



To Have (or Not)
and to Hold

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A discussion of federal cases that consider when documents and ESI in the physical custody of another are actually within a litigating party's control.

When Should Your Litigation Hold Notice Go to Third Parties?

Must an insurance company extend its litigation hold notice to independent agents? Must a financial services company advise its parent company to preserve key information in anticipation of litigation? Does your litigation

hold obligation end at the walls of your business?

A decade after the court in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003), launched a nationwide discussion of a party's discovery obligations with respect to electronically stored information (ESI), litigants should be well aware of their duty to put a litigation hold in place to ensure that relevant documents and ESI are preserved when they know or reasonably should know that litigation is foreseeable. In practice, however, determining the appropriate scope of a litigation hold is often fraught with uncertainty, particularly given the severe consequences that may result from a failure to preserve documents and ESI adequately.

Among the potential hazards that parties must negotiate during a litigation hold process is deciding to whom to send the litigation hold notice. By its very nature, ESI

can "live" in a variety of locations, not all of which a party may possess physically. So, when does a party have a duty to preserve documents and ESI in the possession of its corporate relations or other nonparties?

A number of federal district court decisions have adopted the concept of "control" from Federal Rule of Civil Procedure 34 when analyzing whether a party has a duty to preserve documents physically possessed by another. Taking their cue from decisions evaluating when a party must produce documents held by a nonparty, these courts look to whether the party has legal or practical control over relevant information in the hands of a nonparty.

Litigants must consider that their preservation duty may well extend to documents outside their own walls when developing and implementing their litigation hold notices. While the case law addressing the scope of a litigation hold notice is still



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evolving, without question a party's analysis should not stop with the documents or ESI that it physically possesses.

Parties and practitioners alike are undoubtedly aware that when relevant documents and ESI are destroyed, whether intentionally or inadvertently, discovery disputes and sanctions may follow. To help safeguard against these consequences, this article will discuss federal cases considering when documents and ESI in the physical custody of another are actually within a litigating party's control. While this article focuses on federal authorities, similar issues may arise in state courts as well.

When Are Documents Within a Party's Control?

The text of Federal Rule of Civil Procedure 34 is the jumping-off point for most courts when deciding whether a litigant must produce information that a nonparty possesses. Federal Rule of Civil Procedure 34 expressly allows a litigant to request documents and information, including ESI, "in the responding party's possession, custody, or control."

The word "or" is not accidental: "By using the word 'or' Rule 34(a) makes a clear distinction among the meanings of 'possession,' 'custody,' and 'control.'" *Flavel v. Svedala Indus., Inc.*, 1993 WL 580831, at *3 (E.D. Wis. Dec. 13, 1993). Possessing the information sought does not end the legal inquiry. In accordance with this construction, courts have consistently recognized that "the test for production.... is control, not location." *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co., Ltd.*, 769 F. Supp. 2d 269, 289 (S.D.N.Y. 2011).

Courts are now turning to past interpretations of "control" under Federal Rule 34 when considering whether parties have a duty to preserve documents, ESI, or other evidence outside of their actual custody when anticipating litigation, as explained below. In light of this, an important part of understanding the scope of a one's preservation duties and litigation hold obligations is to appreciate the meaning of "control"; that is, which documents and ESI does a litigant or potential litigant in fact control, regardless of location?

Courts define control in the context of Federal Rule 34 broadly, in step with traditionally liberal discovery standards. See, e.g., *Advanced Labor Serv., Inc. v. Hartford*

Accident and Indem. Co., 60 F.R.D. 632, 633 (N.D. Ill. 1973); *Pitney Bowes, Inc. v. Kern Int'l, Inc.*, 239 F.R.D. 62, 66 (D. Conn. 2006) (recognizing that "the word 'control' under Fed. R. Civ. P. 34 is 'broadly construed'"); *Glenz v. Sharp Electronic Corp.*, 2010 WL 2758729, at *3 (D.N.J. July 12, 2010) ("The Third Circuit interprets a party's control over documents in possession of a parent, subsidiary, or sister company broadly.").

