FROM ETHER TO EVIDENCE: TETHERING ESI TO NEW YORK'S SPOLIATION DOCTRINE

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ABSTRACT

As the digital space expands and data proliferates, so too do the opportunities for destruction or material alteration of evidence in pending litigation. This practice is known as the spoliation of evidence. Experts have discussed "deliberate obstructionism" to be a common practice, with even some incentives to alter evidence pending trial. Courts have increasingly dealt with complex cases involving electronically stored information (ESI), increasing the risk of intentional or unintentional evidence loss or deletion. New York State has sought to rectify this spoliation issue through civil remedies instead of a separate, punitive cause of action. Understandably, New York State's legislative approach to this modern evidentiary issue does not cover the gambit of evidence spoliation, specifically when the evidence is destroyed in the early stages of a dispute, prior to any formal litigation. New York State's patchwork of civil procedure remedies, local court rules, and common law decisions has created inconsistent guidance and results, leaving litigants without secure measures of preserving evidence for trial.

This Note proposes to address the gaps in New York State's approach to rectifying the spoliation of evidence. Beginning with a historical analysis of spoliation liability in New York, this Note examines courts' broad discretion in imposing procedural sanctions in spoliation issues, highlighting case law to illustrate the judiciary's treatment of the issue. The Note also evaluates the strength and weaknesses of New York's current approach, discussing the lack of a culpability analysis in third-party spoliation that leaves litigants without adequate recourse. Finally, this Note presents reform aimed at modernizing the current approach, addressing third-party spoliation, assigning duties for pre-litigation preservation, and the unique challenges brought by ESI. No matter how far technology goes,

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it must answer the call when litigants wish to be heard.

INTRODUCTION

As sources of evidence proliferate in the Information Age, spoliation of evidence—the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation—becomes a greater and more amorphous issue in litigation.[1] Not only have commentators noted that "deliberate obstructionism is commonplace,"[2] studies have also uncovered actual incentives to alter evidence pending trial.[3] Moreover, courts increasingly face complex cases involving electronically stored information (ESI), which significantly increases the potential for evidence to be lost or deleted, both intentionally and unintentionally.[4] The "loss of evidence [not only] prevents a party from adequately proving or defending a claim at trial . . . [but also] violates the spirit of liberal discovery, offends notions of fair play, and generally undermines the efficacy of the adversarial system."[5]

New York State handles spoliation primarily through procedural sanctions under Civil Practice Law and Rule (CPLR) § 3126, which gives courts broad discretion to impose remedies such as adverse inference instructions, cost-shifting, or even case dismissal when evidence is destroyed.[6] However, New York's spoliation doctrine differs from that of some other jurisdictions in that it declines to recognize spoliation as an independent tort.[7] Instead, New York courts view spoliation as a procedural issue, addressing it with traditional litigation sanctions as opposed to a separate cause of action. This approach reflects the state's focus on preserving the integrity of the discovery process rather than creating new liabilities.[8]

1. Clemmons v. Acad. for Educ. Dev., 70 F. Supp. 3d 282, 309 (D.D.C. 2014) (providing the federal definition from a line of D.C. cases).
2. James T. Killelea, *Spoliation of Evidence: Proposals for New York State*, BROOK. L. REV. 1045, 1045 (2005) (quoting Edward J. Imwinkelried, *A New Antidote for an Opponent's Pretrial Discovery Misconduct: Treating the Misconduct at Trial as an Admission by Conduct of the Weakness of the Opponent's Case*, 1993 BYU L. REV. 793, 794 (1993)).
3. *Id.*
4. *Id.* at 1050–51.
5. *Id.* at 1046.
6. Ortega v. City of NewYork, 9 N.Y.3d 69, 76 (2007).
7. *Id.* at 77.
8. *Id.* at 82–83.

However, in New York's current framework, the discovery process does not cover all forms of spoliation. For example, New York courts "[require] as a prerequisite to sanctions some evidence that the offending party actually knew that the destroyed item would be required in future litigation."[9] This standard can allow for the destruction of relevant evidence in the early stages of a dispute, before formal litigation commences. Cases such as *Alegria v. Metro Metal Products Inc.* illustrate the complications that arise when third parties control or destroy essential evidence but face limited accountability under New York's current framework.[10]

"New York state has been a forward-looking jurisdiction in dealing with electronic discovery, . . . in part to the simple fact that New York is a world business center, and many businesses in litigation [t]here rely heavily on computer and network systems."[11] However, unlike the federal system, which has designed ESI-specific doctrine, New York state relies on "a patchwork of CPLR provisions, statewide uniform court rules, local court rules, and common law decisions that provide sometimes inconsistent guidance and results."[12] Added to these challenges "are the complexities surrounding evidence preservation in today's world, as technology has advanced to allow potential litigants to store larger volumes of electronic information."[13] Due to the prevalence and uncertainties associated with electronic data, "sanctions concerning the spoliation of electronic information have reached an all-time high."[14]

This Note proposes reforms to New York's approach to spoliation of evidence, focusing on addressing the unique challenges posed by ESI, pre-litigation preservation duties, and third-party involvement. There are at least two problems with New York's approach, both indicating the inadequacy of its spoliation doctrine: (1) "the courts do not take the culpability of a spoliator into account when determining what sanction to apply . . . [and (2)] New York does not recognize the tort of third party spoliation."[15] To

9. Angelo G. Savino, *Sanctions for Negligent Spoliation of* Evidence, 70 N.Y. ST. B.J. 28, 30 (1998).

10. Alegria v. Metro Metal Prods., Inc., 906 N.Y.S.2d 887, 895 (Sup. Ct. 2010).

11. KYLE C. BISCEGLIE, LEXISNEXIS PRACTICE GUIDE: NEW YORK E-DISCOVERY AND EVIDENCE § 4.02 (2016 ed. 2016).

12. *Id.*

13. Brookshire Bros., v. Aldridge, 438 S.W.3d 9, 17 (Tex. 2014).

14. *Id.*

15. Killelea, *supra* note 2, at 1046–48.

improve the consistency and fairness of spoliation remedies, this Note argues for statutory reforms in New York that explicitly define pre-litigation preservation obligations, especially for ESI. By establishing clear statutory duties for parties to preserve evidence when litigation is reasonably foreseeable, these reforms would reduce the ambiguity surrounding pre-litigation spoliation and protect the rights of litigants from unfair prejudice.

Additionally, this Note proposes specific obligations for third parties who possess or control evidence relevant to anticipated litigation. A statutory framework that imposes preservation duties on third parties would ensure that evidence is preserved even when it lies outside the direct control of the litigants. Such reforms would introduce accountability for third parties, allowing courts to impose appropriate sanctions when they fail to preserve essential evidence. These proposals aim to provide New York courts with more consistent and predictable guidelines for handling spoliation cases, safeguarding the integrity of the judicial process while accommodating the modern complexities of ESI and third-party involvement. This Note is organized into three sections that examine New York's approach to spoliation of evidence: analysis of its historical development, evaluation of its current framework, and proposal of targeted reforms.

