

The Prelitigation Duty to Preserve: Look Out!

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INTRODUCTION

Much of the prelitigation duty to preserve case law has focused on physical evidence that was destroyed in testing or lost. “Spoliation” is the label usually applied to the impacted or lost evidence. Sanctions follow spoliation and, in some states, damages for the tort of “spoliation” may even be recoverable.

In the paper world, the prelitigation duty to preserve usually does not present a significant risk of sanctions. Most claims have limitations periods of two to seven years. Most companies keep most paper documents for at least seven years for tax purposes, and many companies keep test data forever. But even in the paper world, the loss of critical documents before litigation has been commenced has presented courts with the opportunity to define a litigant’s obligations to a prospective plaintiff.

In the electronic world, the word “documents” has taken on new meaning to the employees responsible for records retention. They no longer have control over individual electronic document storage habits. Every company employee becomes in charge of his or her own e-mails and other electronically stored records. Executives or managers who, in the paper world, never worried about a document because it was filed by a secretary or assistant, can, in the electronic world, have document preservation responsibilities that they were never trained to handle, nor to which they have had to pay attention. In the electronic world, the prelitigation duty to preserve poses danger for big companies in particular because of routine electronic recycling programs for e-mail and backup tapes on the one hand, and individual document storage habits on the other. *When* the duty is triggered becomes particularly critical because electronic documents can disappear with a keystroke or auto-delete software.

It is digital discovery that prompted the title of this paper especially after *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) and *Stevenson v. Union Pacific Railroad Company*, 354 F.3d 739 (8th Cir. 2004) were decided. I will explore these cases first and then focus more broadly on the

trigger of the duty to preserve, what I call “frequently asked questions,” and then the relationship between the severity of the sanction and the nature of the conduct precipitating the sanction.¹

ZUBULAKE IV

In *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*),² Judge Scheindlin addressed the prelitigation duty to preserve and the appropriate sanction for the failure to preserve electronic evidence.

The district court began its analysis by quoting this standard from *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423 (2d Cir. 2001):

The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.

212 F.R.D. at 216. Under this standard, it was very easy for the district court to conclude that a duty to preserve arose “at the latest” when Zubulake filed her charge of discrimination with the Equal Employment Opportunity Commission (EEOC) in August 2001. And, in fact, UBS’s in-house attorneys at that time “cautioned employees to retain all documents, including e-mails and backup tapes, that could potentially be relevant to the litigation.” *Id.*

But did the duty arise earlier, perhaps at the time that termination was being discussed internally? Zubulake argued that UBS should have known that electronic documents were relevant to future litigation by April 2001 and, thus, the duty to preserve arose then for two reasons. First, e-mails pertaining to Zubulake were labeled “UBS Attorney Client Privilege” four months before the EEOC charge was filed, “notwithstanding the fact that no attorney was copied on the e-mail and the substance of the e-mail was not legal in nature.” *Id.* at 216-217 Second, Zubulake’s supervisor, Chapin, “admitted in his deposition that he feared litigation from as early as April 2001” when he was asked if he thought that Ms. Zubulake was going to sue UBS in late April 2001, and he said, “Certainly it was something that was in the back of my head.” *Id.* at 217. The arguments were persuasive to the district court:

Merely because one or two employees contemplate the possibility that a fellow employee might sue does not generally impose a firm-wide duty to preserve. But in this case, it appears that almost everyone associated with Zubulake recognized the possibility that she might sue.

¹ Thanks go out to two colleagues at Shook, Hardy & Bacon L.L.P., Nan Leverett and Jennifer Webb, who assisted me with research for this paper.

² *Zubulake* involved a gender-discrimination claim. Two prior *Zubulake* decisions focused on factors applicable to a determination of shifting the costs of retrieving information from backup tapes from the producing party to the requesting party and the allocation of those costs, and a third decision dealt with the confidentiality of information in a deposition. See, generally, *Barkett, Bytes, Bits and Bucks: Cost Shifting and Sanctions in E-Discovery*, 71 Def. Couns. J. 334 (2004)

Id. The district court gave one illustration to prove its point. An e-mail that was titled, “UBS attorney client privilege [sic]” was distributed to Chapin and others in late April 2001. It “essentially called for Zubulake’s termination.” It read:

“Our biggest strength as a firm and as a desk is our ability to share information and relationships. Any person who threatens this in any way should be firmly dealt with . . . [Believe] me that a lot of other [similar] instances have occurred earlier.”

