

**DISCOVERY ABOUT DISCOVERY:
DOES THE ATTORNEY-CLIENT PRIVILEGE PROTECT
ALL ATTORNEY-CLIENT COMMUNICATIONS
RELATING TO THE PRESERVATION OF
POTENTIALLY RELEVANT INFORMATION?**

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* The opinions expressed herein are solely those of the authors and not necessarily of the organizations mentioned.

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I. INTRODUCTION

A. Overview

This article will examine when some attorney-client communications may be considered in connection with a spoliation claim based on an alleged breach of the duty to preserve information.¹ The steps taken by a client to fulfill the duty to preserve information, even if taken in response to privileged communications, have been held to be discoverable, although related attorney communications have not been routinely discoverable.² Where there is a preliminary showing of a breach of the duty to preserve information, at least some attorney-client implementation³

1. See *infra* Part V.

2. See *infra* Part III.

3. When “implement,” “implementation communications,” and other similar terms and phrases are used in this article, they refer to what was said and done in the course of issuing a litigation hold notice, interviewing records custodians, information technology personnel, key players, computer forensic experts, and generally monitoring the preservation process.

communications have not been protected by courts faced with the issue.⁴

The courts' decisions may be supported by a number of different theories, including: the communications are in furtherance of a common-law duty, and not for the purpose of seeking legal advice; under the crime, fraud, or tort exception to the privilege; under the theory that the communications are fact work product and disclosable pursuant to established work product rules; because they are put in issue by an "advice of counsel" defense; or, under the attorney "self-defense" doctrine.⁵ In short, there are two alternative paradigms. Under one, the communications are not privileged at all.⁶ Under the other, they are treated as exceptions to the privilege.⁷

Under the first rationale, because preservation communications are made pursuant to a duty imposed by law, they are not privileged communications seeking legal advice and absent a preliminary showing of breach of the duty to preserve, the attorney-client communications are wholly irrelevant to the claims, defenses, and subject-matter of the action, and therefore not discoverable.⁸ Under the second theory, attorney-client preservation communications are inherently privileged or work product; however, at least portions of them may become discoverable under either an exception to, or waiver of, those protections. The communications become relevant when there is a preliminary showing of a failure to preserve information that should have been preserved.⁹ Regardless of the rationale, it appears settled that, upon such a preliminary showing, some attorney-client communications become discoverable.¹⁰

The outer boundary of a reviewing court's inquiry into attorney-client preservation communications and analysis, however, remains to be determined. Courts may distinguish between legal advice related to preservation, on the one hand, and implementation communications, on the other, with the former remaining protected by the privilege in all but the most egregious circumstances, and the latter open to discovery upon a preliminary showing of breach of

4. See *infra* Part III.B–D.

5. See *infra* Part IV.B–D, V.

6. See *infra* Part V.C.

7. See discussion *infra* Part IV.C. Although the attorney-client privilege is separate and distinct from the work-product doctrine, on occasion the two are combined under the umbrella of "privilege" for simplicity.

8. See *infra* Part IV.E.

9. See *infra* Part IV.A.

10. See *infra* Part IV.

duty.¹¹ It is not clear whether legal analysis and advice concerning preservation decisions, and client's specific requests for advice, will be discoverable in some instances.¹²

B. Factual Hypothetical

Assume the following: ABC Corporation reasonably anticipates litigation with XYZ Corporation related to a June 2003 contract. Eight weeks after litigation is anticipated, ABC's attorney sends key employees a "privileged and confidential" litigation hold letter directing preservation of all "relevant evidence." A month later, ABC's attorney speaks with some ABC employees, but not with others. ABC's president asks ABC's attorney to define the outer contours of the duty to preserve, and they discuss how those principles are applicable to ABC in this instance. ABC's counsel retains a non-testifying forensic computer expert and, at counsel's direction, the expert and ABC employees preserve some electronically stored information (ESI) and paper documents, but—in conjunction with ABC's attorneys—determine that other ESI, e.g., certain back up tapes and deleted data, need not be preserved. This latter decision is based on counsel's analysis of case law defining the duty to preserve back up tapes and data that are not reasonably accessible because of undue burden or cost. A lawsuit is subsequently commenced against ABC. In discovery, XYZ asks ABC employees to describe their preservation efforts, and XYZ establishes that ABC failed to preserve unique information that was relevant and allegedly subject to the duty to preserve. XYZ then moves for sanctions.

In resolving that motion, what facts may the reviewing court consider? Is ABC's litigation hold letter discoverable, in part or in its entirety? Can XYZ properly discover what steps ABC employees and experts took to fulfill the duty to preserve, given the fact that those steps were taken on advice and instruction of counsel? Are some or all of the details of ABC's attorney's communications with ABC's key players open for deposition inquiry? Is counsel's analysis and application of case law defining the duty to preserve back up tapes open to discovery? Is the legal advice given by ABC's counsel to ABC's president discoverable? And, if ABC believes that it fulfilled its duty to preserve under the circumstances presented, can

11. See *infra* Part IV.B.

12. See *infra* Part VI.

ABC voluntarily present evidence of its due diligence, without waiving its attorney-client privilege?

This article examines the answers that courts have given to some of these questions and the way the rulings offer counsel and their clients guidance on what to expect in the event that an opposing party questions their compliance with the duty to preserve relevant information. It does so in the context that “lawyers must understand that information, as a cultural and technological edifice, has profoundly and irrevocably changed. There has been a civilization-wide morph, or pulse, or one might say that information has evolved.”¹³ This has resulted in a “need to re-engineer” the litigation process.¹⁴

C. Background

When a prospective party reasonably anticipates litigation, that party has a duty to preserve potentially relevant material.¹⁵ The duty to preserve is one of the fundamental common-law foundations of the adversarial system of justice. In today’s litigation environment, it is counsel who most often notify clients of the duty to preserve and oversee the preservation process, draft litigation hold notices, interview records custodians, key persons, and information technology personnel, and take other steps to ensure that the duty to preserve is not breached.¹⁶

The attorney-client privilege and work product protection are likewise fundamental underpinnings of the adversarial system of justice. The attorney-client privilege exists to encourage full and frank communication between counsel and client.¹⁷ The work-

13. George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, ¶ 1 (2007), <http://law.richmond.edu/jolt/v13i3/article10.pdf>.

14. *Id.* ¶ 26.

15. *See, e.g.*, *Mosel Vitelic Corp. v. Micron Tech., Inc.*, 162 F. Supp. 2d 307, 310–11 (D. Del. 2000) (“A party, who is aware that evidence might be relevant to a pending or future litigation, has an affirmative duty to preserve this material. This duty extends to that party’s attorneys.” (citations omitted)); *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443, 1446 (C.D. Cal. 1984) (holding that GNC had a duty to preserve relevant documents at inception of litigation).

16. The contours of the duty to preserve are discussed in a related article in this issue. *See* Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381 (2008).

17. *E.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (“Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration

product doctrine recognizes that, in the adversarial system of justice, “[p]roper preparation of a client’s case demands that [counsel] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.”¹⁸ Under Federal Rule of Civil Procedure 26(b)(3), discovery of an opposing party’s work product is permitted only upon a showing “that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”¹⁹ When discovery of fact work product is permitted, courts are enjoined to “protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney.”²⁰

In the absence of a breach of the duty to preserve, courts have not hesitated to hold that attorney-client preservation communications are not discoverable; however, faced with a preliminary showing of a breach of that duty, courts have required disclosure of some attorney-client communications implementing the duty to preserve.²¹ For example, attorneys and clients have been deposed or otherwise required to disclose their actions in preserving—or failing to preserve—relevant material.²² What do these decisions mean for counsel and their clients when faced with actual or potential litigation? Can they move forward with confidence that their implementation communications will be protected from disclosure? Or must they now assume that, at least with respect to the preservation and production of discoverable materials, some, or perhaps all, of their communications are themselves subject to discovery?

of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.”); *Fisher v. United States*, 425 U.S. 391, 403–04 (1976) (“Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged. The purpose of the privilege is to encourage clients to make full disclosure to their attorneys.” (citations omitted)).

18. *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947).

19. FED. R. CIV. P. 26(b)(3).

20. *Id.*

21. *See, e.g.,* *Peskoff v. Faber*, 244 F.R.D. 54 (D.D.C. 2007); *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422 (S.D.N.Y. 2004); *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212 (S.D.N.Y. 2003); *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257 (2007).

22. *See, e.g.,* *Capellupo v. FMC Corp.*, 126 F.R.D. 545 (D. Minn. 1989).

D. *Scope of This Inquiry*

This article examines recent decisions holding that a client's preservation actions are discoverable, and that some attorney-client communications are discoverable and may be considered in connection with a spoliation claim based on a preliminary showing of a breach of the duty to preserve information.²³ To set the framework, the article begins with the principle that, absent a showing of breach of duty, attorneys' implementation communications with their clients, and the steps taken by attorneys to preserve relevant materials, are not discoverable; however, the steps a client takes to implement that duty are discoverable.²⁴ This article then turns to those decisions that have permitted discovery of attorney-client implementation communications, in order to identify under what circumstances the discovery was permitted and the rationales for permitting that discovery.²⁵ Finally, the outer boundaries of that type of discovery will be explored.²⁶

II. THE PRIVILEGE, WORK PRODUCT, AND THE DUTY TO PRESERVE

A. *The Attorney-Client Privilege Protects Communications Related to Legal Advice*

It is generally assumed that confidential communications involving legal advice between an attorney and client are privileged.²⁷ This privilege is firmly grounded in public policy,²⁸ and the privilege is so important to the functioning of the adversarial system, that Congress currently is considering legislation that will prohibit government agencies from making waiver of the privilege a "precondition" for

23. See *infra* Parts III-IV.

24. See *infra* Part IV.A-B.

25. See *infra* Part V.

26. See *infra* Part VI.

27. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." (citing 8 JOHN HENRY WIGMORE, TREATISE ON EVIDENCE § 2290 (McNaughton rev. vol. 1961))).

28. *Id.* at 389; *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (noting the privilege is based on the "necessity, in the interest . . . of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"); see also *Ehrlich v. Grove*, 396 Md. 550, 576 (2007) (stating that the attorney-client privilege is a "cornerstone" of the legal system).

lenient treatment by government prosecutors in criminal cases.²⁹ Furthermore, a proposed amendment to the Federal Rules of Evidence is designed to ensure that the inadvertent production of privileged material in litigation will not cause a waiver of the privilege.³⁰

Nevertheless, not all communications between counsel and client are privileged.³¹ In *Fisher v. United States*,³² for example, the Supreme Court wrote that the privilege “protects only those disclosures necessary to obtain informed legal advice *which might not have been made absent the privilege.*”³³ For a communication to be privileged, it must be for the purpose of seeking or providing legal advice,³⁴ and it protects the client’s communication of information to

29. See Attorney-Client Privilege Protection Act of 2007, S. 186, H.R. 3013, 110th Cong. (2007); see generally Paul & Baron, *supra* note 13, at ¶ 61 (generally discussing pending legislation and Federal Rule of Evidence 502). The House Bill was recently approved by a two-thirds majority and the Senate Bill is pending before the Senate Judiciary Committee. See Library of Congress, Summary and Status of H.R. 3013, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR03013:@@@X> (last visited Mar. 5, 2008).

