Georgia State University Law Review

Volume 38
Issue 2 *Winter 2022*

Article 10

4-1-2022

Presuit Civil Protective Orders on Discovery

Jeffrey A. Parness
northern illinois university college of law, jparness@niu.edu

PRESUIT CIVIL PROTECTIVE ORDERS ON DISCOVERY

Jeffrey A. Parness*

ABSTRACT

There are few civil procedure laws broadly authorizing trial courts in the United States to consider presuit requests seeking protection from discovery sanctions or spoliation claims in later civil actions. There should be more laws on presuit protective orders addressing information maintenance, preservation, and production.

New presuit protective order laws are most apt where there have been demands by potential adversaries involving alleged information preservation duties under civil discovery laws or under substantive spoliation laws; where the recipients have strong reasons to secure early judicial clarifications; and where the availability and use of presuit protective orders will serve both private and public interests in the just, speedy, and inexpensive determinations of civil claims. New protective order laws are also warranted for some potential witnesses in receipt of presuit information preservation demands.

An Arizona court rule, effective July 2018, authorizes presuit information preservation orders that go beyond the most common forms of presuit discovery. Yet that rule is limited and should not be fully modeled. The Arizona rule speaks only to "the existence or scope of any duty to preserve" electronically stored information (ESI). It allows those in receipt of a "preservation request" for information relevant to an expected or current lawsuit to petition for an order to determine any duty to preserve ESI. Petitioner need not be an

* Professor Emeritus, Northern Illinois University College of Law. B.A., Colby College; J.D., The University of Chicago. This Article is partly based on and expands previous research published by the Author. *See* Jeffrey A. Parness, *State Spoliation Claims in Federal District Courts*, 71 CATH. U. L. REV. (forthcoming 2022); Jeffrey A. Parness & Jessica Theodoratos, *Expanding Pre-Suit Discovery Production and Preservation Orders*, 2019 MICH. ST. L. REV. 651; Jeffrey A. Parness, *Lost ESI Under the Federal Rules of Civil Procedure*, 20 SMU SCI. & TECH. L. REV. 25 (2017).

anticipated adverse party in advance of a civil suit and need not be an anticipated new party to a pending related suit.

New laws on presuit protective orders should go further. They should authorize protective orders concerning both ESI and non-ESI. They should be available even at times when there may not be a legal duty to preserve. These new laws should, however, provide explicit guidelines limiting judicial discretion. Finally, any new laws on presuit protective orders should reflect the unique information maintenance, production, and preservation duties within a judicial system, whether in procedural (as with discovery sanctions) or substantive (as with independent spoliation claims) laws. A one-size-fits-all approach is unwarranted.

CONTENTS

INTRODUCTION

There are few civil procedure laws broadly authorizing general jurisdiction trial courts in the United States to consider presuit requests seeking protection from civil discovery sanctions or from substantive spoliation claims in later civil actions (herein presuit protective orders). This Article argues for enhanced availability of orders that can address these requests for, or duties regarding, information creation, preservation, and production in anticipation of later related civil litigation.[1] In particular, it urges that presuit protective orders are most apt where there have been presuit information requests by potential adversaries involving alleged duties under civil discovery laws or under substantive spoliation laws; where those receiving requests have good reasons to secure early judicial clarifications; and where presuit protective orders will serve both private and public interests in the just, speedy, and inexpensive determinations of later information duty issues.[2]

Currently, an Arizona civil procedure rule[3] narrowly authorizes orders for the preservation of certain presuit information that, unlike common forms of presuit discovery, is not aimed at identifying possible defendants, investigating potential causes of action, and perpetuating testimony.[4] Instead, the rule allows petitions for presuit protective orders, immunizing petitioners from any later discovery sanctions for failing to create, preserve, and produce electronically stored information (ESI).[5] Because the Arizona rule is limited, it

1. Herein, maintenance requests encompass known or knowable information that would or might not otherwise be kept at all. Preservation requests encompass existing information that would or might otherwise not continue to be kept. Production requests encompass information that would or might not otherwise be delivered.

2. Although this Article focuses on presuit protective orders, similar postsuit orders should also be available where Federal Rule of Civil Procedure (FRCP or Rule) 26(c) protective orders are unavailable because "discovery" has not yet been "sought," such as due to the lack of a discovery planning conference under Rule 26(f) per Rule 26(d)(1). FED. R. CIV. P. 26(d)(1).

3. ARIZ. R. CIV. P. 45.2(e).

4. *Id.*

5. *Id.*

should not be fully modeled in creating new presuit civil discovery protective order laws.

In fact, new laws on presuit protective orders should go further than they do in Arizona. They should authorize protective orders concerning both ESI and non-ESI. They should be available even at times when there may not be a clear legal duty to preserve. These new laws should, however, provide guidelines limiting judicial discretion.[6] Finally, new laws on presuit protective orders should reflect a judicial system's unique information maintenance, production, and preservation duties, whether in procedural (as with discovery sanctions) or substantive (as with independent spoliation claims) laws. A one size fits all approach is unwarranted.

Because civil discovery and substantive spoliation laws on presuit information losses should guide new laws on presuit protective orders, this Article first briefly surveys those laws.[7] Then it discusses possible new presuit civil protective order laws and explores the related issues of justiciability, choice of forum, and necessary conditions.[8]

I. CURRENT PROCEDURAL LAWS ON PRESUIT INFORMATION LOSSES

A. Introduction

Presuit information losses can be prevented by presuit discovery or can be addressed postsuit through discovery sanctions.[9] New laws on preventing and addressing presuit information losses can come from diverse sources—comprised of court rules, statutes, and case law.[10] These laws can be general, as illustrated by civil procedure rules on presuit testimony perpetuation achieved through the depositions of witnesses that would likely be unavailable at a later date.[11] These laws

6. These guidelines accompany authorizations of presuit protective orders on discovery in Arizona where there is no pending civil action. ARIZ. R. CIV. P. 45.2(f).

7. *See infra* Part I; *see also infra* Part II.

8. *See infra* Part III.

9. *See* Jeffrey A. Parness & Jessica Theodoratos, *Expanding Pre-Suit Discovery Production and Preservation Orders*, 2019 MICH. ST. L. REV. 651, 658 (2019).

10. *Id.* at 663.

11. *Id.*

can also be special, as exemplified by Florida's presuit discovery statute, which implicates medical negligence claims and defenses.[12]

The following two sections generally review current federal and state laws on how presuit information losses can be sanctioned in later civil actions and on how presuit information losses can be prevented by presuit maintenance, preservation, and production orders.[13] This review will then guide the exploration of possible new presuit civil protective order laws.[14]

B. Discovery Sanctions in Pending Cases

Some discovery laws on sanctions for presuit information losses cover only certain information. For example, under Federal Rule of Civil Procedure (FRCP or Rule) 37(e), 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."[15]

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.[16] Other state discovery laws speak more generally to information losses involving all forms of information, including ESI and non-ESI.[17] Yet other state

12. *Id.* at 663–64; FLA. STAT. ANN. § 766.106(6)(a) (West, Westlaw through 2021 First Reg. Sess. & Spec. "A" Sess. of 27th Leg.), *invalidated by* Weaver v. Myers, 229 So. 3d 1118 (Fla. 2017) (providing that "[u]pon receipt by a prospective defendant of a notice of claim, the parties shall make discoverable information available without formal discovery" under the provision entitled "[i]nformal discovery").

13. *See infra* Part I; *see also infra* Part II.

14. *See infra* Part III.

15. FED. R. CIV. P. 37(e)(2) (harsher sanctions available for intentional deprivations).

16. Parness & Theodoratos, *supra* note 9, at 664. *See, e.g.*, WYO. R. CIV. P. 37(e)(2); D.C. SUPER. CT. R. CIV. P. 37(e)(2). *Compare* VT. R. CIV. P. 37(f) (including only the initial portion of FRCP 37(e) so that it does not speak directly to intentional acts), *with* ARIZ. R. CIV. P. 37(g) (containing FRCP 37(e) but also articulating the parameters of the "duty to take reasonable steps to preserve" ESI and guidelines on what constitute these steps).

17. Parness & Theodoratos, *supra* note 9, at 664. *See, e.g.*, ILL. SUP. CT. R. 219 advisory committee's comment (providing that the 2014 Rules Advisory Committee Comment says the rule "is sufficient to cover sanction issues as they relate to electronic discovery"); MASS. G. EVID. § 1102 (2021) (providing that "[a] judge has the 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").

discovery laws follow an earlier (2006) version of FRCP 37(e) by differentiating between all ESI and non-ESI.[18]

Additional federal civil procedure laws seemingly authorize sanctions for presuit information losses in limited settings. One federal statute, for example, generally encompasses information losses that so "unreasonably and vexatiously" multiply the proceedings that the attorney or person admitted to try the case can be found liable for excess costs and attorneys' fees.[19] Additionally, there are similar special state laws that address presuit information losses.[20]

General federal civil procedure laws on sanctions involving discoverable information that was lost presuit and is relevant in pending federal civil actions are chiefly encompassed in the FRCP 37 provisions outside of Rule 37(e).[21] Separate FRCP provisions in Rule 37 authorize discovery sanctions, inter alia, for "fail[ure] to obey an order to provide or permit discovery" and for failure to provide information under the rules on "required disclosures" (Rule 26(a)).[22]

18. Although the 2006 rule operated in the federal district courts for only nine years, it still operates in several states. *See, e.g.*, MD. R. CIV. P. 2-433(b); N.C. R. CIV. P. 37 (b1); MONT. R. CIV. P. 37(f); VT. R. CIV. P. 37(f); MINN. R. CIV. P. 37.05; TENN. R. CIV. P. 37.06; KAN. STAT. ANN. § 60-237(e) (West, Westlaw through 2021 Reg. Sess.); HAW. R. CIV. P. 37(f); N.J. STAT. ANN. § 4:23-6 (West, Westlaw through L.2021); ALA. R. CIV. P. 37(g); *see also* UTAH R. CIV. P. 37(e) (adopting the 2006 FRCP 37(e) accompanied by an explicit recognition of a continuing "inherent" judicial power to deal with lost ESI or non-ESI "in violation of a duty" to preserve); OHIO R. CIV. P. 37(F) advisory committee's note to 2008 amendment (adopting a 2008 rule that, in addition to adding 2006 FRCP 37(e), provides five factors that courts may consider when determining whether to sanction).

