Winter 2022

State Spoliation Claims in Federal District Courts

Jeffrey A. Parness

STATE SPOLIATION CLAIMS IN FEDERAL DISTRICT COURTS

Jeffrey A. Parness[+]

The increasing amounts of electronically stored information (ESI) relevant to civil litigation, and the ease of their loss, caused federal lawmakers explicitly to address the possible consequences of certain pre-suit or post-suit ESI losses. These lawmakers acted in both 2006 and 2015 through Federal Civil Procedure (FRCP) 37(e). But they acted only on certain ESI. Their actions have prompted increasing attention to the significant risks of pre-suit and post-suit losses of all ESI, and of non-ESI, otherwise discoverable in civil actions. In addition, their actions have spurred increasing attention to the availability of substantive law claims involving spoliation of information relevant to future or pending federal civil actions. Such claims complement the federal civil procedure laws on discovery sanctions for information losses.

Federal court jurisdiction over state substantive spoliation claims in related federal civil litigation was expressly invited by the federal judicial rulemakers when amending FRCP 37(e) in 2015. Prior to and since, federal courts have recognized the availability of state spoliation claims for losses of either ESI or non-ESI relevant in pending civil actions.

As state spoliation claims typically involve no federal law question, their pursuit in federal courts may be barred by the lack of, or a failure to exercise, subject matter jurisdiction. Their pursuit may also be stymied by other barriers, including the lack of personal jurisdiction, an inability to effect joinder, and collateral estoppel.

This article explores federal district court power to hear state spoliation claims involving information losses related to and within ongoing civil litigation. It explores whether jurisdictional norms should vary between FRCP 37(e) ESI spoliation and other ESI and non-ESI spoliation. As well, the article examines whether spoliation claims should be comparably available for pre-suit and post-suit losses and for claims against those who are otherwise not parties in the related civil actions, like insurers and attorneys. Finally, it reviews possible joinder, collateral estoppel, and choice of law issues arising when federal courts hear state spoliation claims.

The increasing amounts of electronically stored information (ESI) relevant to civil litigation, and the ease of their loss, caused federal lawmakers explicitly to address the possible consequences of certain pre-suit or post-suit ESI losses. These lawmakers acted in both 2006 and 2015 through Federal Civil Procedure

---

[+] Professor Emeritus, Northern Illinois University College of Law. B.A., Colby College; J.D., The University of Chicago. This article follows up on Jeffrey A. Parness & Jessica Theodoratos, *Expanding Pre-Suit Discovery Production and Preservation Orders*, 2019 MICH. ST. L. REV. 651 (2019).

(FRCP) 37(e). But they acted only on certain ESI. Their actions have prompted increasing attention to the significant risks of presuit and postsuit losses of all esi, and of nonesi, otherwise discoverable in civil actions. In addition, their actions have spurred increasing attention to the availability of substantive law claims involving spoliation of information relevant to future or pending federal civil actions. Such claims compliment the federal civil procedure laws on discovery sanctions for information losses.

Federal court jurisdiction over state substantive spoliation claims in related federal civil litigation was expressly invited by the federal judicial rulemakers when amending FRCP 37(e) in 2015. Prior to and since, federal courts have recognized the availability of state spoliation claims for losses of either ESI or non-ESI relevant in pending civil actions.

As state spoliation claims typically involve no federal law question, their pursuit in federal courts may be barred by the lack of, or a failure to exercise, subject matter jurisdiction. Their pursuit may also be stymied by other barriers, including the lack of personal jurisdiction, an inability to effect joinder, and collateral estoppel.

This article explores federal district court power to hear state spoliation claims involving information losses related to and within ongoing civil litigation. It explores whether jurisdictional norms should vary between FRCP 37(e) ESI spoliation and other ESI and non-ESI spoliation. As well, the article examines whether spoliation claims should be comparably available for presuit and postsuit losses and for claims against those who are otherwise not parties in the related civil actions, like insurers and attorneys. Finally, it reviews possible joinder, collateral estoppel, and choice of law issues arising when federal courts hear state spoliation claims.

INTRODUCTION

The increasing amounts of electronically stored information ("ESI") relevant to civil litigation, and the ease of their loss, caused federal lawmakers to explicitly address the possible consequences of certain pre-suit or post-suit ESI losses. These lawmakers acted in both 2006 and 2015 through amendments to Federal Rule of Civil Procedure ("FRCP") 37(e). However, they acted only on certain ESI. Nevertheless, their reforms have prompted increasing attention by federal and state lawmakers to pre-suit and post-suit losses of all ESI, and of non-ESI, otherwise discoverable in civil actions.[1] In addition, there is increasing attention by state lawmakers to the availability of substantive law claims for loss of information (spoliation) relevant to future or to pending civil actions. Such claims compliment the civil procedure laws on discovery sanctions for information losses, including FRCP 37(e).[2]

After federal rule makers amended FRCP 37(e) in 2015, the amended rule expressly invited federal subject matter jurisdiction over state substantive

1. This article focuses on failures of pre-suit information duties leading to substantive spoliation claims, not on pre-suit evidence duties, since pre-suit information duties, like post-suit discovery duties, can reach beyond admissible materials. *See*, *e.g.*, FED. R. CIV. P. 26(b) (discoverable information "need not be admissible in evidence.").

2. FED. R. CIV. P. 37(e). Failures of pre-suit information duties, as with failures of post-suit information duties, can result in both substantive and procedural law repercussions. In both settings, the repercussions are often labeled as acts involving spoliation. *See*, *e.g.*, Herster v. Bd. of Supervisors of LSU, 221 F. Supp. 3d 791, 795–96 (M.D. La. 2016) (examining Louisiana spoliation laws which operate in both tort and discovery sanction settings). Spoliation laws thus are like attorney fee recovery laws, which can be either procedural or substantive. *See*, *e.g.*, FED. R. CIV. P. 11 (attorney fees as sanction); 42 U.S.C. § 1988(b) (attorney fees to prevailing civil rights claimant).

spoliation claims.[3] Prior to and since, federal courts have recognized their authority over certain state spoliation claims for losses of either ESI or non-ESI relevant in pending civil actions.[4]

As state spoliation claims typically involve no federal law question, their pursuit in federal courts can be barred by the lack of, or a failure to exercise, subject matter jurisdiction. Pursuit may also be stymied by other barriers, including the lack of personal jurisdiction and an inability to effect joinder. When pursued, these claims can prompt challenging issues involving differences between pre-suit and post-suit information losses, possible federal law preemption, collateral estoppel, and choice of state substantive spoliation laws.

This article explores the powers of the federal district courts to resolve state spoliation claims involving information losses related to and within ongoing civil litigation. It explores whether jurisdictional norms should vary, as between FRCP 37(e) ESI spoliation and other ESI and non-ESI spoliation, or as between pre-suit and post-suit spoliation. The article further examines whether state spoliation claims should ever be pursuable against those who otherwise are not parties, like insurers and attorneys. Finally, it reviews possible preemption, collateral estoppel, joinder, and choice of law issues arising when federal courts do hear state spoliation claims.

I. FEDERAL CIVIL PROCEDURE LAWS ON LOST DISCOVERABLE INFORMATION

Federal civil procedure laws on sanctions involving discoverable information that is lost before or during federal cases are chiefly encompassed in FRCP 37 on discovery sanctions.[5] Federal procedural laws on sanctions involving discoverable information that is lost before any federal cases, but becomes relevant to later-filed federal cases, are chiefly encompassed in inherent

3. The 2015 Advisory Committee Note to FRCP 37(e) says the new ESI discovery sanction rule was not intended to "affect the validity of an independent tort claim for . . . spoliation if state law applies in a case and authorizes the claim." FED. R. CIV. P. 37(e) advisory committee's note (2015). The federal courts have entertained state spoliation claims in civil actions involving federal question claims. *See*, *e.g.*, *Herster*, 221 F. Supp. 3d at 796 (considering Louisiana intentional spoliation tort).

4. *See*, *e.g.*, *Herster*, 221 F. Supp. 3d at 796 (district court addressing Louisiana spoilation claim in 2016); Unigard Sec. Ins. Co. v. Lakewood Eng'g. & Mfg. Corp., 982 F.2d 363, 367 (9th Cir. 1992) (finding diversity jurisdiction over claim); Lewis v. J.C. Penney, Inc., 12 F. Supp. 2d 1083, 1086 (E.D. Cal. 1998) (finding diversity jurisdiction over claim and ruling based on forum state law).

5. Federal civil procedure laws apply whether diversity, supplemental, or federal question subject matter jurisdiction is invoked. *See*, *e.g.*, Adkins v. Wolever, 554 F.3d 650, 652–53 (6th Cir. 2009) (overruling contrary precedents).

authority precedents, and in Rule 37(e) analyses.[6] Sanctions involving information lost during pending cases are chiefly covered in Rules 26 and 37.[7]

Conceivably, other written federal civil procedure laws may operate in certain sanction settings,[8] as where information losses so "unreasonably and vexatiously" multiply a federal civil action that an attorney or other culprit can be assessed attorneys' fees.[9] Further, certain pre-suit information preservation orders are available under FRCP 27(a),[10] as well as in independent federal civil actions under FRCP 34(c) and guided by equitable principles.[11] Federal substantive laws can also operate. Some information losses, like intentional

6. FED. R. CIV. P. 37; *see*, *e.g.*, Hartford Cas. Ins. Co. v. Winston Co., 09 CV 5088, 2011 U.S. Dist. LEXIS 174350, at *19 (N.D. Ill. May 18, 2011) ("[T]he analysis for imposing sanctions under our inherent powers and Rule 37 is essentially the same."); Silvestri v. Gen. Motors Corp., 271 F.3d 583, 585 (4th Cir. 2001) (holding involuntary dismissal due to pre-suit destruction of a car was not an abuse of discretion). Inherent authority precedents are said to be available for discovery sanctions even if there are FRCP provisions on point. *See*, *e.g.*, CAT3, LLC v. Black Lineage, Inc., 164 F. Supp. 3d 488, 497–98 (S.D.N.Y. 2016) (citing Chambers v. NASCO, Inc., 501 U.S. 32, 49 (1991)). Outside of civil procedure laws there are other procedural laws governing federal civil litigation that effectively sanction those responsible for information losses. *See*, *e.g.*, FED. R. EVID. 804(b)(6) ("A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, and did so intending that result" is an exception to the rule barring hearsay). On the possible consequences of information losses in federal criminal cases, *see*, *e.g.*, People v. Sandridge, 162 N.E.3d 278, 285 (Ill. App. Ct. 2020) (finding a police officer's deliberate destruction of field notes, which had been subpoenaed earlier, violated defendant's Due Process rights, the Court vacated a first-degree murder conviction).

7. *See generally* FED. R. CIV. P. 26, 37.

8. For a proposal that FRCP 26 on initial information disclosures contain a requirement that information preservation efforts to date be revealed, *see* Paula Schaefer, *Attorney Negligence and Negligent Spoliation: The Need for New Tools to Prompt Attorney Competence in Preservation*, 51 AKRON L. REV. 607, 630–31 (2017).

