

# Spoliation of Evidence

A State by State Summary

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## **INTRODUCTION**

The Commercial Transportation Litigation Committee of the Tort Trial & Insurance Practice Section of the American Bar Association is pleased to provide with you with this Spoliation of Evidence Summary for the Fifty States and the District of Columbia. The purpose of the Summary is to provide an easy reference for industry members, insurance representatives, adjusters, and attorneys, to a general description of the law on spoliation of evidence claims in every jurisdiction.

Each article will provide you with a summary description of the law for each State. At times, where relevant and space limitations allowed, our authors have also addressed other issues pertinent to the topic of spoliation of evidence. The summaries are just that, summaries only, and they are not intended to provide an exhaustive analysis of the issue.

The authors are attorneys and claims people who practice in the respective jurisdictions. Each author is designated at the bottom of each summary and you are encouraged to follow up with her/him directly for additional information or a more in depth analysis, should that be required. We hope this summary is helpful to you in your work or practice. As always, for specific legal advice on a specific matter, please contact your attorney. No effort is made here to provide such advice.

## ALABAMA

By Edgar M. Elliott, IV

Alabama law does not recognize an independent cause of action for spoliation of evidence where the alleged spoliator is a party to the action. *Christian v. Kenneth Chandler Const. Co., Inc.*, 658 So. 2d 408, 413-14 (Ala. 1995). For example, if the alleged spoliator is a defendant in an action that includes tort claims other than spoliation, no claim for spoliation may be maintained by a plaintiff whose evidence was lost or destroyed. *Smith v. Atkinson*, 771 So. 2d 429, 432 (Ala. 2000). This principle is based on Alabama courts' conclusion that Alabama law affords plaintiffs an adequate remedy for spoliation by an adverse party. *Id.* Chiefly, a finding of spoliation authorizes the finder of fact to presume or infer that the missing evidence reflects unfavorably on the spoliator's interest. *Vesta Fire Ins. Corp. v. Milam & Co. Const. Inc.*, 901 So. 2d 84, 93 (Ala. 2004). Significantly, too, a finding of spoliation entitles the court to sanction the offending party up to and including dismissal. *Id.* Alabama courts analyze spoliation in terms of the following factors: (i) the importance of the evidence destroyed; (ii) the culpability of the offending parties; (iii) fundamental fairness; (iv) alternative sources of information; and (v.) the possible effectiveness of sanctions other than dismissal. *Id.* at 94-95.

While Alabama law does not recognize a spoliation claim against a party, the law does recognize a cause of action for negligent spoliation against third parties. *Smith*, 771 So. 2d at 432. In addition to proving the traditional elements of negligence, spoliation plaintiffs must prove that: (i) the spoliator had actual knowledge of the pending or potential litigation; (ii) a duty was imposed on the defendant through a voluntary undertaking, an agreement or a specific request; and (iii) the missing evidence was vital to the plaintiff's pending or potential action. *Id.* at 432. Proof of these elements entitles the plaintiff to a rebuttable presumption that *but for* the alleged spoliation of evidence the plaintiff would have recovered in the litigation. *Id.* at 432-33. The defendant may rebut this presumption with a showing that the plaintiff would not have prevailed in the underlying action even if the lost or destroyed evidence had been available. *Id.* at 435. Unsuccessful defendants may be held liable for the plaintiff's compensatory damages. *Id.* at 438. Although a spoliation defendant may not be held liable for the punitive damages which the plaintiff would have been recovered against the original tortfeasor, the spoliation defendant who acted willfully or wantonly may be held liable for punitive damages in an amount commensurate with its own conduct. *Id.*

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## ALASKA

**By Ann B. Black**

Alaska defines spoliation as “the destruction or alteration of evidence.” *Estate of Day v. Willis*, 897 P.2d 78, 80 n.2 (Alaska 1995). The potential remedies for spoliation of evidence in Alaska depend upon the nature of the spoliation.

Intentional spoliation of evidence gives rise to a common law action in tort for intentional interference with a prospective civil action. *Hazen v. Mun. of Anchorage*, 718 P.2d 456 (Alaska 1986). A cause of action for intentional spoliation requires sufficient evidence from which a reasonable person could conclude the defendant lost or destroyed evidence with the intent to disrupt a prospective civil action. *Sweet v. Sisters of Providence in Washington*, 895 P.2d 484, 492 (Alaska 1995). No cause of action exists unless a party’s underlying cause of action has been prejudiced by the spoliation. *Day*, 897 P.2d at 81. In *Day*, the Alaska Supreme Court concluded that, because the State does not owe a legal duty to protect fleeing offenders from their own actions, the estate of an offender killed in a high-speed chase could not maintain a stand-alone action for spoliation of evidence. The alleged spoliation was the failure to provide the estate with the name of a witness who contradicted the pursuing officer and the failure to provide the officer’s missing notebook.

If the spoliation is not intentional, the proper remedy is a jury instruction that the loss of the evidence raises a rebuttable presumption or a shifting of the burden of proof as to duty, breach, and causation. *Id.*; *Nichols v. State Farm Fire & Cas. Co.*, 6 P.3d 300 (Alaska 2000). Before burden shifting is appropriate, the plaintiff must first establish that the absence of the evidence hinders his ability to establish a *prima facie* case. *Sweet*, 895 P.2d at 491. Burden shifting is only appropriate when the essential evidence is missing or destroyed through the negligence or fault of the adverse party. *Id.* at 492-93.

Alaska law does not yet authorize burden shifting or recognize a tort for third-party spoliation. However, the Alaska Supreme Court has indicated it may recognize a third-party spoliation cause of action under the right circumstances. *Id.*

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## ARIZONA

By William S. Sowders and Tamara N. Cook

Spoliation of evidence is “the destruction or significant and meaningful alteration of a document or instrument.” *Blacks Law Dictionary*. In Arizona, there is no separate cause of action for a tort of spoliation of evidence. *La Raia v. Superior Court*, 722 P.2d 286, 289 (Ariz. 1986); *Tobel v. Travelers Insurance Company*, 988 P.2d 148, 156 (Ariz. App. 1999). However, the courts do recognize that “litigants have a duty to preserve evidence which they know, or reasonably should know, is relevant in the action.” *Souza v. Fred Carries Contracts, Inc.*, 955 P.2d 3, 6 (Ariz. App. 1997).

