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.*

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[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 priviladge [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.'"*

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[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:

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[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.

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[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*

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[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 instruction[9] 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

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[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*

[10] A 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***

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[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
Testa v. Wal-Mart Stores, Inc., 44 F.3d 173, 177 (1st Cir. 1998) (citation omitted).	"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."
Blinzler v. Marriott Int'l, Inc., 81 F.3d 1148, 1159 (1st Cir. 1996) (citations omitted).	"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."
Kronish v. United States, 150 F.3d 112, 127 (2d Cir. 1998).	"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."
Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 81 (3rd Cir. 1994).	"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.

[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
	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. 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]
Silvestri v. General Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001) (citation omitted).	"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."
Welsh v. United States, 844 F.2d 1239, 1247-48 (6th Cir. 1988) (citation omitted) (applying Kentucky law).	"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."

[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.

Circuit Decision	Statement of the Duty
Partington v. Broyhill Furniture Indus., Inc., 999 F.2d 269, 272 (7th Cir.1993).	"But if, 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, the inference arises that it has purged incriminating evidence."
Lewy v. Remington Arms Co., Inc., 836 F.2d 1104, 1112 (8th Cir. 1988) (citations omitted).	"We are unable to decide, based on the record we have before us, whether it was error for the trial court to give this instruction. On remand, if the trial court is called upon to again instruct the jury regarding failure to produce evidence, the court should consider the following factors before deciding whether to give the instruction to the jury. First, the court should determine whether Remington's record retention policy is reasonable considering the facts and circumstances surrounding the relevant documents. For example, the court should determine whether a three year retention policy is reasonable given the particular document. A three year retention policy may be sufficient for documents such as appointment books or telephone messages, but inadequate for documents such as customer complaints. Second, in making this determination the court may also consider whether lawsuits concerning the complaint or related complaints have been filed, the frequency of such complaints, and the magnitude of the complaints. Finally, the court should determine whether the document retention policy was instituted in bad faith. In cases where a document retention policy is instituted in order to limit damaging evidence available to potential plaintiffs, it may be proper to give an instruction similar to the one requested by the Lewys. Similarly, even if the court finds the policy to be reasonable given the nature of the documents subject to the policy, the court may find that under the particular circumstances certain documents should have been retained notwithstanding the policy. For example, if the corporation knew or should have known that the documents would become material at some point in the future then such documents should have been preserved. Thus, a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy."
Stevenson v. Union Pacific R.R. Co., 354 F.3d 739, 749 (8th Cir. 2004).	"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

Circuit Decision	Statement of the Duty
	impose the sanction of an adverse inference instruction."
Rowe v. Albertsons, Inc., No. 02-4186, 2004 WL 2252064 (10th Cir. Oct. 7, 2004) (applying Texas law) (citation omitted).	"The person asserting the presumption must show that the party who destroyed the evidence had notice both of the potential claim and of the evidence's potential relevance. Notice of a claim does not refer to any particular statistical probability that litigation will occur; rather, it simply means that litigation is more than merely an abstract possibility or unwarranted fear. The underlying inquiry is whether it was reasonable for the investigating party to anticipate litigation and prepare accordingly."

State supreme courts outline the duty in similar ways. Illustratively, in *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267, 270-71 (Ill. 1995), the Illinois Supreme Court devised a two-prong test to determine when there is a duty to preserve: (1) is there a duty to preserve via agreement, contract, statute, special circumstance, or voluntary undertaking? (2) "In any of the foregoing instances, a defendant owes a duty of due care to preserve evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action."[14]

In *Kippenhan v. Chaulk Serve., Inc.*, 697 N.E.2d 527, 530 (Mass. 1998), the Massachusetts Supreme Court framed the question this way:

> *Sanctions may be appropriate for the spoliation of evidence that occurs even before an action has been commenced, if a litigant or its expert knows or reasonably should know that the evidence might be relevant to a possible action. (citations omitted). The threat of a lawsuit must be sufficiently apparent, however, that a reasonable person in the spoliator's position would realize, at the time of spoliation, the possible importance of the evidence to the resolution of the potential dispute.*

Among other states, in deciding the appropriate sanction for spoliation of evidence, Pennsylvania adopted the analysis set forth in *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 81 (3rd Cir. 1994), and weighs the degree of fault, the degree of prejudice, and "the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct." *Schroeder v. Pennsylvania*, 710 A.2d 23, 27 (Pa. 1998). Texas states it this way: "Such a duty arises only when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and the evidence in

[14] *Boyd* allowed a negligence action for spoliation under the circumstances. Travelers was Boyd's employer's workers' compensation carrier. It had taken custody of a heater that had exploded and caused the plaintiff's injury. It subsequently lost the heater. Boyd sued the manufacturer of the heater on a products liability theory and Travelers for negligent spoliation. The supreme court held that the allegations against Travelers stated a cause of action under Illinois law but refused to permit an evidentiary presumption as a sanction against Travelers. The supreme court reasoned that if plaintiff prevailed against the manufacturer, plaintiff could not establish causation or damages with respect to Travelers since the loss of the heater had no impact on the underlying claim against the manufacturer. And if plaintiff lost the claim against the manufacturer, Travelers should be permitted to try to establish that the loss of the heater would not have made a difference in the outcome. 652 N.E.2d at 273.

its possession or control will be material and relevant to the claim." *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 722 (Tx. 2003).

The cases applying these various formulations of the standard generally fall into four categories:

1. Spoliation of physical evidence where a personal injury or property damage has occurred.
2. Spoliation of documents where a personal injury or property damage has occurred.
3. Economic loss litigation (*e.g.*, a discrimination claim, or a claim for monies owed).
4. Pattern litigation.

Cases of Spoliation of Physical Evidence

In general, the "was there a duty to preserve" question is affirmatively answered when relevant physical evidence is destroyed or lost or tampered with in a way that changes its character. The focus of this case law is on the prejudice to the other side and the severity of the sanction.

Much of the case law on the destruction of physical evidence has involved vehicle or boat cases. For example, *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995) affirmed a judgment for the defendant. Plaintiff's husband died as a result of a fire on a boat. An expert for plaintiff examined the boat in destructive ways that deprived defendant of the opportunity to conduct its own inspection of the alleged defect. The trial court sanctioned the plaintiff by allowing the jury to draw an adverse inference if the jury found that the plaintiff or her agents caused the destruction or loss of relevant evidence. The court of appeals affirmed the judgment entered on the jury verdict for the defendant saying that the district court acted within its discretion.

In *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001), the plaintiff never got to the jury. Plaintiff claimed that a GM vehicle was defective and that the defect caused the accident in issue. Plaintiff had his experts inspect the vehicle. One of the experts told plaintiff to advise GM of the accident so GM could inspect it. But GM was not notified of the accident until three years later and by then the vehicle had been repaired and resold. The district court dismissed the case as a sanction. The Fourth Circuit affirmed. "In sum, we agree with the district court that Silvestri failed to preserve material evidence or to notify GM of the availability of the evidence, thus breaching his duty not to spoliate evidence." 271 F.3d at 592.

There are a number of other contexts in which physical evidence has been destroyed, lost, or tampered with and the outcome is a function of quality of the knowledge or notice, the timing of the response to the spoliation, and the level of prejudice. *See Rice v. United States*, 917 F. Supp. 17 (D.D.C. 1996) (samples of donated tainted blood were not preserved where plaintiff contracted HIV from a blood transfusion using the tainted blood, and the hospital knew this before the tainted blood samples were exhausted; adverse inference required); *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.2d 423, 435-36 (2d Cir. 2001) (silicon wafers were damaged in transit and the shipping container was no longer available; there was no abuse of discretion in the district court's decision not to sanction plaintiff where defendant never made a request to inspect the damaged shipping container at the time it was put on notice by plaintiff of the damage or anytime thereafter until it filed a motion for summary judgment three years later); *Howell v. Maytag,*, 168 F.R.D. 502, 507-08 (M.D. Pa. 1996) (destruction of a fire

scene by plaintiff's insurance carrier warranted an adverse inference instruction and possibly a more severe sanction if the evidence at trial showed greater prejudice than the record revealed at the time); *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d at 81 (reversing the district court's decision to exclude expert testimony on his examination of a circular saw because the defendant could not show prejudice from the changed condition of the saw); *Shimanovsky v. General Motors Corp.*, 692 N.E.2d 286, 293 (Ill. 1998) (destructive testing of power-steering components should have been sanctioned but not by dismissal where defendant had access to information, reports, and photographs used by plaintiff's experts, defendant possessed original information and data on the original design and production of the power-steering mechanism, and defendant was not diligent in seeking production and was untimely in objecting to the condition of the evidence).[15]

Cases of Spoliation of Documents After a Personal Injury or Property Damage Has Occurred

Stevenson v. Union Pacific Railroad Company, 354 F.3d 739 (8th Cir. 2004) is an example of this category of a prelitigation failure to preserve evidence. Generally speaking, the more serious the injury or damage, the more likely it is that a duty to preserve will be found. In *Stevenson*, for example, there was a death involved in the accident. The court of appeals held that the defendant railroad should have prevented the recycling of a recorded voice radio communication between the train crew and dispatchers on the date of a railroad accident in circumstances where it preserved all of the other documents related to the accident. *Stevenson, supra*, 354 F.3d at 748.

Consider these other examples:

- In *Rowe v. Albertsons, Inc.*, No. 02-4186, 2004 WL 2252064 (10th Cir. Oct. 7, 2004), the court of appeals vacated a summary judgment in a premises liability case where the testimony of the store's night manager created an issue of fact over the propriety of allowing the recording over of a videotape of the condition of the floor. The night manager had reviewed the tape and knew by the day after a customer's fall that the customer had retained counsel, and then wrote a report that said there was going to be a dispute with the company.
- In *Blinzler v. Marriott Int'l Inc.*, 81 F.3d 1148 (1st Cir. 1996), a hotel discarded telephone operator records that would have established if an operator called for an ambulance in a timely manner in response to the frantic call of a guest whose husband was having a heart attack and eventually died while his wife waited for the ambulance. The court of appeals vacated a judgment notwithstanding the verdict and reinstated the jury award.

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[15] Knowledge sufficient to establish a duty to preserve has been easy to demonstrate in subrogation cases where the plaintiff insurance company failed to preserve physical evidence. The fight in these cases has been on the severity of the sanction relative to the level of prejudice. *Ballotis v. McNeil*, 870 F. Supp. 1285, 1290 (M.D. Pa. 1994) (where insurer was in control of a fire scene, had identified a microwave oven as the cause of the fire but failed to preserve it, and had identified the manufacturer of the oven as a potential subrogation target, a duty to preserve arose warranting adverse inference); *Howell v. Maytag* 168 F.R.D. 502 (M.D. Pa. 1996) (in another microwave oven-fire case, the oven was preserved but the fire scene was destroyed eliminating Maytag's ability to identify other causes of the fire other than the oven, resulting in an adverse inference instruction); *Bell v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546 (6th Cir. 1994) (while the duty to preserve was found to exist, dismissal was too severe a sanction for prelitigation destruction of a heater alleged to have caused a fire).

- *Kronisch v. United States,* 150 F.3d 112 (2d Cir. 1998) involved destruction of records of testing LSD on unwitting subjects. The records were destroyed by CIA personnel who ran the testing program depriving an alleged victim of proof he had been drugged. A summary judgment for the defendant was vacated and the matter remanded for trial.
- In *Lamarca v. United States*, 31 F. Supp. 2d 110 (E.D.N.Y. 1999), nursing flow charts were missing for the key days in which a patient first fell and later died. The issue was whether the patient was put on "fall" risk and the missing records would have answered that question. The government could not locate the records and ultimately conceded the patient was not put on "fall risk" so that the sanctions issue did not have to be reached. The district court entered judgment for the plaintiff.
- In a slip and fall case which resulted in plaintiff's broken hip, a water park purged accident records after each season. A Nevada statute provided that evidence willfully suppressed would be adverse if produced. The Nevada Supreme Court felt that the destruction of the accident records before the limitations period had run was willful suppression. A judgment for the defendant was reversed. *Reingold v. Wet 'N Wild Nevada, Inc.*, 944 P.2d 800 (Nev. 1997).

Cases Involving Economic Loss Claims

These cases focus on the facts relating to notice of the claim. If the court determines that there was a duty to preserve, the focus again shifts to the nature of the conduct that resulted in the destruction. Were the documents lost innocently under a records-retention program? Or were they negligently destroyed? Or something worse?

Many of these cases are discrimination cases where the threat of suit was apparent. For example, in *Capellupo v. FMC Corp.*, 126 F.R.D. 545 (D. Minn. 1989), key employment practice documents were destroyed following a threat of a gender-based class action. One of the plaintiffs told the EEO manager that she was contemplating a gender-based class action and that information was passed along to the defendant's general counsel's office. The district court rejected FMC's argument that record destruction was permissible because it did not have the class action pleadings in hand and specifically found that FMC's corporate hierarchy knew the claim was coming. FMC was required to pay the plaintiff's fees and costs of the sanctions motions, multiplied by two, and to prepare a list of all documents destroyed so that the district court could evaluate what other sanctions might be appropriate to remedy the "injustices arising out of defendants' actions." *Id.* at 552-53.[16]

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[16] For additional discussion see also *Partington v. Broyhill Furniture Indus., Inc.*, 999 F.2d 269 (7th Cir. 1993) where the files of a salesman over the age of 40 were purged before an age-discrimination suit was brought. The "purge" covered terminated salesmen most of whom happened to be over the age of 40 where the defendant was "sensitive" to the possibility of a suit. In *Byrnie v. Town of Cromwell*, 243 F.3d 93 (2d Cir. 2001), the court of appeals held that a duty to preserve hiring records existed once plaintiff filed a failure-to-hire discrimination claim with the Connecticut human rights commission. Foreshadowing *Zubulake* IV, discussed above, the court of appeals also suggested that "arguably" the duty may have arisen earlier, when the board received a Freedom of Information Act (FOIA) request from the plaintiff requesting materials on the hiring process, or after the plaintiff met with the principal and assistant principal of the school at which he was seeking to become an art teacher and he expressed concerns about the hiring process and asked for copies of the interview questions. The school board superintendent had also testified that after the hiring process was completed it was "very apparent" that plaintiff "had concerns, and that after the FOIA request was received, he was assured by the school principal that "information" had been "retained." 243 F.3d at 108. Ultimately, the court of appeals relied on a regulation requiring that hiring records be kept in finding that a duty existed, that the records were destroyed intentionally (but not in bad faith), and that they were relevant, all of which justified an inference of discrimination sufficient to withstand defendant's summary judgment motion. *Id.* at 109-10.

Broccoli v. Echostar Communications, 229 F.R.D. 506 (D.Md. 2005) followed *Zubulake IV* in concluding that a defendant had a duty to preserve in January 2001, two years before suit was filed, when plaintiff "orally and via email" told two of his supervisors that he was being sexually harassed by his immediate supervisor. To put this conclusion into perspective, plaintiff was terminated on November 28, 2001 (and complained again about harassment then) and the EEOC complaint in the matter was not filed until February 2002 (both of which dates would have also triggered the duty to preserve). Once the duty to preserve was triggered, the company had a duty to preserve e-mail among other documents. However, the defendant's e-mail retention policy automatically placed all sent messages over seven days old in a "deleted" folder. All items in the deleted folder over 14 days old were automatically purged. Defendants did not have an e-mail back-up system. In addition, the electronic files of former employees, including the contents of all folders, sub-folders, and all email folders, were also deleted within 30 days after an employee left defendant.

Calling this system "extraordinary" and "risky," the district court said these policies might be defensible "under normal circumstances." However, after reviewing the relevant facts, the district court concluded instead that defendant intentionally "deep-sixed" "nettlesome documents" as a regular policy of management. *Id.* at 511. Hence, the failure to suspend the document retention policy and to preserve potentially relevant documents was in bad faith. *Id.* at 512. The district court issued sanctions consisting of the preclusion of certain evidence at trial relating to the sexual harassment claim as well as an adverse inference instruction, and plaintiff's attorneys' fees in connection with the sanctions motion.[17]

Alliance to End Repression v. Rochford, 75 F.R.D. 438, 440 (N.D. Ill. 1976) involved the destruction of records of confidential informants. The district court was persuaded that the defendant police department knew that suit was going to be brought by the organization it had infiltrated because one of the informants warned that a suit was coming and "any steps that can be taken to prepare for the possible problems should be taken as soon as possible." The district court added: "Defendants have nowhere stated that document destruction here in issue was in the ordinary course of business nor have they shown any written authorization for the destruction." *Id.* at 440.

In *United States v. Koch Industries, Inc.*, 197 F.R.D. 463 (N.D. Okla. 1998), a witness had testified in a 1986 deposition in an separate proceeding that Koch was engaged in a companywide scheme to steal oil and Koch knew this witness was trying to get the United States to investigate Koch. The allegations made by this witness "came to fruition" in a 1988 action in which Koch was accused of the conduct discussed by the witness. The action in question was not brought until 1991. Certain computer tapes were destroyed before the lawsuit was brought.

