

41. See, e.g., Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) (discussing federal court inherent power to sanction for pre-suit evidence spoliation); see also Adkins v. Wolever, 554 F.3d 650, 652 (6th Cir. 2009) (en banc) (noting that earlier circuit panel rulings applied state law to sanctions for pre-suit loss or destruction of evidence in federal question cases); Flury v. Daimler Chrysler Corp., 427 F.3d 939, 944 (11th Cir. 2005) (“[F]ederal law governs the imposition of spoliation sanctions” in a diversity case); Fines v. Ressler Enters., Inc., 820 N.W.2d 688, 690 (N.D. 2012) (discussing when state court inherent power is utilized to



sanctions flow from written laws or common law rulings, possible sanctions typically include default judgments or claim dismissals,<sup>42</sup> as well as adverse jury instructions.<sup>43</sup>

These duties on pre-suit evidence preservation prompting post-suit sanctions sometimes reflect certain of Professor Spencer's suggestions. His proposal speaks to the reasonable anticipation of a pending civil action when the evidence was lost, wherein a "party" can be sanctioned in a civil action if that party earlier received an evidence preservation request from another party no more than sixty days before the commencement of the action.<sup>44</sup> His proposal also speaks to a pre-suit preservation duty when there is reasonable anticipation of a pending civil action by a later party because that party had notice of events prompting a possible claim and of "resulting harm of sufficient magnitude to make related litigation probable."<sup>45</sup> Finally, Professor Spencer suggests that a pre-suit evidence preservation duty, which upon breach can result in a discovery sanction in a pending civil action, encompasses circumstances where the party "took steps in anticipation of asserting or defending against a claim in the pending action" or where there was "a statutory or regulatory duty to preserve."<sup>46</sup>

---

sanction a party for pre-suit evidence spoliation); *Tatham v. Bridgestone Ams. Holding, Inc.*, 473 S.W.3d 734, 740–46 (Tenn. 2015).

42. See FED. R. CIV. P. 37 (b)(2)(A)(v)-(vi), (e); see also WYO. R. CIV. P. 37(e)(2)(C) (stating that a possible sanction involving unrestorable and irreplaceable ESI could be to "dismiss . . . or enter a default judgement"); WYO. R. CIV. P. 37(b)(2)(A)(v)-(vi) (stating that possible sanctions involving restorable ESI and non-ESI are dismissal or default judgment).

43. See FED. R. CIV. P. 37(e); FED. R. CIV. P. 37(b)(2)(A)(i) (stating that the court can order that facts "be taken as established"); WYO. R. CIV. P. 37(e)(2)(B) (stating that the court can instruct the jury that it "may or must" presume information was unfavorable to the party being sanctioned regarding unrestorable and irreplaceable ESI); WYO. R. CIV. P. 37(b)(2)(A)(i) (discussing sanctions involving restorable ESI and non-ESI); see also *Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917, 921 (Tex. 2015) (per curiam) (holding that spoliation jury instructions will be inappropriate where a failure to preserve did not deprive a litigant of a meaningful ability to present a claim or defense).

44. See Spencer, *supra* note 3, at 2022–23 (discussing proposed amendments FRCP 37(e)(1)(C)(ii) and 37(e)(2)(B)).

45. *Id.* at 2023 (citing FED. R. CIV. P. 37(e)(1)(C)(ii) and quoting FED. R. CIV. P. 37(e)(2)(C)).

46. *Id.* (citing FED. R. CIV. P. 37(e)(1)(C)(ii) and quoting FED. R. CIV. P. 37(e)(1)(C)(iii), (D)). Quite sensibly, a civil procedure law on sanctioning evidence losses can be employed when there is a breach of a substantive law duty on evidence preservation.

Procedural laws on pre-suit evidence preservation duties germane to post-suit discovery sanctions do not always follow substantive law pre-suit evidence preservation duties that can lead to money damage claims. Borrowing from Robert Frost, an Appellate Court described one harmed by spoliated evidence as confronting “two roads diverged in a wood,” wherein the elements for pursuing a discovery sanction differ from the elements for pursuing a substantive law claim involving evidence spoliation.<sup>47</sup> Post-suit discovery sanctions for pre-suit evidence preservation failures can be authorized generally or can be addressed in special discovery sanction laws.<sup>48</sup>

### 1. General Sanctioning Authority

FRCP 37 generally authorizes sanctions for the failure to produce certain lost ESI (like restorable or replaceable ESI), as well as for the failure to produce lost non-ESI (like paper documents), that should have been preserved in anticipation of litigation.<sup>49</sup> Guidelines for sanctions involving nonrestorable and nonreplaceable ESI differ from sanctions authorized for lost but replaceable ESI and for lost non-ESI,<sup>50</sup> as do the guidelines on the types of culpability necessary for finding discovery violations.<sup>51</sup> A number of states have comparable general civil procedure discovery laws.<sup>52</sup> Other state courts employ

---

47. See *Adams v. Bath & Body Works, Inc.*, 830 N.E.2d 645, 652 (Ill. App. Ct. 2005) (finding sanction of dismissal requires deliberate or contumacious conduct or “unwarranted disregard of the court’s authority” while a spoliation of evidence claim in tort “requires mere negligence” (quoting *Shimanovsky v. Gen. Motors Corp.*, 692 N.E.2d 286, 291 (Ill. 1998))).

48. See FED. R. CIV. P. 37(b)(2)(A).

49. See FED. R. CIV. P. 37(b) (failure to comply with a court order); FED. R. CIV. P. 37(c) (failure to disclose, to supplement an earlier discovery response, or to admit); FED. R. CIV. P. 37(d) (failure to attend a deposition, to serve answers to interrogatories, or to respond to a request for inspection).

50. See FED. R. CIV. P. 37(e) (covering only irreplaceable or nonrestorable ESI and expressly mentioning only four possible sanctions); see also FED. R. CIV. P. 37(b)(2) (recognizing a broader category of possible sanctions (including staying proceedings, specific evidentiary bars, and striking only portions of pleadings) for lost, but replaceable or restorable ESI, and for lost non-ESI).

51. See FED. R. CIV. P. 37(e). While FRCP 37(e) distinguishes between intentional and unintentional discovery failures involving nonrestorable and nonreplaceable ESI, FRCP 37(b) speaks generally to failures to obey court orders on discovery involving other ESI and non-ESI without differentiating between the types of culpability. See FED. R. CIV. P. 37(b), (e).

52. See, e.g., WYO. R. CIV. P. 37; see also D.C. SUP. CT. R.C.P. 37; VT. CIV. P. R. 37 (including only the initial portion of FED. R. CIV. P. 37(e) so it does not speak to intentional acts).

laws that fail to distinguish between some ESI and other ESI, or between ESI and non-ESI.<sup>53</sup>

## 2. Special Sanctioning Authority

Post-suit discovery sanctions may also follow violations of special, or explicit, pre-suit evidence preservation duties. As just noted, a FRCP and some state laws now speak to the consequences of failing to produce during discovery a certain form of “lost” ESI that “should have been preserved in the anticipation . . . of litigation.”<sup>54</sup> This form involves ESI that “cannot be restored or replaced through additional discovery.”<sup>55</sup> Sanctions, only available where there is prejudice to another party, normally encompass solely “measures no greater than necessary to cure the prejudice.”<sup>56</sup> However, when the evidence loss resulted from a party’s actions intended “to deprive another party of the information’s use in the litigation,” more significant sanctions are possible.<sup>57</sup>

An earlier section of the same FRCP also spoke specifically to ESI. That section, now operative in some states,<sup>58</sup> only directed that “[a]bsent exceptional circumstances,” no discovery sanctions should follow failures to provide ESI “as a result of the routine, good-faith operation of an electronic information system.”<sup>59</sup> This allows courts

---

53. See, e.g., ILL. SUP. CT. R. 219. A 2014 Committee Comment declared that the rule “is sufficient to cover sanction issues as they relate to electronic discovery.”

54. FED. R. CIV. P. 37(e). An early proponent of such a special ESI rule was Martin H. Redish. See Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 608 (2001) (suggesting a conditional cost-shifting rule); see also Stanley Richards, *The False Promise of Proposed Rule 37(E): Why It Will Not End Data Producers’ Over-Preservation Habits*, 32:2 YALE L. & POL’Y. REV. INTER ALIA 34, 38–41 (2014) (providing a critique of the current special ESI rule, written when it was being considered).