30. See Proposed FED. R. EVID. 502, available at http://www.uscourts.gov/rules/EV_502_Rev_Note.pdf. Maryland has amended its similar rule. See MD. R. 2-402; Court of Appeals of Maryland Rules Order, 158th Report, 11–22 (Dec. 4, 2007), available at <http://www.courts.state.md.us/rules/rodocs/ro158.pdf>.

31. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977) (“[T]he attorney must have been engaged or consulted by the client for the purpose of obtaining legal services or advice services or advice that a lawyer may perform or give in his capacity as a lawyer, not in some other capacity. A communication is not privileged simply because it is made by or to a person who happens to be a lawyer.”).

32. 425 U.S. 391 (1976).

33. *Id.* at 403 (emphasis added).

34. See *Upjohn Co. v. United States*, 449 U.S. 383, 394–95 (1981); *Meredith*, 572 F.2d at 601–02; *McCafferty’s, Inc. v. Bank of Glen Burnie*, 179 F.R.D. 163, 166 (D. Md. 1998); see also *Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 272 (E.D. Va. 2004) (“To meet its burden on the attorney-client privilege claim, [the claimant] must show . . . that: (1) the asserted holder of the privilege is or has sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.” (emphasis added)).

the lawyer for the purpose of obtaining that legal advice.³⁵ Thus, by extension, when the lawyer interviews client personnel and gathers information that is “part and parcel of legal advice given by the lawyer,”³⁶ those communications are privileged.³⁷

B. The Work Product Doctrine Protects Counsel’s Communications and Activities Undertaken Because of Litigation

The work-product doctrine has its origins in *Hickman v. Taylor*,³⁸ where the Supreme Court held that “lawyer” materials prepared in anticipation³⁹ of litigation should not be subject to discovery by the opposing party, stating:

[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.⁴⁰

However, the Supreme Court did not grant absolute protection for the “[w]ork product of [a] lawyer,” noting that relevant, nonprivileged facts could not be hidden by an attorney and that there could be circumstances under which an adversary could establish adequate reasons to justify intruding into that work product.⁴¹

In the federal courts, the work product protection is embodied in Federal Rule of Civil Procedure 26(b)(3), which distinguishes fact from opinion work product.⁴² Fact work product can be discoverable

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35. See, e.g., *Fed. Trade Comm’n. v. Glaxo Smith Kline*, 294 F.3d 141, 148 (D.C. Cir. 2002).
36. EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 244 (ABA 4th ed. 2004).
37. See, e.g., *Upjohn*, 449 U.S. at 390–91; *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir. 1996); see also *Prudential Ins. Co. v. Massaro*, No. CIV. A. 97-2022, 2000 WL 1176541, at *8 (D.N.J. Aug. 11, 2000) (enjoining in-house counsel from disclosing client confidences and privileged information, including the shredding of documents that led to an investigation of the client).
38. 329 U.S. 495 (1947).
39. The duty to preserve relevant materials is a duty that arises because of pending or anticipated litigation. The duty to preserve and the work-product doctrine share this common basis.
40. *Hickman*, 329 U.S. at 510–11.
41. *Id.* at 511–12.
42. Fed. R. Civ. P. 26(b)(3); see also *Hickman*, 329 U.S. at 511.

upon a showing of substantial need and that the same information cannot be obtained from another source without undue hardship.⁴³ Opinion work product, on the other hand, is almost always protected from disclosure.⁴⁴

C. *The Duty to Preserve Potentially Relevant Information Incorporates a Duty to Communicate*

In our adversary system, characterized by broad discovery in civil litigation, the duty to preserve relevant information is critical to the truth-finding function and the integrity of the judicial process.⁴⁵ As a result, parties have long had a common-law duty to preserve information relevant to the litigation.⁴⁶

The range and limit of the duty to preserve is addressed in many decisions, and is beyond the scope of this article.⁴⁷ The duty rests on

43. FED. R. CIV. P. 26(b)(3); e.g., *Maartin v. Armstrong World Indus., Inc.*, 172 F.R.D. 143, 150 (D.N.J. 1997).

44. *See Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 734 (4th Cir. 1974); *Trustmark Ins. Co. v. General & Cologne Life Re of Am.*, No. 00 C 1926, 2000 WL 1898518, at *3 (N.D. Ill. Dec. 20, 2000) (finding that protection of an attorney's opinion work product is almost absolute).

45. *See infra* notes 46–58 and accompanying text.

46. *See, e.g., Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001); *In re Sept. 11th Liab. Ins. Coverage Cases*, 243 F.R.D. 114, 125, 131 (S.D.N.Y. 2007) (“Discovery is run largely by attorneys, and the court and the judicial process depend upon honesty and fair dealing among attorneys. . . . Zurich, as the lead insurer on the case, and its attorneys, as lead counsel in the proceedings before me, owed the Court and the public better conduct than the conduct described herein”); *Thompson v. U.S. Dept. of Hous. & Urban Dev.*, 219 F.R.D. 93, 99–100 (D. Md. 2003); *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 286 (E.D. Va. 2001) (“Though the Fourth Circuit has not specifically spoken to the duty to preserve evidence . . . it is a necessary predicate of the controlling Fourth Circuit decisions that such a duty exists, because, without such an obligation, there would be no wrongdoing in destroying relevant documents.”); *Winters v. Textron, Inc.*, 187 F.R.D. 518, 520 (M.D. Pa. 1999) (“A duty to preserve evidence . . . arises when there is (1) pending or probable litigation involving the defendant; (2) knowledge of the existence or likelihood of litigation, (3) foreseeable prejudice to the other party if the evidence were to be discarded and (4) evidence relevant to the litigation.” (citation omitted)); Joseph Gallagher, *E-ethics: The Ethical Dimension of the Electronic Discovery Amendments to the Federal Rules of Civil Procedure*, 20 GEO. J. LEGAL ETHICS 613, 617–18 (2007) (“[T]his [duty to preserve] creates an affirmative duty on outside counsel to investigate the document retention policies of their clients during the earliest stages of representation. Indeed, lawyers who advise their clients on the creation of a document-retention policy, as well as in-house counsel charged with managing that policy, have an ethical obligation to do so in a way that does not obstruct justice.” (footnotes omitted)).

47. For a discussion of the scope of the duty to preserve, see Grimm et al., *supra* note 16.

both the attorney and the client.⁴⁸ The duty to preserve potentially relevant information includes, and is effectuated by, a reciprocal duty to communicate.⁴⁹ Counsel's duty to communicate with clients about the preservation of discoverable materials has been articulated by the American Bar Association,⁵⁰ and in a variety of court decisions.⁵¹ For example, in *Zubulake v. UBS Warburg LLC (Zubulake V)*,⁵² the court based its decision finding that there was a failure to preserve on "counsel's obligation to ensure that relevant information is preserved by giving clear instructions to the client to preserve such information and, perhaps more importantly, a client's obligation to heed those instructions,"⁵³ and enjoined counsel and clients "to communicate clearly and effectively with one another to ensure that litigation

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48. See, e.g., *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932, at *9 (S.D. Cal. Jan. 7, 2008), *vacated and remanded in part*, No. 05CV1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008); *Thompson v. Jiffy Lube Intern., Inc.*, 2007 WL 608343, at *5 (D. Kan. Feb. 22, 2007) (holding that, where counsel's computer crashed, counsel was ordered to submit affidavit); *Telecom Int'l Am., Ltd. v. AT&T Corp.*, 189 F.R.D. 76, 81 (S.D.N.Y. 1999) ("Once [a party is] on notice, the obligation to preserve evidence runs first to counsel, who then has a duty to advise and explain to the client its obligations to retain pertinent documents that may be relevant to the litigation."); Thomas Y. Allman, *Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments*, 13 RICH. J.L. & TECH. 9, ¶ 22 (2007), <http://law.richmond.edu/jolt/v13i3/article9.pdf> ("Some decisions imply that counsel owes an independent duty to a court to actively supervise a party's compliance with preservation obligations.") (citing, inter alia, *Zubulake V*, 229 F.R.D. 422, 435 (S.D.N.Y. 2004) ("[C]ounsel [both employed counsel and outside counsel] [are] responsible for coordinating her client's discovery efforts. In this case, counsel failed to properly oversee UBS in a number of important ways, both in terms of its duty to locate relevant information and its duty to preserve and timely produce that information." (alterations in original)); Gregory G. Wrobel, Andrew M. Gardner & Michael J. Waters, *Counsel Beware: Preventing Spoliation of Electronic Evidence in Antitrust Litigation*, 20 ANTITRUST 79, 80 (2006) ("[Other cases] do not address in the same depth the separate duty—if any—of counsel to locate and preserve relevant electronic information.")). Under appropriate circumstances, the duty may shift to the client, and it does not appear to be a non-delegable duty. *Zubulake V*, 229 F.R.D. at 425–26.
49. See *Zubulake V*, 229 F.R.D. at 424 ("The conduct of both counsel and client thus calls to mind the now-famous words of the prison captain in *Cool Hand Luke*: 'What we've got here is a failure to communicate.'" (citation omitted)).
50. ABA CIVIL DISCOVERY STANDARDS, No. 10 (August 2004) ("When a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents . . .").
51. See, e.g., *Zubulake V*, 229 F.R.D. 422; *Telecom Int'l*, 189 F.R.D. at 81.
52. 229 F.R.D. 422.
53. *Id.* at 424.

proceeds efficiently.”⁵⁴ The duty runs both ways, and clients have a duty to communicate with their attorneys. In *Wachtel v. Guardian Life Ins.*,⁵⁵ the court found that the defendants “violated the integrity of this [c]ourt’s judicial processes by: . . . (10) keeping even their own outside counsel . . . unaware of their e-mail procedures that resulted in widespread dereliction of their discovery obligations.”⁵⁶ Recently, in *Qualcomm Inc. v. Broadcom Corp.*,⁵⁷ the court noted:

For the current “good faith” discovery system to function in the electronic age, attorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents. Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search.⁵⁸

In short, the duty to preserve incorporates a duty to engage in effective attorney-client communication.

III. DISCOVERABILITY OF A CLIENT’S ACTIONS IMPLEMENTING THE DUTY TO PRESERVE

It is axiomatic that an opponent may routinely obtain discovery of a client’s actions taken to implement the duty to preserve information. As set forth below, this is no different than the traditional “paper

54. *Id.*

55. Nos. 01-4183 (FSH), 03-1801(FSH), 2007 WL 1752036 (D.N.J. June 18, 2007).

56. *Id.* at *8.

57. No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), *vacated and remanded in part*, No. 05CV1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008). In addition to addressing counsel’s duty to communicate to the client, *Qualcomm* also addressed the client’s duty to communicate with counsel:

Qualcomm also has not presented any evidence that outside counsel knew enough about Qualcomm’s organization and operation to identify all of the individuals whose computers should be searched and determine the most knowledgeable witness. And, more importantly, Qualcomm is a large corporation with an extensive legal staff; it clearly had the ability to identify the correct witnesses and determine the correct computers to search and search terms to use. Qualcomm just lacked the desire to do so.

Id. at *11 n.6.

58. *Id.* at *9.

discovery” paradigm of asking a deponent to describe his or her search for responsive paper documents.