Against the backdrop of this broad interpretation of control, the burden remains with a movant to establish that such control exists in a specific case. *Camden Iron & Metal, Inc. v. Marubeni Am. Corp.*, 138 F.R.D. 438, 441 (D.N.J. 1991) ("A party seeking production of documents bears the burden of establishing opposing party's control over those documents."). Moreover, whether a litigant has control over information which rests with a third party requires a fact-specific inquiry. *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1145 (N.D. Ill. 1979) ("The issue of control is more a question of fact than of a law....").

Despite these caveats, courts have often found such control to exist based on a fairly minimal showing. What began as a concern about the potential for a party to hide documents by lodging them with entities in other countries with which the party has a corporate relationship has led to a variety of tests, all of which oblige a party to produce information in the hands of third parties if the party asked to produce information can be said to exercise some form of control over that information.

The notion of extended control dates back to the Supreme Court decision in *Societe Internationale Pour Participations Industrielles et Commerciales F.A. v. Rogers*, 357 U.S. 197 (1958), which recognized that documents in the hands of a foreign, affiliated corporation that was "substantially identical" to the corporate party litigant were within that litigant's control. The Court found that allowing a litigant to assert that it lacked control over documents in the possession of its "substantially identical" affiliate would "invite efforts to place ownership of American assets in persons or firms whose sovereign assures secrecy of records." *Id.* at 205. In this case, the party opposing the discovery claimed that disclosure of the documents at issue would violate Swiss law.

"Legal Right" vs. "Practical Ability"

Since the *Societe* decision, courts have devised a number of tests to determine whether a litigant has control over documents that a nonparty possesses. In general, courts ask whether a party has the "legal right to obtain documents requested upon demand." *Jans ex rel Jans v. The GAP Stores, Inc.*, 2006 WL 2691800, at *2 (M.D. Fla. Sept. 20, 2006); *Camden*, 138 F.R.D. at 441 ("control is defined as the legal right, authority or ability to obtain documents upon demand").

Some jurisdictions, such as the Third, Sixth, Ninth, and Eleventh Circuits, have limited "control" to situations in which a party has actual possession, custody, or control of the documents, or the legal right to obtain the documents on demand. See *Mercy Catholic Med. Ctr. v. - son*, 380 F.3d 142, 160 (3d Cir. 2004); *Pasley v. Caruso*, 2013 WL 2149136, at *5 (E.D. Mich. May 16, 2013); *In re Citric Acid Litig.*, 191 F.3d 1090, 1107 (9th Cir. 1999); *Siddiq v. Saudi Arabian Airlines Corp.*, 2011 WL 6936485 (M.D. Fla. Dec. 7, 2011) (citing *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984)).

District courts within the Seventh Circuit and the Tenth Circuit have also found that a party has control or custody of a document when it has the legal right to obtain the document even if it does not have physical possession. *Engel v. Town of Roseland*, 2007 WL 2903196, at *3 (N.D. Ind. Oct. 1, 2007); *Morningware, Inc. v. Hearthware Home Products, Inc.*, 2011 WL 4715189 (N.D. Ill. Oct. 6, 2011); *U.S. v. Approximately \$7,400 in U.S. Currency*, 274 F.R.D. 646, 647 (E.D. Wis. 2011); *Al Noaimi v. Zaid*, 283 F.R.D. 639, 641 (D. Kan. 2012) (tying control "to the legal right to obtain the documents on demand").

Courts in other jurisdictions have expanded the definition of "control," however, to situations in which a party has the right, authority, or practical ability to obtain the documents from a nonparty to the related action. These courts include the Second Circuit and district courts within the Fourth, Fifth, and Eighth Circuits. The Second Circuit found that "control" for Federal Rule 34 purposes includes documents "to which a party has 'access and the practical ability to possess.'" See *Thai Lao Lignite (Thailand) Co., Ltd. v. Gov't of*



Lao People's Democratic Republic, 924 F. Supp. 2d 508, 515 (S.D.N.Y. 2013) (citing *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138 (2d Cir. 2007)); *Ferber v. Sharp Electronics Corp.*, 1984 WL 912479, at *1 (S.D.N.Y. Nov. 28, 1984) (defining control as the “right and ready ability to obtain possession”).