Arizona courts have further recognized that when spoliation does occur, the ultimate sanction, i.e., dismissal, is not an appropriate remedy in every case. *Id.* Rather, the remedy for the “destruction of potentially relevant evidence obviously occurs on a continuum of faults - ranging from innocence through the degrees of negligence to intentionally. The result in penalties vary correspondingly.” *Id.*, quoting *Welsh v. United States*, 844 F.2d 1239, 1246 (6<sup>th</sup> Cir. 1988). The *Souza* court also noted that the appropriate sanction for spoliation or destruction of evidence depends on the circumstances.

Adopting inflexible or ‘bright line’ rules in this area, in our view, would be ill-advised. Rather, issues concerning destruction of evidence of appropriate sanctions therefor should be decided on a case-by-case basis, considering all relevant factors.

*Souza v. Fred Carries Contracts, Inc.*, 955 P.2d 3, 5 (Ariz. App. 1997).

A recent Arizona case, *Smyser v. City of Peoria*, relied on *Souza* to lay out the requirements for a spoliation instruction. *Smyser* held that in order for a party to get a spoliation instruction, a party must prove that the records are essential and the lack of evidence is because of an intentional act or bad faith. *Smyser v. City of Peoria*, 160 P.3d 1186, 1198 (Ariz. App. 2007).

In *Smyser*, evidence was missing, however, no evidence showed who caused its loss or that the evidence had been intentionally or negligently destroyed. *Id.* at 1197. The court held that when no evidence shows intentional or bad faith destruction of evidence, a spoliation instruction is not mandatory. *Id.* at 1198. Further, “an innocent failure should be of less concern than intentional destruction or failure to comply with a court order or discovery obligation to preserve or produce evidence.” *Smyser* at 1197 citing *Souza*.

A court has “inherent discretionary power to make appropriate evidentiary rulings in response to destruction or spoliation of relevant evidence.” *Med. Lab. Mgmt. Consultants v. Am. Broad Co., Inc.*, 306 F.3d 806, 823-24 (9<sup>th</sup> Cir. 2002). As stated previously, “whether or not a loss of evidence merits an instruction allowing an adverse inference generally requires evidence of bad faith or intentional destruction.” *Id.*

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## ARKANSAS

**By Christy Comstock**

Under Arkansas law, spoliation is defined as the intentional destruction of evidence. *Goff v. Harold Ives Trucking Co.*, 27 S.W.3d 387 (Ark. 2000). Arkansas does not recognize a separate tort for the intentional or negligent spoliation of evidence. Similarly, Arkansas does not recognize a tort for third-party spoliation of evidence. *Downen v. Redd*, 242 S.W.3d 273 (Ark. 2006); *see also* Jason B. Hendren, *Spoliation of Evidence: Why This Evidentiary Concept Should Not Be Transformed Into Separate Causes of Action*, 27 UALR L.R. 281 (2005).

Arkansas does recognize a duty to preserve evidence, which is based upon the sufficiency and timeliness of notice to the preserving party as well as the imminence of litigation and the role of the documents with respect to the precise issues to be litigated. *Stevenson v. Union Pac. R.R., Co.*, 354 F.3d 739, 746-50 (8th Cir. 2004). Once a request is made for retention of evidence, subsequent destruction will not be tolerated and a document retention policy will not act as a shield. *Id.* There may also be a duty to create and preserve evidence where standard procedures and public policy require the creation of a document. *Smith v. United States*, 128 F. Supp. 2d 1227, 1233-34 (E.D. Ark. 2000) (court made adverse inference under spoliation doctrine where physician failed to dictate post-surgical note).

Evidence that is "material" to a pending or potential claim is subject to preservation by first parties; "material" is defined as "evidence that could be a substantial factor in evaluating a claim or defense." *Stevenson*, 354 F.3d at 746-50; *see also* AMI 106. The Arkansas courts have not recognized, absent a subpoena or court order, any inherent duty on behalf of third parties to preserve evidence that may ultimately be useful to others. *Wilson v. Beloit Corp.*, 725 F. Supp. 1056, 1058 (W.D. Ark. 1989).

When destruction of evidence is part of a record retention policy, courts have considered (1) whether the document retention policy is reasonable in light of the facts and circumstances of the case; (2) whether lawsuits or complaints are frequently filed concerning the types of records at issue; and (3) whether the document retention policy was instituted in bad faith. *Stevenson*, 354 F.3d at 746 (citing *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1111-12 (8th Cir. 1988)). Regardless of the policy, there must be some indication of an intent to destroy the evidence for the purpose of obstructing or suppressing the truth in order for the courts to impose the sanction of an adverse inference instruction. To date, the Arkansas courts have not given an adverse jury instruction in a case where documents were destroyed pursuant to a routine document retention policy and the evidence amounted to negligence alone.

The Eight Circuit Court of Appeals has avoided the issue of whether the issues are substantive or procedural, noting the standard is the same under either federal law or Arkansas state law. *Stevenson*, 354 F.3d at 746. There must be a finding of intentional destruction indicating a desire to suppress truth. *Lewy*, 836 F.2d at 1111-12.; *Rodgers v. CWR Constr., Inc.*, 33 S.W.3d 506 (Ark. 2000); *Goff*, 27 S.W.3d at 389. There must also be a finding of prejudice to the opposing party. *Stevenson*, 354 F.3d at 748.



There are a number of sanctions available to the courts but the most important remedy in Arkansas is the evidentiary inference, *omnia praesumtus contra spoliator*. This allows the aggrieved party to request Arkansas Model Jury Instruction 106 which instructs a jury that it is permitted to draw a negative inference against the spoliator—the jury may draw the inference that the intentionally destroyed or suppressed evidence would have been unfavorable to the spoliator. Evidence of intentional destruction is required—a jury instruction is not available for negligent spoliation. *Rodgers*, 33 S.W.3d at 511; *see also Gallup v. St. Louis, I.M. & S.R. Co.*, 215 S.W. 586 (Ark. 1919). The adverse inference is subject to reasonable rebuttal. *Stevenson*, 354 F.3d at 748. AMI 106 and evidence of intentional destruction supported an award of punitive damages in the amount of \$25 million in *Union Pacific R.R. Co. v. Barber*, 149 S.W.3d 325 (Ark. 2004).

If a party does not comply with an order to provide or permit discovery, the Arkansas Rules of Civil Procedure also allow various sanctions to be imposed at the discretion of the trial court. *Goff*, 27 S.W.3d at 390. Arkansas' Model Rules of Professional Conduct are broad enough to include sanctions for a lawyer engaged in intentional spoliation as the Rules prohibit “conduct involving dishonesty, fraud, deceit or misrepresentation . . . [and] conduct that is prejudicial to the administration of justice.” If a person purposefully alters or destroys a document or thing to impair its availability in an official proceeding or investigation, the destruction may be prosecuted as a Class B misdemeanor under Ark. Code Ann. § 5-53-111 (1997).