It is of no moment that the paper or electronic search was conducted at the direction of counsel. Parties are permitted to inquire into an opponent’s efforts to preserve relevant information through interrogatories and in depositions directed to the opposing client.⁵⁹ In the ESI context, this is exemplified by *In re eBay Seller Antitrust Litigation*.⁶⁰

In *eBay*, the parties were locked in acrimonious “discovery about discovery,”⁶¹ in which the plaintiff demanded the production of defendant’s litigation hold notices (termed “document retention notices,” or DRNs, by eBay) in order to determine whether eBay had preserved relevant electronic information.⁶² eBay refused to produce the DRNs, claiming that they had been “drafted by in-house counsel in consultation with outside counsel and were expressly labeled as ‘Attorney-Client Privileged & Confidential’” and that they contained information “protected by either the privilege or work product doctrine with respect to counsel’s analysis of plaintiffs’ claims in this litigation.”⁶³ In response, the court ruled that:

eBay need not produce copies of the DRNs nor any information about matters contained therein that are privileged or constitute work product. Plaintiffs, however, are entitled to inquire into the *facts* as to what the employees receiving the DRNs have done in response; *i.e.*, what efforts they have undertaken to collect and preserve applicable information.⁶⁴

The court went on to define the appropriate boundaries for plaintiff’s Rule 30(b)(6) deposition inquiry into eBay’s steps to identify and preserve relevant evidence:

Although plaintiffs may not be entitled to probe into what exactly eBay’s employees were *told* by its attorneys, they are certainly entitled to know what eBay’s employees are

59. See, e.g., *In re Triton Energy Ltd. Sec. Litig.*, No. 5:98CV256, 2002 WL 32114464, at *3 (E.D. Tex. Mar. 7, 2002) (noting Triton’s witnesses testified in deposition that they had not been asked by Triton’s counsel to produce or preserve documents).

60. No. C 07-01882 JF (RS), 2007 WL 2852364 (N.D. Cal. Oct. 2, 2007); accord *Zubulake V*, 229 F.R.D 422 (S.D.N.Y. 2004).

61. *eBay*, 2007 WL 2852364, at *1 n.1.

62. *Id.* at *1.

63. *Id.* at *2.

64. *Id.* at *1.

doing with respect to collecting and preserving ESI. Furthermore, because it would neither be reasonable nor practical to require or even to permit plaintiffs to depose all 600 employees [who received the litigation hold notice], it is appropriate to permit plaintiffs to discover what those employees are *supposed* to be doing. Even though such inquiry may, indirectly, implicate communications from counsel to the employees, the focus can and should be on the *facts* of what eBay's document retention and collection policies are, rather than on any details of the [litigation hold letter]. . . . [P]laintiffs are entitled to know what kinds and categories of ESI eBay employees were instructed to preserve and collect, and what specific actions they were instructed to undertake to that end.⁶⁵

eBay stands for the proposition that the steps taken by a client to implement a litigation hold are discoverable, without any showing of need, loss of ESI, or otherwise. Quite simply, those steps are both relevant and unprivileged. As noted, however, the *eBay* court did not, on the facts presented, permit discovery of counsel's litigation hold instructions to the client.⁶⁶

IV. DISCOVERABILITY OF COUNSEL'S COMMUNICATIONS IN FULFILLING THE DUTY TO PRESERVE

Absent a preliminary showing of a failure to preserve that which should have been preserved, courts have generally refused to permit discovery of counsel's communications related to the preservation of information.⁶⁷ Courts have permitted such discovery, however, when confronted with a showing of a failure to preserve.⁶⁸

A. Absent a Preliminary Showing of a Failure to Preserve That Which Should Have Been Preserved, Courts Have Generally Refused to Permit Discovery of Counsel's Communications Related to the Preservation of Information

As noted above, in *eBay*, the court ruled that, "eBay need not produce copies of the DRNs [drafted by counsel] nor any information

65. *Id.* at *2 (footnote omitted).

66. *Id.*

67. *E.g.*, *Gibson v. Ford Motor Co.*, 510 F. Supp. 2d 1116, 1123–24 (N.D. Ga. 2007) (refusing discovery of litigation hold notice as work product); *see also* *India Brewing, Inc. v. Miller Brewing Co.*, 237 F.R.D. 190, 194 (E.D. Wis. 2006) (holding document retention policy irrelevant in absence of showing of failure to preserve).

68. *See, e.g.*, *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 551–53 (D. Minn. 1989).

about matters contained therein that are privileged or constitute work product.”⁶⁹ The court, however, left open the question of whether the litigation hold notice was protected by the privilege or work product doctrine.⁷⁰

In *Muro v. Target Corp.*,⁷¹ the court reached a similar conclusion. The court wrote:

Muro’s fifth objection is to the Magistrate Judge’s ruling that Target’s “litigation hold” notices are subject to the attorney-client privilege and to work product protection. But Muro makes no argument as to what error the Magistrate Judge made in classifying the notices as privileged, after conducting an *in camera* review of the documents, other than to say that she finds it “incredible” that the documents would contain privileged information. The court has examined the litigation hold notices *in camera*. Each seem to be communications of legal advice from corporate counsel to corporate employees regarding document preservation. As the litigation hold notices, on their face, appear to be privileged material, there is no basis for finding that the Magistrate Judge clearly erred, nor any need to address Muro’s argument that work product protection is overcome here by her showing of need.⁷²

Similarly, in *Gibson v. Ford Motor Co.*,⁷³ the court explained why litigation hold notices sent by an attorney to a client were not discoverable:

In the Court’s experience, these instructions are often, if not always, drafted by counsel, involve their work product, are often overly inclusive, and the documents they list do not necessarily bear a reasonable relationship to the issues in litigation. This is not a document relating to the Defendant’s business. Rather, the document relates exclusively to this litigation, was apparently created after this dispute arose, and exists for the sole purpose of assuring compliance with discovery that may be required in this

69. *eBay*, 2007 WL 2852364, at *1.

70. *Id.* at *2 n.3. (“Whether the privilege or work product protection would apply to instructions regarding document retention or collection is far from certain. In light of the conclusions reached in the remainder of this order, however, the Court need not decide that question at this time.”)

71. No. 04 C 6267, 2007 WL 3254463 (N.D. Ill. Nov. 2, 2007).

72. *Id.* at *9 (citations omitted).

73. 510 F. Supp. 2d 1116 (N.D. Ga. 2007).

litigation. Not only is the document likely to constitute attorney work-product, but its compelled production could dissuade other businesses from issuing such instructions in the event of litigation.⁷⁴

Other recent decisions recognize the protected status of litigation hold notices, including *Kingsway Financial Services, Inc. v. Price Waterhouse-Coopers LLP*,⁷⁵ *Turner v. Resort Condominiums International*,⁷⁶ and *Capitano v. Ford Motor Co.*⁷⁷ In these decisions, with greater or lesser analysis, courts declined requests to order that litigation hold notices be produced.⁷⁸ In summary, absent a showing of a breach of the duty to preserve, attorney-client preservation communications have not been discoverable and were held to be either privileged or work product.

B. Upon a Showing of a Breach of the Duty to Preserve, Some Attorney-Client Communications Relating to the Implementation of the Duty to Preserve Are Discoverable

Faced with a failure to preserve information that should have been preserved, courts have considered attorney-client communications in addressing spoliation issues. Preceding *Zubulake V*, Judge Shira Scheindlin issued a series of decisions addressing defendant UBS's

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74. *Id.* at 1123. It is noteworthy that in *Gibson*, unlike *Zubulake V*, 229 F.R.D 422, 426 (S.D.N.Y. 2004), the requesting party did not make a preliminary showing that ESI had not been preserved. *Gibson*, 510 F. Supp. at 1123.
75. No. 03 Civ. 5560 RMB HBP, 2006 WL 1520227, at *2 (S.D.N.Y. June 1, 2006) (denying motion to compel production of litigation hold notice and holding that failure to list the notice on privilege log did not waive the privilege).
76. No. 1:03-cv-2025-DFH-WTL, 2006 WL 1990379, at *7-8 (S.D. Ind. July 13, 2006) (denying motion to compel production of litigation hold notice which defendant claimed was privileged).
77. 831 N.Y.S.2d 687, 688-89 (N.Y. App. Div. 2007) (noting that “suspension orders” may lead to the production of admissible evidence and are, therefore, relevant” but holding that they “are privileged communications from attorney to client which relate to legal advice given by counsel to client and, as such, are protected as attorney-client privileged documents”).
78. The decision in *India Brewing, Inc. v. Miller Brewing Co.*, 237 F.R.D. 190 (E.D. Wis. 2006), presents an interesting comparison to the “litigation hold” cases. In *India Brewing*, the court held that, because there was no evidence of failure to preserve information, the responding party’s document retention policy was irrelevant and not discoverable. *Id.* at 192. It wrote that “IBI has failed to persuade the court that the document retention policy . . . is relevant to any claim or defense alleged in the pleadings. Thus, the motion to compel production of the document retention policy will be denied.” *Id.*

failure to preserve relevant ESI.⁷⁹ The detail with which the court considered the communications between UBS and its counsel is illustrated in the following passage:

Fully aware of their common law duty to preserve relevant evidence, UBS's in-house attorneys gave oral instructions in August 2001—immediately after Zubulake filed her EEOC charge—instructing employees not to destroy or delete material potentially relevant to Zubulake's claims, and in fact to segregate such material into separate files for the lawyers' eventual review. This warning pertained to both electronic and hard-copy files, but did *not* specifically pertain to so-called "backup tapes," maintained by UBS's information technology personnel. In particular, UBS's in-house counsel, Robert L. Salzberg, "advised relevant UBS employees to preserve and turn over to counsel all files, records or other written memoranda or documents concerning the allegations raised in the [EEOC] charge or any aspect of [Zubulake's] employment." Subsequently - but still in August 2001 - UBS's outside counsel met with a number of the key players in the litigation and reiterated Mr. Salzberg's instructions, reminding them to preserve relevant documents, "including e-mails." Salzberg reduced these instructions to writing in e-mails dated February 22, 2002 - immediately after Zubulake filed her complaint - and September 25, 2002. Finally, in August 2002, after Zubulake propounded a document request that specifically called for e-mails stored on backup tapes, UBS's outside counsel instructed UBS information technology personnel to stop recycling backup tapes. *Every* UBS employee mentioned in this Opinion (with the exception of Mike Davies) either personally spoke to UBS's outside counsel about the duty to preserve e-mails, or was a recipient of one of Salzberg's e-mails.⁸⁰

The *Zubulake V* court considered the fact that: UBS's "counsel instructed UBS's information technology personnel that backup tapes

79. *Zubulake v. UBS Warburg LLC (Zubulake I)*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg LLC (Zubulake II)*, 230 F.R.D. 290 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg LLC (Zubulake III)*, 216 F.R.D. 280 (S.D.N.Y. 2003); *Zubulake IV*, 220 F.R.D. 212 (S.D.N.Y. 2003).

