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Litigating Litigation Holds: A Survey of Common Law Preservation Duty Triggers

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ARTICLES

LITIGATING LITIGATION HOLDS: A SURVEY OF COMMON LAW PRESERVATION DUTY TRIGGERS

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> It's something of a miracle that documentary discovery works at all. Discovery charges those who reject the theory and merits of a claim to identify supporting evidence. More, it assigns responsibility to find and turn over damaging information to those damaged, trusting they won't rationalize that incriminating material must have had some benign, non-responsive character and so need not be produced. Discovery, in short, is anathema to human nature.[1]

In our legal system and its attendant rules of discovery, once a person or juridical entity reasonably anticipates litigation, paradoxically, that person or entity has a duty to undertake good faith measures to preserve information salient to the reasonably anticipated litigation—including incriminating (and even privileged) evidence that may ultimately be provided to an opposing party seeking to hold that party liable or guilty.[2] Indeed, Mr. Fox is thus charged with the task of gathering and producing the feathers and eggshells from his henhouse raid.

This has been the common law for hundreds of years.[3] The preservation duty is not intuitive to most litigants, and documentary discovery works because of lawyers. As officers of the court,[4] lawyers

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1. Craig D. Ball, *Imagining the Evidence*, L. TECH. NEWS (Aug. 10, 2012), *available at* http://www.dailyreportonline.com/PubArticleDRO.jsp?id=1202566842609.

2. *See, e.g.*, Fujitsu, Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2d Cir. 2001) (citing Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998)). *See also* Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001) ("The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.") (citing *Kronisch*, 150 F.3d at 126).

3. *See infra* Part I (presenting the genesis of the doctrine of spoliation and the duty to preserve relevant evidence, dating back to eighteenth century England).

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> The concept of a lawyer as an officer of the court and hence part of the official mechanism of justice in the sense of other court officers, including the judge, albeit with different duties, is not unique in our system but it is a significant feature of the lawyer's role in the common law. This concept has sustained some erosion over the years at the hands of cynics who view the lawyer much as the "hired gun" of the Old West. In less flamboyant terms the lawyer in his relation to the client came to be called a "mouthpiece" in the gangland parlance of the 1930's. Under this bleak view of the profession the lawyer, once engaged, does his client's bidding, lawful or not, ethical or not. . . . The role of a lawyer as an officer of the court predates the Constitution; it was carried over from the English system and became firmly embedded in our tradition. It

advise their clients of the duty to preserve, and shepherd them through the discovery process—instructing clients what information to preserve and, often, when to start preserving such information.

Despite these significant requirements upon litigants and their counsel alike, a bright-line rule does not exist and serious consequences await those who fail to adhere to this duty to preserve. These serious consequences come in the form of sanctions, ranging from the innocuous—such as a warning—to the draconian—such as dismissal.[5] In some cases, the fact that a party discarded certain information when they had a duty to preserve said information can be outcome determinative of a lawsuit, regardless of the underlying merits of the claim.

The common law duty to preserve thus creates a unique and high-stakes situation wherein counsel must guide their clients through the labyrinthine and highly technical process of gathering and preserving emails, voicemails, text messages, photographs, metadata, and more. In an effort to best meet the duty to preserve most organizations[6] disseminate what have been monikered "legal holds" or "litigation holds"[7] to prevent the loss or destruction of relevant or discoverable

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> included the obligation of first duty to client. But that duty never was and is not today an absolute or unqualified duty. It is a first loyalty to serve the client's interest but always within -- never outside -- the law, thus placing a heavy personal and individual responsibility on the lawyer. That this is often unenforceable, that departures from it remain undetected, and that judges and bar associations have been singularly tolerant of misdeeds of their brethren, renders it no less important to a profession that is increasingly crucial to our way of life. The very independence of the lawyer from the government on the one hand and client on the other is what makes law a profession, something apart from trades and vocations in which obligations of duty and conscience play a lesser part. It is as crucial to our system of justice as the independence of judges themselves.

In re Griffiths, 413 U.S. 717, 731–32 (1973) (Burger, J., dissenting).

5. Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789 *passim* (2010).

6. Throughout this Article, where appropriate, the term "organization" should be interpreted to include natural persons and the term "party" should be read broadly enough to include individuals and organizations that are engaged in litigation and those individuals and organizations which are not engaged in litigation, but may reasonably anticipate it. *See The Sedona Conference Commentary on Legal Holds: The Trigger & the Process*, 11 SEDONA CONF. J. 265, 267 (2010).

7. The term "litigation hold" was popularized from the 2003 decision *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003), in which Judge Scheindlin suggested that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold.'" Zubulake v. UBS Warburg LLC (Zubulake IV), 220 F.R.D. 212, 218 (S.D.N.Y. 2003). Throughout this Article, we use the terms "litigation hold" and "legal hold" interchangeably, even though preservation requirements may arise prior to litigation.

information. But, when does the preservation duty trigger and when must a litigation hold be issued?

Obviously, the filing of a complaint (for a plaintiff) or service of process (for a defendant) triggers the duty to preserve.[8] However, the date of filing or of service is rarely when a litigant gets first wind of a dispute. An employee's complaint, a demand letter, harsh words between parties, or even falling out of a chair could all trigger the duty to preserve. Such determinations are tethered to the abstruse concept of "reasonable anticipation of litigation[,]" which is determined *ex post facto* in a judicial analysis.

This analysis is oft-determined as a matter of law by judges and lawyers who are specifically and formally trained to recognize issues that could give rise to litigation—and whose judgment is very different from that of the layperson. While a lawyer may see a swing set in an unfenced empty lot and think "attractive nuisance[,]"[9] a reasonable person not trained in the law would likely see only a playground. Indeed near infinite events could trigger the duty to preserve, and reasonable minds often differ as to whether certain events trigger a "reasonable" anticipation of litigation.

This Article seeks to provide a road map to reasonableness in determining when the duty to preserve is triggered and, to that end, identifies and catalogues various trigger points from the 106 state and federal decisions we identified as involving a judicial analysis of when a party reasonably anticipated litigation in the context of spoliation allegations or issues of preservation efforts.[10] This empirical analysis

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8. For a plaintiff, the filing of a complaint is an admission that the plaintiff reasonably anticipated litigation (at least as to the subject matter of the litigation). For a defendant, the date of filing does not have the same significance—rather, it is the date of service of process that is more significant, for that is the date the defendant is put on notice of the suit, as framed by the plaintiff's complaint. For convenience to the reader, in this Article and attached Appendix A, we refer to both the date the complaint was filed and date of service upon the defendant as the "filing of the complaint." This was also done in response to certain decisions that did not adequately specify whether the trigger event was the filing of the complaint or date of service, but generally referenced the filing of the complaint as when the preservation duty arose or as a temporal reference point.

9. "The very theory of an attractive nuisance is that the device or thing claimed to be such is, by its character or nature, calculated and likely to attract children on the premises, where they may suffer injury." Aetna Ins. Co. v. Stringham, 440 F.2d 103, 104 (6th Cir. 1971) (quoting Smith v. Iowa City, 239 N.W. 29, 30 (Iowa 1931)).

10. These cases were identified by running a comprehensive search on Westlaw's electronic database for written decisions including the term "reasonable anticipation of litigation" (and related terms such as "reasonably anticipating litigation") and either the term "spoliation" or "preservation," for all state and federal decisions issued before January 1, 2012. The resulting decisions were then manually reviewed and, where a court addressed a party's "reasonable anticipation of litigation," catalogued in Appendix A. The authors acknowledge that the electronic search, by its nature, could not capture all decisions in which the duty to preserve was examined (to the extent the duty was discussed without explicitly referencing the "reasonable anticipation of litigation"), but decided to limit the search to the "reasonable

confirms the common-sense conclusion that the duty to preserve frequently triggers long before service of process, sometimes by a period of several years or more, yet remains unpredictable and highly fact-specific.

Part I of this Article details the genesis of the common law duty to preserve evidence from its Dickensian origins. Part II provides an overview of the common law duty to preserve in the present and catalogues various judicially-identified trigger events, as well as an analysis of alternative proposals championing bright-line preservation rules. Part III discusses the nuts-and-bolts of the implementation of a litigation hold in the information age. In Part IV, we review the consequences of failing to get preservation right, discussing the myriad of potential sanctions available to the court to remedy a party's breach of a duty to preserve.

I. THE CHIMNEY SWEEP AND THE RAKE: ORIGINS OF THE DUTY TO PRESERVE

The common law duty to preserve originates from "a Dickensian tale of avarice and trickery."[11] In 1722, young Mr. Armory was an apprentice chimney sweep toiling in London when he stumbled upon a ring containing jewels appearing to be of the highest quality—good fortune uncommon among the common.[12] In an effort to determine the value of his find, Armory visited the shop of a wealthy London jeweler, Paul Delamirie.[13]

Delamirie came from modest beginnings. He had emigrated from the Netherlands as a boy and served as an apprentice to a prominent goldsmith before achieving financial success.[14] Delamirie, however, was a bit of a rake. He was frequently fined for employing foreigners

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anticipation of litigation" articulation of the standard, as best exemplified by the *Zubulake* decision, given the wide acceptance and near-universal use of the standard by courts both prior to and after the *Zubulake* decision. As such, Appendix A, with over 100 decisions, provides an illustrative and robust sample of decisions addressing trigger events, based on a party's "reasonable anticipation of litigation."

11. Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494, 517 n.12 (D. Md. 2009).

12. Armory v. Delamirie, 93 Eng. Rep. 664 (K.B. 1722). Apprentice chimney sweeps, or "climbing boys" as they were often called, were the children of the very poor, or wards of the church, who were sold into the service of the chimney sweep. *Id.* Their lives were shortened by the "carcinogenic nature of coal soot, and the fact that the fires were often still lit when the child went up the chimney." Lucy Inglis, Armory vs. Delamirie, *1722, King's Bench*, GEORGIAN LONDON (Sept. 26, 2009), *available at* http://www.georgianlondon.com/post/49464108280/armory-vs-delamirie-1722-kings-bench.

13. Inglis, *supra* note 12.

14. *Id.*

and cheating customs officials.[15] The young Armory probably appeared an easy mark to the veteran ne'er-do-well.

Armory handed the ring to Delamirie who, in turn, handed it to his apprentice.[16] The apprentice, "under pretence of weighing it," removed the stones, and then returned the empty ring to Delamirie with a determined value of "three halfpence."[17] The goldsmith offered to pay Armory the three halfpence, but Armory declined, demanding his ring returned to him in its prior condition.[18] The apprentice then delivered "back the socket without the stones," and Armory brought a common law claim of trover, or wrongful taking of personal property, against Delamirie in the King's Court.[19] At trial, with the whereabouts of the stones at issue, Chief Justice Lord Pratt delivered what would later be known as an adverse inference instruction:

> As to the value of the jewel several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest case against him, and make the value of the best jewels the measure of their damages: which they accordingly did.[20]

After failing to produce the jewels, Delamirie was ordered to compensate Armory for a "diamond of the finest and first water" of a size to fit into the setting.[21] Chief Justice Lord Pratt thus sanctioned Delamirie for failing to preserve the jewels, or for spoliation—"the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."[22]

The common law has much developed in the United States in the spirit of *Armory v. Delamirie*, staying true to the goal of preventing a wrongdoer from benefiting from the effects of his wrongdoing. As explained in the 1882 case of *Pomeroy v. Benton*, the law seeks to, at the very least, eliminate any inequity caused by the breaching party: "[T]he law, in hatred of the spoiler, baffles the destroyer, and thwarts

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15. *Id.*
16. *Id.*
17. *Armory*, 93 Eng. Rep. at 664.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) ("It has long been the rule that spoliators should not benefit from their wrongdoing, as illustrated by 'that favourite maxim of the law, *omnia presumuntur contra spoliatorem.*'") (citations omitted).

his iniquitous purpose, by indulging a presumption which supplies the lost proof, and thus defeats the wrong-doer by the very means he had so confidently employed to perpetrate the wrong."[23] The spoliator, however, need not be as devious or malicious as Delamirie and his apprentice to be subject to sanction. Indeed, sanctions may be imposed in the absence of bad faith.[24]

II. PRESERVATION IN THE PRESENT

The duty to preserve evidence has evolved over the centuries, but one fact in particular has remained constant. In most situations, the duty to preserve is typically triggered well before the filing of a lawsuit or service of process.[25] The event triggering the duty to preserve can be a seemingly humdrum occurrence, at least to an eye untrained in the law.[26]

A. *One Must Preserve Upon the Reasonable Anticipation of Litigation*

"[O]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."[27] This obligation to preserve evidence "runs first to counsel, who has 'a duty to advise his client of the type of information potentially relevant

23. Pomeroy v. Benton, 77 Mo. 64, 86 (1882).

24. *See infra* Part IV & app. A (chronicling the variety of trigger events identified in spoliation and preservation cases).