The magistrate judge concluded that the destruction of the computer tapes was not intentional but, after analyzing the failure of senior management to give proper instructions to data-processing personnel or the computer tape librarian, found that senior management was negligent:

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[17] Despite the evidentiary sanctions, the jury found for defendant on the harassment claim even as it awarded plaintiff $9,668.64 on state law breach of contract and wage payment claims. The award to plaintiff of his attorneys' fees in connection with the motion for sanctions occurred after the verdict. The attorneys fees awarded ($16,097) were less than what was sought ($26,109) but more than the verdict.

> *The Court finds that KII's senior management was negligent in failing to determine which tapes in the tape library contained information relevant to imminent and ongoing litigation and in failing to communicate clear guidelines regarding the preservation of information related to imminent and ongoing litigation to KII's data processing personnel and computer tape librarian. The negligence of KII's senior management created an environment that led to the destruction by computer personnel of computer tapes that should have been preserved as evidence potentially relevant to imminent or ongoing litigation.*

197 F.R.D. at 486.

The magistrate judge explained that an adverse inference instruction required bad faith, but the plaintiffs would be permitted to inform the jury "as to which relevant computer tapes were destroyed and the impact that the destruction has on Plaintiffs' proof. The jury will simply have to draw its own inferences without a specific 'adverse inference' instruction from the Court." *Id.*

The magistrate judge then proceeded to evaluate the prejudice to the plaintiffs of trying the case without the computer tapes and concluded that statistical analyses that would have been performed from information on the tapes "would have been useful and probative in helping Plaintiffs prove their allegations" that the defendant's equipment generated false measurements, but that the inability to perform these analyses did not "completely prevent Plaintiffs from proving their allegations." *Id.* The magistrate judge then invited plaintiffs to propose a sanction in light of the judge's findings on what was spoliated and the degree of prejudice suffered.[18]

Contrast this analysis with that of the district court in *E*Trade Sec. LLC v. Deutsche Bank AG*, 2005 U.S. Dist. Lexis 3021, at *14 (D. Minn. Feb. 17, 2005). Plaintiff had filed a complaint against defendants alleging they engaged in a fraudulent securities lending scheme that resulted in the collapse of at least one broker/lender and the loss of millions of dollars by other entities. Prelitigation destruction of documents occurred and sanctions were sought. The question, in part, was whether destruction of documents occurred after a duty to preserve was triggered.

The magistrate found the duty arose by January 3, 2002, when the "Nomura Defendants" received a copy of a bankruptcy order that provided that the bankruptcy court was investigating what appeared to be a "complex and far-reaching fraudulent scheme" involving the securities of three companies in which defendants "NSI" and "Nomura Canada" had traded in.

> *As of that point in time, Nomura Canada and NSI had the obligation to retain all information and documentation that would be relevant to the lending and borrowing transactions of the securities at issue and all information with respect to personnel that were involved, either directly or in a supervisory role, in the lending of those securities.*

[18] Research to date did not produce a subsequent decision on the sanctions issue.

Id. at *16. However, in mid-2002, before the complaint was filed, the "Nomura Defendants" erased computer hard drives among other acts of misfeasance.[19]

Nomura Canada contended it was not aware of potential litigation at the time. It said that the hard drives were erased because the company was shutting down and it was giving the computers to its employees. It wanted to ensure that no confidential information was left on the computers and claimed that all relevant information on the computers was preserved. *Id.* at *17.

The magistrate judge held that if litigation has not yet commenced, there must be a finding of bad faith to support a sanctions request but held that bad faith can be implied by the party's behavior. *Id.* at *14. The magistrate judge drew a distinction between litigation that had not yet commenced and "imminent litigation" because the judge later explained that if the destruction of evidence "occurs after litigation is imminent or has begun," then "no bad faith need be shown" before imposition of a sanction. *Id.* That concept of "imminence" or "notice" presumably explains the magistrate judge's holding which otherwise appears to contradict the earlier holding that bad faith was required to be shown for a prelitigation destruction of documents:

> *Nomura Canada is essentially arguing that the plaintiff's [sic] fail to show that Nomura Canada acted in bad faith when the computer hard drives were wiped clean. As discussed previously, however, because the destruction occurred after this court has found that the Nomura Defendants were aware of the potential for litigation, the plaintiffs need not demonstrate bad faith or willful intent to destroy. Thus, Nomura Canada's arguments are unavailing.*

Id. at *18. Then citing *Stevenson*, 354 F.3d 739, the magistrate judge held that bad faith could be shown: "Here, as in *Stevenson,* Nomura Canada chose to retain certain documents prior to the destruction of the hard drives. This gives rise to an implication of bad faith on the part of the Nomura Defendants." *Id.* Then citing *Stevenson* again, the magistrate held: "The substantial and complete nature of the destruction of the evidence contained in . . . hard drives destroyed by Nomura Canada,

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[19] Nomura also recorded and preserved its traders' calls on recordable DVDs. The system involved two rewritable DVDs. When one was full the system would record to the other and when the second was filled the system would switch back to the previous DVD and record over it. Nomura did not make any changes to this system after it was aware of likely litigation. The magistrate concluded there was a high likelihood that telephone calls relevant to this matter were lost so that this also was sanctionable spoliation. Another defendant, NSI, failed to place a litigation hold on the auto-deletion of e-mail. NSI stated that any deleted e-mail would be retained on backup tapes. However, the backup tapes were only retained for three years. Although NSI contended that it placed a litigation hold on the e-mail accounts of certain key employees, it stated that in 2004 it identified other employees whose e-mail needed to be searched but, the magistrate judge noted, the backup tapes containing these employees would have been overwritten since backup tapes were only retained for three years. That meant that relevant e-mail messages from 2001 and earlier were "irretrievably destroyed." The magistrate concluded that NSI committed spoliation by not placing an adequate litigation hold on e-mail boxes and making no changes in its backup tape three-year retention policy. 2005 U.S. Dist. LEXIS 3021, at *19-28. Separately, the magistrate judge found a violation of Rule 26(g)(2)'s certification obligations and ordered each defendant to produce additional documents and to pay $5,000 for costs incurred. Nomura Canada was ordered to produce certain recordings which they claimed were inaudible, and to pay $5,000, also because of a Rule 26(g)(2) violation. *Id.* at *29-36.

justifies a finding of prejudice."[20] The magistrate judge then recommended that sanctions be imposed, including an adverse inference instruction and monetary sanctions.[21]

Banco Latino, S.A.C.A. v. Gomez Lopez, 53 F. Supp. 2d 1273 (S.D. Fla. 1999) involved destruction by a third party. Plaintiff was pursuing RICO claims against defendants and had a particularly difficult time serving Mr. Lopez. It hired Pinkerton to find and serve Mr. Lopez. Pinkerton did so. But a dispute arose between plaintiff's counsel and Pinkerton over billing. Pinkerton was discharged. The Pinkerton employee who had served Mr. Lopez discarded his file after a couple of years.

Mr. Lopez challenged service and sought the Pinkerton server's investigative file, which, of course, was gone. Mr. Lopez sought an adverse inference, arguing that plaintiff was responsible in negligence for the spoliation of the file by Pinkerton and therefore, relying on law from other circuits, should be sanctioned. The district court rejected the argument. It held that in the Eleventh Circuit bad faith was required to merit an adverse inference instruction and there was no evidence that Pinkerton had destroyed the file in bad faith. *Id.* at 1277.[22]

Cases Involving Pattern Litigation

Pattern litigation can be a bit trickier. A defendant that is constantly involved in litigation over products it sells has to be thoughtful in how it handles document-retention policies, as is illustrated by *Lewy v. Remington Arms Co.*, 836 F.2d 1104 (8th Cir. 1988) and *Livingston v. Isuzu Motors, Ltd.*, 910 F. Supp. 1473 (D. Mont. 1995).

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[20] *Stevenson* is a more complicated decision than this, of course. It involved a train accident in which the defendant's normal practice was to retain voice tapes, defendant had preserved all other records relating to the accident, and a death had occurred. Even so, the court of appeals held that the finding of bad faith tested "the limits of what we are able to uphold as bad faith." 354 F.3d at 748. As for prejudice, the court of appeals explained, "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.* *Stevenson* also held that an adverse inference for prelitigation document destruction pursuant to a document retention program could not be issued unless there is a finding "of intentional destruction indicating a desire to suppress the truth." *Id.* at 746. The magistrate judge did not mention this requirement or the Eighth Circuit's decision in *Morris*, another Union Pacific voice tape case, in which the district court, after a four-day hearing, characterized Union Pacific's conduct as "bad faith" but not "intentional." The latter finding showed there was no desire to suppress the truth. Hence, pursuant to the rule articulated in *Stevenson*, the court of appeals vacated a judgment after a trial in which an adverse inference instruction had been given for the prelitigation destruction of the voice tape created on the date of the accident in that matter. 373 F.3d at 901-02. The outcomes in *Stevenson* and *Morris* were based on factual findings made by the district court after evidentiary hearings (three days and four days respectively). *E*Trade* did not involve a routine document-retention program and it does not appear that an evidentiary hearing was held before the magistrate judge ruled. The basic message of these cases is that litigants need to be aware that bad faith and prejudice might not be as difficult to prove in the digital world where more information is captured than in any time in history, and some of it may be regarded as so relevant to a claim that its prelitigation loss could result in sanctions.

[21] The magistrate judge determined that the information contained on the hard drives was "irretrievably destroyed" and did not comment on defendants' argument that relevant information on the hard drives had been retained. 2005 U.S. Dist. LEXIS 3021, at *27. He added that there was a "reasonable probability that the loss of the evidence stored on hard drives . . . has materially prejudiced" the plaintiffs. *Id.*

[22] *Cf. Lawrence Ins. Group, Inc. v. KPMG Peat Marwick L.L.P.*, 5 A.D.3d 918, 920 (N.Y. App. Div. 2004). The trial court had refused a sanction for spoliation of accounting work papers but left open the possibility of an adverse inference jury instruction depending upon the proof at trial. KPMG appealed. The appellate court rejected KPMG's argument: "Here, on the one hand, defendant's employee affirmed that, unless ordered held, work papers are routinely destroyed after six years. Plaintiff asserts that the large and sudden reversal involving a $35 million deficit, without any obvious business reason for its occurrence, should have, along with some evidence of in-house communication concerning this topic, the obvious unhappiness of the client and the existence of similar lawsuits, prompted defendant to put a hold on these papers and not destroy them. We believe these competing allegations present a genuine triable issue of fact which should be resolved by a jury."

In *Lewy*, Remington was sued because of a gun accident. It routinely destroyed complaints and gun examination reports after three years. This document-retention policy had been in place since 1970. The accident in question in the litigation occurred in 1982. The trial court had given an adverse inference instruction taken from Devitt and Blackmar's, *Federal Jury Practice and Instructions*, that reads as follows: "If a party fails to produce evidence which is under his control and reasonably available to him and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not." *Lewy*, 836 F.2d at 1111.

The jury found for plaintiff but on appeal the judgment was reversed and remanded for a new trial for other reasons. The court of appeals did not determine whether the instruction was properly given but instead told the trial court to evaluate the following factors before deciding to give the instruction in the new trial:

1. Was the record-retention policy reasonable considering the facts and circumstances surrounding the relevant documents? "For example, the court should determine whether a three year retention policy is reasonable given the particular document. A three year retention policy may be sufficient for documents such as appointment books or telephone messages, but inadequate for documents such as customer complaints." 836 F.2d at 1112.
2. Have there been lawsuits concerning the complaint or related complaints filed? With what frequency? What magnitude? *Id.*
3. "Finally, the court should determine whether the document retention policy was instituted in bad faith." *Id.* Even if the retention policy were reasonable, the court of appeals explained that the district court may find that documents should have been retained despite the policy under the "particular circumstances" of the matter. "For example, if the corporation knew or should have known that the documents would become material at some point in the future then such documents should have been preserved." *Id.*[23]

It seems safe to say that, prelitigation, companies that test products for safety would be large risk-takers if they routinely purge testing information on product safety and would be a larger-risk taker if they did so after knowledge of a problem with the product or a pattern of complaints or injuries, even where causation has not yet been established.

Phrased another way, the more closely related to a likely potential claim a document might be – objectively – the more careful a prospective corporate defendant has to be, even if not on notice of a specific claim. That's why in *Remington*, the court of appeals was cautious in not faulting *Remington*

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[23] Compare *Willard v. Caterpillar, Inc.* 40 Cal. App. 4th 892, 922 (Cal. Ct. App. 1995) (which was later overruled by *Cedars-Sinai Med. Ctr. v. Super. Court*, 954 P.2d 511, 521 (Cal. 1998) on the issue of the existence of a spoliation tort). In *Willard*, the appellate court, in effect, refused to sanction Caterpillar for the destruction of testing records even though there was testimony by former employees that the Caterpillar legal department had ordered documents destroyed after products liability litigation had "really started up" in the late 1960s or 1970s. *Id.* at 905. The product in question was built in 1955 and the injury occurred in 1990. With respect to test reports on the product, the appellate court explained: "The 'evidence' Caterpillar destroyed was its own property-records and reports which it generated for its own purposes and use. Willard has not shown that Caterpillar was under any statutory or regulatory duty to preserve the documents for any period of time. When the document-destruction program began in 1978-1979, the documents pertained to a tractor which had been out of production for nearly 20 years. There were no known claims or actions as to which the documents might be relevant. *Id.* at 919-20.

for routine destruction (after three years) of complaints and gun examination reports. Such a policy in the abstract may be reasonable "given the particular document." But for a company in the business of selling guns, which is sued often because of gun accidents, is it reasonable to destroy gun examination reports and customer complaint documents after three years? The Eighth Circuit would not reach a conclusion, until it knew what litigation, if any, already existed, or how many complaints had been made (suggesting, presumably that suit was inevitable if there were many complaints). The court was also curious about motive. Why did *Remington* establish this time period for these documents? For legitimate reasons or to deprive potential plaintiffs of evidence?[24] These kinds of questions can be expected where the link between the claim and the documents discarded is tenuous or uncertain.[25]

In *Livingston v. Isuzu Motors, Ltd.*, 910 F. Supp. 1473 (D. Mont. 1995), Isuzu lost a jury verdict.[26] Isuzu was trying to use summary reports of rollover testing to defend itself but had destroyed the underlying raw data which was necessary to test the accuracy of the summary reports. The trial court allowed the plaintiff to show that the raw data had been destroyed. Isuzu claimed that this decision was a basis for entry of judgment notwithstanding the verdict since the trial court had also determined that the destruction of the raw data was not in bad faith. In this context, the trial judge ruled that Isuzu had notice of the relevance of the raw data to this litigation and other litigation involving the Trooper II because of Isuzu's knowledge of the Jeep rollover problem in the United States and industrywide information on the rollover factor in narrow track utility vehicles. So it held the evidence was properly allowed.

Concord Boat Corp. v. Brunswick Corp., No. LR-C-95-781, 1997 WL 33352759 (E.D. Ark. Aug. 29, 1997), involved a party involved in several antitrust suits. Plaintiff argued that because defendant was involved in other antitrust lawsuits beginning in 1992 prior to the filing of its antitrust suit in December 1995, the defendant was under a duty to preserve all e-mail relevant to antitrust issues from 1992 forward. The trial court rejected the argument. It said that asking a corporation to maintain all email would be burdensome where the e-mail system that happened to be involved in the matter was

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[24] Contrast this approach to that of the Nevada Supreme Court in *Reingold, supra*, which held that the limitations period should control disposition of accident reports for the operation of a water park. Similarly in *Molly Howard v. D'Agostino Supermarkets, Inc.*, 637 N.Y.S.2d 124, (N.Y. App. Div. 1996), the third-party defendant, an insurance company, destroyed an insurance policy two months after suit was filed. But its record-retention policy prompted the Appellate Division to say, "its practice of destroying policies, except for declaration sheets, two years after their expiration, well within the three-year period of limitations for negligence actions and the six-year period for contract action" is "'indefensible.'" On the other hand, in *Laport v. Lake Michigan Management Co.*, 625 N.E.2d 1, 5 (Ill. App. Ct. 1991), a jury verdict for defendant was affirmed where a plaintiff was injured by a protruding pipe in a Pizza Hut bathroom in 1981 and sued in 1990. The store created an incident report but such reports were kept for two years and then discarded in the ordinary course of business. Because of this routine document-retention policy, the appellate court held that plaintiff was not entitled to an adverse inference.

[25] In the Eighth Circuit, at least, *Stevenson* now has clarified that the prelitigation destruction of records pursuant to a document-retention program requires more than negligence to justify an adverse inference instruction: "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." 354 F.3d at 747. Assuming no litigation hold exists to require preservation of test or product safety data or product design documents or the like, the standard of conduct required to justify an adverse inference instruction in the various circuits (discussed below) could becomes a significant forum selection issue.