19. 28 U.S.C. § 1927.

20. *See, e.g.*, MONT. CODE ANN. § 37-61-421 (West, Westlaw through 2021 Sess. of Mont. Leg.) (stating that an attorney or party is liable personally for excess costs caused by the unreasonable and vexatious multiplication of proceedings); IND. CODE ANN. § 34-52-1-1(b)(3) (West, Westlaw through all legis. of 2021 First Reg. Sess. of 122nd Gen. Assemb.) (stating that a prevailing party gets attorney's fees if adverse party "litigated the action in bad faith").

21. *See generally* FED. R. CIV. P. 37.

22. FED. R. CIV. P. 37(b)(2)(A) (including a sanction for failing to obey a court order); FED. R. CIV. P. 37(c)(1) (containing a sanction for failing to provide information in a required disclosure). To prevent unwarranted presuit information losses by lawyers, Professor Paula Schaefer has proposed amendments to FRCP 26(a)(1) on initial disclosures that would require that "a party" provide to "other parties . . . a 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 the initial disclosure rule).

Some general state discovery laws are comparable.[23] These and other laws can cover certain presuit information losses.[24]

A brief look at the history behind the general and special sanction provisions of FRCP 37 is warranted, as it will facilitate exploration of possible new laws on civil protective orders. This review demonstrates the existence and imprecise nature of presuit information maintenance, preservation, and production duties. These duties should guide many individual jurisdictions in drafting new laws on presuit civil protective orders, as many states chiefly follow the key elements of FRCP 37, even if not all of its provisions.[25]

As to FRCP 37, before 2006, the rules treated unavailable ESI and non-ESI comparably.[26] Under the 1993 amendment to Rule 37(c), "[i]f a party fails to provide information or identify a witness . . . the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."[27] The court can replace or supplement this sanction by (1) ordering the party to pay for "reasonable expenses," (2) informing "the jury of the party's failure," and (3) ordering other "appropriate sanctions."[28] Seemingly, one also cannot employ certain information that was provided, like product test results, where other

23. *Compare* VT. R. CIV. P. 37, ME. R. CIV. P. 37 (including no provision like FRCP 37(f) on failing to participate in framing a discovery plan), D.C. SUPER. CT. R. CIV. P. 37 (including no discovery plan provision), ALA. R. CIV. P. 37 (containing no discovery plan provision), N.D. R. CIV. P. 37, *and* OHIO R. CIV. P. 37 (including no discovery plan provision), *with* ILL. SUP. CT. R. 137 (treating conduct prompting possible discovery sanctions as governed by the same standards governing pleading and motion sanctions, unlike FRCP 11(d)), *and* ILL. SUP. CT. R. 219(e) (no voluntary dismissal "to avoid compliance with discovery deadlines, orders or applicable rules").

24. On presuit information losses causing a failure to obey a court order in a pending civil action, see, for example, Thompson v. U.S. Dep't of Hous. & Urb. Dev., 219 F.R.D. 93, 95, 99 (D. Md. 2003) (describing 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, for example, Silvestri v. Gen. Motors Corp., 271 F.3d 583, 587, 588 (4th Cir. 2001) (describing 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, for example, Broccoli v. Echostar Commc'ns Corp., 229 F.R.D. 506, 509 n.2 (D. Md. 2005).

25. For a more detailed treatment of this history, see Jeffrey A. Parness, *State Spoliation Claims in Federal District Courts*, 71 CATH. U.L. REV. (forthcoming 2022) (manuscript at 3–13) (on file with author) and Jeffrey A. Parness, *Lost ESI Under the Federal Rules of Civil Procedure*, 20 SMU SCI. & TECH. L. REV. 25, 26–28 (2017).

26. *See* FED. R. CIV. P. 37(c).

27. FED. R. CIV. P. 37(c)(1).

28. FED. R. CIV. P. 37(c)(1)(A)-(C).

related and pertinent information, like the product itself, the testing processes, or both, were not provided.[29] Moreover, under Rule 37(a)(3)(A), "[i]f a party fails to make a [required discovery] disclosure . . . any other party may move to compel disclosure and for appropriate sanctions."[30] Failures to provide or to make a disclosure of certain information can involve information losses occurring presuit.[31]

FRCP 37(e) on unavailable ESI was created in 2006 but lasted only until 2015, though its norms are still followed in some state civil procedure laws.[32] Rule 37(e) recognized that sanctions could be assessed against a party who lost ESI due to "the routine, good faith operation of an electronic information system"; but sanctions could only be levied upon finding "exceptional circumstances."[33]

---

29. *See* FED. R. CIV. P. 37 (2006).

30. FED. R. CIV. P. 37(a)(3)(A); *see* FED. R. CIV. P. 26(a).

31. Inherent judicial powers are employed to sanction presuit information losses. *See, e.g.*, Silvestri v. Gen. Motors Corp., 271 F.3d 583, 593–95 (4th Cir. 2001) (discussing why 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., 09 CV 5088, 09 CV 5176, 2011 WL 13382162, at *6 (N.D. Ill. May 18, 2011) ("[T]he analysis for imposing sanctions under our inherent powers and Rule 37 is essentially the same.").

32. *See generally* FED. R. CIV. P. 37(f) (2006). *See, e.g.*, MD. R. CIV. P. 2-433(b); N.C. R. CIV. P. 37(b1); MONT. R. CIV. P. 37(f); VT. R. CIV. P. 37(f); MINN. R. CIV. P. 37.05; TENN. R. CIV. P. 37.06; KAN. STAT. ANN. § 60-237(e) (West, Westlaw through 2021 Reg. Sess.); HAW. R. CIV. P. 37(f); N.J. STAT. ANN. § 4:23-6 (West, Westlaw through L.2021); ALA. R. CIV. P. 37(g); *see also* UTAH R. CIV. P. 37(e) (adoption of 2006 FRCP 37(e) accompanied by an explicit recognition of continuing "inherent" judicial power to deal with lost ESI or non-ESI "in violation of a duty" to preserve); OHIO R. CIV. P. 37(F) (a 2008 rule that, in addition to adding 2006 FRCP 37(e), sets out five factors that courts may consider when determining whether to impose sanctions); Parness, *Lost ESI Under the Federal Rules of Civil Procedure*, *supra* note 25, at 26 n.10. *But see* ARIZ. R. CIV. P. 37(g) (containing 2015 FRCP 37(e) but also articulating the parameters of the "duty to take reasonable steps to preserve" ESI and guidelines on what constitute these steps); Parness, *State Spoliation Claims in Federal District Courts*, *supra* note 25, at 6 n.16.

33. FED. R. CIV. P. 37(e) (2006). During that period and beyond, other federal procedural laws have sometimes also distinguished ESI and non-ESI. *See, e.g.*, FED. R. CIV. P. 26(b)(2)(B) ("A party need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of undue burden or cost . . . [unless] the requesting party shows good cause. . . ."); FED. R. CIV. P. 26(f)(3)(C) ("A discovery plan must state the parties' views and proposals on . . . any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced."); FED. R. CIV. P. 34(b)(2)(D) ("[A party] may state an objection to a requested form for producing [ESI]."). Additionally, from 2006 to 2015, other federal discovery rules mingled ESI and non-ESI. *See, e.g.*, FED. R. CIV. P. 26(a)(1)(A)(ii) (The rule on required disclosures includes "a copy—or a description by category and location—of all documents, [ESI], and tangible things that the disclosing party has in its possession, custody, or control . . . ."); FED. R. CIV. P. 34(a)(1)(A) (The rule on requests for production includes "any designated documents or [ESI] . . . from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form."); FED. R. CIV. P. 34(b)(2)(E) (comparably situating documents and ESI for parties producing discovery).

Litigants soon voiced concerns about "the increasing burden of preserving [ESI] for litigation,"[34]under Rule 37(e), and about the uncertainties regarding applicable "preservation standards" created by "[s]ignificant divergences among federal courts across the country."[35] The FRCP Advisory Committee suggested amendments to Rule 37(e) in 2013 that aimed to create uniform guidelines for "all discoverable information," regardless if ESI or non-ESI, in cases of a breach of information-preservation duties.[36] Although this proposal was never completely adopted, a new Rule 37(e) went into effect in 2015.[37]

In contrast to the 2006 Rule that tied ESI to an "electronic information system," the 2015 FRCP 37(e) covers lost ESI both inside and outside of that system.[38] Moreover, the 2015 Rule does not require "exceptional circumstances" to impose sanctions and instead envisions curative measures as sanctions for irreplaceable ESI.[39] It also recognizes broader sanctions for intentional deprivations of ESI.[40]

The 2015 FRCP 37(e) aimed to "foreclose[] reliance on inherent authority or state law to determine when certain measures should be used."[41] Rule 37(e) is based on the federal "common-law duty" to help "preserve relevant information when litigation is reasonably foreseeable."[42] As such, it does not foreclose the validity of an

34. FED. R. CIV. P. 37(e)(2) advisory committee's note to 2013 proposed amendments.

35. *Id.*

36. *Id.* Although rejecting an adoption of the 2006 FRCP 37(e), in 2009, an advisory judicial rulemaking committee in New Mexico determined that its rules should not treat any differently the ESI and non-ESI that is lost as a result of "good-faith, routine destruction" of potential evidence. N.M. R. CIV. P. 1-037(f) committee's note to 2009 amendments.

37. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendments. *See* Parness, *supra* note 25, at 9.

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

39. *Id.* These differences are not always recognized or deemed significant. *See, e.g.*, Gonzalez-Bermudez v. Abbott Laboratories PR Inc., 214 F. Supp. 3d 130, 160 n.10 (D.P.R. 2016) (claiming that the new FRCP 37(e) has "substantially similar" considerations on imposition of sanctions as did the former rule).

40. FED. R. CIV. P. 37(e)(2) advisory committee's note to 2015 amendments.

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

42. *Id.*; *see also* Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) (arguing that federal spoliation principles, not New York spoliation principles, apply during a discovery dispute in a product liability case arising from a New York accident). Regarding when a presuit duty to preserve arises, one court has gone so far (and too far) as to say that "any time a party receives notification that litigation is likely to be commenced." Marten Transp., Ltd. v. Platform Advert., Inc., No. 14-cv-02464, 2016 WL

"independent tort claim for spoliation" under state law, which is operative even if there is no available Rule 37(e) sanction.[43] This is because, unlike Rule 37(e), a spoliation claim may not require a party to fail to "take reasonable steps to preserve"[44] and unavailable ESI can trigger strict liability for information losses under a state statute.[45]

For lost replaceable ESI and for lost non-ESI that are outside of Rule 37(e), there are also available state spoliation claims against parties for presuit losses of materials later deemed discoverable.[46] As will be shown, these claims are sometimes labeled as first-party claims. State spoliation claims sometimes also encompass liabilities for those who are nonparties in the civil actions wherein discoverable information was unavailable from them due to presuit losses.[47] As explained below, these claims are frequently labeled as third-party claims. Here, there is no express, complimentary procedural law duty under FRCP 37(e) for a nonparty to preserve certain ESI "in the anticipation" of civil litigation.[48] The FRCP 37(e) ESI preservation duty follows the federal "common-law duty" regarding information relevant to reasonably foreseeable civil litigation.[49] This procedural common-law duty has encompassed presuit losses of relevant information by future parties, including replaceable ESI and non-ESI

492743, at *5, *6 (D. Kan. Feb. 8, 2016) (including cease-and-desist letter which was acknowledged and acted upon within a few days). A worthy suggestion for codifying the presuit information preservation duty (within FRCP 37) appears in A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 FORDHAM L. REV. 2005, 2023–24 (2011). *Cf.* Joshua M. Koppel, *Federal Common Law and the Courts' Regulation of Pre-Litigation Preservation*, 1 STAN. J. COMPLEX LITIG. 171, 185, 198 (2012) (suggesting that with both federal question and state law claims, federal courts employ state presuit preservation laws and advocating for a model state law to move states toward uniformity).

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

44. *Id.*

45. *See, e.g.*, 210 ILL. COMP. STAT. ANN. 90/1 (West, Westlaw through P.A. 102-376 of 2021 Reg. Sess.) (imposing hospital duty to keep certain x-rays); Rodgers v. St. Mary's Hosp., 597 N.E.2d 616, 620 (1992) (finding an implied cause of action that arises from statute should be governed by principles of negligence (per se) or strict liability). *Cf.* Howard Reg'l Health Sys. v. Gordon, 952 N.E.2d 182, 188 (Ind. 2011) (finding no implied cause of action arising from violation of the statute on maintenance of health care records). Parness, *Lost ESI Under the Federal Rules of Civil Procedure*, *supra* note 25.

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

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

48. *Id.* (ESI lost by a "party" who failed to preserve).

49. FED. R. CIV. P. 37(e), advisory committee's note to 2015 amendments. Presumably, this nonparty preservation duty also operates during litigation before or after the nonparty is served with discovery requests via a deposition.

(outside of FRCP 37(e)).[50] Federal civil procedure law sanctions on nonparties who fail to preserve information presuit might also accompany (or serve instead of) third-party spoliation claims to provide relief for and deter harm caused by information losses. Thus, a procedural law sanction might be levied against a nonparty deponent who fails to provide relevant tangible materials at a deposition due to a presuit loss.[51] This sanction might be a trial witness disqualification or a disallowance of witness fees, which is a significant sanction when it comes to expert witnesses.

C. Presuit Information Creation, Preservation, and Production and Protective Orders

As noted, presuit information losses can be prevented by presuit discovery orders. Under the FRCP, however, presuit opportunities to secure the creation, preservation, and production of relevant information for future civil cases are limited. Some states have broader presuit discovery opportunities, including laws to identify potential defendants[52] and to identify potential causes of action.[53] Of course, the

50. *See, e.g.*, Silvestri v. Gen. Motors Corp., 271 F.3d 583, 585, 587 (4th Cir. 2001) (affirming the district court's dismissal of plaintiff's product liability claim against car maker because, although the plaintiff had the car inspected after the accident, he nevertheless failed to preserve the car, and the car maker only learned about the accident three years later).

51. A nonparty's failure is more likely tied to a contract, agreement, statutory, or regulatory duty to preserve, although 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*, 271 F.3d at 585–87 (sanctioning plaintiff with involuntary dismissal for failing to provide future defendant with a notice of a likely claim and an opportunity to inspect plaintiff's landlady's vehicle that was involved in an accident; however, the landlady, whose husband owned the car, was not sanctioned because she was not asked for the car during discovery); *id.* at 586, 591–92 (seeking no discovery sanction against plaintiff's experts, who inspected and reported on the car soon after the relevant accident, about three years before the suit was commenced—which was also when the defendant learned of the accident—and those experts also suggested that the future defendant "need[ed] to see the car"; yet plaintiff later countersued his lawyer for malpractice when the plaintiff sued for attorney's fees and costs).

52. *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/2-402 (West, Westlaw through P.A. 102-376 of 2021 Reg. Sess.) (allowing the designation of respondents in discovery in pending civil cases); N.Y. C.P.L.R. 3102(a), (c) (MCKINNEY, Westlaw through L.2021) (providing for presuit discovery "to aid in bringing an action").

53. *See, e.g.*, TEX. R. CIV. P. 202.1 (providing for deposition petitions to the court to help investigate a potential claim or suit); N.Y. C.P.L.R. 3102(a), (c) (allowing 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").

need for presuit discovery opportunities substantially evaporates when laws mandate the creation, preservation, and affirmative production of information in a timely manner before the suit. In Florida, for instance, a prospective medical negligence claimant must serve presuit "notification of intent to initiate medical negligence litigation," accompanied by "a verified written medical expert opinion from a medical expert . . . which . . . shall corroborate reasonable grounds to support the claim" and "copies of all the medical records relied upon by the expert."[54]

There are few, if any, state laws on opportunities for individuals or organizations, including those who receive presuit information creation, preservation, or production requests, to secure judicial presuit protective orders.[55] The aforenoted Arizona court rule does provide limited avenues.[56]

The main federal procedural rule on affirmative presuit discovery is FRCP 27.[57] In part, the Rule allows depositions "about any matter" where "the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought."[58] Yet the petitioner must show that the deposition "may

54. FLA. STAT. ANN. § 766.106(2)(a) (West, Westlaw through 2021 First Reg. Sess. & Spec. "A" Sess. of 27th Leg.), *invalidated by* Weaver v. Myers, 229 So. 3d 1118 (Fla. 2017); FLA. STAT. ANN. § 766.203(2)(b) (West, Westlaw through 2021 First Reg. Sess. & Spec. "A" Sess. of 27th Leg.).

55. *See, e.g.*, FED. R. CIV. P. 27.

56. *See supra* notes 3–5 and accompanying text.

57. FED. R. CIV. P. 27.

58. FED. R. CIV. P. 27(a)(1)(A); *see also* CONN. GEN. STAT. ANN. § 52-156a(a)(1) (West, Westlaw through 2021 Reg. Sess. & 2021 June Spec. Sess.); MISS. CODE ANN. § 13-1-227(a)(1) (West, Westlaw through laws from 2021 Reg. Sess.); S.D. CODIFIED LAWS § 15-6-27(a)(1)(A) (Westlaw through 2021 1st Spec. Sess.); ALA. R. CIV. P. 27(a)(1); ARK. R. CIV. P. 27(a)(1); ARIZ. R. CIV. P. 27(a)(1)(A); MINN. R. CIV. P. 27.01; NEB. CT. R. DISC. § 6-327(a)(1)(i); S.C. R. CIV. P. 27(a)(1); W. VA. R. CIV. P. 27(a)(1). *But see* WIS. STAT. ANN. § 804.02(1)(a) (West, Westlaw through 2021 Act 59-79); 9 R.I. GEN. LAWS ANN. § 9-18-12 (West, Westlaw through ch. 424 of 2021 Reg. Sess. of R.I. Leg.); ILL. SUP. CT. R. 217(a)(1) (not needing to show that petitioner "cannot presently" sue); MD. R. CIV. P. 2-404(a)(2).