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

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

57. FED. R. CIV. P. 37(e)(2) (such sanctions include a presumption that the lost information was unfavorable, a jury instruction embodying an unfavorable presumption, a dismissal, and a default judgment); see also *Wai Feng Trading Co. v. Quick Fitting, Inc.*, No. 13-33WES, 2019 WL 118412, at \*7 (D.R.I. Jan. 7, 2019) (containing significant review of the rule).

58. See, e.g., ME. R. CIV. P. 37(e); see also TENN. R. CIV. P. 37.06(2); N.D. R. CIV. P. 37(f). Ohio Civil Procedure Rule 37(e) is comparable but goes on to elaborate on the factors to be used in determining whether to impose sanctions. See OHIO R. CIV. P. 37(e).

59. FED. R. CIV. P. 37(e). See generally Jeffrey A. Parness, *Lost ESI Under the Federal Rules of Civil Procedure*, 20 SMU SCI. & TECH. L. REV. 25 (2017) (explaining the history behind the ESI sanction rule changes in 2015).

more discretion in determining where sanctions are appropriate.<sup>60</sup> But it fails to discourage adequately the disposal of information important to later foreseeable litigation that could be very easily and inexpensively retained.

A current special Arizona discovery rule on pre-suit ESI preservation contains some elements of both the former and current FRCP sections on pre-suit ESI preservation.<sup>61</sup> Rather than the “exceptional circumstances” prescribed under the former federal rule, the Arizona rule authorizes sanctions for failing to take “reasonable steps” to preserve ESI that is destroyed due to the “routine operation” of an ESI system or of an “application of a document retention policy.”<sup>62</sup> Additionally, preservation of information is explicitly required when one “reasonably anticipates an action’s commencement” wherein one would be either a defendant or a plaintiff.<sup>63</sup> Like the current FRCP, the Arizona rule comparably addresses sanctions for lost ESI that cannot be “restored or replaced.”<sup>64</sup> Unlike the current FRCP, the Arizona rule sets out factors relevant to inquiries into “reasonable steps to preserve relevant” ESI.<sup>65</sup>

## II. INADEQUATE DISCOVERY LAWS ON PRE-SUIT EVIDENCE PRESERVATION ORDERS

For now, there are generally no written civil procedure laws authorizing pre-suit discovery aimed at evidence preservation where the potential defendants and causes of action are known and where those pursued for information pre-suit will likely be available for post-suit discovery. This Article posits that pre-suit evidence production and maintenance orders should be available against those who owe duties to the petitioners, whether via criminal laws, civil procedure discovery laws on sanctionable conduct, regulatory record retention laws, and/or contract and where there is a very good chance that the duties will be breached, resulting in harm to the petitioners. As well, there are generally no written civil procedure laws authorizing pre-suit

---

60. See *Mont. State Univ.-Bozeman v. Mont. First Judicial Dist. Court*, 426 P.3d 541, 559 (Mont. 2018) (utilizing rule founded on the earlier version of FRCP 37(e) and finding the sanction of a default judgment constituted an abuse of discretion).

61. See ARIZ. R. CIV. P. 37(g).

62. FED. R. CIV. P. 37(e); ARIZ. R. CIV. P. 37(g)(1)(A), (C)(i).

63. ARIZ. R. CIV. P. 37(g)(1)(B).

64. ARIZ. R. CIV. P. 37(g)(2).

65. ARIZ. R. CIV. P. 37(g)(1)(C)(ii).

protective orders on behalf of those receiving evidence preservation demands who successfully urge they have no evidence preservation duties, but there should be.

An Arizona court rule, effective July 2018, does authorize certain pre-suit evidence preservation orders that are not aimed at perpetuating witness testimony or at identifying potential defendants or potential causes of action.<sup>66</sup> Rather, it speaks to judicial determinations on “the existence or scope of any duty to preserve” ESI.<sup>67</sup> The rule permits discovery orders directed at those against whom there is no “anticipated litigation.”<sup>68</sup> It also allows one in receipt of a “preservation request” concerning information relevant to “anticipated litigation” to petition for a pre-suit order determining the “existence or scope” of any ESI preservation duty.<sup>69</sup> Yet the rule requires that petitions regarding the ESI preservation duties of nonparties occur in a “pending action in which the request is made,”<sup>70</sup> not unlike the aforementioned Illinois statute on nonparty respondents in discovery where a pending civil action is required.<sup>71</sup>

Written civil procedure laws should go much further. They should authorize pre-suit discovery orders, or discovery immunity, concerning evidence where there is no preexisting legal duty. Such a duty could be deemed to arise simply from a pre-suit request to preserve and/or produce information. Civil procedure laws should not go as far as to authorize pre-suit evidence preservation discovery based solely on an information request that is denied or that goes unaddressed. Requests for information alone should not prompt evidence preservation responsibilities.

Pre-suit civil discovery laws originate in varying sources, including court rules, statutes, and case precedents. These laws can be general or special. General laws are exemplified by the broad array of federal and state civil procedure rules on pre-suit testimony perpetuation accomplished through depositions of those likely to be unavailable later. Special duties are illustrated by the Florida statutory

---

66. ARIZ. R. CIV. P. 45.2(e).

67. *Id.*

68. ARIZ. R. CIV. P. 45.2(b)(1).

69. ARIZ. R. CIV. P. 45.2(b)(1), (e)(1). Rule 45.2(e) petitions need not be preceded by “meet and confer” consultations. *See* ARIZ. R. CIV. P. 45.2(e); *see also* ARIZ. R. CIV. P. 16(b)(1); (c)(8)(B)(xiii).

70. ARIZ. R. CIV. P. 45.2(b)(2); *see also* ARIZ. R. CIV. P. 26(c)(1) (explaining that protective orders sought by a nonparty to whom an ESI preservation request is made to be sought “in the court in the county where the action is pending”).

71. *See* 735 ILL. COMP. STAT. 5/2-402 (2006).

provisions on pre-suit discovery involving later medical negligence claims and defenses.<sup>72</sup> Thus, possible new pre-suit evidence preservation laws may come from a variety of lawmakers.

Possible new laws may speak only to certain evidence, like irreplaceable or nonrestorable ESI. Some current civil procedure laws, as noted, already differentiate between certain ESI, other ESI and non-ESI.<sup>73</sup> Other possible new laws may speak to a broader array of evidence, including all forms of both ESI and non-ESI.

In crafting new pre-suit discovery laws, preemption issues can arise. One recurring issue can be whether new written pre-suit civil discovery laws supersede, or merely supplement, earlier case precedents, like those on equitable bills in discovery. Written laws sometimes now obliquely reference the continuing vitality of case precedents, for example, by recognizing the continuing availability of “an action” or an “independent action” seeking discovery.<sup>74</sup> Other current laws are silent about their effects.<sup>75</sup> Any new written discovery laws on pre-suit evidence preservation orders should be clear about the continuing vitality of earlier precedents and the roles of earlier and related statutes and rules. Certainly, new written laws on pre-suit evidence preservation/production can be exclusive, thus preempting earlier laws—whether written or common law.

Before further exploring the needed expansions of laws on pre-suit evidence preservation orders, the Article first reviews current substantive law claims for pre-suit evidence loss.<sup>76</sup> Such substantive law claims, together with the earlier noted civil procedure laws on post-suit sanctions for pre-suit evidence losses, should primarily provide the foundations for any new written laws on pre-suit evidence preservation orders.<sup>77</sup> Because the substantive as well as the post-suit procedural laws now vary between U.S. jurisdictions, we anticipate that any new pre-suit evidence preservation laws might vary between

---

72. FLA. STAT. § 766.106(6)(a) (2013) (“Upon receipt by a prospective defendant of a notice of claim, the parties shall make discoverable information available without formal discovery.”).

73. See, e.g., FED. R. CIV. P. 37(b)(2), (e).

74. See FED. R. CIV. P. 27(c); FLA. R. CIV. P. 1.290(c) (governing pre-suit depositions to perpetuate testimony); ILL. SUP. CT. R. 224(a) (promulgating rules for pre-suit discovery by “[a] person or entity” seeking to ascertain “the identity of one who may be responsible in damages”).

75. See CONN. GEN. STAT. ANN. § 52-156a (West 2019); S.D. CODIFIED LAWS § 15-6-27(a) (2019); ALASKA R. CIV. P. 27; ARIZ. R. CIV. P. 27; MD. R. CIV. P. 2-404.