The Fourth Circuit Court of Appeals has



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not defined control under Federal Rule of Civil Procedure 34, although recent district court decisions in that circuit have applied the expanded view, finding that even when a party does not have legal ownership or physical possession of the documents at issue, they are considered within the party's control if the party has the right, authority, or practical ability to obtain them from a nonparty. See *D.J.'s Diamond Imports, LLC v. Brown*, 2013 WL 1345082, at *9 (D. Md. Apr. 1, 2013); *Grayson v. Cathcart*, 2013 WL 1401617, at *3 (D.S.C. Apr. 8, 2013); *Bush v. Ruth's Chris Steak House, Inc.*, 286 F.R.D. 1, 5-6 (D.D.C. 2012). But see *Ebersole v. Kline-Perry*, 85 Fed. R. Serv. 3d 1004 (E.D. Va. 2013) (finding that courts in the Fourth Circuit define control under Fed. R. Civ. P. 34 as documents one actually possesses or has a legal right to obtain on demand (citing *Hatfill v. N.Y. Times Co.*, 242 F.R.D. 353, 355 (E.D. Va. 2006))).

District courts in the Fifth and Eighth Circuits have also included the “practical ability to obtain the documents” factor in

their definitions of Federal Rule 34 “control,” although those circuits have yet to adopt such a standard explicitly. See *Lafleur v. Ean Holdings, LLC*, 2013 WL 2490613, at *2 (M.D. La. June 10, 2013); *Shell Global Solutions (US) Inc. v. RMS Eng'g, Inc.*, 2011 WL 3418396, at *2 (S.D. Tex. Aug. 3, 2011); *New Alliance Bean & Grain Co. v. Anderson Commodities, Inc.*, 2013 WL 1869832, at *3 (D. Neb. May 2, 2013); *Handi-Craft Co. v. Action Trading, S.A.*, 2003 WL 26098543, at *6 (E.D. Mo. Nov. 25, 2003). The right, authority, or ability to obtain documents upon demand is also considered “control” under Federal Rule 34 by district courts in the First Circuit. See *Vazquez-Fernandez v. Cambridge Coll., Inc.*, 269 F.R.D. 150, 164 (D.P.R. 2010); *Calzaturificio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 39 (D. Mass. 2001).

Special Considerations for Corporate Parents, Subsidiaries, and Affiliates

The Federal Rule of Civil Procedure 34 control analysis becomes more complex when information is held by entities with which a litigant has a corporate relationship. For documents held by nonparty corporate parents and affiliates, courts evaluate the relationship between the entities, which in some jurisdictions is expressed more formally as an inquiry into (1) the corporate structure and relationship between the litigant and the nonparty; (2) the involvement or connection with the transaction at issue by the nonparty, or both; and (3) the extent to which the nonparty may receive a benefit in connection with the outcome of the litigation. See *In re Global Power Equip. Grp.*, 418 B.R. 833, 842 (D. Del. 2009); *Costa v. Kerzner Int'l Resorts, Inc.*, 277 F.R.D. 468, 472 (S.D. Fla. 2011).

In certain jurisdictions, the test also involves looking at a number of alternate grounds for control, including whether (1) the party is the alter ego of the corporate parent; (2) the party is the agent of the parent; (3) the party can secure documents from its parent that would help it in the litigation; (4) the party can access documents from the parent when the need arises in the ordinary course of business; or (5) the party is the marketer or servicer of the parent's products. See *Gerling Int'l Ins. Co. v. C.I.R.* 839 F.2d 131, 140-141 (3d Cir. 1988); *Camden*, 138 F.R.D. at 442; *Glenz*, 2010 WL 2758729, at *3.

For many courts, these inquiries are satisfied by focusing on the level of practical or managerial control that the nonparty corporate parent or affiliate exercises over the litigant. For example, in the *Uranium Antitrust* case, the court found that requisite control existed when the nonparty parent corporate completely owned the party subsidiary; when the party and the parent acted as “a single functional unit” and “shared an interlocking structure” of corporate officers and directors; or when the nonparty parent “has, or once had, control over [the subsidiary's] directors, officers and employees” in connection with the business at issue. *Uranium Antitrust*, 480 F. Supp. at 1151-54.

