

FLETCHER | FARLEY

# Saving the Environment

The Duty to Preserve Evidence

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CONFLICT RESOLVED

# From the Austin Office



CONFLICT RESOLVED

# Duty to Preserve Evidence

1. Duty to preserve
2. Breach of duty
3. Prejudice

# DUTY

- Statutory

- Common Law

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# DUTY

## Common Law

1. Know/Should know substantial likelihood claim will be filed; and
2. Evidence is potentially material and relevant



# DUTY

Substantial chance that a claim will be filed

- Objective standard
- Actions and communications of the parties
- Can occur long before suit is filed



# DUTY

Potentially material and relevant evidence

- Not required to keep everything
- Reasonably calculated to lead to the discovery of admissible evidence, reasonably likely to be requested in discovery, or is the subject of pending discovery

## **Breach of Duty**

- Deliberate destruction, failure to produce, or failure to explain non-production
- Extraordinary measures not required
- Defense: reasonable explanation
- Not a defense: Destruction in ordinary course of business after notice of a claim





# Prejudice

- Will lack of evidence hinder ability to present case at trial?
- Is lost evidence cumulative of other evidence?

# Repercussions

Sanctions: judicial discretion

- dismissal
- default judgment
- excluding evidence
- Restricting discovery
- assessing costs
- contempt

# Repercussions

## Jury Instructions:

### “Rebuttable Presumption” instruction:

1. Jury should presume that the destroyed evidence was unfavorable to the spoliating party on that particular issue
2. Spoliating party bears the burden of proof on that particular issue to the spoliating party to overcome the presumption.

### Simple presumption instruction:

Jury that may, but is not required to presume that the destroyed evidence would have been unfavorable.

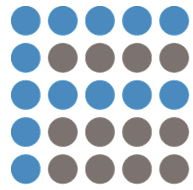
# Strategies for Preserving Evidence

1. Identify evidence to be preserved
  - a. Consider the claims asserted and potential claims
  - b. Err on the side of caution
2. Document the evidence preserved
  - a. Keep track of what evidence was preserved
  - b. Establish a chain of custody to memorialize movement, location and condition of evidence.
3. Store in Secure Location/clearly marked

# Strategies for Preserving Evidence

Electronically Stored Information (ESI):

- Can include word processing documents, spreadsheets, power point files, task lists, databases, calendars, telephone logs, emails, instant messages, tweets, audio recordings, video files, contact information, internet usage files, and metadata
- Sources: computer hard drives (office & home), removable media (CDs & DVDs), laptops, tablets, phones, cameras, backup tapes, cloud files
- Act quickly; delay can allow evidence erasure through routine practices
- Hold instruction to cease automatic deletion/recycling of backup data.



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