Id. While perhaps a termination should lead a firm to conclude that it was going to be sued, not every termination results in litigation. Nonetheless, the district court then concluded:

Thus, the relevant people at UBS anticipated litigation in April 2001. The duty to preserve attached at the time that litigation was reasonably anticipated.

Id.

The district court cautioned that this conclusion does not mean that a corporation must preserve “every shred of paper, every e-mail or electronic document.” *Id.* The district court recognized that such a rule “would cripple large corporations, like UBS, that are almost always involved in litigation. As a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation.” *Id.*

However, the district court was quick to add that one who anticipates being a party or is a party to a lawsuit “must not destroy unique, relevant evidence that might be useful to an adversary.” *Id.* To support this proposition, the district court quoted from *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991), which was itself a quote from *William T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984):³

“While a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.”

³ *Turner* involved a claim of personal injuries arising from a bus accident. The district court rejected an adverse inference instruction as a sanction for destruction of bus brake maintenance records which the defendant knew or should have known were relevant as of the time of filing of the complaint, because there was insufficient evidence to show the destruction was willful (as opposed to negligent) or that the brakes of the bus were not in working order. 142 F.R.D. at 76-77. It instead imposed the costs of discovery related to the fate of the documents. *Id.* at 78. *Turner* did not involve prelitigation notice questions, 142 F.R.D. at 73, although *Turner* does contain this statement: “Finally, the obligation to preserve evidence even arises prior to the filing of a complaint where a party is on notice that litigation is likely to be commenced.” 142 F.R.D. at 73 (citations omitted). The *Thompson* decision involved antitrust issues where defendant intentionally destroyed records it knew to be relevant even after document preservation orders were entered by the district court and orders to produce documents were entered by a special master. Based on extensive findings of fact including ones on the prejudice to the plaintiff, defendant’s answer was stricken and a default judgment was entered as a sanction, in addition to the awarding of costs related to the discovery on the destruction issues. 593 F. Supp. at 1455-56. The district court found that notice of the relevance of the documents in question was, in part, “provided by the prelitigation correspondence between counsel for the parties.” *Id.* at 1446.

*Id.*⁴

The district court then attempted to answer the question, “Whose Documents Must Be Retained?” It answered this question first by outlining the “broad contours” of the duty to preserve:

That duty should certainly extend to any documents or tangible things (as defined by Rule 34a) made by individuals “likely to have discoverable information that the disclosing party may use to support its claims or defenses.” The duty also includes documents prepared for those individuals, to the extent those documents can be readily identified (e.g., from the “to” field in e-mails). The duty also extends to information that is relevant to the claims or defenses of any party, or which is “relevant to the subject matter involved in the action.” Thus, the duty to preserve extends to those employees likely to have relevant information – the “key players” whose backup tapes were lost (Chapin, Hardisty, Tong, Datta, and Clarke) fall into this category.

Id. at 217-18. (emphasis in original).

Proceeding methodically from the initial premise that a duty to preserve arose in April 2001 when Zubulake’s termination was imminent, the district court then asked, “What Must Be Retained?” This was the district court’s answer:

A party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter. In recognition of the fact that there are many ways to manage electronic data, litigants are free to choose how this task is accomplished. For example, a litigant could choose to retain all then-existing backup tapes for the relevant personnel (if such tapes store data by individual or the contents can be identified in good faith and through reasonable effort), and to catalog any later-created documents in a separate electronic file. That, along with a mirror-image of the computer system taken at the time the duty to preserve attaches (to preserve documents in the state they existed at the time), creates a complete set of relevant documents. Presumably there are a multitude of other ways to achieve the same result.