Part I begins by tracing the historical development of spoliation liability in New York. This Section outlines the evolution of spoliation remedies, starting from early common law doctrines that relied on adverse inferences, where juries could presume missing evidence to be unfavorable to the party responsible for its destruction. The Note then examines New York's adoption of CPLR § 3126, which grants courts broad discretion to impose procedural sanctions in response to spoliation, rather than recognizing it as an independent tort. Key cases, including *Ortega v. City of New York* and *Alegria v. Metro Metal Products Inc.*, illustrate how New York courts have shaped spoliation law through procedural mechanisms, underscoring New York's preference for addressing spoliation within the discovery process rather than through additional liabilities imposed by tort law.[16] Additionally, this section explores the challenges introduced by ESI, highlighting how the rise of digital evidence has complicated traditional preservation principles, creating new gaps in New York's approach to spoliation.

16. Ortega v. City of NewYork, 9 N.Y.3d 69, 79 (2007); Alegria v. Metro Metal Prods., Inc., 906 N.Y.S.2d 887, 893–94 (Sup. Ct. 2010).

Part II provides a critical analysis of New York's current framework for addressing spoliation, focusing on the limitations of CPLR § 3126 and the extensive discretion it grants to judges. This Section evaluates the strengths and weaknesses of New York's reliance on procedural sanctions, including adverse inferences, cost-shifting, and case dismissal. Part III addresses specific issues arising from this discretionary approach, including inconsistencies in the application of sanctions and the challenges presented by New York's vague standard for when the duty to preserve evidence begins. This analysis extends to the issue of third-party spoliation, where non-litigants destroy or fail to maintain evidence crucial to a case, often leaving litigants without adequate recourse. Part II draws on New York case law and statutory sources to assess the effectiveness of existing remedies and to identify significant gaps, especially regarding the preservation of ESI and third-party evidence obligations.

Part III presents a proposal for reform aimed at modernizing New York's spoliation doctrine to address the challenges posed by pre-litigation preservation, third-party spoliation, and ESI. Recognizing the inconsistencies in judicial discretion under CPLR § 3126, this Section proposes codified standards for pre-litigation preservation duties, ensuring that attorneys formally notify third parties who control relevant evidence of their preservation obligations. The proposal advocates for permitting courts to impose cost-shifting sanctions on non-compliant third parties who fail to preserve evidence after being properly notified. Additionally, this Section calls for the adoption of an ESI-specific spoliation rule modeled after FRCP 37(e), which would distinguish between negligent and intentional spoliation, ensure proportionality in sanctions, and provide clear guidelines for handling lost metadata and ephemeral data. By introducing structured legal standards and targeted sanctions, these reforms aim to close procedural gaps, improve consistency in spoliation rulings, and balance the burdens of preservation with fairness in litigation.

I. HISTORY

This Section explores the development of New York's spoliation doctrine, from its common law origins to the adoption of CPLR § 3126. It then examines the challenges in this developing approach, especially difficulties concerning ESI and third-party accountability.

A. Foundations of Spoliation Law

New York defines spoliation broadly as "the destruction or significant alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."[17] New York courts have long recognized that spoliation of evidence fundamentally undermines the fairness and integrity of the judicial process, as it deprives one party of critical evidence needed to prove its case.[18] Over time, New York has developed a unique approach to addressing spoliation, opting to treat it as a procedural matter rather than an independent tort.

"The remedy a court chooses is intended to serve three purposes: deterrence, punishment, and remediation."[19] One of the earliest and most enduring spoliation doctrines is the adverse inference rule, which allows courts to instruct juries that destroyed evidence may be presumed unfavorable to the spoliator.[20] This principle, which can be traced to the Latin maxim *omnia praesumuntur contra spoliatorem* ("all things are presumed against a despoiler")—embodied in the 18th-century English case, *Armory v. Delamirie*[21]—is a "well-established and long-standing principle of law."[22] The objectives of the adverse inference are "to restore the prejudiced party to its previous position," and "to discourage and punish spoliation by placing the risk of an erroneous judgement on the party who wrongfully created such a risk."[23] However, "courts disagree on the requisite level of culpability" for an adverse inference instruction to be appropriate.[24] There is no test assessed before imposing the adverse inference instruction, New York courts "simply appl[y] the inference if [they believe] dismissal would be too severe a sanction."[25]

Generally, courts have found that negligence is not enough to support the instruction, with some courts requiring bad faith or intent before giving

17. West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999).
18. Killelea, *supra* note 2, at 1046.
19. *Id.* at 1053.
20. Stefan Rubin, *Tort Reform: A Call for Florida to Scale Back its Independent Tort for the Spoliation of Evidence*, 51 FLA. L. REV. 345, 347 (1999).
21. Jonathan Judge, *Reconsidering Spoliation: Common-Sense Alternatives to the Spoliation Tort*, 2001 WIS. L. REV. 441, 444 (2001).
22. Killelea, *supra* note 2, at 1056 (internal citations omitted).
23. *Id.* at 1056–57.
24. *Id.* at 1057–58.
25. *Id.* at 1073.

an adverse inference instruction.[26] "[M]any courts require corroborating evidence of spoliation before imposing an adverse inference on negligent spoliators . . . [and for those that] impose the inference on negligent spoliators, many impose a rebuttable presumption, allowing the spoliator to rebut the testimony of the spoliation victim."[27] Such a severe burden-shifting presumption is ultimately left to the jury.[28]

B. The Development of Procedural and Evidentiary Sanctions

"English courts have imposed sanctions for spoliation of evidence since the eighteenth century."[29] Federal courts derive their power to issue spoliation sanctions from two sources: the "inherent power to sanction parties when carrying out their judicial duties" and the Federal Rules of Civil Procedure (FRCP).[30] "Under Rule 37 of the FRCP, a court may issue sanctions for spoliation when a party 'fails to obey [a court] order to provide or permit discovery.'"[31] The inherent power to issue sanctions is broad, while the FRCP provides more definitive guidelines.[32]

State courts, including those in New York, mirrored these developments by enacting rules like CPLR § 3126, which empowers judges to issue a range of sanctions for discovery violations.[33] New York decisions historically "have applied strong sanctions even for inadvertent, negligent spoliation of evidence."[34] Trial courts are known to have broad discretion in determining whether, and to what extent, to impose discovery sanctions.[35] Sanctions include "resolving all issues based on the non-disclosed evidence against the offending party; prohibiting the offending party from supporting designated claims or defenses with the undisclosed evidence; awarding attorney's fees or striking the offending party's pleadings."[36]