76. See *infra* Part III.

77. See *supra* Part I (discussing existing laws on post-suit sanctions).

jurisdictions.<sup>78</sup> Yet variations cause difficulties, as in choice of law settings and with lawyer uncertainties regarding how current conduct will later be assessed. Our hope is that new written pre-suit evidence preservation laws will be largely comparable, reducing such difficulties.

### III. SUBSTANTIVE LAW CLAIMS FOR PRE-SUIT EVIDENCE SPOILIATION

Several states recognize claims for evidence spoliation involving loss or unavailability of information that results in harms involving diminished or eliminated opportunities to present civil claims or defenses.<sup>79</sup> Such claims may arise from general or special laws. Often, such claims are recognized in common law precedents.<sup>80</sup> Significant interstate variations exist, including differences on who owes an evidence preservation duty; the manner in which such a duty is breached; and the available remedy upon breach.<sup>81</sup> The following

---

78. See *supra* Part I (noting that federal and state civil procedure laws vary in scope and sanctions).

79. Compare *Hibbits v. Sides*, 34 P.3d 327 (Alaska 2001) (recognizing intentional third-party spoliation as a tort that could be pursued against a state trooper by motorcycle riders hurt by a pickup truck driver who collided with them, where trooper—first on the scene—removed the driver for about two hours after the collision because the trooper knew the driver was under the influence of marijuana), with *Ortega v. City of New York*, 876 N.E.2d 1189 (N.Y. 2007) (declining to create intentional or negligent spoliation tort claims against a city that sold a vehicle it was ordered to preserve so that future claimants could use it in a later suit against the vehicle manufacturer). We recognize there may be, but do not address, implied causes of action for evidence spoliation against prosecutors pursued by those criminally accused. See *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (“[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.”); *State v. DeJesus*, 395 P.3d 111, 124 (Utah 2017) (reaffirming precedent on state constitutional due process obligation of prosecutors to preserve evidence, which requires “a reasonable probability that [the] lost evidence would have been exculpatory” and, if so found, a balancing of the culpability of the State and the prejudice to the defendant in order to determine an appropriate remedy).

80. See, e.g., *Ortega*, 876 N.E.2d at 1193 (recognizing claims for spoliation of evidence arise in common law precedents).

81. While there are interstate differences, at least for corporations there are a useful set of guiding principles on organizational practices regarding record disposition. See The Sedona Conference, *Commentary on Defensible Disposition*, 20 SEDONA CONF. J. 179, 195–98 (2019).

review of current U.S. state laws employs Illinois policies to compare, categorize, and explore the varying state approaches.<sup>82</sup>

Prelawsuit evidence preservation duties, prompting substantive law claims, usually in tort,<sup>83</sup> on behalf of those harmed by evidentiary losses, are described in the *Boyd* case in Illinois as follows:

The general rule is that there is no duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, a contract, a statute . . . or another special circumstance. Moreover, a defendant may voluntarily assume a duty by affirmative conduct. In any of the foregoing instances, a defendant owes a duty of due care to preserve evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action.<sup>84</sup>

These duties are only somewhat akin to the duties under Illinois civil procedure laws to have evidence available when requested via formal discovery, including duties to preserve before civil litigation commences.<sup>85</sup>

---

82. See Steven Plitt & Jordan R. Plitt, *A Jurisprudential Survey of the Tort of Spoliation of Evidence: Resolving Third-Party Insurance Company Automobile Spoliation Claims*, 24 CONN. INS. L.J. 63, 70–71 (2017). To date, Article III federal courts have not generally recognized substantive federal law claims grounded on evidence spoliation. See *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001); *Lombard v. MCI Telecomms. Corp.*, 13 F. Supp. 2d 621, 627 (N.D. Ohio 1998) (finding no federal claim, though there was a violation of federal regulation on record retention).

83. At times, duties regarding information maintenance may also be undertaken through contract, as with employees who are required, as a condition of employment, to provide confidential information to their employers. See, e.g., *Dittman v. UPMC*, 196 A.3d 1036, 1057 (Pa. 2018) (Saylor, C.J., concurring in part and dissenting in part) (finding information maintenance claims against employers can sound in both tort and contract, presenting a hybrid scenario).

84. *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267, 270–71 (Ill. 1995) (internal citations omitted). Similar descriptions appear in other state court precedents. See *Hannah v. Heeter*, 584 S.E.2d 560, 569 (W. Va. 2003) (first quoting *Boyd*, then adopting both a negligent and intentional tort claim for evidence spoliation by a nonparty, but only an intentional tort claim for evidence spoliation by an adverse party); *Oliver v. Stinson Lumber Co.*, 993 P.2d 11, 19 (Mont. 1999) (first quoting *Boyd*, then recognizing both a negligent and intentional tort claim for evidence spoliation).

85. See, e.g., *Shimanovsky v. Gen. Motors Corp.*, 692 N.E.2d 286, 290 (Ill. 1998) (if trial court could not “sanction a party for the presuit destruction of evidence, a potential litigant could circumvent discovery rules or escape liability simply by destroying the proof”). Remedies for breaches of evidence preservation duties vary depending upon whether the duties arose under tort law or civil procedure laws on discovery. For example, sanctions involving adverse jury instructions may only be rendered post-suit and arise solely under civil procedure laws. Pre-suit information preservation duties differ from pre-suit information maintenance duties. See, e.g., *Dittman*, 196 A.3d at 1043, 1047–48 (duty owed by employer to employees “to



Breaches of substantive pre-lawsuit evidence preservation duties may be addressed in at least two different ways: through a claim for spoliation, which often will be presented and heard concurrently with the underlying suits in which the lost or destroyed evidence would have been relevant,<sup>86</sup> or through the imposition of a formal discovery sanction.<sup>87</sup>

### A. Common Law Tort Law Claims

Common law torts, as per *Boyd*, involving evidence spoliation can arise through a “special circumstance” or through a voluntary assumption of a preservation duty “by affirmative conduct.”<sup>88</sup> A special circumstance may involve a fiduciary or otherwise special relationship between parties where future civil litigation is reasonably anticipated.<sup>89</sup> Relevant relationships, where there are no explicit

---

exercise reasonable care” to safeguard the employees’ sensitive personal data when the employers collect and store it “on its internet-accessible computer system”).

86. See Parness, *supra* note 59, at 39; see also FED. R. CIV. P. 37(e) (the advisory committee’s note to the 2015 amendment, described earlier, recognizing that the discovery sanction rule was not intended to “affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim”).

87. In a federal district court, the inherent power of the court can be employed to address pre-suit evidence spoliation, as in *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) (involuntary dismissal of lawsuit was not an unduly harsh sanction arising from a discovery failure involving the failure to preserve a car). In Illinois, the inherent power of the court can be found under Supreme Court Rule 219(c). See, e.g., *Peal v. Lee*, 933 N.E.2d 450, 457–58 (Ill. App. Ct. 2010) (stating there are possible sanctions for discovery noncompliance involving spoliation of electronic evidence include adverse inference instructions to the jury and involuntary dismissals with prejudice).

88. *Boyd*, 652 N.E.2d at 270–71. Similar common law torts can be pursued outside of Illinois where the *Boyd* rationale is followed. See *Oliver*, 993 P.2d at 19–20; *Hannah*, 584 S.E.2d at 569–70.

89. See *Oliver*, 993 P.2d at 20 (explaining the duty to preserve evidence may arise against third-party spoliator “based upon a contract . . . or some other special circumstance/relationship”) (citing *Johnson v. United Servs. Auto. Ass’n.*, 79 Cal. Rptr. 2d 234, 239–41 (Cal. Ct. App. 1998)); *Cooper v. State Farm Mut. Auto. Ins. Co.*, 99 Cal. Rptr. 3d 870 (Cal. Ct. App. 2009) (insured sued insurer for promissory estoppel or voluntary assumption of duty when insurer destroyed tire it examined that was needed by insured for its later product liability suit, where a promise to safeguard was made by the insurer). Determinations of such special circumstances can be challenging. See, e.g., *Reynolds v. Lyman*, 903 F.3d 693, 696 (7th Cir. 2018) (owner of LLC that was represented by a lawyer was owed no duty of care by the lawyer as long as owner was not “a direct and intended beneficiary” of the legal representation). Comparably, a “special relationship of trust and confidence” in an otherwise “ordinary business” relationship can prompt a duty to disclose “material information.” *BAS Broad., Inc. v. Fifth Third Bank*, 110 N.E.3d 171, 175 (Ohio Ct. App. 2018).

agreements or contracts on evidence preservation in play, can include insurer-insured and attorney-client relationships.<sup>90</sup> Here, information germane to a future case may not be procured or preserved by an insurer or an attorney or a doctor, resulting in harm to an insured or a client or a patient in a later anticipated case.<sup>91</sup> Similarly, a special circumstance could arise when an expert, retained by a future litigant without an explicit agreement on evidence preservation, loses information passed to the expert for analysis. Yet for insurers, attorneys, doctors, and experts, there seemingly may be few such spoliation claims pursued, since related claims seemingly can be founded on implicit or explicit duties involving agreements or contracts, like duties to defend, represent, treat, or test only in reasonable fashions.