Beyond testimony perpetuation via deposition under FRCP 27, there is little else in the FRCP or the U.S. Judicial Code on presuit opportunities to preserve discoverable information, excepting the recognition under FRCP 27(c) of "a court's power to entertain an action to perpetuate testimony." FED. R. CIV. P. 27(c).

Some states have special testimony perpetuation laws. For example, 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 right." MO. ANN. STAT. § 492.420 (West, Westlaw

prevent a failure or delay of justice."[59] As part of the deposition, the petitioner may request that the deponent produce documents or submit to a mental or physical evaluation.[60]

Importantly, the Rule "does not limit a court's power to entertain an action to perpetuate testimony[,]"[61] which stems from an equitable bill predating the FRCP.[62] Although the bill is not employed often,[63] it tracks the Rule 27 requirements.[64] As with testimony perpetuation, there are comparable state laws recognizing independent presuit discovery actions.[65]

---

through 2021 First Reg. & First Extraordinary Sess. of 101st Gen. Assemb.); *see also* GA. CODE ANN. § 24-13-150 (West, Westlaw through 2021 Reg. Sess. of Ga. Gen. Assemb.) ("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.). Further, in Illinois, there is a separate testimony perpetuation law for witnesses in pending criminal cases. ILL. SUP. CT. R. 414.

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

60. *Id.* (referencing FED. R. CIV. P. 34 and 35).

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

62. *See, e.g.*, Rindskopf v. Platto, 29 F. 130, 130 (E.D. Wis. 1886) (discussing equity discovery bill where related law action between same parties was pending); 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 from a bill to obtain evidence to be used in another suit."); Shore v. Acands, Inc. 644 F.2d 386, 389 (5th Cir. 1981).

63. 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's records shortly after Dr. Dao was involuntarily removed from a United flight. *See* Parness & Theodoratos, *supra* note 9, at 655 (granting Dr. Dao's bill per party agreement). An older case is Lubrin v. Hess Oil Virgin Islands Corp., 109 F.R.D. 403, 405 (D.V.I. 1986) (preserving 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. These 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." Parness & Theodoratos, *supra* note 9, at 681.

64. *See, e.g.*, *Shore*, 644 F.2d at 389 (citing 4 MOORE'S FEDERAL PRACTICE ¶ 27.21); *see also Rule 34(c) and Discovery of Nonparty Land*, 85 YALE L.J. 112 (1975); *Lubrin*, 109 F.R.D. at 405 (stating most cases find that "independent action to obtain discovery" of information and documents from a nonparty is similar "to the antiquated instrument called an equitable bill of discovery").

65. ARK. R. CIV. P. 27(c); KAN. STAT. ANN. § 60-227(d) (West, Westlaw through 2021 Reg. Sess.); MISS. CODE ANN. § 13-1-227(c) (West, Westlaw through laws from 2021 Reg. Sess.); NEB. CT. R. DISC. § 6-327(c); S.C. R. CIV. P. 27(c); *see also* MINN. R. CIV. P. 34.03(b) (noting no preclusion of "an independent action against a person not a party for production of documents and things and permission to enter land"). *But see* MD. R. CIV. P. 2-404(a)(6); CONN. GEN. STAT. ANN. § 52-156a (West, West, Westlaw through 2021 Reg. Sess. & 2021 June Spec. Sess.); S.D. CODIFIED LAWS § 15-6-27(a)(3) (Westlaw through 2021 1st Spec. Sess.); ALASKA R. CIV. P. 27(a)(4), (b)(3) (comprising court rules and statutes on perpetuating witness testimony via presuit depositions where there are no recognitions of independent actions).

Some state civil procedure discovery laws permitting presuit creation, preservation, and production orders go beyond the FRCP, by authorizing depositions, document productions, and inspections involving nonparties, in cases where pending civil actions involving others already exist.[66] Other state discovery laws go beyond the FRCP by allowing presuit information creation, preservation, and production orders when there are no pending lawsuits.[67] Still, other state presuit discovery laws, such as a Texas rule, [68] help those petitioners looking to establish potential causes of action, when the roles of possible defendants who caused the harm are unknown.[69]

66. FED. R. CIV. P. 30(a)(1) (allowing deposition by oral questions of any person including a party); FED. R. CIV. P. 34(c) ("[A] nonparty may be compelled to produce documents and tangible things or to permit an inspection."); FED. R. CIV. P. 45(c)(2) (noting that a subpoena commanding a person to attend a deposition may also command production of ESI or tangible things, or an inspection); *see* 735 ILL. COMP. STAT. ANN. 5/2-402 (West, Westlaw through P.A. 102-376 of 2021 Reg. Sess.) (authorizing 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 . . ."); *see also* N.Y. C.P.L.R. 3102(c) (MCKINNEY, Westlaw through L.2021) (permitting presuit discovery "to aid in bringing an action").

67. *See generally* ILL. SUP. CT. R. 224(a)(i) (authorizing an independent action by a potential claimant "for the sole purpose of ascertaining the identity of one who may be responsible in damages . . ."); N.Y. C.P.L.R. 3102(c) (permitting presuit discovery "to aid in bringing an action"); OHIO R. CIV. P. 34(D)(3)(a)-(b) (allowing presuit discovery only where "necessary to ascertain the identity of a potential adverse party"); *see also* Bay Emm Vay Store, Inc., v. BMW Fin. Servs. N.A., 116 N.E.3d 858, 861 (Ohio Ct. App. 2018) (stating that petitioner must also be "otherwise unable to bring the contemplated action"); White v. Equity, Inc., 899 N.E.2d 205, 210, 211 (Ohio Ct. App. 2008) (finding 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, 1055 (Ohio Ct. App. 1997) (the rule supplements were promulgated in response to a case interpreting the statute on presuit discovery aimed at identifying potential causes of action).

68. *See* TEX. R. CIV. P. 202.1 (noting that conditions limiting postsuit depositions can also limit presuit depositions). The potential availability of this rule in a federal district court is discussed in Jeffrey Liang, *Reverse* Erie *and Texas Rule 202: The Federal Implications of Texas Pre-suit Discovery*, 89 TEX. L. REV. 1491 (2011). Under the Texas rule, a petitioner must show that the deposition "may prevent a failure or delay of justice," or that "the likely benefit" of the deposition "outweighs the burden or expense of the procedure." TEX. R. CIV. P. 202.4(a); *see also In re* Hewlett Packard, 212 S.W.3d 356, 362 (Tex. Crim. App. 2006) (stating that benefits do not outweigh burdens, especially as trade secrets were involved). These depositions "are governed by the rules applicable to depositions of nonparties in a pending suit." TEX. R. Civ. P. 202.5. That is, petitioners can secure document or ESI production through the depositions. *See* TEX. R. CIV. P. 176.2(b) (stating that 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).

69. *See generally* Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 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 (2007) (advocating for expanding presuit discovery laws in order to promote greater access to justice for those with claims but limited resources).

Under New York law, for instance, "[b]efore an action is commenced, disclosure to aid in bringing an action . . . may be obtained" through several presuit discovery devices, such as interrogatories, depositions, inspections of documents or property, physical and mental examinations, demands for addresses, and requests for admission.[70] Under Ohio law, "[w]hen a person claiming to have a cause of action or a defense . . . without the discovery of a fact from the adverse party, is unable to file his complaint or answer, he may bring an action for discovery . . . with any [necessary] interrogatories . . . ."[71]

As with the laws on discovery sanctions in pending cases, the laws on presuit discovery creation, preservation, and production 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 other instrument of writing, and 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."[72]

Presuit information protective order laws are different in that they allow petitions to secure judicial orders so that certain information need not be created, preserved, or produced ahead of any related civil litigation.[73] These laws are rare. As noted, a current Arizona court rule, effective since 2018, authorizes these petitions for nonparties to "determine the existence or scope of any duty to preserve [ESI]."[74] Additionally, it allows nonparties with "a preservation request" for ESI relevant to pending litigation to petition for a protective order on ESI

70. N.Y. C.P.L.R. 3102(a), (c).

71. OHIO REV. CODE ANN. § 2317.48 (West, Westlaw through File 59 of 134th Gen. Assemb. (2021-2022)). 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).

72. MO. ANN. STAT. § 492.420 (West, Westlaw through 2021 First Reg. & First Extraordinary Sess. of 101st Gen. Assemb.); *see also* MONT. WATER RIGHT ADJUDICATION R. 28 (requiring that testimony perpetuation via deposition "regarding the historical beneficial use of any water right claim" include "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").

73. *See, e.g.*, ARIZ. R. CIV. P. 45.2(e).

74. ARIZ. R. CIV. P. 45.2(e)(1).

preservation.[75] Petitioner need not be an anticipated adverse party in a later related suit[76] and need not be an anticipated new adverse party in a pending related suit.[77]

Comparable in effect to presuit information protective order laws are presuit information laws that deny the existence of certain duties on information creation, preservation, and production in anticipation of later civil litigation.[78] These laws are typically not express in their denials; rather, they are laws that can be read to exclude certain duties by only expressly recognizing other duties.[79] For example, consider an Illinois statute requiring hospitals to retain x-rays for five years, though up to twelve years if notified within five years of pending litigation.[80] Seemingly, after five years with no notice of pending litigation, hospitals can destroy x-rays with little concern about later spoliation claims or sanctions for information preservation failures.