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26. *Id.* at 1058.
27. *Id.* at 1059.
28. *Id.* at 1060.
29. Tristan Evans-Wilent, *The Electronic Document Retention System Ate My Homework: Gross Negligence and the Rebuttable Presumption of Prejudice within the Doctrine of Spoliation in Federal Courts*, 87 ST. JOHN'S L. REV. 1193, 1196–97 (2013).
30. *Id.* at 1197–98.
31. *Id.* at 1198.
32. *Id.*
33. Savino, *supra* note 9, at 28.
34. Killelea, *supra* note 2, at 1072.
35. Savino, *supra* note 9, at 28.
36. *Id.*

"At least eight states recognize independent claims for intentional spoliation of evidence," and several jurisdictions recognize some form of negligent spoliation, "either as a separate cause of action or as part of a negligence claim."[37] Proponents of an independent spoliation tort argue that it compensates for the shortcomings of traditional spoliation remedies: it better compensates the victim, especially when evidence is lost; it allows for punitive damages alongside the originally contemplated damages; and "the tort is the only potential remedy that allows a plaintiff to recover directly from third-party spoliators."[38] "The most common reason for not recognizing an independent spoliation tort is that there are other available remedies . . . such as inferences and presumptions. Another popular reason is that the damages are inherently too speculative."[39] New York addresses spoliation as a procedural issue rather than as a separate cause of action. This procedural focus allows New York courts to concentrate on balancing competing interests while addressing judicial and social policy concerns.[40] New York's refusal to recognize spoliation as an independent tort has been a defining feature of its jurisprudence, distinguishing it from jurisdictions like California and Florida that permit tort claims for evidence destruction.[41] This approach is driven by two principal policy considerations: (1) the sufficiency of existing procedural remedies to address prejudice caused by missing evidence and (2) the fear that recognizing spoliation as an independent tort would lead to an influx of collateral litigation.[42]

C. New York's Approach

New York courts address spoliation using both CPLR § 3126 and common law principles. CPLR § 3126 gives New York courts broad discretion to impose a variety of sanctions depending on the circumstances of each case, including adverse inference instructions, cost-shifting, striking of pleadings, and, in extreme cases, dismissal of claims.[43] These sanctions allow courts to respond flexibly to varying degrees of spoliation. Adverse

37. CARY STEWART SKLAREN, PRODUCTS LIABILITY § 18.07 (2024).
38. Judge, *supra* note 21, at 449.
39. Rubin, *supra* note 20, at 356.
40. Ortega v. City of NewYork, 9 N.Y.3d 69, 82 (2007).
41. Rubin, *supra* note 20, at 350–351.
42. *Ortega*, 9 N.Y.3d at 82–83.
43. *Id.* at 76.

inference instructions, which permit a jury to assume that the destroyed evidence would have been unfavorable to the spoliator, are one of the more commonly applied sanctions.[44] "When parties involved in litigation engage in the destruction of evidence," the Court in *Ortega v. City of New York* emphasized that such sanctions must be proportionate to the prejudice caused by the destruction of evidence.[45] Where applicable, courts may even strike pleadings or dismiss a case entirely.[46] However, CPLR § 3126 only applies within the context of existing litigation as a procedural sanction to a person or party who refuses a disclosure order or willfully fails to disclose.[47] If CPLR § 3126 does not apply, New York courts will still employ its common-law spoliation doctrine.[48]

Existing New York remedies for spoliation serve two main purposes: (1) to remedy the disadvantage faced by the non-spoliating party and (2) to deter future spoliation.[49] The Court of Appeals' decision in *Ortega v. City of New York* set a significant precedent by declining to recognize an independent tort for third-party negligent spoliation.[50] However, *Alegria v. Metro Metal Products Inc.* clarified that sufficient duty can be found in a third party to constitute actionable spoliation if the third party is connected to underlying litigation.[51] The Court found that the defendants had been given written notice that the machinery in question would be critical evidence in a potential third-party claim against the manufacturer.[52] Although there was no definitive ruling on spoliation, the Court found that New York precedent—to impose a duty on employers for third-party claims when they have notice or control over the evidence—was sufficient to establish a prima facie duty to preserve evidence, which led to factual disputes precluding summary judgement.[53] In *Alegria v. Metro Metal Products Inc.*, the Court reaffirmed the standard that "[a] party that destroys essential evidence such that its opponent is prejudicially bereft of appropriate means to either present or confront a claim with incisive

44. Killelea, *supra* note 2, at 1056.
45. *Ortega*, 9 N.Y.3d at 76.
46. *Id.*
47. N.Y. C.P.L.R. § 3126 (MCKINNEY 2024).
48. Strong v. City of NewYork, 112 A.D.3d 15, 21 (N.Y. App. Div. 2013).
49. *Ortega*, 9 N.Y.3d at 79.
50. Alegria v. Metro Metal Prods., Inc., 906 N.Y.S.2d 887, 895 (Sup. Ct. 2010).
51. *Id.* at 597.
52. *Id.* at 598–99.
53. *Id.* at 600.

evidence is subject to severe sanctions."[54] While procedural remedies remain the primary tool for addressing spoliation in New York, courts continue to scrutinize whether a duty existed and whether the destruction of evidence caused prejudice, thereby refining the application of *Ortega*'s principles.

However, the Court's discretion has led to decisions that "applied strong sanctions even for inadvertent, negligent spoliation of evidence."[55] Two concerns raised were that New York can "employ any sanction with relative impunity" and that "New York does not employ any kind of test before imposing the adverse inference instruction."[56] Although an adverse inference jury instruction is the most common remedy for spoliation, it is "arguably, [also the] most controversial."[57] It allows a jury to presume that any missing or destroyed evidence would have been unfavorable to the party responsible for its destruction.[58] "The determination of whether to apply an adverse inference instruction to the facts of a case is ultimately left to the jury."[59] Although adverse inference instructions can avoid the costs of collateral litigation, there are generally two criticisms: "the inference fails to achieve the objectives of punishment and deterrence" and the inference can be unfairly severe to litigants.[60] Both the adverse inference jury instruction and sanctions do not consistently take the culpability of the spoliator into account since "New York simply asks whether a particular sanction is fair to the injured party and not unduly prejudicial to the spoliator."[61] Moreover, "third-party spoliators often go unpunished . . . [because they] are not parties to an underlying suit."[62]

The broad discretion that CPLR § 3126 grants to judges has led to inconsistent application of sanctions across cases. Courts assess factors such as the intent behind the destruction of evidence, the extent of prejudice suffered by the opposing party, and the specific context of the spoliation to