Similarly, the court in *Flavel* found adequate indicia of control based on the “close corporate relationship” between the litigant and the nonparties that owned the documents at issue, including “close managerial connections, interlocking management structures, and a significant ownership by the non-party parent in the subsidiary,” as well as its conclusion that the subsidiary could “likely obtain such documents upon demand.” *Flavel*, 1993 WL 580831, at *2. The court further pointed out that the nonparty need not be subject to actual liability: “it is clear that a party may exercise the requisite degree of ‘control’ over documents held by a related entity under the discovery rules without exhibiting the degree of interrelationship necessary to project liability upon such entity....” *Id.* See also *Uranium Antitrust*, 480 F. Supp. at 1155 (recognizing the “crucial distinction between the ability to compel production of documents and liability for a subsidiary's acts”).

Similarly, in *Costa*, a purported class action seeking redress for allegedly deceptive housekeeping and utility fees charged by a resort, the plaintiff sought documents from the defendant's nonparty foreign affiliate. The court found that the “unified corporate structure” and “financial and operational interactions between the defendants and their Bahamian affiliate warranted a finding of control in that case.” 277 F.R.D. at 1. This decision was further bolstered by the fact that the nonparty affiliate was directly involved in imposing and collecting the fees at issue. *Id.* at 472. Finally, persuaded that the defendant company and its affiliate “may ultimately

be responsible for damages to the class,” the *Costa* court determined that a sufficient financial interest in the litigation’s outcome also warranted finding that the defendants had control over documents and information that their foreign affiliates possessed. *Id.* at 473. See also *Alimenta (U.S.A.), Inc. v. Anheuser-Busch Cos., Inc.*, 99 F.R.D. 309, 310 (N.D. Ga. 1983) (finding that documents possessed by the plaintiff’s sister company were subject to the plaintiff’s control because the sister corporation was “intimately involved in the transaction at issue”).

But even less than “intimate” involvement between a party and its nonparty parent can support a finding of control. In *Cooper Industries Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918 (S.D.N.Y. 1984), the plaintiff sought aircraft service manuals and blueprints in the hands of the defendant’s foreign parent. *Id.* at 919. After considering the defendant’s role as the “distributor and servicer in the United States of the British affiliate’s planes,” the court concluded that “the documents plaintiff seeks all relate to the planes that defendant works with every day; it is inconceivable that defendant would not have access to these documents and the ability to obtain them for its usual business.” *Id.* at 920. On the strength of this inconceivability, the court required the defendant to produce the documents at issue under the threat of monetary sanctions. *Id.*

The broad definition of control found in these cases does have some limits, depending in part on which test or group of tests a court believes applies, and more often, depending on the specific facts of the particular case. Some distinct decisions have required more than the minimal showing of control that courts found adequate in earlier cases.

For example, in *Glenz*, the court rejected the notion that the defendant Sharp’s role as the “U.S. sales and marketing subsidiary of Japan’s Sharp Corporation” satisfied the Federal Rule 34 control requirement and thus obliged production of technical specification documents possessed by Sharp’s parent corporation. The *Glenz* court distinguished the sales and marketing relationship between Sharp and its parent from the distribution and service relationship existing in the *Cooper Industries* case, finding

persuasive Sharp’s argument that “the parent/child relationship prohibits Sharp from having control over any documents in the Sharp Corporation’s possession.” *Id.*

Having found that the plaintiff did not meet its burden to establish Sharp’s control over the parent corporation’s documents, however, the *Glenz* court allowed targeted discovery “regarding the structural and functional relationship” between Sharp and the nonparty parent and affiliates from which the plaintiff sought production. *Id.* at *4. See also *Pitney Bowes Inc. v. Kern International Inc.*, 239 F.R.D. 62, 64–68 (D. Conn. 2006) (finding a “servicing relationship” is not enough, on its own, to establish a subsidiary’s control over documents in the possession of a foreign parent when a party and its parent company would not exchange the requested documents “in the normal course of its business”); *U.S. Int’l Trade Comm. v. ASAT, Inc.*, 411 F.3d 245, 255 (D.C. Cir. 2005) (rejecting the idea that a wholly owned subsidiary engaged in “sales and servicing” necessarily controls documents of the parent company, noting “there must be a nexus between the [documents sought] and the [party’s] relationship with its parent companies, taking into account, among other things, [the party’s] business responsibilities”); *Zenith Electronics LLC v. Vizio, Inc.*, 2009 WL 3094889, at *2 (S.D.N.Y. Sept. 25, 2009) (finding that even in the context of the “practical ability” test, mere parent-subsidiary relationship without “demonstrated access” to the parent’s documents by the subsidiary does not establish the requisite level of control to compel the subsidiary to produce the parent’s documents).