[26] The verdict was a foregone conclusion after the magistrate judge struck the defendant's defenses and tendered the case immediately to the jury after Isuzu's expert disclosed information to the jury that the court, in an order on plaintiff's motion in limine, had told the defendant could not be disclosed.

used primarily for routine communication rather than "to convey material significant to antitrust violations." The trial court added that employees receive hundreds of e-mails per day and are in no position to evaluate the potential relevance of a given email to future litigation. *Id.* at *4. The district court then said:

> *One additional reason for rejecting this proposition lies in the nature of e-mail itself. Many corporations have hundreds of employees who undoubtedly receive several e-mails a day. These employees are in no position to evaluate the potential relevance of a given e-mail to future litigation. The modern reality of e-mail is that it will be retained if the recipient has a business reason for doing so. If the recipient reads the e-mail and has no business reason to keep it, it is discarded, even though the contents of that communication could possibly, at a later date, have some relevance to a lawsuit. It would not be appropriate to sanction these individuals and their employers for such benign actions.*

Id. at *5.[27]

FREQUENTLY ASKED QUESTIONS

The prelitigation case law raises a number of questions that are not consistently answered. I do not pretend to provide definitive answers to these questions for every jurisdiction, but the illustrations should serve as a useful guide to lawyers faced with any of these questions.

Is there a private right of action in tort for spoliation?

As alluded to elsewhere in this paper, a few states do allow an independent tort for spoliation.[28] Some of those allow the tort only against nonparties and some only for intentional spoliation.

State	Citation	Scope of the Tort
Alaska	*Hazen v. Municipality of Anchorage*, 718 P.2d 456, 463 (Alaska 1986)	Intentional spoliation
Montana	*Oliver v. Stimson Lumber Co.*, 993 P.2d 11, 19 (Mont. 1999)	Third-party negligent or intentional spoliation

[27] "The district court gave this example: "For example, suppose employee # 1 sends an e-mail to employee # 2 saying 'Let's get together and talk about Program X. The CEO is backing the program, but I think it's time we terminate it.' If litigation arises two years later placing Program X at issue, then arguably, this e-mail could be relevant to the lawsuit. However, most likely employee # 2 would read this e-mail and simply delete it. Employee # 2 would not have any 'business reason' for keeping it and certainly would not be able to evaluate its significance to a future lawsuit." 1997 WL 33352759, at *5 n.1.

[28] The typical elements of the tort are: "(1) existence of a potential civil action, (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action, (3) destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages." *Continental Ins. Co. v. Herman*, 576 So. 2d 313, 315 (Fla. 3d DCA 1990).

State	Citation	Scope of the Tort
New Mexico	*Herrera v. Quality Pontiac*, 73 P.3d 181 (N.M. 2003)	Intentional spoliation
Ohio	*Smith v. Howard Johnson Co.*, 615 N.E.2d 1037, 1038 (Ohio 1993)	Intentional spoliation

As noted above, Illinois does not recognize a separate tort for spoliation, but permits a negligence claim for spoliation if a breach of a duty of care, proximate cause, and damage can be demonstrated. *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267, 270-71 (Ill. 1995). For example, in *Jones v. O'Brien Tire & Battery Serv. Ctr.*, 752 N.E.2d 8, 12-13 (Ill. App. Ct. 2001), Jones sued one tortfeasor and settled. An insurer to Jones failed to preserve a tire-wheel assembly that related to the alleged negligence of O'Brien who was later sued by Jones. O'Brien filed a third-party action against the insurer and its adjuster in negligence claiming that they had a duty to preserve the assembly because they knew or should have known it was material to a potential civil action arising from the incident in which Jones was injured. The trial court dismissed the action, but the appellate court held that O'Brien's complaint stated a claim under *Boyd*.

New Jersey also does not recognize a separate tort but allows recovery for spoliation under "existing tort principles." New Jersey refers to this claim as a "the tort of fraudulent concealment," and it addresses concealment or destruction of evidence in anticipation of litigation. *Rosenblit v. Zimmerman*, 766 A.2d 749, 757 (N.J. 2001). As is the case with many of the prelitigation spoliation tort cases, the context for this claim is an employer-employee setting, where the worker's compensation laws bars suit for an injury suffered by the employee, the employee sues the manufacturer of the equipment that caused the injury, and the employer has spoliated the equipment or concealed critical evidence material to the claim allegedly depriving the employee of his or her ability to prove the liability of the manufacturer. *Viviano v. CBS, Inc.*, 597 A.2d 543, 548-49 (N.J. Super. Ct. App. Div. 1991).[29]

New York may recognize a species of the tort. *MetLife Auto & Home v. Joe Basil Chevrolet, Inc.*, 807 N.E.2d 865, 866 (N.Y. 2004).[30] This was a subrogation action in which a homeowner's insurer sought to recover monies paid to its insured from the insurer of the automobile that, it was alleged, was the source of a fire that damaged the homeowner. The automobile insurer took custody of the automobile.

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[29] In this case, immediately after the accident, the employer determined the accident had been caused by a defective timer on a piece of equipment and discarded the timer. 597 A.2d at 547. Like Illinois, New Jersey may also recognize a claim for spoliation based on negligence principles. *Swick v. The New York Times Co.*, 815 A.2d 508 (N.J. Super. Ct. App. Div. 2003) (this is another worker's compensation-bar case where the equipment in question was sold by the employer, and the appellate court suggested a negligence claim might lie even after *Rosenblit*, but then found no proof of causation or damages even if there was a duty to preserve the equipment).

[30] *See also Wetzler v. Sisters of Charity Hosp.*, 794 N.Y.S.2d 540, 542 (N.Y. App. Div. 2005) ("A party asserting that it is aggrieved by the spoliation of evidence may seek sanctions either pursuant to CPLR 3126 or on an independent, per se, basis *(see MetLife Auto & Home v. Joe Basil Chevrolet*, 1 N.Y.3d 478, 482-483, 775 N.Y.S.2d 754, 807 N.E.2d 865).").

It arranged for an inspection of the vehicle with the homeowner's insurer but before the inspection, the vehicle was disassembled and disposed of. The homeowner's insurer sued in negligence.

The Court of Appeal recognized that New York had permitted a common law cause of action against a spoliator where the spoliation "impairs an employee's right to sue a third-party tortfeasor," citing *DiDomenico v. C&S Aeromatik Supplies*, 682 N.Y.S.2d 452 (N.Y. App. Div. 1998). In *DiDomenico*, the employee was injured by a caustic liquid sprayed from a package he was handling. He requested that his employer, UPS, identify the manufacturer, packer, and shipper of the liquid. UPS failed to preserve the package and delayed in providing appropriate records. As a result the employee could not sustain an action and the manufacturer could not defend the claim. The Appellate Division struck the answer of UPS relying on a New York statute (CPLR 3126)[31] but added that there was an evolving rule that a spoliator of "key physical evidence" is "properly punished by the striking of its pleading" whether the spoliation was negligent or willful, and even if it was destroyed before the spoliator was made a party, "provided it was on notice that the evidence might be needed for future litigation." 682 N.Y.S.2d at 459.

The Court of Appeal in *MetLife* distinguished *DiDomenico* and held that on the facts of this matter the automobile insurer had no duty to preserve because there was no relationship between it and the homeowner's insurer to give rise to a duty to preserve; the latter made no effort to preserve the evidence "by court order or written agreement," and although the homeowner's insurer had verbally requested the preservation of the vehicle, "it never placed that request in writing or volunteered to cover the costs associated with preservation." 807 N.E.2d at 868. "The burden of forcing a party to preserve when it has no notice of an impending lawsuit, and the difficulty of assessing damages, militate against establishing a cause of action for spoliation in this case, where there was no duty, court order, contract or special relationship." *Id.* at 868.

But the majority of states do not permit the tort, finding that sanctions are a sufficient remedy in the underlying litigation and fearing that litigation would otherwise never end. *See generally Cedars-Sinai Med. Ctr. v. Super. Court*, 954 P.2d 511, 521 (Cal. 1998) ("[T]here is no tort remedy for the intentional spoliation of evidence by a party to the cause of action to which the spoliated evidence is relevant, in cases in which, as here, the spoliation victim knows or should have known of the alleged spoliation before the trial or other decision on the merits of the underlying action.");[32] *Fletcher v. Dorchester Mut. Ins. Co.*, 773 N.E.2d 420, 427-28 (Mass. 2002) (affirming trial court's dismissal for

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[31] "CPLR 3126 provides that a court may, in its discretion, impose a wide range of penalties upon 'a party' which either (a) 'refuses to obey an order for disclosure' or (b) 'wilfully fails to disclose information which the court finds ought to have been disclosed.' The penalties proposed by the statute include (1) deciding the disputed issue in favor of the prejudiced party, (2) precluding the disobedient party from producing evidence at trial on the disputed issue, or (3) either striking the pleadings of the disobedient party, or staying the proceedings until the ordered discovery is produced, or rendering a default judgment against the disobedient party. The statute's proposed penalties were not intended to be exhaustive. The Practice Commentaries to CPLR 3126 encourage the courts to exercise their ingenuity, and to devise sanctions as narrowly tailored as possible to the circumstances of the individual case. However, the Commentaries support striking a party's pleading when the 'refusal' to supply discovery is so 'pervasive' that it in effect precludes an opponent from making out his action or defense (citation omitted). Generally, the penalties authorized by CPLR 3126 are designed 'to prevent a party who has refused to disclose evidence from affirmatively exploiting or benefiting from the unavailability of the proof during the pending civil action.'" 682 N.Y.S.2d at 456-57.

[32] In *Temple Community Hospital v. Superior Court*, 976 P.2d 223, 230-33 (Cal. 1999), the California Supreme Court refused to recognize a spoliation tort against third parties who destroyed evidence.

failure to state a claim: "In our view, appropriately tailored sanctions imposed in the underlying action are a more efficacious remedy for spoliation than allowing a separate, inherently speculative cause of action for such litigation misconduct."); *Trevino v. Ortega*, 969 S.W.2d 950, 953 (Tex. 1998) ("[O]bligations not to destroy evidence arise in the context of particular lawsuits; consequently, spoliation is best remedied within the lawsuit itself, not as a separate tort."); *Martino v. Wal-Mart Stores Inc.*, 835 So. 2d 1251, 1255-56 (Fla. 4th DCA 2003) *aff'd* 908 So.2d 342 (Fla. 2005) (there is no independent cause of action for spoliation against a party accused of spoliating evidence).

Will an investigation by a defendant following an accident automatically give rise to a duty to preserve?

The answer is "maybe." For example, in *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718 (Tx. 2003), decided by the Texas Supreme Court, a Wal-Mart associate accidentally knocked a decorative reindeer from a shelf onto Mr. Johnson's head. Mr. Johnson was cut on one arm and dazed but told a Wal-Mart supervisor he was not hurt. A Wal-Mart employee cleaned and bandaged the cut and Mr. Johnson left the store. Mr. Johnson's fiancée was with him but did not see the accident. The supervisor investigated the incident, making notes, taking photographs, and obtaining a written statement from the associate who caused the accident. Mr. Johnson made no threats of suit and did not ask Wal-Mart to pay for any medical costs or damages. 106 S.W.3d at 720. Mr. Johnson then began to suffer pain which did not dissipate despite six months of treatment. He and the now Mrs. Johnson sued. *Id.*

The Johnsons asked Wal-Mart for the decorative reindeer that fell on him. Wal-Mart no longer had the item but offered a reasonable facsimile. The Johnsons rejected this approach. The trial court then granted a motion in limine prohibiting Wal-Mart from "introducing into evidence a reasonable facsimile of the reindeer made the basis of this lawsuit." *Id.* The parties then debated the composition and weight of the reindeer. Mr. Johnson said it was made of wood and heavy. Wal-Mart said it was made of papier-mache and weighed five to eight ounces. The photograph of the reindeer was too poor to substantiate either description.

In this context, the Johnsons persuaded the trial court to issue a spoliation instruction: "If you find by a preponderance of the evidence that Wal-Mart had possession of the reindeer at a time it knew or should have known they would be evidence in this controversy, then there is a presumption that the reindeer, if produced, would be unfavorable to Wal-Mart." *Id.* The jury returned a verdict for the Johnsons and the court of appeals affirmed. Wal-Mart successfully petitioned the Texas Supreme Court to determine whether the instruction should have been given.

The supreme court held that no duty to preserve arose under these circumstances:

> *Wal-Mart argues that it had no duty to preserve the reindeer as evidence because it had no notice that they would be relevant to a future claim. Specifically, Wal-Mart contends that it did not learn of the Johnsons' claim until all of the reindeer had been disposed of in the normal course of business. The Johnsons point out that Wal-Mart's extensive investigation on the day of the accident indicates its awareness of both the potential claim and the reindeer's importance to it. Wal-Mart responds that it*

> *routinely investigates all accidents on its premises, and this particular investigation revealed that Johnson had not been seriously injured and never indicated that he might seek legal relief. We agree that nothing about the investigation or the circumstances surrounding the accident would have put Wal-Mart on notice that there was a substantial chance that the Johnsons would pursue a claim.*

106 S.W.3d at 722.

On the other hand, in *Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173 (1st Cir. 1998), plaintiff was delivering fish to a Wal-Mart store. The store ramp was icy and plaintiff fell and was injured. Wal-Mart investigated the claim immediately thereafter. Wal-Mart claimed it put a hold on delivery of fish for that day, did not expect a delivery on the date of the accident, and thus had no reason to clear the delivery ramp. However, it could not produce purchase order records or phone records for the relevant date to support its defense. Wal-Mart explained that these records were destroyed as part of a routine document-retention policy. The district court instructed the jury as follows:

> *A reasonable inference is a deduction which common sense and reason lead you to draw from the evidence. An example is one inference that the plaintiff seeks to have you draw here is to the effect that the defendant, having known that a lawsuit was pending, destroyed certain records and did so because defendant knew the records to be harmful to its own case. But the law holds that such an inference can be drawn only if the plaintiff proves by a preponderance of the evidence that [the defendant] not only knew of the potential claim of the plaintiff, but also knew of the potential relevance of the destroyed documents. And even where plaintiff satisfies this burden of proof, any inference that may be drawn is permissive and not mandatory. That is, such inference may or may not be drawn by the jury.*

144 F.3d at 176-77. The jury found for plaintiff. Wal-Mart urged that this instruction was erroneous on the facts.

The court of appeals held that a rational jury could conclude that Wal-Mart was on notice of the personal injury claim, in part because Wal-Mart investigated the accident and an associate completed a report in which there was an acknowledgment of the "inclination to sue," and therefore the failure to keep the records was relevant:

> *We think it is obvious that a rational jury could conclude that Wal-Mart was on notice of Testa's claim. The accident occurred on February 2, 1993. Wal-Mart investigated immediately and, as early as February 18, 1993, Wal-Mart completed an internal accident report in which it acknowledged Testa's inclination to sue. There is nothing in the record that would have dispelled this premonition.*
>
> *By like token, a rational jury also could conclude that Wal-Mart was on notice of the records' relevance. After all, Wal-Mart's defense from the start was anchored on the premise that it had no reason to anticipate any deliveries on the day in question. Surely, then, a reasonable factfinder could view Wal-Mart's placing of a purchase order for delivery on February 2 to be antagonistic to this defense. The telephone*

> *records showing whether Manning in fact called Heavenly Fish to abrogate the purchase order (and if so, when) also would bear on this line of defense. Accordingly, a jury could find that Wal-Mart had ample notice of both the claim and the relevance of the records.*

Id. at 177 (footnote omitted).

Is anyone's knowledge the organization's knowledge?

This is dangerous territory for corporations. If the company's law department is not aware of the potential for a suit, who is going to create the litigation hold necessary to honor the prelitigation duty to preserve?

Again the cases are not easily reconciled. For example, in *Zubulake IV*, 220 F.R.D. at 212, the district court held that a prelitigation duty to preserve arose at the time that e-mails were circulated among department personnel recognizing the potential for suit, without any indication that the law department of UBS Warburg was aware of the potential:

> *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.*

220 F.R.D. at 217. The district court then proceeded to give content to the word "everyone" by describing persons who worked with Ms. Zubulake. These were the "relevant people" for determining knowledge sufficient to trigger the duty to preserve, the district court held. *Id.*

In *Byrnie v. Town of Cromwell*, 243 F.3d 93, 108 (2d Cir. 2001), the court of appeals suggested that a school board was "arguably" on notice of potential litigation when an FOIA request was made to the board, or when the applicant for an art-teacher position met with the principal and assistant principal of the school and expressed concerns about the process and asked for copies of the interview questions, and the school board superintendent testified that it was "very apparent" that the applicant had concerns. There was no mention of the school board's counsel in this process.