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## CALIFORNIA

By Virginia L. Price

Spoliation is the intentional destruction or suppression of evidence. *Cedars-Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511, 512 (Cal. 1998). California does not recognize an independent tort for spoliation by third parties. *Cedars-Sinai*, 954 P.2d at n.1 (no independent tort cause of action for intentional spoliation of relevant evidence by party to underlying action); *Temple Cmty. Hosp. v. Superior Court*, 976 P.2d 223, 228 (Cal. 1998) (no independent tort cause of action against nonparty or third party for intentional spoliation of relevant evidence); *Coprish v. Superior Court* 80 Cal. App. 4th 1081, 1083 (2000) (no tort remedy for negligent spoliation).

The chief non-tort remedy for a party's intentional spoliation of evidence is that they will face a dreaded evidentiary inference—that "evidence which one party has destroyed or rendered unavailable was unfavorable to that party." *Cedars-Sinai*, 954 P.2d at 517. Section 413 of the Evidence Code sets forth this inference: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's . . . willful suppression of evidence relating thereto . . ." CAL. EVID. CODE § 413 (West 2008). The standard California jury instruction, moreover, includes an instruction concerning this inference as well: "If you find that a party willfully suppressed evidence in order to prevent its being presented in this trial, you may consider that fact in determining what inferences to draw from the evidence." BAJI No. 2.03 (8th ed. 1994).

During discovery, both negligent and intentional spoliation have been held to constitute "misuses of the discovery process" warranting the imposition of sanctions. *Puritan Ins. Co. v. Superior Court*, 171 Cal. App. 3d 877, 884 (1985). Discovery sanctions in the underlying action, therefore, are also a crucial legal tool for dealing with spoliation. *Id.* The court's ability to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious, or whimsical action. *R.S. Creative, Inc. v. Creative Cotton, Ltd.*, 75 Cal. App. 4th 486 (1999). Only two facts are absolutely prerequisite to imposition of the sanction: (1) there must be a failure to comply and (2) the failure must be willful. *Id.*; CAL. CIV. PROC. CODE § 2023. In California, case law provides little guidance to trial courts concerning how they should exercise their discretion to select whether and which sanctions to impose for spoliation of evidence. Generally, discovery sanctions may not "exceed that which is required to protect the interests of the party entitled to but denied discovery," and terminating sanctions are a "drastic penalty which should be sparingly used." *Deyo v. Kilbourne*, 84 Cal. App. 3d 771, 793 (1978); *Garza v. Delano Union Elementary Sch. Dist.*, 110 Cal. App. 3d 303 (1980).

In *R.S. Creative*, the Court of Appeals affirmed the trial court's imposition of terminating sanctions for spoliation-related misuses of discovery and violations of court orders. 75 Cal. App. 4th at 487. The plaintiff, in *R.S. Creative*, destroyed evidence, forged the contract at the center of the dispute, and refused to allow the completion of a deposition after the forgery had been revealed. *Id.* The court declared that this egregious and intentional spoliation of evidence by a party was "intolerable" and commended the trial court for heeding the *Cedars-Sinai* court's charge to use discovery sanctions to punish spoliation. *Id.* In addition to civil sanctions, Section

135 of the Penal Code imposes misdemeanor penalties on individuals convicted of the willful destruction or suppression of evidence. CAL. PENAL CODE. § 135.

In some cases, there is a duty to preserve evidence. This duty generally arises from: (1) a voluntary undertaking (taking possession of physical evidence), (2) a bailment, (3) a request for preservation, or (4) an agreement or independent duty to preserve (contract between parties/statutory obligation to preserve).

A strong argument can be made that the duty to preserve evidence attaches at the point the spoliator knew or should have known that litigation is likely to be instituted. *Velasco v. Commercial Bldg. Maint. Co.*, 169 Cal. App. 3d 874 (1985); *Hazen v. Mun. of Anchorage*, 169 Cal. App. 3d 874 (1985). Factors, which have been considered by California courts, in determining whether a spoliating party had a duty to preserve evidence include: (1) the extent to which the transaction was intended affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury suffered; (5) the moral blame attached to the defendant's conduct and (6) the policy of preventing future harm. *Velasco*, 169 Cal. App. 3d 874 (1985); *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799 (1979); *Biakania v. Irving*, 49 Cal. 2d 647 (1958).

If evidence has been destroyed or lost, counsel must address the questions of whether and when to disclose that fact. The answers depend on (a) the stage of the trial, and (b) whether the trial is pending in state or federal court. If the spoliating party has not responded to discovery requests, the party may only have a duty to state that the information is unavailable. *Pantzanals v. Superior Court*, 272 Cal. App. 2d 499, 503 (1969). If the item was known to have been in the party's possession, though, the party should be prepared to explain to the court the fate of the spoliated evidence. If the spoliating party has already responded to discovery requests, whether that party has a duty to disclose the spoliation is a question of whether the particular court imposes a duty to update discovery responses. Parties in federal court have a duty to supplement prior discovery responses with material after-acquired information, including information regarding whether responsive evidence has been lost or destroyed. FED R. CIV. PRO. 26(e). In California courts, however, no such explicit statutory duty exists; the party propounding discovery requests must propound a supplemental request to elicit later-acquired information concerning previous responses. *Guzman v. General Motors Corp.*, 154 Cal. App. 3d 438, 442, (1984) (stating in dicta that parties should amend erroneous or misleading discovery responses despite lack of duty to do so, to avoid sanctions and prosecution for perjury).

In some cases of spoliation, not only can the party be sanctioned, but the party's attorney can also be sanctioned. A party's attorney can only be sanctioned for his or her client's spoliation, however, if the attorney advised the client to commit spoliation; attorney negligence falling short of such advice will not give rise to sanctions. However, counsel for the offending party has the burden of proving he or she did not advise the client's disobedience to discovery-related orders. *Corns v. Miller*, 181 Cal. App. 3d 195, 200 (1986) (disciplinary sanctions, criminal penalties and legal malpractice liability can be pursued.)

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## COLORADO

**By Laurence F. Dunn III**

Like several other Western states, Colorado courts do not recognize spoliation of evidence – either intentional or negligent – as a separate cause of action. Instead, spoliation of evidence creates an adverse evidentiary inference upon which the judge may instruct the jury. Such an instruction is frequently given to remedy the perceived evidentiary imbalance between the parties which may arise through the destruction of (or failure to preserve) relevant evidence. It may be also be accompanied by monetary sanctions against an attorney who willfully destroys evidence.

