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Presuit Lawyer Information Duties Relevant to Civil Litigation

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PRESUIT LAWYER INFORMATION DUTIES RELEVANT TO CIVIL LITIGATION

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In both federal and state courts in the United States, there are significant civil procedure, professional responsibility, and substantive laws addressing presuit lawyer duties on creating, preserving, producing, and protecting information relevant to later civil litigation. These laws speak to lawyer conduct both in personally handling information and in overseeing the information acts of others. To date, the challenges these laws pose to lawyers have not been well examined, or even largely perceived. And, to date, lawyers have been left unaccountable for their personal violations of these duties.

This Article is the first to survey presuit lawyer information duties. It reviews more general laws that sometimes distinguish between certain types of information (as between ESI and non-ESI); vary between states; differ in federal and state settings; and appear in several sources simultaneously (including statutes, court rules, and precedents). It also reviews some very special laws that are applicable to very particular information (like x-rays) or to limited types of lawsuits (like medical malpractice). The challenges posed by these laws are magnified when later civil litigation might involve several possible forums, with multistate lawyer or lawyer-related conduct.

The Article utilizes the 2001 federal circuit decision in Silvestri v. GMC*, a prominent ruling on the federal procedural common law duty to preserve information, to explore presuit lawyer information duties. The Article suggests possible new written laws and common law precedents to serve better the goal of "just, speedy and inexpensive determination of every action and proceeding," as well as to guide civil lawyers on their obligations and civil judges on their enforcement powers.*

In particular, the Article urges that lawyers (and their law firms), rather than or together with their clients, be held more personally accountable for presuit information duty violations, not unlike the accountability demanded of lawyers for their presuit pleading violations and for some of their presuit discovery violations. The Article encourages greater employment of

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professional responsibility mechanisms when presuit lawyer information duties are breached, with use prompted by more disciplinary referrals by judges and lawyers that are expressly referenced in civil procedure discovery laws, as in some civil procedure pleading and motion practice laws. Finally, the Article demonstrates the opportunities for substantive law claims on behalf of those harmed by presuit lawyer information failures, including claims in spoliation and/or malpractice.

I. INTRODUCTION

Lawyers representing those somewhat likely to be involved, and those actually involved, in civil litigation in courts in the United States have varying duties in creating, preserving, producing, and protecting relevant information (information duties). Such duties often arise under professional responsibility, civil procedure, and substantive state spoliation and malpractice laws. These duties can speak to both lawyer conduct in personally handling information and in overseeing information handling by others, including clients, nonclients, and other lawyers.

More general laws on presuit lawyer information duties are challenging because they sometimes distinguish between certain types of information (as

between electronically stored information (ESI) and non-ESI; vary between states; differ in federal and state settings; and appear in several sources simultaneously (including statutes, court rules, and precedents). General laws are sometimes superseded by very special laws, as with those applicable only to certain types of lawsuits. Challenges to lawyers are enhanced when possible civil litigation could involve several possible forums and would involve multistate conduct.

The Article begins by reviewing the 2001 decision in *Silvestri v. GMC*,[1] a prominent ruling on the federal procedural common law duty to preserve information relevant in civil litigation.[2] The Article then surveys some presuit lawyer information duties, including those in professional responsibility, civil procedure, and substantive state spoliation and malpractice settings. It then explores their import in a *Silvestri*-type case. The Article concludes by reflecting on possible reforms of presuit information duties for civil litigation lawyers. In particular, it focuses on reforming civil discovery laws so that lawyers (and their law firms), rather than their clients, can be held personally accountable for breaches of presuit duties.

II. THE *SILVESTRI* RULING

Mark Silvestri filed a federal products liability action against General Motors Corporation (GMC).[3] He alleged that the airbag in his GMC Chevrolet did not deploy as warranted when he crashed the car into a utility pole.[4] Because Silvestri failed, before the vehicle was repaired, to give GMC notice of his claim and an opportunity to inspect the car, described as "the sole piece of evidence in this case," the district court dismissed Silvestri's action as a sanction for evidence spoliation.[5] The Fourth Circuit affirmed.[6]

A single vehicle crash in New York in early November 1994 occurred while Silvestri was driving his landlady's automobile.[7] While intoxicated and driving

1. Silvestri v. Gen. Motors Corp., 271 F.3d 583 (4th Cir. 2001). As of July 23, 2021, according to Westlaw Edge the decision has been cited in 669 cases and 449 secondary sources.

2. The ruling has since been employed when recognizing a comparable preservation duty under discovery norms in pending federal civil litigation, *Silvestri*, 271 F.3d at 591, as well as in many future and current state civil action settings. *See*, *e.g.*, Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497 (D. Md. 2010) (Silvestri applied in current federal civil litigation).

3. The case description is mostly gleaned from the *Silvestri*, 271 F.3d at 585–89, ruling. Additional information from outside the ruling is specifically footnoted.

4. The case was filed on December 16, 1997. Westlaw Docket, Silvestri v. Gen. Motors Corp., 271 F.3d 583 (4th Cir. 2001), 1999 WL 99-2142.

5. *Silvestri*, 271 F.3d at 585.

6. *Id.*

7. *Id*. 586.

at an excessive rate of speed, Silvestri lost control of the car.[8] During the ensuing accident, the airbag did not deploy.[9] Though Silvestri was wearing a seatbelt, he sustained severe facial injuries.[10] Silvestri urged that had the airbag deployed, he would not have sustained disfiguring facial injuries.[11]

While Silvestri was in the hospital, his parents retained attorney William G. Moench to protect Silvestri's legal interests, both in Silvestri's ticket for driving while intoxicated and in any civil action against GMC.[12] Silvestri later "requested that Moench continue to represent him until his period of incapacitation ended and he was able to meet with Moench in person."[13] Later, Silvestri discharged Moench and got new counsel.[14]

> While acting on behalf of Silvestri, Moench retained two accident reconstructionists, Erik Carlsson and Albert Godfrey, to inspect the damaged Chevrolet and to visit the crash scene so that they could render expert opinions regarding the circumstances of the crash. Carlsson later testified that it was his understanding that he was conducting his investigation "in anticipation of filing a lawsuit against General Motors." Carlsson and Godfrey inspected and photographed the vehicle and inspected the site, and each prepared a report of his findings. Because Carlsson considered it important that General Motors have an opportunity to see the car, Carlsson "suggested" to Attorney Moench, at the time he conducted his inspection, that "the car has to be kept"; and Carlsson stated,

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8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* Seemingly, Silvestri got new counsel before his suit against GMC was filed in 1997. But Moench evidently served as Silvestri's counsel for some time, as one of his briefs to the Fourth Circuit noted Silvestri "was severely, almost fatally, injured in the crash, was hospitalized numerous times, and underwent countless reconstructive surgeries in the days, weeks and months following the accident." Brief of Appellant at 33, n.13, Silvestri v. Gen. Motors Corp., 271 F.3d 583 (4th Cir. 2001) (No. 00-2523), 2000 WL 33992316. The accident occurred on November 5, 1994, *Silvestri*, 271 F.3d at 586, and suit was filed on December 16, 1997. Westlaw Docket, Silvestri v. Gen. Motors Corp., 271 F.3d 583 (4th Cir. 2001), 1999 WL 99-2142. Upon being discharged, Moench sued Silvestri and his parents, resulting in a trial court upholding Moench's "retaining lien." Brief of Appellant, *supra* note 14, at 33. Moench sought "attorney's fees and costs." *Silvestri*, 271 F.3d at 592. Moench represented Silvestri at least until early 1995, as at that time a meeting between Moench and Silvestri ("some two months after the accident") resulted "in disagreement about who would advance the quickly increasing litigation costs." *Id.* Following the disagreement, Moench sued Silvestri, with Silvestri counterclaiming in malpractice. *Id.*

> "General Motors needs to see the car." He also told Moench after the inspection that "he does indeed have a case [against General Motors] because the airbag should have deployed."[15]

Carlsson's inspection took place about a week after the accident.[16] Carlsson examined the car and took photographs.[17] However, during his inspection, Carlsson did not inspect the undercarriage of the car.[18] Although he did take one "crush" measurement of the car, Carlsson did not record the measurement.[19] Despite the fact that Carlsson did not record the measurement, years later at his deposition, Carlsson "seem[ed] to recall" that the measurement was "18 inches, but he could not definitely remember."[20]

Similar to Carlsson, Godfrey's measurements were just as unreliable as Godfrey failed to record any measurements during his inspection.[21] Although he did capture a photo of a "ruler on the hood of the vehicle to measure the extent to which the front of the hood was bent."[22] Even though Godfrey did not record the measurement of the skid marks left by the car, he stated that he "eyeball[ed] the skid marks" which formed his opinions about Silvestri's speed at the time of the accident.[23]

"After their inspections, both Carlsson and Godfrey prepared written reports, dated December 6, 1994, which they submitted to Moench."[24] In his report, Carlsson concluded: "In spite of the substantial front end damage that affected the rails of the frame, the vehicle's airbag did not deploy at the accident. Yet, the diagnostics of the airbag showed no defect or malfunction."[25] Carlsson opined that the "failure by the airbag to deploy in this accident must be considered a defect that unnecessarily added to Mr. Silvestri's injuries."[26]

In Godfrey's report, the opinion was that "the dual airbags in the vehicle should have inflated," but "failed to do so."[27] He concluded: "A major question arises as to why the air bags did not inflate . . . . Had the air bags worked

15. *Silvestri*, 271 F.3d at 586.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id*. 587.
26. *Id.*
27. *Id.*

properly the operator would not have struck his face on the steering wheel causing the massive facial injuries."[28]

"Notwithstanding the anticipation of litigation, neither Moench nor Silvestri took any steps to preserve the car or to notify GMC of Silvestri's potential claim."[29] In fact, GMC was not notified about the accident until more than three years after the accident when Silvestri sued.[30] The Chevrolet had "remained in its damaged condition for more than three months after the accident."[31] But in "early 1995, the title-owner, Carl E. Burhans, the husband of Silvestri's landlady, transferred title to his insurance company."[32] That "insurance company in turn sold the vehicle to Prestige Collision, Inc., which repaired the vehicle and then sold it."[33]

GMC "ultimately found the vehicle in June 1998 in Quebec, Canada."[34] When GMC inspected "the airbag sensing and diagnostic module, which monitors and retains in its memory defects in the airbag system, it found that the module had not been damaged in the accident. The module revealed that there had been no defect or malfunction in the airbag system."[35] A Silvestri "expert, however, questioned whether this was the original module that had been in the vehicle the time of the accident."[36]

After GMC was named a defendant in a lawsuit filed on December 16, 1997,[37] "its reconstruction expert, Keith Schultz, evaluated the evidence collected by Carlsson and Godfrey, as well as the sensing and diagnostic module"[38] and concluded:

> [T]hat the oblique impact of the vehicle with the utility pole did not meet the airbag deployment criteria set forth in General Motors' warranty to provide head and face protection in a frontal impact. He stated, "My investigation indicates that the impact speed and direction and conditions of the subject

28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* The transfer was prompted by "Silvestri's attorney," presumably Moench, "allowing the Burhans' insurance company to dispose of the vehicle for its salvage value" without notifying GMC. Brief of Plaintiff-Appellee at 11, Silvestri v. GMC, 271 F.3d 583 (4th Cir. 2001) (No. 99-2142) 1999 WL 33613032.
34. Silvestri v. Gen. Motors Corp., 271 F.3d 583, 587 (4th Cir. 2001).
35. *Id.*
36. *Id.*
37. Westlaw Docket, Silvestri v. Gen. Motors Corp., 271 F.3d 583 (4th Cir. 2001), 1999 WL 99-2142.
38. *Silvestri*, 271 F.3d at 587.