Affirmative conduct prompting a preservation duty may involve the assumption of control over evidence that is reasonably foreseeable as (quite) important to later litigation. Such a duty might be extended to those who are not in a fiduciary or otherwise special relationship with the litigant harmed by evidence spoliation.<sup>92</sup> Consider, for example, an expert retained by one future litigant to conduct evidence testing, who destroys or significantly alters the evidence during testing so that the consulting litigant's future adversary has no opportunity to test independently or to observe the expert's testing.<sup>93</sup> The one-time future adversary, now involved in litigation with the party who retained the expert, may have an evidence spoliation claim against the expert.

Consider, as well, a future litigant's insurance adjuster who takes possession of, and then negligently loses or intentionally destroys, important potential evidence so that the litigant's future adversary later has no access. The one-time future adversary, now in litigation

---

90. See, e.g., *Reynolds*, 903 F.3d at 696.

91. See, e.g., *Foster v. Lawrence Mem'l Hosp.*, 809 F. Supp. 831, 838 (D. Kan. 1992) (spoliation claim against treating physician founded on a regulatory duty to maintain medical records, Kan. Admin. Regs. § 100-24-1 (1998)); *Longwell v. Jefferson Parish Hosp. Serv. Dist. No. 1*, 970 So. 2d 1100, 1106 (La. Ct. App. 2007).

92. See generally *Elliot-Thomas v. Smith*, 110 N.E.3d 1231 (Ohio 2018) (recognizing no such duty for a lawyer to the lawyer's client's adversary, at least where evidence was concealed, but not destroyed, by the lawyer).

93. Once civil litigation is pending, there are some written laws on the need to notify, and perhaps include, an adversary when expert testing of relevant evidence is planned. See, e.g., TENN. R. CIV. P. 34A.01.

with the insured, may have an evidence spoliation claim against the current adversary's insurer.<sup>94</sup>

Finally, consider a governmental officer or agency who takes information and then loses it to the detriment of another involved in later litigation with the evidence supplier. A torts claim statute or comparable law might place the government in a similar position to a private party who spoils evidence.<sup>95</sup>

Where a common law duty to preserve is established and is not dependent upon an agreement or contract, whether through a "special circumstance" or "affirmative conduct," an evidence spoliation tort can require proof of culpability going beyond mere negligence.<sup>96</sup> The

---

94. Compare *Dardeen v. Kuehling*, 821 N.E.2d 227 (Ill. 2004) (explaining why an insurer, who told insured homeowner she could remove bricks in an allegedly hazardous sidewalk, had no liability to pedestrian who had earlier fallen), with *Jones v. O'Brien Tire & Battery Serv. Ctr., Inc.*, 871 N.E.2d 98 (Ill. App. Ct. 2007) (finding driver's insurer potentially liable to the insured's joint tortfeasor for failure to preserve wheels from driver's car after driver's insurer settled with a tort victim who later sued the insured's joint tortfeasor; driver's insurer had voluntarily undertaken control of wheels for its own benefit and should have anticipated possibility of future litigation), and *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267, 272 (Ill. 1995) (holding an employer's workers' compensation insurer owed duty to preserve space heater that it took possession of and that was involved in a workplace accident, where employee pursued product liability claim against manufacturer of heater).

95. See, e.g., *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 463 (Alaska 1986) (stating that one who is arrested has a common law claim "in tort for intentional interference with prospective civil action [caused] by [the] spoliation of evidence[.]" here, the alteration of an arrest tape); see also *Nichols v. State Farm Fire & Cas. Co.*, 6 P.3d 300, 303–04 (Alaska 2000) (holding there is no first-party or third-party evidence spoliation claim founded on negligence, where first-party alleged spoliators were defined as the parties to the original action). But see, e.g., 28 U.S.C. § 2680(h) (2012) (stating the tort claims act does not apply to claims of "malicious prosecution, abuse of process . . . deceit, or interference with contract rights"). A statute, court rule, or inherent power precedent on civil procedure sanctions often does not distinguish between private and public officer conduct, or between private and public entity conduct. See, e.g., FED. R. CIV. P. 11, 16(f), 37 (containing no reference to any private/public distinction in varying sanction settings).

96. *Boyd*, 652 N.E.2d at 270–71; see, e.g., *Willis v. Cost Plus, Inc.*, No. 16-639, 2018 WL 1319194 (W.D. La. 2018) (while the Louisiana Supreme Court has held there is "no cause of action . . . for negligent spoliation[.]" lower Louisiana state courts have recognized a Louisiana claim for spoliation based on intentional conduct (quoting *Reynolds v. Bordelon*, 172 So. 3d 589, 592 (La. 2015)). But see *Richardson v. Sara Lee Corp.*, 847 So. 2d 821 (Miss. 2003) (finding no negligence or intentional tort claim for spoliation of evidence). Similarly, a civil procedure law sanction for pre-suit evidence spoliation may only be available if intentional misconduct is shown. See, e.g., *Tatham v. Bridgestone Ams. Holding, Inc.*, 473 S.W.3d 734, 745–46 (Tenn. 2015) (altering earlier laws by declaring that "intentional misconduct is not a prerequisite" for spoliation sanctions any longer); see also *Mont. State Univ.-*

requisite degree of proof can be dependent upon whether the duty was owed by one who is or could have been an adverse party in the civil litigation wherein the lost information would have been employed.<sup>97</sup> Finally, even where the necessary degree of culpability is established, liability may vary depending upon whether the evidence was intentionally destroyed or only intentionally concealed.<sup>98</sup>

## B. Common Law Agreement/Contract Claims

Agreement and contract duties operate differently than tort law duties for pre-suit evidence preservation. The intentions of the agreeing or contracting parties—rather than the hypothesized actions of the reasonable persons—are key. Seemingly, there can be instances where there are both tort and agreement or contract claims involving the same spoiled evidence.<sup>99</sup>

---

Bozeman v. First Judicial Dist. Court, 426 P.3d 541, 553–54 (Mont. 2018) (explaining that intentional evidence spoliation prompts a rebuttable presumption that evidence was materially unfavorable to spoliating party, while negligent spoliation does not).

97. See, e.g., *Hannah v. Heeter*, 584 S.E.2d 560, 573–74 (W. Va. 2003) (holding there was no negligent spoliation claim against adverse party, but a negligent spoliation claim against a third-party who could not otherwise be an adverse party, since only the former can be sanctioned under discovery laws; intentional evidence spoliation is a stand-alone tort available against both an adverse party and a third party). Compare *Oliver v. Stinson Lumber Co.*, 993 P.2d 11, 17, 20 (Mont. 1999) (recognizing possible negligent spoliation of evidence tort by employee against employer who could not otherwise be sued, due to Workers' Compensation Act, for employment injuries though equipment manufacturer could be sued; request to preserve may have been made and, if it was, employer did not need to offer to pay reasonable costs of preservation), and *MetLife Auto & Home v. Joe Basil Chevrolet, Inc.*, 807 N.E.2d 865, 868 (N.Y. 2004) (discussing how a homeowner might be able to sue car owner's insurer for spoliation, but seemingly would need to submit a written (not just oral) preservation request and to volunteer to cover the costs associated with preservation), with *Nichols*, 6 P.3d at 304 (explaining that intentional spoliation claim by neighbor against homeowner/tortfeasor's insurer and against homeowner), and *Fletcher v. Dorchester Mut. Ins. Co.*, 773 N.E.2d 420, 427–28 (Mass. 2002) (discussing that no negligent evidence spoliation tort by tenant against a landlord's insurer or against an expert retained by that insurer).

98. See, e.g., *Elliott-Thomas v. Smith*, 110 N.E.3d 1231, 1235 (Ohio 2018) (explaining the tort of intentional evidence spoliation extends to destroyed, but not concealed, evidence).