In an evaluation of the "intent" of the actual spoliators, the court of appeals in *Testa v. Wal-Mart Stores, Inc.*, 44 F.3d 173, 177-78 (1st Cir. 1998), said that the persons who discarded the documents in question did not have to have knowledge of the claim as long as the institution had knowledge:

> *Second, Wal-Mart notes that there is no proof that Manning (the Wal-Mart employee who actually discarded the records) knew of either the claim or the records' relevance to it. This is true as far as it goes--but it does not go very far. Whether the particular person who spoils evidence has notice of the relationship between that evidence and the underlying claim is relevant to the factfinder's inquiry, but it does not necessarily dictate the resolution of that inquiry. The critical part of the foundation that must be laid depends, rather, on institutional notice--the aggregate knowledge possessed by a party and its agents, servants, and employees.*

Id. at 177-78.

Bowmar Instrument Corp. v. Texas Instruments, Inc., 25 Fed. R. Serv. 2d 423 (N.D. Ind. 1977) arguably casts a different light on the answer to this question. The district court refused to sanction prelitigation destruction of records (six months before suit was filed) in part because the law department had no knowledge of potential suit even though others in the defendant corporation had heard rumors that Bowmar was going to sue Texas Instruments.

> *The plaintiffs' contentions regarding destruction of evidence are based entirely upon certain exhibits and deposition testimony. The defendant concedes that "in the spring and summer of 1974 transcripts of recorded telephone conversations were destroyed at the direction and under the supervision of defendant's Legal Department." The critical question is when the threat of litigation first became known to the Texas Instruments Legal Department. Without a clear showing of this knowledge, it is quite impossible to find that the defendant's actions constituted the willful destruction of evidence.*
>
> *The plaintiffs relied on certain exhibits to establish this crucial point. Only two items seem relevant. First, there is the deposition testimony of Leonard J. Donahoe, Manager of the defendant's Component Design Department for Calculators, that he had heard rumors since 1972 that Bowmar intended to sue. Second, there was the testimony of John Brougher that he had learned that TI employee Chris Graham had visited Bowmar in early 1974, and had reportedly been told by Ed White, President of Bowmar, that Bowmar planned to file suit against TI.*
>
> *This is not convincing evidence that those responsible for the document destruction were aware at the time it took place that this litigation was a serious threat. No attempt was made to show when the threat of litigation became known to the Legal Department. The plaintiffs' evidence at best shows that a rumor circulated in the offices of a large corporation. This is too slim a reed to support the plaintiffs' charges.*

Id. at 427.[33]

Of course, if the law department is made aware of a potential claim, there is a higher likelihood that the duty to preserve will be triggered. *See, e.g., Gath v. M/A-Com, Inc.*, 802 N.E.2d 521, 525, 527 (Mass. 2003) (affirming a spoliation finding and allowing the jury to draw an adverse inference against defendant where, *inter alia*, defendant notified legal department the day of the incident and later discussed preserving the relevant evidence with its trial counsel, but then failed to do so).

Is a request to preserve evidence enough to trigger the duty to preserve?

The cases come in pairs, but there is little question that making a prelitigation request to preserve material evidence in the possession or control of another can be important to the outcome of a post-filing sanctions motion.[34] And responding to such prelitigation requests in an appropriate manner may be just as important in defending against such a motion. Reasonableness – both of the request and the response -- is almost certainly going to play a significant role in the court's decision making.

Lombardo v. Broadway Stores, Inc., No. G026581, 2002 WL 86810 (Cal. Ct. App. Jan. 22, 2002) (*not officially published*) illustrates the point. Before the lawsuit was filed in 1995, Lombardo had sent Broadway letters requesting that Broadway preserve all writings that had an effect on the conduct of Broadway's business, including payroll records. Broadway later went out of business and copied its payroll records onto data storage devices. It later destroyed the storage devices after it learned they had become damaged and could not be read or software to read them could not longer be obtained. Lombardo sought formal discovery in 1997 after these storage tapes had been destroyed. Broadway put off Lombardo for awhile but in 1999 finally told Lombardo about the destruction. It did, however,

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[33] The district court said the involvement of the TI Legal Department in document destruction did arouse concern, but that it was satisfied by the explanation provided at a hearing: "However, the testimony of William Roche, General Counsel for TI, adequately refuted any malevolent implications. It was Roche's testimony that the destruction of telephone transcripts after a limited period of time was long-standing policy; that the Legal Department had long been assigned the task of 'following up' on implementation of this policy; that in May of 1974 the Legal Department was again requested to see that the procedure was followed; and that the Legal Department did so. Most significantly, Roche testified that at the time of the destruction he had no knowledge of a threatened suit by Bowmar." 25 Fed. R. Serv. 2d at 427-28. *Cf. Arthur Andersen LLP v. United States*, 544 U.S. __, Slip Opinion at 7-8 (May 31, 2005) ("It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances."). The district court further held that Roche was aware of a separate suit against TI at the time the documents were destroyed, but then said: "The significance of this fact has never been adequately explained by the plaintiffs. The issue before the court is whether the defendant wilfully destroyed documents which it knew might constitute evidence relevant to this case. Even if it were established that the defendants wilfully destroyed evidence relevant to the Master Calculator litigation, something which has not been established, this would not lead to a conclusion that evidence relevant to the present case was wilfully destroyed." So the district court concluded: " The evidence with respect to the telephone transcripts demonstrates only that any destruction was pursuant to a long-standing company policy. The plaintiffs have failed to prove that relevant evidence was wilfully and knowingly destroyed by the defendant." 25 Fed. R. Serv. 2d at 428.

[34] In Florida, notice of a claim or a demand to preserve evidence may be essential. *Pennsylvania Lumberman's Mut. Ins. Co. v. Florida Power & Light Co.*, 724 So. 2d 629 (Fla. 3d DCA 1999) (in what appears to be an independent claim for spoliation, which is allowed in Florida, the appellate court held that in the absence of a statutory or contractual duty to maintain or preserve evidence, there is no common law duty to preserve evidence, at least in the absence of notice of a possible legal action in connection with the evidence sought to be preserved. *Cf. Royal Sunalliance v. Lauderdale Marine Ctr.*, 877 So. 2d 843 (Fla. 4th DCA 2004). In this case, a boat fire occurred at a marina. The boat insurer paid the claim. Fire inspectors collected debris from the fire and placed them in barrels. Shortly thereafter, the marina owner discarded the barrels. The boat insurer later sued the marina claiming it had a common law duty to preserve the debris without which the insurer could not prove the exact cause of the fire and who might be responsible. Under these circumstances, the Fourth District held that prior Florida case law did not establish "a duty to preserve evidence when litigation is merely anticipated." *Id.* at 846. In surveying Florida law at the time, the district court in *Silhan v. Allstate Ins. Co.*, 236 F. Supp .2d 1303, 1312 (N.D. Fla. 2002) observed: "Thus, no common law duty to preserve evidence (absent some form of notice) currently exists in Florida law."

offer up five-million hard-copy records for review. Lombardo moved for sanctions in the amount of $31,250 in attorneys' fees and an order requiring Broadway to recompile the records.[35]

The appellate court noted that Lombardo had put Broadway on notice in 1995 that she wanted the evidence preserved and that after litigation commenced and knowing Lombardo wanted the data, "Broadway intentionally destroyed it." 2002 WL 86810, at *8. And it was virtually impossible to extract the relevant data from five-million pages of records, the appellate court added. Broadway's (a) numerous agreements to produce the records and (b) its statement that it had produced all of them and (c) later that it would produce them when it knew they had been destroyed and (d) then still later claiming it was having problems compiling the data and (e) then saying they were lost or misplaced and (f) then it did not know where they were, "smacks of an intentional destruction of evidence followed by a cover up." In response to an argument that it did not destroy evidence in anticipation of or in response to a discovery request, the appellate court emphasized again that Lombardo had written Broadway twice in 1995 advising it "under federal law to preserve relevant evidence." *Id.* at *9.

In *William T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443 (C.D. Cal. 1984), where postlitigation destruction of records occurred, the district court found that notice of the relevance of the documents in question was, in part, provided by prelitigation correspondence:

> *GNC was on notice from the inception of the litigation that the records identified in Findings 7 and 9 above were relevant to the litigation or at least were reasonably calculated to lead to the discovery of admissible evidence. Notice was provided by the pre-litigation correspondence between counsel for the parties; the Complaint filed by Thompson on August 17, 1978; Thompson's requests for discovery served in August and September 1978 and the depositions conducted in September 1978; and Thompson's Motion for Preliminary Injunction filed on September 15, 1978.*

Id. at 1446.

Andersen v. Mack Trucks, Inc., 793 N.E.2d 962, 969 (Ill. App. Ct. 2003) gives a different answer to this question in a case also involving not records, but physical evidence. Plaintiff's father was killed at his place of employment (BFI) in an accident involving a truck hoist and an allegedly defective hose. Plaintiff sued the manufacturer of the hoist, Galbreath. Galbreath was given a chance to inspect the truck hoist and hose. BFI subsequently sold the business. When Galbreath discovered the fact of sale, it searched out the equipment only to find that the hoist and hose were no longer available. So Galbreath sued BFI, claiming that BFI breached a duty to preserve evidence, a negligence claim allowed under Illinois law,[36] which impaired the manufacturer's ability to defend itself in the underlying suit. The trial court dismissed the complaint against BFI with prejudice. The appellate court affirmed the dismissal but remanded to permit the plaintiff the opportunity to amend.

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[35] Broadway later informed Lombardo it had found a data conversion company to convert the hard-copy records into electronic records at a cost of $100,000 which it was spending and that it would have the project completed within a month. The discovery referee recommended that Broadway recompile the records as planned and pay the attorney fee sanction. The trial judge accepted the recommendation. On appeal, the court held that spoliation occurred even if hard copies are available. 2002 WL 86810, at *8.

[36] *See Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267, 270-71 (Ill. 1995)

In this context, the appellate court said that "a mere request that a party preserve evidence" was not sufficient to impose a duty to preserve "absent some further special relationship":

> *In this case, Galbreath does not allege any contract or agreement between BFI and itself, nor does it allege that BFI had any statutory or regulatory duty to preserve the evidence. Since BFI had informed Galbreath that the truck was to be put back into service approximately two weeks after the accident, Galbreath cannot plead that BFI voluntarily undertook to preserve the evidence specifically regarding the truck. Galbreath suggests that its undated letter sent 'shortly after' its inspection of the truck, requesting that BFI turn over or preserve the hose and related evidence, constitutes a special circumstance imposing a duty to preserve evidence. We decline to hold that a mere request that a party preserve evidence is sufficient to impose a duty absent some further special relationship.*

Id. at 968-69.

In another physical evidence case, *Martino v. Wal-Mart Stores*, 835 So. 2d 1251 (Fla. 4th DCA 2003), plaintiff claimed to have been injured as a result of a negligently maintained shopping cart. The trial court directed a verdict on the claim refusing to fault Wal-Mart because the cart had not been preserved. While concluding that an adverse inference instruction was not appropriate, the appellate court nonetheless reversed:

> *We agree with appellants that a proper consideration of the "adverse inferences" which may arise when a party fails to produce pertinent evidence within its control required that the negligent maintenance claim in this case be presented to the jury... Mrs. Martino testified that she "pointed out" where her cart was in the parking lot and requested that the assistant manager save both the cart and the video tape. If Mrs. Martino's testimony were believed, the jury* could *have inferred that the condition of the cart and the actions depicted on the video would have been unfavorable to Wal-Mart. This "adverse inference"* may *have led the jury to find that Mrs. Martino's claim was valid. Thus, the Martinos are entitled to a new trial on their claim that Wal-Mart negligently maintained its shopping carts.*

Id. at 1257 (emphasis in original) (citations omitted).[37]

Must a nonparty preserve evidence?

In *Fletcher Dorchester Mut. Ins. Co.*, 773 N.E.2d 420 (Mass. 2002), five young children were trapped and severely burned in a house fire. *Id.* at 422. In the immediate aftermath of the fire, the owner's insurer, defendant Dorchester Mutual Insurance Company, retained an expert to investigate the fire scene. That expert, defendant Richard Splaine, removed certain wiring components and fixtures from the remains of the building approximately two weeks after the fire. *Id.* at 422-23. Defendant homeowner was not involved in the removal of the items, and they were not destroyed.

The supreme court held that there was no duty to preserve:

> *Persons who are not themselves parties to litigation do not have a duty to preserve evidence for use by others. Nonparty witnesses may have evidence relevant to a case -- documents, photographs, tape recordings, equipment parts, or any other tangible objects -- and may know of its relevance, but that knowledge, by itself, does not give rise to a duty to cooperate with litigants. Automatic imposition of such a duty on all witnesses would interfere with a witness's own property rights. A nonparty witness is not required to preserve and store an item merely because that item may be of use to others in pending or anticipated litigation.*

Id. at 425; *cf. Royal Sunalliance v. Lauderdale Marine Ctr.*, 877 So. 2d 843 (Fla. 4th DCA 2004) (in an action brought by a boat-owner's insurer, refusing to find that a marina had a duty to preserve fire debris collected by fire inspectors and stored in barrels at the marina after the inspectors' investigation of a fire on a boat docked at the marina).

Can regulations create a duty to preserve?

Byrnie v. Town of Cromwell, 243 F.3d 93, 108-09 (2d Cir. 2001) explains that, "Several courts have held that destruction of evidence in violation of a regulation that requires its retention can give rise to

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[37] In a footnote, the appellate court explained that counsel was free "to make arguments concerning the adverse inference created by Wal-Mart's failure to produce the shopping cart and videotape" but a jury instruction on the matter was not appropriate. 835 So. 2d at 1257 n.2. *Martino* also held that there was not a cause of action in Florida for first-party spoliation of evidence. This question was certified to the Florida Supreme Court which affirmed the Fourth District. *Martino v. Wal-Mart Stores, Inc.*, 908 So.2d 342, 344-45 (Fla. 2005). The other holdings reached by the Fourth District were not considered by the Supreme Court over the objections of two justices who specially concurred and argued that the district court of appeal's decision should be quashed since suit was not filed for two years after the accident and "during that two-year period, no court order or discovery rule required Wal-Mart to maintain or preserve the cart or videotape." *Id.* at 348 (Wells, J. specially concurring). Justice Wells specifically noted the burden that prelitigation preservation would impose on business ("Obviously, storage space, both in warehouses and in computers, have (sic) finite limits. Practically, what was Wal-Mart to do when it was notified by Martino in March 1997? Was Wal-Mart to take the cart out of service? Was Wal-Mart to store the cart? How many warehouses would it take to store all of the property involved in the four-year statute of limitations period when Wal-Mart receives a notice of a possible claim?"). *Id. at 349.* He specifically was concerned about the burden associated with storage of electronic documents. *Id.* at 349, n.3 (quoting from Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561, 623-25 (2001)).

an inference of spoliation."[38] It then agreed that a regulation under the right circumstances could create a duty:

> *We agree that, under some circumstances, such a regulation can create the requisite obligation to retain records, even if litigation involving the records is not reasonably foreseeable. For such a duty to attach, however, the party seeking the inference must be a member of the general class of persons that the regulatory agency sought to protect in promulgating the rule.*

Id. at 109.

Keene v. Brigham & Women's Hospital, Inc., 786 N.E.2d 824 (Mass. 2002) was a medical malpractice case regarding the failure to diagnose or treat a child with meningitis. The hospital lost the child's records during the critical period of the hospital stay making it impossible to determine who treated the child. Judgment was entered against defendant as a result of spoliation. The supreme court held that defendant should have been aware of a litigation claim when it filed a potential claim with its insurer relating to the plaintiff's injuries but also considered the defendant's statutory duty to keep records as a hospital as an additional basis for spoliation. *Id.* at 833.

This case law may have an impact on consent-decree signatories. Persons that enter into consent decrees frequently are bound to preserve documents for some period of time. Consent-decree signatories should be thoughtful in evaluating the scope of this obligation particularly in view of electronic recycling programs for e-mail and backup tapes.

Will a work-product claim establish that a party anticipated litigation?

Work product exists only if a company anticipates litigation. A company that anticipates litigation has a duty to preserve records. That preservation duty will embrace the documents – paper and electronic – that are relevant to the litigation being anticipated.

Normally, the work-product privilege is invoked to resist the production of documents that have been preserved. The question presented is whether the documents in question were created "in anticipation of litigation."

Federal courts have characterized the analysis of this question with a number of similar formulations: was the document prepared "because of the prospect of litigation" but which cannot be a "remote prospect"? *Diversified Indus. Inc. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1988) (quoting in part 8 Wright & Miller 198-99); *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1120 (7th

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[38] The Second Circuit cited *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 716 (7th Cir.1998) ("The violation of a record[-]retention regulation creates a presumption that the missing record contained evidence adverse to the violator."); *Favors v. Fisher*, 13 F.3d 1235, 1239 (8th Cir.1994) (because employer violated record-retention regulation, plaintiff "was entitled to the benefit of a presumption that the destroyed documents would have bolstered her case"); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1419 (10th Cir.1987) (same); and a law review article, Steffen Nolte, *The Spoliation Tort: An Approach to Underlying Principles*, 26 St. Mary's L.J. 351, 368-69 (1995) ("collecting cases announcing a tort cause of action for spoliation based on violation of record-retention regulations"). 243 F.3d at 109.