Colorado case law makes no black-and-white distinction between intentional spoliation and negligent spoliation. *See, e.g., Pfantz v. Kmart*, 85 P.3d 564 (Colo. 2003); *see also Rodriguez v. Schutt*, 914 P.2d 921 (Colo. 1996). Furthermore, trial courts enjoy fairly broad discretion in fashioning a remedy appropriate to the wrongdoing. *Aloi v. Union Pac. R.R. Corp.*, 129 P.3d 999 (Colo. 2006).

In exercising this discretion and determining whether or not to give an adverse-inference instruction, trial courts may consider the state-of-mind of the party which destroyed (or failed to preserve) relevant evidence, as well as the likelihood that the absent evidence would, in fact, have been damaging. In *Western Fire Truck, Inc. v. Emergency One, Inc.*, 134 P.3d 570 (Colo. 2006), for example, the trial court heard testimony from a witness that he did not intentionally destroy evidence; on that basis, the trial court declined to administer an adverse-inference instruction, a decision which was upheld by the Supreme Court. *See also Castillo v. The Chief Alternative, LLC*, 140 P.3d 234 (Colo. 2006) (sanctions not warranted under *Colo. R. Civ. P. 37* where defendant discarded evidence a year after accident and after being assured by claimant that she was not planning to sue).

This discretion can cut both ways, however. In *Aloi* the Supreme Court was asked to consider a trial court's assertedly-duplicative instructions on the adverse inference: the judge gave an adverse-inference instruction on three separate occasions, including once during the midst of cross-examination. The Supreme Court held that the trial court did not abuse its discretion in repeating the instruction – or even in interrupting cross – "because it acted to remedy prejudice and as a result did not depart from the required impartiality so as to deny the defendant a fair trial." *Aloi*, 129 P.3d at 1006.

As noted above, particularly egregious cases of spoliation may result in imposition of monetary sanctions against the offending party or attorney. In *The Lauren Corp. v. Century Geophysical Corp.*, 953 P.2d 200 (Colo. 1998), the Colorado Supreme Court upheld such a sanction order, finding it an authorized exercise of the trial court's inherent power to administer justice fairly and impartially, even in the absence of a related discovery order.

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## CONNECTICUT

**By Brian Del Gatto, Stephen Brown, and Eric Niederer**

Connecticut law now recognizes the tort of intentional spoliation of evidence. *See Rizzuto v. Davidson Ladders, Inc.*, 905 A.2d 1165 (Conn. 2006). The prior law of spoliation in Connecticut provided for only an adverse inference against the spoliating party who destroyed evidence or failed to preserve evidence. *See Beers v. Bayliner Marine Corp.*, 675 A.2d 829 (Conn. 1996). While the case law is unresolved at this time and continues to evolve in light of the newly recognized tort action for intentional spoliation of evidence, the courts have allowed both a claim for intentional spoliation of evidence and an adverse inference at trial in post-*Rizzuto* decisions.

The Court established the following essential elements for a tort of intentional spoliation of evidence: 1) defendant's knowledge of a pending or impending suit; 2) defendant's destruction of evidence; 3) in bad faith with the intent to deprive the plaintiff of his or her cause of action; 4) plaintiff's inability to establish a prima facie case without the spoliated evidence; and 5) damages. *Rizzuto*, 905 A.2d at 1178-79.

A party suffering from spoliation cannot build a case for intentional spoliation of evidence on a spoliation inference alone. In order for a spoliation claim to be actionable, the party must also possess some concrete evidence that will support the underlying claim. *Rizzuto*, 905 A.2d at 1178. In bringing a claim for intentional spoliation, "[d]isruption of a party's case is a critical element of the intentional spoliation tort." [Internal citation omitted.] *Rizzuto*, 905 A.2d at 1170.

Furthermore, the disruption of a plaintiff's case from spoliation of evidence must be due to the bad faith actions of the defendant, or another party. Summary judgment is proper if there is no evidence to support an allegation that the spoliation of the evidence was done in bad faith. *Paylan v. St. Mary's Hosp. Corp.*, 2007 Conn. Super. LEXIS 2503 (Scholl, J., Sept. 20, 2007). Therefore, a party must be able to prove bad faith in the destruction or alteration of evidence to succeed on an intentional spoliation claim.

However, a party may seek an adverse inference for destroyed evidence without satisfying the bad faith element required for an intentional spoliation claim. *Beers*, 675 A.2d at 832.

Upon establishing the elements for an intentional spoliation claim, there arises a rebuttable presumption that but for the spoliation the plaintiff would have recovered in the litigation. The burden then shifts to the defendant to establish that the plaintiff would not have prevailed even if the lost or destroyed evidence had been available.

The measure of damages looks to restore an injured party to the position he or she would have been in if the spoliation had not occurred.

The Connecticut courts appear to be expanding this newly recognized tort. Recently, the courts held that a third-party action for intentional spoliation of evidence was viable where a third-party's spoliation of evidence was done knowingly and willingly in order to affect the outcome of litigation. *See Diana v. NetJets Servs, Inc.*, 2007 Conn. Super. LEXIS 3491 (Bellis, J., Dec. 12, 2007). Furthermore, defendants are now bringing intentional spoliation counterclaims where plaintiffs have destroyed evidence that would have aided the defendants in defending the claims against them.

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## DELAWARE

By Delia A. Clark

Under Delaware law, if a party acts intentionally, willfully or recklessly in failing to preserve or retain evidence in its control or custody, then the opposing party is permitted to receive an adverse inference jury instruction. The trial court is required to determine whether the party acted willfully or recklessly in failing to preserve the evidence. *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 547-48 (Del. 2006). The doctrine is not available when the evidence is destroyed accidentally or where the records are purged under a routine document destruction policy. *Id.* Thus, in order to receive the adverse inference instruction, there must be a showing that the party acted with a mental state indicative of spoliation which includes the bad faith destruction of probative evidence. A litigant will not be penalized for destruction of old files in the ordinary course of business when at the time of the destruction there was no need to retain the information. *Id.* The trial court is required to inquire whether there existed an intent to "suppress the truth." <sup>1</sup> *Id.* (citing *Morris v. Union Pac. R.R.*, 373 F.3d 896, 901 (8th Cir. 2004) & *Gumbs v. Intn'l Harvest*, 718 F. 2d 88 (3rd Cir. 1983).