Id. at 218. The district court then summarized a litigant’s preservation obligations:

⁴ The full quote is: “Sanctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and destroys such documents and information. While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.” 593 F. Supp. at 1455. This statement from *Thompson* is the most frequently quoted description of discovery obligations. *Thompson* derived the contours of discovery obligations from *Bowmar Instrument Corp. v. Texas Instruments, Inc.*, 25 Fed. R. Serv. 2d 423 (N.D. Ind. 1977), a case involving a sanctions claim related to prelitigation destruction of documents. *Bowmar* is discussed below.

The scope of a party's preservation obligation can be described as follows: Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (i.e., actively used for information retrieval), then such tapes would likely be subject to the litigation hold.

However, it does make sense to create one exception to this general rule. If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of "key players" to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to all backup tapes.

Id. (emphasis in original).

Against this backdrop, the district court then examined the facts. UBS's domestic document-retention policy required retention of monthly backup tapes for three years. Despite this policy, there were six monthly backup tapes and part of a seventh missing. *Id.* at 218-19.

Three backup tapes contained the e-mail files of Chapin, Hardisty, Clarke, and Datta created after April 2001. These tapes were not destroyed before the litigation. Rather, contrary to the document-retention policy, and despite an August 2001 directive from counsel to preserve documents, these backup tapes were deleted between October 2001 and February 2002, "after UBS staff were warned to retain documents, but before they were told specifically to preserve backup tapes." *Id.* at 219 n.30.

Two backup tapes were for the time period after Zubulake filed her EEOC charge and contained e-mails of Rose Tong, a human resources employee.⁵ UBS was unable to explain the disappearance of these tapes which, at a minimum, should have been subject to the preservation directive issued by UBS in August 2001, the district court determined. *Id.* at 219.

Given that all of the backup tapes at issue should have been in existence after the preservation directive was issued in August 2001 or were deleted after this directive was issued, it is not clear why the district court felt compelled to discuss when the duty to preserve was first triggered.⁶ Without relating the duty to a particular trigger date, the district court made the unsurprising finding that the duty to preserve existed. *Id.* at 219.

⁵ The other two tapes apparently related to a period before Zubulake filed her EEOC complaint and contained e-mails of Rose Tong as well.

⁶ As noted in the prior footnote, the tapes that contained Ms. Tong's e-mails for June 2001 and July 2001 were missing. Ms. Tong was working in UBS's Hong Kong office where a one-month, not three-year, retention policy existed. Arguably, the June 2001 backup tape would have survived only had the duty to preserve been communicated within UBS as of late April 2001 when the district court found that litigation was reasonably anticipated.

Having found that a duty to preserve existed but that evidence was lost, the district court then considered remedies. The district court rejected an effort to reshift a 25 percent allocation charged to Zubulake for defendant's cost of producing backup tapes saying it had already accounted for UBS's missing e-documents in *Zubulake III*.⁷ *Id.*

It also rejected Zubulake's request for an adverse inference instruction to the jury that the destroyed evidence "would have been favorable to Zubulake and harmful to UBS." *Id.* Calling this an "extreme sanction" that "should not be lightly given," the district court explained that Zubulake had to satisfy three elements: (1) that there was a duty to preserve the evidence, (2) the records in question were destroyed with a "culpable state of mind," and (3) the "destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *Id.* at 220.

As to (1), the duty issue had already been favorably determined in Zubulake's favor.

As to (2), the district court determined that the disappearance or deletion of the backup tapes was negligent and possibly reckless but not intentional or willful. The district court first explained that once a "duty to preserve attaches"—here in late April 2001 based on the e-mail traffic discussing her termination — "any destruction of documents is, at a minimum, negligent." *Id.* at 220.

With respect to the backup tapes that were overwritten, the district court was forgiving:

Whether a company's duty to preserve extends to backup tapes has been a grey area. As a result, it is not terribly surprising that a company would think that it did not have a duty to preserve all of its backup tapes, even when it reasonably anticipated the onset of litigation. Thus, UBS's failure to preserve all potentially relevant backup tapes was merely negligent, as opposed to grossly negligent or reckless.

Id. (emphasis in original). The district court, however, warned litigants that its largesse would not be available to others: "Litigants are now on notice, at least in this Court, that backup tapes that can be identified as storing information created by or for 'key players' must be preserved." *Id.* n.47.

