

SPOLIATION AND THE DUTY TO PRESERVE ELECTRONIC EVIDENCE[®]

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The rapidly changing nature of communication and information technology poses challenges to businesses to meet their potential obligation to preserve and manage electronic evidence in the event of future litigation or investigation. These information management and discovery issues implicate the law of spoliation, and recent cases suggest that even if a document retention policy is developed and maintained, risks with respect to spoliation sanctions exist. The proposed amendments to the Federal Rules of Civil Procedure concerning electronic discovery add a further layer of complexity to information management. The discussion that follows primarily focuses on the law governing spoliation of evidence in the Eighth Circuit and Minnesota but also includes two recent decisions involving the same document retention policy and the same party but two very different results.¹

I. SPOLIATION GENERALLY

Spoliation is the destruction, significant alteration, or non-preservation of evidence relevant to pending or reasonably foreseeable litigation.² Universally recognized as impermissible, spoliation of evidence may occur when litigants or potential litigants are

¹ See *Rambus* discussion *infra* at 8 -10.

² See, e.g., *Stevenson v. Union Pacific Railroad*, 354 F.3d 739, 748 (8th Cir. 2004); *Dillon v. Nissan Motor Co. Ltd.*, 986 F.2d 263, 267 (8th Cir. 1993); *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104, 1112 (8th Cir. 1988); see also *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216, 92 Fair Empl. Prac. Cas. (BNA) 1539 (S.D.N.Y. 2003).

charged with the duty “to preserve property for another’s use as evidence in pending or future litigation.”³ Evidence destruction “undermines two important goals of the judicial system – truth and fairness.”⁴ Although courts may impose sanctions on spoliating parties, before any such sanctions are imposed courts must determine initially whether a duty to preserve evidence exists.⁵ If such a duty exists, then courts will examine the nature of the evidence lost or destroyed and whether the evidence was destroyed intentionally or negligently; these issues ultimately bear on the nature of any court-imposed sanction or remedy.⁶

The duty to preserve evidence arises from at least three different sources.⁷ First, the duty may arise by statute or regulation, or by ethical duties of a profession. Second, a duty may also arise if a party voluntarily assumes such duty. Lastly, a duty may arise when litigation is filed, is imminent or is common or frequent in a particular industry.⁸ Courts decide the question of whether a party has a duty to preserve evidence on a case-by-case basis,⁹ and generally refuse to find a duty to preserve evidence where the litigation possibility is too remote or speculative.¹⁰

The extent of the duty to preserve evidence varies depending upon whether a party is a litigant or non-litigant. The duty to preserve attaches to litigants when they are served with

³ *Fed Mut. Ins. Co. v. Litchfield Precision Components Inc.*, 456 N.W.2d 434, 436 (Minn. 1990); see also Black’s Law Dictionary 1132 (7th ed. 2000).

⁴ Lawrence B. Solum & Stephen J. Marzen, *Truth & Uncertainty: Legal Control of the Destruction of Evidence*, 36 **EMORY L.J.** 1085, 1138 (1987).

⁵ Lauri Kindel & Kai Richter, *Spoilation of Evidence: Will the New Millennium See a Further Expansion of Sanctions for the Improper Destruction of Evidence?*, 27 **WM. MITCHELL L. REV.** 687, 689 (2000).

⁶ See *infra* at 8 -15.

⁷ Note, *Linking the Culpability and Circumstantial Evidence Requirements for the Spoliation Inference*, 51 **DUKE L.J.** 1803, 1807-08 (2002).

⁸ Note, 51 **DUKE L.J.** at 1808 n. 35, 36, 37.

⁹ Jeffrey S. Kinsler & Anne R. Keyes MacIver, *Demystifying Spoliation of Evidence*, 34 **TORT & INS. L.J.** 761, 763-64 (1999).

¹⁰ *Id.* at 764.

either an administrative or judicial complaint.¹¹ In at least one instance, the Eighth Circuit has held that the duty to preserve evidence even extends to evidence third parties control.¹²

Non-litigants are required to preserve evidence whenever litigation is “reasonably foreseeable,” yet not formerly commenced.¹³ In this context, a party’s duty to preserve evidence can arise in numerous situations, including when a party is on notice of a potential action because it has a history of lawsuits in a particular matter, or when a party has received pre-litigation correspondence.¹⁴ The Eighth Circuit has attempted to further delineate the boundaries of this “reasonable foreseeable” test, in the products liability context, by suggesting that frequent discovery requests for a particular type of document in litigation over the same product may establish “reasonable forcibility” and relevance of other documents of that same type in future litigation.¹⁵ As the *Rambus* cases discussed *infra* demonstrate, however, the obligation to preserve electronic evidence varies not only on a case-by-case basis but also on a court-by-court basis.

When the duty to preserve evidence attaches, the chief responsibility of the party who has the duty is to act reasonably. Obviously, parties are not obligated to keep or retain every document in their possession. Nevertheless when such a duty attaches, parties under the *Zubulake* line of decisions, become responsible for preserving evidence that they know, or

¹¹ *Id.* at 763.