II. CURRENT SUBSTANTIVE LAWS ON PRESUIT INFORMATION LOSSES[81]

A. Introduction

Beyond discovery sanction laws on presuit information losses, some states allow damage claims for harms caused by these losses (herein

75. ARIZ. R. CIV. P. 45.2(d)(2).

76. *See* ARIZ. R. CIV. P. 45.2(b)(1), (b)(2), (e)(1). Rule 45.2(e) petitions need not be preceded by "meet and confer" consultations. *See also* ARIZ. R. CIV. P. 16(b)(1), (c)(8)(B)(xiii). Parness & Theodoratos, *supra* note 9, at 663 n.69.

77. *See* ARIZ. R. CIV. P. 45.2(b)(1), (b)(2), (d)(2).

78. *See, e.g.*, 210 ILL. COMP. STAT. ANN. 90/1 (West, Westlaw through P.A. 102-376 of 2021 Reg. Sess.).

79. *Id.*

80. *Id.*; *see also* LA. STAT. ANN. § 40:2144(F)(1) (Westlaw through 2021 Reg. Sess. & Veto Sess.) ("Hospital records shall be retained by hospitals . . . for a minimum period of ten years from the date a patient is discharged."), *used in* Longwell v. Jefferson Parish Hosp. Serv. Dist. No. 1, 970 So. 2d 1100, 1106 (La. Ct. App. 2007) (need deliberate spoliation to support tort claim); KAN. ADMIN. REGS. § 100-24-1(a) (Westlaw through Vol. 40, No. 47, Nov. 25, 2021) (a licensee's duty to "maintain an adequate record for each patient for whom the licensee performs a professional service"), *employed in* Foster v. Lawrence Mem'l Hosp., 809 F. Supp. 831, 838 (D. Kan. 1992) (spoliation claim against doctor for breach of regulatory duty).

81. This section summarizes previous work that the Author published elsewhere. For a longer discussion, see Parness, *supra* note 25 (manuscript at 13–29) and Parness & Theodoratos, *supra* note 9, at 665–74.

spoliation claims). Because state substantive spoliation claims now vary widely in the United States and can be presented in related civil actions,[82] either in federal or state courts, the interplay between these laws and any new procedural laws on presuit protective orders should vary.

Spoliation claims cover harms dealing with the reduced or eliminated opportunity to bring civil claims or defenses. They may originate in both general or special laws and are frequently recognized in case law.[83] State spoliation laws vary significantly on issues such as who owes a duty to preserve information; how the duty is breached; and what the available remedies are for breach.[84] The following sections briefly review current laws recognizing spoliation claims[85] because they will guide the availability of any new presuit protective orders.

---

82. There is precedent in some state courts that a concurrent presentation is preferred. *See, e.g.*, Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 272 (Ill. 1995). Any preference for joinder of related spoliation claims in federal courts is more difficult, primarily due to subject matter jurisdiction constraints, such as with the discretion that accompanies supplemental or ancillary jurisdiction claims. 28 U.S.C. § 1367 (supplemental jurisdiction); Butt v. United Bhd. of Carpenters & Joiners of Am., 999 F.3d 882, 886 (3d Cir. 2021) (explaining the differences between and "needless confusion" over supplemental and ancillary jurisdiction).

83. 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) (stating that "unless 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, 122 (Utah 2017) (reaffirming precedent on state constitutional due process obligations 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, 328, 330 (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, who was 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, 1191, 1197 (N.Y. 2007) (finding 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). Parness & Theodoratos, *supra* note 9, at 665 n.79.

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

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

State spoliation claims can be heard in federal district courts because there are no federal substantive spoliation claims that can be heard in those courts.[86] The Advisory Committee Note accompanying the amendments to 2015 FRCP 37(e) recognized that this rule did not "affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim."[87] 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 nonrestorable ESI.

The following sections survey the varying forms of state spoliation laws, utilizing the Illinois Supreme Court's ruling in *Boyd v. Travelers Insurance Company* as guidance. The *Boyd* court 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.[88]

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

87. *See* FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendments. There is room for some substantive federal spoliation law especially when a government official intentionally destroys, or fails to maintain or preserve, information important in a later civil action. *See, e.g.*, 42 U.S.C. § 1983 (providing 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) (finding liability for those acting unconstitutionally under color of federal law). On Due Process claims involving information lost during criminal cases which may prompt federal civil actions, see, for example, Jutrowski v. Twp. of Riverdale, 904 F.3d 280, 294 (3d Cir. 2018) (providing that a civil rights claim can be based on a conspiracy of silence amongst police regarding an officer's earlier use of excessive force).

88. 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*, 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

These duties, recognized "under existing negligence law,"[89] are only somewhat akin to the duties under Illinois civil procedure laws to have information available when requested via formal discovery, including information tied to duties to preserve before civil litigation commences.[90]

B. Special Circumstance and Voluntary Assumption Claims

As the *Boyd* court explained, although the general common-law torts rule "is that there is no duty to preserve evidence," a duty can result from a "special circumstance" or from a defendant's voluntary assumption of a "duty by affirmative conduct."[91] A special circumstance can emerge from an agreement, contract, or statute as well as from a fiduciary relationship among potential adverse parties.[92] This fiduciary relationship, which does not require an explicit ESI

---

and intentional tort claim for evidence spoliation by a nonparty but only an intentional tort claim for evidence spoliation by an adverse party).

89. *Boyd*, 652 N.E.2d at 267. These duties may originate elsewhere, such as in contract or insurance laws. *See, e.g.*, cases cited *supra* note 83. At times, preservation duties are said to arise under the traditional doctrine of negligence, but the burden of proof is shifted. Smith v. Atkinson, 771 So. 2d 429, 432 (Ala. 2000) (finding a third-party spoliator must have actual knowledge of pending or potential civil action).

90. *See, e.g.*, Shimanovsky v. Gen. Motors Corp., 692 N.E.2d 286, 290 (Ill. 1998) (providing if trial court could not "sanction a party for the 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 postsuit and arise solely under civil procedure laws. As noted, presuit information preservation duties differ from presuit information maintenance duties. *See supra* note 1; *see also, e.g.*, Dittman v. UPMC, 196 A.3d 1036, 1048 (Pa. 2018) (finding employer owed duties to employees "to use reasonable care" to safeguard employees' sensitive personal data once collected and presumed duties regarding privacy protections during data collection).

91. *Boyd*, 652 N.E.2d at 267.

92. *See, e.g.*, Cooper v. State Farm Mut. Auto. Ins. Co., 177 Cal. App. 4th 876, 901 (2009) (entailing suit by insured against insurer for promissory estoppel or voluntary assumption of duty when insurer destroyed the tire that it examined, which was needed by the insured for its later product liability suit, and the insurer had made a promise to safeguard the tire); *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 these special circumstances can be challenging. *Compare* Reynolds v. Henderson & Lyman, 903 F.3d 693, 696 (7th Cir. 2018) (finding the owner of LLC, who was represented by a lawyer, was owed no duty of care by the lawyer as long as the owner was not "a direct and intended beneficiary" of the legal representation), *with* BAS Broad., Inc. v. Fifth Third Bank, 110 N.E.3d 171, 175 (Ohio Ct. App. 2018) (finding a "special relationship of trust and confidence" in an otherwise "ordinary business" relationship can prompt "a duty to disclose material information").

preservation agreement, emerges in doctor–patient, insurer–insured,[93] and attorney–client relationships.[94]

The voluntary assumption of a preservation duty can occur when someone has assumed control over information that will be important, with reasonable foreseeability, during a future lawsuit.[95] A party, for example, may have a spoliation claim against a government officer, an expert, or an insurance adjuster in control of vital trial information.[96]

A common-law information spoliation tort might require proving more than mere negligence in cases where there are no special circumstances or an affirmative assumption of the duty.[97] The required

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

94. On deterring presuit attorney spoliation, see, for example, Schaefer, *supra* note 22, at 631–32 (advocating for a new procedural rule, within FRCP 26(a)(1)(A)(v), on mandated disclosures of presuit evidence preservation efforts by parties, including efforts by their attorneys). Special deterrence norms for attorneys, compared to insurers or doctors, may be especially in order in settings where only attorneys are immunized from suits for malfeasance by those with whom they are not in fiduciary or otherwise special relationships. *See generally* Haynes & Boone, LLP v. NFTD, LLC, 631 S.W.3d 65 (Tex. 2021) (attorneys immune from claims by nonclients founded on attorneys' providing legal services to clients within adversarial contexts or on attorneys' services for clients in nonlitigation settings involving business transactions surrounding sale of company assets). *Compare* Andrea A. Anderson, *The Spoils of War: Arguments in Favor of Independent Claims for Spoliation Against Third Parties*, 11 WAKE FOREST L. REV. ONLINE 1, 3 (2021) (urging state law recognitions of intentional spoliation claims against third-parties), *with* 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. While some privilege . . . in or in anticipation of litigation might sometimes be appropriate, any such privilege should be limited to conduct directed to seeking favorable adjudication.").

95. In one case, there was no duty recognized for a lawyer to the lawyer's client's adversary, at least where evidence was concealed, but not destroyed, by the lawyer. *See generally* Elliot-Thomas v. Smith, 110 N.E.3d 1231 (Ohio 2018).

96. *Compare* Dardeen v. Kuehling, 821 N.E.2d 227, 233 (Ill. 2004) (finding that insurer, who told insured homeowner she could remove bricks in an allegedly hazardous sidewalk, had no liability to pedestrian who had earlier fallen), *with* Jones v. O'Brien Tire & Battery Serv. Ctr., Inc., 871 N.E.2d 98, 108 (Ill. App. Ct. 2007) (finding a driver's insurer potentially liable to the insured's joint tortfeasor for failure to preserve wheels from the driver's car after the driver's insurer settled with a tort victim, who later sued the insured's joint tortfeasor, when the driver's insurer had voluntarily undertaken control of wheels for its own benefit and should have anticipated possibility of future litigation), *and Boyd*, 652 N.E.2d at 271 (finding employer's workers' compensation insurer owed duty to preserve space heater that it took and that was involved in a workplace accident, where employee pursued product liability claim against manufacturer of heater).

