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.