> accident were not sufficient to cause the deployment and that the subject airbag properly did not deploy." He added, "It is my opinion that the injuries sustained . . . due to the violent impact of wood from a fence impacting the vehicle compartment, could have been greater if the [Supplemental Inflatable Restraint] had deployed as claimed by [Silvestri]." Schultz explained further that "the plaintiff was injured not by an impact with a telephone pole but rather when the vehicle ran through a wooden fence, violently projecting portions of the fence into the passenger compartment of the vehicle. The change in velocity . . . of the vehicle when it impacted the telephone pole was not sufficient and not directionally correct to deploy the airbags."[39]

Schultz lamented that there was no opportunity for GMC to do a "crush analysis" as there was no ability to "actually" measure "the amount of crush at numerous points on the vehicle."[40] Silvestri did not dispute that crush measurements are generally taken at numerous points.[41] Schultz added a serious caveat, indicating that Silvestri's failure to preserve the vehicle in its condition after the accident "hinders" GMC's ability to defend a claim of product defect.[42] He concluded that evidence destruction had prejudiced the defense:[43]

> Following receipt of Schultz's report, both Carlsson and Godfrey changed some of their conclusions about their observations of the vehicle following the accident. . . . [A]lthough Carlsson initially stated that the windshield on the vehicle had collapsed and fallen completely inward, making no reference to seeing any blood, he changed his report later to say that he saw blood on the windshield. Carlsson also originally concluded that Silvestri's face struck the windshield rather than the steering wheel and that he had not seen any deformation to the steering wheel nor any evidence that the steering column had been "stroked" (compressed) as a result of the accident. But in his later opinions, he concluded that Silvestri's face struck the steering wheel with a force sufficient to deform the steering wheel and cause the steering column to be stroked.

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39. *Id.*
40. *Id.*
41. *Id*. 589.
42. *Id*. 588.
43. *Id.*

> Godfrey likewise changed his opinions as well as his "original" observations. In his deposition, taken before Schultz's report became available, Godfrey stated that he did not take any crush measurements of the car and therefore did not calculate the equivalent barrier speed of the vehicle as it struck the utility pole. After Schultz's report, however, Godfrey gave a specific crush measurement of "approximately" 24 inches and a calculation of the equivalent barrier speed of 24 miles per hour, based on "a rule of thumb" of one mile per hour for each inch of crush. . . . In addition, Godfrey originally testified that he did not believe that anyone could calculate the angle at which Silvestri hit the steering wheel. But in a subsequent report, issued after Schultz's report, he stated that the front of Silvestri's skull and face hit the right side of the steering wheel.[44]

Following discovery, GMC moved for summary judgment, arguing that Silvestri could not establish a prima facie case for a product defect.[45] GMC further asked that the case be dismissed based on Silvestri's spoliation of evidence.[46]

On GMC's' spoliation argument, the district court dismissed the case.[47] It concluded that:

> Silvestri had breached his duty to preserve the vehicle or to notify General Motors about its availability and his claim. The court concluded that Silvestri's failure to discharge this duty caused General Motors to be "highly prejudiced." After recognizing that the determination of whether the airbag should have been deployed could only be determined by a reconstruction of the accident, the court explained that General Motors was denied the opportunity to reconstruct the accident accurately because of its inability to take the necessary crush measurements.
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> On appeal, Silvestri contend[ed] that he [was] not responsible for any spoilation of evidence because (1) he had no duty to preserve the vehicle in question as he was not its owner, and (2) any act of spoliation was that of attorney Moench, hired by his parents, not him, and therefore not

44. *Id.*
45. *Id.*
46. *Id.*
47. *Id*. 589.

> imputable to him. . . . He also argue[d] that the sanction of dismissal was too harsh because General Motors was not so severely prejudiced that it could not adequately defend itself in the action.[48]

In their arguments, "the parties agreed that the law of New York—where the accident occurred—supplie[d] the applicable spoliation principles."[49] The appeals court concluded:

> [H]owever, that a federal law of spoliation applie[d] because . . . the power to sanction for spoliation derives from the inherent power of the court, not substantive law. . . . The policy underlying this inherent power of the courts is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth.[50]

While evidence spoliation "may give rise to court imposed sanctions," the appeals court ruled that any spoliation acts did not prompt substantive law claims or defenses.[51]

In reviewing the district court's sanction, the appeals court held that the "duty to preserve material evidence arises not only during litigation but also extends to that period before litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation."[52] Even when one "cannot fulfill [the] duty to preserve because one does not own or control the evidence, he still has an obligation to give the opposing party notice of access to the evidence and of the possible destruction of the evidence. . . ."[53] Though utilizing the federal inherent procedural law power to sanction, the appeals court cited New York state law precedents on a litigant's information duty/obligation.[54]

While "Silvestri did not own the vehicle, nor did he even control it in a legal sense after the accident," the appeals court found it apparent that Silvestri had access to the vehicle since his attorney and retained experts were given access to the vehicle for inspection purposes.[55] "Moreover, the vehicle was preserved in its post-accident condition for perhaps two to three months, or more," this

48. *Id.*
49. *Id*. 590.
50. *Id.*
51. *Id.*
52. *Id*. 591.
53. *Id.*
54. *Id.*
55. *Id.*

was a time during which Silvestri, his lawyer, and his experts knew that GMC would or might later be sued:[56]

> Within a couple of weeks of the accident, Silvestri's counsel had a conversation with his experts about the need to preserve the vehicle and have General Motors inspect it. One of Silvestri's expert witnesses, Erik Carlsson, testified that it was his understanding that his inspection of the vehicle was being conducted in anticipation of filing a lawsuit against General Motors and that he advised Moench that Silvestri had a valid case against General Motors "because the airbag should have deployed."[57]

In opining this, he stated to Moench that "General Motors needs to see the car."[58]

"Silvestri himself, Silvestri's parents, Moench, and the experts all recognized there was a need to act quickly to preserve evidence."[59] The appeals court also noted "there [was] no evidence to indicate that Silvestri attempted to buy the damaged vehicle or to request that it be maintained in its post-accident condition until GMC could inspect it."[60] The appeals court found it "readily apparent . . . that Silvestri, his attorneys, and his experts . . . were fully aware that the vehicle was material evidence in [possible] litigation. . . . Yet, they failed to take any steps to ensure that Silvestri discharged his duty to prevent spoliation."[61]

Silvestri argued that "Moench's failure to preserve the evidence should not be imputed to [him]."[62] The appeals court found the record belied this contention.[63] While "Silvestri discharged Moench and retained new counsel . . . he did not disavow the existence of an attorney-client relationship with Moench and the benefits of that relationship."[64] "In fact, Moench also represented Silvestri in connection with the related criminal matter involving Silvestri's driving while intoxicated."[65] Further, Silvestri "continued to use the investigative materials that Moench and the experts developed" via his new

56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id*. 592.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*

lawyer.[66] And "when Moench later sued Silvestri for attorney fees and costs, Silvestri filed a counterclaim alleging attorney malpractice" arising from the failure to "preserve the vehicle" which was to be evidence in his later lawsuit, "a claim that could arise only out of an attorney-client relationship."[67] The appeals court, agreeing with the district court, found it would be "particularly unjust" to allow Silvestri to disavow Moench while partaking in the benefits provided by Moench.[68]

Independent of Moench's conduct, the district court concluded that the spoilation of the evidence was imputable to Silvestri.[69] First, Silvestri had authorized Moench to continue, on Silvestri's behalf, to collect information to support a potential lawsuit, in which Moench had then retained experts to examine the vehicle.[70] Second, Silvestri knew the importance of preserving the Chevrolet "because when Moench sued him, he counterclaimed for malpractice, alleging that Moench had failed to preserve the vehicle."[71] Both of these occurred before GMC had knowledge of the accident or was sued.[72] The appeals court affirmed the district court's holding "that Silvestri failed to preserve material evidence in anticipation of litigation or to notify [GMC] of the availability of this evidence, thus breaching his duty not to spoliate evidence."[73]

The appeals court affirmed, concluding that while the district court dismissal order was "severe,"[74] there was no abuse of discretion.[75] A dissent

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id*. 595. While severe, loss of client claims due to lawyer misconduct has occurred elsewhere, as when attorneys have settled claims without client consultations, at times over their clients' express rejections of the very offers to which the clients are then bound; losses are justified here on apparent or presumed attorney settlement authority. On apparent authority, *see*, *e.g.*, Robertson v. Alling, 351 P.3d 352, 356 (Ariz. 2015) (citing RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 27 (AM. L. INST. 2000)); Reutzel v. Douglas, 870 A.2d 787, 793 (Pa. 2005) (apparent authority recognized even where settling attorney commits fraud). On presumed authority, *see*, *e.g.*, *In re* Artha Mgmt., Inc., 91 F.3d 326, 329 (2d Cir. 1996); *see also*, *e.g.*, Makins v. District of Columbia, 861 A.2d 590, 597 (D.C. 2004).

75. Silvestri v. Gen. Motors Corp., 271 F.3d 583, 595 (4th Cir. 2001). Any affirmance of such a dismissal might be reviewed differently today given the policy change in the FED. R. CIV. P. 37(e) (2015). In that rule, a dismissal of a claim can only be ordered due to a loss of information "that should have preserved in the anticipation . . . of litigation" if the claimant "acted with the intent to deprive

found the sanction was "excessive" as GMC did not need, according to its own expert, "any information between what the vehicle looked like from . . . photographs immediately after the accident and the present time in order to support its position" on summary judgment.[76]

The appeals court seemingly waffled on the guidelines for imposing sanctions due to information preservation/notification failures.[77] At one point, it declared the "inherent power to control the judicial process and litigation . . . is limited to that necessary to redress conduct 'which abuses the judicial process.'"[78] Later on, it went beyond "redress" to note that any sanction "should be molded to serve" not only the "remedial rationales underlying the spoliation doctrine," but also the "prophylactic" and "punitive" rationales.[79]

III. PRESUIT LAWYER INFORMATION DUTIES

A. Introduction

Presuit lawyer duties on creating, preserving, producing, and protecting information relevant to civil litigation are recognized in several legal sources, including professional responsibility laws; civil procedure laws; substantive spoliation laws; and substantive lawyer malpractice laws. They can operate generally or specially depending upon such matters as the type of information (just ESI or just certain types of ESI) or the type of claim (just medical malpractice). As will be seen, there exists some significant state-to-state and federal-to-state differences on these duties, especially in civil procedure and substantive spoliation laws. These differences often provide difficult challenges to lawyers when there are multistate acts relevant to future litigation and when future forums are not easily predicted.

Presuit lawyer creation duties can involve, e.g., their own privilege logs and the oversight of their clients' statutory duties on record maintenance, as in employment and medical settings. Presuit lawyer preservation duties can involve, e.g., evidence maintenance related to foreseeable litigation. Presuit lawyer production duties can involve, e.g., disclosures to their clients' potential adverse parties of expert testing of products likely to be relevant in any future

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another party [including, via case law, a future adversary] of the information's use in the litigation." FED. R. CIV. P. 37(e). FED. R. CIV. P. 37(e)'s comparable application to pending litigation, is clear as it speaks to failure to preserve ESI in the "conduct of litigation." *Id.*

76. *Silvestri*, 271 F.3d at 595 (Traxler, J., concurring in part and dissenting in part).

77. *Silvestri*, 271 F.3d at 590.

78. *Id.* (quoting Chambers v. Nasco, Inc., 501 U.S. 32, 45–46, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991)).

79. *Id.*

litigation. And presuit lawyer protection duties can involve, e.g., affirmative confidentiality responsibilities.

