

# Court Clarifies When Duty to Preserve Evidence in Litigation Arises

## Description

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The duty to preserve potentially relevant documents and electronically stored information is an important obligation that arises in litigation, and one that litigants and their attorneys must not take lightly. But at what point does this duty arise? In a recent decision, Judge Salinger of the Superior Court Business Litigation Session had occasion to revisit a prior order on remand from an interlocutory appeal. *JFF Cecilia LLC v. Weiner Ventures, LLC, et al.*, No. 1984CV03317-BLS2, 2023 WL 1804375 (Mass. Super. Ct. Jan. 30, 2023).

A single justice of the Appeals Court remanded a prior order denying a motion for sanctions with an order that the Superior Court “determine if the defendants knew or reasonably should have known that evidence might have been relevant to a possible action.” The Court clarified that an action may be “possible”—triggering the duty to preserve relevant evidence—when it is “within the limits of ability, capacity, or realization.” The “relevant to a possible action” standard contrasts with the prior, and overturned, “likely to be involved in litigation” standard, where litigation is “‘likely’ only if it has a ‘high probability of occurring.’”

Relevant Facts: *JFF Cecilia LLC v. Weiner Ventures, LLC, et al.*

In *JFF Cecilia*, plaintiffs’ counsel sent a letter in August 2019 to the defendants to provide notice of a dispute between the parties. On October 1, 2019, plaintiffs’ counsel sent another letter conveying a settlement offer to defendants’ counsel, wherein plaintiffs set an October 5, 2019 deadline for the parties to reach an agreement. The plaintiffs filed their complaint on October 23, 2019.

The plaintiffs later filed a motion for spoliation sanctions after discovery revealed that defendants had deleted relevant emails and texts and had reset the contents of a cell phone when transitioning to a new phone without a backup. This occurred in the time between the August 2019 letter and the filing of the litigation on October 23, 2019.

In opposition to plaintiffs’ motion, the defendants claimed that after the August 2019 letter, there were additional intervening communications that suggested that actual litigation was not yet likely, and thus they argued the duty to preserve evidence did not arise. Under the clarified standard from the Appeals Court, however, Judge Salinger rejected the defendants’ arguments, and allowed plaintiffs’ motion for spoliation sanctions. Ultimately, Judge Salinger ordered that plaintiffs could offer evidence concerning the alleged spoliation at trial, and that plaintiffs were entitled to a jury instruction permitting (but not requiring) an inference that the contents of deleted emails and texts were unfavorable to the defendants.

## Key Takeaway

In light of the Appeals Court’s articulation of the “might have been relevant to a possible action” standard, potential litigants and their attorneys should discuss their duty to preserve evidence at the inception of a dispute. Failing to preserve potentially relevant documents and electronically stored information can have serious consequences for litigants. Identification and preservation should be one of the first things that potential litigants discuss with their attorneys when evaluating legal dispute resolution options, in order to ensure that these obligations are met, and such consequences avoided.

Partridge Snow & Hahn’s [Litigation Practice Group](#) is ready to answer questions regarding the implications of this decision. For more information, contact [Paul M. Kessimian](#), [Christian R. Jenner](#) or [Hannah Y. Amadei](#).

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