9. 28 U.S.C. § 1927; *see*, *e.g.*, *In re* Olympia Brewing Co. Sec. Litig., 613 F. Supp. 1286, 1304–05 (N.D. Ill. 1985) (holding discovery failure leads to attorney fee awards).

10. FED. R. CIV. P. 27(a) (depositions to perpetuate testimony); *In re Ford*, 170 F.R.D. 504, 506–07 (M.D. Ala. 1997) (explaining the limited scope of pre-suit discovery under FRCP 27(a)).

11. FED. R. CIV. P. 34(c); Lubrin v. Hess Oil Virgin Islands Corp., 109 F.R.D. 403, 404–05 (D.V.I. 1986) (holding a prospective plaintiff may obtain an order to enter onto land for purposes of discovery and to force a deposition of one not a prospective defendant). The author has proposed an amendment to FRCP 27(c) that would expressly recognize greater opportunities for pre-suit information preservation orders. Jeffrey A. Parness, *Proposed Amendment to Federal Civil Procedure Rule 27(c): Federal Presuit Information Preservation Orders*, (Dec. 9, 2020), https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=39810. Interestingly, the original (1937) FRCP Advisory Committee Notes on FRCP 27(c) indicated that it was meant to preserve "the right to employ a separate action to perpetuate testimony under U.S.C., Title 28, former § 644." FED. R. CIV. P. 27(c) advisory committee's note (1937). These Notes have prompted some precedents disallowing Rule 27(c) actions that extend beyond the requirements of Rule 27(a). *See*, *e.g.*, Nevada v. O'Leary, 63 F.3d 932, 936–37 (9th Cir. 1995).

destruction of key evidence during a criminal investigation, would support a federal civil rights claim grounded in Due Process.[12]

As to FRCP 26, Rule 26(g) has governed, indirectly, since 1983 some in-suit information losses, particularly losses tied to responses or objections to discovery requests.[13] In signing discovery responses and objections, attorneys and unrepresented parties must certify there has been "a reasonable inquiry."[14] Of course, there are no reasonable inquiries where the earlier requested information was intentionally destroyed after the discovery requests were tendered. From 1983–1993, the certifier, the certifier's client—where the certifier was an attorney—or both could be sanctioned for reasonable inquiry failures.[15] Since 1983, failures "without substantial justification" are subject to sanction, where "appropriate" sanctions include orders to pay reasonable expenses incurred, including "a reasonable attorney's fee."[16]

As to FRCP 37, before 2006, sanctions involving unavailable ESI and non-ESI were comparably addressed. Thus, Rule 37(c) has said, since 1993, that a party who "fails to provide information . . . is not allowed to use that information . . . to supply evidence . . . unless the failure was substantially justified or is harmless."[17] Alternatively, such information could be used where the jury is informed of the "party's failure" or where other sanctions are deemed more "appropriate."[18] As well, Rule 37(a)(3)(A) has said, since 1993, that a party who "fails to make a disclosure" required without a discovery request (per Rule 26(a)) may be subject to "appropriate sanctions."[19]

---

12. *See generally* 42 U.S.C. § 1983 (2018) (liability for those acting unconstitutionally under color of state law); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 395–97 (1971) (finding liability for those acting unconstitutionally under color of federal law). On Due Process claims involving information lost during criminal cases, which may prompt federal civil actions, *see*, *e.g.*, State v. DeJesus, 395 P.3d 111, 120–22 (Utah 2017) (finding state Due Process protections involving lost evidence that would have been exculpatory differ from federal protections, as in Utah "concerns . . . arise when the State is responsible for the loss or destruction of evidence that has a reasonable probability of exculpating a criminal defendant."). In contrast, under the federal Constitution, a criminal defendant must prove "bad faith" in the loss or destruction of evidence in order to win on a violation of Due Process claim. Arizona v. Youngblood, 488 U.S. 51, 58 (1988); *see also* Jutrowski v. Twp. of Riverdale, 904 F.3d 280, 294 (3d Cir. 2018) (holding a civil rights claim can be founded on conspiracy of silence amongst police officers regarding earlier excessive force).

13. *See* FED. R. CIV. P. 26(g).

14. *Id.* 26(g)(1).

15. *Id.*

16. *Id.* 26(g)(3).

17. *Id.* 37(c)(1).

18. *Id.* 37(c)(1)(B)–(C).

19. *Id.* 37(a)(3)(A).

In 2006, a new FRCP 37(e) on unavailable ESI was promulgated.[20] It lasted until 2015.[21] The 2006 rule authorized, with a finding of "exceptional circumstances," judicial "sanctions . . . on a party" who lost ESI due to "the routine, good-faith operation of an electronic information system."[22]

ESI and non-ESI have, from 2006–2015 and since, sometimes been distinguished in other federal procedural laws. Since 2006, FRCP 26(b)(2)(B) has said that "a party need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of [an] undue burden or cost," a burden which is carried by the requesting party, unless the "requesting party shows good cause."[23] Since 1993, FRCP 26(f) has stated that a mandatory "discovery plan must state . . . any issues about disclosure, discovery or preservation of [ESI], including the form or forms in which it should be produced."[24] And since 2006, FRCP 34(b)(2)(D) has said that a party may object "to a requested form for producing" ESI.[25]

Other federal discovery rules lumped together ESI and non-ESI from 2006-2015. Thus, since 2006, the rule on required disclosures has spoken of providing a copy or description of certain "documents, electronically stored information and tangible things" in the disclosing party's "possession, custody, or control."[26] And since 2006, the rule on requests for production has spoken of seeking "any designated documents or [ESI] . . . from which information can be obtained."[27] This rule also comparably situates documents and ESI for those producing discovery.[28]

---

20. FED. R. CIV. P. 37 advisory committee's note (2006); *see generally* Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561 (2001) (advocating for a new ESI rule).

21. While the 2006 rule operated in the federal district courts for only nine years, it has been adopted and continues to operate in several states. *See*, *e.g.*, MD. RULE 2-433 (b); N.C. GEN. STAT. § 1A-1, RULE 37(b1) (effective 2011); MONT. CODE ANN. RULE 25-20-37(e) (2011); OHIO CIV. R. 37(E) (effective 2008) (amended 2021); V.R.C.P. 37(f) (effective 2009) (amended 2017); MINN. R. CIV. P. 37.05 (2007) (amended 2018); TENN. R. CIV. P. 37.06 (effective 2009); KAN. STAT. ANN. § 60-237(e) (2017); HAW. R. CIV. P. 37(f) (effective 2015); ALA. R. CIV. P. 37(g) (effective 2010) (amended 2018). *See also* U.R.C.P. 37(e) (adopting the 2006 FRCP 37(e) accompanied by an explicit recognition of continuing "inherent" judicial power to deal with lost ESI or non-ESI "in violation of a duty" to preserve); OHIO CIV. R. 37(F) (a 2008 rule that, with the addition of the 2006 FRCP 37(e), sets out five factors that courts may consider when determining whether to sanction). *Contra* ARIZ. R. CIV. P. 37(g)(A) (containing 2015 FRCP 37(e), but also articulating the parameters of the "duty to take reasonable steps to preserve" ESI and guidelines on what constitutes such steps).

22. FED. R. CIV. P. 37(e) (2006) (prior to 2015 amendment).

23. *Id.* 26(b)(2)(B).

24. *Id.* 26(f)(3)(C).

25. *Id.* 34(b)(2)(D).

26. *Id.* 26(a)(1)(A)(ii).

27. *Id.* 34(a)(1)(A).

28. *Id.* 34(b)(2)(E).

Not long after the promulgation of FRCP 37(e) in 2006, concerns were expressed to the federal judicial rule makers that "preservation problems . . . nonetheless increased."[29] These concerns chiefly involved "the increasing burden of preserving information for litigation, particularly with regard to [ESI]."[30] The rule makers further observed that "[s]ignificant divergences among federal courts across the country" since 2006 had prompted great uncertainties for "potential parties" regarding "what preservation standards they will have to satisfy to avoid sanctions" in later civil actions.[31]

In 2013, the FRCP Advisory Committee responded to the rising concerns about information preservation by suggesting amendments to Rule 37(e) that would establish "a uniform set of guidelines for . . . all discoverable information," not just ESI, when information preservation duties, "recognized by many court decisions," are breached.[32] No longer was lost ESI to be tied to an "electronic information system," as under the 2006 FRCP 37(e), that thus distinguished some lost ESI from other lost ESI and from lost non-ESI.

Upon breach of a new FRCP 37(e), the 2013 proposal envisioned possible "additional discovery . . . curative measures, or . . . reasonable expenses, including attorney's fees, caused by the failure."[33] Other sanctions, or "adverse-inference" jury instructions, could follow a breach, but only where (1) a party's actions "caused substantial prejudice . . . and were willful or in bad faith," or (2) a breach "irreparably deprived a party of any meaningful opportunity" to litigate.[34] The proponents suggested "factors" within a new Rule 37(e) on how judicial assessments would be made of "a party's conduct" causing a breach of the duty to preserve information.[35] This 2013 proposal was not fully adopted. But a new FRCP 37(e) was promulgated in 2015.

The 2015 amendments to FRCP 37(e) speak to lost ESI once found within and outside of "an electronic information system."[36] The amendments contemplate both possible curative measures and other sanctions for lost, and now

---

29. David G. Campbell, COMM. ON RULES OF PRACTICE AND PROCEDURE, REP. OF THE ADVISORY COMM. ON CIV. RULES 44 (2013) (discussing the Committee's proposed amendment to Rule 37(e)).

30. *Id.*

31. *Id.*

32. *Id.* In 2009, an advisory New Mexico judicial rulemaking committee determined, in rejecting an adoption of the 2006 FRCP 37(e), that its rules should not treat any differently ESI and non-ESI potential evidence lost as a result of "good faith routine destruction." N.M. STAT. ANN. § 1-037 (2009) committee cmt.

33. Campbell, *supra* note 29, at 43.

34. *Id.* This was intended to be a "more demanding" test than the 2006 rule norm on "substantial prejudice." *Id.* at 48.

35. Campbell, *supra* note 29, at 43–44.

36. The 2015 amendments to FRCP 37(e) are reviewed in two articles: Thomas Y. Allman, *Dealing with Prejudice: How Amended Rule 37(E) Has Refocused ESI Spoliation Measures*, 26 RICH. J. L. & TECH. 1 (2020); Thomas Y. Allman, *Informing Juries About Spoliation of Electronic Evidence After Amended Rule 37(e): An Assessment*, 13 FED. CTS. L. REV. 81 (2021).

irreplaceable ESI, which do not require "exceptional circumstances."[37] And they limit certain sanctions to intentional spoliations.[38]

The 2015 federal rule on unrestorable and irreplaceable ESI was said to "foreclose[] reliance on inherent authority or state law to determine when certain measures should be used" in addressing unavailable information with the goal of eliminating, or at least reducing, the "significantly different standards" within the circuits.[39] The new measures addressing FRCP 37(e) ESI are dependent upon the finding of a breach of the federal "common-law duty" regarding the preservation of relevant information when litigation is reasonably foreseeable or pending.[40] Such measures were to comparably apply in federal cases involving federal question and nonfederal question claims.