¹² See *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 43 F.3d 277 (8th Cir. 1995) (despite the fact that plaintiff no longer owned car, the fact that she obtained evidence from the car meant she could have obtained other crucial evidence). Whether this same reasoning applies to, for example, third party administrators of an ERISA plan when the trustee is a party to litigation remains to be seen. Nevertheless given the Eighth Circuit’s reasoning in *Sylla*, it is reasonable to conclude that a trustee presumably controls a third party administrator and therefore would have a duty to ensure that evidence should be preserved.

¹³ *Kinsler & MacIver*, *supra* note 9, at 763.

¹⁴ *Id.*; *Computer Associates Intern., v. American Fundware, Inc.*, 133 F.R.D. 166, 169 (D. Colo. 1990).

¹⁵ *Lewy v. Remington Arms Co., Ins.*, 836 F.2d 1104, 1112 (8th Cir. 1998). See also, *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001).

reasonably should know, may be relevant in an action, may be reasonably calculated to lead to the discovery of admissible evidence, may be reasonably likely to be requested during discovery, or is the subject of a pending discovery request.¹⁶

To determine what documents need to be retained, federal court practitioners should first review the individuals named—or who will be named—in the disclosures made under Federal Rule of Civil Procedure 26(a)(1)(a).¹⁷ If a person is identified or will be identified in those disclosures, documents made for or by that person must be saved.¹⁸ When the individuals whose documents should be retained are identified, these individuals “must retain all relevant documents in existence at the time the duty to preserve attaches, and any relevant documents created thereafter.”¹⁹ Outside these beginnings steps, there really is no magic way for a party to fulfill its preservation obligation. Other practical suggestions have, however, been offered by Judge Schendlin in her landmark *Zubulake* decision regarding the preservation of electronic evidence:

Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in a 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.²⁰

II. IMPACT OF PROPOSED AMENDMENTS

The proposed amendments to the Federal Rules of Civil Procedure, if adopted, will further clarify a parties’ obligation to preserve evidence and will also encourage parties to

¹⁶ *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217-218 (S.D.N.Y. 2003). See *infra* note 21.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218-19 (S.D.N.Y. 2003).

agree upon and anticipate any spoliation issues that concern electronic evidence early in the litigation process.

On April 12, 2006, the Supreme Court approved changes to the Federal Rules of Civil Procedure, most notably the rules relating to electronic discovery. The amended Rules now go to Congress and will take effect December 1, 2006 unless Congress takes action to the contrary. With regard to electronic discovery the basic changes to Rules 16, 26, 33, 34, and 45 are as follows:

- Ø **Rule 16** – The amended Rule allows the Court to include provisions in a scheduling order concerning disclosure and discovery of electronically stored information.
- Ø **Rule 26** – The amended Rule states that a party need not provide discovery of electronically stored information that such party identifies as “not reasonably accessible.” The Advisory Committee notes that determining whether information is “reasonably accessible” may be impacted by “whether the party itself routinely accesses or uses the information.” The Advisory Committee further notes that, in identifying information not “reasonably accessible,” the “goal is to inform the requesting party” of the “nature of the information” and the “basis for the responding party’s contention that it is not reasonably accessible.” For information not “reasonably accessible,” the proposed amended Rule also provides that the requesting party may bring a motion seeking to obtain the information identified as “not reasonably accessible,” with the burden on the responding party to show that the information is not reasonably accessible. Finally, the proposed amended Rule requires the parties to discuss at their Rule 26(f) meeting any issues concerning “preserving discoverable information” and to include in their Rule 26(f) Report proposals concerning discovery of electronically stored information.
- Ø **Rule 33** – The amended Rule includes “electronically stored information” concerning a party’s option to produce business records.
- Ø **Rule 34** – The amended Rule covers the production of “electronically stored information” and generally provides that the information must be produced “in a form in which it is ordinarily maintained, or in an electronically searchable form.”
- Ø **Rule 37** – The amended Rule creates a “safe harbor” from sanctions for a party’s failure to produce electronically stored information if (1) “the party took

reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action;” and (2) “the failure resulted from the loss of the information because of the routine operation of the party’s electronic information system.”

- Ø **Rule 45** – The amended Rule specifically provides that a subpoena may seek electronically stored information.

While there are specific changes relating to electronic discovery, these to amendments to the Rules are not revolutionary. The Advisory Committee Notes state that the application of these Rules will be developed through case law like *Zubulake*.²¹ A number of jurisdictions have adopted their own local rules in anticipation of these changes relative to electronic discovery. For example, Delaware has adopted a default standard for electronic discovery. Under the local version of local Rule 26, in Delaware parties are required to exchange very specific information about electronic discovery issues and even are required to designate an individual to serve as that party’s “e-discovery liaison.”²² New Jersey also has specific provisions relating to “computer-based information.”²³

III. LIMITING THE DUTY TO PRESERVE EVIDENCE: DOCUMENT RETENTION POLICIES

The topic garnering the most interest and discussion within the general topic of electronic evidence and spoliation is document retention and destruction policies (“document retention policies”). Though it is true that companies are free to develop their own document

²¹ See *Zubulake v. UBS Warburg, LLC*, 230 F.R.D. 290 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004); *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg, LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003). See also *Wiginton v. CB Richard Ellis, Inc.* 2004 WL 1895122 (N.D. Ill. 2004)(post-*Zubulake* decision).