80. *Zubulake V*, 229 F.R.D. 422, 425 (S.D.N.Y. 2004) (alterations in original) (footnotes omitted).

were also subject to the litigation hold;⁸¹ UBS's counsel "advised UBS's information technology personnel to locate and retain all existing backup tapes for employees identified by plaintiff;" and UBS's counsel "re-emphasized that directive and confirmed that these tapes continued to be preserved both orally and in writing on several subsequent occasions."⁸² The court referred to specific conversations between UBS's outside counsel and key UBS employees by date,⁸³ and reviewed other attorney-client communications in detail sufficient to permit it to conclude that there were "clear and repeated warnings of counsel."⁸⁴

The *Zubulake V* court did not stop there. It also considered what UBS's counsel did *not* say to UBS.⁸⁵ It noted that counsel "failed to request retained information from one key employee and to give the litigation hold instructions to another" and that counsel "failed to adequately communicate with another employee about . . . how she maintained her computer files," and "failed to safeguard backup tapes that might have contained some of the deleted e-mails."⁸⁶ And, finally, the court inferred the content of attorney-client communications from the production of materials based upon client conduct.⁸⁷

The *Zubulake V* court relied on several decisions in which attorney-client communications were considered in evaluating a party's preservation efforts. For example, the court cited *Keir v. UnumProvident Corp.*,⁸⁸ in which certain electronic records were

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81. *Id.* at 427. "In August 2002, after *Zubulake* specifically requested e-mail stored on backup tapes, UBS's outside counsel orally instructed UBS's information technology personnel to stop recycling backup tapes." *Zubulake IV*, 220 F.R.D. at 215.
 82. *Zubulake V*, 229 F.R.D. at 425 n.15 (citation omitted).
 83. *Id.* at 434-35.
 84. *Id.* at 426.
 85. *See id.* at 424.
 86. *Id.*
 87. *See id.* at 429 (discussing the witness's production of responsive e-mails shortly after the witness testified in deposition about the substance of her preservation-related communications with counsel).
 88. No. 02 Civ. 8781(DLC), 2003 WL 21997747 (S.D.N.Y. Aug. 22, 2003), *cited in Zubulake V*, 229 F.R.D. at 434. In addition to *Keir*, the *Zubulake V* court provides a brief overview of cases dealing with counsel's obligation to preserve evidence. *See, e.g., Zubulake V*, 229 F.R.D. at 433 n.80 (citing *Telecom Int'l Am., Ltd. v. AT&T Corp.*, 189 F.R.D. 76, 81 (S.D.N.Y. 1999) ("Once on notice [that evidence is relevant], the obligation to preserve evidence runs first to counsel, who then has a duty to advise and explain to the client its obligations to retain pertinent documents that may be relevant to the litigation.") (citing *Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co.*, 109 F.R.D. 12, 18 (D. Neb. 1983)); *id.* at 434 n.87 (citing *Metro.*

erased, triggering discovery about discovery.⁸⁹ In considering whether spoliation had occurred, the *Keir* court considered a series of attorney-client communications, including an email from the legal department to a UnumProvident employee,⁹⁰ an oral communication from a UnumProvident employee to the legal department,⁹¹ the law department's forwarding of a court order to corporate staff,⁹² and a conference call between counsel and staff.⁹³ The court ordered "UnumProvident . . . to provide . . . an affidavit from one or more witnesses of the defendants *or its counsel* who had firsthand knowledge" of facts pertinent to the loss.⁹⁴ At the court-ordered evidentiary hearing on the loss of the data, "UnumProvident invoked its attorney-client privilege to protect most of its communications concerning the issues addressed at the hearing."⁹⁵ The court was nonetheless able to ascertain that UnumProvident had failed to communicate specific preservation instructions to its agent, IBM, resulting in loss of the data.⁹⁶ Thus, in *Keir*, attorney-client implementation communications were explored; however, the court did not conduct a full-scale inquiry into areas covered by the privilege.

Zubulake V and *Keir* do not stand alone. For example, in *Cache La Poudre Feeds, Inc. v. Land O'Lakes*,⁹⁷ the court considered without comment the communications and actions of counsel:

Opera Ass'n. v. Local 100, Hotel Employees & Rest. Employees Int'l Union, 212 F.R.D. 178, 222 (S.D.N.Y. 2003) (ordering default judgment against defendant as a discovery sanction because "counsel (1) never gave adequate instructions to their clients about the clients' overall discovery obligations, [including] what constitutes a 'document' . . . ; (2) knew the Union to have no document retention or filing systems and yet never implemented a systematic procedure for document production or for retention of documents, including electronic documents; (3) delegated document production to a layperson who . . . was not instructed by counsel[] that a document included a draft or other nonidentical copy, a computer file and an e-mail; . . . and (5) . . . failed to ask important witnesses for documents until the night before their depositions and, instead, made repeated, baseless representations that all documents had been produced.")).

89. *Keir*, 2003 WL 21997747, at *1.

90. *Id.* at *6.

91. *Id.*

92. *Id.* at *7.

93. *Id.* at *8.

94. *Id.* at *10 (emphasis added).

95. *Id.* at *11 n.3.

96. *See id.* at *5-6.

97. 244 F.R.D. 614 (D. Colo. 2007).

In this case, Land O'Lakes's General Counsel and retained counsel failed in many respects to discharge their obligations to coordinate and oversee discovery. Admittedly, in-house counsel established a litigation hold shortly after the lawsuit commenced and communicated that fact to Land O'Lakes employees who were believed to possess relevant materials. However, by his own admission, Land O'Lakes' General Counsel took no independent action to verify the completeness of the employees' document production. As [general counsel] explained, he simply assumed that the materials he received were complete and the product of a thorough search. While [general counsel] presumed that e-mails generated by former employees would be located on shared computer drives utilized by current employees, he made no effort to verify that assumption. Without validating the accuracy and completeness of its discovery production, Land O'Lakes continued its routine practice of wiping clean the computer hard drives for former employees. Under the circumstances and without some showing of a reasonable inquiry, it is difficult to understand how Defendants' retained counsel could legitimately claim on July 7, 2005 that Land O'Lakes had "made every effort to produce all documentation and provide all relevant information."⁹⁸

These problems persuaded the court to authorize a deposition of Land O'Lakes's counsel: "I permitted Plaintiff to take a Rule 30(b)(6) deposition to explore the procedures Land O'Lakes took to identify, preserve and produce . . . responsive documents. Mr. Janzen [the attorney] testified that he instructed employees to produce all . . . documents responsive to discovery requests served in the PROFILE litigation."⁹⁹

In reviewing the evidence, the court noted that "Mr. Janzen [the attorney] did not have a full understanding of his company's computer systems or the process for creating computer back-up tapes,"¹⁰⁰ and that "Mr. Janzen conceded that no attempt was made to verify whether anyone actually reviewed the [company] website for responsive materials."¹⁰¹ Thus, the court considered counsel's instructions to his client's employees, and whether counsel had a

98. *Id.* at 630 (citation omitted).

99. *Id.* at 634.

100. *Id.* at 628.

101. *Id.* at 632.

“full understanding” of his client’s computer systems.¹⁰² As in *Zubulake V*, the court’s rationale for requiring disclosure of attorney-client communications relating to the duty to preserve appears to rest on the presumption that counsel had a duty to establish a litigation hold and oversee discovery.¹⁰³

Similarly, in *United Medical Supply Co. v. United States*,¹⁰⁴ the U.S. Court of Federal Claims, faced with the government’s inadequate document retention and undisputed destruction of documents in violation of the duty to preserve,¹⁰⁵ engaged in a comprehensive examination of the preservation communications between the two government attorneys responsible for identifying and preserving relevant materials.¹⁰⁶ It then closely analyzed discussions between another government attorney, Mr. Chadwick, and a government paralegal, Mr. Brown, about “collecting responsive documents from all the facilities involved in this matter,” and secured the affidavit testimony of Mr. Chadwick that he had instructed Mr. Brown “to gather and produce all available records of the medical treatment facilities relating to alleged diverted purchases of medical and surgical supplies.”¹⁰⁷ Faced with multiple preservation failures, the court wrote:

In light of these serious allegations, . . . the court ordered defendant to file two additional affidavits: one by Mr. Chadwick and the other by Mr. Brown, detailing their conversations regarding Mr. Brown’s search for documents. The court also ordered defendant to file copies of any general notices sent, either in paper or electronic form, by defendant to all affected [medical treatment facilities] requesting or relating to the preservation of relevant documents.¹⁰⁸

In short, after being presented with a breach of the duty to preserve, the court probed attorney-client communications and attorney-paralegal discussions, and demanded production of the government’s

102. *Id.* at 634.

103. *Id.* at 629–30.

104. 77 Fed. Cl. 257 (2007).

105. *Id.* at 264, 273–74.

106. *Id.* at 260.

107. *Id.* at 260–61.

108. *Id.* at 262.

litigation hold notices, even though the failure to preserve was not intentional, but a result of mere negligence.¹⁰⁹

These decisions are in accord with Guideline No. 9 of the *Sedona Conference Commentary on Legal Holds*, which notes that a legal hold policy and the process of implementation of that policy “may be subject to scrutiny by the opposing party and review by the court.”¹¹⁰ The *Sedona Conference Commentary* reflects a growing trend in litigation where one party alleges that another party has failed to satisfy its duty to preserve.¹¹¹ The *Sedona Conference Commentary* to Guideline No. 9 advises that:

Considering issues regarding work product and attorney-client privilege, the [litigation hold] documentation need not disclose strategy or legal analysis. However, sufficient documentation should be included to demonstrate to opposing parties and the court that the legal hold was implemented in a reasonable, consistent and good faith manner *should there be a need to defend the process*.¹¹²

The *Commentary* goes on to note:

While it may never be necessary to disclose this [litigation hold] information, or disclosure may be made only to the court *in camera* to preserve privileged legal advice and work product information, the availability of documentation [of creation and implementation of the litigation hold] will preserve the option of the party to disclose the information in the event a challenge to the preservation efforts is raised.¹¹³

In short, when there is a need to defend the preservation process, the Sedona litigation hold guidelines contemplate that courts may inquire into implementation of the legal hold and that the inquiry may

109. *Id.* at 272–74.

110. THE SEDONA CONFERENCE WORKING GROUP ON ELECTRONIC DOCUMENT RETENTION & PRODUCTION, THE SEDONA CONFERENCE COMMENTARY ON LEGAL HOLDS: THE TRIGGER AND THE PROCESS 4 guideline 9 (draft ed. 2007), available at http://www.thosedonaconference.org/content/miscFiles/Legal_holds.pdf [hereinafter LEGAL HOLDS]. Guideline No. 5 of the *Sedona Conference Commentary on Legal Holds* discusses judicial evaluation of “an organization’s legal hold decision.” See *id.* at 10.

111. See *id.* at 5–7, 15.

112. *Id.* at 15 (emphasis added).

113. *Id.* at 16.

require the disclosure of some attorney-client communications.¹¹⁴ The Sedona guidelines suggest that parties and their counsel should not include legal strategy or legal advice in the legal hold notice, so as to ensure continued protection for that information.¹¹⁵

In the Sedona guidelines, and in each of these and many other cases,¹¹⁶ when faced with evidence that a party had failed to preserve relevant ESI, courts considered some attorney-client communications

114. *See id.* at 15–16.