Cir. 1983) (same). Or "at the very least some articulable claim, likely to lead to litigation, must have arisen." *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980).

National Tank Company v. Brotherton, 851 S.W.2d 193 (Tx. 1993) was a plurality opinion but there was agreement among the justices on the likelihood of litigation required to justify the invocation of a work-product privilege:

> *We agree with the dissenting justices' characterization of 'substantial chance of litigation.' This does not refer to any particular statistical probability that litigation will occur; rather it simply means that litigation is 'more than merely an abstract possibility or an unwarranted fear.' The underlying inquiry is whether it was reasonable for an investigating party to anticipate litigation and prepare accordingly.*

Id. at 204 (citation omitted).

When the federal rules were amended in 1970, the Advisory Committee Notes were amended as well to provide that, "Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes" are not protected work product. *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 501 (1970). Litigants seeking work-product protection must avoid any one of these characterizations if they wish to protect the documents from production.

In the electronic world, where the prelitigation costs of preservation can be quite high, it would appear prudent to use the sometimes ubiquitous "attorney work product" label[39] with respect to documents only when litigation is genuinely anticipated.[40] And one should expect that if a work-product privilege is claimed during litigation, the date to which the claim of privilege relates back will be scrutinized in relation to the preservation of electronic records especially those subject to recycling (like e-mails and backup tapes).

Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 722 (Tx. 2003) makes the point. Handwritten notes were made by employees during the course of an investigation of an accident. The notes were not kept. In response to an interrogatory in the litigation seeking notes made during interviews of witnesses, Wal-Mart objected in part on work-product grounds. Plaintiffs then argued that this claim represented a "tacit admission that Wal-Mart anticipated" the plaintiffs' claim "from the beginning" because the only notes identified in discovery were the notes made during the postaccident

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[39] The typical litany is "Privileged and Confidential, Attorney-Client Communication; Attorney Work Product" but the last in this litany only applies when litigation is anticipated and speaking only generally, the attorney-client privilege should protect attorney-client communications in which legal advice is being sought and rendered.

[40] Putting an insurance carrier on notice is another prelitigation step that some may take as a precaution to ensure that the carrier does not claim late notice. Does that same step trigger a duty to preserve records? *Keene v. Brigham & Women's Hospital, Inc.*, 786 N.E.2d 824, 832 (Mass. 2002) says yes: "The defendant's claim that the missing records were lost long before it was aware (or should have been aware) of the possibility of a suit on behalf of the plaintiff, however, is not supported by the record, which establishes that the defendant should have been aware of a likely claim at least as early as May 1, 1987, the time that it filed a notice with [the Risk Management Foundation] of a potential claim based on the plaintiff's injuries." In an electronic world, with document recycling programs working in the background of most corporate operations, this too is an area where sensitivity to document preservation must be considered.

investigation. The Texas Supreme Court held that because there were several explanations for Wal-Mart's objection to the interrogatory (the notes no longer existed, the report prepared from the notes was available and was produced, and the interrogatory was broad enough to encompass notes created after the lawsuit was filed), "it cannot constitute an admission that Wal-Mart knew on the day of the accident that there was a substantial chance that Johnson's injury would result in litigation." 106 S.W.3d at 723. In other words, the supreme court rejected the argument on the facts, and not as an inappropriate legal position.[41]

Rambus, Inc. v. Infineon Technologies AG, et al., 222 F.R.D. 280 (E.D. Va. 2004) is a more complicated case because it involved a conscious document destruction effort by Rambus that coincided with plans to bring patent infringement suits against a number of manufacturers of dynamic random access memory. Rambus was required to produce privileged documents based on the district court's application of the "crime/fraud" exception to the production of privileged documents. As part of the discussion of what Rambus knew and when in relation to the litigation it later brought, the district court cited to a privilege log filed by Rambus which showed that, in February 1998, Rambus exchanged communications with counsel which Rambus claimed were privileged, according to the log, because they are "'legal strategy in anticipation of litigation'" and "'strategic patent litigation.'" *Id.* at 291. These claims allowed Infineon to argue that Rambus "was anticipating patent litigation during the time period that it formulated and instituted its document purging system." *Id.*

Is postjudgment interest payable on a sanctions award of attorneys fees and costs?

It appears that the answer to this question may be "yes" and since some attorneys fees awards in the sanctions case law can be quite large, the amount may also be significant if enough time passes between the award and a final judgment.

Consider *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045 (11th Cir. 1994) which involved a $350,000 sanctions award. BankAtlantic asserted that, under 28 U.S.C. §1961, it was entitled to postjudgment interest on the district court's sanctions award from July 10, 1989, the date of the sanction order. Paine Webber (which ultimately had prevailed in the matter) argued that BankAtlantic was not entitled to postjudgment interest because it had never requested an award of

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[41] *Cf. Hagopian v. Publix Supermarkets, Inc.*, 788 So. 2d 1088 (Fla. 4th DCA 2001). Plaintiff claimed to have been injured by a Coca-Cola bottle that exploded. In July 1991, plaintiff's attorney wrote to Publix notifying it of the claim. The attorney did not request that Publix preserve the bottle. The store was subsequently closed and the bottle discarded before suit was brought in 1994. Publix's manager prepared an incident report on the date of the accident. Publix refused to give a copy of the incident report to the plaintiff on work product grounds. The trial court held that these two acts "evidenced Publix's anticipation of litigation and therefore the necessity of preserving the instrumentality of the injury, the bottle." Hence, plaintiff brought an independent spoliation of evidence claim against Publix, which is allowed under Florida law, claiming that the loss of this evidence hampered plaintiff in her ability to recover from The Coca-Cola Company. The trial court ultimately directed a verdict on this claim against plaintiff recollecting incorrectly that plaintiff's expert had testified he did not need the bottle to express his opinions. Even though plaintiff settled the claim against The Coca-Cola Company, the Fourth District reversed holding that it was error to direct the verdict since plaintiff was entitled to show she would have recovered more than the settlement amount. Because of the directed verdict, the trial court had refused to issue an adverse inference instruction even though it had earlier held it would do so as a sanction against Publix for failing to maintain the bottle. The Fourth District held that the trial court could reconsider this issue "anew based on the evidence presented." *Id.* at 1091-92. The district court in *Silhan v. Allstate Ins. Co.*, 236 F. Supp. 2d 1303, 1313 (N.D. Fla. 2002) interpreted *Hagopian* as holding that the Fourth District had determined a duty to preserve based on the work product claim and the creation of the incident report. But the Fourth District in its analysis did not comment on the bases for the trial court's determination that Publix had a duty to preserve the bottle.

postjudgment interest in the district court. The court of appeals sided with BankAtlantic. It first explained that under Federal Rule of Appellate Procedure 37, "in a civil case money judgment, affirmed on appeal, 'whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court.'" *Id.* at 1053. So BankAtlantic did not waive its right to postjudgment interest. As for the proper date, the court of appeals explained: "The proper date upon which interest shall be calculated for the sanction amount is July 10, 1989, the date of the sanction order. Federal Rule of Civil Procedure 54(a) (1993) defines 'judgment' as including 'a decree and any order from which an appeal lies. Thus, the July 10, 1989, sanction order is a 'judgment' for purposes of the accrual of interest pursuant to section 1961." *Id.*

Does prelitigation destruction come within Rule 37?

Rule 37(b)(2) provides in pertinent part that if a party fails to obey an order entered under Rule 26(f), the district court may make "such orders in regard to the failure as are just."[42] Rule 26(f) addresses, among other things, the requirement of counsel to confer and to develop a discovery plan before a Rule 16 scheduling conference. Rule 37(d) addresses the failure of a party to serve a written response to a request for production under Rule 34. Again, the district court may issue an order this is "just" including orders permitted by Rule 37(b)(2).[43]

Do these rules reach prelitigation conduct? Cases can be found on both sides of this ledger although the "inherent power" of the courts to sanction a party's conduct is always available.

The Massachusetts Supreme Court in *Keene v. Brigham & Women's Hospital, Inc.*, 786 N.E.2d 824, 832 (Mass. 2002) held that the state version of Rule 37(b) was not available to address a prelitigation sanction and instead relied on spoliation principles:

> *The parties and the judge considered the situation as one arising under rule 37(b)(2)(C), which authorizes a judge, when confronted with a party who fails to obey an order to provide or permit discovery, to "make such orders in regard to the*

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[42] Among the sanctions listed in Rule 37(b)(2) are these: "(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

[43] The Civil Rules Advisory Committee has proposed a change to Rule 37 to add an e-discovery safe harbor for parties. Proposed Rule 37(f) provides that, "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system." Does this language apply to a prelitigation destruction of documents? What is the "routine" operation of an electronic information system? If an information technology employee was supposed to be advised of a lawsuit and the need to suspend recycling programs and was not, is the operation "routine"? If a records hold should have been issued and was not, can the operation be in "good faith"? Are individuals who delete e-mails from the individuals' computers covered by the phrase "routine good faith operation of an electronic information system"? Courts, or course, have "inherent power" to issue sanctions irrespective of the rules, but application of this safe harbor in a prelitigation destruction setting will be subject to case law development. The spirit of this rule should prevent second-guessing of organizations which develop a reasonable prelitigation records hold, at least with respect to "electronic information systems." The proposed rule does not seem to provide a safe harbor for the electronic storage habits of individuals, putting a premium on reasonably determining the "key players" for individual storage records holds. E-discovery related rules changes will go into effect December 1, 2006. For a discussion of the rules changes, *see* Barkett, *Help Is on the Way...Sort of: How the Civil Rules Advisory Committee Hopes to Fill the E-Discovery Void*, ABA Section of Litigation Annual Conference (Los Angeles, April 20, 2006).

> *failure as are just, and among others . . . [a]n order striking out pleadings or parts thereof . . . or rendering a judgment by default against the disobedient party." In view of the judge's determination that the defendant was unable (as opposed to unwilling) to produce the documents, this was not correct. Requests for discovery pursuant to Mass. R. Civ. P. 34(a), 365 Mass. 792 (1974), require production of documents that "are in the possession, custody or control of the party upon whom the request is served." By these express terms, rule 34(a) does not demand production of documents that "were in" or that "should have been kept in" the party's possession. Put simply, there can be no discovery violation, and hence no rule 37 sanction, when a party fails to produce documents it does not possess. The parties and the judge cannot be faulted, however, for treating the problem of the missing records as one invoking sanctions for a discovery violation. As indicated above, it was not until the discovery process was well underway that the defendant admitted it no longer was in possession of the plaintiff's complete set of medical records.*
>
> *In retrospect, the matter should have been disposed of under the doctrine of spoliation, which permits the imposition of sanctions and remedies for the destruction of evidence in civil litigation.*

Similarly, in *Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546 (6th Cir. 1994) (applying Kentucky law), the court of appeals held that the district court abused its discretion by dismissing the case under Rule 37(d).

> *Rule 37(d) allows for sanctions in three defined situations: (1) if a party fails to appear at its own deposition after being served, (2) if a party fails to answer or object to interrogatories submitted under Rule 33, and (3) if a party fails to serve a written response to a request for inspection submitted under Rule 34. The only situation that may be applicable to this case is a party's failure to serve a written response to a request for inspection submitted under Rule 34. A request for inspection pursuant to the procedures set out in Rule 34(b) was not made. Moreover, a request for the heater and electrical cords would be outside of the scope of Rule 34 because the rule is limited to tangible things in the possession, custody, or control of the party upon whom the request is made. The heater and electrical cords were never in State Auto's possession or control during the lawsuit. The heater and electrical cords were discarded in or about March 1991. The lawsuit was not filed until November 1991. Thus, had a request been made, State Auto could have properly complied with Rule 37 by filing a response stating that it could not produce the heater and electrical cords because they had been destroyed and, therefore, were not in its possession, custody, or control.*
>
> *This court's decision is in no way meant to condone pre-litigation destruction of evidence. The court simply recognizes that Rule 37 is a procedural rule, and like all procedural rules, it governs conduct during the pendency of a lawsuit. Rule 37 does not, nor does any procedural rule, apply to actions that occurred prior to the lawsuit. Such a remedy must be found in the substantive law of the case. For example,*

> *several states have laws which shift the burden of proof when a party is responsible for discarding evidence or which allow juries to draw inferences about discarded evidence. This has been done in Kentucky.*

Id. at 552.

Capellupo v. FMC Corp., 126 F.R.D. 545, 551 n.14 (D. Minn. 1989) is in accord, explaining, that Rule 37 is applicable "to the 'normal' disputes, delays, or difficulties occurring in civil litigation. Its sanctions are appropriate in instances of a litigant's failure to make or cooperate in discovery. Rule 37 enables a court to punish the litigant who has not responded adequately to discovery requests of an opposing party or to orders of the court compelling discovery. Rule 37 does not, by its terms, address sanctions for destruction of evidence prior to the initiation of a lawsuit or discovery requests."

Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72 (S.D.N.Y. 1991) takes a different view: "Even though a party may have destroyed evidence prior to issuance of the discovery order and thus be unable to obey, sanctions are still appropriate under Rule 37(b) because this inability was self-inflicted." And *Miller v. Gupta*, 656 N.E.2d 461, 466 (Ill. App. Ct. 1995) rejected an argument that Illinois Rule 219(c), the equivalent to Rule 37, does not extend to prelitigation destruction of records. *See also Klupt v. Krongard,* 728 A.2d 727, 734 (Md. Ct. Spec. App. 1999) (following *Turner* under Maryland's Rules).

In the end, it may not matter because the "inherent power" of courts is broad enough to impose a sanction for prelitigation destruction of documents. *Turner*, 142 F.R.D. at 72; *Capellupo*, 126 F.R.D. at 551; *see generally Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980) (courts have inherent power to sanction parties for abusive litigation practices); *Bowmar Instrument Corp. v. Texas Instruments, Inc.*, 25 Fed. R. Serv. 2d at 426-27.[44]

In a diversity case, does federal or state law control the decision to issue an adverse inference instruction?

Cases appear to fall on both sides of this ledger. *King v. Illinois Central R.R.*, 337 F.3d 550, 555-56 (5th Cir. 2003) explains that federal law controls: "Because this is a diversity suit we must determine, as a preliminary matter, whether to apply Mississippi law or federal law to the issue of spoliation. Generally, federal courts apply their own evidentiary rules in diversity matters. *Washington v. Dep't of Transp.*, 8 F.3d 296, 300 (5th Cir.1993). Evidentiary 'presumptions' which merely permit an adverse inference based on unproduced evidence are, likewise, controlled by federal law."

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[44] "The most extreme legal position taken by the defendant is that the court is powerless to punish the wholesale, wilful destruction of relevant evidence where the destruction takes place prior to a specific court order for their production. Surely this proposition must be rejected. The plaintiffs are correct that such a rule would mean the demise of the real meaning and intent of the discovery process provided by the Federal Rules of Civil Procedure." "It has long been recognized that sanctions may be proper where a party, before a lawsuit is instituted, willfully places himself in such a position that he is unable to comply with a subsequent discovery order. *Cf., e.g., Societe Internationale v. Rogers*, 357 U.S. 197, 208-09 (1958). Although a potential litigant is under no obligation to preserve every document in its possession, whatever its degree of relevance, prior to the commencement of a lawsuit, *see United States v. International Business Machines Corp.*, 66 F.R.D. 189, 194 (S.D.N.Y. 1974), some duty must be imposed in circumstances such as these lest the fact-finding process in our courts be reduced to a mockery."

Compare this holding to the decision in *Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d at 552, where the Sixth Circuit held that Rule 37 did not reach prelitigation destruction of evidence and suggested that state law should be considered: "Rule 37 does not, nor does any procedural rule, apply to actions that occurred prior to the lawsuit. Such a remedy must be found in the substantive law of the case. For example, several states have laws which shift the burden of proof when a party is responsible for discarding evidence or which allow juries to draw inferences about discarded evidence. This has been done in Kentucky." In *Welsh v. United States*, 844 F.2d at 1245, a Sixth Circuit Federal Tort Claims Act case, the court of appeals held: "The parties have cited, and the Court's own research has found, no Kentucky case dealing with prelitigation disposal of ultimately critical evidence by a negligent defendant. However, in this Tort Claims Act case our task, as in diversity, is to make our best prediction, even in the absence of direct state court precedent, of what the Kentucky Supreme Court would do if it were confronted with this question. In that inquiry we may rely upon analogous cases."