97. *See, e.g.*, Willis v. Cost Plus, Inc., No. 16-639, 2018 WL 1319194, at *3–5 (W.D. La. Mar. 12,

level of proof may change depending on whether the one who owed the duty could be an adverse party in the litigation.[98] And, if found to be intentional, liability can differ if the information was either destroyed or concealed.[99]

At least in the tort setting, special circumstances 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.[100]

C. Agreement/Contract Claims

It is not clear under *Boyd* if there is a significant distinction between information preservation claims tied to agreements and those tied to

2018) (showing that although 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). *But see* Richardson v. Sara Lee Corp., 847 So. 2d 821, 824 (Miss. 2003) (finding no negligence or intentional tort claim for spoliation of evidence). 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) (finding intentional evidence spoliation prompts a rebuttable presumption that evidence was materially unfavorable to spoliating party, while negligent spoliation does not).

98. *See, e.g.*, Hannah v. Heeter, 584 S.E.2d 560, 573–74 (W. Va. 2003) (finding no negligent spoliation claim against adverse party but finding a negligent spoliation claim against a third party, who could not otherwise be an adverse party, because 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). *But see, e.g.*, Oliver v. Stimson Lumber Co., 993 P.2d 11, 16–17, 20 (Mont. 1999) (recognizing a possible negligent spoliation of evidence tort by employee against employer, who could not otherwise be sued due to Workers' Compensation Act, for employment injuries even though the 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); MetLife Auto & Home v. Joe Basil Chevrolet, Inc., 807 N.E.2d 865, 868 (N.Y. 2004) (concluding that 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); Nichols v. State Farm Fire & Cas. Co., 6 P.3d 300, 301–02, 304 (Alaska 2000) (dealing with intentional spoliation claim by neighbor against homeowner's/tortfeasor's insurer and against homeowner); Fletcher v. Dorchester Mut. Ins. Co., 773 N.E.2d 420, 427–28 (Mass. 2002) (concluding no negligent evidence spoliation tort by tenant against a landlord's insurer or against an expert retained by that insurer).

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

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

contracts. Perhaps those information preservation claims founded on agreements embody promises of future information preservation procedures related to potential or actual lawsuits. Similar civil procedure rules address choice of law and jury trial waivers. And maybe those information preservation claims, tied to a contract, embody promises related to information storage that are unrelated to current litigation. Instead, document preservation is needed to ensure future access to certain materials, like tax, school, or medical records. These promises will, more likely, follow substantive contract laws (instead of civil procedure laws), but preservation failures could prompt later civil litigation sanctions. Finally, agreements, as opposed to contracts, under *Boyd* might also entail unilateral promises on information preservation that, when harmful to those who reasonably relied on them if broken, could lead to civil claims as well as sanctions.

D. Statutory and Regulatory Claims

Spoliation claims under statutes on information maintenance, preservation, or production are also contemplated by the *Boyd* court. Statutes might expressly recognize a claim for harm in civil litigation resulting from the loss of certain information.[101] Further, statutory duties, as well as regulatory information maintenance or preservation duties tied to enabling statutes, can support implied spoliation claims. Absent express legislative intent, claims generally may be implied from prohibitions in written statutes under certain circumstances.[102] As such, implied spoliation claims arising from regulatory duties will be

101. For a longer discussion on this topic and specific examples, see Parness & Theodoratos, *supra* note 9, at 671–74.

102. Metzger v. DaRosa, 805 N.E.2d 1165, 1168 (Ill. 2004) ("Implication of a private right of action is appropriate if: (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."). 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 Chi., 441 U.S. 677, 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) ("[I]nfluenced by three of four factors set out in [*Cort*]."); Bennett v. Hardy, 784 P.2d 1258, 1261 (Wash. 1990) (en banc) ("[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).

assessed differently than claims implied from statutory duties.[103] Additionally, some statutory duties on information preservation apply to criminal cases. These duties could also support civil spoliation claims.[104]

III. NEW LAWS ON PRESUIT PROTECTIVE ORDERS

A. Introduction

As demonstrated, there are significant procedural and substantive legal consequences for those who fail to maintain, preserve, or produce discoverable information before civil litigation. Failures often occurred when there were presuit information demands from potential adversaries. Whether or not faced with presuit demands, those holding or having access to possibly relevant information are between a rock and a hard place. Thus, both compliance with presuit maintenance, preservation, and preservation demands and noncompliance with these demands frequently carry heavy costs.[105] Even where there are no demands, spoliation sanctions, spoliation claims, or both can later be pursued where relevant information was earlier lost because presuit information maintenance, preservation, and production duties (either procedural or substantive in nature) generally do not depend upon presuit information demands.

103. Of course, precedents implying causes of action from regulations necessarily entail considerations of the language and legislative intentions behind the enabling statutes. Alexander v. Sandoval, 532 U.S. 275, 1522–23 (2001) (although a five-justice opinion rejected implying a private cause of action for violations of a Department of Transportation regulation, the majority indicated there may be a different outcome where the enabling statute contained language on creating private rights rather than on government enforcement).

104. *See, e.g.*, S.C. CODE ANN. § 17-28-320(a)(1), (10), (14), (19) (Westlaw through Act No. 116) (codifying the duty of a "custodian" to "preserve all physical evidence and biological material related to conviction or adjudication of a person" for some offenses, including murder, criminal sexual conduct, arson, and certain forms of "sexual misconduct"). 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(A) (Westlaw through Act No. 116).

105. These costs can be reduced, for example, by following local rules guiding presuit information demands. *See, e.g.*, N.D. Ill. L.P.R. ESI 2.2 (advising counsel to avoid "[v]ague and overly broad preservation requests").

New laws authorizing presuit protective orders are needed both for those who face and for those who do not face presuit information demands regarding materials potentially discoverable later.[106] New laws should especially allow potential civil litigants presented with presuit demands for information maintenance, production, and preservation in anticipation of future (and perhaps imminent) civil litigation to seek trial court assistance to better determine their information duties. Here, there is little speculation about a disputed issue. New laws would lessen the need for later discovery sanctions, state spoliation claims, or both; prompt more informed presuit settlements; and, over time, foster greater certainties about presuit obligations on, and opportunities for, information maintenance, preservation, and production.

Difficult issues arise, however, in crafting any new laws. One issue is justiciability because protective order petitions would not necessarily raise or supplement pending, substantive law claims.[107] Assuming justiciability, additional questions arise on whether a court can issue a presuit protective order related to a future claim that may not (or will not) ever be presented in that court. Whatever the breadth of authority and wherever the forum, there are also issues about the factors that should guide any presuit protective order, including how imminent any later suit must be; the availability of alternative protective devices; whether a prospective nonparty in a related later suit (like a witness) can ever seek a protective order; and what

106. Elsewhere, this Article's Author argued for greater authorizations of presuit information maintenance, production, and preservation orders. Parness and Theodoratos, *supra* note 9, at 685 ("New civil procedure laws should, at the least, authorize presuit court orders involving evidence preservation when the evidence, relevant to possible civil litigation, will likely spoil otherwise and is subject to a preservation duty under substantive law."). This led to the Author's proposed FED. R. CIV. P. 27 amendment on these orders. *See* Jeffrey A. Parness, *Proposed Amendment to Federal Civil Procedure Rule 27(c): Federal Presuit Information Preservation Orders*, ADVISORY COMM. ON FED. CIV. PROC. RULES 2020, at 9 (Dec. 9, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3745893 [https://perma.cc/H576-55SW] (proposing that FRCP 27(c) explicitly recognizes a court's power to entertain an action "involving presuit information preservation when necessary to secure the just, speedy, and inexpensive resolution of a possible later federal civil action").

107. A protective order petition would not be supplemental to a claim that is already presented in a pending case, where the pending claim could not, by itself, support the requested protective order (under FRCP 26(c)), as when a litigant in the case seeks an information protection order unrelated to any pending claim (i.e., no relevance), but desired in anticipation of a new (perhaps imminent) claim. FED. R. CIV. P. 26(c).

consequences should attach to a presuit protective order, such as possible cost recovery where an order is warranted and possible sanctions where an earlier presuit protective order is later deemed erroneous.

These issues on possible new presuit civil protective orders must be approached with a view of the particular jurisdiction's current laws on postsuit civil protective orders. The varying forms of postsuit protective orders in U.S. courts will first be addressed.[108]

B. Current Discovery Laws on Postsuit Protective Orders

FRCP 26(c) is the foundation for federal postsuit civil protective orders involving discovery.[109] This rule is substantially replicated in some states.[110] Other states have postsuit protective order laws involving discovery that differ somewhat from FRCP 26(c).[111] Of course, there are also distinct, non-discovery postsuit protective orders so that later judgments may be satisfied, such as cases involving domestic violence or property maintenance.[112]

FRCP 26(c) recognizes "[a] party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or . . . on matters relating to a deposition, in the court for the district where the deposition will be taken."[113] Thus, when a person from whom discovery is sought seeks a protective order, the order may be issued before there is a joinder of any claim involving that person.[114] Pre-motion attempts to resolve disputes must first

108. *See infra* Part III.B.

109. *See* FED. R. CIV. P. 26(c).