²² A compendium of information about federal e-discovery issues can be found at <http://www.fjc.gov/>. Referencing the section relating to electronic discovery will reveal some of the developments like that referenced above in Delaware.

²³ See *id.*

retention policies—provided those policies are consistent with federal, state, and local law²⁴—litigation often forces companies to suspend normal document practices and procedures and to retain documents ordinarily not retained. Companies that neglect to establish any document retention policy must do so when litigation takes hold, or likely suffer disastrous consequences.²⁵

Obviously, well-drafted document retention policies—policies’ whose main goal is to preserve all relevant documents and destroy only those documents that interfere with a company’s legitimate business purpose—help protect companies by reducing the risk of a court finding that documents were discarded or destroyed in bad faith.²⁶ By contrast, when document retention policies are drafted for improper purposes or are blindly or haphazardly administered, they have little value and may actually lure their sponsors into a false sense of security.²⁷ The legal reasoning and principles that apply to documents, physical evidence, and adherence to document retention policies apply with the same force to electronically generated, transmitted, or stored information.²⁸

Lewy v. Remington Arms Co. provides practical guidance on how document retention policies should be drafted to avoid spoliation sanctions.²⁹ In that case, the plaintiff brought a

²⁴ Carrol, *Developments in the Law of Electronic Discovery*, 27 **AM. J. TRIAL ADVOC.** 357, 367 (2003).

²⁵ *Id.* In fact, in one of the *Rambus* decisions there was evidence that one of the company’s outside patent lawyers had been involved in another case where his client suffered the imposition of spoliation sanctions because of the absence of a formal document retention policy. See *Hynix Semiconductor, Inc. v. Rambus, Inc.* Case No. C-00-20905 RMW (Findings of Fact and Conclusions of Law on Unclean Hands Defense) (hereinafter *Hynix FF & CL*) at ¶¶ 38-41, pages 8-9.

²⁶ Jay E. Grenig and Jeffery S. Kinsler, *Handbk. Fed. Disc. & Disclosure* § 16.20 (2d ed.).

²⁷ Kindel & Richter, *supra* note 5, at 690.

²⁸ See, e.g., *Morris v. Union Pacific Railroad*, 373 F.3d 896 (8th Cir. 2004) (destruction of audiotape); *Stevenson v. Union Pacific Railroad*, 354 F.3d 739 (8th Cir. 2004) (same); *E*Trade Securities v. Deutsche Bank, AG*, 2005 WL 2140807 (audio recordings of employee phone calls); *Lexis-Nexis v. Beer*, 41 F.Supp.2d 950 (D.Minn. 1999) (electronic database).

²⁹ 836 F.2d 1104 (8th Cir. 1988).

product liability action against the defendant gun manufacturer, claiming that he suffered injuries when one of the manufacturer's guns fired while the safety was on.³⁰ In the discovery process, the plaintiff was unable to obtain several documents that were destroyed in accordance with the manufacturer's document retention policy.³¹ Under the defendant's document retention policy, all product complaints and gun examination reports had to be destroyed after three years, absent any action concerning a particular record.³²

Notwithstanding the policy, the trial court instructed the jury that it could infer that the missing evidence was unfavorable to the manufacturer.³³ On appeal, while the court of appeals refused to determine the appropriateness of the adverse inference instruction because of the limited record, warned that document retention policies would not shield litigants from liability if they were drafted for an improper purpose or were blindly administered.³⁴

The Eighth Circuit directed lower courts to assess these factors in making this determination: (1) whether the record retention policy was reasonable considering the facts and circumstances surrounding the documents; (2) whether lawsuits or complaints were filed frequently concerning the type of records at issue; and (3) whether the document retention policy was instituted in bad faith.³⁵ In the court's view each of these inquiries was fact and case specific. For example, regarding the first factor, the court of appeals instructed lower courts to determine whether a three-year retention period was "reasonable given the particular

³⁰ *Id.* at 1105.

³¹ *Id.* at 1111.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 1112.

³⁵ *Id.*

document.”³⁶ A three year retention period may be sufficient for documents such as appointment books or telephone messages, but inadequate for documents such as customer complaints.”³⁷

Following *Lewy*’s directives, lower courts have imposed sanctions on parties that have destroyed documents, even under reasonable document retention policies, when the documents were destroyed in circumstances that suggest bad faith.³⁸ Thus, even when a document retention policy is reasonable, if documents or evidence are destroyed when litigation or investigation is imminent, or likely given a company’s past experience, then adherence to the policy may still give rise to a spoliation issue.³⁹

Recently, two cases from opposite sides of the country, but involving the same party and same retention policy illustrate that what is “reasonable” maybe in the eyes of the beholder or, more accurately the federal trial judge who is the arbiter of what is reasonable.⁴⁰ The basic facts relating to the intertwining of a document retention policy and a litigation strategy present in the *Rambus* can be summarized as follows:

1. Rambus formulated and instituted a document retention policy in early 1998 with the help of an outside law firm;
2. Rambus company executives gave slide presentations to employees to inform them of their duties under the system;
3. The document retention policy was initiated with an event called “Shred Day” that resulted in the

³⁶ *Id.*

³⁷ *Id.*

³⁸ See, e.g., *Stevenson v. Union Pacific Railroad Company*, 354 F.3d 739 (8th Cir. 2004).