25. *See infra* app. A; *see also, e.g.*, Kraft Reinsurance Ir., Ltd., v. Pallets Acquisitions LLC, 843 F. Supp. 2d 1318, 1321, 1324 (N.D. Ga. 2011) (trigger event occurred more than two years prior to the filing of the complaint); EEOC v. Dillon Cos., Inc., 839 F. Supp. 2d 1141, 1143 (D. Colo. 2011) (trigger event occurred more than three years prior to the filing of the complaint); Zimmerman v. Poly Prep Country Day Sch., No. 09 CV 4586(FB), 2011 WL 1429221, at *1–2 (E.D.N.Y. Apr. 13, 2011) (trigger event occurred more than seven years prior to the filing of the complaint).

26. *See infra* app. A (for example, certain products liability or negligence actions may be especially difficult to predict with any certainty, as any accident or occurrence, as innocuous as it may seem, could result in a lawsuit); *see also, e.g.*, Nichols v. Steelcase, Inc., No. 2:04-0434, 2005 WL 1862422, at *1, *5 (S.D. W. Va. Aug. 4, 2005) (trigger event was an incident where the chair plaintiff sat in immediately dropped to "its lowest position" and, although the chair did not break or shatter, plaintiff filed a products liability action a year and a half later).

27. Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec. LLC, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010) (quoting Treppel v. Biovail Corp., 249 F.R.D. 111, 118 (S.D.N.Y. 2008) (quoting Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003))). Other decisions have articulated a party's preservation requirements in a different manner. The *Zubulake* articulation of the standard, however, remains one of, if not the most, commonly cited standard for determining a party's preservation requirements and is credited for popularizing the term "litigation hold."

to the lawsuit and of the necessity of preventing its destruction.'"[28]

> Once a "litigation hold" is in place, a party and [its] counsel must make certain that all sources of potentially relevant information are identified and placed "on hold" . . . . [This] involve[s] communicating with the "key players" in the litigation . . . . [Moreover,] [u]nless counsel interviews each [player], it is impossible to determine whether all potential sources of information have been inspected.[29]

"Key players" include "the people identified in a party's initial disclosure and any subsequent supplementation thereto. Because these 'key players' are the '[ones] likely to have relevant information,' it is particularly important that the preservation duty be communicated clearly to them."[30] This imposes a substantial duty on litigants, and places a supervisory discovery responsibility on attorneys, one that may be difficult to meet.

This duty to preserve extends to what a potential litigant "knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request."[31] The duty extends to "any documents or tangible things . . . made by individuals 'likely to have discoverable information that the disclosing party may use to support its claims or defenses.'"[32]

As such, a person or entity has an ongoing duty to preserve evidence over which it has control and reasonably knows or can foresee would be material—and thus relevant—to a potential legal action.[33]

B. *Surveying the Litigation Hold Landscape*

A party's duty to preserve has arisen from a wide array of events prior to the date the complaint was filed, including a party's notification of contaminated goods,[34] a confrontation between an employee and

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28. Chan v. Triple 8 Palace, Inc., No. 03CIV6048(GEL)(JCF), 2005 WL 1925579, at *6 (S.D.N.Y. Aug. 11, 2005) (quoting Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 73 (S.D.N.Y. 1991)); *see also* Vagenos v. LDG Fin. Servs. LLC, No. 09-cv-2672(BMC), 2009 WL 5219021, at *2 (E.D.N.Y. Dec. 31, 2009).

29. Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) ("*Zubulake V*") (citing *Zubulake IV*, 220 F.R.D. at 218).

30. *Id.* at 433–34 (footnote omitted) (quoting *Zubulake IV*, 220 F.R.D. at 218).

31. *Zubulake IV*, 220 F.R.D. at 217 (quoting *Turner*, 142 F.R.D. at 72).

32. *Id.* at 217–18 (quoting FED. R. CIV. P. 26(a)(1)(A)).

33. Jones v. Bremen High Sch. Dist. 228, No. 08 C 3548, 2010 WL 2106640, at *5 (N.D. Ill. May 25, 2010).

34. *See* Kraft Reinsurance Ir., Ltd., v. Pallets Acquisitions LLC, 843 F. Supp. 2d 1318,

supervisor,[35] a fatal accident,[36] a meeting with counsel to discuss potential litigation,[37] and receipt of an opposing attorney's demand to preserve evidence,[38] among others.

In an effort to provide more certainty to when the duty to preserve arises, this Article includes and cites a comprehensive survey of written opinions from federal and state cases addressing a party's "reasonable anticipation of litigation," issued prior to January 1, 2012.[39] This survey identified 106 decisions, which are catalogued in Appendix A.[40] The catalog includes a listing of the various trigger events identified in the 106 decisions (including, where appropriate, filing of the complaint).[41] Appendix A makes clear that courts are devoting more attention to addressing preservation issues and that the range of potential trigger events has evolved into a broad spectrum of incidents occurring at various points along the path to litigation.

1. The Number of Decisions Addressing a Party's Reasonable Anticipation of Litigation is Increasing

Since the amendments were made to the Federal Rules of Civil Procedure in 2006 to address the discovery of electronically stored information (ESI) in federal courts,[42] preservation issues have commandeered numerous lawsuits and, too frequently, litigation of the case on the merits has heeded to the ensuing discovery squabbles. Although the duty to preserve documents is certainly not a novel concept, only recently has it become a prevalent concern of both counsel and parties.[43] Our survey identified cases from as early as the mid-1990s addressing the reasonable anticipation of litigation, but the cases over the next decade were sporadic, with some years having only one decision addressing the duty to preserve, and other years having none.[44] Not surprisingly, a noticeable uptick in cases can be correlated with the passage of the 2006 amendments to the Federal Rules of Civil

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1320 (N.D. Ga. 2011).

35. *See* EEOC v. Dillon Cos., Inc., 839 F. Supp. 2d 1141, 1143 (D. Colo. 2011).

36. *See* Ashton v. Knight Transp., Inc., 772 F. Supp. 2d 772, 775 (N.D. Tex. 2011).

37. *See* Orbit One Commc'ns, Inc. v. Numerex Corp., 271 F.R.D. 429, 433 (S.D.N.Y. 2010).

38. *See* IO Group, Inc. v. GLBT, Ltd., No. C-10-1282, 2011 WL 4974337, at *1 (N.D. Cal. Oct. 19, 2011).

39. *See supra* note 10.

40. *See infra* app. A.

41. *See supra* note 10; *see also infra* app. A.

42. *See generally* ADVISORY COMM. ON FEDERAL RULES OF CIVIL PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., REPORT TO THE CIVIL RULES ADVISORY COMM. (2006), *available at* http://www.uscourts.gov/uscourts/RulesAnd Policies/rules/Reports/CV06-2006.pdf.

43. *See infra* app. A.

44. *See infra* app. A.

Procedure, where annual cases began routinely exceeding double digits.[45] Correspondingly, sanction motions and sanction awards for spoliation have also been trending upward from 2006 onward.[46]

2. The Duty to Preserve Typically Arises Long Before Filing or Service Yet Remains Unpredictable

As the duty to preserve arises upon the "reasonable anticipation of litigation," it is omnipresent in litigation, arising in every lawsuit. Yet, when the duty to preserve is specifically triggered is not always an issue subject to judicial scrutiny—it is not until an opposing party moves to examine another party's preservation efforts, typically alleging that their efforts fell short. Appendix A helpfully illustrates that the duty to preserve arises in all cases, ranging from intellectual property disputes to bankruptcy proceedings, and everything in between.[47]

When examining Appendix A for patterns occurring amongst specific types of litigation, certain trends emerge. In employment discrimination cases, for example, with the exception of one decision (interpreted generously),[48] courts held that the trigger event occurred well before the plaintiff filed the complaint, and often, well before the plaintiff filed a charge with the appropriate state or federal agency—even though state and federal agencies were created to promote conciliatory efforts to avoid litigation and, arguably, preclude a reasonable anticipation of litigation. Courts looked to an employee's internal complaint;[49] the employee's protestation to a denial of promotion or issuance of discipline;[50] or, at the latest, receipt of an EEOC charge.[51]

Unlike a car accident which connects two previously unrelated parties in one violent moment, employment litigation is predicated on a preexisting relationship between employer and employee, which often forms the basis of trigger events prior to the filing of the complaint. Yet, if every employee's internal complaint or frustration constituted a

45. *See infra* app. A.

46. *See* Willoughby, Jr. et al., *supra* note 5, at 792–95.

47. *See infra* app. A.

48. Piccone v. Town of Webster, No. 09-cv-6266T, 2010 WL 3516581, at *6–7 (W.D.N.Y. Sept. 3, 2010) (although the court held that the plaintiff's termination was likely the earliest possible date upon which the defendant could have anticipated litigation, the plaintiff was unable to demonstrate that the defendant destroyed evidence after that date and her motion for sanctions was denied).

49. McCargo v. Tex. Roadhouse, Inc., No. 09-cv-02889-WYD-KMT, 2011 WL 1638992, at *4 (D. Colo. May 2, 2011); Broccoli v. Echostar Commc'ns Corp., 229 F.R.D. 506, 510–11 (D. Md. 2005).

50. Keaton v. Cobb Cnty., 545 F. Supp. 2d 1275, 1287, 1306–07 (N.D. Ga. 2008).

51. Williams v. N.Y.C. Transit Auth., No. 10-CV-0882(ENV), 2011 WL 5024280, at *5 (E.D.N.Y. Oct. 19, 2011).

trigger event—even though the employee may never file a charge or complaint—employers would be stuck in a perpetual cycle of storing and preserving information that could consume, if not cripple, the entire business operations. Such a proposition is untenable and unforgiving. This uncertainty forces employers to strike a delicate balance between their preservation requirements and ability to maintain their daily operations as a going concern, while also giving deference to each employer's unique workplace dynamic and the Supreme Court's mandate that discrimination and harassment statutes, such as Title VII, were not intended to be "general civility code[s]"[52] that provide redress for every perceived workplace slight.

Similarly, in intellectual property cases, although the duty to preserve occasionally triggers with the filing of the complaint,[53] the cases are typically marked by protracted periods of time prior to the filing of the complaint in which the duty to preserve was triggered.[54] Presumably, these early trigger events are a manifestation of or testament to the complexity of such litigation and the amount of research and strategy, often a combination of science and law, which typically precedes such litigation—whether it be a plaintiff examining if one of its patents, copyrights, or trademarks has been infringed by a competitor or a defendant analyzing if its proposed product will infringe upon any existing patents, copyrights, or trademarks owned by a competitor.[55] Collectively, these decisions reinforce the unpredictability and fact-sensitive nature of trigger events but, more importantly, underscore the risks associated with waiting for the filing of the complaint to trigger a party's preservation requirements.