One can see that the answer to this question may have an impact on the outcome of a matter where the standard of care required by the governing jurisdiction to justify the issuance of adverse inference instruction is bad faith or something less than bad faith, as the discussion which follows explains.

THE LEVEL OF CONDUCT REQUIRED TO IMPOSE SANCTIONS IN THE FEDERAL CIRCUITS

The spoliation instruction is not an American jurisprudential invention. *See Armory v. Delamirie*, 93 Eng. Rep. 664 (K.B. 1722).[45] In American jurisprudence, however, the spoliation instruction is likely to be just as outcome determinative.[46]

The cases discussed below include both prelitigation and postfiling spoliation. Because the lines between the two can be blurred in the level of conduct case law, I thought it prudent to include both. There is no substitute for reading the cases. Not all of the cases involve adverse inference instructions. And I have not attempted to categorize district court decisions or state rules. However, the table below provides readers with a circuit-by-circuit "sense" of whether bad faith is required to support an adverse inference instruction for the prelitigation destruction of evidence.

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[45] This case involved the good fortune of a chimney sweeper's boy who found a jewel and took it to a goldsmith to have it valued. The goldsmith's apprentice removed the stones from the piece of jewelry before weighing it. The goldsmith made the boy an offer for the piece of jewelry minus the stones. The boy refused and demanded the return of the jewelry. The apprentice delivered it without the stones. The boy sued. The stones were never produced by the goldsmith. The court gave a spoliation instruction, which the jury followed: "As to the value of the jewel several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest case against him, and make the value of the best jewels the measure of their damages: which they accordingly did."

[46] "An adverse inference instruction is a powerful tool in a jury trial. When giving such an instruction, a federal judge brands one party as a bad actor, guilty of destroying evidence that it should have retained for use by the jury. It necessarily opens the door to a certain degree of speculation by the jury, which is admonished that it may infer the presence of damaging information in the unknown contents of an erased audiotape. As the district court in this case put it colloquially, 'it's like cow crap; the more you step in it, the more it stinks.' One distinguished court years ago cautioned against use of an adverse inference instruction like the one given in this case (there, involving an absent witness rather than missing evidence), because '[t]he jury should not be encouraged to base its verdict on what it speculates the absent witness would have testified to, in the absence of some direct evidence.' *Felice v. Long Island R.R. Co.*, 426 F.2d 192, 195 n.2 (2d Cir. 1970) (Friendly, J.)." *Morris v. Union Pacific Railroad*, 373 F.3d 896, 900-01 (8th Cir. 2004)

Cir.	Is Bad Faith Required for an Adverse Inference for Prelitigation Loss of Evidence?
01	Research did not produce a circuit decision directly on point, but bad faith may not be required.
02	Negligence appears to be enough to warrant an adverse inference if there is sufficient prejudice.
03	There should be a balancing of the level of fault, the degree of prejudice, and the type of sanction available to avoid unfairness but which will deter similar conduct by others in the future.
04	Bad faith is not always necessary to justify an adverse inference.
05	Bad faith is necessary.
06	Negligence may be enough depending upon the level of prejudice but state law may determine the standard in diversity cases.
07	Bad faith may be required but it is not entirely clear from the circuit decisions.
08	In the case of a prelitigation loss of records due to a routine document-retention program, 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.
09	Bad faith does not appear to be required.
10	Bad faith appears to be required.
11	Bad faith is required.
D.C.	Bad faith may be required.

Here are the circuit cases that were reviewed.

First Circuit

Allen Pen v. Springfield Photo Mount Co., 653 F.2d 17, 24 (1st Cir.1981).

Factual Context: In this Robinson-Patman price-discrimination case, Springfield had identified computer-generated lists (monthly invoice registers, monthly distribution journals and monthly sales analyses) which indicated, among other things, the prices Springfield charged Allen Pen's competitors and the quantities shipped. Six months after Springfield answered the interrogatories, it destroyed the lists. The court of appeals observed that Springfield should have preserved these documents because Allen Pen's interrogatories "had targeted them for possible production; and they were specifically identified in response to a request to identify records central to Allen Pen's claim." But Allen Pen

made no request to produce the documents until April 1980, three and one-half years after it learned of their existence and just before trial. And it sought "too draconian a sanction. It might have asked, prior to trial, for costs and fees needed to obtain the same information from third parties. Having failed to seek lesser remedies, it cannot wait for trial and then seek close to a declaration of victory on the issue."

Conduct Standard: "In any event, Allen Pen has not shown that the document destruction was in bad faith or flowed from the consciousness of a weak case. There is no evidence that Springfield believed the lists would have damaged it in a lawsuit. Without some such evidence, ordinarily no adverse inference is drawn from Springfield's failure to preserve them."

Nation-Wide Check Corp. v. Forest Hills Distribs., Inc., 692 F.2d 214, 219 (1st Cir. 1982).

Factual Context: Nation-Wide sold money orders through vendors like Forest Hills. Forest Hills executed an assignment of assets for benefit of creditors. After the liquidation, Nation-Wide told the assignees of its claim for damages in December 1974. Suit was filed on April 1, 1975. Assignees (through a person named Gordon) were storing FH's records and after April 11, 1975, abandoned the records to the landlord of the storage facility who discarded them. The district court used the destruction to fill in a gap in plaintiff's proof tracing the money owed to plaintiff to show that it was among the assets assembled by assignees for payment to creditors. The court of appeals held that this was not an abuse of discretion.

Conduct Standard: "The court's reluctance to label Gordon's conduct as 'bad faith' is not dispositive: 'bad faith' is not a talisman, as Allen Pen itself made clear when it stated that the adverse inference 'ordinarily' depended on a showing of bad faith. Indeed, the 'bad faith' label is more useful to summarize the conclusion that an adverse inference is permissible than it is actually to reach the conclusion."

Young v. Gordon, 330 F.3d 76, 82 (1st Cir. 2003).

Factual Context: Young failed to appear at this deposition despite being forewarned by the district court that his claim would be summarily dismissed if he failed to appear. The district court kept its word.

Conduct Standard: "Young also maintains that the sanction was too harsh because he was acting in good faith. This is at best a debatable question--and one on which the district court had the better coign of vantage. At any rate, a finding of bad faith is not a condition precedent to imposing a sanction of dismissal."[47]

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[47] The only First Circuit citation in support of this proposition was *Farm Constr. Servs., Inc. v. Fudge*, 831 F.2d 18, 21 (1st Cir.1987). The focus of this case appears to be on violation of a court order: "We can find no abuse of discretion on the part of the district court in dismissing a case where the appellant has intentionally disregarded court orders on repeated occasions and substituted its own judgment for that of the court. Appellant was notified by the magistrate on October 11, 1985 that sanctions in the form of dismissal would be imposed for failure to comply with discovery. It must now face the consequences of withholding the requested documents."

Second Circuit

Byrnie v. Town of Cromwell, 243 F.3d 93, 109 (2d Cir. 2001).

Factual Context: An applicant refused a position brought a discrimination claim against a school board. The school board did not maintain certain hiring records contrary to a regulation promulgated by the EEOC. The court of appeals held that the board was on notice of potential litigation "arguably" when the applicant made contact with the school principal and assistant principal and made inquiries about the interview process and submitted a FOIA request for hiring records, but certainly by the time of filing of a charge of discrimination with a state human rights commission. In any event, there was the duty to preserve records created by the regulation.

Conduct Standard: "Cromwell admitted its policy to destroy such records soon after the hiring process had been completed and that the records in this case were so destroyed. At no point has Cromwell asserted that their destruction was merely accidental. This is evidence of intentional destruction sufficient to show a culpable state of mind on Cromwell's part. Given that we have held that bad faith--an intent to obstruct the opposing party's case--need not be shown to justify an inference of spoliation, (citation omitted), intentional destruction of documents in the face of a duty to retain those documents is adequate for present purposes."

Residential Funding Corp. v. DeGeorge Fin. Corp. 306 F.3d 99, 108-09 (2d Cir. 2002).

Factual Context: RFC had been "purposefully sluggish" in the production of e-mails. In August 2001, just before trial, it produced a number of e-mails but none from a critical time period in 1998. DeGeorge asked for backup tapes to search for e-mails itself. RFC turned over the backup tapes. Within four days, DeGeorge's contractor found 950,000 e-mails in the relevant time period. Of these, 4,000 were printed out in the limited time available (trial was ongoing) and 30 of these were determined to be responsive to discovery requests, "though none appear to be damaging to RFC." DeGeorge moved for sanctions seeking a presumption that the e-mails from October to December 1998 which had not been produced "would have disproved RFC's theory of the case." After hearing argument, the district court denied the motion. The jury found for RFC and awarded RFC $96.4 million. On appeal, the court of appeals vacated the sanctions order and remanded for reconsideration of the propriety of sanctions.

Conduct Standard: Referring to Rule 37 and in remanding the sanctions motion for reconsideration, the court of appeals held: "In sum, we hold that discovery sanctions, including an adverse inference instruction, may be imposed upon a party that has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence." The court of appeals earlier

obliquely explained that prejudice would still be required to be shown if only ordinary negligence was proven.[48]

Third Circuit

Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 868 (3d Cir. 1984).

Factual Context: Plaintiff's counsel failed to file a pretrial statement on time ultimately resulting in a dismissal of the action that was vacated and remanded. The district court dismissed the action a second time despite defendant's willingness to accept lesser sanctions. The court of appeals vacated the judgment again.

Conduct Standard: "In exercising our appellate function to determine whether the trial court has abused its discretion in dismissing, or refusing to lift a default, we will be guided by the manner in which the trial court balanced the following factors, which have been enumerated in the earlier cases, and whether the record supports its findings: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense."

Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76 (3d Cir. 1994).

Factual Context: Plaintiff's counsel, before suit was filed or determination made that there was a basis for suit, had an expert examine a circular saw that had caused plaintiff's injury. The expert examined the saw and "noted that the guard was closing sluggishly and that there was a grating noise. He disassembled the guard to find out why. This disassembly, according to [the expert], revealed particles trapped in the guard mechanism, some of which fell out during the course of the examination. Some of the trapped particles had caused scoring of the metal on the mating areas of the blade guard. [The expert] took photos of the assembled saw, the disassembled saw, the scoring,

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[48] The district court in *Pace v. National R.R. Passenger Corp.*, 291 F. Supp. 2d 93 (D. Conn. 2003) held that *Residential Funding* applies to prelitigation as well as postlitigation destruction of documents: "Amtrak argues that this court erred in allowing the state of mind requirement to be satisfied by a showing of negligence. It maintains that the standard enunciated by *Residential Funding* is inapplicable because that case involved post-litigation discovery abuses. In *Residential Funding*, however, the Second Circuit discussed destruction of evidence generally, finding that 'the culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without an intent [to breach a duty to preserve it] or *negligently*" *Id.* at 108 (internal quotations omitted; brackets and emphasis in original). It further explained that '[t]he sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence.' *Id.* at 108. The panel gave no indication that it intended for its ruling to be confined to post-litigation destruction." 291 F. Supp. 2d at 99. The district court added this significant reminder: "As the Second Circuit explained, the inference 'is adverse to the destroyer not because of any finding of moral culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss.' *Residential Funding*, 306 F.3d at 108. That rationale certainly applies here, where the plaintiff's claim turned on whether the railroad had improperly maintained its cars and specifically the buffer plates, and the various unavailable records related to their inspection and maintenance." 291 F. Supp. 2d at 99. Amtrak had claimed that the records in question were destroyed pursuant to the defendant's normal file destruction calendar of two years. And that it did not anticipate litigation until it was filed. The district court rejected the claim, holding that the litigation was reasonably foreseeable since the defendant had been conducting clandestine video surveillance of the plaintiff as early as February 2000 and had an independent medical examiner examine plaintiff in May 2001, whereas the records in dispute would not have been disposed of until July 2001. *Id.*

and the debris." The particles that fell out of the saw were not kept. Based on this conduct, the district court excluded the expert's testimony as a sanction. The Third Circuit reversed.

Conduct Standard: "While we do not doubt the inherent authority of a district court to impose such a drastic sanction in an appropriate case, we conclude that this was not such a case. We believe the key considerations in determining whether such a sanction is appropriate should be: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future."

Brewer v. Quaker State Refining Corp., 72 F.3d 326, 334 (3d Cir. 1995).[49]

Factual Context: A personnel file had last been in the hands of an in-house counsel and could not be located by defendant after the untimely death of the in-house counsel. As a result, plaintiff sought an adverse inference sanction, which the district court rejected. The court of appeals affirmed.

Conduct Standard: "Further, it must appear that there has been an actual suppression or withholding of the evidence. No unfavorable inference arises when the circumstances indicate that the document or article in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for. *See generally* 31A C.J.S. Evidence §156(2); 29 Am.Jur.2d Evidence §177 ('Such a presumption or inference arises, however, only when the spoilation or destruction [of evidence] was intentional, and indicates fraud and a desire to suppress the truth, and it does not arise where the destruction was a matter of routine with no fraudulent intent.')."[50]

Fourth Circuit

Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995).

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[49] Citing *Brewer* in part, the district court in *Mosaid Technologies Inc. v. Samsung Elec. Co., Ltd., et al.*, 348 F.Supp.2d 332, 336 (D.N.J. 2004), a postlitigation destruction case, set forth the factors that must be satisfied in the Third Circuit before a "spoliation inference" can apply: "First, 'it is essential that the evidence in question be within the party's control.' *Brewer*, 72 F.3d at 334 (citing *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir.1983)). Second, 'it must appear that there has been actual suppression or withholding of the evidence.' *Id.* Third, the evidence destroyed or withheld was relevant to claims or defenses. [*Scott v. IBM Corp.*, 196 F.R.D. 233, 248 (D.N.J. 2000)]; *Veloso v. Western Bedding Supply Co.*, 281 F.Supp.2d 743, 746 (D.N.J.2003). And fourth, it was reasonably foreseeable that the evidence would later be discoverable. *Scott*, 196 F.R.D. at 248; *Veloso*, 281 F.Supp.2d at 746. 'While a litigant is under no duty to keep or retain every document in its possession, even in advance of litigation, it is under a duty to preserve what it knows, or reasonably should know, will likely be requested in reasonably foreseeable litigation.' *Scott*, 196 F.R.D. at 249."

[50] In *Mosaid Technologies Inc. v. Samsung Elec. Co., Ltd., et al., supra*, the district court in New Jersey surveyed the Third Circuit case law on the level of conduct required before issuance of an adverse inference instruction. It held that "bad faith" was not required: "Having considered the two different approaches courts take under the Third Circuit's "actual suppression" standard, and the Third Circuit's characterization of the spoliation inference as a lesser sanction, this Court believes the flexible approach is the better and more appropriate approach. Primarily, the spoliation inference serves a remedial function–leveling the playing field after a party has destroyed or withheld relevant evidence. As long as there is some showing that the evidence is relevant, and does not fall into one of the three categories enumerated in *Schmid*, the offending party's culpability is largely irrelevant as it cannot be denied that the opposing party has been prejudiced. Contrary to Samsung's contention, negligent destruction of relevant evidence can be sufficient to give rise to the spoliation inference. If a party has notice that evidence is relevant to an action, and either proceeds to destroy that evidence or allows it to be destroyed by failing to take reasonable precautions, common sense dictates that the party is more likely to have been threatened by that evidence. *See Schmid*, 13 F.3d at 78. By allowing the spoliation inference in such circumstances, the Court protects the integrity of its proceedings and the administration of justice." 348 F.Supp.2d at 338 (footnotes omitted).

Factual Context: An expert engaged in destructive testing of portions of a boat that was central to plaintiff's negligence theory. The district court was found to have acted within its discretion "in permitting the jury to draw an adverse inference if it found that Vodusek or her agents caused destruction or loss of relevant evidence. Rather than deciding the spoliation issue itself, the district court provided the jury with appropriate guidelines for evaluating the evidence."

Conduct Standard: "We reject the argument that bad faith is an essential element of the spoliation rule."

"As a general proposition, the trial court has broad discretion to permit a jury to draw adverse inferences from a party's failure to present evidence, the loss of evidence, or the destruction of evidence. While a finding of bad faith suffices to permit such an inference, it is not always necessary."

Anderson v. Found. for Advancement, Educ. & Employment of Am. Indians, 155 F.3d 500, 504 (4th Cir. 1998).

Factual Context: The Foundation failed to comply with a magistrate's order requiring certain discovery be provided. The magistrate judge had threatened Anderson with a default judgment for noncompliance and carried out the threat following the failure to comply. The court of appeals affirmed the entry of the default judgment by the district court ("entry of a default judgment was warranted both as a deterrent and as a last-resort sanction following the Foundation's continued disregard of prior warnings") except with respect to one cause of action, which the court of appeals held, failed to state a claim, and therefore, could not serve as a basis for a damages award irrespective of the default judgment.