While state laws on curative measures or sanctions within a federal court case against a party who loses Rule 37(e) ESI are not to be employed, an "independent tort claim for spoliation" may be used.[41] Since FRCP 37(e) explicitly covers ESI that "should have been preserved in the anticipation or conduct of litigation,"[42] one can pursue a state spoliation claim for ESI that was lost before or during federal civil litigation. This spoliation claim can operate

---

37. Exceptional circumstances were required under FED. R. CIV. P. 37(e) between 2006 and 2015. These differences are not always recognized, or deemed significant. *See*, *e.g.*, Gonzalez-Bermudez v. Abbott Labs. PR Inc., 214 F. Supp. 3d 130, 160 n.10 (D.P.R. 2016) (finding that the new FRCP 37(e) has "substantially similar" considerations on imposition of sanctions as did former rule).

38. *See*, *e.g.*, Jenkins v. Woody, No. 3:15cv355, 2017 U.S. Dist. LEXIS 9581, at *42–44 (E.D. Va. Jan. 21, 2017) (finding no default judgment and no adverse inference instruction because no intent to deprive a litigant of information).

39. FED. R. CIV. P. 37(e) advisory committee's notes (2015).

40. *Id.*; FED. R. CIV. P. 37(e) (referencing "information that should have been preserved in the anticipation or conduct of litigation . . . ."). Federal common law duties also operate outside of FRCP 37(e). *See, e.g.*, Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) (concluding federal, not New York, spoliation principles apply during a discovery dispute in a product liability case arising from a New York accident). As to when a pre-lawsuit duty to preserve arises, one court has gone so far as to say, "any time a party receives notification that litigation is likely to be commenced." Marten Transp., Ltd. v. Plattform Advert., Inc., 2016 U.S. Dist. LEXIS 15098, at *14, *19 (D. Kan. Feb. 8, 2016) (involving a cease and desist letter that was acknowledged and acted upon within a few days); *see also* A. Benjamin Spencer, *Civil Procedure and the Legal Profession: The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 FORDHAM L. REV. 2005, 2006-14 (2011) (reviewing federal "common-law duty" cases on pre-suit information preservation). Spencer further urges "the time is ripe for a uniform federal approach to the pre-litigation duty to preserve and sanctions for spoliation" and suggests a FRCP 37 amendment to unify this procedure. A. Benjamin Spencer, *Civil Procedure and the Legal Profession: The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 FORDHAM L. REV. 2006, 2023–24 (2011). *See also* Joshua M. Koppel, *Federal Common Law and the Court's Regulation of Pre-Litigation Preservation*, 1 STAN. J. OF COMPLEX LITIG. 171 (2012) (arguing that with both state and federal question claims, the federal courts should apply state law norms on prelitigation information preservation duties to achieve uniformity).

41. FED. R. CIV. P. 37(e) advisory committee's notes (2015).

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

where there is no available Rule 37(e) sanction, as when a spoliation tort does not require — as does a FRCP 37(e) sanction — a failure "to take reasonable steps to preserve" or when a tort can encompass strict liability under a state information preservation statute.[43]

The employment of the FRCP on sanctions for lost discoverable information, including all ESI and non-ESI then unavailable in a pending civil case, should be guided by the FRCP on pre-suit and post-suit discovery. Sanctions involving then unavailable information should be less available, if available at all, where lost information could have been easily secured earlier under FRCP discovery norms or under other non-FRCP information-gathering avenues, like the Freedom of Information Act and preservation demand letters.

Pre-suit opportunities under the FRCP to preserve discoverable information — whether ESI or non-ESI — relevant to and desired for possible future cases are quite limited. A few American states have more expansive pre-suit discovery opportunities, including laws on identifying potential defendants and laws on identifying potential causes of action.[44] Few laws in the United States have significant pre-suit discovery norms on information preservation.[45]

FRCP 27, substantially replicated in many states, is the major federal rule on pre-suit discovery.[46] It authorizes testimony perpetuation via deposition "about any matter cognizable in a United States court" where the petitioner "expects to

---

43. *Id. See*, *e.g.*, 210 ILL. COMP. STAT. ANN. 90/1 (LexisNexis 2021) (codifying hospital duty to keep certain X-rays); Rodgers v. St. Mary's Hosp. of Decatur, 597 N.E.2d 616, 619 (Ill. 1992) (implied cause of action arises from statute, to be governed by principles of negligence *per se* or strict liability). *Cf.* Howard Reg'l Health Sys. v. Gordon, 952 N.E.2d 182, 187–88 (Ind. 2011) (no implied cause of action arising from violation of the statute on maintenance of health care records).

44. *See*, *e.g.*, 735 ILL. COMP. STAT. ANN. 5/2-402 (LexisNexis 2021) (respondents in discovery in pending civil cases); N.Y. C.P.L.R. § 3102(c) (McKinney 2011) (pre-suit discovery "to aid in bringing an action . . . ."); TEX. R. CIV. P. 202.1 (permitting depositions to help investigate a potential claim or suit); N.Y. C.P.L.R. § 3102(a), (c) (McKinney 2011) (holding pre-suit discovery beyond depositions "to aid in bringing an action"); Sunbeam Television Corp. v. Columbia Broad. Sys., Inc., 694 F. Supp. 889, 892 (S.D. Fla. 1988) (describing Florida bill of discovery on securing information to maintain a claim or defense in "a suit . . . about to be brought in another court . . . .").

45. *But see* ARIZ. R. CIV. P. 45.2 (dispute resolution procedures for when a "preservation request" is made regarding "anticipated litigation," as well as procedures for a nonparty in a pending case to pursue a "protective order" involving a preservation request).

46. *See*, *e.g.*, ARK. R. CIV. P. 27(a)(1); MISS. CODE ANN. § 13-1-227(a)(1); CONN. GEN. STAT. § 52-156(a); S.D. CODIFIED LAWS § 15-6-27(a)(1)(A) (2006); ARIZ. R. CIV. P. 27(a)(1)(A); ALASKA R. CIV. P. 27(a)(1)(1); NEB. CT. R. DISC. § 6-327(a)(1)(i); S.C. R. CIV. P. 27(a)(1)(1); W. VA. R. CIV. P. 27(a)(1)(1). *Cf.* ILL. S. CT. R. 217 (a)(1) (no need to show petitioner cannot presently sue); MD. R. CIV. P. CIR. CT. 2-404(a)(2); R.I. GEN. LAWS § 9-18-12; WIS. STAT. § 804.02(1)(a); PA. R. Civ. P. 1532(a)(2). Some states have special testimony perpetuation laws. In Missouri, a statute covers pre-suit witness depositions "to perpetuate testimony" where "the object is to perpetuate the contents of any lost deed or . . . instrument in writing or the remembrance of any . . . matter . . . necessary to the recovery . . . of any estate or property . . . or any other personal right." MO. REV. STAT. § 492.420.

be a party" to an action in a U.S. court, but "cannot presently" sue.[47] Beyond testimony perpetuation via deposition under FRCP 27, there is little else in the FRCP or the U.S. Judicial Code on pre-suit opportunities to preserve discoverable information. Under this rule, a deposition can only be ordered to "prevent a failure or delay of justice."[48] In pursuing such a deposition, a petitioner can also request that the deponent produce documents and other tangible things at the deposition, or submit to a physical or mental examination.[49]

The federal rule on pre-suit depositions "does not limit a court's power to entertain an action to perpetuate testimony,"[50] a power substantially defined by "the former bill in equity to perpetuate testimony."[51] Use of such a bill predates the FRCP. Current usage of such a bill in equity has been read by federal courts to track the FRCP requirements on deposition testimony perpetuation.[52] Usage of bills in equity is infrequent.[53]

II. SUBSTANTIVE STATE LAW CLAIMS FOR INFORMATION SPOLIATION

A. Introduction

While federal civil procedure laws govern sanctions for lost discoverable information relevant in pending civil actions, whether lost pre-suit or post-suit, state substantive laws often support claim recoveries for harms caused by similar

47. FED. R. CIV. P. 27(a)(1)(A).

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

49. *Id.* (referencing Rules 34 and 35).

50. FED. R. CIV. P. 27(c). *See also* IND. R. TRIAL P. 27(c); N.C. GEN. STAT. § 1A-1, RULE 27(c) (2011); OHIO CIV. R. 27(c) (referencing "inherent" court power); M.R.C.P. 27(c); W. VA. R. CIV. P. 27(c); IOWA R. CIV. P. 1.722; WIS. STAT. § 804.02. *Cf.* VA. SUP. CT. R. 4:2(a), (c) (2021) (the explicit rule on pre-suit perpetuation of testimony via deposition is "the exclusive procedure to perpetuate testimony"). Some state civil procedure laws on pre-suit perpetuation of testimony by deposition are silent on the availability of "an . . . action to perpetuate testimony." V.R.C.P. 27 reporter's notes.

51. *See*, *e.g.*, Shore v. Acands, Inc. 644 F.2d 386, 389 (5th Cir. 1981).

52. *See*, *e.g.*, *id.* (citing 4 MOORE'S FEDERAL PRACTICE ¶ 27.21). *See also Rule 34(c) and Discovery of Non Party Land*, 85 YALE L.J. 112, 118 (1975); Lubrin v. Hess Oil Virgin Islands Corp., 109 F.R.D. 403, 405 (D.V.I. 1986) (noting most cases find "independent action to obtain discovery" of things and documents from a nonparty is similar "to the antiquated instrument called an equitable bill of discovery").

53. A recent, newsworthy state case illustrates an effective use of a bill. The case involved Dr. David Dao's petition seeking to preserve United Airlines' records shortly after Dr. Dao was involuntarily removed from a United flight. Jeffrey A. Parness & Jessica Theodoratos, *Expanding Pre-Suit Discovery Production and Preservation Orders*, 2019 MICH. ST. L. REV. 651, 655 (2019) (bill granted per party agreement). For an older example, *see Lubrin*, 109 F.R.D. at 405 (preservation of conditions at site of accident). Of course, private pre-suit agreements or unilateral assumptions of information preservation duties lessen the need for pre-suit equitable discovery bills. Such agreements and assumptions are promoted where petitions for pre-suit equitable discovery bills beyond testimony perpetuation via pre-suit discovery must be preceded by a conference, like the conference required before post-suit discovery. FED. R. CIV. P. 26(f).

information losses.[54] As noted, the 2015 FRCP 37(e) drafters anticipated such claims, to be governed by state spoliation laws, that could also encompass misconduct under Rule 37(e) and be heard in the federal courts. There is no good reason to think those same state laws could not be pursued in federal courts for other discovery violations. There is no general federal substantive common law right to recover for harm caused by information losses tied to federal civil litigation.[55] Before and since 2015, substantive state spoliation claims involving both ESI and non-ESI have been pursued in federal civil actions wherein the information losses caused harms.[56]

Several American states recognize spoliation claims involving information losses resulting in harms of diminished or eliminated opportunities to present civil claims or defenses.[57] Such claims may arise from general or special laws.[58] Sometimes such claims are recognized in common law precedents, as in the

54. In the absence of harm in litigation caused by information loss, there will be no spoliation claim. *See*, *e.g.*, Hills v. UPS, Inc., 232 P.3d 1049, 1057–58 (Utah 2010) (discussing spoiled evidence relevant to liability that was admitted).