Extending the Control Analysis to a Party’s Litigation Hold Obligations

The historically broad definition of “control” in the context of Federal Rule 34 has and will likely continue to define the scope of a party’s litigation hold obligation with respect to information possessed by that party’s corporate subsidiaries, parents, and affiliates. As issuing a litigation hold notice has become standard operating procedure in the age of ESI, corporate parties and practitioners should consider courts’ broadly interpreted definition of Federal Rule 34 “control” in when assessing their litigation hold obligations. Indeed, a party’s

failure to preserve documents possessed by its nonparty affiliate can lead to sanctions.

For example, in *Felman Production, Inc. v. Industrial Risk Insurers*, 2011 WL 4547012, at *11 (S.D. W. Va. Sept. 29, 2011), the court sanctioned the plaintiff for failing to issue a litigation hold notice to, and preserve documents from, its affiliated companies. While the case is notable for

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the significant level of misconduct on the plaintiff’s part throughout the litigation, which contributed to the court’s decision to award sanctions, the court took pains to explain that the plaintiff’s litigation hold obligations extended to those entities and their employees that possessed documents within the plaintiff’s control. Having found that the plaintiff had “at a minimum, the practical ability to obtain the documents” from Privat, the affiliated company with which it was “significantly intertwined,” the court held: “Further, it was not an unreasonable or disproportional effort for Felman to issue a litigation hold to the key Privat players.” *Id.* at *11–12.

The *Felman* decision may not be too astonishing given the broad interpretation of control that courts use to evaluate a party’s production obligations with respect to information in the hands of its corporate parent or affiliates. But, it may surprise many that some federal courts have extended a party’s preservation duties to its independent agents and consultants that possess relevant documents. With the duty to preserve, of course, comes the duty to send a litigation hold notice as soon as litigation is reasonably anticipated. The existence of a contractual or legal right to obtain documents or ESI from a third party, or the practical ability to do, is a critical consideration for actual and potential



litigants when analyzing their preservation duties and initiating their litigation holds.

A perfect illustration of the need for such consideration is a New Jersey District Court decision in *Haskins v. First American Title Insurance Company*, 2012 WL 5183908 (D.N.J. Oct. 18, 2012). During the *Haskins* litigation, the plaintiffs requested from the defendant sample closing files phys-



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ically possessed by the defendant's independent title agents. Charged with deciding whether the defendant should be ordered to direct its agents to implement a litigation hold to preserve the closing files, the court turned to the "possession, custody, or control" standard of Federal Rule 34.

Noting that physical possession of documents is not required for control to exist for Federal Rule 34 purposes, the *Haskins* court found that "[i]t logically follows that a litigating party has control of documents if a contractual obligation requires a non-party to provide requested documents to the litigating party upon demand." *Haskins*, 2012 WL 5183908, at *1. There, certain contracts that the defendant had with its agents required those agents to preserve the defendant's records or to make the records available to the defendant for inspection or examination. The court found that this was sufficient to establish control under Federal Rule 34, given the defendant's legal right to obtain documents from its agents on demand and its ability to

pursue a breach of contract action against any agent that did not produce documents upon its request. *Id.* at *2-4.

Notably, the court then ordered the defendant to "implement a litigation hold to preserve all documents relevant to this litigation that are in its possession, custody, or control," including documents in the physical possession of the defendant's independent title agents—documents that the defendant controlled due to its contracts with these agents. *Id.* at *5. See also *Pine Top Receivables of Illinois, LLC v. Banco De Seguros Del Estado*, 2013 WL 3776971, at *2-3 (N.D. Ill. July 18, 2013) (holding the plaintiff responsible for preserving relevant documents in possession of its assignor's liquidator since it had a legal right to obtain them from liquidator pursuant to agreement); *Boucher v. First Am. Title Ins. Co.*, 2011 WL 5299497 (W.D. Wash. Nov. 4, 2011) (finding that the defendant had control of certain documents in its agents' possession in light of contracts requiring the agents to produce documents upon reasonable request).