The district court was less forgiving with respect to the backup tapes of a key human resources employee that were lost after the EEOC charge was filed but before suit was brought:

UBS failed to include these backup tapes in its preservation directive in this case, notwithstanding the fact that Tong was the human resources employee directly responsible for Zubulake and who engaged in continuous correspondence regarding the case. Moreover, the lost tapes covered the time period after Zubulake filed her EEOC charge, when UBS was unquestionably on notice of its duty to preserve. Indeed, Tong herself took part in much of the correspondence over Zubulake's charge

⁷ *Zubulake III* applies the *Zubulake* seven-factor test for determining when costs should be shifted to the requesting party for "inaccessible" electronic information—here backup tapes. *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003). Judge Scheindlin had earlier ruled that UBS should pay 75 percent and Zubulake 25 percent of the cost of extracting e-mails from 77 backup tapes. 216 F.R.D. at 282.

of discrimination. Thus, UBS was grossly negligent, if not reckless, in not preserving those backup tapes.

Id. at 221. (emphasis in original).

But being grossly negligent does not represent “willful” conduct, so “relevance” had to be proven and could not be presumed. *Id.* at 221. While the district court had earlier found that the e-mails that were produced from existing backup tapes bore on issues in the litigation, it also had found that nowhere in these e-mails was “there evidence that Chapin’s dislike of Zubulake related to her gender.” *Id.* (quoting from *Zubulake III*, 216 F.R.D. at 286). Hence, “There is no reason to believe that the lost e-mails would be any more likely to support her claims.” *Id.* The district court added that Tong’s August 2001 e-mail correspondence – relevant to the retaliation claim – was preserved on the September 2001 backup tape. “Thus, there is no reason to believe that peculiarly unfavorable evidence resides solely on that missing tape. Accordingly, Zubulake has not sufficiently demonstrated that the lost tapes contained relevant information.” *Id.*

The district court concluded that although UBS had a duty to preserve backup tapes, the appropriate remedy was to grant Zubulake’s request to require UBS to pay the costs of re-deposing certain witnesses “for the limited purpose of inquiring into issues raised by the destruction of evidence and any newly discovered e-mails.” *Id.* at 222.⁸

STEVENSON V. UNION PACIFIC RAILROAD COMPANY

Stevenson v. Union Pacific Railroad Company, 354 F.3d 739 (8th Cir. 2004) involved a car-train grade-crossing accident in which Mr. Stevenson was injured, and his wife was killed. Union Pacific did not retain the voice tape of conversations between the train crew and dispatch at the time of the accident. It also failed to maintain track maintenance records from before the accident. The district court sanctioned Union Pacific for this conduct by giving the jury an adverse inference instruction⁹ and awarded plaintiff \$164,410.25 in costs and attorneys’ fees incurred as a result of the spoliation. The jury returned a \$2 million verdict in plaintiff’s favor.

This was the sequence of events. The accident occurred on November 6, 1998. Within 90 days thereafter the voice tape was “destroyed” by “recording over it in accordance with the company’s routine procedure of keeping voice tapes for 90 days and then reusing the tapes.” Plaintiff filed suit on September 20, 1999. The request for production of the voice tape was mailed on October 25, 1999. The district court found no fault with the tape-retention policy in the abstract, but found “it was unreasonable and amounted to bad faith conduct for Union Pacific to adhere to the principle in the

⁸ This opinion was followed by *Zubulake V*, in which the district court decided that post-filing destruction or loss of relevant evidence warranted the issuance of an adverse inference instruction to the jury. *Zubulake v. UBS Warburg*, 2004 WL 1620866 (S.D.N.Y. July 20, 2004). On April 12, 2005, the jury returned a verdict against UBS Warburg of \$9.1 million in compensatory damages and about \$20.2 million in punitive damages.