Conduct Standard: "The Fourth Circuit has developed a four-part test for a district court to use when determining what sanctions to impose under Rule 37. The court must determine (1) whether the non-complying party acted in bad faith, (2) the amount of prejudice that noncompliance caused the adversary, (3) the need for deterrence of the particular sort of non-compliance, and (4) whether less drastic sanctions would have been effective."

Silvestri v. General Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001)

Factual Context: Plaintiff claimed that a GM vehicle was defective and that the defect caused the accident in issue. Plaintiff had his experts inspect the vehicle. One of the experts told plaintiff to advise GM of the accident so GM could inspect it. But GM was not notified of the accident until three years later and by then the vehicle had been repaired and resold. The district court dismissed the case as a sanction. The Fourth Circuit affirmed.

Conduct Standard: "We agree with Silvestri that dismissal is severe and constitutes the ultimate sanction for spoliation. It is usually justified only in circumstances of bad faith or other 'like action.' *Cole v. Keller Indus., Inc.*, 132 F.3d 1044, 1047 (4th Cir.1998). But even when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case." *Id.* at 593. "At bottom, to justify the harsh sanction of dismissal, the district court must consider both the spoliator's conduct and the prejudice caused and be

able to conclude either (1) that the spoliator's conduct was so egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim." *Id.*

Law Enforcement Alliance of Am., Inc. v. USA Direct, Inc., No. 02-1715, 2003 WL 1154115, at *7 (4th Cir. Mar. 14, 2003).

Factual Context: LEAA had failed to produce certain invoices "until after the deadline for the exchange of mandatory disclosures under the court's scheduling order, after the close of all discovery, after the filing of motions for summary judgment, and only two weeks before trial." The invoices reflected they had been approved by LEAA, but LEAA argued otherwise until they were finally produced. LEAA was ordered to pay defendant's counsel fees associated with discovery on the issue (about $6,000). The court of appeals affirmed.

Conduct Standard: "LEAA misreads *Anderson*. *Anderson* does not hold that a district court must find that a party acted in bad faith, it merely holds that in determining what sanctions are appropriate, a district court must consider "whether" the party acted in bad faith. *Id.* (155 F.3d) at 504. Where a district court determines that there was no bad faith, that determination will likely be reflected in a less severe sanction. *Anderson* does not require a finding of bad faith before discovery sanctions can be awarded and to hold otherwise would be at odds with Rule 37(c)(1)'s plain language, which contains no such requirement."

Fifth Circuit

Vick v. Texas Employment Comm'n, 514 F.2d 734, 737 (5th Cir. 1975).

Factual Context: Records of the Texas Employment Commission were destroyed before trial pursuant to Commission regulations governing disposal of inactive records. Vick sought an adverse inference based on the disposal.

Conduct Standard: "The adverse inference to be drawn from destruction of records is predicated on bad conduct of the defendant. 'Moreover, the circumstances of the act must manifest bad faith. Mere negligence is not enough, for it does not sustain an inference of consciousness of a weak case.' McCormick, Evidence § 273 at 660-61 (1972), 31A C.J.S. Evidence § 156(2) (1964). There was indication here that the records were destroyed under routine procedures without bad faith and well in advance of Vick's service of interrogatories. Certainly, there were sufficient grounds for the trial court to so conclude."

Merritt v. Int'l Bhd. of Boilermakers, 649 F.2d 1013, 1018-19 (5th Cir. 1981).

Factual Context: A magistrate determined that plaintiffs were responsible for defendants' fees and costs in connection with a motion to compel discovery, arguing that bad faith was required before this sanction could be imposed.

Conduct Standard: Appellants cited *Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197 (1958), for the proposition that Rule 37 sanctions can only be imposed upon a finding of bad faith. "We find appellant's argument to be without merit. *Societe*

Internationale actually stands for the much narrower proposition that the sanction of dismissal under Fed.R.Civ.P. 37(b)(2)(C) cannot be imposed where noncompliance with a court's discovery order is due to inability to comply, 'and not to willfulness, bad faith, or any fault.' 357 U.S. at 212. We are not faced here with the sanction of dismissal with prejudice under Rule 37(b)(2) (C). Instead, we deal with an award of expenses under Rule 37(a)(4) in connection with a motion to compel discovery."

Sixth Circuit

Welsh v. United States, 844 F.2d 1239, 1240, 1247-48 (6th Cir. 1988) (applying Kentucky law).

Factual Context: "The outcome of this appeal turns upon what effect a defendant's negligent destruction of crucial evidence under its exclusive control should have on the plaintiff's burden of proof. Two acts by the hospital surgeons in this case create a rebuttable presumption of negligence and proximate causation against the defendant--the negligent destruction of a skull bone flap after the second operation, and the consequent failure at that time to undertake a pathological examination of this evidence in accordance with customary standards of medical practice. The defendant has not rebutted that presumption, and the judgment of the District Court therefore is affirmed."

Conduct Standard: "[T]he 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.

When, as here, a plaintiff is unable to prove an essential element of her case due to the negligent loss or destruction of evidence by an opposing party, and the proof would otherwise be sufficient to survive a directed verdict, it is proper for the trial court to create a rebuttable presumption that establishes the missing elements of the plaintiff's case that could only have been proved by the availability of the missing evidence. The burden thus shifts to the defendant-spoliator to rebut the presumption and disprove the inferred element of plaintiff's prima facie case."

Beil v. Lakewood Eng'g & Mfg. Co., 15 F.3d 546, 552 (6th Cir. 1994).

Factual Context: A fire destroyed a home and killed the owners. The insurer hired an investigator who removed a heater to inspect it and concluded that heater had caused the fire. The investigator disposed of the heater about three months later. Approximately eight months later, the insurer filed suit against the manufacturer of the heater. Relying on F.R.Civ.P. 37, the district court found that the insurer was grossly negligent based on the investigator's disposal of the heater, and dismissed the case. The court of appeals reversed.

Conduct Standard: "Dismissal is the sanction of last resort. It should be imposed only if the court concludes that the party's failure to cooperate in discovery was willful, in bad faith, or due to its own fault."

Nationwide Mut. Ins. Co. v. Ford Motor Co., 174 F.3d 801, 804 (6th Cir. 1999).

Factual Context: Ford successfully moved to exclude the testimony of Nationwide's expert as a sanction for removing the electrical wire harness from the vehicle in issue. The district court granted the motion, agreeing that the removal of the wire harness amounted to spoliation. The district court stated that by removing the car from the garage, and the wire harness from the car, Nationwide denied Ford an opportunity to develop information favorable to its defense. The court of appeals reversed

Conduct Standard: "A court may exclude expert testimony as a sanction for spoiling evidence if it determines that the evidence has been intentionally altered or destroyed by a party or its expert before the defense had an opportunity to examine the evidence."

"It is not disputed that the wire harness was not destroyed. Nationwide determined that in the circumstances, removing the wire harness was necessary for further close inspection and preservation in case of litigation. Whether Ford, or the district court, or this court for that matter, would or would not have removed the harness is not the test for determining whether evidence has been spoiled. Rather the test, under Ohio law, is whether Nationwide intentionally altered or destroyed its evidence, causing prejudice to Ford. There is no evidence in the record to suggest that Nationwide intentionally altered or destroyed the evidence before Ford had an opportunity to inspect it, either before the harness was removed from the car, or thereafter. 'Intentional' here, of course, does not mean merely that the act of removal was knowing and willful, but rather that the harness was removed for the purpose of rendering it inaccessible or useless to the defendant in preparing its case; that is, spoiling it."

Regional Refuse Sys., Inc. v. Inland Reclam. Co., 842 F.2d 150, 156 (6th Cir. 1988).

Factual Context: The plaintiff was not characterized as well-intentioned in the district court's findings: "plaintiff Dzina himself engaged in conduct that 'can only be characterized as outrageous and beyond the realm of which the other parties to the action and their counsel should be made to tolerate.' The court gave numerous and specific examples of Dzina's conduct--absenting himself from the deposition without explanation, evading questions, refusing to answer questions he deemed repetitive, refusing to identify persons he claimed provided information upon which his lawsuit was based, claiming vague and spurious privileges, and so forth. While this circuit has been more ready than others to reverse dismissals for disobedience to discovery orders, especially when it appears that the party is blameless, this is not a case in which a party has simply failed to appear and no one is clearly at fault except for the party's attorney." The court of appeals affirmed the judgment of dismissal as a sanction.

Conduct Standard: "Dismissal is generally imposed only for egregious misconduct, such as repeated failure to appear for deposition, (citation omitted), and Dzina's misconduct here, as characterized by the district court, clearly falls in this category. It is an unusual aspect of this case that Dzina did appear to be deposed, and consistently made a colorable effort to seem to be acting in good faith while in fact consistently refusing to supply relevant and unprivileged information. However, misconduct is not any less misconduct because it is executed with a veneer of good intentions."

Seventh Circuit

Coates v. Johnson & Johnson, 756 F.2d 524, 550-51 (7th Cir. 1985).

Factual Context: "Plaintiffs also argue that they should have had the benefit of an evidentiary presumption because certain documents were destroyed by defendants during the closing of the plant. One group of documents destroyed was the departmental files, which were maintained plant-wide beginning in 1976 and contained duplicates of all disciplinary documents. Although only the personnel files were relied on by defendants in considering discharge decisions, the departmental files were allegedly important to plaintiffs' case because they allegedly contained the only record of oral counseling given to employees, which plaintiffs contended were given to white employees in situations in which blacks were issued written warnings. Plaintiffs argue that because of defendants' spoilation of this evidence, plaintiffs were entitled to an evidentiary presumption that the records of the oral reprimands would corroborate plaintiffs' testimonial evidence that blacks were 'written up' in situations in which whites were not. In addition, defendants' manager of labor relations, Thomas Rochon, destroyed a small group of disciplinary letters that were in his possession at the plant closing. These letters had been removed from some personnel files after March, 1978, in connection with an agreement with the union that disciplinary letters more than three years old would be removed. Plaintiffs maintain the presumption should also have applied to these letters."

Conduct Standard: "The prevailing rule is that bad faith destruction of a document relevant to proof of an issue at trial gives rise to a strong inference that production of the document would have been unfavorable to the party responsible for its destruction. *S.C. Johnson & Son, Inc. v. Louisville & Nashville Railroad,* 695 F.2d 253, 258-59 (7th Cir. 1982); *Vick v. Texas Employment Commission,* 514 F.2d 734, 737 (5th Cir. 1975). However, considering the circumstances surrounding the destruction of the documents in this case, nothing gives rise to an inference of bad faith by defendants. The district court accepted the testimony of Williams, the black plant manager, that the personnel files were destroyed only after he consulted with the EEOC/Affirmative Action coordinator regarding which files needed to be maintained in light of the pending class action. Williams was told that these files, in view of the closing of the plant, did not have to be kept. He then decided that they could be destroyed considering that (1) the departmental files were not official records and the management had agreed with the union not to rely on them in issuing discipline, and that (2) to Williams' knowledge, the departmental files included only incomplete duplications of documents kept in the official files and were not well maintained. Similarly, the district court found that Rochon was unaware at the time he destroyed the disciplinary letters that there was any pending litigation regarding defendants' disciplinary policies, although Rochon was aware that one employee had filed a suit regarding his discharge. These circumstances suggest that the documents were destroyed under routine procedures, not in bad faith, and thus cannot sustain the inference that defendants' agents were conscious of a weak case."

Partington v. Broyhill Furniture Indus., Inc., 999 F.2d 269, 271-72 (7th Cir. 1993).

Factual Context: In affirming an age discrimination award to plaintiff, the court of appeals observed: "Broyhill was aware that a company that dismisses an older worker has potential liability under the age discrimination law. No inference of guilt can be drawn from awareness of one's legal obligations; to do so would be to promote the ostrich over the farther-seeing species. But the innocuous evidence of age awareness becomes significant in conjunction with evidence that Broyhill ordered a 'purge' of the files of its terminated salesmen (most of whom were over the age of 40 and thus potential age

discrimination plaintiffs). The word was first used by Partington's counsel but it was adopted by the employee who had administered the purge. Broyhill presented evidence that the purpose was merely to eliminate duplicates, yet the purge came to light only because pretrial discovery turned up from other sources documents that should have been in the terminated employees' files but were not. We know that Broyhill was sensitive to the possibility of being sued by these employees under the age discrimination law, and for this sensitivity, as we have said, it cannot be criticized."

Conduct Standard: "But if, 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, the inference arises that it has purged incriminating evidence."

Melendez v. Illinois Bell Tel. Co., 79 F.3d 661, 671 (7th Cir. 1996).

Factual Context: The district court sanctioned Illinois Bell under Rule 37(b)(2)(B) for its failure to produce the Basic Skills Aptitude Test – Replacement (BSAT-R) by prohibiting an expert, Dr. Morris, from testifying in this discrimination case. Illinois Bell unsuccessfully argued on appeal that it had made an honest mistake in the failure to produce.

Conduct Standard: "Illinois Bell asserts that the district court erred by ascribing bad faith motives to it. Bad faith, however, is not required for a district court to sanction a party for discovery abuses. Sanctions are proper upon a finding of wilfulness, bad faith, or fault on the part of the noncomplying litigant. The district court found that Illinois Bell, through its trial counsel and Dr. Morris, knew or should have known that disclosure of the BSAT-R was required by the court's discovery orders. We interpret this finding to mean that Illinois Bell acted in bad faith (*i.e.*, that Illinois Bell knew disclosure was required) or, alternatively, was at fault (*i.e.*, that Illinois Bell should have known disclosure was required). After reviewing the facts, we cannot deem the district court's finding to be clearly erroneous."

Crabtree v. National Steel Corp., 261 F.3d 715 (7th Cir. 2001).

Factual Context: The defendant had discarded documents relating to a reduction in force and certain employment applications prior to the filing of the lawsuit but while plaintiff's claim was pending before the state human rights agency. The district court excluded evidence of the destruction because there was no showing that defendant had acted in bad faith. The court of appeals affirmed under the particular circumstances presented.

Conduct Standard: "'The prevailing rule [in this circuit] is that bad faith destruction of a document relevant to proof of an issue at trial gives rise to a strong inference that production of the document would have been unfavorable to the party responsible for its destruction.' *Coates v. Johnson & Johnson*, 756 F.2d 524, 551 (7th Cir. 1985); *see also Partington v. Broyhill Furniture Indus., Inc.*, 999 F.2d 269, 272 (7th Cir. 1993) ('[I]f, 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, the inference arises that it has purged incriminating evidence.')."

"Although Granite City Steel destroyed most of the RIF documents while Crabtree's claim was pending before the Illinois Department of Human Rights ("IDHR"), there was no evidence that they

were destroyed in bad faith. Granite City Steel destroyed the RIF documents only after maintaining them for two years (one year longer than required under company policy) and only after giving notice to the IDHR that it was doing so. Additionally, most of the RIF documents were not relevant to Crabtree's case because his lawsuit did not challenge the RIF, and those that were relevant--Crabtree's own RIF evaluations--were preserved and produced."

Eighth Circuit

Lewy v. Remington Arms Co., Inc., 836 F.2d 1104, 1112 (8th Cir. 1988).

Factual Context: The district court gave an adverse inference instruction where a gun manufacturer discarded customer complaints and gun-examination reports after three years according to a long-standing, routine document-retention program.

Conduct Standard: "Finally, the court should determine whether the document retention policy was instituted in bad faith. (Citations omitted.) In cases where a document retention policy is instituted in order to limit damaging evidence available to potential plaintiffs, it may be proper to give an instruction similar to the one requested by the Lewys. Similarly, even if the court finds the policy to be reasonable given the nature of the documents subject to the policy, the court may find that under the particular circumstances certain documents should have been retained notwithstanding the policy. For example, if the corporation knew or should have known that the documents would become material at some point in the future then such documents should have been preserved. Thus, a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy."

Stevenson v. Union Pac. R.R. Co., 354 F.3d 739, 746, 747, 748-49 (8th Cir. 2004).

Factual Context: A voice tape of a dispatcher recorded on the date of a train accident was allowed to be recycled after 90 days and certain track-maintenance records were discarded, both before suit was brought. The district court gave an adverse inference instruction to the jury and the jury found for the plaintiff. The court of appeals found no abuse of discretion in giving the instruction with respect to the voice tape, but remanded because the defendant was not given the opportunity to rebut the presumption under the circumstances of this matter.

Conduct Standard: "We need not decide and do not reach any choice of law question in this case because the standard is the same under either state or federal law-there must be a finding of intentional destruction indicating a desire to suppress the truth."

"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."

"The district court said it was not persuaded that the document retention policy was instituted in bad faith, but '[a]s with the voice tape, however, [Union Pacific] knew or should have known that the documents would become material and should have preserved them.' (Record citation omitted.) The

'knew or should have known' language indicates a negligence standard, and as noted earlier, we have never approved of giving an adverse inference instruction on the basis of negligence alone. Even if the district court intended its findings to be the equivalent of a bad faith determination, we conclude that the findings regarding the prelitigation destruction of track maintenance records do not amount to a showing of bad faith and that the district court abused its discretion in giving the adverse inference instruction in relation to the destruction of all track maintenance records up to two years prior to the accident."