B. Professional Responsibility Laws

Presuit lawyer information duties on creating, preserving, producing, and protecting information relevant to future civil litigation arise in professional responsibility laws, frequently following on one of several American Bar Association (ABA) models.[80] The Illinois Supreme Court promulgated such laws based on the most recent ABA model. A sampling of these Illinois laws illustrates such lawyer information duties.[81]

As to information creation, Rule 4.2 generally bars a lawyer from communicating about the subject of a client's representation "with a person the lawyer knows to be represented by another lawyer in the matter."[82]

As to information preservation, Rule 3.4(b) requires a lawyer not to "falsify evidence" and not to "counsel or assist a witness" to testify falsely.[83] Rule 3.4(a) requires a lawyer not to "counsel or assist another person" to unlawfully alter or destroy "material having potential evidentiary value."[84]

As to information production, Rule 3.3(a)(3) bars a lawyer from offering "evidence that the lawyer knows to be false," while requiring "reasonable remedial measures" when a lawyer later "comes to know" of the "falsity" of "offered material evidence."[85] Rule 3.4(a) bars a lawyer from "unlawfully" obstructing "another party's access to evidence."[86] Rule 3.4 (a) bars a lawyer from counseling or assisting "another person" in concealing "material having potential evidentiary value."[87] And Rule 4.1 generally bars a lawyer from making "a false statement of material fact" and from failing to "disclose a

80. The ABA models appeared, inter alia, in the 1908 ABA Canons of Professional Ethics and its amendments [hereinafter 1908 Canons]; the MODEL CODE OF PROF. RESP. (AM. BAR ASS'N 1969) [hereinafter 1969 ABA Code]; and the MODEL RULES OF PROF. RESP. (AM. BAR ASS'N 1983) [hereinafter 1983 ABA Rules].

81. Lawyer violations of professional responsibility laws, by themselves, usually do not prompt civil claims (e.g., spoliation or malpractice) on behalf of those harmed (clients or nonclients). *See*, *e.g.*, *In re* Est. of Weber, 2021 IL App (2d) 200354, ¶¶ 21–24.

82. ILL. RULES OF PROF'L. CONDUCT 4.2 (2010). Exceptions under Rule 4.2 include when the lawyer "has the consent of the other lawyer or is authorized to do so by law or a court order." *Id.*

83. ILL. RULES OF PROF'L. CONDUCT R. 3.4(b).

84. ILL. RULES OF PROF'L. CONDUCT R. 3.4(a).

85. ILL. RULES OF PROF'L. CONDUCT R. 3.3(a)(3).

86. ILL. RULES OF PROF'L. CONDUCT R. 3.4(a).

87. ILL. RULES OF PROF'L. CONDUCT R. 3.4(b).

material fact when disclosure is necessary to avoid assisting a "fraudulent act by a client."[88]

As to information protection, Rule 1.6(a) generally bars a lawyer from revealing "information relating to the representation of a client unless the client gives informed consent."[89] Rule 1.6(e) generally mandates that a lawyer "make reasonable efforts to prevent" disclosure or access to "information."[90]

Beyond these rules, lawyer information duties arise under Rule 5.1(a) for a lawyer with "managerial authority in a law firm."[91] This provision says a lawyer "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm" act in conformance with their information duties.[92] Similarly, Rule 5.1(b) says a lawyer with "direct supervisory authority over another lawyer" must take reasonable efforts to ensure rule compliance.[93] Rule 5.3 recognizes comparable duties for lawyers with "managerial authority" or "direct supervisory authority" over nonlawyers who are "employed or retained by or associated with a lawyer."[94]

C. Civil Procedure Laws

Presuit lawyer civil procedure duties on creating, preserving, and producing information relevant to future civil litigation can emanate from laws on discovery sanctions for presuit acts causing difficulties with post-suit discovery; on laws for improperly certifying in pleadings or motions that there were reasonable presuit factual inquiries; and on laws recognizing opportunities

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88. ILL. RULES OF PROF'L. CONDUCT R. 4.1.

89. ILL. RULES OF PROF'L. CONDUCT R. 1.6(a). Exceptions involving discretionary revelations appear in Rule 1.6(b) (including to prevent client fraud, secure legal advice about lawyer's compliance with the rules, and to comply with a court order). ILL. RULES OF PROF'L. CONDUCT R. 1.6(b). *Cf.* MICH. RULES OF PROF'L. CONDUCT R. 1.6(c) (discretionary revelation to rectify the consequences of a client's fraudulent or illegal conduct in which "the lawyer's services have been used"); TEX. PRO. RESP. RULE 1.05(c)(8)(similar). Exceptions involving mandatory revelations appear in Illinois Rule 1.6(c) (including reasonable belief on preventing "certain death or substantial bodily harm"). The revelation bar in Illinois Rule 1.6(a) generally continues for information relating to the representation of a former client, Illinois Rule 1.9(c)(2), and operates regarding information from a "prospective client," ILL. RULES OF PROF'L. CONDUCT R. 1.18(b).

90. ILL. RULES OF PROF'L. CONDUCT R. 1.6(e).

91. ILL. RULES OF PROF'L. CONDUCT R. 5.1(a).

92. *Id.*

93. ILL. RULES OF PROF'L. CONDUCT R. 5.1(b).

94. ILL. RULES OF PROF'L. CONDUCT R. 5.3(c). A lawyer is "responsible" for another lawyer's or a nonlawyer's conduct in violation of the professional responsibility rules where the lawyer orders or ratifies the conduct or fails to "take reasonable remedial action" when the lawyer learns of the conduct. ILL. RULES OF PROF'L. CONDUCT R. 5.1(c); ILL. RULES OF PROF'L. CONDUCT R. 5.3(c).

for presuit discovery production and protective orders. Duty breaches can prompt sanctions personal to the culprit lawyers and sanctions upon clients for their lawyers', as well as their own, mishaps.[95]

i. Discovery Sanctions in Pending Cases for Presuit Acts

Presuit lawyer conduct prompting otherwise discoverable materials to be lost only sometimes can lead to sanctions on lawyers when the materials are later sought in discovery.[96] Following is a brief review of the Federal Rules of Civil Procedure (FRCP) on discovery sanctions for presuit lawyer acts that illustrate, with significant state law variations sometimes noted.

Some discovery laws on sanctions for presuit information losses causing later discovery failures cover only certain information. For example, under the 2015 amendments to the FRCP Rule 37(e), "curative" discovery sanctions are available under Rule 37(e) for lost ESI that "cannot be restored or replaced" and "that should have been preserved in the anticipation of . . . litigation," but is lost because "a party failed to take reasonable steps to preserve it."[97] No possible sanctions against the party's lawyer are mentioned, with such sanctions for lost ESI seemingly unavailable because only "curative" sanctions impacting factfinding during trials are authorized.[98]

Some current state civil procedure laws similarly differentiate between losses of certain ESI and losses of other ESI and non-ESI that are enforceable through sanctions in civil actions.[99] Other state discovery laws speak more

95. On the need for determining individual lawyer and client culpability in assessing sanctions available against one or both, *see*, *e.g.*, Bellamy v. Montgomery, 2012 WL 4321160 (Ohio Ct. 2012) (discovery failures).

96. The challenges facing lawyers whose clients receive presuit information preservation demands and thus must consider institution of a litigation hold are reviewed in Jason A. Pill & Derek E. Larsen-Chaney, *Litigating Litigation Holds: A Survey of Common Law Preservation Duty Triggers*, 17 J. TECH. L. & POL'Y 193, 196–97 (2012) (collecting federal cases and focusing on what triggers a reasonable anticipation of litigation in particular case [e.g., employment, contracts, tort, copyright] settings). The consequences, under discovery (and professional responsibility and tort) laws, for lawyers who fail to consider properly such demands are reviewed in Nathan M. Crystal, *Ethical Responsibility and Legal Liability of Lawyers for Failure to Institute or Monitor Litigation Holds*, 43 AKRON L. REV. 715, 716 (2010).

97. FED. R. CIV. P. 37(e) (recognizing harsher sanctions are available for intentional information deprivations by "a party").

98. FED. R. CIV. P. 37(e) (possible sanctions for unintentional ESI losses can only include "measures no greater than necessary to cure" prejudice, while possible sanctions for intentional ESI losses include presumptions or instructions on the unfavourability of lost ESI, as well as dismissal or default).

99. *Compare* WYO. R. CIV. P. 37(e); OHIO R. CIV. P. 37(E); KAN. STAT. ANN. § 60-237(e) (2019); *and* D.C. SUP. CT. R. CIV. P. 37(e), *with* VT. R. CIV. P. 37(f) (includes only initial portion of

generally to information losses involving all forms of information, including ESI and non-ESI.[100] Yet other state discovery laws follow an earlier (2006) version of FRCP 37(e) by differentiating between all ESI and non-ESI.[101]

Additional federal civil procedure laws seemingly authorize sanctions for presuit information losses in limited settings. One statute generally encompasses information losses that so vexatiously and unreasonably multiply a federal civil action that a lawyer or other similar culprit can be assessed attorneys' fees.[102] There are some state vexatious litigation laws that seemingly cover presuit information losses; they may or may not authorize sanctions against lawyers.[103]

General federal civil procedure laws on sanctions involving discoverable information that was lost presuit and is relevant in pending actions are chiefly encompassed in the FRCP 37 provisions outside of Rule 37(e). Separate FRCP provisions in Rule 37 authorize discovery sanctions, inter alia, for failure "to obey an order to provide or permit discovery" and for failing to provide information under the rules on "required disclosures" under Rule 26(a), with no mention of possible sanctions against lawyers.[104] Some general state discovery

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FED. R. CIV. P. 37(e) so it does not speak directly to intentional acts), *and* ARIZ. R. CIV. P. 37(g) (containing FED. R. CIV. P. 37(e) (2015) but also articulating the parameters of the "duty to take reasonable steps to preserve" ESI and guidelines on what constitutes such steps).

100. *See*, *e.g.*, ILL. RULES OF PROF'L. CONDUCT R. 219 (2014 Rules Advisory Committee Comment says the rule "is sufficient to cover sanction issues as they relate to electronic discovery"), SUPREME JUDICIAL COURT ADVISORY COMMITTEE ON MASSACHUSETTS EVIDENCE LAW, MASSACHUSETTS GUIDE TO EVIDENCE 261 (2021) ("A judge has discretion to impose sanctions for the spoliation or destruction of evidence, whether negligent or intentional, in the underlying action in which the evidence would have been offered.").

101. FED. R. CIV. P. 37(f) (2006). While the 2006 rule operated in the federal district courts for only nine years, it operates in several states. *See*, *e.g.*, MD. CODE ANN. CTS. & JUD. PROC. § 2-433(b) (West 2022); N.C. GEN. STAT. ANN. § 1A-1 (West 2022) (Rule 37(b1)); MONT. R. CIV. P. 37(e) (2011); VT. R. CIV. P. 37(f) (2009); MINN. R. CIV. P. 37.05; TENN. R. CIV. P. 37.06(2); HAW. R. CIV. P. 37(f); N.J. CT. R. 4:23-6; and ALA. R. CIV. P. 37(g). *See also* UTAH R. CIV. P. 37(e) (adoption of FED. R. CIV. P. 37(e) (2006) 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 R. CIV. P. 37(e) (a 2008 rule that, in addition to adding FED. R. CIV. P. 37(f) (2006), sets out five factors that courts may consider when determining whether to sanction).

102. 28 U.S.C. 1927 (other culprits, however, are limited to persons "admitted to conduct cases").

103. *See*, *e.g.*, MONT. CODE ANN. § 37-61-42 (2021) (attorney or party is liable personally for excess costs caused by unreasonable and vexatious multiplication of proceedings) and IND. CODE § 34-52-1-1(a)(3) (2021) (prevailing party gets attorney's fees if adverse party "litigated the action in bad faith").

104. FED. R. CIV. P. 26(a), 37(b)(2) (sanction for failing to obey a court order), FED. R. CIV. P. 37(c)(1) (sanction for failing to provide information in a required disclosure). Rule 37(b)(2) expressly

laws are comparable.[105] These and other laws can cover certain presuit information losses.[106]

As well, FRCP 37(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."[107] Failures to "provide" or to "make a disclosure" of certain information lost presuit can prompt repercussions, though perhaps not directly under the rule.[108] There is no explicit indication in this rule that sanctions may be assessed against lawyers whose clients fail to make required disclosures.