In criminal matters, the courts have set forth a three-part analysis. *Deberry v. State*, 457 A.2d 744 (Del. 1983). If the evidence was in the possession of the State at the time of the defense request, it was subject to disclosure under Criminal Rule 16. If it is subject to disclosure, the next inquiry is "whether the government had a duty to preserve the material." Finally, if such a duty existed, "was the duty breached, and what consequences flow from a breach." *Id.* Again the principle concern is the intent of the State. *Id.*

In two Superior Court civil decisions, the trial court permitted an adverse inference for the negligent loss of evidence. *Welsh v. Del. Clinical & Lab. Assoc.*, 2000 WL 33111147 (Del Super. Nov. 9, 2000); *Burris v. Kay Bee Toy Stores*, 1999 WL 1240863 (Del. Super. Sept. 17, 1999). However, the Delaware Supreme Court refused to adopt this rule. *Sears, Roebuck & Co. v. Midcap*, 893 A.2d at 548.

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## DISTRICT OF COLUMBIA

**By Inga Oesterle Drewniak and Wes P. Henderson**

The District of Columbia Court of Appeals has held that “negligent or reckless spoliation of evidence is an independent and actionable tort in the District of Columbia.” *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 847 (D.C. 1998). “[T]he elements of a cause of action for negligent or reckless spoliation of evidence are: (1) existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to that action; (3) destruction of that evidence by the duty-bound defendant; (4) significant impairment in the ability to prove the potential civil action; (5) a proximate relationship between the impairment of the underlying suit and the unavailability of the destroyed evidence; (6) a significant possibility of success of the potential civil action if the evidence were available; and (7) damages adjusted for the estimated likelihood of success in the potential civil action.” *Id.* at 854.

The D.C. Courts have also fashioned a series of civil and evidentiary sanctions for destruction of evidence. The Courts have held that “upon a finding of gross indifference to or reckless disregard for the relevance of the evidence to a possible claim, the trial court must submit the issue of lost evidence to the trier of fact with corresponding instructions allowing an adverse inference.” *Battocchi v. Washington Hosp. Ctr.*, 581 A.2d 759, 767 (D.C. 1990). Where the negligence is not intentional or reckless, the court is accorded discretion in determining whether to give an adverse inference instruction and an appellate court will not disturb its decision absent an abuse of that discretion. *Id.*; *See also Williams v. Washington Hosp. Ctr.*, 601 A.2d 28 (D.C.1991). However, “even if the trial court does not find ‘gross indifference or reckless disregard,’ it may at its discretion impose an adverse inference instruction after consideration of three factors: [1] ‘the degree of negligence or bad faith involved, [2] the importance of the evidence lost to the issues at hand, and [3] the availability of other proof enabling the party deprived of the evidence to make the same point.’” *Williams*, 601 A.2d at 32, (citing *Battocchi*, 581 A.2d at 767).

While the Courts tend to impose less onerous sanctions, such as fines, attorneys’ fees, or evidentiary rulings, the Courts have warned that “the ultimate sanction of dismissal or default” may be appropriate in two different cases: where the destroyed document is dispositive of the case, so that an issue-related sanction effectively disposes of the merits anyway, and where the guilty party has engaged in such wholesale destruction of primary evidence regarding a number of issues that the district court cannot fashion an effective issue-related sanction. *Shepherd v. Am. Broad. Co.*, 62 F.3d 1469, 1479 (D.C. Cir. 1995). In *United States v. Phillip Morris USA, Inc.*, the Court found that at least eleven employees who held some of the highest and most responsible positions in the company had failed to adhere to a preservation order and the company’s own document preservation policy by losing or destroying e-mails. 327 F.Supp.2d 21, 23-24, 26 (2004). As such, the Court ordered that the Defendants were: (1) precluded from calling as fact or expert witnesses at trial any individual who failed to comply with Phillip Morris’ own internal document retention program; (2) required to pay a monetary sanction of \$2,750,000.00; and (3) reimburse the United States in the amount of \$5,027.48. *Id.*

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## FLORIDA

**By Eugene G. Beckham**

Florida's remedies for spoliation of evidence are determined by the relationship and duties existing between the parties. Parties to a lawsuit may seek sanctions but claims against others, outside of the original litigation who owe a duty to preserve evidence, are subject to an independent cause of action. In *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342, 347 (Fla. 2005), the Florida Supreme Court held that there is no cause of action for spoliation of evidence against a party to the lawsuit—presumptions and appropriately fashioned sanctions are applied instead.

The elements of an independent cause of action for spoliation are: (1) existence of a potential civil action; (2) a legal or contractual duty to preserve evidence relevant to the civil action; (3) destruction of the evidence; (4) significant impairment of the ability to prove the lawsuit; and (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit. *St. Mary's Hosp. v. Brinson*, 685 So. 2d 33, 35 (Fla. Dist. Ct. App. 1996); *Cont'l Ins. Co. v. Herman ex rel. Herman*, 576 So. 2d 313, 315 (Fla. Dist. Ct. App. 1990). “[L]ose the evidence, lose the case” is not the rule in Florida. *Reed v. Alpha Prof'l Tools*, 975 So. 2d 1202, 1204 (Fla. Dist. Ct. App. 2008). Loss of evidence by the plaintiff does not mandate dismissal unless the defendant would be completely unable to defend. *Torres v. Matsushita Elec. Corp.*, 762 So. 2d 1014, 1017-18 (Fla. Dist. Ct. App. 2000). As long as the non-spoliator does not bear an unfair burden and the parties can be placed on an equal footing, the case may proceed. *Reed*, 975 So. 2d at 1204. Florida courts are reluctant to allow employers to be sued for spoliation in cases where workers' compensation immunity applies. *Perez v. La Dove, Inc.*, 964 So. 2d 777, 779-80 (Fla. Dist. Ct. App. 2007), *rev. denied*, 977 So. 2d 577 (Fla. 2008).

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## GEORGIA

By Erin Russell

Georgia courts define spoliation of evidence as “the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation.” *Baxley v. Hakiel Indus., Inc.*, 647 S.E.2d 29 (Ga. 2007); *Bridgestone/Firestone North Am. Tire, LLC v. Campell*, 574 S.E.2d 923 (Ga. 2002); *Am. Multi-Cinema, Inc. v. Walker*, 605 S.E.2d 850 (Ga. 2004); *Bouve & Mohr, LLC v. Banks*, 618 S.E.2d 650 (Ga. 2005); *Brito v. The Gomez Law Group, LLC*, 658 S.E.2d 178 (Ga. 2008).