55. While there is overlap in conduct relevant to a federal discovery violation and a state spoliation claim, a "[v]iolation of the federal rules has not been policed by permitting them to serve as the duty component of a state law negligence claim." Turubchuk v. S. Ill. Asphalt Co., 958 F.3d 541, 549 (7th Cir. 2020).

56. *See*, *e.g.*, Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001); Lombard v. MCI Telecomms. Corp., 13 F. Supp. 2d 621, 627 (N.D. Ohio 1998) (finding no federal claim though there was a violation of federal regulation on record retention).

57. The assessments of such harms pose difficult questions, unaddressed here. For example, are recoveries permitted for unavailable claims due to information losses even where without such losses, any recoveries would have been uncollectible? *Cf.*, *e.g.*, Ewing v. Westport Ins. Corp., 315 So. 3d 175 (La. 2020) (holding attorney's liability for malpractice not limited to amount that would have been collected from tortfeasor in underlying action). Besides information losses resulting in harms caused during civil litigation, there are state laws addressing other duties (i.e., tort or contract) tied to information maintenance. *See*, *e.g.*, Dittman v. UPMC, 196 A.3d 1036 (Pa. 2018) (discussing possible employer's duties to employees involving reasonable care to protect employees from information data breaches, including a special tort duty, a duty under negligence law, and a contractual duty). There may also be causes of action for information losses–including information fabrication–against criminal prosecutors and criminal law investigators available to the criminally accused. *See*, *e.g.*, Arizona v. Youngblood, 488 U.S. 51, 58 (1988) ("[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."); State v. DeJesus, 395 P.3d 111, 123–24 (Utah 2017) (reaffirming precedent on state constitutional due process obligation of prosecutors to preserve evidence, which requires "a reasonable probability that the lost . . . evidence would have been exculpatory" and, if so found, a balancing of the culpability of the State and the prejudice to the defendant in order to determine an appropriate remedy); Frost v. N.Y.C. Police Dep't, 980 F.3d 231 (2d Cir. 2020) (claim under 42 U.S.C. § 1983 against police detectives who allegedly fabricated a witness's false identification; the suspect had a Due Process right to a fair criminal trial).

58. *See*, *e.g.*, RESTATEMENT (SECOND) OF TORTS § 870 (AM. L. INST. 1979) ("One who intentionally causes injury to another is subject to liability to the other for that injury, his conduct is generally culpable and not justified under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability.").

Boyd case discussed below.[59] Significant interstate variations do exist,[60] however, such as differences in spoliation laws on who owes an information preservation duty and the culpability needed to show a duty is breached.[61]

The following sections review current state substantive spoliation laws.[62] These laws originate in tort, agreement/contract, statutory and regulatory principles. A survey of these laws facilitates understanding what substantive spoliation claims might be heard in federal civil actions.

B. Tort Claims

Information preservation duties prompting state spoliation claims in tort on behalf of those harmed were described by the Illinois Supreme Court in *Boyd v. Travelers Insurance Company* as follows:

> The general rule is that there is no duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, a contract, a statute . . . or another special circumstance. Moreover, a defendant may voluntarily assume a duty by affirmative conduct . . . In any of the foregoing instances, a defendant owes a duty of due care to preserve evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action.[63]

---

59. *See*, *e.g.*, Boyd v. Travelers Ins., 652 N.E.2d 267 (Ill. 1995).

60. While there are interstate differences, some uniformity may be achieved with the Restatements of the American Law Institute on contracts and torts. For corporations, there are a useful set of guiding principles on organizational practices regarding record disposition. The Sedona Conference Drafting Team, *Commentary on Defensible Disposition*, 20 SEDONA CONF. J. 179 (2019).

61. *See*, *e.g.*, Kimball v. Publix Super Mkts., Inc., 901 So. 2d 293, 296 (Fla. Dist. Ct. App. 2005) ("[T]his court will not recognize a claim for spoliation when the alleged spoliator and the defendant in the underlying cause of action are the same."); Hazen v. Mun. of Anchorage, 718 P.2d 456, 464 (Alaska 1986) (holding Hazen had common law claims for false arrest, malicious prosecution and intentional spoliation of evidence against a municipality); Cook v. Children's Nat'l Med. Ctr., 810 F. Supp. 2d 151, 157 (D.D.C. 2011) (D.C. law allows negligent spoliation claim against third party); Reynolds v. Bordelon, 172 So. 3d 589, 600 (La. 2015) (no negligent spoliation claim against third party). *See also* Hibbits v. Sides, 34 P.3d 327, 329 (Alaska 2001) (third party liable in tort for intentional spoliation); Temple Cmty. Hosp. v. Superior Ct., 976 P.2d 223, 232–32 (Cal. 1999) (holding for no first party or third-party liability for intentional spoliation); Elliott-Thomas v. Smith, 110 N.E.3d 1231, 1235 (Ohio 2018) (holding no third-party liability for intentional spoliation). Dowdle Butane Gas Co. v. Moore, 831 So. 2d 1124, 1132–35 (Miss. 2002) (jurisdictions deal differently with intentional and negligent evidence spoliation claims).

62. Steven Plitt & Jordan R. Plitt, *A Jurisprudential Survey of the Tort of Spoliation of Evidence: Resolving Third-Party Insurance Company Automobile Spoliation Claims*, 24 CONN. INS. L.J. 63 (2017) (fully surveying American state spoliation claims).

63. Boyd, *supra* note 59 at 270–71. Similar descriptions appear in other state court precedents. *See*, *e.g.*, Oliver v. Stimson Lumber Co., 993 P.2d 11, 19 (Mont. 1999) (after citing *Boyd*, recognizing both a negligent and intentional tort claim for evidence spoliation); Hannah v. Heeter, 584 S.E.2d 560, 569–70 (W. Va. 2003) (after citing *Boyd*, adopting both a negligent and intentional tort claim for evidence spoliation by a nonparty, but only an intentional tort claim for

These substantive law duties are only somewhat akin to the duties under Illinois civil procedure laws to have information available when requested via discovery, including procedural law preservation duties before civil litigation commences.[64]

Common law spoliation torts, per *Boyd*, can arise in Illinois, and elsewhere, through a "special circumstance" duty or a duty through a voluntary assumption of a preservation obligation "by affirmative conduct."[65] A special circumstance may involve a fiduciary or otherwise special relationship between those where future civil litigation is reasonably anticipated or where civil litigation is pending.[66] Relevant relationships, where there are no explicit agreements or

---

evidence spoliation by an adverse party). Some of these precedents precede *Boyd*. *See*, *e.g.*, Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177, 1179 (Kan. 1987) (refusing to recognize pre-suit intentional spoliation claim in absence of "some special relationship or duty rising by reason of an agreement, contract, statute, or other special circumstance"). Beyond the guidelines in *Boyd*, there may be other bases for spoliation claims. *See*, *e.g.*, Metlife Auto & Home v. Joe Basil Chevrolet, Inc., 807 N.E.2d 865, 868 (N.Y. 2004) (holding a third-party spoliation claim may lie where one insurer—e.g. a home insurer—requests another insurer—e.g. a car insurer—to preserve the car which alleged caused a fire "in writing or volunteered to cover the costs associated with preservation"). Herein, information preservation, not evidence preservation, duties tied to spoliation claims are reviewed as nonevidentiary losses can also cause harm. *See*, *e.g.*, FED. R. CIV. P. 26(b)(1) (codifying that information "need not be admissible in evidence to be discoverable").

64. *See*, *e.g.*, Shimanovsky v. Gen. Motors Corp., 692 N.E.2d 286, 290 (Ill. 1998) (finding if a trial court could not "sanction a party for the pre-suit destruction of evidence, a potential litigant could circumvent discovery rules or escape liability simply by destroying the proof"). Remedies for breaches of information preservation duties vary depending upon whether the duties arose under tort law or civil procedure laws. For example, sanctions involving adverse jury instructions may only be rendered post-suit and arise solely under civil procedure laws. *See*, *e.g.*, ILL. SUP. CT. R. 215(c)(iii) (offending party debarred from claim maintenance). Only tort claims prompt compensatory damages. *See*, *e.g.*, *Boyd*, 625 N.E. 2d at 272 ("actual damages" due to inability to proceed a products liability claim). Procedural law pre-suit information preservation duties differ from information maintenance and preservation duties which operate without any specific concerns regarding possible or actual lawsuits. *See*, *e.g.*, Dittman v. UPMC, 196 A.3d 1036, 1047–48 (Pa. 2018) (duty owed by employer to employees "to use reasonable care" to safeguard the employees' sensitive personal data when the employers collect and store it "on an internet-accessible computer system").

65. *Boyd*, 652 N.E.2d at 270–71. Outside of Illinois the *Boyd* rationale is sometimes followed. *See*, *e.g.*, *Oliver*, 993 P.2d at 18–19; *Hannah*, 584 S.E.2d at 569-70.

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

contracts on information preservation, can include insurer-insured, attorney-client, and doctor-patient relationships. Here, information germane to a future or pending case may not be preserved by an insurer or an attorney or a doctor,[67] resulting in harm to an insured or a client or a patient. As well, a special circumstance may arise when an expert, retained by a future or current litigant without an explicit agreement on information preservation, loses information passed to the expert for analysis.[68] Yet, for insurers, attorneys, doctors, and experts, seemingly there may be few such spoliation tort claims since claims will often be founded on implicit or explicit duties involving agreements/contracts, like duties to defend, represent, treat, or test only in reasonable fashions. Where such claims are viable, they are often called third-party claims since the spoilers are not the adversaries wherein the spoiled information is needed.[69] Thus, an independent expert's loss of information sought by one harmed in an auto accident can make the accident victim's product liability claim quite difficult, if not impossible, to present.

Affirmative conduct prompting a preservation duty, per *Boyd*, may involve the assumption of control over information that is reasonably foreseeable as (quite) important to later or pending litigation.[70] Such an assumption of control duty can extend to those who are not in a fiduciary or otherwise special relationship with the litigant harmed by information spoliation, thus overlaying with the special circumstance duty.[71]

For example, consider a case where an expert, retained by one future litigant to conduct device testing, destroys or significantly alters the device during testing so that the consulting litigant's future adversary has no opportunity to

---

Ct. App. 2018). *But see* Martin v. Keely & Sons, Inc., 979 N.E.2d 22, 28 (Ill. 2012) (general contractor did not owe a duty to preserve evidence to employees due to special circumstances).