FRCP 26(g) does target lawyers who fail to follow certain presuit norms on discovery.[109] The rule demands that a lawyer who signs a discovery disclosure (under Rule 26(a)(1) or (3)) must certify, "after a reasonable inquiry," that the

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authorizes sanctions against "a party or a party's officer, director, or managing agent—or a witness," while FED. R. CIV. P. 37(c)(1) expressly authorizes sanctions against "a party." FED. R. CIV. P. 37(b)(2); FED. R. CIV. P. 37(c)(1). To prevent unwarranted presuit information losses by lawyers, Professor Schaefer has proposed amendments to FED. R. CIV. P. 26(a)(1) on initial disclosures that would require that "a party" provide to "other parties . . . description of the steps taken to preserve discoverable information in the case." Paula Schaefer, *Attorney Negligence and Negligent Spoliation: The Need for New Tools to Prompt Attorney Competence in Preservation*, 51 AKRON L. REV. 607, 631–32 (2017) (focusing on incentivizing attorney competence regarding information preservation through amendments to compelled disclosure rules).

105. *See*, *e.g.*, VT. R. CIV. P. 37; ME. R. CIV. P. 37 (no provision like FED. R. CIV. P. 37(f) on failing to participate in framing a discovery plan); D.C. SUP. CT. R. CIV. P. 37 (no discovery plan provision); ALA. R. CIV. P. 37 (no discovery plan provision); N.D. R. CIV. P. 37; and OHIO R. CIV. P. 37 (no discovery plan provision). *But compare* ILL. RULES OF PROF'L. CONDUCT R. 137 *and* 219 (conduct prompting possible discovery sanctions governed by same standards governing pleading and motion sanctions, unlike FED. R. CIV. P. 11(d); per ILL. RULES OF PROF'L. CONDUCT R. 219(e), no voluntary dismissal "to avoid compliance with discovery deadlines, orders or applicable rules") *with* FED. R. CIV. P. 11(d).

106. On presuit information losses causing a failure to obey a court order in a pending civil action, *see*, *e.g.*, Thompson v. U.S. Dept. of Hous. & Urb. Dev., 219 F.R.D. 93, 95 (D. Md. 2003) (failure by defendant to produce email records of departing officials). On presuit information losses causing a failure to make certain discovery available in a pending civil action, *see*, *e.g.*, Silvestri v. Gen. Motors Corp., 271 F.3d 583, 588 (4th Cir. 2001) (failure to make available a vehicle involved in an accident). On presuit information losses causing a failure regarding required disclosures in a pending civil action, *see*, *e.g.*, Broccoli v. Echostar Commc'ns Corp., 229 F.R.D. 506, 509 n.2 (D. Md. 2005).

107. FED. R. CIV. P. 37(a)(3)(A).

108. FED. R. CIV. P. 37(b)(2)(A). Inherent judicial powers are employed to sanction presuit information losses. *See*, *e.g.*, *Silvestri*, 271 F.3d at 590 (involuntary dismissal of lawsuit was not an unduly harsh sanction arising from a discovery violation involving the presuit failure to preserve a car). *See also* Hartford Cas. Ins. Co. v. Winston Co., 2011 WL 13382162, *6 (N.D. Ill. 2011) ("the analysis for imposing sanctions under our inherent powers and Rule 37 is essentially the same").

109. FED. R. CIV. P. 26(g). Substantially similar to FED. R. CIV. P. 26(g) is MONT. R. CIV. P. 26(g); N.C. R. CIV. P. 26(g); MISS. R. CIV. P. 26(g); and VT. R. CIV. P. 26(g).

disclosure "is complete and correct as of the time it is made."[110] The same rule further demands that a lawyer who signs a discovery request, response, or objection must certify, "after reasonable inquiry," that the disclosure is "consistent" with the FRCP and "neither unreasonable nor unduly burdensome or expensive."[111]

A violating certification under Rule 26(g), "without substantial justification," authorizes the district court to "impose an appropriate sanction" on the signing lawyer, "the party on whose behalf the signer was acting, or both."[112] Possible sanctions include orders on reasonable expense payments, which might include attorney's fees, that address the harms "caused by the violation."[113] It is not difficult to imagine that Rule 26(g) certification violations by lawyers could involve lawyer failures to create and preserve information in anticipation of later litigation, as when lawyer discovery requests/objections are founded on problematic factual premises.

Beside Rule 26(g), Rule 37(a) authorizes a court to require an attorney "advising" conduct that prompts a motion for an "order compelling disclosure or discovery" to "pay the movant's reasonable expenses incurred in making the motion, including attorney's fees" where attorney conduct is found to be not "substantially justified" and an award of expense would not be "unjust."[114] Similarly, an advising attorney can be sanctioned under Rule 37(d) where a party's failure to attend its own deposition, serve answers to interrogatories or respond to a request for inspection, again unless there is substantial justification or injustice.[115]

While some federal civil procedure sanction laws do not expressly target lawyers who fail before suit to preserve information relevant to their clients' future cases, there are laws authorizing other nonparties to be sanctioned for presuit acts; such sanctions might accompany or serve instead of third-party spoliation claims in order to provide relief for harms caused to parties.[116] Thus, a procedural law sanction can be levied against a nonparty deponent who fails

110. FED. R. CIV. P. 26(g)(1).

111. FED. R. CIV. P. 26(g)(1)(B)(i) and (iii).

112. FED. R. CIV. P. 26(g)(3).

113. *Id*.

114. FED. R. CIV. P. 37(a)(5)(A)(ii).

115. FED. R. CIV. P. 37(d)(3). Similar is MINN. R. CIV. P. 37.02(a) and ARK. R. CIV. P. 37(d), applied in Helton v. Fuller, 772 S.W.2d 343, 343 (Ark. 1989) (expenses, including attorney fees, assessed on lawyer).

116. *See* FED. R. CIV. P. 34(c); *See also* FED. R. CIV. P. 37 (providing for, generally, sanctions against parties or persons unjustifiably resisting discovery).

to provide relevant tangible materials at a deposition due to presuit loss.[117] Such a sanction may include trial witness disqualification which negatively impacts a party, as well as disallowance of witness expenses and fees, a significant sanction when it comes to expert witnesses.

ii. Non-Discovery Presuit Certificates of Reasonable Inquiry

Presuit lawyer information duties tied to future civil litigation are not explicitly addressed in discovery laws, though post-suit lawyer information duties are addressed in the FRCP 26(g) "signing" provisions.[118] But presuit lawyer information duties are addressed in some procedural laws on (certifying, presenting and the like) any pleadings, motions or other civil litigation papers.[119] These laws on presuit duties appear in FRCP 11 and in state laws, which are often modeled on some version of FRCP 11.[120] These laws are sometimes inapplicable to required information disclosures or discovery materials.[121]

Litigation paper presentation duties under current FRCP 11 encompass the need for presenters to undertake "an inquiry reasonable under the

117. FED. R. CIV. P. 45(g) (failure without adequate excuse to obey a subpoena can prompt contempt). Comparable is TEX. R. CIV. P. 215.2(c). A nonparty's failure is more likely tied to a contract or statutory duty to preserve, though a duty can be imagined for some nonparties where there is reasonably foreseeable litigation in which the nonparties will likely serve as key witnesses, whether or not as experts. *See*, *e.g.*, Silvestri v. Gen. Motors Corp., 271 F.3d 583, 585–86 (4th Cir. 2001) (plaintiff's landlady's car involved in accident, where plaintiff was sanctioned (e.g., involuntary dismissal) for failing to provide future defendant notice of a likely claim and an opportunity to inspect vehicle, but where landlady (whose husband owned the car) was not sanctioned as she was not asked for the car during discovery) and *Id*. 586, 591–92 (no discovery sanction sought against plaintiff's experts, who inspected and reported on the car soon after the relevant accident, about three years before the suit was commenced and the defendant learned of accident, as experts suggested to plaintiff's lawyer that the future defendant "needs to see the car," plaintiff later countersued his lawyer for malpractice when the plaintiff sued for attorney's fees and costs).

118. FED. R. CIV. P. 26(g).

119. FED. R. CIV. P. 11. There are similar pre-appeal lawyer information duties geared to deterring the filing of frivolous appeals. *See*, *e.g.*, FED. R. P. 38 (after a "motion or notice from the court," an award of just damages and costs to an appellee for a frivolous appeal), applied to an attorney in Hilmon Co. (V.I.) v. Hyatt Intern., 899 F.2d 250, 253–54 (3d Cir. 1990).

120. FED. R. CIV. P. 11. Versions of FED. R. CIV. P. 11 took effect in 1938, 1983, and 1993.

121. *See*, *e.g.*, FED. R. CIV. P. 11(d). *Compare* ILL. RULES OF PROF'L. CONDUCT R. 137 (lawyer certifications of "every pleading, motion, and other document") to FED. R. CIV. P. 11(d), cited in L. Offs. of Brendan Appel, LLC v. Ga.'s Rest. & Pancake House, Inc., 2021 IL App (1st) 192523, ¶ 82 (Rule 137 sanction for conduct that included defendants' "failures to provide witness information and provision of false and conclusory statements," with court looking at defendants' "conduct as a whole" and not to "each discovery violation committed," which would have prompted the use of Rule 219 on discovery failures). Before its amendment in 1993, FED. R. CIV. P. 11, as it read between 1938 and 1983, and between 1983 and 1993, did not explicitly exclude compulsory information disclosures and discovery materials.

circumstances."[122] Presenters include both those who signed the litigation papers and those who advocated, filed, or submitted the allegations in those papers.[123] Presenters include both lawyers and law firms. While these inquiry duties operate both presuit and post-suit, they do not cover presentations involving "disclosures and discovery" materials and motions.[124] Possible sanctions arising due to the Rule 11 inquiry failures can be considered "on the court's initiative."[125]

Less significant presuit lawyer information duties tied to future civil litigation, including discovery, are found in some state procedural laws also addressing "signing" pleadings, motions and other papers.[126] At times, only signing lawyers may be sanctioned for "reasonable inquiry" failures, including presuit acts, where litigation papers are not "well grounded in fact" or are "not warranted by existing law or a good faith argument" on the need for a change in existing law.[127] These laws follow the FRCP 11 language as it existed between 1983 and 1993.[128]

Even more limited presuit lawyer information duties tied to future civil litigation, including discovery, are found in state procedural laws on "signing" litigation papers which follow FRCP 11 as it existed between 1938 and 1983.[129] Here, a signing lawyer may only be sanctioned for a "willful violation" through an "appropriate disciplinary action."[130] Such a violation can involve a lack of

122. FED. R. CIV. P. 11(b).

123. *Id.*

124. FED. R. CIV. P. 11(d).

125. FED. R. CIV. P. 11(c)(3). State laws generally following current FED. R. CIV. P. 11 include WIS. STAT. ANN. § 802.05; TENN. R. CIV. P. 11.01 to 11.04; UTAH R. CIV. P. 11 (no presumption of joint law firm responsibility and no exception for disclosures and discovery); MINN. R. CIV. P. 11.01 to 11.04; KAN. STAT. ANN. § 60-211; and MO. R. CIV. P. R. 55.03(c) ("presenting and maintaining").

126. *See*, *generally*, KY. R. CIV. P. 11; N.C. GEN. STAT. ANN. § 1A-1 (West 2022 (Rule 11); ARK. R. CIV. P. 11; TEX. R. CIV. P. 13; VA CODE ANN. 8.01-271.1; COLO. R. CIV. P. 11; and WASH. SUP. CT. CIV. R. 11.

127. *See*, *generally*, KY. R. CIV. P. 11; N.C. GEN. STAT. ANN. § 1A-1 (West 2022 (Rule 11); ARK. R. CIV. P. 11; TEX. R. CIV. P. 13; VA CODE ANN. 8.01-271.1; COLO. R. CIV. P. 11; and WASH. SUP. CT. CIV. R. 11.

128. *See*, *generally*, KY. R. CIV. P. 11; N.C. GEN. STAT. ANN. § 1A-1 (West 2022 (Rule 11); ARK. R. CIV. P. 11; TEX. R. CIV. P. 13; VA CODE ANN. 8.01-271.1; COLO. R. CIV. P. 11; and WASH. SUP. CT. CIV. R. 11.