115. *Id.*

116. *Id.*; *see, e.g.*, *Peskoff v. Faber*, 244 F.R.D. 54, 55 (D.D.C. 2007) (“In response to my order, Faber’s counsel submitted an affidavit that described the previously conducted search for emails.”); *In re* Sept. 11th Liab. Ins. Coverage Cases, 243 F.R.D. 114, 117, 120 (S.D.N.Y. 2007) (“[Plaintiffs] allege that the positions that Zurich took in its pleadings, motions, and other papers were objectively unreasonable, in violation of Rule 11, and that Zurich produced certain documents much later than they were required to produce the documents, and destroyed other documents, in violation of Rule 37. These allegations require the Court to consider what Zurich and its lawyers knew, when they knew it, and whether such knowledge rendered their pleadings, motions, and conduct during discovery subject to sanctions. . . . On January 7, 2002, Thomas W. Brunner, a partner at the law firm of Wiley Rein LLP, then known as Wiley Rein & Fielding LLP, who became the lead lawyer for the insurance companies in the case before me, met with primary liability and excess liability underwriters and instructed that ‘all communications relating to [the] situation should be preserved, including communications that would be discarded in the ordinary course of business.’” (citation omitted)); *Samsung Elecs. Co. v. Rambus, Inc.*, 439 F. Supp. 2d 524, 545 (E.D. Va. 2006) (“To help accomplish these corporate objectives, Karp, in January 1998, telephoned Diane Savage, a partner at the law firm Cooley Godward. Karp told Savage that ‘he was working at Rambus, and that he was looking for some litigation—somebody to provide him with litigation assistance.’ In response to that request, Savage asked Dan Johnson, a litigation partner at Cooley Godward, to meet with Karp.”); *Danis v. USN Communications, Inc.*, No. 98 C 7482, 2000 WL 1694325, at *13–14, *39–40 (N.D. Ill. Oct. 23, 2000) (considering statements by outside attorneys to board and failure of in-house attorney to take certain actions); *School-Link Techs., Inc. v. Applied Res., Inc.*, No. 05-2088-JWL, 2007 WL 677647, at *4–5 (D. Kan. Feb. 28, 2007) (considering deposition testimony that defendant’s “key player” employee was never contacted by counsel or instructed to preserve information, and considering affidavit that defense counsel instructed defendant to preserve and gather documents, resulting in collection of more than 7,500 pages); *cf. Google, Inc. v. Am. Blind & Wallpaper Factory, Inc.*, No. C 03-5340 JF(RS), 2007 WL 1848665, at *2, n.4 (N.D. Cal. June 27, 2007) (“The Flynn and Charno declarations also both state that they received such [preservation] instructions from American Blind’s counsel. The inclusion of such statements is curious given the Court’s express instruction that the declarants could and should state what they did [to preserve evidence] without disclosing communications with counsel.” (emphasis omitted)).

in resolving whether the duty to preserve had been violated.¹¹⁷ In each of these cases, the courts appear to have limited their inquiry to consideration of attorney-client communications focused on the implementation of the duty to preserve and not on legal advice or litigation strategy.¹¹⁸ The courts, however, generally did not provide the rationale for their consideration of attorney-client communications.¹¹⁹

C. *One Justification for Considering Attorney-Client Communications When There Has Been a Breach of the Duty to Preserve is the Crime, Fraud, or Tort Exception to the Privilege*

The crime, fraud, or tort exception¹²⁰ to the privilege will abrogate claims of privilege where the client consulted with counsel in order to commit a crime, fraud, or tort, and the challenged communications or attorney work product were “in furtherance” of that alleged crime or fraud.¹²¹ Courts also have applied the crime, fraud, or tort exception where counsel committed fraud on the court by engaging in a cover up of the client’s prior misconduct and document destruction.¹²²

117. LEGAL HOLDS, *supra* note 110, at 15–16; Board of Regents of Univ. of Neb. v. BASF Corp., No. 4:04-CV-3356, 2007 WL 3342423, at *2, *4 (D. Neb. Nov. 5, 2007) (considering affidavit of counsel); Thompson v. Jiffy Lube Intern., Inc., No. 05-1203-WEB, 2007 WL 608343, at *5 (D. Kan. Feb. 22, 2007) (covering deposition of counsel); Thompson v. HUD, 219 F.R.D. 93, 104 (D. Md. 2003) (noting failure of counsel to request preservation).

118. LEGAL HOLDS, *supra* note 110, at 15–16.

119. *Id.*

120. The exception is sometimes referred to as the crime-fraud exception and sometimes as the “crime, fraud or tort” exception because some courts will apply the exception to attorney-client communications in furtherance of a tort. *See, e.g., In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979) (holding that if FMC made false statements to the EPA after having consulted with counsel, the crime-fraud exception would be applied to counsel’s work product); *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1221–22 (4th Cir. 1976); *Bertho v. Kan. Farm Bureau Mut. Ins. Co., Inc.*, 205 F.R.D. 586, 589 (D. Kan. 2002) (noting that Kansas statutorily defines the exception to include torts).

121. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 (2000); Theodore L. Banks, Leslie Wharton, Michael R. Geske, Cheryl G. Ragsdale, Erik D. Nadolink & Charles R. Wall, *Attorney-Client Privilege and Attorney Work Product Protections*, in ASSOCIATION OF CORPORATE COUNSEL, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 33-153 (Robert L. Haig, ed., West 2007).

122. *In re Sealed Case*, 754 F.2d 395, 402 (D.C. Cir. 1985). In this case, the government alleged that the defendant engaged in document destruction and misrepresentations that constituted fraud on the court. The D.C. Circuit held that client communications with counsel about past misconduct would be protected, but that communications that

Recently, in *In re Grand Jury Investigation*,¹²³ the court held that certain attorney-client communications fell within the crime-fraud exception where the client used counsel's legal advice to destroy electronic information.¹²⁴ The court stated:

If, with knowledge of the Government's interest in retrieving any remaining emails, Jane Doe continued to receive emails that were arguably responsive to the subpoena and failed to use her position as an executive of the Organization to direct that all email deletions stop immediately, she may be viewed as furthering the obstruction of the grand jury's investigation or the obstruction of justice. . . . In any event, if Jane Doe learned of the Government's interest in certain documents from her conversation with Attorney on January 20, 2005 and subsequently acquiesced in the deletion or destruction of those documents, the second prong of the crime-fraud exception would be satisfied.¹²⁵

The court's reasoning here is significant because it demonstrates that the crime-fraud exception can be used to abrogate the privilege even when counsel advised the client to fulfill its duty to preserve.¹²⁶ In this case, because the government was able to show consultation with the attorney, and a subsequent improper deletion of email, the

were part of a cover-up would be subject to the crime-fraud exception. *Id.* at 398, 402.

123. 445 F.3d 266 (3d Cir. 2006), *cert. denied*, Doe v. United States, 127 S. Ct. 538 (2006).

124. *Id.* at 278; *see also* Allman, *supra* note 48, at 13, ¶ 23 ("Conversations about preservation obligations are not necessarily privileged when criminal grand jury investigations involving potential criminal obstruction of justice are involved." (citing *In re Grand Jury Investigation*, 445 F.3d at 269)).

125. *In re Grand Jury Investigation*, 445 F.3d at 279.

126. Application of the crime-fraud exception has never required knowing participation by the attorney in the client's crime or fraud. The only requirement is that counsel's work or advice be used by the client to engage in wrongdoing. *See, e.g.*, *Wachtel v. Guardian Life*, Nos. 01-4183 (FSH), 03-1801(FSH), 2007 WL 1752036, at *8 (D.N.J. June 18, 2007) ("The Health Net Defendants have violated the integrity of this Court's judicial processes by . . . keeping even their own outside counsel . . . unaware of their e-mail procedures that resulted in widespread dereliction of their discovery obligations."); *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 103 (D.N.J. 2006); *Samsung Elecs. Co. v. Rambus, Inc.*, 439 F. Supp. 2d 524, 545 (E.D. Va. 2006).

Third Circuit affirmed an order enforcing the subpoena for attorney-client communications.¹²⁷

In *Rambus v. Infineon Technologies AG*,¹²⁸ the court applied the crime, fraud, or tort exception to the destruction of ESI in a civil case.¹²⁹ The court held “that the crime/fraud exception extends to materials or communication created for planning, or in furtherance of, spoliation.”¹³⁰ Rambus destroyed relevant materials at a time when it had a duty to preserve the evidence.¹³¹ Rambus organized a “shred day” and destroyed 20,000 pounds of documents.¹³² In resolving the resulting dispute over Rambus’ duty to preserve, the court considered attorney-client communications such as those of Rambus’ former outside patent prosecution counsel who “testified that he destroyed some documents, pursuant to orders from Rambus, just before Rambus instituted this litigation in 2000 but before Rambus sent a letter to Infineon accusing it of infringement,”¹³³ and those of one of Rambus’ in-house attorneys who “testified that one of the understood reasons behind Shred Day was that ‘some of that stuff is discoverable.’”¹³⁴ On these facts, the court found: “It is self-evident . . . that any communication between lawyer and client respecting spoliation is fundamentally inconsistent with the asserted principles behind the recognition of the attorney-client privilege, namely, ‘observance of law’ or the ‘administration of justice.’”¹³⁵ In a subsequent decision involving Rambus, *Samsung Electronics Co. v. Rambus*,¹³⁶ the trial judge who authored *Rambus v. Infineon*

127. *In re Grand Jury Investigation*, 445 F.3d at 280; *cf.* *Tigard Sportsurfaces, LLC v. Syntennico, Inc.*, No. CIV. 98-1359-JE, 2000 WL 284189, at *4 (D. Or. Mar. 10, 2000) (denying application of crime-fraud exception to abrogate privilege where client erased tapes after consultation with counsel).

128. 220 F.R.D. 264 (E.D. Va. 2004).

129. *Id.* at 279.

130. *Id.* at 283; *accord Wachtel v. Guardian Life*, 2007 WL 1752036, at *2 (citing *Rambus v. Infineon*, 220 F.R.D. at 283); *Wachtel v. Health Net*, 239 F.R.D. at 103 (noting that, “when outside counsel asked employees to search for emails in response to Plaintiffs’ document requests and Court Orders, that counsel did not know from Health Net that these employees could not access ‘historic’ e-mail beyond the most current three month period.”); PAUL R. RICE, ELECTRONIC EVIDENCE: LAW AND PRACTICE 123 (ABA 2005) (“Developing case law supports the application of the crime/fraud exception.”).

131. *Rambus v. Infineon*, 220 F.R.D. at 280.

132. *Id.* at 284.

133. *Id.*

134. *Id.* at 285.

135. *Id.* at 284.

136. 439 F. Supp. 2d 524 (E.D. Va. 2006).

Technologies AG, noted that the attorney-client and work product privileges were pierced in *Infineon*.¹³⁷ *Rambus v. Infineon* was squarely grounded on the crime, fraud, or tort exception to the privilege.¹³⁸

Other courts have applied the crime, fraud, or tort exception where counsel's advice or work product is used to destroy relevant evidence or otherwise "undermines the adversary system itself."¹³⁹ In *Capellupo v. FMC Corp.*,¹⁴⁰ the court was faced with a situation where attorneys had directed destruction of evidence after the duty to preserve had arisen.¹⁴¹ In resolving the discovery dispute, attorneys were deposed, their calendar entries were entered into evidence, and their thoughts explored.¹⁴²

Although the crime, fraud, or tort exception may provide justification for permitting discovery of attorney-client preservation communications in the context of a failure to preserve, that exception is not the only one that may be applicable nor does it appear to be the vehicle employed in decisions such as *Zubulake V*. Obviously, each case turns on its own unique facts.