99. For example, a contractual duty of an insurer to preserve evidence reasonably necessary in an insured's later defense of an action seeking damages beyond policy limits may arise in settings where there are also independent preservation duties in tort owed by the insurer to the insured or to one harmed by the insured. See, e.g., *Silhan v. Allstate Ins. Co.*, 236 F. Supp. 2d 1303, 1309 (N.D. Fla. 2002) (discussing circumstances allowing recognition of tort or contract claims by

The *Boyd* court did not elaborate on what, if any, differences arise between evidence preservation claims founded on agreements and on contracts. Perhaps the two are synonymous. Or perhaps one evidence preservation claim encompasses a pact made in anticipation of a possible lawsuit or during a lawsuit, to be guided by civil procedure laws. Comparable pacts include, for example, matters like forum selection, choice of law, and jury trial waiver. If so, the other evidence preservation claim encompasses a pact unrelated to litigation but related to the need or desire to access earlier developed materials, as perhaps with tax preparation, medical, or educational records. Here the pacts would more likely be guided by substantive contract laws, not civil procedure laws, though such spoliation could be the basis for evidence preservation disputes and sanctions in civil litigation.

### C. Statutory Claims

Beyond common law tort and agreement or contract claims untethered to statutes, or other written laws like agency regulations or court rules, under *Boyd* there may be substantive law claims for violations of statutes on pre-suit evidence preservation. Such statutes can expressly recognize a claim for harm resulting from lost evidence. Statutory evidence preservation duties operating pre-suit can be read to prompt causes of action. Claims are found where statutes prohibiting certain conduct were intended by legislatures to enable those wronged to recover for their harms.<sup>100</sup> Without such clear legislative intent, claims can also be implied from the statutory prohibitions, often where

- (1) the plaintiff is a member of the class for whose benefit the statute was enacted;
- (2) the plaintiff's injury is one the statute was designed to prevent;
- (3) a private right of action is consistent with the underlying purpose of the statute; and
- (4) implying a private right of action is necessary to provide an adequate remedy for violations of the statute.<sup>101</sup>

---

insureds against insurers due to spoliation of evidence by insurers that is needed in insureds' (product liability) claims against third parties).

100. See, e.g., *Gonzaga University v. Doe*, 536 U.S. 273, 283–84 (2002).

101. *Metzger v. DaRosa*, 805 N.E.2d 1165, 1168 (Ill. 2004). This is still good law in Illinois, as recognized in *Alarm Detections Systems, Inc. v. Orland Fire Protection District*, 929 F.3d 865, 870 (7th Cir. 2019). See also *Hardy v. Tournament Players Club at Southwind, Inc.*, 513 S.W.3d 427, 435 (Tenn. 2017). Comparable guidelines for implied federal claims were established in *Cort v. Ash*, 422 U.S. 66, 78 (1975), whose analysis was altered as focus has now shifted primarily to legislative intent. See *Thompson v. Thompson*, 484 U.S. 174, 179 (1988). For differing views on

A medical records retention statute in Illinois is illustrative of a written law on which a pre-suit evidence spoliation claim might be based.<sup>102</sup> There, a hospital must retain an x-ray for at least five years, and for up to twelve years if notified within five years that there is pending litigation wherein the x-ray is “possible evidence.”<sup>103</sup> Here, unlike many written laws on evidence preservation, duties exist both pre-suit and post-suit.<sup>104</sup> Seemingly, the *Boyd* precedent could support a substantive law claim under this statute on behalf of one harmed in civil litigation by a hospital’s pre-suit failure to retain covered records.

Not unlike the Illinois statute is a California Government Code provision on employment record retention.<sup>105</sup> It says:

It shall be an unlawful practice for employers, labor organizations, and employment agencies subject to the provisions of this part to fail to maintain and preserve any and all applications, personnel, membership, or employment referral records and files for a minimum period of two years after the records and files are initially created or received, or for employers to fail to retain personnel files of applicants or terminated employees for a minimum period of two years after the date of the employment action taken . . . . Upon notice that a verified complaint against it has been filed under this part, any such employer, labor organization, or employment agency shall maintain and preserve any and all records and files until the complaint is fully and finally disposed of and all appeals or related proceedings terminated.<sup>106</sup>

Another California statute is also comparable.<sup>107</sup> It says: “Audit documentation shall be maintained for a minimum of seven years which shall be extended during the pendency of any board

---

applying these (and other) guidelines on implied causes of action, see the varying opinions in *Gonzaga University*, 536 U.S. at 280, 291–92.

102. See 210 ILL. COMP. STAT. 90/1 (1975).

103. *Id.*; see also LA. STAT. ANN. § 40:2144(F)(1) (“Hospital records shall be retained by hospitals . . . for a minimum period of ten years from the date a patient is discharged.”); KAN. ADMIN. REGS. § 100-24-1(a) (1998) (explaining a licensee’s duty to “maintain an adequate record for each patient for whom the licensee performs a professional service”); *Longwell v. Jefferson Parish Hosp. Serv. Dist. No. 1*, 970 So. 2d 1100, 1106 (La. Ct. App. 2007) (stating that deliberate spoliation is needed to support tort claim); *Foster v. Lawrence Mem’l Hosp.*, 809 F. Supp. 831, 838 (D. Kan. 1992) (employing KAN. ADMIN. REGS. § 100-24-1 spoliation claim against doctor for breach of regulatory duty).

104. See 210 ILL. COMP. STAT. 90/1.

105. See CAL. GOV’T CODE § 12946 (West 2013).

106. *Id.* This section is located within a title on state government addressing prohibited discrimination.

107. See CAL. BUS. & PROF. CODE § 5097 (West 2003).

investigation, disciplinary action, or legal action involving the licensee or the licensee's firm."<sup>108</sup>

Further, a federal regulation on public contract recordkeeping says "any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of two years."<sup>109</sup> It goes on:

Where the contractor has received notice that a complaint of discrimination has been filed, that a compliance evaluation has been initiated, or that an enforcement action has been commenced, the contractor shall preserve all personnel records relevant . . . until final disposition . . . . The term *personnel records* . . . would include, for example, personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person, and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected.<sup>110</sup>

Here, as with the Illinois medical record statute, there are both pre-suit and post-suit duties.

Another federal regulation, governing producers participating in the Prune/Dried Plum Program of the Department of Agriculture, says this:

The producers . . . must keep accurate records and accounts showing the details relative to the prune/plum tree removal . . . . Such records and accounts must be retained for two years after the date of payment to the producer under the program, or for two years after the date of any audit of records by USDA, whichever is later. Any destruction of records by the producer at any time will be at the risk of the producer when there is reason to know, believe, or suspect that matters may be or could be in dispute or remain in dispute.<sup>111</sup>

There are criminal statutes on evidence preservation that may also be employed by civil claimants to recover for harm caused by evidence loss. In South Carolina, a statute addresses the duty of a "custodian" to "preserve all physical evidence and biological material related to the conviction or adjudication of a person" for certain offenses, including murder, criminal sexual conduct, arson, and certain sexual misconduct.<sup>112</sup> While this statute operates only after a

---

108. *Id.* This section is located within a division on professions and vocations generally; this appears in the chapter on accountants.

109. Recordkeeping, 41 C.F.R. § 60-300.80(a) (2018).

110. *Id.*

111. *See* Records and Accounts, 7 C.F.R. § 81.13 (2018).

112. S.C. CODE ANN. §17-28-320(a)(1), (10), (14), (19) (2009).

suit has resulted in a conviction or an adjudication,<sup>113</sup> it could be used by one who is later exonerated and whose exoneration was (long) delayed by a statutory violation because the non-preserved evidences was not available for new testing methods which became available post-conviction.<sup>114</sup>

#### IV. COMMON ELEMENTS FOR PRE-SUIT EVIDENCE PRESERVATION ORDERS

Civil procedure laws operating pre-suit that promote evidence preservation should be expanded, via new written laws, in order to promote enforcement of the current substantive laws and civil procedure sanction laws on pre-suit evidence spoliation. As both the substantive and procedural laws on evidence preservation now vary widely between jurisdictions,<sup>115</sup> new written laws on pre-suit evidence preservation orders should differ interstate and intrastate (i.e., between federal and state courts). Yet all such laws should contain some common elements. A discussion of such common elements follows.<sup>116</sup>

##### A. Situs

As to the situs of such new laws, they are best located within amendments to existing written civil procedure laws on perpetuating witness testimony via deposition.<sup>117</sup> The goals behind pre-suit evidence preservation orders mirror the goals behind pre-suit deposition orders to perpetuate testimony, in that both involve greater assurance that information important for accurate fact-finding during later hearings or trials in civil litigation will be available in order to

---

113. An adjudication without a conviction of certain covered offenses, like a finding that a person is a “sexually violent predator,” can be made, for example, in an involuntary civil commitment proceeding. S.C. CODE ANN. § 44-48-100 (2010).