129. John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 370 (2002).

130. Nancy H. Wilder, *1983 Amendments to Rule 11: Answering the Critics' Concern with Judicial Self-Restraint*, 61 NOTRE DAME L. REV. 798, 798 (1986).

a lawyer's "knowledge, information and belief there is good ground to support" the litigation paper.[131]

iii. Presuit Discovery Production and Protective Orders

Presuit acts causing information losses preventing later discovery can be deterred by presuit discovery orders. Presuit opportunities under federal and state civil procedure laws to secure information production and protective orders relevant to future civil cases are quite limited, however. Some American states have more expansive presuit discovery opportunities, including laws on identifying potential defendants[132] and laws on identifying potential causes of action.[133] There are few state laws on opportunities for individuals or organizations, including those who receive presuit information maintenance, preservation, or production requests, to secure judicial presuit protective orders.[134] In these laws on presuit discovery, and the consequences of discovery failures, lawyers are not specially mentioned.[135]

FRCP 27, substantially replicated in many states, is the major federal rule on affirmative presuit discovery. In one part it authorizes testimony perpetuation via deposition "about any matter cognizable in a United States court" where the petitioner "expects to be a party" to an action in a U.S. court, but "cannot presently" sue.[136] Under this rule, a deposition can only be ordered

131. *See* IND. TRIAL PROC. R. 11. State laws generally follow FED. R. CIV. P. 11 as it existed between 1938 and 1983. *See also* OHIO R. CIV. P. 11; ALA. R. CIV. P. 11(a); MISS. R. CIV. P. 11(b) (also authorizing a judicial sanction in the case where a litigation paper is "frivolous" or "filed for the purpose of harassment or delay").

132. *See*, *e.g.*, 735 ILL. COMP. STAT. 5/2-402 (West 1993) (respondents in discovery in pending civil cases) and N.Y. CIV. PRAC. L. & RULES § 3102(c) (presuit discovery "to aid in bringing an action").

133. *See*, *e.g.*, TEX. R. CIV. P. 202.1 (deposition to help investigate a potential claim or suit); N.Y. CIV. PRAC. L. & RULES § 3102(a) and (c) (presuit 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"), *abrogated by* Empire Fin. Grp., Inc. v. Fin. Reguluth., Inc., 2009 WL 10644856 (S.D. Fla. 2009) (bill of discovery does not constitute a cause of action).

134. *But see* ARIZ. R. CIV. P. 45.2.

135. *Id*.

136. FED. R. CIV. P. 27(a)(1)(A). Similar is ARK. R. CIV. P. 27(a)(1); MINN. R. CIV. P. 27.01; MISS. CODE ANN. § 13-1-227(a)(1) (1976); CONN. GEN. STAT. § 52-156 a (a)(1)(A) (2012). 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. 6-327(a)(1)(i); S.C. R. CIV. P. 27(a)(1)(1); and W. VA. R. CIV. P. 27(a)(1)(1). *Compare* ILL. SUP. CT. R. 217 (a)(1) to FED. R. CIV. P. 27(a)(1)(A) (no need to show petitioner "cannot presently" sue). Similar are MD. CODE ANN. CTS. & JUD. PROC. § 2-404(a)(2) (West 2022); R. I. GEN. LAWS § 9-18-12 (2014); and WIS. STAT. § 804.02(1)(a) (2019–2020). Beyond testimony perpetuation

to "prevent a failure or delay of justice."[137] Through the use of 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.[138]

The rule governing a presuit deposition per FRCP 27 "does not limit a court's power to entertain an action to perpetuate testimony,"[139] a power substantially defined by "the former bill in equity to perpetuate testimony."[140] Use of such a bill predates the FRCP.[141] Current usage of a bill in equity, however, has been read to track the FRCP requirements on deposition testimony perpetuation.[142] Usage is thus infrequent.[143] As with testimony

via deposition under FED. R. CIV. P. 27, there is little else in the FED. R. CIV. P. or the U.S. Judicial Code on presuit opportunities to preserve discoverable information, excepting the recognition under FED. R. CIV. P. 27(c) of "a court's power to entertain an action to perpetuate testimony." Some states have special testimony perpetuation laws. In Missouri, a statute covers presuit 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 rights." MO. REV. STAT. § 492.420 (1939). And *see* GA. CODE ANN. § 24-13-150 (2018) ("Superior Courts may entertain [equitable] proceedings for the perpetuation of testimony in all proceedings in which the fact to which the testimony relates cannot immediately be made the subject of an investigation" as long as a common-law proceeding is not available . . . .").

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

138. FED. R. CIV. P. 27(a)(3) (referencing FED. R. CIV. P. 34 and 35).

139. FED R. CIV. P. 27(c).

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

141. *See*, *e.g.*, Rindskopf v. Platto, 29 F. 130 (E.D. Wis. 1886) (equity discovery bill where related law action between same parties was pending) and Preston v. Equity Sav. Bank, 287 F. 1003, 1005 (D.C. Cir. 1923) ("Nor is the contention sound that discovery can only be had in aid of a suit pending or to be brought . . . being an original and inherent power of a court of equity, it may be enforced directly . . . Discovery, incident to a bill for equitable relief, is distinguishable form a bill to obtain evidence to be used in another suit.").

142. *See*, *e.g.*, *Shore*, 644 F. 2d at 389 (*citing* 4 Moore's Federal Practice ¶ 27.21). *See* Note, *Rule 34(c) and Discovery of Nonparty Land*, 85 YALE L.J. 112 (1975); Lubrin v. Hess Oil Virgin Islands Corp., 109 F.R.D. 403, 405 (D.V.I. 1986) (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").

143. 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. *See* Jeffrey A. Parness & Jessica Theodoratos, *Expanding Pre-suit Discovery Production and Preservation Orders*, 2019 MICH. ST. L. REV. 652, 655 (bill granted Dr. Dao per party agreement). An older case is *Lubrin*, 109 F.R.D. 405 (preservation of conditions at site of accident). Of course, private presuit agreements or unilateral assumptions of information preservation duties lessen the need for presuit equitable discovery bills. Such agreements and assumptions are promoted where petitions for presuit equitable discovery bills beyond testimony perpetuation via presuit discovery must be preceded by a "meet and confer."

perpetuation, there are comparable state laws recognizing independent presuit discovery actions.[144]

Some state civil procedure discovery laws permitting presuit creation, preservation, and production orders go beyond the FRCP that allow depositions, document productions, and inspections involving nonparties where there are already pending civil actions involving others.[145] Broader presuit discovery from nonparties is available under an Illinois statute[146] that authorizes discovery by a plaintiff from a nonparty respondent "believed by the plaintiff to have information essential to the determination of who should properly be named as additional defendants."[147]

Other state civil procedure discovery laws go beyond the FRCP by allowing presuit information maintenance, preservation, and production orders when there are no pending civil actions. In Illinois, a court rule authorizes an "independent action" pursued by a potential claimant for "the sole purpose of ascertaining the identity of one who may be responsible in damages."[148] In New York, a statute permits presuit discovery "to aid in bringing an action."[149] In Ohio, a civil procedure rule allows presuit discovery "necessary to ascertain the identity of a potential adverse party."[150]

Related to the laws on identifying potential defendants, there are some state presuit civil discovery laws aiding petitioners who seek to identify potential

144. ARK. R. CIV. P. 27(c); KAN. STAT. ANN. § 60-227(d) (1963); MISS. CODE ANN. § 13-1-227(c) (2014); NEB. R. DISCOVERY IN CIV. CASES 6-327(c); and S. C. R. CIV. P 27(c). *See also* MINN. R. CIV. P. 37.03(b) (no preclusion of "an independent action against a person not a party for production of documents and things and permission to enter land). *But compare* MD. CODE ANN. CTS. & JUD. PROC. § 2-404 (West 2022); CONN. GEN. STAT. § 52-156a (2012); S. D. CODIFIED LAWS § 15-6-27(a) (1966); ALA. R. CIV. P. 27; and ALASKA R. CIV. P. 27 (court rules and statutes on perpetuating witness testimony via presuit depositions where there are no recognitions of "independent" actions).

145. FED. R. CIV. P. 30(a)(1) (deposition by oral questions of any person including a party); FED. R. CIV. P. 34(c) (per FED. R. CIV. P. 45, "a nonparty may be compelled to produce documents and tangible things to permit an inspection"), FED. R. CIV. P. 45(c)(1) and (2) (a subpoena commanding a person to attend a deposition may also command production of ESI or tangible things, or an inspection).

146. 735 ILL. COMP. STAT. 5/2-402(a) (West 1993). *See also* N.Y. C.P.L R. § 3102(c) (CONSOL. 2002) (presuit discovery "to aid in bringing an action").

147. 735 ILL. COMP. STAT. 5/2-402(a) (West 1993).

148. ILL. RULES OF PROF'L. CONDUCT R. 224(a)(1).

149. N.Y. C.P.L.R. § 3102(c) (CONSOL. 2002).

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

causes of actions.[151] Here potential defendants may be known, but their roles—if any—in causing harm are unknown and may not become known without presuit discovery (i.e., res ipsa loquitur scenarios). Illustrative is a Texas rule allowing a petition seeking deposition authorization in order "to investigate a potential claim or suit," with judicial authority recognized only where there is an "anticipated suit."[152] Under this rule, a petitioner must demonstrate that the deposition order "may prevent a failure or delay of justice," or that "the likely benefit" of the deposition "outweighs the burden or expense of the procedure."[153] Authorized depositions are governed by "the rules applicable to depositions of non-parties in a pending suit."[154] Thus, document or ESI production can be sought.[155]

A New York statute is broader, as it authorizes varying presuit discovery devices, including depositions, interrogatories, physical and mental examinations, and requests for admission "to aid in bringing an action."[156] An Ohio statute allows "a person claiming to have a cause of action" who is "unable to file his complaint" without discovery "from the adverse party" to "bring an action for discovery . . . with any interrogatories . . . that are necessary to procure the discovery sought."[157]

As with the laws on discovery sanctions in pending cases, the laws on presuit discovery creation, preservation, production, and protective orders can be special. For example, in Missouri there is a statute on perpetuating testimony by deposition where "the object is to perpetuate the contents of any lost deed or

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

152. *See* TEX. R. CIV. P. 202.1 (conditions limiting post-lawsuit depositions can also limit presuit depositions). The potential availability of this rule in a federal district court is discussed in Jeffrey Liang, Note, *Reverse Erie and Texas Rule 202: The Federal Implications of Texas Pre-Suit Discovery*, 89 TEX. L. REV. 1491 (2011).

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

154. TEX. R. CIV. P. 202.5.

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

156. N.Y. C.P.L.R. § 3102(a) and (c) (CONSOL. 2002).

157. OHIO REV. CODE ANN. § 2317.48 (1985). The statute "occupies a small niche between an unacceptable 'fishing expedition' and a short and plain statement of a complaint or a defense." Poulos v. Parker Sweeper Co., 541 N.E.2d 1031, 1034 (Ohio 1989).

other instrument of writing, or the remembrance of any fact, matter or thing necessary to the recovery, security or defense of any estate or property, real or personal, or any interest therein, or any other personal right."[158]

D. Substantive State Spoliation Laws

Presuit lawyer duties on creating, preserving, producing, and protecting information relevant to future federal or state civil litigation can emanate from substantive state spoliation laws, including claims in common law tort, in common law contract, and in statutes.

Spoliation claims cover harms involving diminished or eliminated opportunities to present civil claims or defenses. They may originate in general or special laws.[159] Often the claims arise from common law precedents. The significant variations in spoliation laws include differences on who owes an information preservation duty; the manner in which such a duty is breached; and the available remedy upon breach.[160] The following sections briefly review current laws recognizing spoliation claims,[161] as they will guide the availability of any new presuit protective orders.

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158. MO. REV. STAT. § 492.420 (1939). *See also* MONT. WATER RIGHT ADJ. RULE 28 (testimony perpetuation via deposition "regarding the historical beneficial use of any water right claim" includes "a verified petition with the water court," with "notice to expected adverse parties . . . served by mail to the most recently updated address documented in the [water] department's centralized record system").