Control over a nonparty's documents in light of the nonparty's contractual obligation to allow access to its documents also was found in *In re NTL, Inc. Securities Litigation*, 244 F.R.D. 179 (S.D.N.Y. 2007). The plaintiffs sought sanctions against the defendant NTL Europe, Inc. related to its failure to preserve documents and ESI possessed by NTL, Inc. While NTL, Inc. was not a party to the litigation, it had a contractual relationship with defendant NTL Europe, Inc. After both NTL, Inc. and NTL Europe, Inc. emerged from the bankruptcy of a former company and several of its subsidiaries, they entered into a demerger agreement essentially providing each access to the other's documents and records. *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. at 181-82. After failing to obtain particular responsive documents and e-mails either directly from defendant NTL Europe, Inc. or through a subpoena from nonparty NTL, Inc., certain plaintiffs sought sanctions against NTL Europe, Inc. in the litigation, arguing in part that NTL Europe, Inc. failed to preserve relevant documents and evidence that NTL, Inc. possessed.

Ultimately agreeing with the moving plaintiffs, the court found that NTL

Europe, Inc. had control over, and the corresponding duty to preserve and produce documents and ESI in NTL, Inc.'s possession. The finding of control was grounded in the fact that the demerger agreement required NTL, Inc. to make its documents available to NTL Europe, Inc. so that it could comply with its legal obligations, as well as in NTL Europe, Inc.'s practical ability to obtain documents from NTL, Inc. by simply asking for them. The court ultimately granted these plaintiffs' spoliation motion against NTL Europe, Inc. and awarded them an adverse inference instruction and attorneys' fees.

Documents in the hands of a party's independent consultant have also been found to be within the party's "control" and thus subject to the party's preservation obligations despite the absence of a legal or contractual duty when only "practical control" exists. In *GenOn Mid-Atlantic, LLC v. Stone & Webster, Inc.*, 282 F.R.D. 346 (S.D.N.Y. 2012), Stone & Webster sought sanctions against GenOn for alleged spoliation of e-mails by GenOn's third-party consultant. Stone & Webster argued that GenOn had a duty to direct its consultant to preserve evidence when it reasonably anticipated litigation with Stone & Webster because the consultant was GenOn's agent, and GenOn had legal and practical control over the consultant's information. Although Stone & Webster failed to prove that GenOn had legal control over the consultant's information, the New York District Court found that Stone & Webster had established that GenOn had "practical control" over its consultant's materials. *GenOn Mid-Atlantic, LLC*, 282 F.R.D. at 355. Significantly, this "practical control" was found despite the absence of any direct evidence either that GenOn could have obtained the consultant's materials merely by asking for them or that the consultant would in fact have honored GenOn's request for preservation, simply because "common sense suggest[ed] that this [was] likely." *Id.*

After determining that practical control over the consultant's materials existed, the court's finding that GenOn had a duty to ensure the preservation of those materials was essentially automatic. Indeed, the court stated that it followed from the finding of control that GenOn had a duty to ensure that relevant materials in the con-

sultant's possession were adequately preserved. *Id.* While the court discussed that GenOn failed to cause its consultant to issue a litigation hold letter to its personnel, it ultimately declined to issue sanctions, finding that Stone & Webster was not prejudiced by any spoliation.

No duty to preserve exists, however, without control. In *Goodman v. Praxiar Services, Inc.*, 632 F. Supp. 2d 494 (D. Md. 2009), the plaintiff, who sought spoliation sanctions against the defendant in a breach of contract action, argued that the defendant failed to preserve evidence in possession of its third-party consultants after it reasonably anticipated litigation with the plaintiff. Relying in part on *In re NTL, Inc. Securities Litigation*, the *Goodman* court found that "control" in the Federal Rule 34 context "provides the closest analogy to control in connection with a spoliation issue." *Goodman*, 632 F. Supp. 2d at 515–16. It then concluded that the defendant did not have sufficient control over its third-party consultants to oblige it to preserve relevant documents in their possession. *Id.* The court explained that the plaintiff presented insufficient evidence that the defendant had either the legal authority or practical ability to ensure that its consultants preserved documents related to the dispute.