110. *See, e.g.*, MONT. R. CIV. P. 26(c); W. VA. R. CIV. P. 26(c); ARK. R. CIV. P. 26(c); N.D. R. CIV. P. 26(c).

111. *Compare* TENN. R. CIV. P. 26.03 (requiring no pre-motion certification of good faith effort to resolve dispute without court action), OHIO R. CIV. P. 26(c) (demanding no pre-motion certification of good faith), N.M. DIST. CT. R. CIV. P. 1-026(c) (requiring no pre-motion certification of good faith), N.C. R. CIV. P. 26(c) (including special provision on protective order involving ESI discovery), *and* MINN. R. CIV. P. 26.03(a) (requiring no pre-motion certification of good faith), *with* FED. R. CIV. P. 26(c).

112. *See, e.g.*, W. VA. CODE ANN. § 48-27-403(a) (West, Westlaw through legis. of 2021 First Spec. Sess.) (providing ex parte protective orders on domestic violence); N.Y. C.P.L.R. 7502(c) (MCKINNEY, Westlaw through L.2021) (allowing attachment or preliminary injunction related to an arbitration "that is pending or that is to be commenced" in New York or elsewhere).

113. FED. R. CIV. P. 26(c)(1).

114. *See id.*

occur.[115] The rule declares that any protective order must safeguard against "annoyance, embarrassment, oppression, or undue burden or expense."[116] Discovery may be forbidden altogether or limited in certain ways.[117] Information disclosures may be wholly denied for varying reasons, including trade secrets, confidential research, and commercial information.[118] The expenses involved in presenting or defending against a protective order motion can be shifted with orders directed at parties, movants, or advising attorneys that are founded on either the lack of substantial justification or concerns about justice.[119]

As noted,[120] Arizona has had a broader protective order law on discovery since 2018. But that rule only speaks to ESI preservation duties.[121] It authorizes a presuit petition for protection on behalf of one receiving a "preservation request" before any pending lawsuit is filed, whether or not one is expecting to be named as a party in a later related suit.[122] It also authorizes not only postsuit protective orders on behalf of a party in a pending civil action[123] but also a postsuit order on behalf of a nonparty who may or may not later be named as a party in the suit.[124]

C. Justiciability

Under federal protective order laws, and almost all comparable state laws, usually a constitutional "[c]ase" or "[c]ontroversy," "justiciable matter," or the like[125] involving a "claim" and a "demand for relief"[126] must have at least been alleged before a protective order can be sought. In presuit settings, protective order petitions will not accompany these

115. *Id.* (movant's certification).
116. *Id.*
117. FED. R. CIV. P. 26(c)(1)(A) ("forbidding the disclosure or discovery"); FED. R. CIV. P. 26(c)(1)(B) ("specifying terms").
118. FED. R. CIV. P. 26(c)(1)(G).
119. FED. R. CIV. P. 26(c)(3) (referencing FED. R. CIV. P. 37(a)(5)).
120. *See supra* notes 3–6 and accompanying text.
121. ARIZ. R. CIV. P. 45.2(a).
122. ARIZ. R. CIV. P. 45.2(b)(2).
123. ARIZ. R. CIV. P. 45.2(b)(1), (b)(2), (d)(1).
124. ARIZ. R. CIV. P. 45.2(b)(1), (b)(2), (d)(2).
125. The terminology on required justiciability varies. *Compare* U.S. CONST. art. III, § 2 (mentioning "[c]ases" or "[c]ontroversies"), *with* ILL. CONST. art. VI, § 9 (referring to "all justiciable matters").
126. FED. R. CIV. P. 8(a)(2), (3).

allegations, as they do not in Arizona.[127] Might some or all laws on presuit civil protective orders violate constitutional justiciability requirements?

The answer should usually be no, as demonstrated by the longstanding general recognition of orders in both federal and state courts on presuit depositions to perpetuate testimony.[128] These depositions can include orders involving productions of documents, ESI, and tangible things; land entries, inspections, measures, photographs, tests, samples, and the like; and physical or mental examinations or both.[129]

A quick review of FRCP 27(a) on testimony perpetuation demonstrates that there does not even need to be a dispute between interested "expected adverse" parties over the deposition.[130] Seemingly, presuit depositions can be ordered even where all "expected adverse" parties agree (as does the deponent who is not an expected party) that testimony needs to be perpetuated. Yet court oversight is permitted, in part, so that the deposition can be introduced into evidence in a later federal civil action[131] and so that a judge may rule upon any disputes occurring during the deposition.

Although there is no need for a pending "claim" and "demand for relief" under FRCP 27(a), the petitioner must be expecting to be a party to an action cognizable in a United States court, which the petitioner cannot then "bring . . . or cause . . . to be brought."[132] So, in many

127. ARIZ. R. CIV. P. 45.2(b)(1) (allowing ESI preservation request "for possible use in . . . anticipated litigation").

128. *See* FED. R. CIV. P. 27(a)(3).

129. *See, e.g.*, *id.* (stating that presuit deposition orders can authorize discovery under FRCP 34 and 35).

130. FED. R. CIV. P. 27(a)(1).

131. *Id.*; FED. R. CIV. P. 27(a)(4) (stating that a deposition taken under FRCP 27(a) "may be used under Rule 32(a) in any later-filed district-court action" and a presuit deposition not taken under FRCP 27(a) is only admissible in a later federal action if "admissible in evidence in the courts of the state where it was taken").

132. FED. R. CIV. P. 27(a)(1)(A). It is unclear whether a "United States court" under the rule means only a U.S. district court, means any Article III court, or includes any U.S. tribunal. *See* U.S. CONST. art. I, § 8 ("Tribunals inferior to the [S]upreme Court"). *Compare* ILL. SUP. CT. R. 217(a) (allowing presuit testimony perpetuation "regarding any matter that is or may be cognizable in any court or proceeding"), *with* ALA. R. CIV. P. 27(a)(1) (providing presuit testimony perpetuation "regarding any matter that may be cognizable in any court of this state"), *and* TEX. R. CIV. P. 202.1(a) (allowing testimony perpetuation "for use in an anticipated suit").

FRCP 27(a) settings, there is imminent, more traditional justiciability.[133] Thus, a mere witness cannot seek to perpetuate his or her own testimony in order to avoid the need to respond to any later deposition in some possible civil action.[134] And an expected lienholder with interests in another's later civil action recovery or an insurer who expects to have to, under a duty, defend an insured in a later civil action cannot seek to perpetuate testimony.[135]

Presuit protective orders would be like presuit deposition processes in that they would be available to "prevent a failure or delay of justice."[136] Further, their availability could be made to depend upon an actual dispute over discoverable information.[137] No advisory opinion here making the dispute nonjusticiable. For example, consider the plight of an expected party or witness in a later, likely, civil action who receives a letter demanding information preservation in anticipation of future litigation (whether involving irreplaceable ESI, replaceable ESI, or non-ESI). This letter may also indicate that there is already a procedural common-law duty to preserve, a substantive law not to spoil, or a statutory or regulatory duty to maintain, preserve, produce, or all of the above. The recipient of the demand may believe, in good faith, that the request is not supported under law; that the request, though supported, is excessive or disproportionate when assessing costs and benefits; or that the request is unwarranted since alternative means of access are easily available to the requestor. The availability of a presuit protective order clarifying the recipient's duties would relieve recipients of having to choose between very costly information maintenance, preservation, or production and the risks of later discovery sanctions or spoliation claims due to noncompliance with presuit requests.

Although presuit protective discovery orders are akin to presuit deposition orders, there are other presuit judicial order laws that seemingly meet justiciability requirements unaccompanied by pending

133. FED. R. CIV. P. 27(a)(1)(A).
134. *See id.*
135. *See id.*
136. FED. R. CIV. P. 27(a)(3).
137. *Id.*

claims and demands for relief within affirmative pleadings, like complaints.[138] For example, in advance of a compulsory civil claim contract arbitration, a New York statute authorizes a trial court to "entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration . . . that is to be commenced inside or outside [the] state."[139] And in West Virginia, a magistrate court "may enter an emergency protective order . . . necessary to protect the petitioner . . . from domestic violence and . . . may do so ex parte . . . . Clear and convincing evidence of immediate and present danger of abuse to the petitioner . . . constitutes good cause for the issuance of an . . . order."[140]

D. Proper Court

There are issues involving the proper court(s) to hear protective order petitions filed during, or in anticipation of, a related civil action. When there is a pending federal civil action, a party or a nonparty "from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken."[141] Presumably, there is no protective order opportunity for one receiving a preservation request but not a related discovery request.

By contrast, the aforenoted Arizona Civil Procedure Rule on dispute resolution procedures regarding ESI preservation requests will seemingly operate in a related pending civil action, whether or not the petitioner seeking an order on the scope of, or duty to preserve, ESI is a party to the action and whether or not a discovery request has been

138. *See, e.g.*, N.Y. C.P.L.R. 7502(c) (MCKINNEY, Westlaw through L.2021).
139. *Id.*
140. W. VA. CODE ANN. § 48-27-403(a) (West, Westlaw through legis. of 2021 First Spec. Sess.).
141. FED. R. CIV. P. 26(c)(1).

made.[142] A "preservation request" alone prompts standing for the petitioner.[143]

Determinations on proper court(s) in presuit protective order cases are more difficult. The federal rule on a presuit deposition to perpetuate testimony allows "a verified petition" to be filed "in the district court for the district where any expected adverse party resides."[144] Petitioners must meet not only this requirement but the additional requirement that the deponent be commanded to attend "within 100 miles of where the person resides, is employed, or regularly transacts business in person."[145] The aforenoted Arizona rule, on resolutions of ESI preservation disputes when there is no related pending civil action, authorizes trial court hearings on "the existence or scope of any duty to preserve electronically stored information."[146] The rule contemplates that respondents may be served outside of Arizona.[147] The available courts seemingly will be limited by both personal jurisdiction and venue constraints.