D. Where There Has Been a Failure to Preserve, Attorney-Client Communications May Be Considered if They Are Placed "In Issue" by the Client, if the Client Waives Any Privilege, or if There Are Allegations That Trigger the Attorney Self-Defense Doctrine

In addition to the crime-fraud exception to the privilege, attorney-client communications implementing the duty to preserve relevant material may also become discoverable under a number of waiver doctrines. For example, by putting counsel's actions and advice "in issue," the client waives any privilege or work product protection it would otherwise have for those communications.¹⁴³ If, in the

137. *Id.* at 549 n.20.

138. *See id.* at 531–36, 539 (citing *Rambus v. Infineon*, 222 F.R.D. at 287).

139. *Madanes v. Madanes*, 199 F.R.D. 135, 149 (S.D.N.Y. 2001); *see In re Sealed Case*, 676 F.2d 793, 812 (D.C. Cir. 1982); *Wachtel v. Guardian Life Ins.*, No. 01-4183, 2007 WL 1752036, at *7 (D.N.J. June 18, 2007) (finding prima facie support for *in camera* review of privileged materials where counsel and client failed to comply with discovery orders).

140. 126 F.R.D. 545 (D. Minn. 1989).

141. *See id.* at 546–47, 550.

142. *See id.* at 547–50.

143. *See, e.g., Rambus v. Infineon*, 220 F.R.D. at 288–89 (holding that disclosure of a document retention policy and "some of the reasons for adopting [that] policy" in defending against spoliation and crime-fraud allegations put at issue and waived all

opening hypothetical, ABC were to defend against XYZ's motion based on its counsel's analysis of the duty to preserve backup tapes, that defense would place counsel's advice "in issue."

A client could knowingly chose to waive any privilege. ABC, for example, might feel that its preservation actions were proper and voluntarily disclose them to attempt to defeat XYZ's sanctions motion. Similarly, a party may inadvertently waive privilege and work product protection for counsel's involvement in the preservation process, if and to the extent the party claims that its preservation efforts were adequate as a defense to claims of spoliation.¹⁴⁴ Further, given the traditionally restricted scope of attorney-client privilege in the corporate setting, a number of courts have held that the attorney-client privilege can be waived where counsel's internal investigation had the effect of shielding critical facts from discovery and preventing effective examination of witnesses.¹⁴⁵

At the same time, a client might assert that counsel's advice or actions were negligent, as a defense to spoliation.¹⁴⁶ In these circumstances, under the "self defense" doctrine, counsel might be relieved of their ethical obligation to preserve client confidences and permitted to disclose attorney-client communications in their own defense.¹⁴⁷ This issue was recently addressed in the ongoing

advice of counsel that went into the preparation of the document retention policy); *United States ex rel. Mayman v. Martin Marietta Corp.*, 886 F. Supp. 1243, 1252 (D. Md. 1995) (concluding that voluntary disclosure of privileged communications waives the privilege as to all communications on the same subject matter).

144. *See McKenna v. Nestle Purina Petcare Co.*, No. 2:05-cv-0976, 2007 WL 433291, at *3-4 (D. Ohio Feb. 5, 2007) (noting that the defense of "adequate investigation" will waive privilege claims for documents prepared by attorneys involved in conducting an investigation).
145. *See, e.g., Baker v. GMC*, 197 F.R.D. 376, 391 (W.D. Mo. 1999); *In re S. & E. Dist. Asbestos Litig.*, 730 F. Supp. 582, 585 (S.D.N.Y. 1990).
146. *See, e.g., Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932, at *11 n.6 (S.D. Cal. Jan. 7, 2008), *enforcing* 2007 WL 2900537 (S.D. Cal. Sept. 28, 2007), *vacated and remanded in part*, No. 05CV1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008). Qualcomm asserted that "outside counsel selects . . . the custodians whose documents should be searched" in an effort to deflect sanctions. *Id.* at *10 n.6. In the subsequent March 5, 2008, order vacating and remanding the action in part, the district court expressly applied the "self defense" doctrine, noting that the attorneys targeted by the former client's allegations should be permitted to use privileged communications in their defense. *Qualcomm*, 2008 WL 638108, at *2-3.
147. *See, e.g., Qualcomm*, 2008 WL 638108, at *2-3; MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2007) (permitting an attorney to disclose confidential client information "to establish a claim or defense on behalf of the lawyer in a controversy between the

Qualcomm litigation, when Qualcomm blamed its counsel for failure to discover and produce information relevant to a patent suit.¹⁴⁸ The attorneys then sought permission to disclose privileged and confidential information.¹⁴⁹ Their request to disclose privileged information was initially denied by the United States magistrate judge:

[T]he Court holds that the federal self-defense exception does not apply to the instant situation in which a client and its attorneys are alleged to have engaged in discovery misconduct during the course of litigation and the case has not concluded. Unlike the cases cited in the pleadings and during the hearing [citations omitted], the instant dispute does not involve a new suit or potential suit by a third party against the attorneys nor has the client initiated any complaints or allegations against its attorneys. Because Qualcomm has not waived the attorney-client privilege and this Court holds that the self-defense exception is not applicable, the attorneys' declarations should not include privileged communications. The declarations, however, may include information protected by the attorney work product doctrine. Because federal common law mandates that work product is a privilege that belongs to the attorney, the Court finds that if the attorneys choose to waive the attorney work product privilege in their declarations, doing so does not violate the attorneys' ethical duties and professional responsibilities under Rule 3-100 of the California Rules of Professional Conduct, Section 6068 of the California Business and Professions Code, or other applicable regulations.¹⁵⁰

On review of the magistrate judge's decision, however, the district judge analyzed four declarations filed by Qualcomm employees.¹⁵¹ Those filings "were exonerative of Qualcomm and critical of the

lawyer and the client . . . or to respond to allegations in any proceeding concerning the lawyer's representation of the client").

148. *Qualcomm*, 2008 WL 66932, at *11 n.6.

149. Memorandum of Points and Authorities In Support of the Heller Attorneys' Motion for an Order Determining that the Federal Common Law Self-Defense Exception to Disclosing Privileged and/or Confidential Information Applies to the Heller Attorneys' Response to the Order to Show Cause at 10-12, *Qualcomm*, No. 05cv1958-B (BLM) (S.D. Cal. Sept. 17, 2007), 2007 WL 2821221.

150. *Qualcomm*, 2007 WL 2900537, at *1.

151. *Qualcomm*, 2008 WL 638108, at *3.

services and advice of retained counsel.”¹⁵² The court found that the declarations introduced sufficient “accusatory adversity” to cause it to vacate the prior decision with respect to the six sanctioned attorneys.¹⁵³ It held that the attorneys should be permitted to defend their conduct by disclosing privileged information under the self-defense exception.¹⁵⁴

To summarize, there are a number of doctrines that would, in certain circumstances, support a decision to consider attorney-client implementation communications where there has been a failure to preserve ESI.

V. QUO WARRANTO?: WHAT IS THE BASIS OF A COURT’S POWER TO CONSIDER THE CONTENT OF SOME ATTORNEY-CLIENT COMMUNICATIONS WHEN THERE WAS A BREACH OF THE DUTY TO PRESERVE?

Where there has not been a breach of the duty to preserve, courts have rejected requests to probe the content of attorney-client preservation communications, holding them to be either privileged or work product.¹⁵⁵ When, however, there has been a breach of the duty to preserve, courts have found it necessary and appropriate to inquire into the content of attorney-client communications.¹⁵⁶ The analytical framework for addressing requests to discover the content of these communications is not uniform.

A. *The Differing Views*

In the view of some courts, such as the court in *Gibson v. Ford Motor Co.*,¹⁵⁷ attorney-client communications, such as the legal hold notice, are privileged and/or subject to the work product protection.¹⁵⁸ As such, they are not discoverable unless an exception to the privilege is applicable, as in *Rambus v. Infineon*.¹⁵⁹

Other courts appear to implicitly view the communications as not privileged. The communications become both relevant and discoverable upon the showing of a failure to preserve required

152. *Id.*

153. *Id.*

154. *Id.*

155. In *India Brewing, Inc. v. Miller Brewing Co.*, 237 F.R.D. 190, 192 (E.D. Wis. 2006), where there was no showing of a loss of ESI, the court held that the document retention policy was irrelevant to the claims or defenses.

156. See, e.g., *Zubulake V*, 229 F.R.D. 422, 435–36 (S.D.N.Y. 2004).

157. 510 F. Supp. 2d 116 (N.D. Ga. 2007).

158. See *id.* at 1123–24.

159. *Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 283 (E.D. Va. 2004).

information. This is apparently the view taken in *Zubulake V*¹⁶⁰ and *Land O'Lakes*.¹⁶¹

B. Implications of the Differing Views

The differing approaches present more than an academic distinction, because the scope of the communications that may be considered may not be the same under each of these theories. If consideration of the attorney-client communications implementing the duty to preserve is grounded on the assumption that the communications are not privileged or work product, once found relevant, there might be no limitation to the scope of discovery into those implementing communications and actions taken in carrying out the duty to preserve.¹⁶²

If attorney-client communications are considered under a waiver analysis, the disclosing party must factor the governing jurisdiction's substantive law of waiver into the mix. A party would not, for example, be likely to voluntarily disclose privileged information to defeat a spoliation motion if the collateral effect of that disclosure was a broad privilege waiver, especially one that went beyond implementation communications.

If the allegedly spoliating party asserts an "advice of counsel" defense, by pointing to counsel's advice and actions in defense of the alleged spoliation, the scope may be determined under a separate rule.¹⁶³ In this circumstance, under the doctrine of "in issue" waiver, all attorney-client communications on the same subject matter may become discoverable.¹⁶⁴

160. 229 F.R.D. at 435-36.

161. 244 F.R.D. 614, 623 (D. Colo. 2007).

162. The text refers to implementing communications and actions, drawing a distinction between those events and attorney-client communications that constitute pure legal advice or counsel's opinion work product relating to the duty. That distinction may be difficult to draw in practice.

163. *See* *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 486 (3d Cir. 1995) ("The attorney-client privilege may be waived by a client who asserts reliance on the advice of counsel as an affirmative defense. . . . The party opposing the defense of reliance on advice of counsel must be able to test what information had been conveyed by the client to counsel and vice-versa regarding that advice. . . ." (citations omitted)).

164. *See id.* at 486-87 (holding that, where client relies on advice of counsel, client cannot "define selectively the subject matter of the advice of counsel on which it relied in order to limit the scope of the waiver"); *United States v. Skeddle*, 989 F. Supp. 917, 918-20 (N.D. Ohio 1997) (discussing factors considered in evaluating scope of waiver); *contra* *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932, at *13 n.8 (S.D. Cal. Jan. 7, 2008) ("Recognizing that a client has a right to maintain this privilege and that no adverse inference should be made based upon

Alternatively, where a client attempts to place blame for a failure to preserve on counsel during litigation, the result may be limited to a partial disclosure. For example, in *Qualcomm*, the court initially held that counsel could not invoke the “self defense” doctrine to disclose privileged information; however, counsel were permitted to disclose work product to defend themselves.¹⁶⁵ In a later decision, however, the court held that the self defense doctrine was applicable and the scope of the waiver remains to be seen on remand.¹⁶⁶

Application of the crime, fraud, or tort exception would likely open the door only to consideration of a more limited set of facts. That exception may be invoked only upon a prima facie showing that the client has engaged in the requisite misconduct in failing to preserve relevant documents.¹⁶⁷ Because the crime, fraud, or tort exception is interpreted narrowly and the court’s proper inquiry would be limited to those communications “in furtherance of” the alleged spoliation, not all attorney-client communications made in connection with fulfilling the duty to preserve would be discoverable.¹⁶⁸

Thus, to understand the scope of permissible discovery once the door is opened, it is necessary to determine the justification for demanding or ordering discovery of some attorney-client communications. In appropriate circumstances, of course, more than one rationale may be properly applicable.