54. *Id.* at 597–98 (quoting Awon v. Harran Transp. Co., 69 A.D.3d 889, 890 (N.Y. App. Div. 2010)).
55. Killelea, *supra* note 2, at 1072.
56. *Id.* at 1072–73.
57. *Id.* at 1056.
58. *Id.*
59. *Id.* at 1060.
60. *Id.* at 1062.
61. *Id.* at 1072.
62. *Id.*

determine the appropriate remedy.[63] For example, in cases where spoliation results from negligence rather than intentional misconduct, courts may be reluctant to impose severe sanctions.[64] However, distinguishing between negligent and intentional spoliation is often challenging, particularly in cases involving ESI, where routine data management practices can result in inadvertent evidence loss. This difficulty raises concerns about the need for more standardized guidelines, particularly as ESI becomes more essential in modern litigation.[65]

D. The Evolution of Spoliation Doctrine in ESI Cases

The emergence of ESI in litigation has complicated the application of CPLR § 3126. ESI can be unintentionally altered or deleted through routine practices, such as automatic deletion policies or data overwriting, making it more vulnerable to accidental spoliation.[66] Federal reforms such as Rule 37(e) of the FRCP now exclusively govern sanctions for ESI spoliation, distinguishing between negligent and intentional destruction.[67] This distinction aims to balance fairness with practicality, recognizing the unique challenges of managing vast amounts of digital data. New York courts have incorporated similar principles but have yet to adopt a dedicated statutory framework tailored to ESI.

A critical shift in New York's spoliation doctrine has been the recognition that evidence preservation duties may arise before litigation formally begins. While the traditional view was that parties only had a duty to preserve evidence once litigation commenced, the First Division of the New York State Appellate Division of the Supreme Court clarified in *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.* that "reasonable anticipation of litigation" also encompasses settlement discussions before litigation.[68] Otherwise, parties will be incentivized to destroy evidence in the pre-litigation phase.[69] Federal jurisprudence from cases like *Zubulake v.*

63. 4 N.Y.PRAC., COM. LITIG. IN NEW YORK STATE COURTS § 30:55 (5th ed. 2025).
64. Killelea, *supra* note 2, at 1059.
65. *See id.* at 1050–51.
66. Mark D. Robins, *Computers and the Discovery of Evidence—A New Dimension to Civil Procedure*, 17 J. MARSHALL J. COMPUT. & INFO. L. 411, 422 (1999).
67. 4 N.Y.PRAC., COM. LITIG. IN NEW YORK STATE COURTS § 30:56 n.4 (5th ed. 2025).
68. VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 40 (N.Y. App. Div. 2012).
69. *Id.*

UBS Warburg L.L.C. holds that the duty to preserve arises when the party "knew or should have known that a likelihood of litigation existed."[70] However, New York's approach to this duty remains less developed than the federal approach. Unlike FRCP 37(e), which provides clear guidance on pre-litigation preservation of ESI, New York's CPLR § 3126 does not specify when this duty begins.[71] This ambiguity has led to inconsistent rulings, as the duty "may arise when a client receives notice of litigation, when a client reasonably anticipates litigation, or when a client knew or should have known that information may be relevant to future litigation."[72] The New York State Bar Association even recommends a conservative approach just to be safe.[73]

New York courts have sought to interpret CPLR § 3126 in ways that account for the specific risks associated with ESI.

> In *Zubulake IV*, Judge Scheindlin articulated the now generally accepted three-part test for determining when sanctions may be appropriate and the nature of the sanction, if any, that should be imposed for the spoliation of ESI. A party seeking sanctions must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind"; and (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense.[74]

Observers noted that the decision in *Zubulake* squandered an opportunity to provide instructive rules for questions concerning "whether the conduct constitutes negligence or gross negligence and, if the conduct is merely negligent, whether the relevance of the lost ESI had been

70. KYLE C. BISCEGLIE, LEXISNEXIS PRACTICE GUIDE: NEW YORK E-DISCOVERY AND EVIDENCE § 13.06 (2016 ed. 2016).

71. New York State courts do have the availability of pre-action discovery under CPLR 3102(c), which "may explain why courts have not developed a significant body of law concerning pre-action preservation." KYLE C. BISCEGLIE, LEXISNEXIS PRACTICE GUIDE: NEW YORK E-DISCOVERY AND EVIDENCE § 10.04 (2016 ed. 2016).

72. KYLE C. BISCEGLIE, LEXISNEXIS PRACTICE GUIDE: NEW YORK E-DISCOVERY AND EVIDENCE § 5.08 (2016 ed. 2016).

73. *Id.*

74. 4 N.Y.PRAC., COM. LITIG. IN NEW YORK STATE COURTS § 30:55 (5th ed. 2025).

established (and who bears that burden of proof)—that come into play when the *Zubulake* test is applied."[75] Moreover, "[n]either negligence nor gross negligence has been clearly defined in the context of discovery misconduct, such as spoliation."[76] Even as state courts, particularly in the First Department, increasingly apply *Zubulake* or *Zubulake*-like standards to spoliation of ESI, the application has been limited to cases involving e-discovery.[77] For example, where the plaintiff relied exclusively on the *Zubulake* rule to establish a spoliation claim regarding audiotapes and videotapes, the First Department concluded that the federal standard coming from *Zubulake* was unnecessary outside the context of ESI discovery, as the elements of a spoliation claim could be demonstrated under New York common law.[78]

E. Judicial Discretion and the Challenges of Inconsistent Sanctions

The principles articulated in *Zubulake*, particularly the three-prong test for spoliation sanctions—duty to preserve, culpable state of mind, and relevance—continue to influence spoliation jurisprudence in New York. However, the application of these principles has sometimes led to confusion, particularly as courts balance evolving technological challenges and existing frameworks. In *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, the Court of Appeals emphasized that a "failure to institute a litigation hold is but one factor that a trial court can consider in making a determination as to the alleged spoliator's culpable state of mind."[79] The Court of Appeals agreed with the First Division that defendants' failure to institute a litigation hold did not constitute gross negligence due to considerations including their adequate responses to discovery demands and no evidence of an intentionally compromised computer backup system.[80] The Court still found the defendants to be negligent in failing to preserve ESI, and if the evidence were found to be relevant to Pegasus's claims on remand, then sanctions could still be appropriate.[81]

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75. *Id.*
76. *Id.*
77. BISCEGLIE, *supra* note 70.
78. Strong v. City of NewYork, 112 A.D.3d 15, 23 (N.Y. App. Div. 2013).
79. Pegasus Aviation I, Inc. v. Varig Logistica S.A., 26 N.Y.3d 543, 553 (2015).
80. *Id.*
81. *Id.* at 554.

The debate over what constitutes sufficient prejudice and culpability in spoliation disputes is further illustrated in *Sarach v. M&T Bank Corp.*, where the Court assessed the loss of surveillance footage in a slip-and-fall case.[82] The majority concluded that while the defendant violated a preservation order, the prejudice to the plaintiff was minimal and did not warrant dismissal of the defendant's answer.[83] Instead, the Court opted for an adverse inference sanction at trial.[84] Notably, the dissent took issue with the approach, emphasizing that the loss of evidence occurred due to routine business practices before the preservation order was issued, which was more than a year before the action commenced.[85] The dissent argued that the majority failed to apply *Pegasus* by improperly applying an adverse inference where "the sole basis for the imposition of a penalty is negligent conduct," yet also asserted that a remedy was needed "to retore balance to the litigation" as defendants were "on notice of an impending lawsuit."[86] These opposing considerations reflect ongoing tensions in New York's spoliation jurisprudence, particularly when courts must balance *Zubulake*'s enduring influence against evolving interpretations of culpability and fairness under a heavily discretionary approach.