⁹ “You may, but are not required to, assume that the contents of the voice tape and track inspection records would have been adverse, or detrimental” to the defendant. 354 F.3d at 743.

circumstances of this case.” The district court reasoned that Union Pacific had been involved in many grade-crossing accidents and “knew that the taped conversations would be relevant in any potential litigation.” There was evidence that a claims representative for Union Pacific “had received notice of the accident shortly after it occurred” and that he “immediately began his investigation by calling the Railroad’s Risk Management Communications Center to get details about the accident. He also called the Harriman Dispatching Center in Omaha to request copies of the train orders and warrants, the train consist,¹⁰ and a dispatcher’s record of the train’s movement. He did not, however, request a copy of the voice tape. The district court listened to available samples of this type of voice tape and found that they generally contain evidence that is discoverable and useful in developing a case. Additionally, the district court found that Union Pacific had preserved such tapes in cases where it was helpful to Union Pacific’s position. The district court also found that the plaintiffs were prejudiced by the destruction of this tape because there are no other records of comments between the train crew and dispatch contemporaneous to the accident.” 354 F.3d at 747.

The court of appeals first had to clarify circuit law on the appropriate legal standard:

We have never approved of giving an adverse inference instruction on the basis of prelitigation destruction of evidence through a routine document retention policy on the basis of negligence alone. Where a routine document retention policy has been followed in this context, we now clarify that there must be some indication of an intent to destroy the evidence for the purpose of obstructing or suppressing the truth in order to impose the sanction of an adverse inference instruction.

Id. (footnote omitted).

Saying that this case “tests the limits of what we are able to uphold as bad faith,” the court of appeals held that the district court did not abuse its discretion “by sanctioning Union Pacific’s prelitigation conduct of destroying the voice tape.” *Id.* at 748. The court of appeals held:

The district court’s bad faith determination is supported by Union Pacific’s act of destroying the voice tape pursuant to its routine policy in circumstances where Union Pacific had general knowledge that such tapes would be important to any litigation over an accident that resulted in serious injury or death, and its knowledge that litigation is frequent when there has been an accident involving death or serious injury. While these are quite general considerations, an important factor here is that a voice tape that is the only contemporaneous recording of conversations at the time of the accident will always be highly relevant to potential litigation over the accident. We conclude that this weighs heavier in this case than the lack of actual knowledge that litigation was imminent at the time of the destruction. Additionally, the record indicates that Union Pacific made an immediate effort to preserve other types of evidence but not the voice tape, and the district court noted that Union Pacific was careful to preserve a voice tape in other cases where the tape proved to be beneficial

¹⁰A train consist is a list of the cars by classes, types, or arrangement.

to Union Pacific. The prelitigation destruction of the voice tape in this combination of circumstances, though done pursuant to a routine retention policy, creates a sufficiently strong inference of an intent to destroy it for the purpose of suppressing evidence of the facts surrounding the operation of the train at the time of the accident.

Id.

The court of appeals also determined that “the requisite element of prejudice” was met: “While there is no indication that the voice tape destroyed contained evidence that could be classified as a smoking-gun, the very fact that it is the only recording of conversations between the engineer and dispatch contemporaneous with the accident renders its loss prejudicial to the plaintiffs.” *Id.*

With respect to the track-maintenance inspection records, the court of appeals concluded that there was no bad faith in connection with their disposition:

There is no showing here that Union Pacific knew that litigation was imminent when, prior to any litigation, it destroyed track maintenance records from up to two years prior to the accident pursuant to its document retention policy. Additionally, maintenance records would only be relevant to potential litigation to the extent that they were relatively close in time to the accident and defective track maintenance was alleged to be the cause of the accident. Even then, track maintenance records are of limited use. While they may reveal defects in the track that existed at the time of the last inspection, they do not show the exact condition of the track at the time of the collision. The district court weighed heavily the fact that the Union Pacific knew that litigation is possible when there has been a serious accident but did not consider whether, when the prelitigation destruction was occurring, there had been any notice in this case of potential litigation or that the track maintenance would be an issue or an alleged cause of the accident. It appears that Union Pacific was not on notice that the track maintenance records should be preserved until it received the October 1999 request for production of documents, and the condition of the track was not formally put into issue until the second amendment to the complaint in May 2000. Thus, any bad faith determination regarding the prelitigation destruction of the track maintenance records is not supported by the record, and any adverse inference instruction based on any prelitigation destruction of track maintenance records would have been given in error.