³⁹ See *Lewy*, 836 F. 2d at 1112. Accord, *Stevenson*, 354 F.3d at 743.

⁴⁰ Compare *Hynix Semiconductor, Inc. v. Rambus*, C-00-20905/RMW (Findings of Fact and Conclusions of Law on Unclean Hands Defense) (N.D. Calif. January 4, 2006) with *Rambus, Inc. v. Infineon Techs A.G.* 222 F.R.D. 280 (E.D. Va. 2004).

- destruction of approximately 2 million pages or 20,000 pounds of documents;
4. The document retention program was initiated, partly, to eliminate documents that could be harmful to it in litigation although specific types of documents were not targeted in the program;
 5. At or about the same time, Rambus developed a patent litigation strategy and evidence suggested that the patent litigation strategy was linked with the document retention program.⁴¹

Rambus' licensing and litigation strategy came under scrutiny in two cases.⁴² In one case Rambus was the defendant in a declaratory judgment action brought by Hynix Semiconductor. In the other case, Rambus initiated an infringement claim against Infineon. In both cases, issues relating to the alleged intimate relationship between the litigation strategy and the document retention program that allegedly led to the destruction of evidence were raised. In the Eastern District of Virginia litigation, Rambus' actions were determined to constitute spoliation. This determination led to a decision that allegedly privileged documents must be produced and that they were not protected as privileged because of the "crime/fraud exception."⁴³ Judge Payne wrote:

In sum, the record to date shows that, from early 1998 through 200, Rambus had in effect a document retention program that was conceived and implemented as an integral part of its licensing and litigation strategy. That strategy, included the document retention program portion thereof, was devised and implemented with the aid of lawyers, both in-house and outside. The company's plan was to destroy discoverable documents as part of its litigation strategy and the allegedly privileged documents evince that plan.⁴⁴

⁴¹ See *Rambus v. Infineon Technologies AG*, 220 F.R.D. 264, 284-87.

⁴² The Eastern District of Virginia litigation led to a number of published opinions concerning litigation tactics and spoliation although the decision most pertinent to this discussion is found at 222 F.R.D. 280 (E.D. 2004). The California decision is *Hynix FF & CL*.

⁴³ 222 F.R.D. at 296-99.

⁴⁴ *Id.* at 298.

In sharp contrast in the Northern District of California, Judge Whyte dismissed Hynix's unclean hands defense that was premised on Rambus' document destruction and alleged spoliation of evidence.⁴⁵ Specifically, Judge Whyte wrote that :

[T]he evidence presented does not bear out Hynix's allegations that Rambus adopted its Document retention Policy in bad faith. The evidence also does not demonstrate that Rambus targeted any specific document or category of relevant documents with the intent to prevent production in a lawsuit such as the one initiated by Hynix. The evidence here does not show that Rambus destroyed specific, material documents prejudicial to Hynix's ability to defend against Rambus' patent claims. Therefore, Hynix's unclean hands defense fails.⁴⁶

These sharply conflicting decisions about the same document retention plan cannot be dismissed as a consequence of the different litigation posture of the allegedly spoliating party, Rambus. Nor can the results be reconciled because one concerned the discoverability of allegedly privileged material and the other involved a substantive defense. Rather, the crucial distinction seems to be the trial court's conclusions about the motivations for the document retention program and its relationship to the licensing and litigation strategy. In *Hynix* Judge Whyte was not convinced that Rambus' motive in implementing the program was to destroy evidence in contrast to Judge Payne's conclusions in the *Infineon* decision. These differing conclusions as to motive are of significance as the next section notes, because an alleged

⁴⁵ FF & CL, at 41.

⁴⁶ FF & CL at 41.

spoliator's state of mind is a critical factor that a court will use in determining what, if any, sanctions are appropriate.⁴⁷

IV. CONSEQUENCES OF SPOILIATING EVIDENCE

The above discussion of the *Rambus* litigation and other recent opinions suggest that courts have been aggressive in punishing parties that spoliating evidence.⁴⁸ The penalties imposed include sanctions in pending civil cases, independent legal liability, and criminal charges. Listed below is a brief description of each of these penalties.

A. SANCTIONS IN A PENDING LAWSUIT

Courts have broad discretion in imposing sanctions for evidence spoliation. Because spoliation violates the spirit of discovery, courts are able to impose wide range of sanctions under the Federal Rules of Civil Procedure or state court rules including: dismissal of a lawsuit, entry of default judgment, exclusion of evidence and testimony, and assessment of monetary penalties. Though some courts use Fed. R. Civ. P. 37 ("Rule 37") as the vehicle to impose sanctions, courts are not limited by Rule 37 and may exercise their inherent authority to impose sanctions as well.⁴⁹ Indeed, most courts are forced to use their inherent power (rather than Rule 37) to impose sanctions, because by its express terms, Rule 37 only allows

⁴⁷ Over and above the court's conclusion that the destruction of documents was intertwined with the patent litigation strategy, the record in *Infineon* showed that the missing documents were relevant to the case. See *Rambus, Inc. v. Infineon Tech. AG*, 155 F.Supp.2d 668, 683 (E.D. Va. 2001). As is discussed *infra* at 11-12, both motive and relevance play a crucial role in any sanctions decision.