In addition to cataloging various trigger events identified by courts, Appendix A provides the length of time, in number of days, between the trigger event and filing of the complaint (*i.e.*, Appendix A lists zero (0) days when the filing of the complaint was the trigger event). This number indicates how many days prior to the filing of the complaint

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52. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)).

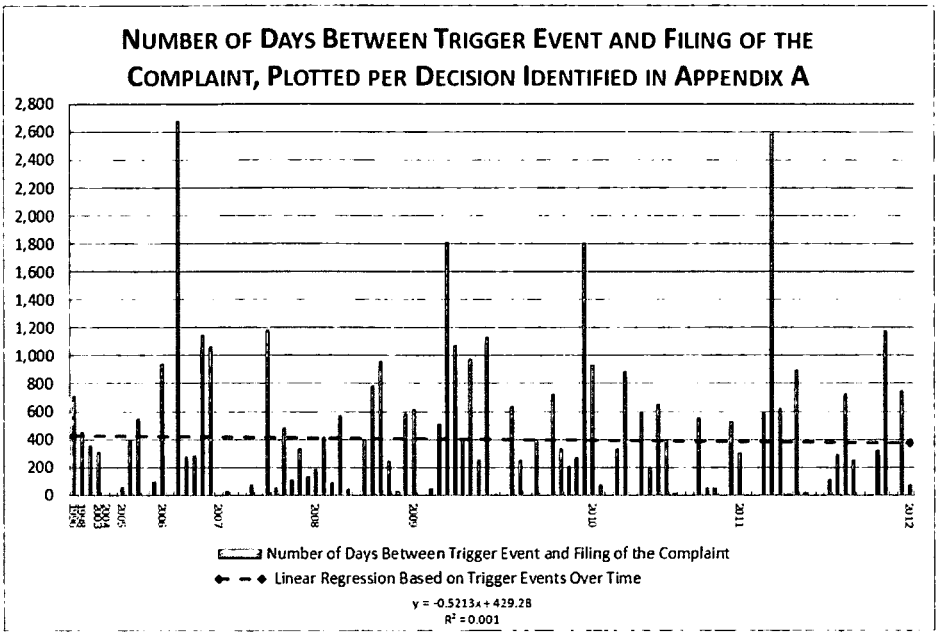
53. Phillips Elecs. N. Am. Corp. v. BC Technical, 773 F. Supp. 2d 1149, 1195 (D. Utah 2011) (noting that, although the duty to preserve may have arisen three years earlier, it was certainly triggered upon the date of service of complaint).

54. *See infra* app. A; *see also* Forest Labs., Inc. v. Caraco Pharm. Labs., Ltd., No 06-CV-13143, 2009 WL 998402, at *1–2 (E.D. Mich. Apr. 14, 2009) (finding that the duty to preserve was triggered 1074 days prior to the filing of the complaint in a patent infringement action); *In re* Napster, Inc. Copyright Litig., 462 F. Supp. 2d 1060, 1065, 1067, 1070 (N.D. Cal. 2006) (finding that the duty to preserve was triggered 1154 days prior to the filing of the complaint in a copyright infringement action); Samsung Elecs. Co., Ltd. v. Rambus, Inc., 439 F. Supp. 2d 524, 529, 560 (E.D. Va. 2006), *vacated on other grounds by* 523 F.3d 1374 (Fed. Cir. 2008) (finding that the duty to preserve was triggered 2682 days prior to the filing of the complaint in a patent infringement action).

55. *See supra* text accompanying note 54.

that the party should have reasonably anticipated litigation and began preserving documents. The number of days between the trigger event and filing of the complaint was then plotted chronologically, by individual case, in Figure 1.

FIGURE 1



The distribution of Figure 1, not surprisingly, highlights the unpredictability of determining when exactly one "reasonably anticipated litigation" as a matter of law. The chronological spectrum ranges from incidents that occurred more than seven years prior to filing the complaint[56] to cases where a court held that a party could not have reasonably anticipated litigation prior to the filing of the complaint.[57] Additionally, the linear regression plotted on Figure 1 shows almost no correlation between cases ($r^2 = 0.001$), which is expected, because a case in one district will have little to no bearing on a case in another district, outside of persuasive value, as factual circumstances vary wildly.[58] The linear regression, however, demonstrates a minor trend downward, indicating a slight decrease over time in the number of days,

56. *See* Zimmerman v. Poly Prep Country Day Sch., No. 09-CV-4586(FB), 2011 WL 1429221, at *1, *11, *14 (E.D.N.Y. Apr. 13, 2011); *Samsung Elecs.*, 439 F. Supp. 2d at 529, 557.

57. *See* Williams v. N.Y.C. Transit Auth., No. 10-CV-0882(ENV), 2011 WL 5024280 (E.D.N.Y. Oct. 19, 2011).

58. *See infra* app. A.

or length of time, that courts have identified between a trigger event and the filing of the complaint.

Critically, the distribution of Figure 1 exemplifies the difficulty, if not impossibility, of implementing a bright-line rule for preserving information—as advocated by certain commentators, typically suggesting the use of the complaint's filing for the unequivocal trigger event.[59] Although the implementation of a bright-line rule based upon the filing of the complaint is tempting for its simplicity in guidance and enforcement, the risk of losing critical information required to litigate claims is too great to ignore. Resisting the temptation of convenience, courts have demonstrated that the landscape of events that trigger a party's reasonable anticipation of litigation is rocky at best, and does not lend itself to a bright-line rule.[60] Each line on Figure 1 represents an occasion where the court determined that the party should have reasonably anticipated litigation in advance of the filing of the complaint—whether it be 4 days[61] or 2,682 days.[62]

Admittedly, there were occasions where the courts held that the filing of the complaint was the triggering event and the party could not have anticipated litigation before that time,[63] but the majority of trigger events identified by the courts occurred prior to the filing of the complaint.[64] When distilled, the decisions demonstrate the judiciary's erosion of the notion that a party may wait until the filing of the complaint or the date of service to preserve information, and suggests the difficulty of determining preservation duty triggers. The survey further emphasizes the fact-specific nature of determining when a party's duty to preserve is triggered and suggests the danger of waiting to preserve information until the complaint is filed.

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59. *See infra* notes 65–67 and accompanying text.

60. *See supra* text accompanying notes 34–38.

61. *Williams*, 2011 WL 5024280, at *1, *5.

62. *Samsung Elecs.*, 439 F. Supp. 2d at 529, 545–46.

63. *See infra* app. A; *see also, e.g.*, Perez v. Vezer Indus. Prof'ls, Inc., No. CIV S-09-2850 MCE CKD, 2011 WL 5975854, at *6 (E.D. Cal. Nov. 29, 2011); FTC v. Affiliate Strategies, Inc., No. 09-4104-JAR, 2011 WL 2084147, at *3 (D. Kan. May 24, 2011); Huggins v. Prince George's Cnty., 750 F. Supp. 2d 549, 560 (D. Md. 2010). Moreover, to the extent that courts determined that the filing of the complaint triggered the defendant's duty to preserve, as opposed to the date of service, this analysis is too imprecise and seemingly disregards that the defendant will likely have no knowledge of a complaint's filing until the date of service. Although the filing of the complaint is significant to the plaintiff, it often means nothing to the defendant until service is received and the defendant learns of the lawsuit. *See, e.g.*, DeBakker v. Hanger Prosthetics & Orthotics E., Inc., No. 3:08-CV-11, 2009 WL 5031319, at *4 (E.D. Tenn. Dec. 14, 2009).

64. *See infra* app. A.

C. *The Bright-Line Fallacy*

The discretionary nature of the pronouncement of when a party should have reasonably anticipated litigation is clearly problematic. Critics complain that the fact-intensive approach lends itself to inconsistent application and unpredictable standards—indeed, the spectrum of data from Appendix A and the rocky spine of Figure 1 would attest to that.[65] In response, commentators have advocated a bright-line rule that would provide clarity and consistency to the determination of the moment that the duty to preserve is triggered.[66] Specifically, they argue that the filing of the complaint should serve as the triggering event,[67] and the position is not without merit. The filing of a complaint is a serious event and the argument follows that costly affirmative preservation burdens should not attach until the complaint is filed.[68]

The universal use of the filing of the complaint[69] as the trigger of the duty to preserve would be the easiest marker of the duty's existence and eliminate uncertainty in most situations. In fact, courts already often find that the filing of the complaint was the event that placed the party on notice.[70] Certainly, the filing of the complaint will—almost[71]—always be the latest date that the preservation duty will be triggered, as parties will have undeniable actual notice of litigation and discovery responsibilities. Proponents may also be correct that the certainty provided would eliminate much of the cost of unnecessarily prolonged preservation of evidence. Unfortunately, as courts have determined, a bright-line rule of this sort, though clear and consistent, is impractical.

An illustrative example shows how a complaint-trigger rule could be unjust. On January 4, 2009, a collision with a hawk caused a helicopter crash that killed seven people, including the children of Kelly and

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65. *See, e.g.*, Letter from Robert D. Owen to Honorable David G. Campbell, Chairman, Advisory Comm. on Civil Rules, 2–3 (Oct. 24, 2011), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/Robert_Owen_Adv_Comm_Submission_final.pdf.

66. *Id.* at 18–19.

67. *Id.*

68. *Id.* at 1 n.2.

69. To be accurate, the proposal would set the date of service of the complaint as the trigger date for the defendant. The plaintiff's duty to preserve would arise when the plaintiff began drafting the complaint. *Id.* at 18–19.

70. *See* cases cited *supra* note 63.

71. Although less common, certain information does not become relevant at the outset of litigation, and only presents its significance as the case develops and facts are unearthed, thus creating a trigger event after the initial filing of the complaint. *See* Ervine v. S.B., 2011 WL 867336, at *1 (N.D. Ill. Mar. 10, 2011) (plaintiff did not initially name all defendants when he filed his defamation suit because they operated anonymously on the internet and certain defendant's preservation requirement was not triggered until the court issued subpoenas to certain third-party website hosting companies).

Stephen Yelton.[72] Stephen Yelton, the only surviving passenger, was severely injured.[73] The Yeltons filed a products liability action on behalf of their children against the helicopter's owner and manufacturer 81 days later.[74] The judge logically determined that the duty to preserve evidence was triggered by the helicopter crash—an event that would reasonably put defendants on notice that litigation was imminent.[75] Here, an argument in favor of the filing of a complaint, rather than the accident, triggering the duty would be dubious at best. Inarguably, defendants should not have been afforded an unfettered opportunity to manipulate relevant evidence during the 81 days between the crash and the filing of the complaint, or allow their internal document retention policies to provide for the timely destruction of potentially relevant evidence.

Further complicating the issue is the fact that subsequent to the initiation of the products liability action on March 26, 2009, more complaints were filed sporadically over the next few months against the same defendants on behalf of the passengers killed in the crash.[76] Affixing a different trigger date for each case stemming from the same accident based solely on the random day on which the party filed her complaint would be nonsensical. While it is true that the filing of the complaint is a serious event, the date it is filed is essentially arbitrary so long as it satisfies governing statutes of limitation.

Moreover, plaintiffs cannot be expected to file lawsuits the instant that an accident occurs in order to ensure proper preservation of evidence. Such a rule would encourage a race to the courthouse (or the computer in this era of electronic filing) upon the occurrence of any accident or incident, and would effectively eviscerate any motivation to resolve disputes prior to engaging in litigation.