114. Such a civil suit for harm caused by evidence loss may require proof of willful and malicious conduct leading to evidence loss, as this mens rea is needed for a criminal misdemeanor conviction. *See* S.C. CODE ANN. § 17-28 -350 (2019).

115. *See, e.g.,* Dodson, *supra* note 30, at 57–59.

116. Our discussion is informed by Professor Spencer’s suggested reforms of FRCP 37. *See* Spencer, *supra* note 3, at 2022–33. It also is informed by Professor Hoffman’s “normative insights about safeguards” needed in expanded state pre-suit discovery options. Hoffman, *supra* note 30, at 270–80. Professor Dodson urged a possible FRCP 27 amendment (or a special statute) but left its elements “for another day.” Dodson, *supra* note 30, at 64.

117. *Compare* Spencer, *supra* note 3, at 2022–24 (suggesting placement within general civil procedure rules on sanctioning discovery abuses), *with* Dodson, *supra* note 30, at 64 (suggesting an amendment to FRCP 27).



resolve disputed facts fairly. Unlike witness testimony perpetuation orders, however, other pre-suit orders concerning evidence preservation may also address the lack of a duty to preserve. For example, this could occur when those who have been asked to preserve evidence obtain judicial declarations that preservation is unnecessary or not required because the relevance of the requested evidence to the civil litigation is not shown or the financial burdens of preservation (far) outweigh the anticipated benefits to later accurate fact-finding.

In the absence of such written amendments (or other new written pre-suit evidence laws), many trial courts can issue pre-suit evidence preservation orders founded on their inherent equitable judicial powers.<sup>118</sup> Of course, inherent powers may be unavailable where written laws foreclose such orders.<sup>119</sup>

## B. Petitioners and Respondents

### 1. *Petitioners*

As to the petitioners who are eligible for pre-suit evidence preservation orders, Professor Spencer is correct that they should be limited to those who are potential parties in later related civil actions.<sup>120</sup> He is wrong about the requirement that petitioners “cannot presently bring . . . or cause . . . to be brought” their actions or that petitioners should be limited to forums within the judicial system wherein the expected claims may later be filed.<sup>121</sup> Further, he is wrong that a petitioner must always proceed only where “any expected adverse party resides or may be found.”<sup>122</sup> To facilitate convenience for a respondent, a pre-suit evidence preservation proceeding should

---

118. See, e.g., *Stokes v. 835 N. Washington St., LLC*, 784 A.2d 1142, 1149 (Md. Ct. Spec. App. 2001) (allowing pre-suit land inspection); see also *Wofford v. Ethyl Corp.*, 447 S.E.2d 187, 189 (S.C. 1994) (allowing inspection of employer’s plant, documents, and other tangible evidence relating to employee’s injury and later death).

119. *Stokes*, 784 A.2d at 1149 (explaining that no Maryland rules prohibit an equitable bill of discovery directed at the inspection of land of a nonparty; such rules “may well violate” the requesting party’s “right[s] of access to the courts”).

120. See Spencer, *supra* note 3, at 2023 (proposed FRCP 37(e)(A)(3)(i)). *But see* *Liberty Mut. Ins. Co. v. Borgata Hotel Casino & Spa*, 195 A.3d 538, 540 (N.J. Super. Ct. Law Div. 2017) (discussing how the insurer of prospective defendant can seek pre-suit discovery under N.J. Ct. R. 4:11-1).

121. Spencer, *supra* note 3, at 2023.

122. *Id.*

be available, at times, where the respondent, not then an expected adverse party, resides or is involved in significant related acts.<sup>123</sup>

Allowing pre-suit evidence preservation petitions even when civil actions could be filed would serve several important purposes, including allowing petitioners to be better assured that their pre-suit “reasonable pre-filing inquiry” duties on claim preservations have been met,<sup>124</sup> avoiding defenses to petitioners raising issues of current ability to sue, and promoting more informed pre-suit settlements.

Allowing pre-suit petitions in judicial systems wherein later related civil claims may not be filed preserves for petitioners their right to choose forums. Further, they facilitate information gathering and often convenience to respondents by allowing, for example, requests in state courts in closer proximity to the evidence sought than any federal courts, though later federal suits are contemplated, if not required, by exclusive subject matter jurisdiction laws.<sup>125</sup> The recognition of a broader array of potential witnesses and potential venues for pre-suit preservation orders parallels the extensive forums sometimes available for orders on pre-suit witness testimony perpetuation via deposition.<sup>126</sup>

## 2. Respondents

As to respondents, a broad range of people and entities should be able to be ordered pre-suit to produce or to preserve evidence. Professor Spencer is correct that information may be ordered from persons, rather than just from an “expected adverse party” who, of course, must be notified of pre-suit discovery requests involving

---

123. *See id.* Surely there are personal jurisdiction-like limits on securing authority over both a respondent and an expected adverse party. These limits are less significant in the Article III federal courts since national, rather than state, powers are exercised. Article III court powers are sometimes available nationwide over U.S. citizens, as in statutory interpleader under 28 U.S.C. § 2361 (where claimants “may be found”). Article III court powers sometimes are available in more limited settings, though still beyond state court powers, as with extraterritorial personal jurisdiction over FRCP 14 third party defendants under FRCP 4(k)(1)(B) (“100 miles from where the summons was issued”).

124. *Id.* at 2020.

125. *See id.* at 2013.

126. For example, the federal rule on witness testimony perpetuation, followed in several U.S. states, allows a petition to be filed in any community (i.e., under the FRCP in any district and under the Arkansas rule in any county) “where any expected adverse party resides.” FED. R. CIV. P. 27(a)(1); *see also* ARK. R. CIV. P. 27(a)(1).

anyone.<sup>127</sup> There is no reason to think that pre-suit discovery is generally more burdensome on respondents than post-suit discovery wherein parties and nonparties alike can be summoned via depositions. Of course, pre-suit discovery is necessarily somewhat more speculative as there is no guarantee of a later related civil action. So, respondents should be less available for pre-suit discovery than for post-suit discovery. Greater limits should be set out in the new civil procedure laws on the petition content requirements for those seeking pre-suit evidence preservation orders.

We agree with the Texas Supreme Court that a Texas trial court should not be able to authorize pre-suit discovery from “persons” seeking to identify an “expected adverse party” where the court is without personal jurisdiction over the anticipated party.<sup>128</sup> The Texas Court concluded that a state trial court should not be turned into “the world’s inspector general.”<sup>129</sup> We acknowledge that some focus should be on the authority over the “persons” from whom discovery is sought. We also understand that post-suit depositions can occur in Texas involving lawsuits already pending elsewhere. But there, some court has found authority over a party who may be affected by the discovery. While pre-suit Texas discovery devices should not be available to assist some seeking information on reasonably anticipated claims without such authority being first established, those seeking information can utilize fact-gathering devices outside the discovery rules.

### C. Petition Contents

Petitions seeking pre-suit evidence preservation orders, given their pleas for extraordinary relief involving discovery disclosures, should be quite detailed, as well as certified and verified by lawyers and their clients. Lawyers should certify reasonable inquiry, which might include meet and confer and proportionality requirements. Their clients should verify the factual circumstances prompting their need

---

127. See Spencer, *supra* note 3, at 2023 (proposed FRCP 37(e)(3)(A)); see also Hoffman, *supra* note 30, at 270–72 (describing the need in Texas for an express requirement of such notice).

128. *In re Doe*, 444 S.W.3d 603, 610 (Tex. 2014) (“If a Rule 202 court need not have personal jurisdiction over a potential defendant, the rule could be used by anyone in the world to investigate anyone else in the world against whom suit could be brought . . . . The reach of the court’s power to compel testimony would be limited only by its grasp over witnesses.”).