Spoliation of evidence creates a rebuttable presumption that the evidence would have been harmful to the spoliator. *Greer v. Andrew*, 75 S.E. 1050 (Ga. 1912); *Bennett v. Associated Food Stores, Inc.*, 711, 165 S.E.2d 581 (Ga. 1968); *Am. Cas. Co. of Reading, Pennsylvania v. Schafer*, 420 S.E.2d 820 (Ga. 1992); *Wal-Mart Stores, Inc. v. Lee*, 659 S.E.2d 905 (Ga. 2008).

Georgia trial courts are afforded wide latitude in fashioning sanctions against spoliators, and do so on a case-by-case basis, considering what is appropriate and fair under the circumstances. *Lee*, 659 S.E.2d 908-09; *Brito*, 658 S.E.2d at 184-85.

In order to remedy the prejudice resulting from evidence spoliation, Georgia trial courts are authorized to charge the jury that the spoliated evidence creates a rebuttable presumption that the evidence would have been harmful to the spoliator, dismiss the case, or exclude testimony about the evidence spoliated. *Lee*, 659 S.E.2d at 909; *Brito*, 658 S.E.2d at 185.

Georgia does not recognize spoliation of evidence as an independent tort. *Gardner v. Blackston*, 365 S.E.2d 545 (Ga. App. 1988); *Richardson v. Simmons*, 538 S.E.2d 830 (Ga. App. 2000); *Owens v. Am. Refuse Sys., Inc.*, 536 S.E.2d 782 (Ga. App. 2000).

*Morgan v. U.S. Xpress, Inc.* is a significant Georgia case, decided in the United States District Court, Middle District of Georgia, in which a motor carrier’s Motion for Summary Judgment was denied, in part due to the adverse inference applied by the Court due to spoliation of satellite positioning data. 2006 WL 1548029 (2006). The issue in *Morgan* was whether either of two possible U.S. Xpress drivers were in the area at the time of Plaintiff’s accident. The backup tape which would have contained the tracking information had been destroyed. The Court held that a jury could infer from destruction of the data that one of the U.S. Xpress drivers had indeed been in the area at the time of the accident.

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## HAWAII

**By William A. Bordner & David Y. Suzuki**

The trial court has “wide-ranging authority to impose sanctions for the spoliation of evidence.” *Stender v. Vincent*, 992 P.2d 50, 57 (Haw. 2000) (defective manufacture claim precluded and jury instructed that manufacturer could have found favorable evidence had automobile seat not been destroyed by plaintiff’s investigator). First, the court has broad discretion in determining the sanctions pursuant to Rule 37(b)(2) of the Hawai’i Rules of Civil Procedure. *Wong v. Honolulu*, 665 P.2d 157, 161 (Haw. 1983) (municipal government estopped from raising defenses relating to malfunction or defect in traffic control box it destroyed). Second, the court “has the inherent power . . . to fashion a remedy to cure prejudice suffered by one party as a result of another party’s loss or destruction of evidence.” *Richardson v. Sport Shinko (Waikiki Corp.)*, 880 P.2d 169, 182-83 (Haw. 1994) (jury instructed to presume that destroyed evidence could have been unfavorable to destroying party).

The factors in determining whether to impose sanctions for spoliation are:

(1) the offending party’s culpability, if any, in destroying or withholding discoverable evidence that the opposing party had formally requested through discovery; (2) whether the opposing party suffered any resulting prejudice as a result of the offending party’s destroying or withholding the discoverable evidence; and (3) the inequity that would occur in allowing the offending party to accrue a benefit from its conduct.

*Stender*, 992 P.2d at 58. Bad faith or intentionality are not required in order for sanctions to be imposed. *Id.*

The Hawai’i Supreme Court has declined to opine whether to recognize a tort of spoliation of evidence as such a case was not properly before it. *Matsuura v. E.I. du Pont de Nemours & Co.*, 73 P.3d 687, 706 (Haw. 2003). The court did note that in other jurisdictions, intentional and/or negligent spoliation of evidence require: (1) the destruction of evidence; (2) the disruption or significant impairment of the lawsuit; and (3) a causal relationship between the destruction of evidence and the inability to prove the lawsuit. *Id.* at 705. Thus, that would likely be the threshold for an attempt to bring a suit for spoliation.

Hawai’i has not yet followed the Federal Rules in promulgating specific provisions relating to electronic discovery.

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## IDAHO

By Donald J. Farley

Idaho has adopted the evidentiary doctrine of spoliation of evidence. *Ada County Highway Dist. v. Total Success Inv., LLC*, 179 P.3d 323, 331 (Idaho 2008). Idaho's appellate courts have held that when a party with a duty to preserve evidence intentionally destroys it, an inference arises that the missing evidence was adverse to the party's position. To prove spoliation, the complaining party must show involvement in the spoliation by the party against whom the presumption will run, and sufficient intent by the same party. Whether such elements have been sufficiently proven is within the discretion of the trial court. *Courtney v. Big O Tires, Inc.*, 87 P.3d 930 (Idaho 2003). The adverse presumption only applies to the party connected to the loss or destruction of the evidence; it is not enough to show that a third person, even if the third person was retained or put in charge of the evidence, destroyed the evidence.

Under Idaho law, mere negligence in the loss or destruction of evidence is not sufficient to invoke the doctrine of spoliation of evidence. *Courtney*, 179 P.3d at 933. The circumstances must demonstrate that the evidence was lost or destroyed because the party responsible for its preservation did not want the evidence available for use by an adverse party intending or reasonably foreseeable litigation. In order to prove spoliation, the complaining party must present evidence of premeditation or intentional conduct to destroy the evidence, and that the offending party knew that the evidence would be important to pending or foreseeable litigation. *Id.* Although Idaho courts have held that negligent conduct will not give rise to a spoliation evidentiary inference, the courts have not ruled out the possibility that circumstances may exist where an adverse inference arises based solely on reckless conduct. *Id.*

The Idaho Supreme Court has also indicated that other penalties may be enforced upon a party engaging in spoliation. In circumstances where spoliation substantially prejudices an opposing party, sanctions such as those listed in Rule 37(b) of the Idaho Rules of Civil Procedure may be appropriate. *Id.* at 933-34.

Idaho courts have not had occasion to address an issue of spoliation of evidence in a commercial transportation case. However, the courts' prior holdings applying the doctrine, or determining whether the inference may arise in a given set of circumstances, would no doubt apply.

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## ILLINOIS

**By James A. Foster and Brian A. Schroeder**

In Illinois, the elements of a claim for spoliation of evidence are: (1) a duty to preserve evidence, which alternatively is phrased as knowledge that litigation is likely and that the evidence will be relevant to the litigation; (2) the defendant lost or destroyed the evidence; (3) the defendant's loss or destruction of the evidence must have affected the plaintiff's ability to prove the case; and (4) the plaintiff must have suffered damages due to the lost or destroyed evidence. *Boyd v. Travelers Ins.*, 652 N.E.2d 267, 273 (Ill. 1995).