⁴⁸ Scott S. Katz & Anne Marie Muscaro, *Spoilage of Evidence-Crimes, Sanctions, Inferences and Torts*, XXIX TORT & INS. L. J. 50 (1993).

⁴⁹ See *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995) (stating that Minnesota courts may exercise their "inherent power" in spoliation cases). In diversity jurisdiction cases, federal courts apply the federal law of spoliation under the *Erie* doctrine. *Silvestri v. General Motors Corporation*, 271 F.Supp. 2d 583, 590 (D. Md. Accord, *Regent Insurance Co. v. Candle Corp. of America*, 2004 WL 2713251, *3 n. 5 (D.Minn.); *Fabrko v. Mayo Clinic Rochester*, 2004 WL 909740, *2 (D.Minn.). In Minnesota, there is no material difference between the federal law governing spoliation and state law. See *Regent*, 2004 WL 2713251, *3 n.5.

courts to impose sanctions if a party violated “an order to provide or permit discovery” occurs,⁵⁰ or if a “party . . . fails to disclose.”⁵¹

The general procedure for courts deciding if a company (or an individual) should be sanctioned, and if so what type of sanction, is to balance the competing interests of the parties.⁵² Courts in this jurisdiction regularly consider the alleged spoliator’s state of mind and any resulting prejudice to the complaining party from the absence of evidence in performing this balancing approach.⁵³ When the missing evidence is critical and the resulting prejudice to the complaining party is high, the state of mind factor weighs more heavily in the complaining party’s favor.⁵⁴ Conversely, if the complaining party’s case is not impaired,⁵⁵ tort liability will not attach and sanctions are unlikely, especially if there is no evidence of bad faith.⁵⁶ After determining that a sanction should be imposed, a court’s primary objective is to then determine the appropriate sanction—in other words, to try and “level the playing field.”⁵⁷ Trial court decisions to impose sanctions will not be reversed

⁵⁰ Fed. R. Civ. P. 37(b)(2).

⁵¹ Fed. R. Civ. P. 37(c)(1).

⁵² Jay E. Grenig & William C. Gleisner, III with general consultants Troy Larson & John L. Carroll, *eDiscovery & Digital Evidence* § 11.08 (2005).

⁵³ See e.g., *Menz v. New Holland North America, Inc.*, 440 F.3d 1002, 1006 (8th Cir. 2006) (court held that intent or “bad faith” must be shown before the sanctions of dismissal or adverse inference instruction could be imposed); *Dillion v. Nissan Motor Co., Ltd.*, 986 F.2d 263, 267 (8th Cir. 1992)(“Before a sanction may be imposed there must also be a finding that the destruction prejudiced the opposing party”).

⁵⁴ In *Koons v. Aventis Pharmaceuticals, Inc.* 367 F.3d 768, 780, (8th Cir. 2004) the absence of an intention to lose or destroy information was critical to the trial court and no adverse inference was drawn.

⁵⁵ Grenig, *eDiscovery & Digital Evidence* § 11.08, (2005). Obviously a party’s status as plaintiff or defendant will affect the nature of the sanction; put differently, how the evidence relates to the burden of proof in a particular case and the identity of the spoliator clearly will influence a court’s sanctions decision.

⁵⁶ See *Dillion*, 986 F.2d at 267.

⁵⁷ *Fischer v. Rheem Manufacturing Co.*, 2004 WL 1088328, at * 2 (D. Minn. 2004).

unless the court abused its discretion, a standard that can only be met when no reasonable person would agree with the trial court's assessment of the appropriate sanction.⁵⁸

1. Dismissal And Default Judgment

Dismissals and default judgments are the severest sanctions courts can impose on parties that spoliates evidence.⁵⁹ Due to their severity, these sanctions are reserved for the most egregious spoliation offenses and cannot be imposed when a lesser but equally effective remedy is available.⁶⁰

Though rarely imposed, courts will dismiss a party's case or enter a default judgment against a party, if a party's spoliation actions were flagrant. For example, in *Computer Assoc. Int'l v. Am. Fundware*,⁶¹ the plaintiff filed an action against Fundware alleging copyright infringement and unfair competition. After the complaint was filed, Fundware destroyed the source code for the computer program in question. Finding the destruction of the source code to be intentional,⁶² the court entered a default judgment against Fundware.⁶³ In another example, *Marrocco v. General Motors Corp.*,⁶⁴ the Seventh Circuit dismissed a plaintiffs' product liability claim because the plaintiffs' experts secretly conducted "private" tests that resulted in

⁵⁸ *Id.*

⁵⁹ *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 552 (D. Minn. 1989).

⁶⁰ *Id.*

⁶¹ *Id.* at 170.

⁶² The intent of the spoliator is a crucial element that courts examine in determining whether sanctions are merited. Of course, a party can intentionally adhere to a document retention policy and not be sanctioned for spoliation, or in other instances, as discussed in *Lewy*, blind adherence to a policy cannot be relied upon to serve as a shield.