129. *Id.* at 611.

for judicial assistance. Such requirements would be similar to the usual dictates on those—including lawyers and their clients—who file complaints or who seek provisional remedies.<sup>130</sup>

In his FRCP 37(e) proposal, Professor Spencer urged that a petition should only be pursued by one expecting to be a party in a civil action “cognizable in a United States court” who “cannot presently bring it or cause it to be brought.”<sup>131</sup> We think that petitioners should sometimes be able to proceed even where any future claim may not, or even likely will not, be brought. Pre-suit settlements founded on accurate factual assessments should be encouraged. Federal and state civil procedure laws on evidence preservation via a pre-suit deposition to perpetuate testimony have no requirements on the current inability to bring a civil action or cause a civil action to be brought.<sup>132</sup>

Professor Spencer was right in arguing that a petition should contain “the subject matter of the expected action and the petitioner’s interest;” the facts a petitioner wishes to establish through use of the preserved material; and the expected adverse party or parties in the expected action, “so far as known.”<sup>133</sup>

Professor Lonny S. Hoffman rightly argued pre-suit discovery should only be permitted where the “information . . . cannot otherwise be obtained.”<sup>134</sup> Judicial oversight, as well as reasonable inquiry and proportionality limits, will prompt pre-suit discoverers to engage in more efficient information gathering techniques.<sup>135</sup> Our concern with Professor Hoffman’s limit is that there may be availability of the information, but the nondiscovery avenue is quite costly, burdensome, and time consuming compared to the pre-suit discovery avenue. We recognize that others favor a more limited scope for pre-suit discovery,

---

130. See FED. R. CIV. P. 11(b)(2) (asserting that lawyers must certify that “legal contentions are warranted by existing law” or by a non-frivolous argument for a change in the law); FED. R. CIV. P. 11(c)(1) (stating that parties responsible for Rule 11 violations, typically involving factual contentions without evidentiary support, per FRCP 11(b)(3), may be sanctioned); FED. R. CIV. P. 65 (explaining that requests for temporary restraining orders must be supported by “specific facts in an affidavit or a verified complaint clearly” showing the need for immediate relief).

131. Spencer, *supra* note 3, at 2023 (providing proposed FRCP 37(e)(3)(A)(i)).

132. See, e.g., FED. R. CIV. P. 27(a)(1); see also MONT. CODE ANN. § 25-20-27(a)(1) (2017).

133. Spencer, *supra* note 3, at 2023–24 (proposing FED. R. CIV. P. 37(e)(3)(A)(ii)-(iv)).

134. Hoffman, *supra* note 30, at 274–75.

135. See *id.* at 272–74.

as with testimony or evidence that could be lost or destroyed before suit is filed.<sup>136</sup>

As to verification, the person or entity petitioning for a preservation order should verify certain facts expressly on the condition that a sanction may follow if verification is found to have been undertaken without reasonable inquiry, without a good factual basis, or with an improper purpose. Professor Spencer also urges there be “a verified petition.”<sup>137</sup> The Illinois court rule on an independent action before suit to identify those who may be “responsible in damages” requires a verified petition containing the necessity of the discovery and the nature of the discovery sought.<sup>138</sup>

Some individual or entity liability for sanctions upon verification failures by agents should also be expressly recognized in a new written pre-suit evidence preservation law so that lawyers and judges are informed of the consequences of failures of verification.<sup>139</sup>

As to certification, the lawyer pursuing a client’s pre-suit evidence preservation request should certify certain circumstances on the condition that a sanction may follow if certification is found deficient. Pre-suit discovery should not be undertaken by a lawyer on a client’s behalf without reasonable inquiry,<sup>140</sup> without a good legal basis, or with an improper purpose by a lawyer’s client or by a lawyer (including promoting such a purpose on behalf of a client).<sup>141</sup> Again,

---

136. See, e.g., *Liberty Mut. Ins. v. Borgata Hotel Casino & Spa*, 195 A.3d 538, 541 (N.J. 2017) (discussing N.J. Ct. R. 4:11-1, which covers testimony perpetuation, evidence preservation, and document or property inspection).

137. Spencer, *supra* note 3, at 2023 (proposing FED. R. CIV. P. 37(e)(3)(A)).

138. Compare ILL. SUP. CT. R. 224(a)(1)(i)-(ii), with 735 ILL. COMP. STAT. § 5/2-402 (2006) (stating there is no verification when discovery sought from respondents in discovery in a pending civil action).

139. Liability for all agent actions is not needed. Compare this idea to FRCP 11 on law firm liability for only some pleading failures by their attorneys. See FED. R. CIV. P. 11. For example, entity liability should arise when an agent’s failure was caused, wholly or in significant part, by the entity’s deficient system on litigation holds. But no entity liability should be grounded on an agent’s purposeful evidence destruction solely geared to shielding the agent from liability to the entity or a third party.

140. Professor Hoffman urges that for pre-suit discovery, there need be “a reasonable probability . . . that the discovery sought will result in a viable claim” (or, for us, a defense) and “a good-faith basis for believing” important facts will be unearthed. Hoffman, *supra* note 30, at 275–76.

141. A client’s improper purpose, for example, may be apparent to the lawyer during the client’s initial solicitation of the lawyer’s help, where the attorney-client communication privilege would not operate, as with the crime-fraud exception.

there should be available individual or entity liability for sanctions arising from failures of attorney certifications.

#### D. Proportionality

As with many post-suit discovery requests or orders, a pre-suit evidence preservation request or order should only be made after a determination on appropriate proportionality by both the petitioner and the trial judge.<sup>142</sup> For post-suit discovery in a federal district court, one presenting a discovery request must certify that the request is “neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.”<sup>143</sup> In ruling upon such a presentation a district judge must consider whether the request is

proportional to the needs of the case, considering the importance of the issues at stake[,] . . . the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit[s].<sup>144</sup>

Clearly, these proportionality assessments will differ for the same requested information in pre-suit and post-suit settings. Given the more speculative nature of the need for the information, proportionality relating to pre-suit requests will be inherently more difficult to demonstrate. We do not, however, think that an irreparable harm standard is necessary before pre-suit discovery is permitted. Pre-suit factual inquiry duties for prospective civil litigants and others must always be undertaken reasonably; they need not be limited to exceptional circumstances. The aforementioned pre-suit witness testimony perpetuation norms, as well as party and claim identification discovery norms, carry no irreparable harm or exceptional circumstance standard.

Access to justice should not be inhibited by pre-suit roadblocks to accessing information unsupported by legitimate public policies, especially when they are erected by those seeking to avoid the legal responsibilities prompted by their own actions. While in civil litigation there is generally no privilege against self-incrimination, that

---

142. Explicit requirements on proportionality assessments for post-suit discovery requests sometimes are only recognized for the trial judges. *See, e.g.*, ILL. SUP. CT. R. 201(c)(3).

143. FED. R. CIV. P. 26(g)(1)(B)(iii).

144. FED. R. CIV. P. 26(b)(1).

privilege may be employed where there remains potential criminal litigation. Thus, judicial assessments of pre-suit discovery requests will differ for requests directed at potential defendants and for requests directed at nonparty witnesses.

### E. Meet and Confer

Pre-suit evidence preservation petitions, outside of witness testimony perpetuation via deposition, should normally be required to be preceded by “meet and confer” encounters between potential petitioners and respondents wherein any concerns are aired and perhaps resolved. Therein, reasonable efforts should be made to agree on information access.<sup>145</sup> Such compelled encounters are commonplace in federal and state civil procedure laws when post-suit disputes arise regarding discovery.<sup>146</sup> They also track the many procedural laws on the need to meet and confer before post-suit discovery begins so that a discovery plan can be formulated.<sup>147</sup>

Following post-suit discovery laws, pre-suit evidence preservation petitions should also be noticed to, and afford conferral opportunities for, later potential parties who are not respondents.<sup>148</sup>

---

145. This requirement attends the Ohio rule on identifying potential defendants before suit. *See* OHIO R. CIV. P. 34(D)(3)(c).

146. *See, e.g.*, FED. R. CIV. P. 26(c)(1) (explaining that parties must make a good faith effort to resolve discovery disputes before a motion for a protective order may be filed). Similar state civil procedure laws include ILL. SUP. CT. R. 201(k), ARK. R. CIV. P. 26(c), and W. VA. R. CIV. P. 26(c). Local court rules sometimes extend such dispute resolution obligations following private meet and confers which do not resolve discovery disputes. *See, e.g.*, S.D. IND. R. 37-1(a) (explaining that before district judge involvement in a “formal discovery motion,” counsel must confer with “assigned Magistrate Judge” in order to see if dispute resolution is possible).