The duty to preserve evidence can be created by an agreement, contract, statute, special circumstance, or affirmative conduct of the defendant. *Boyd*, 652 N.E.2d at 273. The duty exists "if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." *Id.* In *Andersen v. Mack Trucks*, 793 N.E.2d 962 (Ill. App. Ct. 2003), the court held that the mere sending of a letter from a hoist manufacturer to the trucking company in possession of the hoist asking that the hoist be preserved, absent some other special relationship between the parties, did not in and of itself create a duty to preserve the hoist.

Regarding the element of proximate cause, the plaintiff must prove that "but for the defendant's loss or destruction of the evidence, the plaintiff had a reasonable probability of succeeding in the underlying suit. In other words, if the plaintiff could not prevail in the underlying action even with the lost or destroyed evidence, then the defendant's conduct is not the cause of the loss of the lawsuit." *Boyd*, 652 N.E.2d at 271 & n.2.

Regarding the element of damages, in *Petrik v. Monarch Printing*, 501 N.E.2d 1312, 1320-21 (Ill App. 1st Dist. 1987), the court suggested several methods for computing damages. The court stated damages for a spoliation claim could be the entire damages the plaintiff would have recovered in the underlying lawsuit, or alternatively could be the entire damages from the underlying case multiplied by the probability the plaintiff would have won the underlying suit if the plaintiff had the lost or destroyed evidence. However, the court ultimately did not determine which method to apply, because the court held that plaintiff failed to state a proper claim for spoliation.

In *Schusse v. Pace Bus*, 779 N.E.2d 259 (Ill. App. Ct. 2002), the court held a spoliation of evidence claim against an employer is not barred by the worker's compensation exclusivity rule, because the spoliation of evidence does not arise out of the employment relationship. The *Schusse* court also held the statute of limitations for a spoliation of evidence claim is five years from the date the evidence is lost or when the plaintiff knew or should have known of the loss of the evidence.



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## INDIANA

**By Eric L. Kirschner and Julie R. Murzyn**

In Indiana, spoliation consists of the intentional destruction, mutilation, alteration or concealment of evidence. If proven, spoliation may be used to establish that the evidence was unfavorable to the party responsible. *Cahoon v. Cummings*, 734 N.E.2d 535, 545 (Ind. 2000). If a party suppresses facts or evidence, this may result in an inference that the production of the evidence would be against the interest of the party suppressing it. The spoliation rule applies to altered as well as destroyed documents. *Id.*

Indiana does not recognize first party intentional spoliation of evidence as an independent tort claim. *Gribben v. Wal-Mart Stores, Inc.*, 824 N.E. 2d 349, 355 (Ind. 2005). If an alleged tortfeasor negligently or intentionally destroys or discards evidence that is relevant to a tort action, the plaintiff does not have an additional independent cognizable claim against the tortfeasor for spoliation. The court noted that spoliation and other forms of litigation-related misconducts such as perjury have no tort remedy. There is preference for policies of evidentiary inference, discovery sanctions, criminal penalties, civil monetary, contempt and issue sanctions over derivative actions.

The Indiana Supreme Court did opine, however, that fairness and integrity of outcome and deterrence of evidence destruction might require an additional tort remedy when evidence is destroyed or impaired by persons that are not parties to litigation and not subject to the existing remedies and deterrents. *Gribben*, 824 N.E. 2d at 355. There is a cause of action for third party spoliation as recognized in *Thompson v. Owensby*, 704 N.E.2d 134 (Ind. Ct. App. 1998). However, in the employment situation the Indiana courts have held that an employee injured in a work place accident to which the Worker's Compensation Act applies has no claim against the employer for third-party spoliation of evidence relevant to claims arising from that accident. *Murphy v. Target Products*, 580 N.E.2d 687, 690 (Ind. Ct. App. 1991). In *Glotzbach, CPA v. Froman*, 854 N.E.2d 337, 342 (Ind. 2006), the Indiana Supreme Court noted that allowing an employee to make claims of spoliation by the employer would open the door to satellite litigation against the employer that the Worker's Compensation Act is designed to foreclose. Without a strong showing of need, the court would not impose an obligation to retain useless equipment indefinitely or to refrain from repairing equipment necessary to conduct the employer's business.

In addition, Trial Rule 37(E) sets the standard for electronically stored information: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system." However, the courts have held that if a defendant should have known under circumstances that lawsuits were imminent, it should maintain the evidence. The failure to maintain such evidence constitutes spoliation.

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## IOWA

**By Patrick D. Smith**

In Iowa, the only sanction available for spoliation of evidence is an inference instruction. That is, the jury is instructed that it may conclude (but is not required to conclude), the missing evidence would have been unfavorable to the “spoliating” party.

Before the jury can draw such an inference, however, it must find that the party asserting spoliation has proven: (1) the evidence previously existed; (2) the evidence was within the possession of the party against whom the instruction is sought; (3) that party’s interests would call for production of the evidence if favorable; and (4) the party intentionally destroyed the evidence without satisfactory explanation. *See* Iowa Civil Jury Instruction 100.22.

A spoliation instruction is only appropriate “upon the intentional destruction of evidence. It is not warranted if the disappearance of the evidence is due to mere negligence, or if the evidence was destroyed during a routine procedure.” *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 719 (Iowa 2001).

[T]he spoliation inference . . . is not grounded on the need or blamelessness of the party seeking the inference, or the mere fact that the evidence has disappeared. It is based on the nature of the conduct of the party who destroyed the evidence and the need to punish such conduct . . . . [T]he party seeking the inference must generate a genuine factual issue whether the party in control of the evidence intentionally altered or destroyed it.

*Id.* at 721. If a factual issue is generated as to whether there was intentional destruction of evidence, the burden then shifts to the party who destroyed the evidence to provide a satisfactory explanation for the destruction. *Id.* The Iowa Supreme Court has cautioned that the spoliation inference should be used “prudently and sparingly,” and only in those circumstances in which the asserting party shows both intentional destruction and control of the evidence. *Lynch v. Saddler*, 656 N.W.2d 104, 111 (Iowa 2003).