⁶³ See also *Marrocco v. Gen. Motors Corp.*, 966 F.2d 220 (7th Cir. 1992) (dismissing one claim in a consolidated appeal and entering default judgment against defendant on the other claim; destructive testing or examination of an allegedly defective axle); *Cabinetware, Inc. v. Sullivan*, 22 U.S.P.Q.2d 1686 (E.D. Cal. 1991) (default judgment; original computer source code destroyed in copyright infringement case); *Computer Assoc. Int'l v. Am. Fundware*, 133 F.R.D. 166, 170 (D. Colo. 1990) (default judgment; again, computer source code destroyed in unfair competition and copyright infringement case).

⁶⁴ *Marrocco*, 966 F.2d at 220.

damage to the allegedly defective vehicle, in direct contravention of the court's earlier protective order. The *Fundware* and *Marrocco* decisions send an stern warning to parties who are reckless enough to even consider spoliating evidence intentionally.

2. Exclusion of Evidence and Related Testimony

Rather than impose the severest sanctions of dismissal and default judgment, courts often punish spoliators by excluding at trial the evidence they spoliated and any related testimony. This sanction can be especially damaging in products liability cases where plaintiffs may be relying exclusively on one piece of expert testimony to prove their case. *Patton v. Newmar Corp.*,⁶⁵ is a paradigm of that effect. In that case, the plaintiffs sued for injuries that Mrs. Patton suffered in a fall from a motor home that the plaintiffs claimed was defectively designed. Due to plaintiffs' negligence, the motor home was lost between the time of Mrs. Patton's injury and the time of trial, which precluded defendant from examining the vehicle to assess whether certain "modifications" that plaintiffs made to the vehicle caused the fall.⁶⁶ Because of the motor home's disappearance, the trial court excluded the testimony of plaintiffs' expert who had inspected the home.⁶⁷ Without this testimony, plaintiffs could not survive defendant's summary judgment motion and the case was dismissed.⁶⁸ The Minnesota Court of Appeals reversed the trial court's decision, holding that the trial court should have imposed a less severe sanction.⁶⁹ The Supreme Court, however, reinstated the trial court's summary judgment order, ruling that the trial court's initial dismissal of the action was not a sanction but, rather, the inevitable consequence of the plaintiffs' failure (without physical

⁶⁵ 538 N.W.2d at 117.

⁶⁶ *Id.* at 117-118.

⁶⁷ *Id.* at 118.

⁶⁸ *Id.*

⁶⁹ *Id.*

evidence of the product itself) to raise genuine issues of material fact about the design-defect claim.⁷⁰

In Minnesota state courts and the Eighth Circuit, can impose this sanction without a finding “intent” or “bad faith” on the part of the accused because in this jurisdiction, the requisite mental state for this sanction is a “known or should have known” standard.⁷¹

3. Adverse Inference Instruction

The most common court-imposed sanction is an adverse inference instruction.⁷² Under this sanction, the party alleging spoliation is allowed to introduce evidence of the allegedly destroyed materials. The opposing party then has the option of rebutting this evidence.⁷³ If the opposing party, however, fails at rebuttal, the judge may instruct the jury to infer that the destroyed evidence would be unfavorable to the spoliator.⁷⁴ The justification for the adverse inference is two fold: first, if the litigant destroys the evidence, it is likely the evidence was unfavorable; second, it deters spoliation by placing the risk of an adverse judgment on the spoliator.⁷⁵

In Minnesota state courts and the Eighth Circuit, courts cannot impose adverse inference sanctions on spoliators who destroy relevant evidence before the commencement of litigation unless the spoliator destroys evidence in bad faith; that is, intentionally with the

⁷⁰ *Id.* at 120.

⁷¹ *Dillon*, 986 F.2d at 267. *But see, Koons v. Aventis Pharmaceuticals, Inc.* 367 F.3d 768. A comparison of the facts as well as the evidence destroyed in the *Morris* and *Stevenson* decisions also suggests that this issue is not developed fully in the Eighth Circuit.

⁷² *Richter*, *supra* note 2, at 696.

⁷³ *State v. Langlet*, 283 N.W.2d 330, 334 (Iowa 1974).

⁷⁴ *Id.*; *see also Vazquez-Corales v. Sea-Land Serv.*, 172 F.R.D. 10, 15 (D.P.R. 1997).

⁷⁵ *Nation-wide Check Corp. v. Forest Hills Distrib. Inc.*, 692 F.2d 214, 218 (1st Cir. 1982).

“desire of suppressing the truth.”⁷⁶ Deciding whether a spoliator has this intent is a fact-sensitive inquiry that cannot be determined in a vacuum.⁷⁷ Courts have, however, offered some guidance. In *Stevenson*,⁷⁸ the court strongly suggested that in assessing whether a spoliator had the requisite intent to warrant an adverse inference instruction, courts should favor a finding of intent when spoliators preserve beneficial relevant evidence, but destroy detrimental relevant evidence.⁷⁹ During litigation, however, courts also impose adverse inference sanctions even if the destruction was not in bad faith.⁸⁰

4. Monetary Sanctions

Courts also can impose monetary sanctions on spoliators who destroy or conceal evidence. These sanctions may reflect: (1) the fees and costs for investigating, researching, preparing, and arguing evidentiary motions and motions for sanctions; (2) the fees and costs of depositions, interrogatories, and supplemental discovery costs associated with willful concealment; and (3) the wasting of the court’s time and resources.⁸¹ In extreme cases of misconduct, some courts have actually multiplied monetary sanctions to adequately punish spoliators and deter further spoliation.⁸² Even spoliators who have unintentionally failed to preserve evidence have had substantial monetary sanctions levied against them. In *In re Prudential Co. of Am. Sales Litigation*,⁸³ the Court imposed a \$1 million sanction against

⁷⁶ *Stevenson*, 354 F.3d at 746.