C. Resolution of the Differing Views: A Duty-Based Approach

In *Fisher v. United States*, the Supreme Court wrote that the privilege “protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the

the assertion . . .”), enforcing 2007 WL 2900537 (S.D. Cal. Sept. 28, 2007), vacated and remanded in part, No. 05CV1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

165. *Qualcomm*, 2007 WL 2900537, at *1.

166. *Qualcomm*, 2008 WL 638108, at *3.

167. See, e.g., *Rabushka ex rel. United States v. Crane Co.*, 122 F.3d 559, 566 (8th Cir. 1997) (holding that, to apply crime-fraud exception to a particular document, the challenging party must make a threshold showing that the legal advice was made in furtherance of the alleged fraud or closely related to it); *In re Int’l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1243 (5th Cir. 1982) (holding plaintiffs must establish that corporate management had “specific intent” to commit fraud through development of the challenged work product documents for the crime-fraud exception to apply); *Loustalet v. Refco, Inc.*, 154 F.R.D. 243, 246 (C.D. Cal. 1993) (holding crime-fraud exception does not apply where client sought advice of counsel regarding the legality of his conduct prior to submitting false statement to SEC but counsel was not used “to further” the illegal activity).

168. See *Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 288–91 (E.D. Va. 2004).

privilege.”¹⁶⁹ If the duty to preserve ESI was imposed solely on the client, and counsel’s job was limited to advising the client on the nature and scope of that duty, attorney-client communications relating to the duty to preserve would fall squarely within the privilege protection under the *Fisher* rule. But decisions such as *Zubulake V* have held that the duty is not the client’s alone, and that counsel has an independent duty to ensure that relevant information is preserved.¹⁷⁰ That duty runs to the court and the justice system.¹⁷¹

It appears that the *Zubulake V* court may have considered attorney-client communications because those communications were relevant in light of the preliminary showing of breach of the duty to preserve, and because they were exchanged pursuant to a common-law duty imposed on counsel, not in connection with the client voluntarily seeking legal advice.¹⁷² Thus, under this analysis, the duty to

169. 425 U.S. 391, 403 (1976).

170. As the *Zubulake V* court wrote:

I held that UBS had a duty to preserve its employees’ active files as early as April 2001, and certainly by August 2001, when Zubulake filed her EEOC charge. . . . [T]he central question implicated by this motion is whether *UBS and its counsel took all necessary steps* to guarantee that relevant data was both preserved and produced.

. . . .

. . . Counsel must oversee compliance with the litigation hold, monitoring the party’s efforts to retain and produce the relevant documents.

229 F.R.D. 422, 431–32 (S.D.N.Y. 2004) (emphasis added). The court stressed the need for “[p]roper communication between a party and her lawyer.” *Id.* at 432. Other authorities on this point are cited *supra* note 88.

171. See discussion *infra* note 178.

172. A corollary to the duty to preserve information by effective communications is the court’s power to allocate sanctions between attorney and client. A court, faced with a failure to preserve or failure to produce relevant evidence, may need to determine whether the duty was breached by counsel, on the one hand, or by the client, on the other, or by both. See *Zubulake V*, 229 F.R.D. at 430, 432–34; see, e.g., *Qualcomm Inc. v. Broadcom Corp.*, No. 05CV1958-B(BLM), 2007 WL 1031373 (S.D. Cal. Mar. 21, 2007) (ordering party to show cause why sanctions should not be imposed on Qualcomm’s counsel for litigation misconduct in denying the existence of relevant evidence). One leading commentator has noted that “the analysis of the duty of preservation at the beginning of litigation and throughout the discovery process focuses on the intent and behavior of the parties and counsel” Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, ¶ 62 (2006), <http://www.law.northwestern.edu/journals/njtip/v4/n2/3/>.

preserve, and the related duty to communicate in furtherance of that duty to preserve, are considered obligations of counsel, and, under *Fisher*, those compelled communications are outside the penumbra of the privilege and work product protections. They become relevant and discoverable upon a preliminary showing of failure to preserve information that should have been preserved. *eBay*, *Gibson*, and other decisions indicate that litigation hold notices are not discoverable, at least without a preliminary showing of a failure to preserve evidence.¹⁷³ Although these courts have understandably treated attorney-client communications in the process of carrying out the duty to preserve as privileged or work product, an alternative rationale is that those communications that make up the process of identifying and preserving relevant information are not privileged at all. They constitute neither the giving nor receiving of “legal advice,” and the privilege was not intended to cover routine communications between counsel and client when engaged in fulfilling this duty to the adversary system. Under *Fisher*, because these communications are mandated, they would have occurred even in the absence of a privilege and therefore they are not protected by the privilege.¹⁷⁴ This theory fits the basic concepts of privilege. Specifically, privilege is in derogation of full disclosure and should be limited to communications to obtain legal advice.¹⁷⁵

This analysis is also consistent with the multiple decisions permitting discovery. *Zubulake*, *Keir*, *Rambus*, *Cache La Poudre Feeds*, *Capellupo*, *United Medical Supply Co.*, and other decisions support the proposition that, where there is a preliminary showing of failure to comply with the duty to preserve, some preservation communications between attorney and client become relevant and, therefore, discoverable.¹⁷⁶

173. See *Gibson v. Ford Motor Co.*, 510 F. Supp. 2d 1116 (N.D. Ga. 2007); *In re eBay Seller Antitrust Litig.*, No. C 07-01882 JF (RS), 2007 WL 2852364 (N.D. Cal. Oct. 2, 2007); see also *Muro v. Target Corp.*, No. 04 C 6267, 2007 WL 3254463, at *9 (N.D. Ill. Nov. 2, 2007) (finding that litigation hold notices appeared to be privileged on their face, so not discoverable absent another reason).

174. See *Fisher v. United States*, 425 U.S. 391, 403 (1976) (“[S]ince the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege.” (citation omitted)).

175. *Id.*

176. This duty-based approach does not make the communications automatically discoverable. Just as the document retention policy was irrelevant in *India Brewing, Inc. v. Miller Brewing Co.*, 237 F.R.D. 190, 194 (E.D. Wis. 2006), in the absence of

D. Advantages of a Duty-Based Approach

Treating these implementing communications as not privileged can provide counsel and client with a number of very significant benefits. First, it facilitates the resolution of discovery disputes by removing the risk of subject-matter waiver from the disclosure of what counsel has done and learned in the back and forth with the client on what there is, where it is, what should be preserved, and how it should be preserved. In the opening hypothetical, for example, ABC's counsel retained a non-testifying forensic computer expert and, at counsel's direction, the expert and ABC employees preserved some ESI and paper documents, but—in conjunction with ABC's attorneys—determined that other ESI, e.g., certain back up tapes and deleted data, need not be preserved. Tactically, ABC may believe that a reviewing court will agree with ABC's approach, and ABC might wish to disclose these facts in response to XYZ's sanctions motion. If the communications were privileged, ABC would risk waiver of the privilege by disclosure. If, however, the communications were unprivileged, but irrelevant in the absence of an allegation of breach of duty, ABC could disclose them without concern that it would be waiving the privilege.

Treating implementing communications as not privileged, but irrelevant absent a preliminary showing, would not be inconsistent with the purposes of the privilege and the work-product doctrine. The duty to preserve goes to the heart of the adversary system and the attorney's ethical responsibilities.¹⁷⁷ If relevant information may be

any showing of a loss of ESI, the attorney-client implementation communications are not relevant to any claim, defense, or the subject-matter of the action.

177. See *Silvestri v. GMC*, 271 F.3d 583, 590 (4th Cir. 2001) (“The courts must protect the integrity of the judicial process because, ‘[a]s soon as the process falters . . . the people are then justified in abandoning support for the system.’” (quoting *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 462 (4th Cir. 1993)); *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 620 (D. Colo. 2007) (“To ensure that the expansive discovery permitted by Rule 26(b)(1) does not become a futile exercise, putative litigants have a duty to preserve documents that may be relevant to pending or imminent litigation.”); *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 258–59 (2007) (“Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence. Our adversarial process is designed to tolerate human failings—erring judges can be reversed, uncooperative counsel can be shepherded, and recalcitrant witnesses compelled to testify. But, when critical documents go missing, judges and litigants alike descend into a world of *ad hocery* and half measures—and our civil justice system suffers. To guard against this, each party in litigation is solemnly bound to preserve potentially relevant evidence.”); RICE, *supra* note 130, at 123 (“Spoliation is an act

destroyed when litigation is anticipated, the basic premises of the judicial system are brought into question. Just as the crime, fraud, or tort exception is grounded on the need to protect the integrity of the justice system, and on common-sense limits to the attorney-client privilege, a duty-based analysis furthers the same goal.¹⁷⁸ Just as there is no need to protect communications relating to a future crime or fraud, there is no need for implementation discussions to be protected by a privilege, if they become relevant due to a breach of the duty.

Another practical advantage of this approach is that it is grounded on conditional relevancy, not on more adversarial concepts, such as the crime, fraud, or tort exception to the privilege. Because it is triggered by a preliminary showing of loss of discoverable information, rather than the showing of attorney-misconduct, this approach, unlike the crime-fraud exception, would permit inquiry into such communications upon the negligent loss of discoverable information and could avoid acrimonious and protracted discovery disputes.

E. Summary

If implementation communications are viewed as unprivileged, but conditionally protected from discovery as wholly irrelevant, that conclusion will have the practical benefit of facilitating the resolution of discovery disputes. The “duty” rationale appears best suited to effectuate the purposes of both the privilege and the duty to preserve. Adequate protection may be provided to attorney-client preservation communications in the absence of a loss of discoverable information, because disclosure of those communications would be wholly irrelevant to the claims, defenses, and subject-matter of the action.

Where counsel has performed properly, and the client has done what it should do, so that the requesting party is unable to make a preliminary showing of a breach of the duty to preserve ESI,

that is fundamentally inconsistent with the adversary system.”); Maria Perez Crist, *Preserving the Duty to Preserve: The Increasing Vulnerability of Electronic Information*, 58 S.C. L. REV. 7, 63 (2006) (“[T]he need to maintain an institutional memory lies at the core of our judicial system.”); Withers, *supra* note 172, at 189 (“[T]he duty to preserve potential evidence is essential to the courts’ truth-seeking function, and the routine operations of computer systems cannot be allowed to obstruct justice.”).

178. See *Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 284 (E.D. Va. 2004) (noting that consulting an attorney to commit a crime or fraud is inconsistent with the purpose of the attorney-client privilege).

attorney-client communications would not be discoverable. Although they may have been made in furtherance of a duty, and not in connection with privileged legal advice, absent a preliminary showing of breach of the duty to preserve, the communications are wholly irrelevant to any claim or defense and to the subject-matter of the action. The communications also would not be discoverable under the crime, fraud, or tort, fact work product, or attorney “self defense” exceptions, because there has been no wrongdoing. And, the opposing litigant’s interests are fully protected because that party has the right to ask the client in discovery what steps the client took to comply with the duty to preserve.