159. There may also be implied causes of action for information spoliation against criminal prosecutors available to those 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, 124 (Utah 2017) (reaffirming precedent on state constitutional due process obligation of prosecutors to preserve evidence, which requires "a reasonable probability that the lost evidence would have been exculpatory" and, if so found, a balancing of the culpability of the State and the prejudice to the defendant in order to determine an appropriate remedy). *Compare*, *e.g.*, Hibbits v. Sides, 34 P.3d 327 (Alaska 2001) (recognizing intentional third-party spoliation as a tort that could be pursued against a state trooper by motorcycle riders hurt by a pickup truck driver who collided with them, where trooper-first on the scene- removed the driver for about two hours after the collision because the trooper knew the driver was under the influence of marijuana), *with* Ortega v. City of New York, 876 N.E. 2d 1189 (N.Y. 2007) (no intentional spoliation tort claim against city that sold a vehicle it was ordered to preserve so that future claimants could use it in a later suit against the vehicle manufacturer).

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

161. Substantive U.S. state law claims for presuit evidence spoliation are surveyed in more detail in Steven Plitt & Jordan R. Plitt, *A Jurisprudential Survey of the Tort of Spoliation of Evidence: Resolving Third-Part Insurance Company Automobile Spoliation Claims*, 24 CONN. INS. L.J. 63 (2017).

State spoliation claims can be heard in federal district courts, as in those courts there are no federal substantive spoliation laws.[162] The Advisory Committee Note accompanying the amendments to 2015 FRCP 37(e) recognized that the new 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."[163] There is no reason why a state spoliation claim would not be available for information losses outside of FRCP 37(e), that is, for losses beyond irreplaceable and non-restorable ESI.

The following sections survey the varying forms of state spoliation laws, utilizing an Illinois Supreme Court ruling which said:

> The general rule is that there is no duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, 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.[164]

These duties, recognized "under existing negligence law,"[165] are only somewhat akin to the duties under Illinois civil procedure laws to have

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

163. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment. There is room for some substantive federal spoliation law, as when a government official intentionally destroys, or fails to maintain or preserve, information important in a later civil action. *See generally* 42 U.S.C. § 1983 (liability for those acting contrary to federal constitution or federal "laws" under color of state law); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395–97 (1971) (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.*, Jutrowski v. Twp. of Riverdale, 904 F.3d 280, 294 (3d Cir. 2018) (civil rights claim can be founded on conspiracy of silence amongst police regarding earlier excessive force).

164. Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 270–71 (Ill. 1995) (citations omitted). 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*, 652 N.E.2d 267, recognizing both a negligent and intentional tort claim for evidence spoliation); Hannah v. Heeter, 584 S.E.2d 560 (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 clai for evidence spoliation by an adverse party).

165. *Boyd*, 652 N.E.2d at 270. Such duties may originate elsewhere, as in contract or insurance laws. *See*, *e.g.*, *infra* notes 218 and 222.

information available when requested via formal discovery, including duties to preserve before civil litigation commences.[166]

i. Common Law Tort

Common law torts, as per *Boyd*, involving information spoliation can arise through a "special circumstance" or through a voluntary assumption of a preservation duty "by affirmative conduct."[167] A special circumstance may involve a fiduciary or otherwise special relationship between parties where future civil litigation is reasonably anticipated.[168] Relevant relationships, where there may be no explicit agreements or contracts on information preservation, can include insurer-insured and attorney-client relationships.[169] Here, information germane to a future case may not be preserved by an insurer or an attorney or a doctor[170] resulting in harm to an insured or a client or a patient in a later anticipated case. As well, a special circumstance may arise when an expert, retained by a future litigant without an explicit agreement on

166. *See*, *e.g.*, Shimanovsky v. Gen. Motors Corp., 692 N.E.2d 286, 290 (Ill. 1998) (if trial court could not "sanction a party for presuit 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 on discovery. For example, sanctions involving adverse jury instructions may only be rendered post-suit and arise solely under civil procedure laws. As noted, *supra* note 2, presuit information preservation duties differ from presuit information maintenance duties. *See*, *e.g.*, Dittman v. UPMC, 196 A.3d 1036, 1048 (Pa. 2018) (duties owed by employer to employees "to use reasonable care" to safeguard the employees' sensitive personal data once collected; presumably there are also duties regarding privacy protections during data collection).

167. *Boyd*, 652 N.E..2d at 271.

168. *See*, *e.g.*, Cooper v. State Farm Mut. Auto. Ins. Co., 99 Cal. Rptr. 3d 870 (Cal. App. 4th 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 (duty to preserve evidence may arise against third-party spoliator "based upon a contract . . . or some other special circumstance/relationship." (citing Johnson v. United Servs. Auto Ass'n., 67 Cal. App. 4th 626 (1998)). Determinations of such special circumstances can be challenging. *See*, *e.g.*, Reynolds v. Lyman, 903 F.3d 693, 696 (7th Cir. 2018) (owner of LLC that was represented by a lawyer was owed no duty of care by the lawyer as long as owner was not "a direct and intended beneficiary" of the legal representation). Comparably, a "special relationship of trust and confidence" in an otherwise "ordinary business" relationship can prompt a duty to disclose "material information." BAS Broad., Inc. v. Fifth Third Bank, 110 N.E.3d 171, 175 (Ohio Ct. App. 2018).

169. On deterring presuit attorney spoliation, *see, e.g.*, Schaefer, *supra* note 104, at 608 (advocating for a new procedural rule on mandated disclosures of presuit preservation efforts).

170. *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, Kansas Admin. Regs. 100-24-1). *Compare* Longwell v. Jefferson Par. Hosp. Serv. Dist. No. 1, 970 So. 2d 1100, 1106 (Lapp. 5th 2007) (needing deliberate spoliation of evidence to support a tort claim founded on breach of statutory duty to preserve medical records) *with Foster*, 809 F. Supp. 831.

information preservation, loses information passed to the expert for analysis. Yet for insurers, attorneys, doctors and experts, seemingly there will be fewer spoliation tort claims since claims seemingly can be founded on implicit or explicit duties involving agreements/contracts, like duties to defend, represent, treat, or test only in reasonable fashions.

Affirmative conduct prompting a preservation duty may involve the assumption of control over information that is reasonably foreseeable as (quite) important to later litigation. Such a duty might be extended to those who are not in a fiduciary or otherwise special relationship with the litigant harmed by information spoliation.[171] Consider, for example, an expert retained by one future litigant to conduct device testing, who destroys or significantly alters the device during testing so that the consulting litigant's future adversary has no opportunity to test independently or to observe the expert's testing.[172] The one-time future adversary who is now involved in litigation with the party who retained the expert may have an information spoliation claim against the expert.[173]

Consider, as well, a future litigant's insurance adjuster who takes possession of, and then negligently loses or intentionally destroys, important potential 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 an information spoliation claim against the litigant's insurer.[174]

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171. 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. Elliot-Thomas v. Smith, 110 N.E.3d 1231 (Ohio 2018).

172. 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. 34 A.01.

173. Damages could include certain litigation expenses incurred resulting from the spoiled information. *See*, *e.g.*, Goodman v. Praxair Serv.'s, Inc., 632 F. Supp. 494, 524 (D. Md. 2009). The expert's opinion could also be excluded from any trial. *See*, *e.g.*, Nally v. Volkswagen of Am., Inc., 539 N.E. 2d 1017, 1021 (Mass. 1989) ("The reason . . . is the unfair prejudice that may result from allowing an expert deliberately or negligently to put himself or herself in the position of being the only expert with first-hand knowledge of the physical evidence on which expert opinions as to defects and causation may be grounded."), applied in Bolton v. Mass. Bay Transp. Auth., 593 N.E.2d 248, 249 (Mass. App. 1992).

174. *Compare* 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 and Battery Serv. Ctr., Inc., 871 N.E.2d 98 (Ill. App. 5th 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 v. Travelers Ins. Co., 652 N.E.2d 267, 272 (Ill. 1995) (employer's workers' compensation insurer owed duty to preserve space heater

Finally, consider a governmental officer or agency that takes information and then loses it to the detriment of another involved in later litigation with the information supplier. Torts claim statute[175] or comparable law[176] might place the government officer or agency in a position similar to a private party who loses information.

Where a common law duty to preserve is established, and is not dependent upon an agreement/contract, whether through a "special circumstance" or "affirmative conduct," an information spoliation tort might require proof of culpability going beyond mere negligence.[177] 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.[178] Finally, even where the necessary degree or culpability

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that it took possession of and that was involved in a workplace accident, where employee pursued product liability claim against manufacturer of heater).

175. *But see*, *e.g.*, 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").

176. *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 and 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, 16 (f) and 37 (no reference to any private/ public distinction in varying sanction settings).

177. *See*, *e.g.*, Willis v. Cost Plus, Inc., 2018 WL 1319194, at *3–4 (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). *Compare* Richardson v. Sara Lee Corp., 847 So. 2d 821 (Miss. 2003) (no negligence or intentional tort claim for spoliation of evidence), *with Willis*, 2018 WL 1319194. Similarly, a civil procedure law sanction for presuit evidence spoliation may only be available if intentional misconduct is shown. *See*, *e.g.*, Tatham v. Bridgestone Ams. Holding, Inc., 473 S.W.3d 734, 745–46 (Tenn. 2015) (altering earlier laws declaring that "intentional misconduct is not a prerequisite" for spoliation sanctions any longer); 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).

178. *See*, *e.g.*, Hannah v. Heeter, 584 S.E.2d 560, 573–74 (W. Va. 2003) (stating no negligent spoliation claim against adverse party, but a negligent spoliation claim against a third party who could not otherwise be an adverse party, since only the former can be sanctioned under discovery laws; intentional evidence spoliation is a stand-alone tort available against both an adverse party and a third party). *Compare* Oliver v. Stimson Lumber Co., 993 P.2d 11, 20 (Mont. 1999) (recognizing possible negligent spoliation of evidence tort by employee against employer who could not otherwise be sued, due to Workers' Compensation Act, for employment injuries though equipment manufacturer could be sued; request to preserve may have been made and, if it was, it did not need to offer to pay reasonable costs of preservation), *with* MetLife Auto & Home v. Joe Basil Chevrolet, Inc., 807 N.E.2d 865 (N.Y.

is established, liability may vary depending upon whether the information was intentionally destroyed or only intentionally concealed.[179]

At least in the tort setting, "special circumstance" or "affirmative conduct" liability can extend to multiple actors, as when there is both direct personal liability for spoliation and aiding and abetting liability, or principal/agent liability, for others who are connected to those who personally spoiled.[180]

ii. Common Law Contract

Contract duties operate differently than do tort duties in spoliation cases. The intentions of the parties, rather than the hypothesized actions of reasonable persons, are key. Seemingly, there can be instances where there are both tort and contract claims involve the same spoiled information.[181]

The *Boyd* court did not elaborate on what, if any, differences arise between information preservation claims founded on agreements and on contracts.[182] Perhaps the two are synonymous. Or perhaps only the information preservation claim founded an agreement encompasses an explicit pact on future information preservation procedures made in anticipation of a possible lawsuit or during a lawsuit. Such pacts could also address matters like forum selection, choice of law, and jury trial waiver. Or perhaps the information preservation claim founded on contract also encompasses a pact on information storage which at the time was unrelated to any anticipated litigation but was rather related to the need or desire to be able to later access certain current or future materials, like

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2004) (homeowner might be able to sue car owner's insurer for spoliation, but seemingly would need to submit a written (not just oral) preservation request and to volunteer to cover the costs associated with preservation), *and Nichols*, 6 P.3d at 304 (intentional spoliation claim by neighbor against homeowner's/tortfeasor's insurer and against homeowner), *and* Fletcher v. Dorchester Mut. Ins. Co., 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).

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

180. *See*, *e.g.*, Meridian Med. Sys., LLC v. Epix Therapeutics, Inc., 250 A.3d 122, 129 (Me. 2021) (liability standards for aiding and abetting tortfeasors); Cunningham v. Gates, 229 F.3d 1271, 1292 (9th Cir. 2000) (supervisory liability for another official's unconstitutional actions).