⁷⁷ See *Morris v. Union Pacific Railroad*, 373 F.3d 896, 899 (“[W]e reiterate that a finding of intent is a highly contextual exercise.”) (8th Cir. 2004).

⁷⁸ *Stevenson*, 354 F.3d at 739.

⁷⁹ *Id.* at 747.

⁸⁰ *Id.* at 750.

⁸¹ *Capellupo*, 126 F.R.D. at 552-53; see also *Nat’l Ass’n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 558-59 (N.D. Cal. 1987).

⁸² *Capellupo*, 126 F.R.D. at 553 (multiplying attorney’s fees for all motions touching upon the issue of document destruction by a factor of two).

⁸³ 169 F.R.D. 598, 617 (D.N.J. 1997).

Prudential for failing to adequately preserve certain evidence under a court order, even though Prudential's conduct was unintentional.

B. INDEPENDENT CIVIL LIABILITY

Some states recognize independent tort spoliation claims with examples including: Alaska, Illinois, Indiana, Kansas, New Jersey, North Carolina and Florida, and Ohio.⁸⁴ At this time, however, neither Minnesota nor any federal court has recognized an independent tort action for spoliation.

C. CRIMINAL CHARGES

Spoliation acts may be criminal in Minnesota and under federal law. Minn. Stat. 609.63, subd. 1(7) provides that it is unlawful for anyone, “with [the] intent to injure or defraud . . . [to] destroy a writing or object to prevent [the writing] from being produced at a trial, hearing, or other proceeding authorized by law.”⁸⁵ Persons who violate this law commit a felony and, if found guilty, may be sentenced to a maximum imprisonment of three years, or be forced to pay a maximum fine of \$5,000, or both.⁸⁶ Federal law also prohibits the destruction of relevant evidence. A federal criminal statute, 18 U.S.C.A. § 1512(B)(2)(A, B), makes it a crime to “knowingly us[e] intimidation or physical force, [to] threate[n], or corruptly persuad[e] another person . . . with intent to . . . cause” that person to “withhold” documents from, or “alter” documents for use in an “official proceeding.”

⁸⁴ *Hazen v. Municipality of Anchorage*, 718 P.2d 456 (Alaska 1986); *Rodgers v. St. Mary Hosp. of Decatur*, 149 Ill. 2d 302 (Ill. 1992); *Thompson v. Owensby*, 704 N.E.2d 134 (Ind. Ct. App. 1998); *Foster v. Lawrence Memorial Hosp.*, 809 F. Supp. 831 (D. Kan. 1992); *Hirsch v. General Motors Corp.*, 266 N.J. Super. 222 (Law. Div. 1993); *Henry v. Deen*, 310 N.C. 75 (N.C. 1984); *Smith v. Howard Johnson Co., Inc.*, 615 N.E.2d 1037 (Ohio 1993).

⁸⁵ Minn. Stat. § 609.63, subd. 1(7).

⁸⁶ *Id.*

Several years ago, many commentators believed that the threat of criminal prosecution for spoliation in the civil arena was more theoretical than actual. They justified this view on the belief that prosecutors were reluctant to pursue spoliation charges because of their limited resources.⁸⁷ *Arthur Andersen LLP v. U.S.*,⁸⁸ however, suggest that commentators' concerns about prosecutorial resources may be misplaced. In that case, the Department of Justice charged that Arthur Andersen spoliated evidence about the Enron accounting scandal and committed a federal crime under 18 U.S.C.A. § 1512(B)(2)(A, B).⁸⁹ The U.S. Supreme Court held that the jury instruction given at trial failed to account for the *mens rea* requirement of 18 U.S.C.A. § 1512(B)(2)(A, B).⁹⁰ The Court expressly held that only those individuals with the requisite intent, or more specifically, those individuals who are “conscious of [their] wrongdoing” in destroying relevant documents could be convicted under 18 U.S.C.A. § 1512(B)(2)(A, B). Though the Supreme Court ultimately ruled in Arthur Anderson’s favor in this case, the vigorous prosecution of Arthur Anderson under 18 U.S.C.A. § 1512(B)(2)(A, B) makes it apparent that prosecutors are willing and able to pursue criminal charges against spoliators who intentionally destroy evidence.

V. SPOILIATION DEFENSES

Parties that breach their duty to preserve evidence may assert three key defenses. First, they may argue that they acted in good faith and did not intend to destroy relevant evidence. Second, they may argue that their conduct did not “prejudice” the opposing party because the spoliated evidence was irrelevant to controversy. Third, they may rely on a “laches” defense

⁸⁷ Richter, *supra* note 2, at 700.

⁸⁸ 125 S.Ct. 2129.

⁸⁹ *Id.*

⁹⁰ *Id.* at 2135.

if the non-spoliating party had a reasonable opportunity to independently examine the missing evidence before it was lost or destroyed.