Morris v. Union Pac. R.R., 373 F.3d 896, 901-02 (8th Cir. 2004).

Factual Context: Plaintiff owned a wrecking company. He was called to the scene of a collision between a Union Pacific train and a tractor-trailer truck. In making an inspection of the vehicles, the train car suddenly moved forward and caused him injury. As *Stevenson* explained, Union Pacific routinely tapes communications between its train crews and the railroad's dispatcher and recycles the tapes after 90 days. By the time Morris filed suit in this action, the recording related to this particular event "had long since been destroyed." Before trial, Morris moved for sanctions based on the destruction of the tape. After four days of evidentiary hearings, the trial court awarded plaintiff an adverse inference instruction as a sanction but also held that the document retention policy was reasonable on its face and Union Pacific "'did not intentionally destroy the tape.'" The jury awarded plaintiff $8 million. The court of appeals reversed.

Conduct Standard: Relying on *Stevenson*, the court of appeals explained that there must be a finding of "intentional destruction indicating a desire to suppress the truth" before an adverse inference instruction could be issued. Because the district court had made a specific finding of no such intent, the court of appeals vacated the judgment and ordered a new trial.

"We recognize that the district court did find that Union Pacific's destruction of the audiotape at issue in this case constituted 'bad faith' on the part of the railroad. That ruling, however, must be viewed in the context of our court's decision in *Lewy*, which stated in dicta that a finding of 'bad faith' was warranted where a corporation 'knew or should have known' that evidence would become material at some point in the future. 836 F.2d at 1112. The district court's heavy reliance on *Lewy*, and its specific conclusion that Union Pacific did not intentionally destroy the tape, lead us to conclude that the court's finding of 'bad faith' was premised on the 'knew or should have known' standard suggested by *Lewy*, but rejected by *Stevenson*."

Ninth Circuit

Glover v. The BIC Corp., 6 F.3d. 1318, 1329-1330 (9th Cir. 1992).

Factual Context: "BIC also asks us to reverse on the ground that the district court committed error in the handling of Dr. Geremia's testimony. Specifically BIC makes two claims: (1) the alleged spoliation of the lighter by Dr. Geremia and Glover's counsel caused such irreparable prejudice to BIC such that exclusion of the evidence emanating from Dr. Geremia's examination of the lighter was required, and (2) in the alternative, the court erred in including a 'bad faith' requirement in its jury instruction on spoliation of evidence. Although we have already determined on other grounds that a

new trial is necessary, we offer this guidance to the trial court on this issue in the light of *Unigard v. Lakewood,* 982 F.2d 363 (9th Cir. 1992), a case decided after the trial."

Conduct Standard: "Short of excluding the disputed evidence, a trial court also has the broad discretionary power to permit a jury to draw an adverse inference from the destruction or spoliation against the party or witness responsible for that behavior. *Akiona v. United States,* 938 F.2d 158 (9th Cir. 1991). As *Unigard* correctly notes, however, a finding of 'bad faith' is not a prerequisite to this corrective procedure. 982 F.2d at 368-70 & n.2. Surely a finding of bad faith will suffice, but so will simple notice of 'potential relevance to the litigation.' *Akiona*, 938 F.2d at 161."

"In reviewing the spoliation instruction given to the jury in this case (No. 21), we note that it is at best ambiguous on this issue. As written, it might cause a jury to believe that bad faith must be found before a presumption could arise that the condition of the lighter was unfavorable to the party responsible for the spoliation. On remand, we are confident that the trial court with the assistance of the parties will be able to rewrite this instruction to make it clear that bad faith is only one avenue to the presumption, but not the only one."

Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001).

Factual Context: "Deckers appeals the district court's decision to exclude the testimony of Deckers' only damages expert, Dan Vuckovich ('Vuckovich'). Although Deckers disclosed Vuckovich's identity to plaintiffs on August 1, 1997, it failed to provide his expert report for two and a half years. It justified this shortcoming by noting that he would be used only as a rebuttal witness, and that an expert report would be disclosed if Deckers decided to have him testify. In contrast, plaintiffs timely produced and then supplemented the expert report of their damages expert, an economist named Paul Polzin ('Polzin'). Finally, on February 1, 1999, almost two years after the close of discovery, more than one year after Polzin's report was last supplemented, and just 28 days prior to trial, defendants disclosed Vuckovich's report, which was a rebuttal to Polzin's report. Plaintiffs filed a motion in limine pursuant to Rule 37 of the Federal Rules of Civil Procedure asking the district court to exclude Vuckovich from testifying as a sanction for defendants' failure to comply with the discovery deadlines; the district court granted the motion."

Conduct Standard: "By excluding Vuckovich, the district court made it much more difficult, perhaps almost impossible, for Deckers to rebut Polzin's damages calculations. Nevertheless, this case is distinguishable from cases in which we have required a district court to identify 'willfulness, fault, or bad faith' before dismissing a cause of action outright as a discovery sanction. (Citations omitted.) These cases do not apply because this sanction, although onerous, was less than a dismissal."

Tenth Circuit

Turnbull v. Wilcken, 893 F.2d 256, 259 (10th Cir. 1990).

Factual Context: The district court issued a sanction awarding the total amount of opposing counsel's fees for discovery violations. The district court relied on Rules 16(f) and 37(b)(2). There was no finding of bad faith. The court of appeals vacated the sanction because the amounts awarded did not bear a relationship to the violations.

Conduct Standard: "Under some circumstances, courts have inherent power to impose sanctions against those who litigate in bad faith. However, the district court in this case did not make a finding of bad faith or otherwise rely on an inherent power."

"The question now is whether the imposition of sanctions under both Rules 16(f) and/or 37(b)(2) was correct. These rules authorize sanctions, including the award of attorney's fees and reasonable expenses against offending counsel and parties for failure to participate properly at pretrial conferences and during discovery, respectively."

"The award of fees and expenses for noncompliance with the rules is discretionary, and the amount and impact of a monetary sanction should depend on the seriousness of the violation and where the fault lies, *i.e.*, with counsel or client. However, in the absence of a finding of bad faith, there must be a sufficient nexus between noncompliance with the rules and the amount of fees and expenses awarded as a sanction. The rules, by their terms, limit assessments thereunder for the fees and expenses of the adverse party resulting from noncompliance."

Aramburu v. The Boeing Company, 112 F.3d 1398 (10th Cir. 1997).

Factual Context: This was an employment discrimination action. Plaintiff was discharged ostensibly for excessive absenteeism. The district court found for defendant. An employee had lost some of plaintiff's attendance records. Plaintiff claimed he was entitled to a favorable inference under the "spoliation doctrine," as a result. The court of appeal affirmed the judgment on the merits and rejected the spoliation claim.

Conduct Standard: "Although the parties have not directed us to precedent from this circuit on the evidentiary doctrine of spoilation and we cannot locate any such precedent, the general rule is that bad faith destruction of a document relevant to proof of an issue at trial gives rise to an inference that production of the document would have been unfavorable to the party responsible for its destruction. *See Coates v. Johnson & Johnson*, 756 F.2d 524, 551 (7th Cir. 1985); *see generally Telectron, Inc. v. Overhead Door Corp.*,116 F.R.D. 107 (S.D. Fla. 1987). The adverse inference must be predicated on the bad faith of the party destroying the records. *See Vick v. Texas Employment Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975); *see also Anderson v. Cryovac, Inc.*, 862 F.2d 910, 926 (1st Cir. 1988). Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case. *Vick*, 514 F.2d at 737."

Eleventh Circuit

Vick v. Texas Employment Comm'n, 514 F.2d 734, 737 (5th Cir. 1975).

See discussion above for the Fifth Circuit. Fifth Circuit cases decided prior to September 30, 1981, are binding in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

BankAtlantic v. Blythe Eastman Paine Webber, Inc., 12 F.3d 1045, 1049 (11th Cir. 1994).

Factual Context: Pursuant to Rule 37, the district court imposed monetary sanctions against Paine Webber and its counsel (Ruden Barnett) for failure to comply with the court's July 25, 1988 discovery order. The failure involved production of documents from other litigation in which Paine Webber was

involved. Paine Webber prevailed in the action and was awarded taxable costs of $176,660.80. Bank Atlantic was awarded its fees of $350,078.80 under the sanction order which required Paine Webber and its counsel to "bear equally the reasonable costs of [BankAtlantic's] time and preparation in filing the motion to strike and in preparing for the new trial date, including the cost of expedited discovery." The court of appeals affirmed the sanction award.

Conduct Standard: "Ruden Barnett argues that rule 37 sanctions are permissible only upon a showing of willfulness, bad faith, or fault in failure to comply with discovery. Ruden Barnett relies upon precedent reviewing a district court's default judgment or dismissal of the complaint as the sanction for noncompliance. Our caselaw is clear that only in a case where the court imposes the most severe sanction--default or dismissal--is a finding of willfulness or bad faith failure to comply necessary. 'Violation of a discovery order caused by simple negligence, misunderstanding, or inability to comply will not justify a Rule 37 default judgment or dismissal.' A court may impose lesser sanctions without a showing of willfulness or bad faith on the part of the disobedient party."

Bashir v. Amtrak, 199 F.3d 929, 930-31, 932 (11th Cir. 1997).

Factual Context: Whether a train was proceeding at excessive speed was the central issue in this wrongful death action. The district court looked to the testimony of the train's engineer, the assistant engineer, and the conductor, who testified that the train was traveling at a speed of 70 mph at the time it struck decedent. The district court found that appellant had failed to offer evidence of the train's speed. The district court rejected appellant's argument that an issue of fact existed on the excessive speed claim because appellees had failed to preserve the portion of the speed recorder tape which documented the trip from Tampa, Florida, to Jacksonville, Florida, and would have recorded the train's speed at the time it struck appellant's son. "According to appellant, the speed recorder tape was the most reliable indicator of the train's speed, and the absence of the speed recorder tape raised a question of fact as to the actual speed of the train at the moment of impact. In other words, appellant urged an adverse inference from the loss of the tape."

Conduct Standard: "In this circuit, an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith. *Vick v. Texas Employment Comm'n,* 514 F.2d 734, 737 (5th Cir. 1975). 'Mere negligence' in losing or destroying the records is not enough for an adverse inference, as 'it does not sustain an inference of consciousness of a weak case.' *Id.* (quoting McCormick, Evidence §273 at 660-61 (1972), 31A C.J.S. Evidence §156(2) (1964)); *see also Aramburu v. The Boeing Co.* 112 F.3d 1398, 1407 (10th Cir. 1997). Thus, under the 'adverse inference rule,' we will not infer that the missing speed tape contained evidence unfavorable to appellees unless the circumstances surrounding the tape's absence indicate bad faith, e.g., that appellees tampered with the evidence. We agree with the district court that there was no probative evidence in this case to indicate appellees purposely lost or destroyed the relevant portion of the speed tape. And, under the particular circumstances of the instant case, we readily conclude that the district court did not err in declining to draw an adverse inference from the loss of the tape."

D.C. Circuit

Wyler v. Koean Air Lines Co., 928 F.2d 1167, 1174 (D.C. Cir. 1991).

Factual Context: This case involved a Korean Airlines jet (flight KE007) that strayed into Soviet airspace and was shot down and an effort to recover damages from the United States as a result of the conduct of air-traffic controllers. Certain air-traffic controller radar tapes from the evening of the disaster were reused as a matter of routine. The government emphasized the lack of any facts to indicate that Air Force trackers were aware of the flight deviation and pointed to statements by the trackers on duty that night saying they did not observe any traffic flying into what was called "the Buffer Zone." The district court declined to draw any adverse inference against the government from its inability to submit the radar tapes.

Conduct Standard: "Appellants argue that an adverse inference [on the issue of the awareness that the plane had strayed off course] against the government is appropriate because it 'destroyed' the radar tapes of that night. *See, e.g., Friends for All Children v. Lockheed Aircraft Corp.*, 587 F. Supp. 180, 189 (D.D.C. 1984) (suggesting that Air Force destruction of crash photos would create adverse inference against the government if it were a party), *modified*, 593 F.Supp. 388 (D.D.C. 1984), *aff'd*, 746 F.2d 816 (D.C. Cir. 1984). The cases cited by appellants all involved the withholding or destruction of evidence after a discovery order was entered, while here the government insists that the recycling of radar tapes was routine. Appellants contend that the government should have known not to recycle these tapes in light of the disaster. Mere innuendo, however, does not justify drawing the adverse inference requested, and there is absolutely no other evidence supporting appellants' claim that the Air Force radar trackers must have seen KE007 in the Buffer Zone. Therefore, even if they owed KE007 a duty to monitor and warn, we agree that no duty was breached by the Air Force in this case."

Valentino v. United States Postal Serv., 674 F.2d 56, 73, n.31 (D.C. Cir. 1982).

Factual Context: This was a gender-based class action brought by Valentino. She lost in the district court. On appeal, she argued that the district court should have applied the "spoliation doctrine" against the Postal Service because it had destroyed 166 applicant files (called "EVS" files) prior to the certification of the class.

Conduct Standard: "From January 1976 to October 1979, 831 vacancy announcements resulted in promotions to jobs at level 17 or higher. 579 of the files in question were complete, 86 were incomplete, and 166 had been destroyed pursuant to routine USPS record destruction procedures. Valentino contends the 'spoliation' doctrine should have been invoked against USPS for its destruction of relevant EVS files. *See Boyd v. Ozark Air Lines, Inc.*, 568 F.2d 50, 53 (8th Cir. 1977); *Vick v. Texas Employment Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975); *United States v. Roelof Constr. Co.*, 418 F.2d 1328, 1331 (9th Cir. 1969). However, the circumstances of the destruction here provide no basis for attributing bad faith to USPS. *See Vick*, 514 F.2d at 737. Until the June 13, 1978, certification of a class the district court considered appropriate and manageable, USPS had no clear indication of its obligation regarding record preservation. (Valentino's initial delineation of the class to encompass all past, present, and future female USPS employees and applicants for employment addressed a work force of over 650,000.) Upon certification of the class, USPS immediately acted to preserve records relating to the class claim. We find no reason to disagree with the district court's disposition of this issue."

Federal Circuit

Tennant Co. v. Hako Minuteman, Inc., 878 F.2d 1413, 1416 (Fed. Cir. 1989).

The Federal Circuit applies the regional circuit's law: "On a procedural issue, this court applies the law of the regional circuit to which district court appeals normally lie, unless the issue pertains to or is unique to patent law. Here we apply the law of the Seventh Circuit because a Rule 37(b) discovery sanction does not involve such issues."

CONCLUSION

Persons who anticipate litigation have discovery-preservation obligations. As the cases above reflect, whether a person is found to have anticipated litigation is a question of fact that is sometimes easily answered and sometimes not so easily answered. The level of conduct will affect the outcome of a sanctions motion involving a prelitigation destruction of physical evidence or documents. The fault required may vary from jurisdiction to jurisdiction to support outcome determinative sanctions like an adverse inference instruction. But, depending upon the jurisdiction, the level of conduct may be less important to the outcome of the case if the thing or record destroyed is critical to the ability of a party to prove or defend a case. Particularly in a digital world, where records are automatically recycled, consistent with the not-so-easy-to-follow standards set forth above, potential litigants must be alert to the signs of potential litigation and, when appropriate notice exists, must take reasonable steps to preserve "relevant" records, especially with respect to "key players." There is no substitute for foresight that, one hopes, will ultimately be judged as reasonable in hindsight. Hence, parties that do not heed the title to this paper--"Look Out!"—will find themselves on the wrong end of a motion for sanctions due to a prelitigation destruction of evidence.

ABOUT THE AUTHOR

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Mr. Barkett is a partner at the law firm of Shook, Hardy & Bacon L.L.P. in its Miami office. He is a graduate of the University of Notre Dame (B.A. Government, 1972, *summa cum laude)* and the Yale Law School (J.D. 1975) and served as a former law clerk to the Honorable David W. Dyer on the old Fifth Circuit Court of Appeals. Mr. Barkett has, over the years, been a commercial litigator (contract and corporate disputes, employment, trademark, and antitrust), environmental litigator (CERCLA, RCRA, and toxic tort), and, for the past several years, a peacemaker and problem solver, serving as an arbitrator, mediator, facilitator, or allocator in a variety of environmental or commercial contexts. He has served or is serving as a neutral in over forty matters involving in the aggregate more than $350 million. In November 2003, he was appointed by the presiding judge to serve as the Special Master to oversee the implementation and enforcement of the 1992 Consent Decree between the United States and the State of Florida relating to the restoration of the Florida Everglades. He also consults with major corporations on the evaluation of legal strategy and risk, and conducts independent investigations where such services are needed.

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