354 F.3d at 749.

However, Union Pacific still obtained a reversal. It was successful in persuading the court of appeals that the district court’s failure to give Union Pacific the opportunity to rebut the adverse inference was an abuse of discretion requiring reversal and a new trial:

While the district court need not permit a complete retrial of the sanctions hearing during trial, unfair prejudice should be avoided by permitting the defendant to put on some evidence of its document retention policy and how it affected the destruction of

the requested records as an innocent explanation for its conduct. Absent this opportunity, the jury is deprived of sufficient information on which to base a rational decision of whether to apply the adverse inference, and an otherwise permissive inference easily becomes an irrebuttable presumption.

Id. at 750.

The court of appeals also was concerned about the “timing of the instruction.” The district court informed the jury at the outset of the trial that “the Railroad had destroyed evidence that should have been preserved,” and the plaintiff “referred to this destruction throughout the trial.” The court of appeals saw “no need to unduly emphasize the adverse inference at the outset of trial, especially where there is no finding that the evidence destroyed was crucial to the case.” The court of appeals acknowledged that the evidence was relevant and that “its destruction prejudiced the plaintiffs’ discovery efforts.” However, it observed that in prior cases where evidence preclusion or facts were taken as true as sanctions, “the offending party had destroyed the one piece of crucial physical evidence in the case. No such finding exists here.” 354 F.3d at 750 (citations omitted).¹¹

Zubulake IV and *Stevenson* prompt a number of questions. Just when does the duty to preserve arise? How much must one know before the duty attaches? Can a party’s behavior trigger the duty? What must be preserved if the duty does attach? What is the standard of conduct that will inform the discretion of the trial court in deciding whether to impose a sanction? Does that standard vary among the federal circuits? In an attempt to provide guidance to litigants, I boldly enter this thicket.

DUTY TO PRESERVE

As the quotations in the table below describe in more detail, the federal circuit courts have characterized the prelitigation duty to preserve in a variety of similar ways:

- *knowledge of potential relevance* to the claim
- *awareness of circumstances likely to give rise to future litigation* and destruction of *potentially relevant records* without particularized inquiry
- a party *should have known* that the evidence *may be relevant to future litigation*
- when a party *reasonably should know* that the evidence *may be relevant to anticipated litigation*.
- destruction of evidence *foreseeably pertinent* to litigation
- being *sensitive to the possibility of a suit*, a company then destroys the very *files that would be expected to contain the evidence most relevant to such a suit*

¹¹ The court of appeals’ holding on the award of attorneys fees is also instructive for litigants. The district court sat in diversity but cited no Arkansas law to support the fee award. Hence, the court of appeals reviewed the award “under the federal court’s inherent powers.” The court of appeals explained that the inherent power to sanction “reaches conduct both before and during litigation as long as that conduct abuses the judicial process in some manner. A bad faith finding is specifically required in order to assess attorney’s fees.” 354 F.3d at 751. Since it found no abuse of discretion in the district court’s finding that “the prelitigation destruction of the voice tape amounted to bad faith conduct,” this condition was satisfied. However, it also determined that the failure to maintain the track maintenance records was not supported by a bad faith finding. “Because part of the existing award might be based upon prelitigation conduct that does not amount to bad faith, we vacate the award of attorneys’ fees and remand for recalculation under the bad faith standard.” *Id.*

- if the corporation *knew or should have known* that the documents *would become material at some point in the future*¹²

The table puts these concepts into a better context for pertinent circuit decisions that were located.