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

68. Such experts may not be sued independently when retained by those already adverse parties, as when the adverse parties are sued for spoliation. *See, e.g.*, Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165, 1169 (Conn. 2006) (expert retained by store and product manufacturer in ladder collapse case was not sued though ladder was destroyed where store and manufacturer were sued for spoliation).

69. *See supra* note 66 and accompanying text.

70. *See generally* Boyd v. Travelers Ins., 652 N.E.2d 267 (Ill. 1995).

71. In one case, there was no such duty recognized for a lawyer to the lawyer's client's adversary, at least where evidence was concealed by, but not destroyed, by the lawyer. Elliott-Thomas v. Smith, 110 N.E.3d 1231, 1235 (Ohio 2018). *See also* Downen v. Redd, 242 S.W.3d 273, 276–77 (Ark. 2006) (no third-party tort claims for spoliation, including claims against law firms; certain remedies might be available by other "means"). Similarly, lawyers typically cannot be liable in malpractice for harms caused to nonclients. *See, e.g.*, *Reynolds*, 903 F.3d at 696 (reviewing Illinois law).

test independently or to observe the expert's testing.[72] The one-time future adversary, now involved in litigation with the party who retained the expert, may have an information spoliation claim against the expert.[73]

Consider, as well, a future litigant's insurance adjuster who takes possession of, and then negligently loses or intentionally destroys information so that the litigant's future adversary later has no access. The one-time future adversary, now in litigation with the litigant, may have a spoliation claim against the litigant's insurer.[74]

Finally, consider a government officer or agency taking information and then losing it to the detriment of another involved in later litigation with the governmental information supplier. A torts claim statute or comparable law might place the government officer or agency in a position similar to a private party who loses information.[75]

Where a common law duty to preserve is established, and is not dependent upon an agreement/contract, whether through a "special circumstance" or

---

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

73. *See*, *e.g.*, Schaefer v. Universal Scaffolding & Equip., LLC, 839 F.3d 599, 610 (7th Cir. 2016) (bar involved in workplace accident given by project supervisor to safety supervisor who owes the affected employee a duty "to save it for potential litigation," under *Boyd* and its progeny, due to a "voluntary undertaking"). Alternatively, the adversary may seek an order barring the expert's testimony. *See*, *e.g.*, Nally v. Volkswagen of Am., Inc., 539 N.E.2d 1017–21 (Mass. 1989).

74. *Compare*, *e.g.*, Dardeen v. Kuehling, 821 N.E.2d 227 (Ill. 2004) (insurer, who told insured homeowner she could remove bricks in an allegedly hazardous sidewalk, had no liability to pedestrian who had earlier fallen) *with* Jones v. O'Brien Tire & Battery Serv. Ctr., Inc., 871 N.E.2d 98 (Ill. App. 2007) (driver's insurer potentially liable to the insured's joint tortfeasor for failure to preserve wheels from driver's car after driver's insurer settled with a tort victim who later sued the insured's joint tortfeasor; driver's insurer had voluntarily undertaken control of wheels for its own benefit and should have anticipated possibility of future litigation) and *Boyd*, 652 N.E.2d 270–71 (employer's workers' compensation insurer owed duty to preserve space heater that it took possession of and that was involved in a workplace accident, where employee pursued product liability claim against manufacturer of heater).

75. *But see*, 28 U.S.C. § 2680(h) (tort claims act does not apply to claims of "malicious prosecution, abuse of process . . . deceit, or interference with contract rights"). *See*, *e.g.*, Hazen v. Mun. of Anchorage, 718 P.2d 456, 463 (Alaska 1986) (one who is arrested has a common law claim in tort for intentional interference with prospective civil action caused by the spoliation of evidence, here the alteration of an arrest tape); Nichols v. State Farm Fire & Cas. Co., 6 P.3d 300, 303-04 (Alaska 2000) (no first party or third-party evidence spoliation claim founded on negligence, where first party alleged spoliators were defined as the parties to the original action). A statute, court rule, or inherent power precedent on civil procedure sanctions often does not distinguish between private and public officer conduct, or between private and public entity conduct. *See*, *e.g.*, FED. R. CIV. P. 11(c), 16(f), 37 (no reference to any private/ public distinction in varying sanction settings). Of course, given the Fifth and Fourteenth Amendments, only governments and governmental officers have certain special duties regarding information maintenance. *See*, *e.g.*, Jutrowski v. Twp. of Riverdale, 904 F.3d 280, 294 (3d Cir. 2018) (possible due process claims (access to court) involving post-arrest conspiracy amongst police officers to misrepresent facts of arrest are appropriate under 42 U.S.C. § 1983).

"affirmative conduct," a spoliation tort might require proof of culpability going beyond mere negligence.[76] The requisite degree of proof can be dependent upon whether the duty was owed by one who is or could have been an adverse party in the civil litigation wherein the lost information would have been employed.[77]

Finally, even where the necessary degree or culpability is established, spoliation tort liability may vary depending upon whether the information was intentionally destroyed or was only intentionally concealed.[78]

C. Agreement/Contract Claims

Agreement/contract spoliation duties, per *Boyd*, operate differently than do tort spoliation duties on information preservation. The intentions of the agreeing/contracting parties, rather than the hypothesized actions of reasonable persons, may be key. In a single case, though, there can be presented both tort and agreement/contract claims involving the same spoiled information.[79]

---

76. *See*, *e.g.*, Willis v. Cost Plus, Inc., No. 16-639, 2018 U.S. Dist. LEXIS 41943, at *8–9, *14 (W.D. La. 2018) (while the Louisiana Supreme Court has held there is no cause of action for negligent spoliation, lower Louisiana state courts have recognized a Louisiana claim for spoliation based on intentional conduct). *Cf.* Richardson v. Sara Lee Corp., 847 So. 2d 821 (Miss. 2003) (no negligence or intentional tort claim for spoliation of evidence). *See also* Elliott-Thomas v. Smith, 110 N.E.3d 1231, 1234–35 (Ohio 2018) (independent tort of intentional spoliation of evidence requires physical destruction of evidence and, thus, does not include claims involving intentional interference with or concealment of evidence). Similarly, a civil procedure law sanction for pre-suit evidence spoliation may only be available if intentional misconduct is shown. *See*, *e.g.*, Tatham v. Bridgestone Ams. Holding, 473 S.W.3d 734, 745–46 (Tenn. 2015) (altering earlier laws by holding "intentional misconduct is not a prerequisite" for spoliation sanctions); Mont. State Univ.-Bozeman v. Mont. First Jud. Dist. Ct., 426 P.3d 541, 553–54 (Mont. 2018) (intentional evidence spoliation prompts a rebuttable presumption that evidence was materially unfavorable to spoliating party, while negligent spoliation does not).

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

78. *See*, *e.g.*, *Elliott-Thomas*, 110 N.E.3d at 1235 (tort of intentional evidence spoliation extends to destroyed, but not concealed, evidence).

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

The *Boyd* court did not elaborate on what, if any, differences exist between preservation duties based on agreements and on contracts. Perhaps only a spoliation claim founded on an agreement encompasses a unilateral promise on information preservation made in anticipation of, or during, a lawsuit. Perhaps a spoliation claim founded on a contract also encompasses a pact on information storage which, when made, was unrelated to any anticipated or current litigation, based rather on the desire to be able to later access certain current or future materials.

Whatever the differences, contracts and agreements on nonlitigation information preservation may be guided by different substantive laws than the laws on promises tied to litigation information preservation. Only in the latter settings might there be some nods, or significant deference, to the policies within civil procedure laws.

D. Statutory and Regulatory Claims

Beyond common law tort and agreement/contract claims, per *Boyd*, there can be substantive law claims arising from violations of written laws on pre-suit information preservation.[80] Statutes might expressly recognize a claim for harm in civil litigation resulting from the loss of certain information. Further, statutes imposing information preservation duties might prompt implied causes of action for spoliation. Without express legislative intent, spoliation claims may be implied, for example, from statutes where:

> (1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) the plaintiff's injury is one the statute was designed to prevent; (3) a private right of action is consistent with the underlying purpose of the statute; and (4) implying a private right of action is necessary to provide an adequate remedy for violations of the statute."[81]

---

against insurers due to spoliation of information evidence by insurers that is needed in insureds'–here product liability–claims against third parties). Tort claims may be barred by agreement/contract provisions indicating the only claims available for breaches of information duties breaches are those recognized within the agreement/contract. *See*, *e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 195(3) (AM. L. INST. 1981) (discussing the extent to which a contract can exempt a seller of a product from tort liability for physical harm to a user).

80. *See generally* Boyd v. Travelers Ins., 652 N.E.2d 267 (Ill. 1995).

81. Metzger v. DaRosa, 805 N.E.2d 1165, 1168 (Ill. 2004). Cort v. Ash, 422 U.S. 66, 78 (1975) (establishing comparable guidelines for implied federal claims). These guidelines have been employed by state courts. *See*, *e.g.*, Seeman v. Liberty Mut. Ins., 322 N.W.2d 35, 40 (Iowa 1982) ("We believe the basic analytical approach of the Supreme Court is correct."); Yedidag v. Roswell Clinic Corp., 346 P.3d 1136, 1146 (N.M. 2015) (finding "whether to imply a private cause of action is influenced by three of four factors set out in *Cort*"); Bennett v. Hardy, 784 P.2d 1258, 1261 (Wash. 1990) ("borrowing from the test" in *Cort*). For differing views on applying these (and other) guidelines on implied causes of action, see the varying opinions in Gonzaga Univ. v. Doe, 536 U.S. 273 (2002).

Spoliation claims tied to written laws other than statutes, such as agency regulations—"written, non-statutory laws"—also possible, though guiding principles differ from the norms on claims implied from statutes.[82]

A medical records retention statute in Illinois illustrates a written law from which a spoliation claim might be implied. There, a hospital must retain an x-ray for at least five years, but for up to twelve years, if notified within five years that there is pending litigation where the x-ray is "possible evidence."[83] Here, information preservation duties exist both pre-suit and post-suit. And here, such duties are only sometimes explicitly tied to notice of civil litigation. Seemingly, per *Boyd*, a substantive law claim under this statute might arise for one harmed in civil litigation by a hospital's pre-suit failure to retain covered records for five years even when there is no pending lawsuit, as well as a comparable post-suit failure by a hospital once notified of related litigation. By contrast, an Indiana hospital record maintenance requirement, with "disciplinary" sanctions for violations that included possible licensure or certification consequences, has been read to prompt no implied cause of action as it was "designed to protect the public in general."[84] A California Government Code provision on employment record retention says:

> It shall be an unlawful practice for employers, labor organizations, and employment agencies subject to the provisions of this part to fail to maintain and preserve any and all applications, personnel, membership, or employment referral records and files . . . or for employers to fail to retain personnel files of applicants or terminated employees . . . Upon notice that a verified complaint against it has been filed under this part, any such employer, labor organization, or employment agency shall maintain and preserve any and all records and files until the complaint is fully and finally disposed . . . .[85]

---

82. On claims tied to agency regulations, *see*, *e.g.*, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963); J.I. Case Co. v. Borak, 377 U.S. 426, 430–31 (1964) (claims based on false and misleading proxy statements under federal statute and enabling federal regulation); S. Camden Citizens in Action v. N.J. Dep't of Env't Prot., 274 F.3d 771, 788 (3d Cir. 2001) (a regulation may invoke a private right of action that Congress, through statutory text, created; but a regulation cannot create a private right which Congress has not sanctioned).

83. 210 ILL. COMP. STAT. ANN. 90/1 (LexisNexis 2021). *See also* LA. STAT. ANN. § 40:2144 (F)(1), (F)(2) ("Hospital records shall be retained by hospitals . . . for a minimum period of ten years from the date a patient is discharged" while x-ray films "shall be retained" for at least 3 years after the patient is discharged); Longwell v. Jefferson Parish Hosp. Serv. Dist. No. 1, 970 So. 2d 1100, 1106 (La. Ct. App. 2007) (need deliberate spoliation to support spoliation tort claim but violation of x-ray preservation duty was actionable in negligence); KAN. ADMIN. REGS. § 100-24-1 (licensee's duty to "maintain an adequate record for each patient for whom the licensee performs a professional service"); Foster v. Lawrence Mem'l Hosp., 809 F. Supp. 831, 838 (D. Kan. 1992) (spoliation claim against doctor for breach of regulatory duty).

84. Howard Reg'l Health Sys. v. Gordon, 952 N.E.2d 182, 187 (Ind. 2011) (construing Indiana Code 16-39-7 as it existed in 2008).

85. CAL. GOV'T CODE § 12946 (within a title on state government addressing prohibited discrimination). This Code provision, unlike the Illinois medical records statute, does not have the

Another California statute says, "[a]udit documentation shall be maintained for a minimum of seven years which shall be extended during the pendency of any board investigation, disciplinary action, or legal action involving the licensee or the licensee's firm."[86]

As to written laws beyond statutes, a federal regulation on public contract recordkeeping says, "any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of two years."[87] It goes on: "Where the contractor has received notice that a complaint of discrimination has been filed, that a compliance evaluation has been initiated, or that an enforcement action has been commenced, the contractor shall preserve all personnel records relevant . . . until final disposition . . . ."[88] Here, as with the Illinois and California statutes, there are both pre-suit and post-suit duties.

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

> The producers . . . must keep accurate records and accounts showing the details relative to the prune/plum tree removal . . . Such records and accounts must be retained for two years after the date of payment to the producer under the program, or for two years after the date of any audit of records by USDA, whichever is later. Any destruction of records by the producer at any time will be at the risk of the producer when there is reason to know, believe, or suspect that matters may be or could be in dispute or remain in dispute.[89]

Here, there is an absolute preservation duty for two years, and a continuing duty thereafter if there is reason to know of some "dispute." As to the "risk" to the producer, perhaps it encompasses both a possible civil case sanction and a spoliation claim as well as a regulatory—if not criminal—sanction.

Written, nonstatutory laws, including agency regulations and court rules, can also speak to civil litigation information preservation duties.[90] Consider, for example, attorney professional conduct laws. These laws prompt challenging issues on their interface not only with civil procedure discovery sanction laws, but also with state substantive spoliation laws. Some discovery sanction and

---

preservation duty expire at a fixed date. The lengthier duty to preserve in California, unlike in Illinois, only falls, however, to one who is a civil case defendant.

86. CAL. BUS. & PROF. CODE § 5097 (within a division on professions and vocations generally, this appears in the chapter on accountants).

87. 41 C.F.R. § 60-300.80(a).

88. *Id.*

89. 7 C.F.R. § 81.13.

90. *See*, *e.g.*, ILL. SUP. CT. R. 3.4 ("A lawyer shall not: (a) . . . obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value."). There are written nonstatutory laws on information preservation duties tied specifically to possible or potential criminal litigation. *See*, *e.g.*, *id.* at 3.8(d) (a public prosecutor in a criminal case shall "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense").

disciplinary remedies overlap, as with reprimands,[91] while others usually operate only in one setting, like state disbarment as a disciplinary remedy and adverse party fee recovery as a discovery sanction.

As for the relationships between attorney professional conduct laws and state spoliation laws benefitting nonclients, generally, courts do not imply spoliation claims for professional conduct violations involving an attorney's loss of information causing harms incurred by nonclients. For clients who are harmed, there are attorney malpractice claims. Nonclients are barred in malpractice due to a lack of privity.[92]

Beyond attorneys, other professionals are regulated by written, nonstatutory laws. In Kansas, an agency regulation requires licensed doctors to "maintain an adequate record for each patient for whom the licensee performs a professional service."[93] This regulation has been read to prompt a spoliation claim by a former patient when an "adequate record" has not been maintained.[94]

There are some statutes on information preservation related to criminal cases that might prompt civil recoveries for harms caused by information loss. In South Carolina, there is a duty for a "custodian" to "preserve all physical evidence and biological material related to conviction or adjudication of a person" for certain offenses, including murder, criminal sexual conduct, arson and certain sexual misconduct.[95] While the act operates only after a conviction or adjudication,[96] it surely anticipates prejudgment conduct involving information preservation. The statute could be used by a spoliation claimant who is exonerated where the exoneration was (long) delayed by a statutory violation.[97]

Similarly, statutes can address information maintenance related to all lawsuits. A California law deems it a misdemeanor to knowingly destroy or conceal any

91. *See*, *e.g.*, ILL. R. FOR THE ATT'Y REGISTRATION & DISCIPLINARY COMM'N ART. IV, R. 282, ART. V, R. 312; ILL. SUP. CT. R. 137(a) ("appropriate sanction" when a motion is not "well grounded in fact").

92. *See*, *e.g.*, Friedman v. Dozorc, 312 N.W.2d 585, 595-618 (Mich. 1981); *but see* Jonathan K. Van Patten & Robert E. Willard, *The Limits of Advocacy: A Proposal for the Tort of Malicious Defenses in Civil Litigation*, 35 HASTINGS L.J. 891 (1984); Charles W. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281 (1979).

93. KAN. ADMIN. REGS. § 100-24-1.

94. Foster v. Lawrence Mem'l Hosp., 809 F. Supp. 831, 835 (D. Kan. 1992)

95. S.C. CODE ANN. § 17-28-320(A)(1), (10), (14), (19).

96. An adjudication without a conviction of certain covered offenses, like a finding that a person is a "sexually violent predator," can be made, for example, in an involuntary civil commitment proceeding. *Id.* § 44-48-100.

97. Such a civil suit for harm caused by evidence loss may require proof of willful and malicious conduct leading to information loss, as this mens rea is needed for a criminal misdemeanor conviction. *Id.* § 17-28-350.

matter "about to be produced in evidence upon a trial, inquiry or investigation, authorized by law."[98]

The foregoing information preservation duties were all affirmative in that they required action without earlier requests. But statutes/regulations can also prompt preservation duties, whose breaches may lead to substantive spoliation claims, only when earlier preservation requests were made. For example, a federal statute authorizes the government to request a service provider to "take all necessary steps to preserve records and other evidence in its possession" while investigators seek legal process.[99]

III. RESOLVING STATE SPOLIATION CLAIMS IN FEDERAL DISTRICT CLAIMS

The numbers of state spoliation claims presented in the federal district courts should increase given the recognition in the 2015 FRCP 37(e) Comment of some court authority, as well as the convenience, economy, and justice often accompanying exercises of such authority. The following sections provide guidance on how this authority over state spoliation claims should be employed.

A. Irreplaceable ESI, Replaceable ESI, and Non-ESI Spoliation

As noted, FRCP 37 on discovery spoliation sanctions differentiates between irreplaceable ESI and replaceable ESI and non-ESI. The Advisory Committee Comments to the 2015 amendments to FRCP 37(e) expressly recognize possible federal district court jurisdiction over factually related state spoliation torts involving irreplaceable ESI.[100] There is no good reason, however, why state spoliation claims for information losses beyond torts, or involving replaceable ESI or non-ESI, should not also be heard at times in federal courts.[101] Like FRCP 37(e) sanctions, state spoliation claims generally encompass similar public policies on information that "should have been preserved in the anticipation or conduct of litigation."[102] Unlike FRCP 37(e), some spoliation

98. CAL. PENAL CODE § 135.

99. 18 U.S.C. § 2703(f)(1). Armin Tadayon, *Preservation Requests and the Fourth Amendment*, 44 SEATTLE UNIV. L. REV. 105 (2020) (reviewing § 2703 and related Fourth Amendment concerns).

100. FED. R. CIV. P. 37(e) advisory committee notes (2015) ("The rule does not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim.").

101. *Id.* While the Note to the 2015 FRCP 37(e) speaks of an "independent tort claim for spoliation," there is good reason for federal courts also to have authority to hear non-tort spoliation claims. And, there is good reason for state spoliation claims to sometimes be pursued in related federal civil actions even where federal question jurisdiction is invoked. The Note, in saying a spoliation claim can be heard if "state law applies in the case," is best read to mean where a state spoliation law, whatever the type, is applicable, and not simply only in a diversity or supplemental jurisdiction setting. In fact, federal courts have heard state spoliation claims in federal question jurisdiction cases. *See*, *e.g.*, *id.*

102. *See*, *e.g.*, *Boyd*, 652 N.E. 2d at 270–71.

claims promote these policies in circumstances where discovery sanctions are unavailable, as when otherwise nonparties, like insurers or experts, spoil.

B. Venue, Subject Matter Jurisdiction, and Personal Jurisdiction Issues

For any state spoliation claim to be heard in a federal district court, there must be both subject matter jurisdiction and personal jurisdiction. There need not be an independent basis for venue if "pendent venue," sometimes called ancillary venue, operates.[103] With or without an independent basis for venue, the *forum non conveniens* doctrine is available to deprive spoliation claimants of their venue choices.[104] Forum objections should be differently assessed where new parties are added to pending civil actions solely due to their information spoilation. Here, both the evidence and the substantive laws on the claims may be wholly situated outside the forum.

For those already parties to civil actions wherein spoliation claims are presented against them, there would be no need for an independent basis for personal jurisdiction if "pendent personal jurisdiction" operates. Such jurisdiction would operate when the spoliation claims derive from the common nucleus of operative facts relevant to already presented claims.[105] Inconvenience to a party in litigating a spoliation claim can be remedied through a *forum non conveniens* analysis. Consider, for instance, a setting where a claimant loses a federal court case, whether founded in diversity or federal question, because of the absence of any evidence on which to plead properly, where the lack of evidence was caused by the adverse party's spoliation acts outside the forum.

For one not already a party whose presence as a defendant is sought due to spoliation of information helpful to resolving the factual disputes between others, an independent basis for personal jurisdiction is required. Assuming no forum residency, no forum service of process, no consent, or no attachable in-state property, the prospective defendant's ties to the forum must be assessed. There are often at least some ties, as where it was reasonably foreseeable that certain information was quite relevant to claims between others in a current or in a reasonably foreseeable federal forum. There are sometimes few ties, as where future civil litigation was reasonably foreseeable, but not in the forum that was chosen.

As to subject matter jurisdiction, the general diversity statute can cover a spoliation claim, assuming joinder is permitted when there is another claim already pending.[106] When the statute is met, it is difficult for a federal district

---

103. *See*, *e.g.*, 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS, § 3808, at 82 n.7 (2d ed. 1986) (sometimes called ancillary venue).

104. *See*, *e.g.*, Piper Aircraft Co. Reyno, 454 U.S. 235, 249 (1981).

105. *See*, *e.g.*, Charles Schwab Corp. v. Bank of Am. Corp., 883 F.3d 68, 88 (2d Cir. 2018); Action Embroidery Corp. v. Atl. Embroidery, Inc., 368 F.3d 1174, 1180–81 (9th Cir. 2004).

106. FED. R. CIV. P. 20(a)(2) (joining co-defendants).

court to refuse to hear the spoliation claim,[107] though any hearing may need to await the resolution of that same spoliation claim also pending in a state court.[108] Uncertain questions of state law can sometimes be submitted through a certification process to a state court for resolution.[109]

Without independent diversity subject matter jurisdiction, authority to hear spoliation claims can arise under the supplemental jurisdiction statute,[110] again assuming permissible joinder. On occasion, there can be authority under ancillary subject matter jurisdiction precedents.[111] The precise guidelines on exercising this authority over spoliation claims remain uncertain, as suggested by the differing approaches to federal authority over attorney-client fee disputes in pending civil actions.[112]

Even with proper venue, and with both personal and subject matter jurisdiction initially established, there is no assurance that a pending state spoliation claim will later be heard in the court where it is first presented. With both supplemental and ancillary subject matter jurisdiction, a claim once recognized may later be dismissed due to intervening changes. Possible changes

---

107. 28 U.S.C. § 1332(a) ("The district courts shall have original jurisdiction."). *See also*, *e.g.*, Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992) (citing Colorado River Water Conservation Dist. v. U.S., 424 U.S. 800, 817 (1976) ("[F]ederal courts have a virtually unflagging obligation . . . to exercise the jurisdiction given them").

108. *See*, *e.g.*, Exxon Mobil Corp. v. Saudi Basic Indus., 544 U.S. 280, 292 (2005) ("Comity or abstention doctrines may . . . permit or require the federal court to stay . . . the federal action in favor of state-court litigation.").

109. *See*, *e.g.*, Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672 (2003).

110. *See*, *e.g.*, 28 U.S.C. § 1367(a) (with exceptions in subsections (b) [honoring the diversity jurisdiction limits of 28 U.S.C. § 1332] and (c) [factors on the discretion not to exercise supplemental jurisdiction], there is recognized "supplemental jurisdiction over . . . claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution"). Also consider that certain information losses prompting spoliation claims may be unrelated to pending nonspoliation claims, as where information spoliation is alleged to have stymied an intentional tort claim and where the sole pending claim involves an unintentional tort or a contract.

111. *See*, *e.g.*, Kokkonen v. Guardian Life Ins., 511 U.S. 375, 379–80 (1994)

> Generally speaking, we have asserted ancillary jurisdiction . . . for two separate, though sometimes related, purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent . . . and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.

Id.

As it postdates the enactment of 28 U.S.C. § 1367, this precedent arguably compliments, rather than is usurped by, the statute on supplemental jurisdiction.

112. *Compare* Riva Techs., Inc. v. Zack Elecs., Inc., No. 01 C 1390, 2002 U.S. Dist. LEXIS 12907 (N.D. Ill. July 12, 2002) (finding no supplemental jurisdiction), *with* Cluett, Peabody & Co. v. CPC Acquisition Co., 863 F.2d 251 (2d Cir. 1988) (ancillary jurisdiction exercised), *and* Brettschneider v. City of New York, No. 15-CV-4574-CBA-SJB, 2020 U.S. Dist. LEXIS 188647 (E.D.N.Y. Aug. 25, 2020) (finding no supplemental jurisdiction), *magistrate report adopted*, No. 15-CV-4574 (CBA) (SJB), 2020 U.S. Dist. LEXIS 187279 (E.D.N.Y. Oct. 8, 2020).

include the resolution of all nonspoliation claims and a finding that a spoliation claim raises novel state law issues.[113] When a pending state spoliation claim is later dismissed, the dismissing court nevertheless maintains some authority to impose discovery sanctions for earlier information losses.[114]

C. Pre-suit and Post-suit Information Losses

Certain pre-suit and all post-suit information losses impacting federal civil actions differ from other pre-suit information losses. With some pre-suit losses, there will be no reasonable anticipation of a later federal lawsuit. Here, there is less reason for a federal court to hear a state spoliation claim. Where a pre-suit information maintenance, preservation, or production request was made that specifically referenced imminent, or even possible, later federal civil litigation, there is more reason for the exercise of federal court authority.

In spoliation cases, pre-suit information losses by those later otherwise named as parties should be treated differently from pre-suit information losses by those otherwise nonparties. With parties, the consideration of, and settlement involving, discovery sanctions for pre-suit conduct may obviate the need for any spoliation remedies. Nonparties, of course, are far less susceptible to later discovery sanctions though they are accountable for spoliation claim recoveries.[115]

D. Federal Law Preemption

The amendments to FRCP 37(e) did not change the federal law approach to substantive state spoliation laws. The approach has always been to leave substantive spoliation laws, whether in tort, contract, or otherwise, to state

---

113. *See*, *e.g.*, 28 U.S.C. § 1367(c)(3) (court may decline to exercise supplemental jurisdiction over a claim where all original jurisdiction claims have been dismissed); Jallali v. Nat'l Bd. of Osteopathic Med. Exam'rs, Inc., 518 Fed. App'x 863, 867 (11th Cir. 2013) (state negligent spoliation of evidence claim dismissed after federal question claim dismissed). 28 U.S.C. § 1367(c)(1), *recognized in* Phillips v. City of Albuquerque, No. 97-1324 JP /LFG, 1998 U.S. Dist. LEXIS 24371, at *3 (D.N.M Mar. 24, 1998) (state spoliation claim setting).

114. *See*, *e.g.*, Willy v. Coastal Corp., 503 U.S. 131, 139 (1992) ("The interest in having rules of procedure [here, FRCP 11] obeyed . . . does not disappear upon a subsequent determination that the court was without subject-matter jurisdiction.").

115. *See*, *e.g.*, FED. R. CIV. P. 37(e) (failure by a party to preserve certain electronically stored information). Discovery sanctions against nonparty deponents can be imagined where the deponents failed pre-suit to preserve or maintain certain information later sought post-suit where there was a pre-suit duty to provide that information. One who reasonably anticipates litigation, though not yet or perhaps never sued, seemingly can have information duties enforceable via discovery sanctions. *See*, *e.g.*, the Florida medical malpractice law on "informal discovery" that says: "Upon receipt by a prospective defendant of a notice of claim, the parties shall make discoverable information without formal discovery." FLA. STAT. § 766.106(6)(a) (noting that this discoverable information provision is housed under the statutory title "Notice Before Filing Action for Medical Negligence")

lawmakers.[116] So, there should be no general federal law preemption of state spoliation laws, even when information losses are tied to claims exclusively heard by Article III federal courts, like bankruptcy and patent claims.[117]

But, as to outright preemption, consider a federal statute mandating certain information maintenance that is both unrelated to any later or to any pending civil action and has been read not to prompt an implied cause of action on behalf of one harmed by information maintenance failures. Here, there may be federal law preemption, where state lawmakers will not be able to recognize spoliation claims arising solely from such federal statutory violations. Similarly, additional state spoliation lawmaking, as with recognizing additional monetary remedies, may be preempted where federal laws, directly or implicitly, recognize a federal question claim for only certain harms caused by federal statutory violations involving information losses.

E. Joining Claims Against Those Otherwise Nonparties

State spoliation claims are sometimes available against those otherwise not parties to the civil actions wherein lost information was important. As noted, claims against such nonparties are often deemed third-party actions. Besides the venue and jurisdiction issues, the standards on joinder for third-party actions differ from the standards guiding joinder of claims against those already adverse parties, who can be subject to independent first-party spoliation claims.

As to those otherwise nonparties, the Comment to the 2015 amendments to Rule 37(e) recognizes there can be an "independent tort claim for spoliation" that may be pursued for conduct that may also violate the federal civil discovery rule.[118] The Comment does not expressly limit such a claim to one already a party. Any such limit would undermine the state substantive law that federal courts must respect, be it a law on irreplaceable ESI, replaceable ESI or non-ESI.[119]

Yet, the standards on joining those then nonparties can limit third-party spoliation claims. Third-party spoliation claims can be less "related" to pending claims so that supplemental jurisdiction is unavailable.[120] Even when sufficiently related, the standards on exercising supplemental, or ancillary

116. *See*, *e.g.*, FED. R. CIV. P. 37(e) (advisory committee notes to 2015 amendments recognize the Rule "does not affect the validity of an independent tort claims for spoilation if tort law applies in a case and authorizes the claim").

117. 28 U.S.C. § 1334(a) ("[D]istrict courts shall have original and exclusive jurisdiction of all cases under title 11."); § 1338(a) ("No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents.").

118. *See supra* note 116.

119. 28 U.S.C. § 1652; Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (applying § 1652).

120. 28 U.S.C. § 1367(a) (supplemental claims must be "so related" to pending claims "that they form part of the same case or controversy").

jurisdiction, over parties and nonparties who breached substantive state spoliation duties can vary.[121]

Further, the rules on joinder of claims against new parties are more restrictive than the rules on joinder of claims against existing parties, even when there is independent subject matter jurisdiction.[122]

F. Collateral Estoppel

Where there are sought both FRCP discovery sanctions and state spoliation remedies, how should the factual findings made during the resolution of one impact the other? The answer may differ depending on whether a sanction motion is resolved before or after a spoliation claim. Where a sanction motion is first resolved, there would likely be no jury findings of fact as there can be with a spoliation claim.[123] Yet, there would be a full and fair opportunity to contest for one later sanctioned, which can open the door to collateral estoppel consequences. Consider, for example, how an attorney malpractice case can be guided by factual determinations made in an earlier attorney disciplinary proceeding,[124] or how an attorney disciplinary case can be guided by an earlier discovery sanction proceeding.[125]

---

121. 28 U.S.C. § 1367(c) (a court may decline to exercise jurisdiction over a "related" claim where the "claim raises a novel or complex issue of State law").

122. *Compare* FED. R. CIV. P. 18(a) (any claim), *with* FED. R. CIV. P. 20(a) (same transaction and common question of law or fact).

123. On the lack of a jury in certain discovery sanction proceedings, see, e.g., KCI USA, Inc. v. Healthcare Essentials, Inc., 801 Fed. App'x 928, 936–37 (6th Cir. 2020) (no jury trial right on facts leading to default judgments and damage awards against defendants); Klupt v. Krongard, 728 A.2d 727, 736–37 (Md. 1999) (no jury needed for dismissal of claims as a sanction for discovery abuse). *See*, *e.g.*, Hannah v. Heeter, 584 S.E.2d 560, 573 (W. Va. 2003) (jury assessments of compensatory and punitive damages in both first party and third-party spoliation cases).

124. *See*, *e.g.*, B&B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 150 (2015) ("As to the Seventh Amendment [federal jury trial right] . . . the Court has already held that the right to a jury trial does not negate the issue-preclusion effect of a judgment, even if that judgment was entered by a juryless tribunal."). *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 83(4) (AM. L. INST. 1982)

> An adjudicative determination of an issue by an administrative tribunal does not preclude relitigation of that issue in another tribunal if according preclusive effect to determination of the issue would be incompatible with a legislative policy that: (a) The determination . . . is not to be accorded conclusive effect . . . or (b) The tribunal in which the issue subsequently arises be free to make an independent determination.

Id.

125. *See*, *e.g.*, Taylor v. Sturgell, 553 U.S. 880, 892 (2008) ("Issue preclusion . . . bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim.") (citing New Hampshire v. Maine, 532 U.S. 742, 748–49 (2001)). But see the peculiar disciplinary case of Rufus Cook, whose earlier federal court sanction proceeding findings were not utilized against him in an Illinois lawyer disciplinary case. Jeffrey A. Parness, *Enforcing Professional Norms for Federal Litigation Conduct: Achieving Reciprocal Discipline*, 60 ALB. L. REV. 303, 311 (1996) (the earlier federal findings, affirmed in the Court of Appeals, did not absolve

Where a spoliation claim is first resolved by a settlement covering any and all disputes, including pending discovery sanction motions, a discovery sanction proceeding can still follow. The court, as well as a litigant, can be aggrieved by an information loss.[126] Here, there likely would be no collateral estoppel. Yet when a spoliation claim is first resolved upon a trial,[127] a later discovery sanction proceeding will likely be subject to collateral estoppel consequences. The same factual disputes about information losses can be pertinent to both discovery sanction and substantive spoliation proceedings. In federal courts, these factual disputes should be resolved by juries when demanded.

G. Choice of Spoliation Laws

Where conduct causing information losses important to a federal civil action occurred wholly or largely within the United States but outside of the forum state, there can arise choice of spoliation law issues.

When federal courts entertain state spoliation claims having multistate connections, the forum state choice of law rules will generally apply.[128] Forum substantive laws may not,[129] or sometimes cannot,[130] be chosen. For a spoliation claim requiring anticipation of future litigation, be it founded in contract, tort, or otherwise, there may not need to be reasonable anticipation of litigation in the very forum where the spoliation claim is presented.

---

the sanctioning federal district judge from having to appear to testify in the disciplinary hearing, which she refused to do).

126. *See, e.g.*, FED. R. CIV. P. 26(g)(3) ("[T]he court . . . on its own" can impose a sanction on an attorney or a party for discovery certification failures); *Id.* 11(c)(3) ("On its own, the court may order an attorney, law firm or party to show cause" regarding alleged violation of Rule 11(b)). *See also* Kokkonen v. Guardian Life Ins., 511 U.S. 375, 379–80 (1994) ("ancillary jurisdiction . . . to enable a court to . . . vindicate its authority").

127. *See*, *e.g.*, Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479 (1962) (where the same factual issues arise in both pending legal and equitable claims, the legal claims must first be resolved by a jury when a jury is demanded).

128. *See*, *e.g.*, Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (employing Erie R.R. v. Tompkins, 304 U.S. 64 (1938)). But as noted, *supra* note 75, there is some room for federal spoliation claims, as with Due Process claims under 42 U.S.C. § 1983. *See*, *e.g.*, Jutrowski v. Twp. of Riverdale, 904 F.3d 280, 294 (3d Cir. 2018) (possible Due Process claims (access to court) involving post arrest conspiracy amongst police officers to misrepresent facts of arrest are appropriate under 42 U.S.C. § 1983).

129. *See*, *e.g.*, Jou v. Adalian, No. 15-00155 JMS-KJM, 2018 U.S. Dist. LEXIS 69530, at **12–13 (D. Haw. Apr. 25, 2018) (California spoliation law applied).

130. Federal Full Faith and Credit duties limit states in their choice of law decisions. *See*, *e.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302, 310–11 (1981) (plurality opinion) ("[I]f a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional.") (employed in Carey v. Bahama Cruise Lines, 864 F.2d 201, 206 (1st Cir. 1988)). A state with insignificant contact, however, "may dismiss an action based on a foreign law that is deeply offensive to forum public policy, regardless of the forum's contacts with the case." RESTATEMENT (THIRD) OF CONFLICTS OF LAW § 5.04(1) (AM. L. INST., Preliminary Draft No. 6, Sept. 29, 2020).

Some spoliation claims may not require reasonable anticipation of any future litigation. Consider, for example, breaches of state statutory duties on information preservation that support spoliation claims even where the statutes, as with some medical record maintenance laws, do not speak directly to anticipated discovery or use in future civil cases.[131] Here, choice of spoliation laws can be challenging, as where the acts constituting a failure to maintain records occurred in one state, but where a related spoliation claim is pursued in a different state. There may be false conflicts, though, as where a spoliation claim arising from a certain statutory breach was only to be recognized in the state where the breach occurred.

Should spoliation laws operate extraterritorially, and true conflicts arise, there may follow issue-by-issue choices. Thus, one state's laws on whether any information preservation duty was owed and was violated might apply, while another state's laws might guide the remedies available for those harmed.[132]

In choice of law settings, claims of pre-suit spoliation pursued in federal civil actions should differ sometimes from claims of post-suit spoliation, that is, claims for information losses occurring during ongoing federal civil litigation. Only with post-suit spoliation is there necessarily a connection to the forum state. Consider, for example, a post-suit intentional spoliation of Rule 37(e) electronically stored information ("ESI") in one state where a pre-suit demand had been earlier made for preservation in another state where a related federal suit was filed. Federal and state governmental interests differ here as compared to an intentional spoliation that occurred pre-suit but post-demand, or pre-suit and pre-demand.

Of course, the approach to choosing a procedural law on discovery sanctions by a federal district court in a single state or in a multistate conduct setting will differ from the approach to choosing a substantive spoliation law. Clearly, before or after the 2015 amendments to FRCP 37(e), federal procedural laws will generally guide the sanctioning authority of the district courts when any relevant information — be it irreplaceable ESI, replaceable ESI, or non-ESI — is spoiled, whether pre-suit or post-suit.[133]

Yet, since 2015, federal procedure laws may differentiate between losses of irreplaceable ESI under Rule 37(e), as it speaks explicitly about the kinds of allowable sanctions and prompts variations between sanctions for intentional

131. *See*, *e.g.*, 210 ILL. COMP. STAT. ANN. 90/1 (LexisNexis 2021) (x-rays to be kept for at least 5 years). *Cf.* LA. STAT. ANN. § 40: 2144(F)(1) (hospital records to be retained for 10 years).

132. Consider, for example, the failure in State A to preserve information reasonably anticipated as crucial in likely later civil litigation in State B, where suit was brought in State B.

133. On irreplaceable ESI, Fed. R. Civ. P. 37(e) speaks to "information that should have been preserved in the . . . conduct of litigation." FED. R. CIV. P. 37(e). On replaceable ESI and non-ESI, *see*, *e.g.*, Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001) ("The duty to preserve material evidence [here, a car] arises . . . during litigation."). The court also held federal courts have inherent power to sanction for pre-suit information spoliation. *Silvestri*, 271 F.3d at 590. *See* Adkins v. Wolever, 554 F.3d 650, 652-53 (6th Cir. 2009) (noting earlier circuit precedents applied state law to sanctions for pre-suit information losses in federal question cases).

and unintentional acts depriving "another party of the information's use in the litigation,"[134] and losses of replaceable ESI and non-ESI under Rule 37(c), which speaks only generally of sanctions for failures to provide information.[135] So, as state spoliation laws on information losses can vary, so too can federal discovery laws on information losses vary.

Federal procedures beyond discovery sanction guidelines will guide federal court resolutions of all state spoliation claims, whether or not involving ESI. Whether resolved through involuntary dismissals, defaults, summary judgments, settlements, or trials, federal civil procedure laws will be employed though the claims arise under state laws. When federal procedural laws are said to be encompassed in a FRCP, a statute, a local court rule, or a standing order, these laws will apply unless they are deemed not to be procedural.[136] When federal laws originate otherwise, as in common law precedents or individual case orders, procedural law designations are also needed, though challenging.[137]

CONCLUSION

The increasing amount of ESI relevant to civil litigation, and the ease of loss, caused federal lawmakers to explicitly address the possible consequences of certain pre-suit and post-suit ESI losses. These lawmakers acted in both 2006 and 2015 through FRCP 37(e). But they acted only as to certain ESI. Their actions have prompted increasing attention to the significant risks of pre-suit and post-suit losses of other ESI, and of non-ESI, otherwise discoverable.

In addition, their reforms have spurred increasing attention to the availability in federal courts of state substantive spoliation claims involving lost information relevant to future or pending civil actions. Such claims compliment the federal civil procedure laws on discovery sanctions for information losses.

Certain federal court jurisdiction over state spoliation claims in related federal civil litigation was expressly invited by the federal judicial rule makers when they amended FRCP 37(e) in 2015. Prior to and since, federal courts have recognized the availability of state spoliation claims for losses of either ESI or non-ESI relevant in pending federal civil actions.

As state spoliation claims typically involve no federal law question, their pursuit in federal courts may be barred by the lack of, or a failure to exercise, subject matter jurisdiction. As well, their pursuit may also be stymied by other

---

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

135. *Id.* at 37(c)(1) (available sanctions against a party who "fails to provide information").

136. *See*, *e.g.*, 28 U.S.C. § 2072(b) (general rules of practice prescribed by the U.S. Supreme Court "shall not abridge, enlarge or modify any substantive right"); 28 U.S.C. § 2071 (district court rules must be consistent with Acts of Congress, including 28 U.S.C. § 2072).

137. *See*, *e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996) (federal district court hearing New York claims must apply state law norms on checking a jury's verdict excessive damage award, but the scope of the federal circuit's appellate review of the application of these norms is guided by federal procedural laws).

barriers, including the lack of personal jurisdiction, bad forum choice, an inability to effect joinder, and collateral estoppel.

In exploring federal district court power to hear state spoliation claims involving information losses related to federal civil litigation, litigants and judges must also consider whether spoliation claims should be comparably available for pre-suit and post-suit losses, for ESI and non-ESI losses, and for claims against nonparties and parties. Finally, they will sometimes need to confront challenging choice of law issues.