147. *See, e.g.*, FED. R. CIV. P. 26(f) (requiring good faith effort to formulate discovery plan); *see also* FED. R. CIV. P. 26(d)(1) (explaining that there can be no discovery until conferral required by FRCP 26(f) on discovery plan). Similar state civil procedure laws include MINN. R. CIV. P. 26.06(b), IOWA R. CIV. P. 1.507, and ALASKA R. CIV. P. 26(f). *See also* N.D. R. CIV. P. 26(f) (explaining that a discovery planning meeting is required upon request by one party); N.C. R. CIV. P. 26(f) (stating similar).

148. Professor Hoffman found in Texas that a lack of an express notice requirement covering future litigants led to instances of no notice given, prompting changes to the Texas pre-suit discovery rule. *See Hoffman, supra* note 30, at 270–72.

## F. Available Forms of Relief

Pre-suit evidence preservation orders should, at times, prompt information disclosures to petitioners together with information preservations by respondents.<sup>149</sup> So, sometimes copies of documents will be ordered to be revealed to petitioners while the originals will be ordered to be preserved by the respondents.

Pre-suit evidence preservation orders may also, at times, prompt disclosures necessitating evidence destruction. For example, a machine involved in an accident might be ordered tested even if the testing will result in complete destruction, or permanent alteration, of the machine. Of course, all reasonably foreseeable parties to future litigation involving the machine should have opportunities to test or to observe testing.

Pre-suit preservation orders might prompt evidence preservation by a respondent though there is then no disclosure to a petitioner and no evidence destruction. For example, a preservation, but no disclosure, order could allow for a later determination of a privilege claim when the relevance or need for the preserved nondisclosed evidence can be more reasonably assessed.

Finally, available forms of relief should include protective orders. Thus, at least some who receive pre-suit evidence preservation demand letters should have standing to seek declaratory relief on whether or not there is a preservation duty and, if so, what the parameters are of such a duty. Standing is easily justified in settings where the evidence in question is key to reasonably anticipated litigation; where the facts are chiefly, if not wholly, undisputed; and where the legal issue of duty is said to arise from an explicit statute or from an express contract whose validity cannot be reasonably disputed.

## G. Cost Shifting and Sanctions

The costs of compliance with pre-suit evidence preservation orders directing that certain evidence be disclosed to the petitioner, or preserved by the respondent, should be similarly shifted from the respondent to the petitioner as are compliance costs for comparable post-suit discovery orders.<sup>150</sup> This approach provides little incentive to

---

149. Hoffman's article provides more on the general need for judicial oversight of pre-suit discovery. *See id.* at 272–74.

150. Compare 735 ILL. COMP. STAT. § 5/1-101 (2019) (stating that respondent in discovery is “paid expenses and fees provided for witnesses”), with ILL. SUP. CT. R.



accelerate discovery before suit. Moreover, cost shifting arising from sanctions founded on pre-suit discovery law failures should be available.

Sanctions for pre-suit discovery violations should be available and track the sanctions available for similar (or somewhat similar) post-suit discovery violations.<sup>151</sup> Of course, there will be no perfect overlap. For example, sanctions involving future jury instructions would generally be out of place in pre-suit discovery settings.<sup>152</sup>

Vexing choice-of-law issues might arise where pre-suit discovery violations involving pre-suit evidence preservation orders surface in later, related civil actions. Federal district courts already struggle with whose spoliation sanction laws govern when diversity or supplemental claims are involved, with most courts ultimately applying federal civil procedure laws.<sup>153</sup> Where there are findings in later, related federal civil actions that earlier state court evidence preservation orders were violated, even thornier questions arise. While possible, it seems inefficient for the federal courts to refer those violations back to the state courts whose orders were violated. When the violations are addressed in the federal courts, should it matter for choice of discovery sanction law purposes that the violations occurred before the federal actions were commenced? And should state discovery sanction laws for violations of pre-suit state court preservation orders ever be applied in federal courts even where the pending claims in federal court only involve federal substantive laws?

---

224(c) (stating that “reasonable expenses of complying” with pre-suit discovery requests designed to identify those responsible for damages “shall be borne” by the independent action petitioner seeking discovery).

151. *See, e.g.*, ILL. SUP. CT. R. 224(b) (explaining that sanctions available for post-suit discovery violations “may be utilized by a party initiating” an independent action for pre-suit discovery or by a respondent in such an action).

152. However, in pre-suit settings future jury instructions should be addressed where the relevant law on evidence preservation expressly addresses future jury instructions when the law is violated. *See, e.g.*, Recordkeeping, 41 C.F.R. § 60-741.80 (2014) (covering a contractor’s duty to preserve certain personnel and employment records; presumption that records were unfavorable to the party failing to preserve arises, but not where a failure resulted from circumstances outside the control of the party).

153. *See, e.g.*, *Sherman v. Rinchem Co.*, 687 F.3d 996, 1006 (8th Cir. 2012); *see also* *Condrey v. SunTrust Bank of Ga.*, 431 F.3d 191, 203 (5th Cir. 2005) (applying federal evidentiary rules rather than state spoliation laws in diversity suits). *But see* *Reilly v. Natwest Mkts. Grp. Inc.*, 181 F.3d 253, 267 (2d Cir. 1999); *Keller v. United States*, 58 F.3d 1194, 1197–98 (7th Cir. 1995) (noting the split in federal courts).

Sanction requests for pre-suit evidence preservation failures surely will sometimes present challenges in later civil litigation.

## H. Appeals

As there are no claims in the traditional sense, in pre-suit evidence preservation proceedings any appeals cannot be grounded on a final judgment rule or on related doctrines. Appellate standards should be comparable to the standards for interlocutory reviews of formal discovery orders.<sup>154</sup> Discretionary assessments by either or both trial and intermediate appellate court judges seem warranted. Trial judges should assess, at times, the impact on the parties of their orders about any evidence disclosure as well as the significance of the legal issues, especially questions of privileged communications, work product, and other public-policy based immunities from compelled involuntary disclosure. Similarly, discretionary assessments by appellate justices should be the norm. Sometimes, appeals of pre-suit discovery orders would constitute “friendly contempt” proceedings.

## I. Later Effects

As noted, because pre-suit discovery is more speculative regarding actual disputes than post-suit discovery, denials of pre-suit evidence preservation petitions should not foreclose similar discovery requests post-suit. Further, grants of pre-suit evidence preservation petitions should not foreclose similar discovery requests post-suit since new information may have been created or old information may have become unreliable. The general duty to supplement earlier post-suit discovery responses should not attend pre-suit discovery responses, though certain exceptions do seem worthwhile.<sup>155</sup>

---

154. These standards vary in American appellate courts, as with mandamus petitions, as in *In re Hewlett Packard*, 212 S.W.3d 356, 360 (Tex. App. 2006), and with interlocutory appeals of injunctions, as in *Zitella v. Mike's Transportation, LLC*, 99 N.E.3d 535, 539–40 (Ill. App. Ct. 2018) (differentiating between non-appealable discovery orders).

155. See FED. R. CIV. P. 26(e)(1)(A) (learning earlier disclosure or response is “incomplete or incorrect”). Notwithstanding the absence of a general duty to supplement, pre-suit discovery respondents should have the means to correct or supplement their earlier responses. As well, pre-suit evidence preservation orders should be able to include special duties to supplement as where respondents agree that significant new information will be provided. Consider, for example, a general duty to supplement a pre-suit discovery response when the respondent should have known an earlier response was founded on lies that were only recently uncovered.

## CONCLUSION

New civil procedure laws should, at the least, authorize pre-suit court orders involving evidence preservation when the evidence, relevant to possible civil litigation, will likely spoil otherwise and is subject to a preservation duty under substantive law.<sup>156</sup> These new laws should originate in amendments to the written civil procedure laws on witness testimony perpetuation via deposition.<sup>157</sup> New laws should authorize both pre-suit discovery and pre-suit orders declaring a lack of any preservation duty where a pre-suit evidence preservation demand has been made, is disputed, and warrants immediate judicial attention. The availability of more expansive pre-suit evidence preservation orders will promote greater uniformity among the trial courts within a particular judicial system, prompt more informed settlement talks, and enhance accuracy in later litigation factfinding.

---

156. *See, e.g., id.*

157. *See, e.g.,* FLA. STAT. § 766.106(6)(a) (2013) (noting that pre-suit civil discovery laws originate in varying sources, including court rules, statutes, and case precedents).