Where the requesting party is able to make a preliminary showing of a failure to preserve, because the attorney-client communications were exchanged in furtherance of an extrinsic legal duty—the duty to preserve information—and because the preservation of potential evidence is fundamental to fair and equitable civil litigation, courts may permit discovery into the litigation hold, the steps taken or not taken by counsel, and the client’s response to those steps. This is necessary both to further the civil justice system and to allocate responsibility between attorney and client.

VI. THE OUTER LIMIT OF CONSIDERING ATTORNEY-CLIENT COMMUNICATIONS: “PURE” LEGAL ADVICE

The outer limit, if any, of the power to consider attorney-client communications in the context of a breach of the duty to preserve remains to be determined. Decisions such as *Keir*, as well as Sedona Guideline No. 9, demonstrate that, even where ESI has been lost, some communications may be privileged.¹⁷⁹ The limit on discoverability may vary depending upon the applicable rationale. Thus, what is discoverable under a duty-based approach may differ from that available under the other theories, and more than one rationale may apply.

The importance of this analysis was recently demonstrated in *Qualcomm*.¹⁸⁰ Faced with misconduct resulting in the failure to produce ESI, and entertaining a request to sanction Qualcomm and its attorneys, in both initial opinions the United States magistrate judge

179. See *Keir v. UnumProvident Corp.*, No. 02 Civ. 8781(DLC), 2003 WL 21997747, at *9 (S.D.N.Y. Aug. 22, 2003).

180. See *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), enforcing 2007 WL 2900537 (S.D. Cal. Sept. 28, 2007), vacated and remanded in part, No. 05CV1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

in *Qualcomm* viewed some communications as privileged.¹⁸¹ For example, the magistrate judge wrote:

Qualcomm asserted the attorney-client privilege and decreed that its retained attorneys could not reveal any communications protected by the privilege. Several attorneys complained that the assertion of the privilege prevented them from providing additional information regarding their conduct. This concern was heightened when Qualcomm submitted its self-serving declarations describing the failings of its retained lawyers. Recognizing that a client has a right to maintain this privilege and that no adverse inference should be made based upon the assertion, the Court accepted Qualcomm's assertion of the privilege and has not drawn any adverse inferences from it.¹⁸²

The magistrate judge held that only work product could be disclosed by the defending attorneys;¹⁸³ however, the district judge subsequently ruled that the self defense doctrine permitted disclosure of privileged material.¹⁸⁴ In neither decision was the court required to specify the scope or limits of that disclosure.

A continuous thread of this article has been that there are attorney-client communications that relate to implementation of the duty to preserve, on the one hand, and communications involving "pure" legal advice, on the other. In the opening hypothetical, for example, ABC's president asks ABC's attorney to define the outer contours of the duty to preserve, and the attorney and client discuss how those principles are applicable to ABC in this instance. ABC's counsel also determined that certain ESI, e.g., specific back up tapes and deleted data, need not be preserved, based on counsel's analysis of case law defining the duty to preserve back up tapes and data that are not reasonably accessible because of undue burden or cost.

Under a duty-based approach, only implementing communications and actions are not privileged.¹⁸⁵ Thus far courts have not seen the need to probe actual legal advice. It appears that such an intrusion should seldom, if ever, be necessary or compelled. If ABC's counsel determined that back up tapes need not be preserved based on counsel's analysis of case law, XYZ needs to know, at most, only

181. *Qualcomm*, 2007 WL 2900537, at *1; *Qualcomm*, 2008 WL 66932, at *13 n.8 (citations omitted).

182. *Qualcomm*, 2008 WL 66932, at *13 n.8.

183. *Qualcomm*, 2007 WL 2900537, at *1.

184. *Qualcomm*, 2008 WL 638108, at *3.

185. See *supra* Part V.C.

that the decision was made. XYZ has no need to know the rationale of ABC's attorney.

Under this approach, courts would not permit discovery of counsel's legal advice, even advice directly related to the preservation of information such as advice on the duty to preserve, the scope of required preservation, and the legal risks of failing to preserve. To go beyond the non-privileged actions and routine communications involved in the actual process of implementing preservation, a party alleging spoliation would be required to show much more, such as a waiver, a *prima facie* showing that the opposing party's failure to preserve falls within the crime, fraud, or tort exception to the privilege, or some other basis for intruding upon the privilege or work product doctrine.

Thus, the investigation into a party's compliance with its duty to preserve should be a multi-step process that in most situations can go no further than consideration of implementing communications. As illustrated in *eBay*, the first step is discovery of facts from the client demonstrating how the litigation hold was implemented.¹⁸⁶ If it then becomes necessary or appropriate to proceed more deeply into the nature of attorney-client communications to determine the magnitude of, and prejudice caused by, the failure to preserve, courts may cautiously expand that inquiry and consider some of the routine attorney-client communications involved in satisfying the duty to preserve. This might include when a litigation hold was issued, whether and when a forensic expert was retained, what persons were identified as "key players," whether outside ESI storage facilities were contacted, whether "janitor" programs were suspended, what key words were searched, what was preserved, what was not preserved, and whether the lost information was unique, relevant, and significant.¹⁸⁷ If, however, counsel advised a client that litigation holds involve decisions as to whether litigation is reasonably anticipated, choice of law, and proportionality considerations, there

186. *In re eBay Seller Antitrust Litig.*, No. C 07-01882 JF (RS), 2007 WL 2852364, at *2 (N.D. Cal. Oct. 2, 2007).

187. See memorandum from John Rosenthal & Tara Kowalski, to Judge Shira Sheindlin, Howrey Simon, LLP, 12 (Nov. 14, 2007) (available on request) ("To ensure that the discovery process is transparent, objective facts, such as what preservation steps were taken and when, should not be considered privileged. On the other hand, advice from counsel, in any form, regarding the identification, preservation, collection, and production of discovery should be privileged. . . . [I]f a party informs his [or her] attorney that he [or she] inadvertently (or advertently) destroyed documents, that communication should be privileged, even though the fact that the documents were destroyed is not privileged.").

appears to be no cogent reason for requiring disclosure of that advice, absent application of an exception to the privilege.

Nothing contained in this analysis would prohibit a litigant from making a voluntary disclosure.¹⁸⁸ Such disclosures would be facilitated if the party had taken steps to engage in communications implementing the process of preservation with the express understanding that they were not confidential and did not incorporate legal advice, so that they could easily be disclosed without the need for “redaction” to refute any allegations of failure to preserve that might later be raised. That disclosure of non-privileged information would not extend the outer boundary of discovery to encompass pure legal advice.

Applying these principles to the hypothetical involving ABC Corporation, and XYZ Corporation, the threshold inquiry would center on XYZ’s showing that ABC had breached the duty to preserve by failing to effectively communicate. XYZ might make this showing either by routine discovery into the processes followed by ABC employees to preserve information¹⁸⁹ or, alternatively, by evidence such as that presented by Ms. Zubulake, who had retained paper copies of email that UBS failed to produce.¹⁹⁰ Upon a preliminary showing, at least portions of ABC’s litigation hold letter would likely be discoverable. Specifically, the untimely date of the letter, preservation instructions given to ABC employees, as well as the addressees, should be discoverable. A reviewing court would likely wish to determine whether the letter inadequately directed preservation of generic categories, such as “relevant evidence,” or specific documents, such as letters related to the June 2003 contract. If the letter contained litigation strategy and work product, that portion would likely be subject to redaction, unless needed to evaluate the effectiveness of the letter. It is likely that the key players could and would, upon request, be compelled to testify as to what they were instructed to do in connection with preservation efforts, what they were not instructed to do, and what they did. For example, if they were instructed not to preserve back up tapes, that instruction

188. Prudence would suggest consideration of the precautions outlined in *Hopson v. Mayor of Balt.*, 232 F.R.D. 228 (D. Md. 2005).

189. XYZ might, for example, ask a key employee whether his or her email had been preserved, whether back up tapes had been recycled, or whether the employee’s home computer contained ESI that was relevant, but not preserved. Under *eBay*, this information would be discoverable without any showing of a failure to preserve. 2007 WL 2852364, at *2.

190. *Zubulake V*, 229 F.R.D. 422, 428 (S.D.N.Y. 2004).

would likely be discoverable. If counsel did not speak with a key player, that fact would also be discoverable. If the corporate employees failed to follow counsel's instructions, that failure would have to be disclosed. The steps taken by ABC's non-testifying, retained forensic expert, and by ABC's employees, to preserve information, e.g., which hard drives were imaged and when, whether servers were preserved, whether PDAs were examined, whether voice mail was preserved, what the cost of preserving backup tapes is, etc., would be discoverable, even if that discovery would necessarily disclose instructions of counsel. In some circumstances, counsel's instructions might be ordered disclosed. Counsel's legal advice would not be discoverable, unless, for example, it was placed in issue by an "advice of counsel" defense to the spoliation motion or by an express waiver by the client.¹⁹¹

VII. PRACTICAL CONSIDERATIONS

In today's practice, counsel and their clients are well advised to think early and often about the potential for discovery on discovery. Especially in the highly complex world of e-discovery, even with good faith efforts, it is very easy to fail to preserve or lose relevant information by inadvertence.¹⁹² Even the inadvertent loss of relevant data may lead to probing questions into the conduct of counsel and client before a court resolves a sanctions motion.

For this reason, counsel and client should be aware, when drafting preservation documents and engaging in implementation discussions, that those documents and discussions may voluntarily or involuntarily be presented to a court for review in connection with a spoliation motion. Prudence suggests, for example, that litigation hold letters should not contain surplus tactical and strategic discussions, and should be no more expansive than necessary to effectively accomplish the preservation task. It may be advisable to circumscribe preservation discussions and segregate notes regarding the implementation of preservation efforts from substantive communications involving the merits of the dispute. Additionally, all participants in the adversary process need to consider the probability that, even absent a preliminary showing of breach of the duty to preserve, the steps taken by a client to preserve information are likely discoverable, and that discovery may indirectly disclose some information regarding attorney-client communications.

191. See Part IV.C-D.

192. See generally Grimm et al., *supra* note 16.

The preserving party may desire to disclose information about its preservation efforts, without disclosing strategic information, in order to attempt to dissuade or defeat a spoliation motion.¹⁹³ The opponent may seek such information to support a spoliation argument.

As a tactical or strategic matter, attorney and client may intentionally draft some or all preservation documents in a manner that would create the option of disclosing them without waiving any privilege. If implementation discussions are viewed as communications that are unprivileged because they are compelled by a legal duty, nothing would prohibit voluntary disclosure and such disclosure could be made without concerns relating to waiver of privileges. Careful drafting may make it easier to respond to a spoliation motion.

VIII. CONCLUSION

Certain facts—such as what steps a litigant took, or failed to take, to preserve material—should be deemed routinely discoverable. Other facts, such as the contents of a litigation hold letter, and attorney-client implementation discussions, should require a greater showing to support disclosure. Actual legal advice, if disclosable at all, should be discoverable only upon a more compelling showing and, perhaps, after *in camera* review. Although, where there is evidence of a breach of the duty to preserve, there are multiple bases for seeking discovery of some attorney-client preservation communications, the least problematic approach is to assert that implementation communications are unprivileged, compelled exchanges that are only conditionally relevant.

193. See THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 50 (2d ed. 2007), available at http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf.