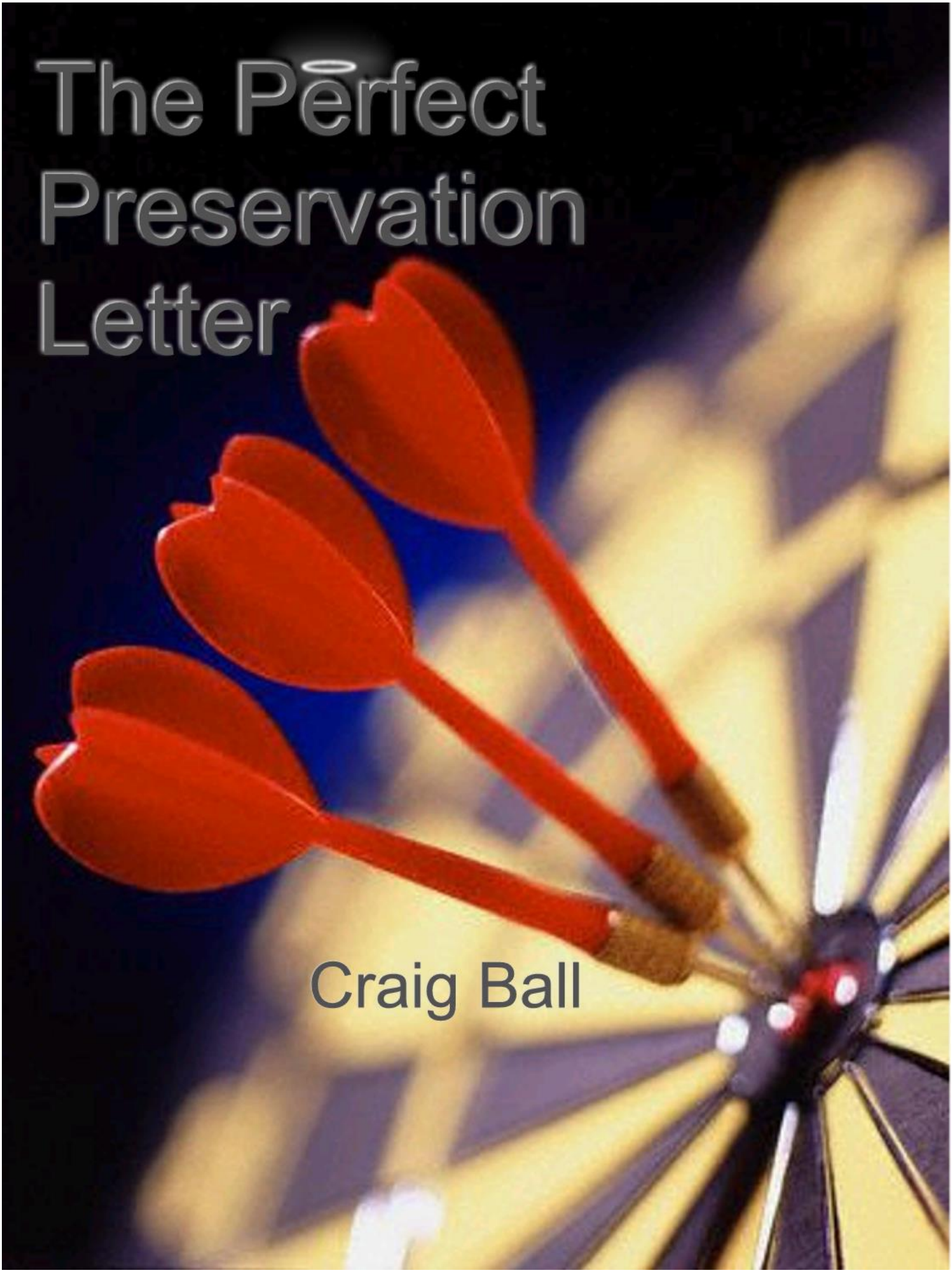
The Perfect Preservation Letter



Craig Ball

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Well, I was drunk the day my Mom got outta prison, and I went to pick her up in the rain; But before I could get to the station in my pickup truck, she got runned over by a damned old train.

From *"You Never Even Called Me by My Name" (a/k/a "The Perfect Country and Western Song")*
By Steve Goodman, performed by David Allan Coe

Outlaw musician David Allan Coe sings of how no country and western song can be "perfect" unless it talks of Mama, trains, trucks, prison and getting drunk. Likewise, no digital evidence preservation letter can be "perfect" unless it clearly identifies the materials requiring protection, educates your opponent about preservation options and lays out the consequences of failing to preserve the evidence*. You won't find the perfect preservation letter in any formbook.* You must custom craft it from a judicious mix of clear, technically astute terminology and *fact-specific* direction. It compels broad retention while asking for no more than the essentials. It rings with reasonableness. Its demands are *proportionate to the needs of the case,* and it keeps the focus of e-discovery where it belongs: *on relevance*. This article discusses features of an effective, efficient preservation letter and offers suggestions as to how it can be drafted and deployed.

Contents

The Role of the Preservation Letter

You can read the Federal Rules of Civil Procedure from cover to cover and you'll find no mention of preservation letters. So why invest effort creating the perfect preservation letter? Doesn't every lawyer know the law and rules prohibiting destruction of evidence apply to electronically stored information just like any other evidence? Don't all litigators ensure clients take reasonable steps to preserve information in anticipation of litigation and discovery? Fifteen years after amendment of the Federal Rules on these points and countless published decisions post-*Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003), the answer remains a sad, resounding "NO." *You cannot rely upon the competence and training of opposing counsel when it comes to electronic evidence.* Too many litigators and in-house counsel remain clueless and careless about information systems. The reality of electronic discovery is it starts off as the responsibility of those who don't understand the technology and ends up as the responsibility of those who don't understand the law. A well-drafted preservation letter helps bridge this knowledge gap.

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At bottom, the preservation letter reminds parties to preserve evidence, *to act,* so evidence doesn't disappear. But the preservation letter also serves as the linchpin of claims for spoliation, helping establish the requisite intent to deprive and conscious disregard for the duty to preserve. The more plainly and practically you convey what evidence must be retained, the greater your client's access to justice when an opponent loses or destroys it.

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The Rules of Civil Procedure

Though serving a preservation letter isn't a formal component of civil discovery procedures, it's a wise precursor to the obligations imposed by the federal, state and local rules of procedure imposing discovery "meet and confer" obligations. Rule 26 of the Federal Rules of Civil Procedure requires litigants "discuss any issues about preserving discoverable information, *Fed. R. Civ. P. Rule 26*, and "any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced." *Fed. R. Civ. P. Rule 26(f)(3)*. By compelling early consideration of the nature and scope of potentially relevant evidence, often before litigation has begun, the preservation letter serves to frame the agenda for conferences to follow.

The preservation letter plays a key role in a court's consideration of whether a party acted in bad faith in connection with the irreparable loss of data that should have been preserved. Rule 37(e) of the Federal Rules of Civil Procedure states:

Failure to Preserve Electronically Stored Information.
If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
(A) presume that the lost information was unfavorable to the party;
(B) instruct the jury that it may or must presume the information was unfavorable to the party; or
(C) dismiss the action or enter a default judgment.

Assessment of intent turns on the subjective awareness of the party failing to preserve evidence. The preservation letter helps establish such awareness, proving a party destroying evidence knew of its discoverability and purposefully disregarded it. A clear and instructive preservation letter that serves to educate your opponent isn't just a professional courtesy; it compels recognition of the duty to intervene to prevent data loss and makes it harder to assert ignorance as a defense.

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What is Electronic Evidence Preservation?

When evidence was on paper, preserving it was simple: We set the original or a copy aside, confident that it would come out of storage as it went in. Absent destructive forces or tampering, paper stays the same. But despite lawyers' archaic ardor for paper, modern information is born *digitally* and stored *digitally*. Little of it is ever printed save for short-term convenience and then discarded.

Preserving electronically stored information (ESI) poses unique challenges because:

- Touching ESI changes it
- Digital evidence is ill-suited to printing
- ESI must be interpreted to be used
- Storage media are fragile and dynamic, changing all the time
- Digital storage media are disposable and recyclable

Touching ESI Changes It

Route a document through a dozen hands and, aside from a little finger grime or the odd coffee stain, the document won't be changed by moving, copying or reading it. But, open the same document in Microsoft Word, or copy it to a thumb drive, and you've irretrievably changed the document's *system metadata*, the data-about-data metrics, like a document's creation date, that

may be evidence in its own right. Open the document in its native application (e.g., Microsoft Word) and embedded *application metadata* values are irreparably altered.

Even the medium employed to copy or transmit data may play a role in altering its metadata. Back when it was common to use recordable optical disks to transfer or produce ESI, few appreciated that merely copying a file from a Windows computer to a recordable CD-R stripped the file of time values. Hard drives, floppy disks, thumb drives and optical media all use different file system architecture such that the CD-R doesn't offer a structure capable of storing all Windows time metadata. Where the Windows NTFS file system offers three "slots" for storing file dates (i.e., Modified, Accessed and Created), the CD-R's Joliet file structure supplies just one. With nowhere to go, temporal metadata is jettisoned in the CD recording process, and the missing metadata misreported on the destination system. Similar incongruities may impact the ability to store long filenames as well as the precision of time values. When ESI is evidence, such differences matter.

Digital Evidence Is Ill-Suited to Printing

Much modern evidence doesn't lend itself to paper. For example, a spreadsheet displays values derived from embedded formulae, but you can't embed those formulae in paper and see the calculated values. In large databases, information occupies expansive grids that wouldn't fit on a printed page. Sound and video evidence can't make the leap to paper and allocating a full sheet of paper to every text message is insanely wasteful and cumbersome. So, preserving on paper has ceased to be a practical option.

ESI Must Be Interpreted to Be Used

If legible and in a familiar language, a paper document conveys information directly to the reader. A literate person can interpret an alphabet, aided by blank spaces and a few punctuation marks. It's a part of our grade school "programming." All digital data are just streaming information denoted as ones and zeroes. For these streams of data to convey anything intelligible to humans, the data must be interpreted by a computer using specialized programming called "interfaces" and "applications." Without the right interface and application—sometimes even without the correct *version* of an interface or application—data is wholly inaccessible or may be inaccurately presented. Successfully preserving data may entail preserving legacy applications capable of correctly interpreting the data as well as legacy computing environments—hardware and software—capable of running the applications. Operator's manuals and the schema laying out a database's architecture may be needed as well.

Storage Media Are Fragile and Dynamic

If your great grandfather put a letter in a folder a century ago, chances are good that apart from signs of age, you could pull it out today and read it. But changes in storage technology and instant obsolescence have already rendered fifteen-year-old digital media largely inaccessible absent considerable effort and expense. How many of us still have a computer capable of reading an optical disk, let alone a floppy disk? Data stored on back up tapes and other magnetic and optical

media fades and disappears over time like the contents of once-common thermal fax paper. Disks expected to last a century are turning up illegible in a few years. Back up tapes stretch a bit each time they are used and are sensitive to poor storage conditions. Long-term data preservation will entail either the emergence of re durable media or a relentless effort to migrate and re-migrate legacy data to new media.

Digital Storage Media Are Disposable and Recyclable

By and large, paper is not recycled for information storage; at least not in a way we'd confuse its prior use as someone's Last Will & Testament with its reincarnation as a cardboard carton. By contrast, a hard drive is constantly changing and recycling its contents. A later version of a document may overwrite—and by so doing, destroy—an earlier draft, and storage space released by the deletion of one file may well be re-used for storage of another. This is in sharp contrast to paper preservation, where you can save a revised printout of a document without affecting—and certainly not obliterating-- a prior printed version.

Clearly, successful preservation of digital data isn't as simple as copying something and sticking it in a folder; but your opponent may not appreciate the planning and effort digital preservation requires. When that's the case, the requesting party is at a crossroads: Do you seek to educate the producing party or its counsel about how and why to properly preserve digital evidence, or do you keep mum in hopes that an advantage will flow from your opponent's ineptitude? That is, do you want the evidence or the sanction?

Setting an opponent up for a spoliation sanction is a fool's errand; most of the time, you'll want the evidence.

The Duty to Preserve

At what point does the duty to preserve evidence arise? When the lawsuit is filed? Upon receipt of a preservation letter? When served with a request for production?

The duty to preserve evidence may arise before—and certainly arises without—a preservation letter. In fact, the duty can arise long before. A party's obligation to preserve evidence is generally held to arise when the party knows or has reason to know that evidence may be relevant to future litigation. This "reasonable anticipation of litigation" standard means that any person or company who should see a claim or lawsuit on the horizon must act, *even before a preservation letter or lawsuit has materialized*, to cease activities likely to destroy electronic or tangible evidence and must take affirmative steps to preserve such evidence.

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Often, the preservation letter's arrival marks the moment parties awaken to their duty to determine what evidence exists and what must be retained.

Thus, the preservation letter is but one of several events sufficient to trigger the duty to preserve evidence, *but the preservation letter is an explicit, decisive trigger.* Often, the preservation letter's arrival marks the moment parties awaken to their duty to determine what evidence exists and what must be retained.

Balance, Reasonableness and Proportionality

I've seen producing parties sneer in contempt at preservation letters when they should consider them a gift. A well-crafted preservation demand is well-nigh a checklist of sources and forms of potentially relevant ESI. Does it too-often overreach? Certainly, because most are drafted by lawyers knowing little-or-nothing about an opponent's information systems. Apprehension and ignorance foster everything-but-the-kitchen-sink requests; the perfect preservation letter esteems the "how" and "how much" issues faced by the other side.

A preservation letter seeking everything and a pony or serving to paralyze an opponent's operations won't see compliance or enforcement. Absent evidence of misconduct (e.g., overt destruction of evidence), a court won't sanction a party for failing to comply with a preservation letter so onerous that no one dare turn on their computer for fear of spoliation! For a preservation letter to work, it must be reasonable on its face.

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Take Note: If your goal is to keep the other side from destroying relevant evidence, any judge will support you in that effort *if your demands aren't cryptic, overbroad or unduly burdensome*. In a word: *proportionate.*

If it could be accomplished with paper evidence, judges expect a corollary accomplishment with electronic evidence. Still, digital is different, and some of the ways we approach paper discovery just won't fly for electronic evidence. For example, using the term "any and all" in a request for digital evidence is a red flag for potential over breadth. Demanding that an opponent retain "any and all electronic communications" is nonsense. After all, phone conversations are electronic communications, and it's unlikely that, outside a regulated environment like a retail brokerage, a court would require a litigant to record all calls, though a judge shouldn't hesitate to compel *retention* of recordings (think Zoom meetings) *when conferences are already recorded and relevant.* If what you want preserved is e-mail, or text messaging or social networking content, *spell it out.* Your opponent may squawk, but at least the battle lines will be drawn on specific evidentiary items your opponent may destroy instead of fighting about vague language" The risk to this approach is that your opponent may fail to preserve what you haven't specified. Fear not! To the extent the evidence destroyed was relevant and material, an omnibus request to retain information items bearing on the claims made the basis of the claim will catch it.

Remember: the preservation letter neither creates the duty to preserve *nor constrains it*. Parties must still think for themselves. If the evidence was relevant and discoverable, its intentional destruction is spoliation, even if you didn't cite it in your preservation demand.

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Preservation Essentials

First and foremost, a perfect preservation letter must seek to halt routine business practices geared to the destruction of potential evidence. It might call for an end to automatic purging of messages, repurposing of drives, overwriting of logs, scheduled destruction of back up media, sale, gift or destruction of computer systems and, (especially if you know computer forensics may come into play) running "privacy" software.. A lot of digital evidence disappears because of a lack of communication ("legal forgot to tell IT") or of individual initiative ("this is MY e-mail and I can delete it if I want to"). So, be sure to highlight the need to effectively communicate retention obligations to those with hands-on access to systems and suggest steps to forestall personal delete-o-thons. **Remember:** When you insist that communications about preservation obligations ***reach*** every custodian of discoverable data and that such communications stress the importance of the duty to preserve, you are demanding no more than the law requires. See, *e.g., Zubulake, supra.*

Next, get fact specific! Focus on items specifically bearing on the claim or suit, like relevant business units, activities, practices, procedures, time intervals, jurisdictions, facilities and key players (a/k/a "custodians"). Here, follow the "who, what, when, where and how" credo of good journalism. Preservation letters are more than a boilerplate form into which you pack every synonym for document and computer. If your preservation letter boils down to "save everything about anything by everyone, everywhere at any time," it's time to re-draft it because not only will no trial court enforce it, many will see it as discovery abuse.

The preservation letter's leading role is to educate your opponent about the many forms of relevant electronic evidence and the importance of taking prompt, affirmative steps to be sure that evidence remains accessible. Educating the other side isn't a noble undertaking—it's sound strategy. Spoliation is frequently defended on the basis of ignorance; *e.g.,* "Your honor, we had no idea that we needed to do that," and your goal is to slam the door on the "it was an oversight" excuse. Doing so entails more than just reciting a litany of storage media to be preserved--you've got to educate, clearly and concisely.

Don't be so focused on electronic evidence that you fail to direct your opponent to retain the old-fashioned paper variety. Finally, remember that *turnabout is fair play*. Don't expect to hold your opponent to a standard of preservation your client won't meet. Your opponent may face a greater *burden* to preserve a larger

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volume or variety of relevant information, but *their duty to preserve is no greater than yours*.

The Nature of the Case

As documentary discovery typically follows service of a complaint, parties know what a dispute is about by the time the first request arrives. But a pre-suit preservation letter may be your opponent's first inkling they face litigation. Don't assume those receiving your preservation letter know what the dispute is about: *spell it out for them*. Supply sufficient information about the claim to allow a reasonable person reading the preservation letter to understand what evidence may be relevant. Names of key players, dates, business units, office locations, causes of action and events will all be weighed in deciding what's relevant and must be retained. The more you elucidate, the less likely you are to hear, "*If you wanted Madison's text messages, why didn't you mention Madison in the preservation letter?*"

When to Send a Preservation Letter

The conventional wisdom is that preservation letters should go out as soon as you can identify potential defendants. But there may be compelling reasons to delay sending a preservation letter. For example, when you face opponents who won't hesitate to destroy evidence, a preservation letter is just the starting gun and blueprint for a delete-o-thon. Instead, consider seeking a temporary restraining order or appointment of a discovery master (but recognize that the Comments to the proposed Rules amendments strongly discourage entry of *ex parte* preservation orders). Deferring the letter may be wise when your investigation is ongoing, and the service of a preservation letter will cause the other side to hire a lawyer or trigger work product privileges running from the anticipation of litigation. There may even be circumstances where you ***want*** your opponent's routine, good faith destruction of information to continue, such as where information unfavorable to your position will be lost in the usual course of business.

Who Gets the Letter?

If counsel hasn't appeared for your opponent, to whom should you direct your perfect preservation letter? Here, the best advice is erring on the side of as many appropriate persons as possible. Certainly, if an individual will be the target of the action, he or she should receive the preservation letter. However, if you know of others who may hold potential evidence (such as a spouse, accountant, employer, banker, customers and business associates), it's smart to serve a *tailored* preservation demand on them, making clear that you are seeking preservation of physical and electronic records in their possession pertaining to the matters made the basis of the contemplated action. Some litigants use the preservation letter to put pressure customers lost to or solicited by a competitor-defendant. ***Beware such tactics!*** The preservation letter isn't a discovery mechanism expressly countenanced by the rules of procedure, so its misuse as an instrument of intimidation may not be privileged and could provoke a counterclaim based of libel or tortuous interference.

If the other side is a corporation, a directive to the wrong person may be ignored or be late in reaching those capable of putting a litigation holds in place. Consequently, if no counsel has appeared, it's wise to direct preservation letters to several within the organization, including,

inter alia, the Chief Executive Officer, General Counsel, Director of Information Technologies and perhaps even the Head of Corporate Security and registered agent for service of process. You may want to copy other departments, facilities or business units.

Consider who is most likely to *unwittingly* destroy evidence and be certain that person receives a preservation letter. Sending a preservation letter to a person likely to destroy evidence *intentionally* is a different story. The letter may operate as the triggering event to spoliation, so you may need to balance the desire to give notice against the potential for irretrievable destruction.

Of course, preservation letters, like any important notice, should be dispatched in a way enabling you to prove receipt, even if that means via certified mail, return receipt requested.

How Many Preservation Letters?

Turning to the obligatory litigation-as-war metaphor, is a preservation letter best delivered as a single giant salvo across the opponent's bow, or might it instead be more effectively launched as several targeted blows? It's common to dispatch a single, comprehensive request, but might it instead be wiser to present your demands in a *series* of focused requests, broken out by, *e.g.*, type of digital medium, issues, business units, or the roles of key players? Your preservation letter may be destined to be an exhibit to a motion, so when the time comes to seek sanctions for a failure to preserve evidence, wouldn't it be more compelling to direct the court to a lean, specific preservation notice than a bloated beast? Consider supplementing a "master" preservation notice with specific notices directed at key players as the matter proceeds. It's difficult to claim, "*We didn't realize you wanted Elizabeth's Facebook content*" when Elizabeth got her very own, custom-tailored preservation letter.

Specifying Form of Preservation

The Federal Rules of Civil Procedure permit a requesting party to specify the form or forms in which the requesting party wants electronic evidence produced. Often, there's no additional trouble or expense for the producing party to generate one format over another and there may be occasions where a non-native production format is preferred, such as when evidence must be redacted to remove privileged content. *But, should the preservation letter specify the form in which the data should be preserved?* Generally, not. Your preservation letter should not demand preservation in forms other than those used in the ordinary course of business. However, when your specification operates to *ease* the cost or burden to the producing party or otherwise *help* the producing party fulfill its preservation obligation, an alternate format might be *suggested*.

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Special Cases: Back Up Tapes, Computer Forensics and Metadata

The e-discovery wars rage in the mountains of e-mail and flatlands of Excel spreadsheets, but nowhere is the battle so pitched as at the front lines and flanks called *back up tapes, computer*

forensics and metadata. These account for much of the bloodshed and so deserve special consideration in a preservation letter.

Back Up Tapes

In the "capture the flag" e-discovery conflicts waged years ago, waged, the primary objective was often your opponent's server backup tapes or, more particularly, forcing their retention and restoration. Backup systems have but one legitimate purpose, being the retention of data required to get a business information system "back up" on its feet in the event of disaster. To this end, a business need retain disaster recovery data for a brief interval since there are few instances where a business would wish to re-populate its information systems with stale data. Because only the latest data has much utility in a well-designed backup system, the tapes containing the oldest backed-up information are typically recycled. This practice is "tape rotation," and the interval between use and reuse of a tape or set of tapes is the "rotation cycle" or "rotation interval."

Ideally, the contents of a backup system would be entirely cumulative of the active "online" data on the servers, workstations, laptops and other devices that make up a network. But, because businesses entrust the power to destroy data to every computer user--including those motivated to make evidence disappear--backup tapes are often the only evidence containers beyond the reach of those with the incentive to destroy or fabricate evidence. Going way back to Col. Oliver North's deletion of e-mail subject to subpoena in the 1980's Iran-Contra affair, it's long been the backup systems that ride to truth's rescue with "smoking gun" evidence.

Another reason backup tape lay at the epicenter of early e-discovery disputes was that many organizations used to retain back up tapes long after they lost their usefulness for disaster recovery. When data has been deleted from the active systems, the stale backup tapes are a means by which the missing pieces of the evidentiary puzzle can be restored.

In organizations with many servers, backup systems are complex, hydra-headed colossi. There may be no simple one-to-one correspondence between a server and a user, and most tape backup systems structure stored data differently from active data on the server, complicating restoration and exploration. Volume, complexity and the greater time it takes to access tape compared to disk all contribute to the potentially high cost of targeting backup tapes in discovery. Compelling a large organization to interrupt its tape rotation, set aside back up tapes and purchase a fresh set can carry a princely price tag, but if the tapes aren't preserved, deleted data may be gone forever. That's been the Hobson's choice[1] of e-discovery.

A preservation letter should target just the backup media likely to contain deleted data relevant to the issues in the case—a feat easier said than done. Whether by Internet research, contact with former employees or consultation with other lawyers who've plowed the same ground, seek

[1] Thomas Hobson was a British stable keeper in the mid-1600s whose policy was that you either took the horse nearest the stable door or he wouldn't rent you a horse. "Hobson's choice" has come to mean an illusory alternative. Back up tapes are problematic, but the unacceptable alternative is letting evidence disappear.

to learn all you can about the architecture of the active and backup systems. The insight gleaned from such an effort may allow for a more narrowly tailored preservation request or justify a much broader one.

The responding party need not preserve evidence that is merely cumulative, so once established that data has not been deleted and all relevant information still exists on the servers, the backup tapes should be released to rotation. Again, this is harder than it sounds because it requires three elements often absent from the adversarial process: ***communication, cooperation and trust*.** Hopefully, the adoption of compulsory meet-and-confer sessions in state courts will force litigants to focus on e-discovery issues sufficiently early to stem unnecessary costs by narrowing the breadth of preservation efforts to just those actions or items most likely to yield discoverable data.

Drive Imaging

Data deleted from a personal computer isn't gone. On electromagnetic ("spinning") hard drives, the operating system simply releases the space the deleted data occupies for reuse and treats the space as available for reuse. Deletion rarely erases data. In fact, there are three and *only* three ways that information's destroyed on personal computer:

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1. Completely overwriting the deleted data on magnetic media (*e.g.,* floppy disks, tapes or conventional hard drives) with new information.
2. Strongly encrypting the data and then "losing" the encryption key; or,
3. Physically damaging the media to such an extent that it cannot be read.

Computer forensics is the science that, *inter alia,* resurrects deleted data. Because operating systems turn a blind eye to deleted data (or at least that which has gone beyond the realm of the Recycle Bin), a copy of a drive made by ordinary processes won't retrieve the deleted data. Computer forensic scientists use specialized tools and techniques to copy every sector on a drive, including those holding deleted information. When the stream of data containing each bit on the media (the so-called "bitstream") is duplicated to a sequence of files, it's called a "drive image" or "forensic image." Computer forensic tools analyze and extract data from images.

In routine computer operation, deleted data is overwritten by random re-use of the space it occupies or by system maintenance activities; consequently, the ability to resurrect deleted data with computer forensics erodes over time. *When the potential for discovery from deleted files on personal computers is an issue*, a preservation letter may specify that the computers on which the deleted data reside should be removed from service and shut down or imaged in a forensically sound manner. Such a directive might read:

> **Act to Prevent Spoliation**
> You should take affirmative steps to prevent anyone with access to your data, systems, accounts and archives from seeking to modify, destroy or hide potentially relevant ESI

wherever it resides (such as by deleting or overwriting files, using data shredding and erasure applications, re-imaging, damaging or replacing media, encryption, compression, steganography or the like).

System Sequestration or Forensically Sound Imaging [*When Implicated*]
As an appropriate and cost-effective means of preservation, you should remove from service and securely sequester the systems, media, and devices housing potentially relevant ESI of the following persons:

[NAME KEY PLAYERS MOST DIRECTLY INVOLVED IN CAUSE]

In the event you deem it impractical to sequester systems, media and devices, we believe that the breadth of preservation required, coupled with the modest number of systems implicated, dictates that forensically sound imaging of the systems, media and devices of those named above is expedient and cost effective. As we anticipate the need for forensic examination of one or more of the systems and the presence of relevant evidence in forensically significant areas of the media, we demand that you employ forensically sound ESI preservation methods. Failure to use such methods poses a significant threat of spoliation and data loss.

"Forensically sound ESI preservation" means duplication of all data stored on the evidence media while employing a proper chain of custody and using tools and methods that make no changes to the evidence and support authentication of the duplicate as a true and complete bit- for-bit image of the original. The products of forensically sound duplication are called, *inter alia,* "bitstream images" of the evidence media. A forensically sound preservation method guards against changes to metadata evidence and preserves all parts of the electronic evidence, including deleted evidence within "unallocated clusters" and "slack space."

Be advised that a conventional copy or backup of a hard drive does not produce a forensically sound image because it captures only active data files and fails to preserve forensically significant data existing in, e.g., unallocated clusters and slack space.

Further Preservation by Imaging
With respect to the hard drive, thumb drives, phones, tablets and storage devices of each of the persons named below and of each person acting in the capacity or holding the job title named below, demand is made that you immediately obtain, authenticate and preserve forensically sound images of the storage media in any computer system (including portable and personal computers, phones and tablets) used by that person during the period from _____ 20___ to _____, 20___, as well as recording and preserving the system time and date of each such computer.

[NAMES, JOB DESCRIPTIONS OR JOB TITLES]

> Once obtained, each such forensically sound image should be labeled to identify the date of acquisition, the person or entity acquiring the image and the system and medium from which it was obtained. Each such image should be preserved without alteration and authenticated by hash value.

Metadata

Metadata, the "data about data" created by computer operating systems and applications, may be critical evidence in your case, and its preservation requires prompt and decisive action. Information stored and transmitted electronically is tracked by the system where it resides and by the applications that create and use it.

For example, a Microsoft Word document is comprised of information you can see (*e.g.,* the text of the document and the data revealed when you look at the document's "Properties" in the File menu), as well as information you don't always see like tracked changes, collaborative comments, revision histories and other data the program only displays on request). This *application* metadata is stored within the document file and moves with the file when it is copied or transmitted. Likewise, the computer system on which the document resides keeps a record of when the file was created, accessed and modified, as well as the size, name and location of the file. This *system* metadata is *not* stored within the document. So, when a file is copied or transmitted—as when it's uploaded or copied to thumb drive for production—potentially relevant and discoverable system metadata is lost or changed. Absent proper steps to protect metadata, it's constantly at peril of loss or alteration.

Metadata is not a crucial evidence in all matters, but it's always enormously important to culling and managing electronic evidence, and to assessing integrity and authenticity. Metadata proves when a document or record was created, altered, copied or deleted. If you reasonably anticipate that metadata will be important—and that's so often the case—you should specifically direct the other side to preserve relevant metadata evidence and warn of the risks threatening its loss and corruption. Because most lawyers have a spotty appreciation of the variety and utility of system and application metadata, the perfect preservation letter defines metadata and informs your opponent where to find it, the actions that damage it and, if possible, the mechanisms by which it should be preserved. *It pays to be specific.* Although specificity is challenging when we know nothing about an opponent's ESI usage, for most of the information deployed in discovery (e.g., e-mail, texts, documents, spreadsheets and presentations), we *CAN* anticipate the metadata of the most common forms and applications. For example, if you know you will need, say, the *Message ID* and *In-Reply-To* metadata fields to thread e-mail, demand that those fields be preserved.

For further information about metadata, see "*Beyond Data about Data: the Litigators Guide to Metadata*" at http://www.craigball.com/metadata.pdf.

Does It *Really* Make a Difference?

Are you prepared to let relevant evidence disappear without a fight? ***No!***
Can the perfect preservation letter really make *that* much difference? ***Yes!***

The preservation letter demands your best effort for a host of reasons. It's the basis of your opponent's first impression of you and your case. A well-drafted preservation letter speaks volumes about your savvy, focus and preparation. A poorly drafted, scattergun missive suggests a lazy formbook attorney who's given little thought to where the case is going or what evidence is required. A letter that demonstrates close attention to detail and preemptively slams the door on cost-shifting and "innocent" spoliation bespeaks a force to be reckoned with. The artful preservation letter serves as a blueprint for meet and confer sessions and a touchstone for efforts to remedy destruction of evidence.

Strategically, the preservation letter forces your opponent to weigh potential costs and business disruption early, often before a lawsuit. If it triggers a litigation hold, everyone from the board room to the mail room may learn of the claim and be obliged to take immediate action. It may serve as the starting gun for a reckless rush to destroy evidence or trigger a move toward amicable resolution. But done right, ***the one thing it won't be is ignored*****.**

APPENDIX: Exemplar Preservation Demand to Opponent (Download as DOCX **here**)

What follows *isn't* the perfect preservation letter for *your unique* case, so ***don't deploy it as a form***. Instead, use it as a ***drafting aid*** to flag issues unique to relevant electronic evidence, and tailor your preservation demand proportionately, *scaled to the unique issues, parties, and systems in your case.*

Demand for Preservation of Electronically Stored Information and Other Evidence

I write as counsel for [Plaintiff(s)] [Defendant(s)] to advise you of [a claim for damages and other relief against you] growing out of the following matters (hereinafter this "cause"):

[DESCRIPTION OF MATTER, INCLUDING ACTORS, EVENTS, DATES, LOCATIONS, CLAIMS/DEFENSES]

We demand that you preserve documents, tangible things, and electronically stored information potentially relevant to the issues and defenses in this cause. As used in this document, "you" and "your" refers to **[NAME OF OPPONENT]**, and its predecessors, successors, parents, subsidiaries, divisions and affiliates, officers, directors, agents, attorneys, accountants, employees, partners Assigns and other persons occupying similar positions or performing similar functions.

You must anticipate that information responsive to discovery resides on your current and former computer systems, phones and tablets, in online repositories and on other storage media and sources (including voice- and video recording systems, Cloud services and social networking accounts).

Electronically stored information (hereinafter "ESI") should be afforded the broadest possible meaning and includes (*by way of example and not as an exclusive list*) potentially relevant information electronically, magnetically, optically, or otherwise stored as and on:

- **Digital communications** (*e.g.*, e-mail, voice mail, text messaging, WhatsApp, SIM cards)
- **E-Mail Servers** (*e.g.,* Microsoft 365, Gmail, and Microsoft Exchange databases)
- **Word processed documents** (*e.g.,* Microsoft Word, Apple Pages or Google Docs files and drafts)
- **Spreadsheets and tables** (*e.g.,* Microsoft Excel, Google Sheets, Apple Numbers)
- **Presentations** (*e.g.,* Microsoft PowerPoint, Apple Keynote, Prezi)
- **Social Networking Sites** (*e.g.,* Facebook, Twitter, Instagram, LinkedIn, Reddit, Slack, TikTok)
- **Online ("Cloud") Repositories** (*e.g.,* Drive, OneDrive, Box, Dropbox, AWS, Azure)
- **Databases** (*e.g.,* Access, Oracle, SQL Server data, SAP)
- **Backup and Archival Files** (*e.g.,* Veritas, Zip, Acronis, Carbonite)
- **Contact and Customer Relationship Management Data** (*e.g.,* Salesforce, Outlook, MS Dynamics)
- **Online Banking, Credit Card, Retail and other Relevant Account Records**
- **Accounting Application Data** (*e.g.,* QuickBooks, NetSuite, Sage)
- **Image and Facsimile Files** (*e.g.*, .PDF, .TIFF, .PNG, .JPG, .GIF., HEIC images)
- **Sound Recordings** (*e.g.,* .WAV and .MP3 files)
- **Video and Animation** (*e.g.,* Security camera footage, .AVI, .MOV, .MP4 files)
- **Calendar, Journaling and Diary Application Data** (*e.g.,* Outlook PST, Google Calendar, blog posts)
- **Project Management Application Data**
- **Internet of Things (IoT) Devices and Apps** *(e.g.*, Amazon Echo/Alexa, Google Home, Fitbit)

- **Computer Aided Design/Drawing Files**
- **Online Access Data** (e.g., Temporary Internet Files, Web cache, Google History, Cookies)
- **Network Access and Server Activity Logs**

ESI resides not only in areas of electronic, magnetic, and optical storage media reasonably accessible to you, but also in areas you may deem *not* reasonably accessible. You are obliged to *preserve* potentially relevant evidence from *both* sources of ESI, even if you do not anticipate *producing* such ESI or intend to claim it is confidential or privileged from disclosure.

The demand that you preserve both accessible and inaccessible ESI is reasonable and necessary. Pursuant to the rules of civil procedure, you must identify all sources of ESI you decline to produce and demonstrate to the court why such sources are not reasonably accessible. For good cause shown, the court may order production of the ESI, even if it is not reasonably accessible. Accordingly, you must preserve ESI that you deem inaccessible so as not to preempt the court's authority.

Preservation Requires Immediate Intervention

You must act immediately to preserve potentially relevant ESI, including, without limitation, information with the *earlier* of a Created or Last Modified date on or after [**DATE**] through the date of this demand and continuing thereafter, concerning:

1. The events and causes of action described [**above**] **[in the Complaint] [in the Answer]**
2. ESI you may use to support claims or defenses in this case
3. ….

Adequate preservation of ESI requires more than simply refraining from efforts to d e l e t e, destroy or dispose of such evidence. You must intervene to prevent loss due to routine operations or a c t i v e d e l e t i o n b y employing proper techniques and protocols to preserve ESI. *Many routine activities serve to irretrievably alter evidence and constitute unlawful spoliation of evidence.*

Preservation requires action.

Nothing in this demand for preservation of ESI should be read to limit or diminish your concurrent common law and statutory obligations to preserve documents, tangible things and other potentially relevant evidence.

Suspension of Routine Destruction

You are directed to immediately initiate a litigation hold for potentially relevant ESI, documents and tangible things and to act diligently and in good faith to secure and audit compliance with such litigation hold. You are further directed to immediately identify and modify or suspend features of your information systems and devices that, in routine operation, operate to cause the loss of potentially relevant ESI. Examples of such features and operations may include:

- Purging the contents of e-mail and messaging repositories by age, quota, or other criteria
- Using data or media wiping, disposal, erasure or encryption utilities or devices
- Overwriting, erasing, destroying, or discarding backup media
- Re-assigning, re-imaging or disposing of systems, servers, devices or media

- Running “cleaner” or other programs effecting wholesale metadata alteration
- Releasing or purging online storage repositories or non-renewal of online accounts
- Using metadata stripper utilities
- Disabling server, packet, or local instant messaging logging
- Executing drive or file defragmentation, encryption, or compression programs

Guard Against Deletion

You should anticipate the potential that your officers, employees, or others may seek to hide, destroy or alter ESI. You must act to prevent and guard against such actions. Especially where company machines were used for Internet access or personal communications, you should anticipate that users may seek to delete or destroy information they regard as personal, confidential, incriminating or embarrassing, and in so doing, they may also delete or destroy potentially relevant ESI. This concern is not unique to you. It’s simply conduct that occurs with such regularity that any custodian of ESI and their counsel must anticipate and guard against its occurrence.

Preservation of Backup Media

You are directed to preserve complete backup media sets (including differentials and incremental backups) that may contain unique communications and ESI of the following custodians for all dates during the below-listed intervals:

[CUSTODIAN] [INTERVAL*, e.g.,* 1/1/20 through 7/15/20]

Act to Prevent Spoliation

You should take affirmative steps to prevent anyone with access to your data, systems, accounts and archives from seeking to modify, destroy or hide potentially relevant ESI wherever it resides (such as by deleting or overwriting files, using data shredding and erasure applications, re-imaging, damaging or replacing media, encryption, compression, steganography or the like).

System Sequestration or Forensically Sound Imaging [When Implicated]

As an appropriate and cost-effective means of preservation, you should remove from service and securely sequester the systems, media, and devices housing potentially relevant ESI of the following persons:

[NAME KEY PLAYERS MOST DIRECTLY INVOLVED IN CAUSE]

In the event you deem it impractical to sequester systems, media and devices, we believe that the breadth of preservation required, coupled with the modest number of systems implicated, dictates that forensically sound imaging of the systems, media and devices of those named above is expedient and cost effective. As we anticipate the need for forensic examination of one or more of the systems and the presence of relevant evidence in forensically significant areas of the media, we demand that you employ forensically sound ESI preservation methods. Failure to use such methods poses a significant threat of spoliation and data loss.

"Forensically sound ESI preservation" means duplication of all data stored on the evidence media while employing a proper chain of custody and using tools and methods that make no changes to the evidence and support authentication of the duplicate as a true and complete bit- for-bit image of the original. The products of forensically sound duplication are called, *inter alia,* "bitstream images" of the evidence media. A forensically sound preservation method guards against changes to metadata evidence and preserves all parts of the electronic evidence, including deleted evidence within "unallocated clusters" and "slack space."

Be advised that a conventional copy or backup of a hard drive does not produce a forensically sound image because it captures only active data files and fails to preserve forensically significant data existing in, e.g., unallocated clusters and slack space.

Further Preservation by Imaging

With respect to the hard drive, thumb drives, phones, tablets and storage devices of each of the persons named below and of each person acting in the capacity or holding the job title named below, demand is made that you immediately obtain, authenticate and preserve forensically sound images of the storage media in any computer system (including portable and personal computers, phones and tablets) used by that person during the period from _____ 20___ to _____, 20___, as well as recording and preserving the system time and date of each such computer.

[NAMES, JOB DESCRIPTIONS OR JOB TITLES]

Once obtained, each such forensically sound image should be labeled to identify the date of acquisition, the person or entity acquiring the image and the system and medium from which it was obtained. Each such image should be preserved without alteration and authenticated by hash value.

Preservation in Native Forms

You should anticipate that ESI, including but not limited to e-mail, documents, spreadsheets, presentations, and databases, will be sought in the form or forms in which it is ordinarily maintained (*i.e.,* native form). Accordingly, you should preserve ESI in such native forms, and you should not employ methods to preserve ESI that remove or degrade the ability to search the ESI by electronic means or that make it difficult or burdensome to access or use the information.

You should additionally refrain from actions that shift ESI from reasonably accessible media and forms to less accessible media and forms if the effect of such actions is to make such ESI not reasonably accessible.

Metadata

You should anticipate the need to disclose and produce system and application metadata and act to preserve it. System metadata is information describing the history and characteristics of other ESI. This information is typically associated with tracking or managing an electronic file and often includes data reflecting a file's name, size, custodian, location and dates of creation and last modification. Application metadata is information automatically included or embedded in electronic files, but which may not be apparent to a user, including deleted content, draft language, commentary, tracked

changes, speaker notes, collaboration and distribution data and dates of creation and printing. For electronic mail, metadata includes all header routing data and Base 64 encoded attachment data, in addition to the To, From, Subject, Received Date, CC and BCC header fields.

Metadata may be overwritten or corrupted by careless handling or improper preservation, including by carelessly copying, forwarding, or opening files.

Servers

With respect to servers used to manage e-mail (*e.g.,* Microsoft 365, Microsoft Exchange, Lotus Domino) and network storage (often called a "network share"), the complete contents of each relevant custodian's network share and e-mail account should be preserved. There are several cost-effective ways to preserve the contents of a server without disrupting operations. If you are uncertain whether the preservation method you plan to employ is one that we will deem sufficient, please contact the undersigned.

Home Systems, Laptops, Phones, Tablets, Online Accounts, Messaging Accounts and Other ESI Sources

Though we expect that you will act swiftly to preserve data on office workstations and servers, you should also determine if any home or portable systems or devices may contain potentially relevant data. To the extent that you have sent or received potentially relevant e-mails or created or reviewed potentially relevant documents away from the office, you must preserve the contents of systems, devices and media used for these purposes (including not only potentially relevant data from portable and home computers, but also from external storage drives, thumb drives, CD- R/DVD-R disks and the user's phone, tablet, voice mailbox or other forms of ESI storage.). Similarly, if you used online or browser-based e-mail and messaging accounts or services (such as Gmail, Yahoo Mail, Microsoft 365, Apple Messaging, WhatsApp or the like) to send or receive potentially relevant messages and attachments, the contents of these account mailboxes and messages should be preserved.

Ancillary Preservation

You must preserve documents and other tangible items that may be required to access, interpret or search potentially relevant ESI, including manuals, schema, logs, control sheets, specifications, indices, naming protocols, file lists, network diagrams, flow charts, instruction sheets, data entry forms, abbreviation keys, user ID and password rosters and the like.

You must preserve passwords, keys and other authenticators required to access encrypted files or run applications, along with the installation disks, user manuals and license keys for applications required to access the ESI.

If needed to access or interpret media on which ESI is stored, you must also preserve cabling, drivers, and hardware. This includes tape drives, readers, DBMS other legacy or proprietary devices and mechanisms.

Paper Preservation of ESI is Inadequate

As hard copies do not preserve electronic searchability or metadata, they are not an adequate substitute for, or cumulative of, electronically stored versions. If information exists in both electronic and paper forms, you should preserve both forms.

Agents, Attorneys and Third Parties

Your preservation obligation extends beyond ESI in your care, possession or custody and includes ESI in the custody of others that is subject to your direction or control. Accordingly, you must notify any current or former agent, attorney, employee, custodian and contractor in possession of potentially relevant ESI to preserve such ESI to the full extent of your obligation to do so, and you must take reasonable steps to secure their compliance.

Preservation Protocols

We are desirous of working with you to agree upon an acceptable protocol for forensically sound preservation and can supply a suitable protocol if you will furnish an inventory and description of the systems and media to be preserved. Alternatively, if you promptly disclose the preservation protocol you intend to employ, we can identify any points of disagreement and resolve them. A successful and compliant ESI preservation effort requires expertise. If you do not currently have such expertise at your disposal, we urge you to engage the services of an expert in electronic evidence and computer forensics so that our experts may work cooperatively to secure a balance between evidence preservation and burden that's fair to both sides and acceptable to the court.

Do Not Delay Preservation

I'm available to discuss reasonable preservation steps; however, *you should not defer preservation steps pending such discussions if ESI may be lost or corrupted because of delay.* Should your failure to preserve potentially relevant evidence result in the corruption, loss, or delay in production of evidence to which we are entitled, such failure would constitute spoliation of evidence, and we will not hesitate to seek sanctions.

Confirmation of Compliance

Please confirm by [**DATE**], that you have taken the steps outlined in this letter to preserve ESI and tangible documents potentially relevant to this action. If you have not undertaken the steps outlined above, or have taken other actions, please describe what you have done to preserve potentially relevant evidence and what you will not do. Else we will rely upon you to complete the preservation sought herein.