Additionally, a trigger rule based on the filing of the complaint would have to consider an expansion to include the specific types of lawsuits that require pre-suit demand letters or other remedial actions—which encourage parties to resolve matters outside of the judicial process and limit frivolous lawsuits—but could result in the loss of relevant information before the complaint is filed and the duty to

72. Yelton v. PHI, Inc., 279 F.R.D. 377, 380 (E.D. La. 2011).

73. *Id.*

74. *Id.*

75. *Id.* It is noteworthy that the co-defendant in question voluntarily initiated a litigation hold just four days after the crash, but still found itself subject to sanctions for failure to include in the hold notice to a "key player," an expert who performed bird strike analysis. *Id.* at 387–88 & 395. Evidence within his control was later destroyed. *Id.* at 391.

76. *Id.* at 380. These claims, filed on the 6th, 7th, 8th, 15th and 22nd of May and June 22nd, 2009, were later consolidated into the earlier *Yelton*. *See* Yelton v. PHI, Inc., 669 F.3d 577, 578 (5th Cir. 2012). Adding yet another wrinkle, various wrongful death actions involving the same parties appeared later in the year.

preserve is triggered.[77] As our research shows, courts often find that justice requires the implication of preservation responsibilities long before litigation officially begins, and, thus, a bright-line rule is simply too rigid.[78] Despite its cost, a fact-intensive, case-specific analysis may be the more measured and thorough approach, so long as the bounds of relevance continue to afford litigants such generosity in discovery and require expansive preservation.

III. PERFECTING PRESERVATION

In reality, recognition of one's duty to preserve is only the first of many important steps in an imprecise process to properly meet preservation requirements and avoid the imposition of penalties. Unfortunately, predicting the scope of the preservation duty can be as challenging as recognizing its genesis. Failure to implement a sufficient legal hold can be as detrimental to a case as neglecting to implement one at all.[79] To that end, experts and commentators have provided "best practices" guidelines to navigate organizations and counsel through the preservation process.[80]

A. *Best Practices to Meet Preservation Obligations*

A legal hold program defines the processes by which information is identified, preserved, and maintained when it has been determined that a duty to preserve exists.[81] Guidelines offer help in determining what should be preserved and how the preservation process should be

77. In Florida, for example, prior to filing an action for medical negligence, an aggrieved party must send its records to a medical expert who is a similar "health care provider[]." *See* FLA. STAT. § 766.106(2)(a) (2011). The medical expert must then execute a "verified written medical expert opinion" that there are sufficient grounds to proceed. *See* FLA. STAT. § 766.203(2) (2011). From there, the aggrieved party notifies the prospective defendants, who are provided with 90 days to conduct a pre-suit investigation and attempt to resolve the matter before an aggrieved party can file a lawsuit. *See id.* § 766.106(3).

78. *See infra* app. A; *see also* text accompanying *supra* note 25.

79. *See Yelton*, 279 F.R.D. at 387–88, 391 (finding that a legal hold voluntarily imposed by the manufacturer of a helicopter involved in a fatal crash was faulty because it failed to notify an expert to preserve his research).

80. The Sedona Conference is arguably the authority on this issue. The Sedona Conference is a nonprofit, research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, intellectual property rights, and e-discovery. THE SEDONA CONFERENCE, *About the Sedona Conference,* https://thesedona conference.org/aboutus (last visited Oct. 13, 2012). As part of its mission, it publishes commentaries on these subjects, including the implementation of legal holds. *See* THE SEDONA CONFERENCE, *The Sedona Conference Commentary on Legal Holds: The Trigger & the Process*, 11 SEDONA CONF. J., 265 (2010) [hereinafter The Sedona Conference].

81. The Sedona Conference, *supra* note 80, at 267.

undertaken. The non-profit Sedona Conference enumerates eleven pragmatic suggestions for completing preservation requirements.[82] The guidelines are intended to facilitate reasonable and good faith compliance with preservation obligations, and to provide the framework an organization can use to create its own preservation procedures.[83] The guidelines are not comprehensive, nor a guarantee of success, and should not be followed blindly, but they do suggest a framework that can be employed to meet preservation requirements.

Among the suggestions is the establishment of a procedure for the reporting of information relating to a potential threat of litigation to a responsible decision maker.[84] This step shows that the organization recognized its preservation duty and acted affirmatively. The guidelines urge that, once a duty to preserve arises, reasonable steps be taken to identify and preserve relevant information "as soon as is practicable."[85] In most cases, reasonable steps include the issuance of a legal hold. While recognizing that the determination of the scope of the preservation requirement can be difficult,[86] the Sedona Conference offers advice on the elements of an effective legal hold.

> [A] notice is most effective when the organization identifies the custodians and data stewards most likely to have relevant information, and when the notice:
> (a) Communicates in a manner that assists persons in taking actions that are, in
> good faith, intended to be effective
> (b) Is in an appropriate form, which may be written
> (c) Provides information on how preservation is to be undertaken
> (d) Is periodically reviewed and, when necessary, reissued in either its original or an amended form, and
> (e) Addresses features of relevant information systems that may prevent retention of potentially discoverable information.[87]

Importantly, the Sedona Conference also stresses the importance of documenting one's legal hold policy and the process of implementation in preparation for scrutiny by the opposing party and the court.[88]

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82. *Id.* at 269–70.
83. *Id.* at 269.
84. *Id.*
85. *Id.* at 270.
86. "Guideline 7 – Factors that may be considered in determining the scope of information that should be preserved include the nature of the issues raised in the matter, the accessibility of the information, the probative value of the information, and the relative burdens and costs of the preservation effort." *Id.*
87. *Id.*
88. *Id.*

Once the duty to preserve is triggered, possible sources of relevant data should be identified and custodians informed of their obligations.[89] Communication with opposing counsel and the court is the key to defining the scope of the discovery obligation, but also helps foster a productive and collaborative approach that may mitigate potential disputes during discovery.[90] Once identified, evidence must be preserved and protected against destruction or alteration on a broad basis before a second round of review and analysis filters the information for relevance.[91] As the "reasonable anticipation" standard requires, much of this must be done long before litigation begins in earnest.

Along these same lines, other commentators provide more concrete recommendations, including the employment of outside attorneys or other experts in e-discovery to coach clients in record management.[92] These commentators also embrace a holistic approach to identifying and preserving documents that involves not only attorneys, but also an organization's IT staff and management, with the aim of combining the accumulated knowledge of information science, law, and technology.[93] Ultimately, the goal is to effectively preserve an organization's information in a timely and cost-effective manner that minimizes the impact of litigation to the going concern of the business.

B. *Preservation "as Soon as is Practicable"*

Of course, the preservation standard (as articulated) is chronologically impossible to meet. An organization cannot instantly preserve everything relevant to a litigation from the exact moment litigation is reasonably anticipated—logistical and administrative steps to preserve information naturally require some time to implement (*i.e.*, drafting and distributing the litigation hold to pertinent custodians). The standard itself does not have lag-time built in to accommodate this; however, spoliation case law tends to deal with this by imposing some sort of scienter requirement for an award of sanctions as a buffer against strict liability.[94]

For the practitioner in the modern age, it is not as easy as keeping a jewel safe from pilfering fingers—you need to ask your client questions to help them figure out what they have, where it is located, and how to keep it safe. This is just a matter of knowing the correct questions to

89. RALPH C. LOSEY, E-DISCOVERY: CURRENT TRENDS AND CASES 9 (2008).
90. *Id.*
91. *Id.* at 12.
92. *Id.* at 7–8.
93. *Id.* at 3, 7–8.
94. *See* Willoughby, Jr. et al., *supra* note 5, at 805–15.

ask, and quickly taking the correct preservation steps to take to keep data safe; which, again, stresses the importance of harmonizing the collective knowledge of attorneys, IT staff, and management in an attempt to quickly preserve documents once the duty arises.[95]

IV. PUNISHMENT FOR POOR PRESERVATION

Without the threat of sanctions, the duty to preserve would lack any teeth beyond stridently worded letters between counsel and cries of lost information. The possible repercussions for failure to meet one's duty to preserve, either through ignorance or intention, can result in sanctions that eviscerate a party's ability to present its case, if not dismiss the case entirely. What is more, the application of sanctions are inconsistent both between and within jurisdictions. This inconsistency, coupled with the prescience required to recognize when the duty to preserve has been triggered, should put practitioners on high alert. Courts no longer accept technological ignorance as an excuse for failure to protect and present relevant evidence.[96]

Naturally, the nature and extent of the discovery violations influence the severity of the sanctions.[97] For the most egregious misconduct, courts have ordered the dismissal of all claims or defenses.[98] More frequently, courts have issued adverse jury instructions and imposed monetary awards for serious violations.[99] Following lesser violations, courts have selected from a pantheon of remedial measures, including evidence preclusion,[100] witness preclusion,[101] prohibition of particular

95. *See* LOSEY, *supra* note 89, at 7–8.

96. *See* Martin v. Nw. Mut. Life Ins. Co., No. 804CV2328T23MAP, 2006 WL 148991, at *2 (M.D. Fla. Jan. 19, 2006) (rejecting an attorney's excuse of "computer illiteracy" as "frankly ludicrous").

97. For an exhaustive and alarming discussion of sanctions for e-discovery violations, see Willoughby, Jr. et al., *supra* note 5. The article presents a comprehensive survey of federal court opinions prior to January 1, 2010, involving motions for sanctions relating to the discovery of electronically stored information (ESI). *Id.* at 789. The authors categorized each case based on date, court, case type, sanctioning authority, sanctioned party, sanctioned misconduct, sanction type, sanctions to counsel, if any, and the protections provided from sanctions by Federal Rule of Civil Procedure 37(e). *Id.* The survey identified 401 sanction cases and 230 sanction awards and showed that sanction motions and awards have increased dramatically over time. *Id.*

98. *Id.* at 803.

99. *Id.*

100. *Id.* at 803–04 n.52 (citing *e.g.*, Shank v. Kitsap Cnty, No. C04-5843RJB, 2005 WL 2099793, at *4 (W.D. Wash. Aug. 30, 2005) (precluding the defendant's introduction of digital audio recordings due to delayed discovery compliance)); *see also* Thompson v. U.S. Dep't of HUD, 219 F.R.D. 93, 104–05 (D. Md. 2003) (prohibiting the defendant from presenting thousands of email records produced after the deadlines imposed by the discovery order).

101. *See* Willoughby, Jr. et al., *supra* note 5, at 804 n.53 (citing, *e.g.*, R & R Sails, Inc. v. Ins. Co. of Pa., 251 F.R.D. 520, 528 (S.D. Cal. 2008) (preventing expert witness testimony which relied on ESI produced after the court-imposed discovery deadline)); *see also* Elion v.

defenses,[102] reduced burden of proof,[103] limitation of jury challenges,[104] abbreviation of closing statements,[105] supplemental discovery,[106] and additional access to computer systems.[107] Moreover, sanction options may be limited only by the imagination of the presiding judge, as some courts have imposed an assortment of more inventive penalties, such as payments to bar associations to fund educational programs,[108] required participation in court-created ethics programs,[109] referrals to the

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Jackson, No. 05-0992 (PLF), 2006 WL 2583694, at *1–2 (D.D.C. Sept. 8, 2006) (precluding the defendant from presenting witness testimony regarding an email not disclosed in a timely manner).

102. *See* Willoughby, Jr. et al., *supra* note 5, at 804 (citing, *e.g.*, JPMorgan Chase Bank, N.A. v. Neovi, Inc., No. 2:06-CV-0095, 2007 WL 1514005, at *1 (S.D. Ohio May 27, 2007) (precluding the defendant from claiming a lack of personal jurisdiction because of the defendant's failure to produce information concerning contacts with the state)); *see also, e.g.*, Kamatani v. BenQ Corp., No. 2:03-CV-437, 2005 WL 2455825, at *15–16 (E.D. Tex. Oct. 6, 2005) (prohibiting defenses relating to a specific license agreement based on the defendant's bad faith representations to the court and failure to produce requested emails).

103. *See* Willoughby, Jr. et al., *supra* note 5, at 804 (citing Great Am. Ins. Co. v. Lowry Dev., LLC, Nos. 1:06CV097 LTS-RHW, 1:06CV412 LTS-RHW, 2007 WL 4268776, at *4 (S.D. Miss. Nov. 30, 2007) (reducing the burden of proof to a preponderance of the evidence standard following the destruction of computer data)).

104. *See* Willoughby, Jr. et al., *supra* note 5, at 804 (citing Juniper Networks, Inc. v. Toshiba Am., Inc., No. 2:05-CV-479, 2007 WL 2021776, at *4 (E.D. Tex. July 11, 2007) (eliminating two of the defendant's juror strikes following the defendant's intentional failure to produce electronic source code. Additionally, the court reduced the defendant's time for voir dire and opening statements, prohibited the defendant from offering any expert testimony regarding non-infringement, instructed the jury on the court's finding of intentionally withholding documents, and awarded attorneys' fees and costs resulting from the defendant's misconduct)).

105. *See* Willoughby, Jr. et al., *supra* note 5, at 805 (citing *Juniper Networks, Inc.*, 2007 WL 2021776, at *4 (reducing defendant's closing statement time to one-third of that allotted to the plaintiff to penalize the defendant's intentional failure to meet discovery requirements)).

106. *See* Willoughby, Jr. et al., *supra* note 5, at 804 (citing, *e.g.*, Preferred Care Partners Holding Corp. v. Humana, Inc., No. 08-20424-CIV, 2009 WL 982460, at *10 (S.D. Fla. Apr. 9, 2009) (permitting further depositions after emails were discovered one month before trial)); *see also* Lava Trading, Inc. v. Hartford Fire Ins. Co., No. 03 Civ.7037PKC MHD, 2005 WL 459267, at *14 (S.D.N.Y. Feb. 24, 2005) (allowing additional depositions after emails were produced after the close of discovery).

107. *See* Willoughby, Jr. et al., *supra* note 5, at 804 (citing, *e.g.*, Sterle v. Elizabeth Arden, Inc., No. 3:06 CV 01584(DJS), 2008 WL 961216, at *10, *14 (D. Conn. Apr. 9, 2008) (permitting plaintiff to inspect electronic records following the defense attorney's discovery obstruction); *see also* Hahn v. Minn. Beef Indus., Inc., No. 00-2282 RHKSRN, 2002 WL 32667146, at *4 (D. Minn. Mar. 8, 2002) (ordering the re-inspection of a computer database after inaccurate information was provided).

108. *See* Willoughby, Jr. et al., *supra* note 5, at 805 (citing Pinstripe, Inc. v. Manpower, Inc., No. 07-CV-620-GKF-PJC, 2009 WL 2252131, at *4 (N.D. Okla. July 29, 2009) (requiring defendant to pay $2,500 to support a seminar on litigation holds and the preservation of electronic data)).

109. *See* Willoughby, Jr. et al., *supra* note 5, at 805 (citing Qualcomm, Inc. v. Broadcom Corp., No. 05CV1958-B(BLM), 2008 WL 66932, at *18–19 (S.D. Cal. Jan. 7, 2008) (requiring the offending attorneys to attend a court-created ethics program)), *vacated in part*, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

appropriate Bar association,[110] payments to the clerk of court,[111] and a moratorium on depositions until the sanctioned party complies with the court's discovery order.[112]

Parties may attempt to weigh the costs and resources associated with proper preservation, which can include storage fees for hundreds of thousands—if not millions—of documents, against the likely sanction for cutting corners with evidence retention and decide to roll the proverbial dice. Unfortunately, an encyclopedic knowledge of the various types of sanctions available to a judge may not permit an accurate prediction of the repercussions. Courts must make a very fact-specific judgment of the nature and severity of the breach of duty in these cases, and their discretion allows for the imposition of a broad range of measures to vindicate the interests of the aggrieved party.

Indeed, judges may even disagree as to the merits of a particular sanction *within the same action.*[113] For example, in the case of *Dong Ah Tire & Rubber Co. v. Glasforms, Inc.*, the magistrate judge charged with conducting the preliminary proceedings in the case, including acting as shepherd to the discovery process, found that the defendant Glasforms was unfairly prejudiced by third-party defendant Taishan Fiberglass, Inc.'s failure to maintain relevant business records and manufacturing materials after litigation was reasonably anticipated and again after it had commenced.[114] Accordingly, the magistrate judge required adverse inference instructions with respect to the various records and materials, including two lost graphite rollers Taishan used to manufacture the defective glass sold to Glasforms.[115]

On objection by Taishan, the district judge upheld the sanctions ordered by the magistrate, but altered the instruction with respect to the missing rollers.[116] Here, the district judge found that "the circumstances surrounding the loss, miscategorization, or destruction of the rollers make the determination of Taishan's culpability an extremely close

110. *See Qualcomm*, 2008 WL 66932, at *17 (demanding the offending attorneys to appear before the state Bar for ethical questioning).

111. *See* Willoughby, Jr. et al., *supra* note 5, at 805 (citing, *e.g.*, Claredi Corp. v. Seebeyond Tech. Corp., No. 4:04CV1304 RWS, 2007 WL 735018, at *4 (E.D. Mo. Mar. 8, 2007) (requiring the defendant to pay $20,000 to the clerk of court for unnecessarily prolonging and increasing the expense of litigation)); *see also, e.g.*, Wachtel v. Health Net, Inc., 239 F.R.D. 81, 111 (D.N.J. 2006) (fining the defendant for consuming the court's time and resources).

112. *See* Willoughby, Jr. et al., *supra* note 5, at 805 (citing Edelen v. Campbell Soup Co., No. 1:08CV00299-JOF-LTW, 2009 WL 4798117, at *3 (N.D. Ga. Dec. 8, 2009) (prohibiting the plaintiff from taking depositions until it narrowed its electronic discovery requests)).

113. Dong Ah Tire & Rubber Co., Ltd. v. Glasforms, Inc., No. C 06-3359 JF(RS), 2009 WL 2485556 (N.D. Cal. Aug. 12, 2009); Dong Ah Tire & Rubber Co., Ltd. v. Glasforms, Inc., No. C 06-3359 JF(RS), 2009 WL 1949124 (N.D. Cal., July 2, 2009).

114. *Dong Ah Tire*, 2009 WL 1949124, at *11.

115. *Id.*

116. *Id.* at *1.

question."[117] As such, the district judge made a slight modification to that particular sanction, holding that the jury would be instructed "that it is not *required* to draw an inference that the rollers would have provided evidence helpful to Glasforms and harmful to Taishan, but that it *may* draw such an inference if it sees fit to do so."[118] It was a subtle distinction to be sure, but one with the potential to change the outcome of a case. The sheer number of possible sanctions in a judge's arsenal and the unpredictability of their employment should discourage parties and practitioners from gambling on the when the duty to preserve arises.

CONCLUSION

Although the duty to preserve relevant evidence has been around since the time of young Mr. Armory and the questionable Mr. Delamirie,[119] our survey, as catalogued in Appendix A, demonstrates the increased judicial attention spent addressing litigants' preservation requirements. This increase in decisions is fueled, in part, by the opposing parties who file motions to compel or for sanctions and present such issues to the court. E-discovery sanctions are at an all-time high and the current trends suggest that sanctions motions and awards will only continue to increase.[120]

As motions for sanctions rise, parties' preservation obligations will continue to be at issue and parties and practitioners alike must stay cognizant of potential trigger events that may give rise to a party's preservation obligation. As demonstrated in our survey, the notion of waiting until the filing of the complaint or date of service to begin preserving documents is becoming archaic and potentially sanctionable; however, identifying the trigger event in any litigation remains highly fact-specific, and often leaves parties with the unsatisfying feeling of aiming for a moving target. Courts have gone back as far as seven years prior to the filing of the complaint to identify when a party's duty to preserve arose, and have gradually eroded the concept that a bright-line rule can dictate when a party's duty to preserve was triggered.

In an effort to avoid sanctions, best practices would suggest that parties and practitioners engage in a collaborative fact-specific inquiry for each incident or occurrence that may result in litigation to determine whether the duty to preserve was triggered and, if so, take appropriate measures to preserve all responsive and discoverable information, as opposed to waiting until service of a complaint months or years later.

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117. *Id.*
118. *Id.* at *4 (emphasis added).
119. *Supra* Part I.
120. *See infra* app. A.

Additionally, corporate counsel (whether in-house or external) should engage key individuals in advance of litigation to discuss potential trigger events that may impact that particular organization and inform the employees when to contact counsel, as the organization's employees ultimately possess the most knowledge of the organization's daily operations and can often notify counsel when to begin the process of assessing whether to issue a litigation hold. It is our hope that this Article and attached Appendix will further illuminate the issues surrounding litigation holds and assist parties in evaluating their unique circumstances by providing a catalogue of judicially-identified trigger events in various types of litigation. Ultimately, the only thing more uncertain than when a party's preservation duty is triggered may be the specific sanctions waiting for the unwary.

APPENDIX A

Court	Judge	Citation	Date of Opinion	Event That Triggered the Party's Reasonable Anticipation of Litigation	Reasonable Anticipation Date	Date Suit Filed	Number of Days Between Triggering Event and Filing of the Lawsuit	Nature of Suit
E.D. La.	Roby, Karen Wells (M)	*Yelton v. PHI, Inc.*, 279 F.R.D. 377 (E.D. La. 2011).	12/7/2011	Helicopter crash.	1/4/2009	3/26/2009	81	Products liability
N.D. Ga.	Totenberg, Amy	*Krafi Reinsurance Ireland, Ltd. v. Pallets Acquisitions, LLC*, 843 F. Supp. 2d 1318 (N.D. Ga. 2011).	12/5/2011	Plaintiff sent a letter of liability to defendant alleging defendant's shipping materials caused contamination of plaintiff's cargo.	11/27/2007	12/15/2009	749	Breach of contract
E.D. Cal.	Delaney, Carolyn (M)	*Perez v. Vezer Indus. Prof'ls, Inc.*, No. CIV S-09-2850, 2011 WL 5975854 (E.D. Cal. Nov. 29, 2011).	11/29/2011	Filing of the Complaint.	9/1/2009	9/1/2009	0	Negligence
D. Colo.	Jackson, R. Brooke	*EEOC v. Dillon Cos., Inc.*, 839 F. Supp. 2d 1141 (D. Colo. 2011).	11/21/2011	Incident regarding physical confrontation between employee and employer in phone booth.	6/22/2006	9/18/2009	1184	Employment discrimination
D. Mass.	Hillman, Timothy S. (M)	*Porcal v. Ciuffo*, 4:10-cv-40016, 2011 WL 6945728 (D. Mass. Nov. 21, 2011).	11/21/2011	Service of attorney general's complaint, not complaint at issue in litigation.	2/25/2009	1/14/2010	323	FLSA
E.D.N.Y.	Pollak, Cheryl L. (M)	*Williams v. N.Y.C. Transit Auth.*, No. 10-CV-0882, 2011 WL 5024280 (E.D.N.Y. Oct. 19, 2011).	10/19/2011	EEOC informed defendant (employer) of plaintiff's (employee's) claim and sent plaintiff certified preservation letter.	2/25/2010	3/1/2010	4	Employment discrimination
N.D. Cal.	Ryu, Donna M. (M)	*IO Grp., Inc. v. GLBT, Ltd.*, No. C-10-1282, 2011 WL 4974337 (N.D. Cal. Oct. 19, 2011).	10/19/2011	Letter sent to defendant requesting preservation.	3/26/2010	3/26/2010	0	Trademark and copyright infringement

Court	Judge	Citation	Date of Opinion	Event That Triggered the Party's Reasonable Anticipation of Litigation	Reasonable Anticipation Date	Date Suit Filed	Number of Days Between Triggering Event and Filing of the Lawsuit	Nature of Suit
N.D. Iowa	Zoss, Paul A. (M)	*Estate of Seaman v. Hacker Hauling*, 840 F. Supp. 2d 1106 (N.D. Iowa 2011).	10/18/2011	Plaintiff's counsel was retained to represent plaintiff's estate after a fatal car accident (defendant moved for sanctions).	2/2/2010	10/15/2010	256	Negligence
D. Conn.	Eginton, Warren W.	*Nicholson v. Bd. of Trs. for the Conn. St. Univ. Sys.*, No. 3:08-cv-1250, 2011 WL 4072685 (D. Conn. Sept. 12, 2011).	9/12/2011	Email from professors' union to university system's chief HR officer requesting retention of promotion and tenure files.	8/16/2006	8/14/2008	729	Employment discrimination
D.D.C.	Friedman, Paul L.	*Chen v. Dist. of Columbia*, 839 F. Supp. 2d 7 (D.D.C. 2011).	9/9/2011	Letter from plaintiff's counsel confirmed intent to file suit.	4/23/2007	2/14/2008	297	Unlawful detention
N.D. Ill.	Ashman, Martin C. (M)	*Buonauro v. City of Berwyn*, No. 08-C-66872011 WL 3754820 (N.D. Ill. Aug. 25, 2011).	8/25/2011	Meeting discussing potential litigation.	5/27/2008	11/21/2008	117	Employment discrimination
E.D. Ky.	Hood, Joseph M.	*Webb v. Jessamine Cnty. Fiscal Court*, No. 5:09-CV-314, 2011 WL 3652751 (E.D. Ky. Aug. 19, 2011).	8/19/2011	Filing of Complaint.	8/25/2009	8/25/2009	0	Negligence
D. Kan.	Sebelius, K. Gary (M)	*F.T.C. v. Affiliate Strategies, Inc.*, No. 09-4104, 2011 WL 2084147 (D. Kan. May 24, 2011).	5/24/2011	Filing of Complaint.	7/20/2009	7/20/2009	0	Unfair and deceptive trade practices
S.D.N.Y.	Yanthis, George A. (M)	*Cacace v. Meyer Mktg. (MACAU Com. Offshore) Co.*, No. 06 Civ. 2938, 2011 WL 1833338 (S.D.N.Y. May 12, 2011).	5/12/2011	Plaintiff's counsel warned defendants of patent infringement.	3/21/2006	4/14/2006	24	Patent infringement

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D. Ariz.	Campbell, David G.	*Surowiec v. Capital Title Agency, Inc.*, No. CV-09-2153, 2011 WL 1671925 (D. Ariz. May 4, 2011).	5/4/2011	Developer's attorney sent letter to title company's attorney in response to inquiries from various homeowners questioning why junior lienholders had not yet signed releases.	No later than 4/28/07	10/13/2009	899	Breach of contract
D. Colo.	Tafoya, Kathleen M. (M)	*McCargo v. Tex. Roadhouse, Inc.*, No. 09-CV-02889, 2011 WL 1638992 (D. Colo. May 2, 2011).	5/2/2011	Plaintiff (employee) filed internal complaint with defendant (employer).	11/25/2009	12/10/2009	15	Employment discrimination
E.D. Va.	Payne, Robert E.	*E.I. Du Pont De Nemours & Co. v. Kolon Indus. Inc.*, No. 3:09CV58, 2011 WL 1597528 (E.D. Va. Apr. 27, 2011).	4/27/2011	Plaintiff hired attorneys to explore litigation possibilities (defendant moved for sanctions against plaintiff).	5/21/2007	2/3/2009	624	Trade secret misappropriation
E.D.N.Y.	Pollak, Cheryl L. (M)	*Zimmerman v. Poly Prep Country Day Sch.*, No. 09-CV-4586, 2011 WL 1429221 (E.D.N.Y. Apr. 13, 2011).	4/13/2011	Defendant conducts internal investigation into allegations of sexual abuse against employee.	9/20/2002	10/26/2009	2593	RICO action alleging school conspired to hide sexual misconduct by football coach
N.D. Ill.	Holderman, James F.	*Ervine v. S.B.*, No. 11-C-1187, 2011 WL 867336 (N.D. Ill. Mar. 10, 2011).	3/10/2011	Plaintiff could not name defendants because defendants operated anonymously on internet. Issuance of subpoenas to third-party website hosting companies placed the website companies on notice of their duty to preserve.	3/10/2011	2/18/2011	(20)	Defamation

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N.D. Tex.	Boyle, Jane J.	*Ashton v. Knight Transp., Inc.*, No. 3:09-CV-0759, 2011 WL 734282 (N.D. Tex. Feb. 22, 2011).	2/22/2011	The fatal accident upon which plaintiff's lawsuit was predicated.	8/11/2007	3/27/2009	594	Motor vehicle product liability
N.D. Ga.	Batten, Timothy C.	*In re Delta/AirTran Baggage Fee Antitrust Litig.*, No. CIV.A. 1:09-MD-2089, 2011 WL 915322 (N.D. Ga. Feb. 22, 2011).	2/22/2011	Delta did not have a duty to the private plaintiffs to preserve evidence requested in 2007 by Department of Justice (Antitrust Division) during confidential investigation. The duty only extended to the Department of Justice.	5/22/2009	5/22/2009	0	Antitrust litigation
D. Utah	Waddoups, Clark	*Philips Elec. N. Am. Corp. v. BC Technical*, No. 2:08-CV-639, 2011 WL 677462 (D. Utah Feb. 16, 2011).	2/16/2011	Court notes duty *may* have arisen three years earlier, but certainly triggered upon the date of service of complaint.	1/16/2008	1/16/2008	0	Copyright infringement
S.D.N.Y.	Francis, James C. (M)	*Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co., Ltd.*, No. 06-CIV-3972, 2011 WL 182056 (S.D.N.Y. Jan. 14, 2011).	1/14/2011	Plaintiff notified defendant the shipment of phenol was "off-specification." Duty was to preserve phenol for testing.	7/21/2005	5/24/2006	307	Breach of contract
W.D. Pa.	Baxter, Susan P. (M)	*Progressive Cas. Ins. Co. v. Winnebago Indus., Inc.*, No. CIV.A. 08-343, 2010 WL 6371906 (W.D. Pa. Nov. 18, 2010).	11/18/2010	Date when the vehicle at issue caught on fire.	6/28/2007	12/8/2008	529	Breach of express and implied warranties; negligence
D. Md.	Williams, Alexander	*Huggins v. Prince George's Cnty., Md.*, 750 F. Supp. 2d 549 (D. Md. 2010).	11/9/2010	Filing of Complaint.	3/30/2007	3/30/2007	0	Due process action

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S.D.N.Y.	Francis, James C.	*Orbit One Communs., Inc. v. Numerex Corp.*, 271 F.R.D. 429 (S.D.N.Y. 2010).	10/26/2010	Plaintiff met with counsel in contemplation of litigation.	11/8/2007	1/7/2008	60	Breach of contract
D. Minn.	Tunheim, John	*Cenveo Corp. v. S. Graphic Sys., Inc.*, No. CIV 08-5521, 2010 WL 3893709 (D. Minn. Sept. 30, 2010).	9/30/2010	CEO of defendant corporation expressed that he was concerned about a lawsuit over the hirings.	8/21/2008	10/14/2008	54	Tortious interference
S.D. Fla.	Simonton, Andrea (M)	*Socas v. Nw. Mut. Life Ins. Co.*, No. 07-20336-CIV, 2010 WL 3894142 (S.D. Fla. Sept. 30, 2010).	9/30/2010	Defendant insurance company requested patient files during investigation of insured dentist's disability claim.	8/1/2005	2/8/2007	556	Breach of contract
D. Md.	Grimm, Paul W. (M)	*Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md. 2010).	9/9/2010	Duty arose at time of service of complaint, perhaps earlier but discussion is limited because of extent of destruction.	10/11/2006	10/11/2006	0	Copyright and patent infringement
W.D.N.Y.	Payson, Marian W. (M)	*Piccone v. Town of Webster*, No. 09-CV-6266T, 2010 WL 3516581 (W.D.N.Y. Sept. 3, 2010).	9/3/2010	Filing of Complaint.	5/21/2009	5/21/2009	0	Employment discrimination
S.D. Fla.	O'Sullivan, John J. (M)	*Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, 736 F. Supp. 2d 1317 (S.D. Fla. 2010).	8/23/2010	Defendant's counsel sent letter to plaintiff's counsel outlining defenses to plaintiff's claim of breach of contract.	2/11/2009	3/6/2009	23	Breach of contract

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E.D.N.Y.	Wall, William D. (M)	*Siani v. St. Univ. of N.Y. at Farmingdale*, No. CV09-407, 2010 WL 3170664 (E.D.N.Y. Aug.10, 2010).	8/10/2010	Plaintiff raised concerns about age discrimination at meeting with defendant in January, 2008. Defendant claimed documents from that meeting were work product. Court held that defendant's assertion indicated anticipation of litigation.	1/1/2008	1/30/2009	395	Employment discrimination
D. N.J.	Cavanaugh, Dennis M.	*sanofi-aventis Deutschland GmbH v. Glenmark Pharm., Inc.*, No. 07-CV-5855, 2010 WL 2652412 (D. N.J. July 1, 2010).	7/1/2010	Defendant claimed work-product immunity with respect to four documents, the earliest of which was dated 2/23/06. This evidenced anticipation of litigation.	2/23/2006	12/7/2007	652	Patent infringement
N.D. Ill.	Cox, Susan E. (M)	*Jones v. Bremen High Sch. Dist. 228*, No. 08-C-3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010).	5/25/2010	Defendant received notice of plaintiff's charge of discrimination.	11/30/2007	6/20/2008	203	Employment discrimination
M.D. Pa.	Connor, Christopher	*Diocese of Harrisburg v. Summix Dev. Co.*, No. 1:07-CV-2283, 2010 WL 2034699 (M.D. Pa. May 18, 2010).	5/18/2010	Letter from plaintiff's attorney threatened litigation.	5/1/2006	12/17/2007	595	Breach of contract
S.D.N.Y.	Leisure, Peter K.	*Passlogix, Inc. v. 2FA Tech LLC*, 708 F. Supp. 2d 378 (S.D.N.Y. 2010).	4/27/2010	Filing of Complaint.	12/18/2008	12/18/2008	0	Breach of contract
S.D.N.Y.	Scheindlin, Shira	*Casale v. Kelly*, 710 F. Supp. 2d 347 (S.D.N.Y. 2010).	4/26/2010	City was sued by individual wrongfully arrested under same statute.	1/1/2003	6/9/2005	890	Assertion of constitutional rights

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E.D. Cal.	Brennan, Edmund (M)	*Contl. Cas. Co. v. St. Paul Surplus Lines Ins. Co.*, 265 F.R.D. 510 (E.D. Cal. 2010).	3/30/2010	Defendant received letters requiring participation in joint mediation with plaintiff.	9/21/2006	8/24/2007	337	Insurance contract dispute
E.D.N.Y.	Hurley, Denis	*Field Day LLC v. Cnty. of Suffolk*, No. CIV.A. 04-2202, 2010 WL 1286622 (E.D.N.Y. Mar. 25, 2010).	3/25/2010	Defendant county received notice of claim from plaintiffs after denying permit.	8/21/2003	8/21/2003	0	Assertion of constitutional rights
S.D. Tex.	Rosenthal, Lee H.	*Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010).	2/19/2010	Defendants planned to preemptively sue plaintiffs to invalidate certain "non-compete" agreements.	11/11/2006	1/30/2007	80	Breach of contract
S.D.N.Y.	Scheindlin, Shira	*Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs.*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010).	1/15/2010	Plaintiffs filed a complaint with financial services commission of British Virgin Islands, certain plaintiffs had retained counsel and initiated communica-tions with other plaintiffs.	4/1/2003	10/24/2005	937	Securities action
E.D. Mich.	Borman, Paul D.	*Chrysler Realty Co. LLC v. Design Forum Architects, Inc.*, No. 06-CV-11785, 2009 WL 5217992 (E.D. Mich. Dec. 31, 2009).	12/31/2009	Plaintiff requested a report of problems with HVAC system, indicating its intention to bring a lawsuit. (Decision based on defendant's motion for sanctions against plaintiffs alleged spoliation).	5/1/2004	4/13/2009	1808	Breach of contract and professional negligence

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E.D. Tenn.	Varlan, Thomas A.	*DeBakker v. Hanger Prosthetics & Orthotics E., Inc.*, No. 3:08-CV-11, 2009 WL 5031319 (E.D. Tenn. Dec. 14, 2009).	12/14/2009	Filing of Complaint (served with summons).	12/14/2007	11/14/2007	(30)	Products liability
S.D.N.Y.	Katz, Theodore (M)	*Schwarz v. FedEx Kinko's Office*, No. 08-CIV-6486, 2009 WL 3459217 (S.D.N.Y. Oct. 27, 2009).	10/27/2009	Date of accident.	9/6/2007	6/5/2008	273	Negligence
U.S. Court of Federal Claims	Horn, Marian B.	*Consol. Edison Co. of N.Y., Inc. v. U.S.*, 90 Fed. Cl. 228 (Fed. Cl. 2009).	10/21/2009	End of negotiations between IRS and plaintiff regarding disputed tax treatment.	9/22/2005	4/19/2006	209	Recovery of overpaid taxes
W.D. Pa.	Ambrose, Donnetta	*Rhoades v. Young Women's Christian Ass'n of Greater Pitt.*, No. CIV. A. 09-261, 2009 WL 3319820 (W.D. Pa. Oct. 14, 2009).	10/14/2009	Defendant received notice of plaintiff's charge of discrimination.	3/28/2008	2/27/2009	336	Employment discrimination
M.D. Pa.	Rambo, Sylvia H.	*Paluch v. Dawson*, No. CIV. 1:CV-06-01751, 2009 WL 3287395 (M.D. Pa. Oct. 13, 2009).	10/16/2009	The date of the attack upon which plaintiff's lawsuit was predicated.	9/9/2004	9/7/2006	728	Prisoner civil rights
W.D. La.	Hayes, Karen L. (M)	*Tango Transp. LLC v. Transp. Intern. Pool, Inc.*, No. 5:08-CV-0559, 2009 WL 3254882 (W.D. La. Oct. 8, 2009).	10/8/2009	Filing of Complaint.	4/21/2008	4/21/2008	0	Breach of contract
E.D.N.Y.	Tomlinson, A. Kathleen (M)	*Scalera v. Electrograph Sys., Inc.*, 262 F.R.D. 162 (E.D.N.Y. 2009).	9/29/2009	Defendant received notice of plaintiff's charge of discrimination.	12/1/2006	1/4/2008	399	Employment discrimination
S.D.N.Y.	Francis, James C.	*Richard Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284 (S.D.N.Y. 2009).	8/13/2009	Filing of Complaint.	10/3/2008	10/3/2008	0	Breach of contract

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N.D. Cal.	Fogel, Jeremy	*Dong Ah Tire & Rubber Co., Ltd. v. Glasforms, Inc.*, No. C 06-3359, 2009 WL 2485556 (N.D. Cal. Aug. 12, 2009).	8/12/2009	Third-party defendant sent letter to plaintiff admitting contamination of fiberglass which caused damages.	9/6/2005	5/23/2006	259	Breach of contract
D. N.J.	Schneider, Joel (M)	*Major Tours, Inc. v. Colorel*, No. CIV 05-3091, 2009 WL 2413631 (D. N.J., Aug. 4, 2009).	8/4/2009	Plaintiffs' attorney sent letter to New Jersey Attorney General alleging discrimination.	9/11/2003	6/15/2005	643	Discrimination
N.D. Okla.	Cleary, Paul (M)	*Pinstripe, Inc. v. Manpower, Inc.*, No. 07-CV-620, 2009 WL 2252131 (N.D. Okla., July 29, 2009).	7/29/2009	Filing of Complaint.	10/30/007	10/30/2007	0	Breach of contract/injunctive relief
M.D. Fla.	Jenkins, Elizabeth A. (M)	*S.E. Mech. Servs., Inc. v. Brody*, No. 8:08-CV-1151, 2009 WL 2242395 (M.D. Fla. July 24, 2009).	7/24/2009	Plaintiff sent defendant a demand letter.	6/3/2008	6/13/2008	10	Violation of Computer Fraud and Abuse Act
D. Md.	Grimm, Paul W. (M)	*Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494 (D. Md. 2009).	7/7/2009	Plaintiff sent letter to defendant mentioning consultation with counsel.	1/5/2001	2/13/2004	1134	Breach of contract
N.D. Cal.	Seeborg, Richard (M)	*Dong Ah Tire & Rubber Co., Ltd. v. Glasforms, Inc.*, No. C 06-3359, 2009 WL 1949124 (N.D. Cal., July 2, 2009).	7/2/2009	Third-party plaintiff sent letter to plaintiff admitting contamination of fiberglass which caused damages.	9/6/2005	5/23/2006	259	Breach of contract
W.D. Tenn.	Anderson, S. Thomas	*Lexington Ins. Co. v. Tubbs*, No. 06-2847, 2009 WL 1586862 (W.D. Tenn. June 3, 2009).	6/3/2009	Date of fire upon which plaintiff's lawsuit was predicated.	4/4/2004	12/14/2006	984	Personal injury

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D. Conn.	Arterton, Janet B.	*Innis Arden Golf Club v. Pitney Bowes, Inc.*, 257 F.R.D. 334 (D. Conn. 2009).	5/21/2009	Plaintiff's duty to preserve soil samples attached when counsel became actively involved in the investigation and analysis of the samples in preparation for legal action against defendant.	8/1/2005	8/30/2006	394	CERCLA action
E.D. Mich.	Friedman, Bernard A.	*Forest Labs., Inc. v. Caraco Pharm. Labs., Ltd.*, No. CIV.A.06-CV-13143, 2009 WL 998402 (E.D. Mich. Apr. 14, 2009).	4/14/2009	Plaintiffs received notice that third party may market drug infringing on plaintiff's patent.	8/1/2003	7/10/2006	1074	Patent infringement
S.D.N.Y.	Chin, Denny	*Adorno v. Port Auth. of N.Y. & N.J.*, 258 F.R.D. 217 (S.D.N.Y. 2009).	3/31/2009	Asian officers filed charges of discrimination with the EEOC eight years earlier regarding similar discrimination. Court determined that the prior issue overlapped with the instant lawsuit and placed defendant on notice. Defendant should have preserved documents regarding discipline and promotion recommendations.	2/1/2001	1/23/2006	1817	Employment discrimination
D. Ariz.	Murguia, Mary H.	*Marceau v. Intl. Broth. of Elec. Workers*, 618 F. Supp. 2d 1127 (D. Ariz. 2009).	3/31/2009	Defendants conducted internal audit of account handling practices.	4/21/2004	9/19/2005	516	RICO action

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E.D.N.Y.	Feuerstein, Sandra	*In re Kessler*, No. 05 CV 6056 SJFAKT, 2009 WL 2603104 (E.D.N.Y. Mar. 27, 2009).	3/27/2009	Date of the fire upon which the lawsuit was predicated.	11/7/2005	12/28/2005	51	Exoneration from or limitation of liability
S.D.N.Y.	Katz, Theodore (M)	*Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409 (S.D.N.Y. 2009).	1/26/2009	Filing of Complaint.	10/12/2007	10/12/2007	0	Copyright infringement
D. Del.	Robinson, Sue L.	*Micron Tech., Inc. v. Rambus, Inc.*, 255 F.R.D. 135 (D. Del. 2009), *vacated by* 2011 WL 1815975.	1/9/2009	Articulation of a time frame and a motive for implementation of defendant's litigation strategy by defendant's Vice President of Intellectual Property.	≈12/1/1998	8/5/2000	≈616	Copyright infringement
E.D. N.C.	Gates, James E. (M)	*Powell v. Town of Sharpsburg*, 591 F. Supp. 2d 814 (E.D. N.C. 2008).	11/25/2008	Defendant received notice of plaintiff's charge of discrimination.	10/25/2004	6/9/2006	592	Employment discrimination
D. Md.	Blake, Catherine C.	*Pandora Jewelry LLC v. Chamilia LLC*, No. CCB-06-3041, 2008 WL 4533902 (D. Md. Sept. 30, 2008).	9/30/2008	The parties' involvement in existing patent litigation.	1/1/2007	2/7/2007	37	Patent infringement
S.D.N.Y.	Dolinger, Michael H. (M)	*Metrokane, Inc. v. Built NY, Inc.*, No. 06-Civ-14447, 2008 WL 4185865 (S.D.N.Y. Sept. 3, 2008).	9/3/2008	Email exchange from the designer of plaintiff's allegedly infringing bags to plaintiff. (Defendant moved for sanctions).	7/6/2006	3/12/2007	249	Patent/trademark infringement
4th Cir.	King, Robert B.	*Buckley v. Mukasey*, 538 F.3d 306 (4th Cir. 2008).	8/20/2008	Internal EEO complaint filed by plaintiff with the Department of Justice.	10/4/2001	5/24/2004	963	Employment discrimination
N.D. Cal.	Laporte, Elizabeth D. (M)	*Keithley v. Home Store.com, Inc.*, No. C-03-04447, 2008 WL 3833384 (N.D. Cal. Aug. 12, 2008).	8/12/2008	Plaintiffs sent defendants a letter discussing impending litigation.	8/3/2001	10/1/2003	789	Patent infringement