More recently, in *Gilliam v. Uni Holdings*, the Court confronted whether certain kinds of evidence, such as a plaintiff's medical condition altered by surgery, could fall within the ambit of spoliation.[87] Drawing on *Zubulake*'s analytical framework, the Court ultimately rejected the notion that such evidence was suitable for a spoliation analysis, reasoning that the preservation of one's physical condition cannot be equated with the destruction of documents or tangible evidence.[88] This decision further highlighted the challenges of determining the boundaries of *Zubulake*'s application, particularly as spoliation intersects with non-traditional evidence and evolving discovery obligations. While *Zubulake* remains a foundational guidepost, its application in New York diverges depending on whether the spoliation issue arises under CPLR § 3126 or common law. CPLR § 3126 codifies procedural remedies for spoliation within the context

82. Sarach v. M & T Bank Corp., 140 A.D.3d 1721, 1721–22 (N.Y. App. Div. 2016).
83. *Id.* at 1722.
84. *Id.*
85. *Id.* at 1724–25.
86. *Id.* at 1725–28 (citation modified).
87. Gilliam v. Uni Holdings, 201 A.D.3d 83, 85 (N.Y. App. Div. 2021).
88. *Id.* at 86.

of litigation, while *Zubulake*'s broader principles frequently inform judicial discretion under common law. Thus, courts often toggle between these frameworks, adapting *Zubulake*'s guidance to address the varied and complex scenarios that arise in modern litigation.

F. The Present and Future of Spoliation Law in New York

The current state of ESI spoliation law in New York reflects an ongoing effort to balance the principles established in *Zubulake* with the flexibility afforded by CPLR § 3126 and common law spoliation. The Court adopted *Zubulake*'s standards to "[provide] litigants with sufficient certainty as to the nature of their obligations in the electronic discovery context and when those obligations are triggered."[89] The Court endorsed *Zubulake* in *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, noting its long-term use by state and federal courts and harmony with New York precedent.[90] Despite arguments that the standard is vague and unworkable, the Court took the pragmatic approach of "reasonable anticipation" to avoid the destruction of evidence before the official notice of a specific claim.[91] The First Department particularly pointed out situations where both sides to a dispute may be negotiating in good faith while "frantically preparing for litigation behind the scenes."[92]

However, critics argue that the lack of codified ESI-specific sanctions in CPLR § 3126 exacerbates inconsistencies in judicial decisions. Unlike FRCP 37(e), which explicitly differentiates between negligent and intentional destruction of electronic evidence,[93] CPLR § 3126 allows courts broad discretion to impose sanctions, ranging from adverse inference instructions to case dismissal.[94] This discretion can result in determinations and sanctions that vary significantly depending on the presiding judge's interpretation.[95] For instance, Judge Scheindlin in *Sekisui American Corporation v. Hart* addresses the "not completely resolved . . . question of

89. Strong v. City of New York, 112 A.D.3d 15, 23 (N.Y. App. Div. 2013) (quoting VOOM HD Holdings, LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 36 (N.Y. App. Div. 2012)).
90. 4 N.Y.PRAC., COM. LITIG. IN NEW YORK STATE COURTS § 30:31 (5th ed. 2025).
91. *Id.*
92. *Id.*
93. FED. R. CIV. P. 37(e).
94. N.Y. C.P.L.R. § 3126 (MCKINNEY 2024).
95. 4 N.Y.PRAC., COM. LITIG. IN NEW YORK STATE COURTS § 30:56 (5th ed. 2025).

whether the innocent party . . . bears the burden of establishing prejudice in order to prevail on a sanctions motion."[96] He notes that "when evidence is willfully destroyed or lost through gross negligence, prejudice to the innocent party may be presumed."[97] When the destruction is negligent, the innocent party has the burden to prove prejudice.[98] The "failure to produce relevant ESI requires a case-by-case approach and that even the grossly negligent destruction of evidence does not automatically lead to sanctions but, rather, requires that all factors surrounding the destruction be considered in fashioning the appropriate sanction."[99]

Inadequate guidance on emerging forms of ESI, such as ephemeral messaging platforms and cloud-based storage systems, makes the proportionality of the sanction a big concern, especially because punishment and deterrence are objectives of spoliation doctrine.[100] In a survey of a group of federal judges and magistrates, they noted that "in the last 12 months social media data and text messages/mobile were the types of electronic data that had seen [sic] spoliated most often-58%."[101] The Commercial Division of Nassau County established its own guidelines in an attempt to balance the sanction with the proportionality of its consequence.[102] In *Klipsch Group, Inc. v. ePRO E-Commerce Limited*, the Court "noted that the defendant provided no authority for the proposition that a district court's discretion to award a compensatory discovery sanction is tied to the ultimate outcome of the case" and "that courts routinely award such sanctions without any discussion on the ultimate merits recovery."[103] "When . . . it appears reasonable *ex ante* to conduct expensive corrective discovery efforts [due to uncooperative behavior, the Second Circuit saw] no reason why the party required to undertake those efforts should not be compensated simply because . . . the obstructive conduct had hidden nothing of real value to the case."[104] That discretion is complicated when it comes to the severe consequences of terminating sanctions, especially when it involves ESI.

96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. Killelea, *supra* note 2, at 1056–57.
101. 4 N.Y.PRAC., COM. LITIG. IN NEW YORK STATE COURTS § 30:56 (5th ed. 2025)
102. 4 N.Y.PRAC., COM. LITIG. IN NEW YORK STATE COURTS § 63:40 (5th ed. 2025).
103. 4 N.Y.PRAC., COM. LITIG. IN NEW YORK STATE COURTS § 30:56 (5th ed. 2025) (quoting Klipsch Grp., Inc. v. ePRO E-Com. Ltd., 88 F.3d 620, 631 (2d Cir. 2018)).
104. *Id.*

"[E]ven where there is no dispute that relevant electronic records have been destroyed, before imposing a sanction the court, in the exercise of its discretion, may refer the issue to an expert in information technology where the parties present conflicting accounts regarding the deletion of that evidence."[105]

Ultimately, the current state of ESI spoliation law in New York reflects a dual reliance on federal jurisprudence and state-specific discretion, but significant gaps remain. The adoption of clearer, codified standards for ESI spoliation, particularly in areas such as proportionality, emerging technologies, and the role of experts, could reduce uncertainty and promote greater fairness in discovery. Until such reforms are enacted, practitioners must navigate a patchwork of rules and judicial interpretations, often relying on foundational principles as a guide in an increasingly complex digital landscape.