181. For example, a contractual duty of an insurer to preserve evidence reasonably necessary in an insured's later defense of an action seeking damages beyond policy limits may arise in settings where there are also independent preservation duties in tort owed by the insurer to the insured, or to one harmed by the insured. *See*, *e.g.*, Silhan v. Allstate Ins. Co., 236 F. Supp. 2d 1303 (N.D. Fla. 2002) (discussing circumstances allowing recognitions of tort or contract claims by insureds against insurers due to spoliation of evidence by insurers that is needed in insureds' (product liability) claims against third parties). *See also* Dittman v. UPMC, 196 A.3d 1036, 1057 (Pa. 2018) (C.J. Saylor concurring and dissenting) (finding information maintenance claims against employers can sound in both tort and contract, presenting a "hybrid" scenario).

182. Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 270 (Ill. 1995).

tax preparation, medical, or educational records. Such pacts may more likely be guided by substantive contract laws (uninfluenced by civil procedure laws), though preservation failures could prompt later civil litigation sanctions.

iii. Statutes

Beyond common law tort and contract, under Boyd there can arise spoliation claims under statutes on information maintenance, production, and preservation.[183] Statutes might expressly recognize a claim for harm in civil litigation resulting from the loss of certain information.[184] Further, statutory duties, as well as regulatory information maintenance or preservation duties tied to enabling statutes, can support implied spoliation claims.[185] Without express legislative intent, claims generally may be implied from prohibitions in written laws 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."[186] Clearly, implied spoliation claims arising from regulatory duties will be assessed differently than claims implied from statutory duties.[187]

A medical records retention statute in Illinois illustrates a written law from which an information spoliation claim might be implied.[188] There, a hospital must retain an x-ray for at least five years, and for up to twelve years if notified within five years that there is pending litigation wherein the x-ray is "possible

183. *Id*. 270–71.

184. *Id*. 272.

185. A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 FORDHAM L. REV. 2005, 2006 (2011).

186. Metzger v. DaRosa, 805 N.E. 2d 1165, 1168 (Ill. 2004). Comparable guidelines for implied federal claims were established in Cort v. Ash, 422 U.S. 66, 78 (1975), as construed in Cannon v. Univ. of Chicago, 441 U.S. 677 (1979). These guidelines have been employed by other state courts. *See*, *e.g.*, Seeman v. Liberty Mut. Ins. Co., 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) ("influenced by three of the four factors set out in *Cort*); and Bennett v. Hardy, 784 P.2d 1258, 1261 (Wash. 1990) ("[b]orrowing 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).

187. Of course, precedents implying causes of action from regulations necessarily entail considerations of the language and legislative intentions behind the enabling statutes. *See*, *e.g.*, Alexander v. Sandoval, 532 U.S. 275 (2001). While a five-justice opinion rejected implying a private cause of action for violations of a Department of Transportation regulation, it indicated there may be a different outcome where the enabling statute contained language on creating private rights rather than on government enforcement. *Id*. 290.

188. 210 ILL. COMP. STAT. 90/1 (West 1993).

evidence."[189] Here, information preservation duties exist both presuit and post-suit.[190] And here, such duties are only sometimes explicitly tied to civil litigation.[191] Seemingly, the *Boyd* precedent would support a substantive law claim under this statute on behalf of one harmed in civil litigation by a hospital's presuit failure to retain covered records, as well as a comparable failure post-suit by a hospital.

Not unlike the Illinois statute is a California Government Code provision on employment record retention. It says:

> It shall be an unlawful practice for employers, labor organizations, and employment agencies subject to the provisions of this part to fail to maintain and preserve any and all applications, personnel, membership, or employment referral records and files for a minimum period of four years after the records and files are initially created or received, or for employers to fail to retain personnel files of applicants or terminated employees for a minimum period of four years after the date of the employment action taken.
>
> Upon notice that a verified complaint against it has been filed under this part, any such employer, labor organization, or employment agency shall maintain and preserve any and all records and files until . . . .
>
> . . . .
>
> . . . the complaint has been fully and finally disposed of and all . . . appeals, or related proceedings have terminated.[192]

Another California statute is also comparable. It says:

> Audit 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

189. *Id*. *See also* LA. STAT. ANN. § 40:2144(F)(1) ("Hospital records shall be retained by hospitals . . . for a minimum period of ten years from the date a patient is discharged"), cited in Longwell v. Jefferson Par. Hosp. Serv. Dist. No. 1, 970 So. 2d 1100, 1106 (La. Ct. App. 2007) (need deliberate spoliation to support tort claim); TEX. HEALTH & SAFETY CODE ANN. § 241.103 (West 2021) (similar, but no destruction of records if hospital knows of related litigation that has not been finally resolved); KAN. ADMIN. REGS. § 100-24-1 (1998) (licensee's duty to "maintain an adequate record for each patient for whom the licensee performs a professional service"), cited in Foster v. Lawrence Mem'l Hosp., 809 F. Supp. 831, 838 (D. Kan. 1992) (spoliation claim against doctor for breach of regulatory duty).

190. 210 ILL. COMP. STAT. 90/1 (West 1993).

191. *Id*.

192. CAL. GOV'T CODE § 12946 (West 2022) (internal numbering omitted) (within a title on state government addressing prohibited discrimination). This Code provision, unlike the Illinois statute, does not have the 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.

involving the licensee or the licensee's firm.[193]

Further, a federal regulation on public contract recordkeeping says, "any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of two years."[194] It goes on:

> Where the contractor has received notice that a complaint of discrimination has been filed, that a compliance evaluation has been initiated, or that an enforcement action has been commenced, the contractor shall preserve all personnel records relevant . . . until final disposition . . . . The term personnel records . . . would include, for example, personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person, and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected.[195]

Here, as with the Illinois and California statutes, there are both presuit and post-suit duties.

There are some statutory duties on information preservation related to criminal cases. Such duties could also support civil spoliation claims. In South Carolina, a statute recognizes the duty of a "custodian" to "preserve all physical evidence and biological material related to conviction or adjudication of a person" for certain offenses.[196] While this statute operates only after a conviction or an adjudication,[197] it anticipates there will be prejudgment information preservation.[198] The statute might prompt a spoliation claim by one who is exonerated where the exoneration was (long) delayed by a statutory violation.[199]

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193. CAL. BUS. & PROF. CODE § 5097 (West 2003) (within a division on professions and vocations generally, this appears in the chapter on accountants).

194. 41 C.F.R. § 60-300.80(a) (2020).

195. 41 C.F.R. § 60-300.80(a) (2020) (emphasis omitted). *See also* 7 C.F.R. § 81.13 (accurate records to be maintained and preserved regarding prune/plum tree removals).

196. S. C. CODE ANN. § 17-28-320(a)(1), (10), (14) and (19) (2008) (offenses include murder, criminal sexual conduct, arson and certain sexual misconduct.

197. An adjudication without a conviction of certain covered offenses, like a finding that a person is a "sexually violent predator," can be made, for example, in an involuntary civil commitment proceeding. S. C. CODE ANN. § 44-48-100 (2008).

198. S. C. CODE ANN. § 17-28-50(c).

199. 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. S. C. CODE ANN. § 17-28-350.

E. Substantive Lawyer Malpractice Laws

Lawyers who fail to satisfy their presuit duties on creating, preserving, producing, and protecting information relevant to civil litigation are sometimes responsible in malpractice for the harms incurred by their (now former) clients. Such responsibilities can be invoked in tort or contract settings.[200] Malpractice (or other) claims for harms to nonclients typically cannot be pursued; however, any attorney's duty can often be extended to a nonclient who is "an intended third-party beneficiary of the relationship between the client and the attorney."[201]

IV. NEW LAWYER PRESUIT INFORMATION DUTIES IN LIGHT OF *SILVESTRI*?

The *Silvestri* ruling involves several important issues on presuit lawyer duties on creating, preserving, producing, and protecting information relevant to civil litigation. The issues differ, though, when considering acts of Silvestri's first lawyer (Moench) who investigated the accident and Silvestri's later lawyer(s), who seemingly initiated suit on Silvestri's behalf for some of his injuries resulting from the accident while employing the fruits of the first lawyer.

In considering the issues related to the varying information duties of Silvestri's lawyers, at the outset some common threads are worthy of note. First, terminology is tricky as the same word may carry different meanings in different contexts. For example, the term "sanction" is often employed when addressing the consequences of duty breaches in civil procedure, tort, and professional responsibility settings. The term "party" may be limited to a litigant who breached or encompass a litigant's principal prompting vicarious responsibility. And the term "spoliation" is frequently employed in both civil procedure and tort settings wherein there is lost, discoverable information.

Second, public policies on information losses sometimes vary depending upon the type of lost information, where the differences are difficult to discern. For example, under FRCP 37(e) lost irreplaceable and non-retrievable information can only prompt "curative" measures, while under other FRCP lost non-ESI can prompt "curative," "compensatory" (e.g., fee recoveries), or both "punitive" (e.g., lawyer disciplinary referral) measures.[202]

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200. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 48 and 55(1) [hereinafter "ALI Restatement"].

201. *See*, *e.g.*, *In re* Est. of Powell, 12 N.E.3d 14, 20 (Ill. 2014) and Phelps v. Land of Lincoln Legal Assistance Found. Inc., 55 N.E.3d 1268, 1276 (Ill. App. Ct. 2016) ("primary purpose and intent of attorney-client relationship" must be to benefit nonclient).

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

A. Silvestri's First Lawyer

On presuit information creation, seemingly the first lawyer was under no duty to Silvestri to engage experts as to how his particular airbag failed. In an earlier decision in the case, the appeals court found that the product liability claim under New York law "required" only proof that the airbag "did not perform as intended."[203] So some expertise was required to be obtained by the first lawyer. Here, any presuit information duty as to such expertise presumably would arise under professional responsibility competence norms[204] (Rule 1.1) and malpractice claim standards (whether in tort or contract).[205] A malpractice claim was, in fact, filed by Silvestri.[206] Its resolution is unknown, but seemingly it was premature, and at best would have been stayed by a court until the GMC claim was resolved, as resulting damages were then speculative.

On presuit information preservation duties, with a case like the one against GMC in a federal court, the civil procedure common law information preservation duty operates.[207] But the non-preserving first lawyer was not in the *Silvestri* case, with Silvestri taking the fall for that lawyer's failure. Extension of that duty to Silvestri, as found by the Fourth Circuit, either personally or through his agent lawyer, seems a stretch. Yet the only explicit FRCP on information preservation is Rule 37(e), on ESI losses, which recognizes "curative" sanctions, including dismissal against a party.[208] Rule 37(e), in any form, was not operative when Silvestri lost his case.[209] Dean Spencer's suggested presuit civil procedure preservation duty in 2011 also only recognized a failure by a "party" to produce requested information, though his proposal went to all requests, not just ESI requests.[210]

Of course, there can be substantive presuit lawyer preservation duties. In fact, Silvestri had sued his first lawyer for malpractice after being sued for fees, alleging a failure to "preserve the vehicle."[211] Yet Silvestri's claim was then speculative as it preceded the finding of nonliability for GMC. Silvestri might have benefitted from joining a spoliation claim against the first lawyer to his claim against GMC.[212]

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203. Silvestri v. GMC, 210 F.3d 240, 244 (4th Cir. 2000).

204. AM. BAR ASS'N. RULE 1.1.

205. ALI Restatement §§ 48 and 55(1).

206. Silvestri v. GMC, 271 F.3d 583, 592 (4th Cir. 2001).

207. *Id.* at 592.

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

209. FED. R. CIV. P. 37(e) advisory committee's note to 2006 amendment.

210. Spencer, *supra* note 185, at 2023.

211. *Silvestri*, 271 F.3d at 592.

212. *See*, *e.g.*, Jeffrey A. Parness, *State Spoliation Claims in Federal District Courts*, 71 CATH. UNIV. L. REV. 1 (2022).