While not having control means that no duty to preserve exists, parties must remember that in certain jurisdictions they may still have a duty to notify opposing parties that a third party possesses relevant documents or evidence under these circumstances. *See, e.g., Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) ("If a party cannot fulfill this duty to preserve because he does not own or control the evidence, he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence."); *Charter Oak Fire Ins. Co. v. Marlow Liquors, LLC*, 908 F. Supp. 2d 673, 679 (D. Md. 2012); *Jain v. Memphis Shelby Cnty. Airport Auth.*, 2010 WL 711328 (W.D. Tenn. Feb. 25, 2010).

These decisions guide the way ahead. If a party has control over information possessed by third parties, as courts interpret Federal Rule of Civil Procedure 34 control, courts will likely require that party to pre-

serve those documents through an appropriate litigation hold notice. While the indicia of such "control" may vary by jurisdiction, or even within a jurisdiction, the mere fact that information rests with a separate corporate entity or independent third party is not enough to excuse that information from the scope of a litigation hold.

Recommendations for Litigants— To Control and to Hold

By now, attorneys and litigants generally understand that litigants risk sanctions if the litigants fail to preserve relevant information, particularly ESI, in the wake of *Zubulake* and its progeny. *See, e.g., Sekisui Am. Corp. v. Hart*, 2013 WL 4116322, at *1 (S.D.N.Y. Aug. 15, 2013) (exploring the range of sanctions available for willful destruction of ESI, including presumption that information was unfavorable to destroying party) (the *Zubulake* court).

Moreover, the proposed revisions to Rule 37(e) of the Federal Rules of Civil Procedure, currently open for public comment, provide additional incentives to preserve information in anticipation of litigation. *See* Comm. on Rules of Practice and Procedure, Judicial Conf. of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure (published for public comment Aug. 2013), <http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx> (last visited Oct. 10, 2013). As currently written, Federal Rule of Civil Procedure 37(e) provides a safe harbor from sanctions "absent exceptional circumstances" for a party's failure to provide ESI "lost as the result of the routine, good faith, operation of an electronic information system."

The proposed revision to Federal Rule 37(e) significantly expands the rule to cover "discoverable information" rather than only ESI, and the expansion specifically relates to such information "that should have been preserved in the anticipation or conduct of litigation." Proposed Amendments, Rule 37(e)(1), *supra*, at 314. Notably the Advisory Committee Notes specifically disavow any effort "prescribe new or different rules on what must be preserved" but expressly leave that issue with the court decisions recognizing a litigation hold obligation. *Id.* at 274.

The proposed amendment to Federal Rule 37(e) provides specific authority to a court to impose sanctions and curative measures without resorting to the court's "inherent authority" and even without an existing court order. *Id.* at 314. The proposed rule further encourages parties to make reasonable efforts to preserve information by including the consideration of such efforts in the determination of whether a court can impose sanctions: "The amended rule is designed to ensure potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subject to sanctions should information be lost despite those efforts." *Id.* at 318.

The proposed amendment enumerates the factors that a court can consider "in determining whether a party failed to preserve discoverable information that should have been preserved in anticipation of litigation," which include "the reasonableness of the party's efforts to preserve the information." Proposed Amendments, Rule 37(e)(2)(B), *supra*, at 316. As a result, a party's reasonable efforts to preserve relevant information can actually mitigate against harsher sanctions for lost information. This change should encourage litigants to evaluate all sources of "discoverable information" carefully when preparing and implementing a litigation hold.

Given the trends discussed here, parties considering their litigation hold obligations have significant motivation to consider the extent to which their agents, independent contractors, and corporate relations may have discoverable information. Taking into account its own jurisdiction's approach (*e.g.* whether it is a "legal right to obtain" or a "practical ability to obtain" jurisdiction), a party should pay particular attention to third parties that hold or may hold relevant information and evaluate how closely those third parties are involved in either the party's own operations or the anticipated litigation. If a party has the right to obtain relevant information from a third party by contract, in the routine and ordinary course of its business, or by virtue of its control over that third party (or vice versa), then that party should include that third party in its litigation hold notice. 