II. ANALYSIS

Spoliation of evidence, whether through intentional destruction, negligence, or the failure to preserve ESI, has become an increasingly pressing issue in New York courts.[106] While spoliation undermines the integrity of the judicial process and can significantly prejudice litigants, New York's legal framework for addressing it remains fragmented and inconsistent. Unlike the federal system, which has implemented structured guidelines for ESI-related spoliation under FRCP 37, New York courts rely on the common law duty to preserve information since the CPLR does not explicitly impose any obligation to preserve electronic information.[107] This affords broad discretion and significant variability in court-imposed sanctions, particularly in cases involving pre-litigation destruction, third-party spoliation, and ESI-specific challenges.

New York courts recognize a duty to preserve evidence when a party "is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation."[108] Courts dispute over what is

105. *Id.*
106. *See generally* Killelea, *supra* note 2.
107. 4 N.Y.PRAC., COM. LITIG. IN NEW YORK STATE COURTS § 140:13 (5th ed. 2025).
108. 4 N.Y.PRAC., COM. LITIG. IN NEW YORK STATE COURTS § 30:55 (5th ed. 2025).

considered the triggering event.[109] The duty to preserve becomes even more attenuated when it comes to third parties who spoliated evidence. Additionally, ESI spoliation presents unique challenges, including the loss of ephemeral data, metadata alteration, and auto-deletion policies, for which New York lacks a dedicated statutory framework.

This Section analyzes these key issues by examining judicial discretion in spoliation sanctions, ambiguities in preservation duties, the challenges of third-party spoliation, and the gaps in New York's ESI-specific spoliation framework. Understanding these deficiencies is critical to formulating effective reforms that promote fairness, consistency, and predictability in spoliation-related rulings.

A. Judicial Discretion in Spoliation Sanctions

CPLR § 3126 authorizes courts to sanction parties that refuse to comply with discovery obligations, allowing for adverse inference instructions, striking of pleadings, monetary fines, or even dismissal of claims. While this flexibility allows courts to tailor sanctions based on case-specific factors, it also results in divergent applications of the law, particularly in distinguishing between negligent, reckless, and intentional spoliation. Some courts impose severe penalties for mere negligence, while others require proof of bad faith before granting adverse inferences or striking pleadings.[110] Moreover, "[a]s a general rule, courts seek to make the penalty proportionate to the disadvantage sustained from the loss of the documents."[111]

In *Strong v. City of New York*, the Court explicitly distinguished ESI from non-ESI evidence and held that the negligent destruction of an audiotape was governed by the common law standard instead of the federal *Zubulake* standard,[112] distinguishing spoliation concerning ESI in state courts from that of federal courts despite lacking a statutory basis for ESI evidence. Unlike cases heard in federal court, "mere negligence continues to be a sufficient 'culpable state of mind' to give rise to sanctions."[113]

In *915 Broadway Assocs. LLC v. Paul, Hastings, Janofsky & Walker,*

109. *Id.*
110. Killelea, *supra* note 2, at 1058.
111. 4 N.Y.PRAC., COM. LITIG. IN NEW YORK STATE COURTS § 30:56 (5th ed. 2025).
112. 4 N.Y.PRAC., COM. LITIG. IN NEW YORK STATE COURTS § 30:57 (5th ed. 2025).
113. 4 N.Y.PRAC., COM. LITIG. IN NEW YORK STATE COURTS § 30:55 (5th ed. 2025).

LLP, the Court imposed severe sanctions for systematic and intentional document destruction, emphasizing the impact that spoliation can have on litigation fairness.[114] The adverse inference instruction, one of the most commonly applied spoliation sanctions, has been particularly controversial in New York. Unlike federal courts, which limit the use of adverse inferences under FRCP 37(e) to cases of intentional destruction, New York courts apply this sanction more broadly. Some courts grant adverse inference instructions for negligent spoliation, which can be highly prejudicial and outcome-determinative, effectively shifting the burden of proof onto the spoliating party.[115] The potentially harsh consequences have led critics to argue that New York should adopt a more restrained approach, similar to federal standards, where severe sanctions require proof of intent or are limited to the criminal context.[116] While judicial discretion allows for case-specific flexibility, it also creates uncertainty for litigants.

B. Pre-Litigation Preservation Duties and Ambiguities in Triggering Events

New York courts generally hold that a party must preserve evidence when litigation is "reasonably foreseeable." However, courts differ in determining when foreseeability begins, particularly in cases where litigation has not yet been initiated. In *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, the First Department adopted the *Zubulake* standard, holding that the duty to preserve arises when a party reasonably anticipates litigation, not just when a party files a complaint. However, courts in other departments have not uniformly followed *VOOM*, leading to uncertainty regarding pre-litigation preservation obligations. Some courts have required actual notice of impending litigation, while others have found that the duty arises as soon as a dispute becomes adversarial, even if no formal legal action has been taken.[117]

This inconsistency raises significant challenges, particularly for corporations with routine document retention policies. In some cases, courts have sanctioned parties for failing to suspend auto-deletion policies, even

114. *Id.*
115. Killelea, *supra* note 2, at 1061.
116. *Id.* at 1062–63.
117. BISCEGLIE, *supra* note 72.

when litigation was not yet imminent.[118] Conversely, other courts have declined to impose sanctions where evidence was lost before a formal demand for preservation was made.[119] In *Strong v. City of New York*, the Court found that pre-litigation destruction of documents could warrant sanctions if the party knew or should have known litigation was likely, but it stopped short of setting a clear threshold while leaving the purpose of the *Zubulake* standard unclear.[120] Moreover, even if the time when the duty arises to preserve evidence is clear, there is a question of what degree of preservation is required. "[T]he preservation obligation is not limited simply to avoiding affirmative acts of destruction. Since computer systems generally have automatic deletion features . . . it is necessary for a party facing litigation to take active steps to halt that process."[121]

An even greater challenge arises when third parties control relevant evidence. New York courts do not recognize an independent tort for spoliation, limiting the remedies available to parties harmed by third-party evidence destruction. For example, in cases where a cloud storage provider, vendor, or employer destroys key records before litigation, the affected party may have no direct recourse. While courts can impose adverse inference instructions or preclusion orders against litigants who fail to preserve evidence, they lack the authority to penalize non-parties. Some jurisdictions, such as California and Florida, have recognized a tort for third-party spoliation, allowing plaintiffs to sue non-parties who destroy evidence relevant to litigation.[122] However, New York courts have rejected this approach, reasoning that existing sanctions are sufficient to deter misconduct. Moreover, avoiding an independent tort can hurdle issues such as numerous "retrials in the guise of independent actions" and the difficulty of quantifying the harm and damages resulting from spoliation.[123]

New York's inconsistent rulings on when the duty to preserve begins and the lack of direct remedies for third-party spoliation create significant uncertainty and unfairness. While courts agree that the duty arises before

118. 4 N.Y.PRAC., COM. LITIG. IN NEW YORK STATE COURTS § 30:56 (5th ed. 2025).
119. *See id.*
120. Strong v. City of New York, 112 A.D.3d 15, 23 (N.Y. App. Div. 2013).
121. VOOM HD Holdings, LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 41 (N.Y. App. Div. 2012).
122. Judge, *supra* note 21, at 449.
123. Donald H. Flanary Jr. & Bruce M. Flowers, *Spoliation of Evidence: Let's Have a Rule in Response*, 60 DEF. COUNS. J. 553, 558 (1993).

litigation is formally filed, they fail to provide a clear standard for when it is triggered. Similarly, third-party spoliation remains largely unaddressed, leaving litigants without recourse when non-parties destroy key evidence.