An interesting, related issue is whether GMC would have sued Silvestri's first lawyer for spoliation if GMC lost the case to Silvestri. As noted, there are varying state law approaches to third-party spoliation claims.[213] The Comment to the 2015 FRCP 37(e) suggests GMC could have joined such a claim to Silvestri's product liability case, with state substantive law applicable.[214] If such a spoliation claim was recognized, GMC would need to show, in some way, how it would have fared better with the vehicle available in its 1994–1995 condition. The availability of the first lawyer as Silvestri's agent in procedural law might differ from similar availability of Silvestri's lawyer as an agent in a substantive law claim against Silvestri. The *Silvestri* court did rule that while spoliation "may give rise to court imposed sanctions deriving from . . . inherent power, the acts of spoliation do not themselves give rise in civil cases to substantive claims or defenses."[215] Yes, albeit dicta, but the same spoliation acts can give rise to state substantive law claims under tort or contract or other law.

On presuit information production, the *Silvestri* court found that Silvestri "failed to take any steps" to discharge his "duty to prevent the spoliation of evidence" and failed to give "notice" of any possible later claim to GMC.[216] This seems harsh. Was it unreasonable, especially with Silvestri coming out of incapacitation and "reconstructive surgeries,"[217] to deem him responsible for not taking these steps? Are such steps, arguably labeled legal duties, better left to Silvestri's lawyer to determine and then advise, with Silvestri accountable for failing to act on the advice? Did Silvestri even know that GMC was unaware of his intentions for three years?

Relatedly, had GMC somehow learned of Silvestri's possible claim (perhaps from Silvestri's experts), could it have sued to ensure information preservation and production, especially after making a litigation hold/evidence access demand that went unrecognized? At least in the federal courts, at the time when *Silvestri* was filed and currently, the answer is no. It would be wise to promulgate/enact presuit discovery laws authorizing such access.[218] One cannot, under FRCP 27(a), depose a vehicle.[219]

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213. *See supra* Part III.D.

214. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

215. *Silvestri*, 271 F.3d at 590.

216. *Id.* at 592.

217. Brief of Appellant at 33, n.13, Silvestri v. GMC, 271 F.3d 583 (4th Cir. 2001) (No. 00-2523) 2000 WL 33992316.

218. Parness & Theodoratos, *supra* note 143, at 652.

219. FED. R. CIV. P. 27(a).

Possible presuit lawyer information protection duties were not at issue in the *Silvestri* case. Yet consider the possible duties of Silvestri and his first lawyer, to protect the vehicle from changes in composition/ownership/and the like upon request by GMC shortly after the accident (perhaps soon after being notified of their work by Silvestri's experts). The request might be denied because the substantive law in *Silvestri* only demanded a claimant prove the airbag "did not perform as intended," with no proof needed on how the particular airbag failed.[220] Could GMC necessarily get the vehicle upon request, assuming it could be secured by Silvestri (as by buying it)? No, as Silvestri could deny the request upon a good faith belief of its irrelevance or the lack of a procedural or substantive law duty to preserve. And could Silvestri get a presuit protective order deeming he had no duty to protect the vehicle from changes? No, as presuit discovery is limited in federal (and many state) courts to evidence perpetuation via depositions under FRCP 27(a) and its followers and an independent "action to perpetuate testimony" under FRCP 27(c) and its followers.[221]

Presuit information preservation and protection orders under new discovery laws are worthy of consideration. They might address only certain information, like ESI as was done in the 2018 Arizona Civil Procedure Rule 45.2.[222] Dean Spencer set forth a proposal on pre-action discovery orders about a decade ago.[223] But the proposal was limited in certain important ways. It required that a petitioner "cannot presently" sue or "cause" a suit "to be brought;"[224] it only spoke to an order against an "expected adverse party,"[225] so the vehicle owner in Silvestri, was not covered, though the owner could be subject to a pre-action deposition under certain conditions; it seemingly allowed ex parte orders without requiring a showing of "immediate and irreparable injury, loss or damage," as needed for many temporary restraining orders;[226] it authorized there be no consequences for the prospective adverse party if a petitioner fails to bring the expected action within sixty days of the issuance of the order, with no express exceptions;[227] and, it only explicitly recognized a petitioner's

220. Silvestri v. GMC, 210 F.3d 240, 244 (4th Cir. 2000).

221. FED. R. CIV. P. 27(a), 27(c).

222. On presuit preservation orders, *see*, *e.g.*, Parness & Theodoratos, *supra* note 143, at 663. On presuit protective orders, *see* Jeffrey A. Parness, *Presuit Civil Protective Orders on Discovery*, 38 G. ST. U. L. REV. 455 (2022).

223. Spencer, *supra* note 185, at 2023.

224. *Id.*

225. *Id.*

226. *See*, *e.g.*, FED. R. CIV. P. 65(b)(1)(A).

227. Spencer, *supra* note 185, at 2024.

payment of expenses related to compliance with an order that was not followed up with a suit within sixty days.[228]

Presuit lawyer substantive law information duties (on creation, preserving, producing, and protecting information relevant to possible civil litigation) can arise, directly or indirectly, through statutory/rule/regulatory provisions, as with aforenoted laws on x-ray, employment, and contractor record retention, which might prompt implied claims.[229] For Silvestri's first lawyer, there appears to be no such applicable provision.

However, might there be a so-called common law "third-party" spoliation claim by GMC against the first lawyer for damages (e.g., litigation expense recovery)? Perhaps such a tort claim arises from the voluntary affirmative conduct in assuming control over the vehicle that would thereafter never be the same.[230] Yet even where the claim elements can be proven, a lawyer may escape liability via an attorney-immunity defense.[231]

B. Silvestri's Second Lawyer

As noted, at least one lawyer beyond Moench seemingly represented Silvestri on his claim against GMC. That lawyer apparently initiated and presented, at least for some time, the suit against GMC in the district court.[232] While not involved in initially securing and directing the experts, Carlsson and Godfrey, the presuit experts' reports were used by the second lawyer on Silvestri's behalf in the GMC suit.[233] Could that lawyer have information

228. *Id.*

229. 28 U.S.C. § 26(h); Richardson v. Sara Lee Corp., 847 So. 2d 821, 824 (Miss. 2003); Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 271 (Ill. 1995).

230. *See*, *e.g.*, Elliot-Thomas v. Smith, 110 N.E.3d 1231, 1235 (Ohio 2018) (in a suit by a client's adversary, possible lawyer liability for harm caused due to destroyed evidence). Often, lawyer tort liability for spoliation is considered when clients spoil, and a lawyer aids and abets the spoliation. *See*, *e.g.*, Crystal, *supra* note 96, at 725.

231. Haynes & Boone, LLP v. NFTD, LLC, 631 S.W.3d 65 (Tex. 2021) (extensive review of history of attorney-immunity). *But see* William T. Barker, *Lawyer Tort Liability to Nonclients: Should There Be Special Immunities?,* 54 TORT TRIAL & INS. PRAC. L.J. 795, 866 (2019) ("Outside the litigation process, lawyers should have no special immunity for committing or aiding and abetting fraud . . . some privilege . . . might sometimes be appropriate, . . . limited to conduct directed to seeking favorable adjudication"); Baxt v. Liloia, 714 A.2d 271, 281 n.8 (N.J. 1998) (any privilege for attorney communications in judicial proceedings is no "defense in a discovery sanction proceeding"); Truman v. Orem City, 998 F.3d 1164, 1177 (10th Cir. 2021) (denying qualified immunity defense to prosecutor who allegedly fabricated evidence relevant to murder charges).

232. As it appears Silvestri discharged Moench on the GMC matter, was sued by Moench, and sued Moench for malpractice before the GMC suit was filed, it is unlikely that Moench filed the GMC suit though he continued to represent Silvestri in the criminal case after being discharged in the GMC matter.

233. *See generally* Silvestri v. GMC, 271 F. 3d 583 (4th Cir. 2001).

duties tied to the employment of these presuit reports? More clearly, the second lawyer secured the report changes from these experts after receiving the report of GMC's expert.[234] The second lawyer may have had information duties related to these changes.[235]

GMC first learned of these initial expert reports after being sued. Its knowledge may have come via a compelled disclosure under FRCP 26(a)(2), an answer to a discovery request, a court order, or an agreement with Silvestri's lawyer. Whatever the source, Silvestri's trial counsel may have "presented" the reports, as that term is defined in FRCP 11(b); yet these presentations of the initial reports seemingly lay outside that provision's reasonable inquiry and advocacy duties due to FRCP 11(d).[236]

Upon learning, or having good reason to learn, of the car preservation and notification failures by Silvestri and his first lawyer, did the second lawyer then have information duties? Perhaps. FRCP 26(g) requires a lawyer signing a discovery "disclosure" or a "discovery response" to certify, based upon a "belief formed after a reasonable inquiry," that there is consistency with the FRCP and warrant under existing law.[237] Sanctions can be levied upon the signing lawyer as well as upon the represented party, including an order to pay reasonable expenses.[238] But if the second lawyer never certified the changed reports of his experts because, for example, the reports were voluntarily distributed to GMC, per a private agreement or sua sponte, any Rule 26(g) information duty may be inapplicable. Nevertheless, can the second lawyer be sanctioned, as under inherent judicial authority, for utilizing experts, with their changed reports, while knowing or having reason to know that the retention of the experts initially was problematic, especially where the changed reports relied, at least to some extent, on the experts' inspections of the car long before GMC was sued?

As with the first lawyer, the second lawyer might also be liable to GMC under a common law "third-party" spoliation claim for at least some litigation expenses.[239] GMC, not the second Silvestri lawyer, presumably paid to find and retrieve the vehicle.[240] The harmful spoliation by the first lawyer and by

234. *Id.* at 588.

235. FED. R. CIV. P. 26(e)(2) ("party's duty to supplement" earlier FED. R. CIV. P. 26(a)(2)(B) disclosures of expert reports).

236. FED. R. CIV. P. 11(b), 11(d).

237. FED. R. CIV. P. 26(g).

238. FED. R. CIV. P. 11(c).

239. *See* Vill. of Roselle v. Com. Edison Co., 859 N.E.2d 1, 15–16 (Ill. App. Ct. 2006) (establishing elements for *prima facie* third-party spoliation claim).

240. Brief of Appellee at 12, Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001) (No. 99-2142) 1999 WL 33613032.

Silvestri (held personally accountable by the appeals court) arguably was aided and abetted by the second lawyer, including perhaps through violations of civil procedure and/or professional responsibility norms (though such violations, alone, would not prompt liability).

V. CONCLUSION

In both federal and state courts in the United States, there are significant civil procedure, professional responsibility, and substantive laws addressing presuit lawyer duties on creating, preserving, producing, and protecting information relevant to later civil litigation. These laws speak to lawyer conduct both in handling/assessing information and in overseeing the information acts of others. To date, the challenges these laws pose to lawyers have not been well examined, or even perceived. And, as yet lawyers largely are left unaccountable for their personal violations of these duties.

This Article is the first to survey presuit lawyer information duties. It reviews more general laws that sometimes distinguish between certain types of information (as between ESI and non-ESI); vary between states; differ in federal and state settings; and appear in several sources simultaneously (including statutes, court rules, and precedents). It also reviews some very special laws that are applicable to particular information (like x-rays) or to certain types of lawsuits (like medical malpractice). The challenges posed by these laws are magnified when later civil litigation might involve several possible forums and/or multistate conduct.

The Article utilizes the 2001 federal circuit decision in *Silvestri v. GMC*, a prominent ruling on the federal procedural common law duty to preserve information, to explore presuit lawyer information duties. In its exploration, the paper suggests possible new written laws and common law precedents to serve better the goal of "just, speedy, and inexpensive determination of every action and proceeding,"[241] as well as to guide civil lawyers on their obligations and civil judges on their enforcement of these obligations.

In particular, the Article urges that lawyers (and their law firms), rather than or together with their clients, be held more personally accountable for all presuit information duty violations, not unlike the accountability demanded for their presuit pleading violations and for some presuit discovery violations. As well, it encourages greater employment of professional responsibility mechanisms when presuit lawyer information duties are breached, with usages prompted by more disciplinary referrals by judges and lawyers when they are expressly noted in civil procedure discovery laws, as in some civil procedure pleading, motion,

241. FED. R. CIV. P. 1.

pretrial conference, and appellate laws. Finally, the Article demonstrates the opportunities for substantive law claims on behalf of those harmed by presuit lawyer information failures, including claims in spoliation and malpractice.