

control or have custody of discoverable evidence. Documents in the possession of such legal persons are, generally, deemed within their corporation's control and, thus, discoverable if non-privileged.<sup>104</sup> This extended and inferred concept of control also covers parent-subsidiary relationships, even if the companies operate in different countries.<sup>105</sup> While the specific corporate form of the companies' relationship does not dispose of the control issue, courts tend to rely on multi-factor tests in assessing whether, overall, the entities have a sufficiently close nexus to justify a finding of control.<sup>106</sup>

#### 4. *Obligation to Preserve and Spoliation*

Until service of process, no general obligation exists to preserve information for potential discovery production.<sup>107</sup> Nevertheless, spoliation, a discovery violation, is defined as the "intentional destruction, mutilation, alteration, or concealment of evidence"<sup>108</sup> in "pending or reasonable foreseeable litigation."<sup>109</sup> Exactly *when* litigation may be deemed "reasonably foreseeable" remains unclear.<sup>110</sup> Thus, while receipt of a warning letter or other notice regarding the possibility of subsequent litigation does not necessarily effect an obligation to preserve likely evidence, courts may construe such acts as sufficient to impose preservation obligations or to permit an adverse inference instruction based on destruction of evidence.<sup>111</sup> Subjective apprehension seems to play an important role in whether document destruction contravenes Rule 26.

#### B. *Context of Rule 34 amid Other Discovery Rules*

As mentioned above, Rule 26 constitutes an umbrella rule detailing the general parameters of discovery.<sup>112</sup> It allows the parties to discover any nonprivileged matter relevant to a party's claim or defense, "including the existence, description, nature, custody, condition and location of any books, documents or other tangible things."<sup>113</sup> Thus, discoverability extends not only to admissible evidence but also to matter that

104 See *American Soc'y for Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus*, 233 F.R.D. 209, 212 (D.D.C. 2006) (documents gathered and possessed by attorney are within client's control, but nondiscoverable as work product); see *General Envtl. Sci. Corp. v. Horsfall*, 136 F.R.D. 130, 134 (N.D. Ohio 1991) (individual defendants who are corporate officers, directors and shareholders must produce documents possessed by corporation).

105 *Japan Halon Co. v. Great Lakes Chem. Corp.*, 155 F.R.D. 626, 627 – 29 (N.D. Ind. 1993).

106 *Uniden America Corp. v. Ericsson, Inc.*, 181 F.R.D. 302, 306 (M.D.N.C. 1998) (applying five-factor test to determine control).

107 E.g. *Hansen v. Dean Witter Reynolds Inc.*, 887 F. Supp. 669, 675 – 76 (S.D.N.Y. 1995).

108 BLACK'S LAW DICTIONARY POCKET EDITION 659 (2d ed. 2004).

109 See *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d. Cir. 1999).

110 See Kenneth R. Adamo et al., *Document Discovery in Patent Litigation*, in PATENT LITIGATION STRATEGIES HANDBOOK 2004 CUMULATIVE SUPPLEMENT *supra* note 1, at 79, 96 – 7.

111 See *Rush v. Artuz*, 00 Civ. 3436, 2003 U.S. Dist. LEXIS 7158, at \*6 (S.D.N.Y. Apr. 3, 2003).

112 See *supra* Part II.

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