E. Necessary Circumstances

For new laws on presuit protective orders involving ESI preservation duties and perhaps possible later discovery, what circumstances should be required? Must there be a related lawsuit pending, must a related lawsuit be imminent, or is a distant lawsuit sufficient? Must there be no other means of securing protection? Should protective orders only be available to petitioners who demonstrate irreparable harms or, at least, undue burdens? Should protective orders be available to those who will likely never be parties

142. ARIZ. R. CIV. P. 45.2(d)(1) (stating procedures for petitioning party, with procedures in ARCP 26(d)); ARIZ. R. CIV. P. 45.2(d)(2) (stating procedures for nonparty petitioner, with procedures in ARCP 26(c), even though that rule only explicitly covers "any person from whom discovery is sought" and although a "preservation request" under ARCP 45.2(d)(2) is not discovery).

143. ARIZ. R. CIV. P. 45.2(b)(1).

144. FED. R. CIV. P. 27(a)(1).

145. FED. R. CIV. P. 45(c)(1)(A); *see also* FED. R. CIV. P. 45(c)(2) (stating that a deposition subpoena may command "production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person").

146. ARIZ. R. CIV. P. 45.2(e)(1).

147. ARIZ. R. CIV. P. 45.2(e)(2).

in later related civil suits? Finally, should the information in question need to be crucial, important, or merely relevant to dispute resolution?

1. Current Lawsuit/Imminent Lawsuit

A more limited new protective order law could apply only where there is a related pending civil action but where a protective order therein could not then be presented.[148] For a party to seek protection involving an anticipated later discovery request, perhaps arising from either a presuit or postsuit preservation request or demand, the petitioner could have to demonstrate costs (e.g., irreparable harm or undue burden) associated with the uncertainties. Similar circumstances seem appropriate for a nonparty confronting a similar rock-or-hard-place dilemma.

A more expansive new protective order law could apply where there is no pending related civil action. A new law could require that petitioners reasonably anticipate litigation, an element in the procedural laws and in most substantive laws on information preservation duties. Yet should that mean that the lawsuit needs to be imminent and perhaps also that it cannot be, or must be, presented by the petitioner?[149] How distant any possible lawsuit is, as well as the likelihood of a suit, should be factors in assessing exercises of judicial discretion to entertain presuit protective orders on discovery.[150]

2. Alternative Means of Protection

A sensible presuit protective order law would require that there are no alternative means of protection that are reasonable, adjudged, in part, by expense and time pressures. Further, a prospective petitioner

148. FRCP 26(c)(1) now only recognizes that protective orders are available to "[a] party or any person from whom discovery is sought . . . ." FED. R. CIV. P. 26(c)(1). Under FRCP 26(d)(1), parties are generally barred from seeking discovery prior to the discovery planning conference which, under FRCP 26(f), need not occur until at least three weeks before a scheduling conference date is set or a scheduling order is due. FED. R. CIV. P. 26(d)(1).

149. For testimony perpetuation through a presuit deposition under the FRCP 27(a), the petitioner must be unable to prompt the related civil action. FED. R. CIV. P. 27(a).

150. Other factors seem pertinent, including whether a settlement is imminent even without a protective order hearing and whether a protective order hearing is likely to prompt a settlement.

should need to undertake reasonable efforts to secure protection privately before seeking judicial relief, a common requirement preceding discovery motions in pending civil cases.[151]

3. Irreparable Harm/Substantial Need

What level of urgency, need, or both should be required of a presuit protective order petitioner? Postsuit equitable orders, such as temporary restraining orders, typically require a showing of "immediate and irreparable injury, loss, or damage" by the movant.[152] Should this be required, or perhaps only the lesser showing of "substantial need" and "undue hardship," a standard employed with postsuit discovery of ordinary work product (i.e., not "mental impressions, conclusions, opinions, or legal theories . . . ")?[153]

4. Prospective Parties

A new presuit civil protective order law could benefit only prospective parties. A more limited new law could apply only to someone very likely-to-be named a party in a pending civil action. A more expansive new law could authorize presuit protective orders on behalf of someone not likely-to-be named a party in a later-filed civil action. Are there reasons to undertake new laws authorizing protective order petitions on behalf of those then-not-parties and not likely-to-be parties in any related case? Nonparties, like existing and expected parties, face rock-or-hard-place dilemmas. They have, as noted, information preservation duties that are enforceable through state substantive spoliation claims, as well as discovery sanction laws involving the "common-law duty" to preserve information "in the anticipation" of civil litigation.[154] Precedents to date, however, are scarce regarding substantive state law spoliation claims and procedural

151. *See, e.g.*, FED. R. CIV. P. 26(c)(1) ("[M]ovant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.").

152. FED. R. CIV. P. 65(b)(1)(A).

153. FED. R. CIV. P. 26(b)(3)(A)(ii); FED. R. CIV. P. 26(b)(3)(B).

154. *See* FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendments (stating that the rule "focuses on the common-law obligation to preserve . . . "); *see also supra* notes 38–41 and accompanying text.

law sanctions involving nonparties who cause information losses. Yet witnesses, like parties, may sometimes be deserving of judicial protection when faced with preservation demands that appear unwarranted and that prompt excessive, nonrecoverable costs should there be compliance. If some nonparties are allowed to seek presuit protective orders, new laws might differentiate between witnesses with alleged contractual or statutory duties and witnesses with common-law duties; only the former are often straightforward, requiring no case-by-case analysis.[155]

5. Importance of Information

Besides the FRCP 27 requirement that a presuit testimony perpetuation order must "prevent a failure or delay of justice,"[156] some precedents further require that the order is limited to a deposition which will elicit "material" and "competent" evidence, meaning not all later discoverable information can be accessed presuit.[157] Additionally, a presuit testimony perpetuation order under FRCP 27 sometimes must limit discovery to the "facts" and "reasons" set out by the petitioner and approved by the court.[158] Comparably, should new presuit protective order laws distinguish between protected and nonprotected relevant information depending on its likely future importance in any later civil action? Should some information have to await a civil case, even if that means information might be lost, although subject to a known presuit duty to preserve? There should be written guidelines on any exercises of judicial discretion as well as incentives for private agreements (perhaps significantly aided, at times, by managerial judges).

155. Contractual and statutory duties typically present chiefly legal issues, while tort law duties often raise significant factual issues intertwined with the merits of civil claims not yet presented (but requiring jury trials if later presented).

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

157. *In re* Hopson Marine Transp., Inc., 168 F.R.D. 560, 564–65 (E.D. La. 1996) (reviewing precedents); *see also In re* Chester Cnty. Elec., Inc., 208 F.R.D. 545, 548–49 (E.D. Pa. 2002) (providing additional support).

158. FED. R. CIV. P. 27(a)(1)(c). Some comparable state laws are noted in *supra* note 2.

CONCLUSION

There are few civil procedure laws authorizing trial courts in the United States to consider presuit requests seeking protection from discovery sanctions or spoliation claims in later civil actions. There should be more laws authorizing presuit protective orders regarding information maintenance, preservation, and production. These laws should reflect a particular jurisdiction's existing laws on information duties arising from civil procedure and substantive spoliation laws.

New presuit protective order laws are most apt where there have been demands by potential adversaries involving alleged information preservation duties under civil discovery laws or under substantive spoliation laws; where the recipients have strong reasons to secure early judicial clarifications; and where the availability and use of presuit protective orders will serve both private and public interests in the just, speedy, and inexpensive determinations of civil disputes. New protective order laws are also warranted for some potential witnesses, especially those in receipt of presuit information preservation demands.

A 2018 Arizona court rule[159] authorizes presuit information preservation orders that go beyond the most common forms of presuit discovery. Yet that rule is limited and thus should not be fully modeled. The Arizona rule speaks only to "the existence or scope of any duty to preserve" ESI.[160] That is, it allows those in receipt of "a preservation request" for information relevant to an expected or current lawsuit to petition for an order to determine any duty to preserve ESI.[161] Petitioner need not be an anticipated adverse party in advance of a civil suit[162] and need not be an anticipated new party to a pending related suit. [163]

159. ARIZ. R. CIV. P. 45.2(e).
160. ARIZ. R. CIV. P. 45.2(a).
161. *Id.*
162. ARIZ. R. CIV. P. 45.2(b)(1), (b)(2), (e)(1). Rule 45.2(e) petitions need not be preceded by "meet and confer" consultations. ARIZ. R. CIV. P. 16(b)(1), (c)(8)(B)(xiii).
163. ARIZ. R. CIV. P. 45.2(b)(1), (b)(2), (d)(2).

New laws on presuit protective orders should go further. They should authorize protective orders concerning both ESI and non-ESI even when there may then not be a legal duty to preserve. These new laws should also provide explicit guidelines limiting discretionary judicial powers.[164] Finally, any new laws on presuit protective orders in a particular locale should reflect the local information maintenance, production, and preservation duties, whether in procedural (as with discovery sanctions) or substantive (as with spoliation claims) laws. A one-size-fits-all approach is unwarranted.

164. These guidelines accompany authorizations of presuit protective orders on discovery where there is no pending civil action. ARIZ. R. CIV. P. 45.2(f).