The involvement of an attorney early in the investigation process can ensure proper methods are employed to avoid spoliation of evidence and protect investigative findings from future disclosures. The involvement of counsel early on to coordinate a pre-suit investigation can provide an immediate assessment of the potential liability and damages. An attorney will also secure evidence that may later be needed at trial by visiting the scene of the alleged accident before it is altered and before witnesses leave.

I. Pre-Suit Investigations & the Attorney-Client Privilege and Work Product Doctrine

The attorney-client privilege exists to protect confidential communications between client and lawyer made for the purpose of securing legal advice. The work product doctrine, codified in Rule 26(b)(3) of the Federal Rules of Civil Procedures protects from disclosure documents and materials prepared in anticipation of litigation. Involving an attorney who is acting in the capacity of legal counsel in your pre-suit investigation may protect investigative material that might otherwise be discoverable during litigation.

One of the most recognized protections afforded to companies in pre-suit investigations is the interviewing of employees. In the case of *Upjohn Co. v. United States* 449 US 383 (1981), the Supreme Court ruled that communications by lower echelon employees were protected by attorney-client privilege when sought to aid in counsel’s ability to render legal advice. The Court noted, “[t]he purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out. The purpose of the privilege is to encourage clients to make full disclosure to their attorneys.” The principles articulated in *Upjohn* continue to be upheld in both Federal and Florida state courts.

II. Preservation of Evidence and Avoiding Claims of Spoliation of Evidence

The most important part of any pre-suit investigation may be the preservation of evidence in order to both defend against any anticipated litigation arising from the incident and in order to avoid claims of spoliation of evidence. Spoliation of evidence refers to the destruction, loss or alteration of evidence and can result in sanctions or liability under a separate cause of action. It applies to not only physical evidence, but in today’s digital world, to electronically stored information as well. Evidence that is critical to a case should not be destroyed or altered in any way and should be preserved. If you don’t know if preservation is necessary or when you do, you should consult an attorney who can aid in the preservation process and/or secure the evidence on your behalf.
Where evidence has been lost, destroyed or altered, Florida courts not only impose sanctions against the parties responsible for spoliation of evidence, but recognize an independent tort action for same. Florida courts are however, split on whether the imposition of sanctions for spoliation of evidence requires a showing of bad faith.

An independent cause of action for spoliation of evidence was first reported in Bondu v. Gurvich, 473 So. 2d 1307 (Fla. 3d DCA 1984). Bondu was a medical malpractice case where the patient suffered cardiac arrest during the administration of anesthesia. During discovery, it was revealed that the anesthesiology records could not be found. On appeal from summary judgment in favor of the defendant, the court held the hospital owed a duty to preserve the evidence (the records) and failed to do so. An independent claim for spoliation was further recognized in Continental Insurance Co., v. Herman, 576 So. 2d 313 (Fla. 3d DCA 1990) where the Court enunciated the elements for a claim of spoliation of evidence. The court held that the elements of a cause of action for negligent destruction of evidence are: (1) existence of a potential civil action, (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action, (3) destruction of that evidence, (4) significant impairment in the ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages.

While federal courts have not recognized an independent action for spoliation of evidence, there are repercussions nonetheless. The 11th Circuit Court of Appeals has stated that “sanctions for discovery abuses are intended to prevent unfair prejudice to litigants and to insure the integrity of the discovery process.” Fluty v. Daimler Chrysler Corp., 427 F.3d 939, 944 (11th Cir.2005). Sanctions for spoliation of evidence may include “(1) dismissal of the case; (2) exclusion of expert testimony; or (3) a jury instruction on spoliation of evidence which raises a presumption against the spoliator.” Flury, 427 F.3d at 945.

The 11th Circuit requires a showing of bad faith for imposition of sanctions on a claim of spoliation. Barnes v. Dalton, 158 F.3d 1212, 1214 (11th Cir.1998). The factors for a finding of spoliation and imposition of sanctions were enumerated in Eli Lilly and Co. v. Air Exp. Intern. U.S.A., Inc., 602 F.Supp.2d 1260, 1280 (S.D.Fla.2009) The Court stated a party seeking sanctions based on the spoliation of evidence must establish the following three elements: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed, (2) that the records were destroyed with a culpable state of mind and (3) that 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.

A review of recent cases in the 11th Circuit shows a trend in avoiding the imposition of sanctions unless the party seeking sanctions can overcome the high burden of proving bad faith. In S.E.C. v. Monterosso, 2010 WL 1332256, at *1 (S.D. Fla. Mar. 30, 2010), the SEC requested phone records and claimed that the records were forged and that the phone company acted in bad faith and destroyed the records. However, the court ruled that because there was no affirmative evidence of the destruction of the records and the forgery, the motion for sanctions was denied. (Burden is on the party seeking sanctions to prove the spoliation) In Atl. Sea Co., S.A. v. Anaïs Worldwide Shipping, Inc,
2010 WL 2346665, at *1 (S.D. Fla. June 9, 2010) there was a fire on a boat caused by a malfunction in the spotlight of a crane and the Plaintiff alleged spoliation for failure to preserve the spotlight and its electrical wiring. The Court was not persuaded by the Claimants’ conclusory allegation that the Defendant acted with bad faith by “destroy[ing] the light fixture since it was lost and/or destroyed well after the subject fire occurred [ ... ].” Given the Claimants' failure to allege an affirmative act by the Plaintiff leading to the spoliation of the evidence, the Court did not need to even reach the issue of whether the Plaintiff knew or should have known of its duty to preserve the evidence. The Southern District has even thrown out requests for sanctions where gross negligence is shown. In *Point Blank Solutions, Inc. v. Toyobo Am., Inc.,* WL 1456029, at *4 (S.D. Fla. Apr. 5, 2011), a claims for spoliation of electronic evidence the court found that “in several cases following the 2005 *Flury* decision the Eleventh Circuit specifically and unequivocally held that bad faith is required for an adverse inference instruction as a sanction for spoliation… even grossly negligent discovery conduct does not justify that type of jury instruction[.]”

Foreman Friedman PA is available 24 hours a day, every day and provides immediate response to all accidents scenes by experienced attorneys who can aid in developing and implementing a pre-suit investigation strategy. The retention of counsel for pre-suit investigations may be useful in protecting portions of your pre-suit investigation from becoming discoverable during litigation. Further, having counsel involved in pre-suit investigation can assist in evaluating potential claims, procuring relevant medical and damages information; inspecting the accident site and retention of any necessary experts for inspection; observing and participating in an state or government inquiry; preventing the tampering and destruction of evidence, as well, as assisting in preserving same; documenting physical evidence, obtaining appropriate photographic and video evidence; procuring records and interviewing witnesses.