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W.D. N.C.	Horn III, Carl (M)	*Eckhardt v. Bank of Am., N.A., No. 3:06-CV-512*, 2008 WL 1995310 (W.D. N.C. May 6, 2008).	5/6/2008	Plaintiff filed an internal administrative grievance (which was denied).	8/31/2005	10/6/2006	401	Employment discrimination
W.D. Pa.	Hay, Amy Reynolds (M)	*Centimark Corp. v. Pegnato & Pegnato Roof Mgmt., Inc.*, No. 05-708, 2008 WL 1995305 (W.D. Pa. May 1, 2008).	5/6/2008	Filing of Complaint.	5/23/2005	5/23/2005	0	Breach of contract
D. Md.	Gesner, Beth P. (M)	*Sampson v. City of Cambridge, Md.*, No. WDQ-06-1819, 2008 WL 7514364 (D. Md. May 1, 2008).	5/1/2008	Plaintiff's counsel sent a preservation letter to defendant.	6/26/2006	8/15/2006	50	Employment discrimination
D. Neb.	Gossett, F.A. (M)	*Meccatech, Inc. v. Kiser*, No. 8:05-CV-570, 2008 WL 6010937 (D. Neb. Apr. 2, 2008).	4/2/2008	Defendant instructed certain employees to hide evidence.	6/1/2004	12/29/2005	576	Breach of contract (restrictive employment covenant)
S.D.N.Y.	Francis, IV, James C.	*Treppel v. Biovail*, 249 F.R.D. 111 (S.D.N.Y. 2008).	4/2/2008	Defendant informed the press that the lawsuit was "without merit" and reported the litigation in a filing with the SEC. (Plaintiff did not effect service of first Complaint).	5/1/2003	8/1/2003	92	Defamation
N.D. Ga.	Story, Richard W.	*Keaton v. Cobb Cnty.*, No. 1:06-CV-1438, 545 F. Supp. 2d 1275 (N.D. Ga. 2008).	2/19/2008	Plaintiff informed supervisor that she would challenge the decision not to promote her.	4/22/2005	6/15/2006	419	Employment discrimination

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D. S.C.	Norton, David C.	*Nucor Corp. v. Bell*, 251 F.R.D. 191 (D. S.C. 2008).	2/1/2008	Plaintiff's general counsel sent a letter to defendant reminding him of confidentiality agreement and that "Nucor would take appropriate action."	3/31/2006	10/6/2006	189	Misappropriation of trade secrets
D. Colo.	Wantanabe, Michael J. (M)	*Palgut v. City of Colorado*, No. 60-cv-01142, 2007 WL 4277564 (D. Colo. Dec. 3, 2007).	12/3/2007	Defendant received litigation hold letter from plaintiff's counsel.	2/14/2006	6/30/2006	136	Employment discrimination
D. Kan.	Rushfelt, Gerald L. (M)	*Benton v. Dlorah, Inc.*, No. 06-CV-2488, 2007 WL 3231431 (D. Kan. Oct. 30, 2007).	10/30/2007	Defendant received notice of plaintiff's charge of discrimination.	12/1/2005	11/7/2006	341	Employment discrimination
C.D. Cal.	Gutierrez, Philip S.	*Cyntegra, Inc. v. Idexx Labs., Inc.*, No. CV 06-4170, 2007 WL 5193736 (C.D. Cal. Sept. 21, 2007).	9/21/2007	Court noted that plaintiff should have anticipated the litigation when the injury occurred, but does not specify a date.	≈3/7/2006	6/30/2006	115	Unfair competition
E.D. Pa.	Rufe,Cynthia	*Travelers Prop. Cas. Co. of Am. v. Cooper Crouse-Hinds, LLC*, No. 05-CV-6399, 2007 WL 2571450 (E.D. Pa. Aug. 31, 2007).	8/31/2007	Plaintiff determined that a subrogation suit was imminent.	1/1/2004	5/1/2005	486	Insurance contract dispute
D.D.C.	Facciola, J. M. (M)	*Peskoff v. Faber*, 244 F.R.D. 54 (D.D.C. 2007).	8/27/2007	Plaintiff gave notice of potential litigation.	2/6/2004	3/31/2004	54	Breach of contract, fraud in the inducement
E.D.N.Y.	Go, Marilyn (M)	*M&T Mortg. Corp. v. Miller*, No. CV 2002-5410, 2007 WL 2403565 (E.D.N.Y. Aug. 17, 2007).	8/17/2007	NYC Department of Consumer Affairs filed a complaint against defendant, prior to the complaints filed by individual buyers.	6/29/1999	10/2/2002	1191	Fraud and violations of the New York Deceptive Practices Act

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Bankr., N.D. Ill.	Sonderby, Susan Pierson (B)	*In re Kmart Corp.*, 371 B.R. 823 (Bankr. N.D. Ill. 2007).	7/31/2007	The date Global filed its administrative claim provided sufficient notice that litigation was likely. (Plaintiff wanted an earlier date, 5/7/03, when an email was sent to a Kmart vice president, but the Court determined that the email was not wide enough within Kmart to trigger a duty to preserve.)	6/19/2003	6/19/2003	0	Bankruptcy
D. Conn.	Hall, Janet C.	*Doe v. Norwalk Cmty. Coll.*, 248 F.R.D. 372 (D. Conn. 2007).	7/16/2007	Plaintiff's counsel sent defendants a letter regarding intention to sue.	9/1/2004	11/22/2004	82	Sexual harassment and assault
D. Colo.	Shaffer, Craig B. (M)	*Cache La Poudre Feeds LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614 (D. Colo. 2007).	3/2/2007	Filing of Complaint.	2/24/2004	2/24/2004	0	Trademark infringement
Fed. Cl.	Damich, Edward	*AAB Joint Venture v. U.S.*, 75 Fed. Cl. 432 (Fed. Cl. 2007).	2/28/2007	Filing of Requests for Equitable Adjustment.	7/1/2002	7/1/2002	0	Breach of government contract
S.D.N.Y.	Peck, Andrew J. (M)	*In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179 (S.D.N.Y. 2007).	1/30/2007	Defendant sent out document preservation memoranda alerting employees.	3/13/2002	4/18/2002	36	Securities fraud
S.D.N.Y.	Ellis, Ronald L. (M)	*de Espana v. Am. Bureau of Shipping*, No. 03-Civ.3573, 2007 WL 210018 (S.D.N.Y. Jan. 25, 2007).	1/25/2007	Filing of Complaint.	5/16/2003	5/16/2003	0	Property damage
Bankr. D. Del.	Walrath, Mary F. (B)	*In re Quintus Corp.*, 353 B.R. 77 (Bankr. D. Del. 2006).	10/27/2006	Closing date of defendant's purchase of the debtor's assets.	4/11/2001	3/18/2004	1072	Bankruptcy

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N.D. Cal.	Patel, Marilyn Hall	*In re Napster Copyright Litig.*, 462 F. Supp. 2d 1060 (N.D. Cal. 2006).	10/25/2006	Defendant told by plaintiff that venture firm would be sued if they did not instantaneously comply with an injunction. Subsequent dismissal of suit against another investor in 7/2001 (one month before a litigation threatening letter to defendant) did not remove the requirement to preserve.	6/3/2000	8/1/2003	1154	Copyright infringement
S.D.N.Y.	Pitman, Henry (M)	*Quinby v. Westlb AG*, 245 F.R.D 94 (S.D.N.Y. 2006).	9/5/2006	Plaintiff informed direct supervisors of sexual harassment and retaliation.	10/1/2002	7/17/2003	289	Employment discrimination
M.D. La.	Noland, Christine (M)	*Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335 (M.D. La. 2006).	7/19/2006	Purchaser sent demand letter to seller.	11/1/2002	8/8/2003	280	Environmental action
E.D. Va.	Payne, Robert E.	*Samsung Elects. Co. Ltd. v. Rambus, Inc.*, 439 F. Supp. 2d 524 (E.D. Va. 2006); *vacated on other grounds by* 532 F.3d 1374 (Fed. Cir. 2008).	7/18/2006	Defendant met with law firm to discuss "Licensing and Litigation" strategy.	2/12/1998	6/17/2005	2682	Patent infringement
N.D. Ill.	Ashman, Martin (M)	*Krumwiede v. Brighton Assocs. L.L.C.*, No. 05-c-3003, 2006 WL 1308629 (N.D. Ill. May 8, 2006).	5/8/2006	Defendant served its Motion for Leave to File First Amended Counterclaim.	8/25/2005	8/25/2005	0	Breach of contract (employment agreement)

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S.D. Ohio	Dlott, Susan	*Hoffman v. CSX Transp., Inc.*, No. 1:04-CV-293, 2006 WL 38954 (S.D. Ohio Jan. 5, 2006).	1/5/2006	Plaintiff's counsel forwarded powder sample to a lab; Plaintiff alleged that that he had been injured when he inhaled the powder at issue.	9/1/2001	4/1/2004	943	Federal Employers' Liability Act claim
S.D.N.Y.	Scheindlin, Shira	*Anderson v. Sotheby's, Inc. Severance Plan*, No. 04 Civ. 8189, 2005 WL 2583715 (S.D.N.Y. Oct. 11, 2005).	10/11/2005	Administrator defendant claimed work product doctrine regarding notes of interview. The Court held that the notes were not afforded work product protection because they were prepared "in the ordinary course." District court held that because Administrator claimed that it reasonably anticipated the litigation (in trying to invoke work product protection) that the duty to preserve arose at that point.	7/6/2004	10/18/2004	104	Breach of contract (employment agreement)
S.D.N.Y.	Francis, IV, James C. (M)	*Chan v. Triple 8 Palace, Inc.*, No. 03-CIV-6048, 2005 WL 1925579 (S.D.N.Y. Aug. 11, 2005).	8/11/2005	Filing of Complaint.	8/11/2003	8/11/2003	0	FLSA
S.D. W.Va.	Copenhaver, John Thomas	*Nichols v. Steelcase, Inc.*, No. 204-0434, 2005 WL 1862422 (S.D. W.Va. Aug. 4, 2005).	8/4/2005	Date of chair collapsing incident upon which the lawsuit was predicated.	9/20/2002	3/23/2004	550	Products liability action

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D. Md.	Davis, Andre	*Broccoli v. Echostar Commc'ns Corp.*, 229 F.R.D. 506 (D. Md. 2005).	8/4/2005	Employee informed direct supervisors of sexual harrassment and retailiation.	1/1/2001	2/1/2002	396	Employment discrimination
C.D. Cal.	Fischer, Dale Susan	*Housing Rights Ctr. v. Sterling*, No. CV 03-859, 2005 WL 3320739 (C.D. Cal. Mar. 2, 2005).	3/2/2005	Plaintiff sent demand letter to defendant.	12/1/2002	2/1/2003	62	Housing discrimination action in violation of FHA.
S.D.N.Y	Francis, IV, James C. (M)	*Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162 (S.D.N.Y. 2004).	8/27/2004	Filing of Complaint.	7/1/2000	7/1/2000	0	Patent infringement
Tex. App.	DeVasto, Diane (S-A)	*Hopper v. Swann*, No. 12-02-00269-CV, 2004 WL 948526 (Tex. App. Apr. 30, 2004).	4/30/2004	Filing of Complaint.	10/17/2000	10/17/2000	0	Negligence
S.D.N.Y.	Scheindlin, Shira	*Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2005) ("*Zubulake IV*").	10/22/2003	Relevant employees of defendant anticipated litigation, as evidenced by key employees sending emails titled "UBS Attorney Client Privilege," even if no attorneys were included on the email.	4/1/2001	2/14/2002	319	Employment discrimination
E.D. Pa.	Hutton, Herbert J.	*Bowman v. Am. Med. Sys., Inc.*, No. 96-7871, 1998 WL 721079 (E.D. Pa. Oct. 9, 1998).	10/9/1998	Prosthesis at issue surgically removed.	6/5/1995	5/31/1996	361	Products liability action

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N.D. Okla.	Joyner, Sam A. (M)	*U.S. v. Koch Indus., Inc.*, 197 F.R.D. 463 (N.D. Okla. 1998).	8/6/1998	General counsel for defendant personally heard deponent William Koch state his intention to have the government investigate defendant's oil measurement practices.	11/1/1986	2/1/1988	457	False Claims Act
M.D. Pa.	Caldwell, William W.	*Howell v. Maytag*, 168 F.R.D. 502 (M.D. Pa. 1996).	9/5/1996	Expert's report concludes that a microwave caused the fire upon which the lawsuit was predicated.	6/17/1993	6/2/1995	715	Products liability