A. GOOD FAITH

Parties commonly raise the good faith defense when charged with spoliating evidence. In the past, the defense was sometimes successful where non-spoliating parties sought adverse evidentiary inferences. In that context, spoliators often admitted negligence in losing or destroying relevant evidence, but argued that negligence is not enough to satisfy the intent requirement (intent meaning the intentional destruction of evidence to suppress truth), which many courts are required to find before imposing an adverse evidentiary inference.⁹¹ A split in authority now exists, however, as to whether good faith is still a valid defense. Courts in Minnesota and the Eighth Circuit continue to follow the traditional view that courts may only impose adverse evidentiary inferences against spoliators who intentionally destroy evidence.⁹² Other courts have adopted a different view, holding that reckless or even negligent conduct is sufficient to warrant an adverse inference instruction.⁹³ Moreover, even when adverse evidentiary inferences are not an appropriate remedy, other sanctions such as exclusion or monetary penalties may still be imposed to correct the effects of unintentional spoliation.⁹⁴

B. PREJUDICE AND RELEVANCE

⁹¹ See, e.g., *Stevenson*, 354 F.3d 739 at 746; *Morris*, 373 F.3d at 901.

⁹² *Id.*

⁹³ See, e.g., *Turner v. Hudson Transit Line*, 142 F.R.D. 74, 75 (S.D.N.Y. 1991).

⁹⁴ *Patton*, 538 N.W.2d at 119 (exclusion of spoliated evidence and related expert testimony is an appropriate remedy even where such evidence is lost or destroyed through inadvertence or negligence rather than intentional misconduct).

Many courts recognize the absence of prejudice as a defense to spoliation. In this jurisdiction, however, prejudice is regarded as an essential element of the spoliating victim's case.⁹⁵ In Minnesota federal and state courts, the difference is one of burden of proof -- when no prejudice is found no sanctions are imposed.⁹⁶ The absence of prejudice is evidenced many times by a complaining party's inability to show that the spoliated evidence was relevant to the particular case.⁹⁷ In *Beer*, the plaintiff accused the defendant of destroying electronic data on his laptop that plaintiff claimed was material to the case, but because the court determined that the plaintiff had "not demonstrated that any of his lost data would have contained evidence pertinent to the . . . litigation," plaintiff's spoliation claim was rejected.⁹⁸ By this decision, the district court offered a blunt reminder to future parties that spoliation sanctions are inappropriate when the spoliated evidence is not "relevant . . . to . . . the pending litigation."⁹⁹

C. LACHES

Another defense closely related to the absence of prejudice is laches. The linchpin here is that parties generally cannot seek to exclude evidence and related testimony when they are given reasonable opportunity to independently examine such evidence before it was lost or destroyed.¹⁰⁰ Under these circumstances, sanctions are inappropriate because the loss of evidence would not have prejudiced the non-spoliating party but for its own failure to

⁹⁵ See, e.g., *Federated Mutual Ins. Co. v. Litchfield*, 456 N.W.2d 434, 439 (Minn. 1990).

⁹⁶ See *Dillion*, 986 F.2d at 267; *Wajda v. Kingbury*, 652 N.W.2d 856, 860 (Minn. Ct. App. 2002).

⁹⁷ See e.g. *Lexis-Nexis v. Beer*, 41 F.Supp.2d 950, 954-955 (D. Minn. 1999).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Kindel & Richter, *supra* note 5, at 704.

adequately examine the missing evidence while it was still available.¹⁰¹ The laches defense will not succeed when a party in possession of evidence does not provide the other party with reasonable notice of its claim or defense.¹⁰² An effective use of the laches defense can be seen in the case of *Henry v. Joseph*.¹⁰³ In that case, a Minnesota state trooper was injured when he was struck by a minivan after stopping two vehicles for speeding. The trooper and the State of Minnesota filed an action against the defendant, who claimed that she had tried to avoid the officer but her breaks failed. To support her defense, the defendant tried to introduce a report produced by a state expert who had examined the defendant's brakes the day after the accident and determined that the brakes locked up when applied. The defendant's expert concluded that the locking of defendant's brakes caused her vehicle to spin immediately prior to the accident. The defendant sold her minivan two months after the accident, and the trooper sought to exclude the defendant's expert's report on the basis that the sale of the van constituted spoliation of evidence. The trial court sided with the trooper on this issue, but the Court of Appeals reversed the trial court's decision, holding that the state's own expert witness had an opportunity to inspect and conduct tests on the brakes before the minivan was sold. As a consequence, neither the trooper nor the State suffered any prejudice.¹⁰⁴

VI. CONCLUSION

The law of spoliation as it relates to the preservation, collection, and management of electronic information is still developing. As these materials show, even well-considered technology information policies create a potential for spoliation sanctions, if negligently

¹⁰¹ *Id.* at 705.

¹⁰² *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66 (Minn. Ct. App. 1998).

¹⁰³ No. C2-98-181, 1998 WL481932, at *1 (Minn. Ct. App. 1998).

¹⁰⁴ *Id.* at *5.

implemented. Nevertheless, a thoughtful policy will go a long way towards preventing spoliation and, plainly, a failure to even attempt to manage and intelligently organize and preserve employee-generated electronic communications may create even larger problems and a greater potential for liability.