C. Third-Party Spoliation and the Lack of Direct Remedies

New York courts have consistently declined to recognize a separate cause of action for spoliation, reasoning that existing sanctions and discovery rules provide adequate deterrents. However, these sanctions apply only to parties in the litigation, leaving courts without authority to penalize third-party spoliators. For example, in *Ortega v. City of New York*, the Court held that a party cannot be sanctioned for evidence destroyed by a third party before litigation commenced, even if the evidence was crucial to the case. Similarly, in *MetLife Auto & Home v. Joe Basil Chevrolet, Inc.*, the Court declined to impose sanctions where a third-party auto dealer failed to preserve an allegedly defective vehicle, ruling that no legal duty to preserve had been established.[124]

Currently, courts address third-party spoliation through discretionary measures, such as shifting the burden of proof onto the party who lost the evidence, allowing adverse inference instructions, ordering cost-shifting sanctions, making the litigant compensate for lost evidence retrieval efforts, and subjecting the non-party to monetary fines or even imprisonment.[125]

The rise of cloud computing and digital recordkeeping has exacerbated the third-party spoliation problem, as non-parties such as IT vendors, cloud storage companies, and corporate employers frequently control relevant electronic evidence. Unlike paper records, which litigants can physically retain, ESI is often stored offsite or managed by third-party vendors who may not be aware of pending litigation. In *In re NTL, Inc. Securities Litigation*, the Court found that a party's failure to retrieve relevant documents from a third-party storage provider constituted a failure to preserve evidence.[126]

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124. Metlife Auto & Home v. Joe Basil Chevrolet, Inc., 1 N.Y.3d 478, 484 (2004).

125. KYLE C. BISCEGLIE, LEXISNEXIS PRACTICE GUIDE NEW YORK E-DISCOVERY AND EVIDENCE § 14:15 (2016).

126. BISCEGLIE, *supra* note 70.

D. ESI-Specific Challenges and the Need for a Modernized Approach

Modern digital communication often involves self-deleting messages, auto-purging emails, and ephemeral chat applications, which complicate spoliation disputes. New York courts have struggled to determine when the loss of such data constitutes sanctionable spoliation, particularly when deletion occurs automatically as part of routine business practices. In *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, the Court found that failure to suspend auto-deletion policies amounted to gross negligence, imposing severe sanctions.[127] However, in *Chin v. Port Authority of New York & New Jersey*, the Second Circuit rejected a per se rule, holding that failing to implement a written litigation hold does not automatically constitute spoliation, creating uncertainty in the application of preservation obligations.[128]

ESI spoliation often occurs not through outright deletion, but through metadata alteration, which can erase critical information about when, how, and by whom a document was modified. Examples include overwriting when a document was "last modified" by accessing it or converting files to PDF. Unlike physical evidence, ESI metadata can be easily manipulated without direct detection, making it difficult for courts to assess whether spoliation occurred intentionally or inadvertently. Some courts have imposed adverse inference instructions when key metadata was lost, even if the content of the document itself remained intact.[129] Others have declined to impose sanctions, ruling that metadata loss does not equate to content destruction, leaving open the question of when metadata itself constitutes evidence.[130]

New York's ad hoc approach to ESI spoliation creates inconsistency, unpredictability, and potential unfairness in litigation. The lack of a uniform standard for ESI loss, auto-deletion, and metadata alteration places excessive burdens on litigants, particularly those handling large volumes of digital records.

127. *Id.*
128. *Id.*
129. 4 N.Y.PRAC., COM. LITIG. IN NEW YORK STATE COURTS § 30:56 (5th ed. 2025).
130. *See* LaBuda v. LaBuda, 175 A.D.3d 39, 44 (N.Y. App. Div. 2019); *see also* Webb v. United Health Servs., Inc., 221 A.D.3d 1315, 1318–19 (N.Y. App. Div. 2023).

III. PROPOSAL

The gaps and inconsistencies in New York's current framework for addressing spoliation, particularly in cases involving judicial discretion, pre-litigation preservation, third-party liability, and ESI-specific challenges, suffers from inconsistencies and gaps that undermine the fairness and predictability of litigation. While CPLR § 3126 provides courts with broad discretion to impose sanctions, the lack of codified standards has led to divergent rulings. To address these issues, this proposal recommends a targeted statutory framework that codifies a clearer standard for when the duty to preserve evidence begins, particularly in pre-litigation disputes; creates an ESI-specific spoliation rule that aligns with modern digital data management practices; establishes third-party preservation obligations and accountability mechanisms; and implements a proportionality framework for judicial discretion in sanctions.

One of the most significant ambiguities in New York's spoliation doctrine is when the duty to preserve evidence arises, which is further complicated when relevant evidence is controlled by third parties to the litigation. While courts recognize that a party's duty to preserve arises when litigation is "reasonably foreseeable," there is no statutory requirement that parties notify third parties to preserve relevant evidence. This omission creates a legal gray area, where litigants on either side, who do not control evidence directly, may suffer irreparable prejudice due to third-party spoliation, with no direct recourse available.

Attorneys already bear a professional responsibility to inform their clients of their duty to preserve evidence and to oversee compliance, particularly when litigation is anticipated.[131] This duty should be explicitly extended to include notifying third parties who control relevant evidence. Such parties would include hosts of ESI, such as cloud storage providers, IT vendors, and data management firms; employers or corporate entities; custodians of regulated records; and subcontractors and manufacturers. This statutory obligation would require counsel to issue formal litigation hold notices to third parties when litigation is reasonably foreseeable. Courts have already signaled the importance of proactive preservation efforts; in *VOOM*, the First Department emphasized that a failure to implement a

131. BISCEGLIE, *supra* note 72.

litigation hold could result in sanctions. An injured party due to spoliation can then seek remedies from the party who holds the duty to inform the third party that destroyed the evidence.