Circuit Decision	Statement of the Duty
<p><i>Testa v. Wal-Mart Stores, Inc.</i>, 44 F.3d 173, 177 (1st Cir. 1998) (citation omitted).</p> <p><i>Blinzler v. Marriott Int'l, Inc.</i>, 81 F.3d 1148, 1159 (1st Cir. 1996) (citations omitted).</p>	<p>“Thus, the sponsor of the inference must proffer evidence sufficient to permit the trier to find that the target knew of (a) the claim (that is, the litigation or the potential for litigation), and (b) the document’s potential relevance to that claim.”</p> <p>“Although no suit had yet been begun when the defendant destroyed the document, it knew of both James Blinzler’s death and the plaintiff’s persistent attempts—including at least one attempt after Blinzler died—to discover when the call for emergency aid had been placed. This knowledge gave the defendant ample reason to preserve the report in anticipation of a legal action. When the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry, a factfinder may reasonably infer that the party probably did so because the records would harm its case.”</p>
<p><i>Kronish v. United States</i>, 150 F.3d 112, 127 (2d Cir. 1998).</p>	<p>“This obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation—most commonly when suit has already been filed, providing the party responsible for the destruction with express notice, but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation.”</p>
<p><i>Schmid v. Milwaukee Elec. Tool Corp.</i>, 13 F.3d 76, 81 (3rd Cir. 1994).</p>	<p>“In the final analysis, it seems to us that we could affirm the district court only if we were willing to hold that an expert in Dr. Bratspies’s position has an affirmative duty not to conduct an investigation without affording all potential defendants an opportunity to have an expert present. We decline to so hold.</p>

¹² The Sedona Conference’s working group on electronic discovery published in January 2004 a document entitled, “Best Practices Recommendations & Principles for Addressing Electronic Document Production.” Comment 14.d. describes the prelitigation duty to preserve in terms of whether the litigation is “reasonably foreseeable”: “Once an organization reasonably anticipates that documents in its possession may be relevant to reasonably foreseeable litigation, the organization should preserve those documents, even if a records-management program calls for the routine destruction of those documents.” It adds that if a party “does not reasonably anticipate litigation,” that party may destroy documents in compliance with a reasonable records-management policy without fear of sanction. “Instead, the fact that the destruction occurred in compliance with a preexisting policy should be considered *prima facie* evidence of the good faith of the organization.”

Circuit Decision	Statement of the Duty
	<p>When Dr. Bratspies conducted his investigation, no suit had been filed and Schmid did not know whether he had a basis for instituting suit. Thus, no defendant had been identified and, a fortiori, no defense expert had been engaged. An across-the-board rule that would require an identification of all potential defendants at this nascent stage of the potential controversy and an invitation to each of them to attend an exploratory investigation would be inefficient, if not altogether unworkable. Many accident investigations do not lead to litigation and many narrow the field of potential defendants. There are still more situations in which the resources necessary to assemble the experts of potential defendants would be invested with no significant return on the investment. On the other hand, in cases like this one, the attendant delay would pose a significant risk of prejudice to the plaintiff.</p> <p>Rather than endorse Electric Tool's novel rule, we consider it more prudent to rely on the traditional case by case approach keyed to the degree of fault on the part of the party accused of spoliation and the degree of prejudice to the opponent."¹³</p>
<p><i>Silvestri v. General Motors Corp.</i>, 271 F.3d 583, 591 (4th Cir. 2001) (citation omitted).</p>	<p>"The duty to preserve extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation."</p>
<p><i>Welsh v. United States</i>, 844 F.2d 1239, 1247-48 (6th Cir. 1988) (citation omitted) (applying Kentucky law).</p>	<p>"The District Court inferred from the VA surgeons' failure to send the skull flap to pathology that 'upon surgically entering the decedent's skull on October 15 . . . the doctors found an infection of long standing that had been walled off in some manner so that it did not manifest itself until October 10.' This inference was not mandatory, but it was permissible. In addition, the negligent destruction of evidence foreseeably pertinent to litigation and the consequent failure to perform pathological examination in accordance with the standards of ordinary medical practice give rise in the circumstances of this case to a rebuttable presumption that the missing specimen would establish that the defendant was negligent in failing to discover the underlying disease process and that this negligence was the proximate cause of the decedent's demise."</p>

¹³ "In this case, there was very little fault that could be laid at Dr. Bratspies's feet, very little nonspeculative prejudice to defendant, and a sanction that deprived Schmid of any opportunity to prove his claim. That sanction was not commensurate with the limited fault and prejudice present in this case. As a result, we can sanction neither the district court's striking of Schmid's expert evidence nor its granting judgment to Electric Tool." 13 F.3d at 81.