A key criticism of recognizing a separate tort for spoliation is that it could lead to an excessive number of collateral lawsuits, creating burdensome litigation over the destruction of evidence rather than the underlying dispute itself. Under this framework, if a third party were properly notified but failed to preserve evidence, the Court could shift certain costs such as attorney's fees and discovery costs onto the third party, depending on the third party's culpability and whether the party to the case fulfilled its duty to inform the third-party. The total cost will be based on the relevance and likelihood of affecting a claim. These fee-shifting remedies will allow courts to immediately address spoliation within the existing case. Courts will continue to use other remedies, including evidentiary presumptions and adverse inferences, which may require greater care due to the likelihood of affecting the outcome of a case. Where such remedies against third parties are used, the burden should be on the injured party to demonstrate the cruciality of the evidence; and the burden on the defendant should be to demonstrate the culpability of the spoliating third parties. This could prevent excessive punishment upon the party involved with the spoliation, while leaving less discretion to judges by allowing the spoliation-injured parties to make their own cases.

Even if the costs shifted onto a third party involved separate litigation, it would still produce fewer lawsuits than if a party could independently pursue a spoliation tort since the third-party suit would be limited by the determinations of the original case. This would not require creating a tort to cover third-party responsibility for spoliation. The underlying litigation should be the focus of the matter, and injuries due to spoliation are mostly only felt when there is underlying litigation. An independent, separate tort will only introduce unnecessary litigation that runs counter to the discretionary remedies that New York courts are accustomed to using.

Such a duty on third parties may seem like an excessive compliance burden, especially on businesses that store large amounts of data and routinely purge records, but this concern can be mitigated by a reasonableness standard. A third party would only be responsible for preserving evidence if properly notified and if preservation was reasonably feasible. Courts can consider data retention policies, storage costs, and

proportionality to demonstrate good faith of a third-party in its record-keeping policies.

This framework may work best if the 'reasonable anticipation' standard were defined so that it would be followed uniformly across New York courts. The duty to preserve evidence begins when a party reasonably anticipates litigation, not just when a complaint is filed. And preservation obligations should extend to all potentially relevant evidence, including ESI, physical documents, and third-party records. A codified "reasonable anticipation" standard already works in federal courts under FRCP 37(e).

If there are costs associated with the preservation of evidence, there should be standards for how those costs are handled so that there will be less debate over how much effort is required to fulfill the duty of evidence preservation. For example, costs of evidence preservation can be divided relative to the final judgement. By providing a clearer standard, attorneys will be better suited to balance the potential for spoliation liability and the costs of preserving potential evidence.

An ESI-specific spoliation rule should also be adopted for more consistent treatment of ESI spoliation. This would also help judges make the determination of third-party culpability when the third party is the spoliator. Such a rule can be modeled after FRCP 37(e), which would: (1) distinguish between negligent and intentional spoliation, reserving severe sanctions (adverse inference, dismissal) for willful destruction; (2) provide guidelines for handling lost metadata and ephemeral data, ensuring that courts consider whether the evidence could have been covered through alternative means; and (3) encourage proportionality in sanctions, preventing overly punitive measure for minor, good-faith preservation failures.[132] A structured ESI spoliation rule would allow courts to apply principles more consistently yet still afford them the discretion to tailor sanctions. Moreover, parties and their attorneys will better fulfill their duties to ensure evidence preservation.

A proportionality framework could restrict adverse inference instructions to cases involving intentional spoliation, aligning with FRCP 37(e); encourage courts to consider alternative remedies, such as cost-shifting or limited evidentiary preclusions, before imposing case-dispositive sanctions; and require a finding of prejudice before severe sanctions are

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

granted, ensuring that penalties are proportionate to the harm suffered. Such a structured proportionality framework would provide greater consistency in cases and a better understanding of responsibilities for the parties, while preserving judicial flexibility based on the severity of the spoliation.

CONCLUSION

New York's spoliation framework, while rooted in long-standing legal principles, fails to adequately address the realities of modern litigation, particularly in cases involving pre-litigation preservation, third-party spoliation, and ESI. The reliance on judicial discretion under CPLR § 3126, without clear statutory guidance, has led to inconsistent rulings, uncertainty regarding preservation obligations, and limited accountability for third parties who destroy critical evidence. This inconsistency not only creates unfair outcomes for litigants but also undermines the integrity of the judicial process, as parties struggle to determine when and how to fulfill their duty to preserve evidence.

Besides proposing targeted statutory reforms to ensure greater consistency, fairness, and accountability in New York's spoliation doctrine, a key recommendation is the codification of a clear standard for pre-litigation preservation. This would provide uniform guidance on when the duty to preserve arises and remove the uncertainty that currently plagues courts and litigants alike. By explicitly requiring attorneys to notify third parties who may control relevant evidence, this reform reinforces preservation obligations across all parties in litigation, ensuring that evidence does not vanish simply because it was outside the immediate custody of a litigant.

A major challenge in New York's current framework is the lack of meaningful sanctions against third parties who destroy evidence, as courts have no mechanism to hold non-litigants accountable. Rather than adopting an independent tort for spoliation, which could invite excessive collateral litigation and create practical challenges in proving damages, this Note proposes a more efficient and pragmatic approach: allowing courts to impose cost-shifting and fee sanctions against third parties who fail to preserve evidence despite proper notice. This approach ensures that third parties who ignore preservation requests are held responsible for the resulting harm, without burdening the legal system with a flood of new tort

claims.

Furthermore, an ESI-specific spoliation rule, modeled after FRCP 37(e), would ensure a more uniform treatment of digital evidence, addressing critical issues such as metadata loss, auto-deletion policies, and ephemeral messaging platforms. New York courts have struggled to apply traditional spoliation rules to modern ESI challenges, often leading to divergent rulings on whether missing digital evidence warrants severe sanctions. By distinguishing between negligent and intentional destruction and limiting the harshest sanctions to cases where spoliation was intentional and prejudicial, this reform would prevent overly punitive measures for minor, good-faith preservation failures while still deterring intentional misconduct.

Beyond procedural efficiency, these reforms reflect a broader shift in litigation practices as courts increasingly grapple with complex digital evidence and the role of third parties in discovery disputes. The rise of cloud computing, decentralized data storage, and ephemeral communications has fundamentally altered the nature of evidence preservation, necessitating a modernized legal framework that aligns with technological realities. By implementing clearer preservation standards, holding third parties accountable, and ensuring fair treatment of ESI spoliation cases, these proposals would enhance confidence in New York's litigation system and ensure that courts remain capable of adjudicating disputes in an era of rapidly evolving digital evidence.

Ultimately, these reforms serve a dual purpose: protecting litigants from unfair prejudice caused by missing evidence while maintaining a balanced and efficient approach to discovery obligations. By ensuring consistency, predictability, and fairness, New York can modernize its spoliation framework to reflect the complexities of modern litigation, while reinforcing the fundamental principle that the integrity of the judicial system depends on the preservation of truth.