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## KANSAS

**By Michael D. Matteuzzi & Matthew J. Brooker**

Spoliation occurs when a party fails to preserve evidence after receiving notice that evidence is relevant to current or future litigation. *See generally Oxford House, Inc. v. City of Topeka*, 2007 WL 1246200, 3 (D. Kan. 2007).<sup>1</sup> Spoliation sanctions considered by Kansas courts include “(1) outright dismissal of claims; (2) exclusion of countervailing evidence; or (3) a jury instruction on the spoliation inference, which permits the jury to assume that destroyed evidence would have been unfavorable to the position of the offending party.” *See Workman v. AB Electrolux Corp.*, 2005 WL 1896246, 5 (D. Kan. 2005). Courts generally require a showing of bad faith before permitting the submission of a negative inference jury instruction. *Aramburu v. Boeing Company*, 112 F.3d 1398, 1407 (10th Cir. 1997). On the other hand, courts can impose other spoliation sanctions without requiring a showing of bad faith. *103 Investors I, L.P. v. Square D Company*, 470 F.3d 985, 988 (10th Cir. 2006) (affirming the Kansas Federal District Court’s grant of spoliation sanctions striking testimony of plaintiff’s witness regarding the absence of a warning on a product plaintiff failed to preserve for later inspection).

Kansas courts have expressed a hesitation and general unwillingness to recognize independent negligent or intentional spoliation of evidence torts. The Kansas Supreme Court first considered this issue in *Koplin v. Rosel Well Perforators, Inc.*, 743 P.2d 1177 (Kan. 1987). The Court concluded that “absent some independent tort, contract, agreement, voluntary assumption of duty, or special relationship of the parties, the new tort of ‘the intentional interference with a prospective civil action by spoliation of evidence’ should not be recognized in Kansas.” *Id.* at 1183 (holding that an employer did not owe its employees a duty to preserve evidence for later use by employees in civil actions against third parties).

The Court in *Koplin* left open the possibility of an independent spoliation tort where “defendants or potential defendants in the underlying case destroyed the evidence to their own advantage” but left this decision “for another day.” *Id.* at 1182. Later, the court in *Foster v. Lawrence Mem’l Hosp.* concluded that the Supreme Court of Kansas “would recognize the tort of spoliation under *some circumstances.*” 809 F.Supp. 831, 838 (D. Kan. 1992) (permitting plaintiffs to proceed on an independent spoliation theory against a medical doctor that destroyed handwritten notes after receiving notice of a potential lawsuit).<sup>2</sup> The court later dismissed the spoliation claim because plaintiffs’ failed to plead damages distinct from their underlying claim. *Foster*, 818 F.Supp. at 322. While no Kansas case has addressed independent spoliation claims in a commercial

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<sup>1</sup> Common forms of notice generally include receipt of a discovery request, service of lawsuit papers or any communication “that litigation is likely to be commenced.” *Id.*

<sup>2</sup> The Court noted that Kansas Administrative Regulation 100-24-1 imposed a duty on doctors to maintain records of treatment provided to patients.

automobile negligence case, such a claim could be recognized in the future under the right set of circumstances.

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## KENTUCKY

**By Nancy Barrett Loucks**

Kentucky Courts have declined to create a separate cause of action for spoliation of evidence. *Hays v. Alia*, 2007 Ky. App. LEXIS 404 (October 19, 2007) and *Monsanto Co. v. Reed*, 950 S.W.2d 811 (Ky. 1997). Nevertheless, where issues of destroyed or missing evidence have arisen, the Courts have addressed the matter as an evidentiary one. The first consideration is whether the missing or destroyed evidence will substantially prejudice the other party's right to a fair trial. *Tinsley v. Jackson*, 771 S.W.2d 331 (Ky. 1989). If there is no substantial prejudice, there should be no remedy.

If, however, there is a substantial prejudice to the absence of the evidence, then the Court must determine whether it should give a "missing evidence" instruction or whether the spoliator's evidence should be limited, or even prohibited, to eliminate the prejudice. *Ware v. Seabring Marine Indus., Inc.*, 2006 U.S. Dist. LEXIS 8505 (March 6, 2006). The Court in *Ware* asked five spoliation questions: (1) Was the spoliation prejudicial? (2) Can the spoliation be cured? (3) How important is the missing evidence? (4) Was the spoliating party acting in good or bad faith? and (5) What is the deterrent effectiveness of the remedy compared with a lesser sanction? Essentially, the Court concluded that since the spoliation was not in bad faith, a missing evidence instruction was appropriate. Presumably, the Court intends "bad faith" to mean "intentional," and if the destruction of evidence had been done intentionally to damage the opponent's ability to pursue its case, a more severe sanction would be imposed.

Federal Courts sitting in Kentucky follow the Federal definition of spoliation, which is "the intentional destruction of evidence that is presumed to be unfavorable to the party responsible for the destruction." *Beck v. Haik*, 377 F.3d 624 (6th Cir. 2004). When the evidence does not support anything beyond mere accidental loss or destruction, the Court may simply choose to deny a motion for an adverse instruction. *Louisville Gas & Elec. Co. v. Continental Field Sys.*, 420 F.Supp. 2d 764 (W.D. Ky. 2005).

On the other hand, a Federal Court may choose to look to Kentucky remedies for lesser infractions than intentional destruction. In *One Beacon Insurance Co. v. Broadcast Development Group*, 147 Fed. Appx. 535 (6th Cir. 2005), a broadcast tower collapsed and the wreckage was subsequently removed and disposed of, leading to a claim of spoliation. There did not appear to be any evidence of intent or "bad faith" in the removal of the wreckage, but the fact remained that it was gone, and the other side claimed prejudice. Looking to Kentucky law, the Sixth Circuit found a missing evidence instruction, allowing (but not requiring) an inference that the evidence would have been favorable to the destroying party, to be the appropriate remedy. Stronger remedies are available through Ky. R. Civ. P. 37, including setting forth non-rebuttable presumptions and factual conclusions, striking pleadings, paying costs, and an adverse judgment. These remedies, however, would likely be imposed only when the evidence shows a

certain degree of intent and bad faith on the part of the spoliator, and not when there is merely negligent destruction of evidence.

As to what and when evidence must be preserved, Kentucky law recognizes that a duty to preserve evidence arises where there is a pending litigation and the evidence would be relevant, *Tinsley v. Jackson*, 771 S.W.2d 331 (Ky. 1989) or if an attorney reasonably can expect that an adversary will be seeking a piece of potentially relevant evidence, *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988).

Finally, in *McAuley v. R+L Transfer*, 2006 U.S. Dist LEXIS 56090 (W.D. Ky. 2006), the defendant trucking company sought some sort of remedy from the Court for the plaintiff's repair of his vehicle before the defendant had an opportunity to examine the alleged damage. The Court denied the motion, and found that "there appears to be no precedent for applying the doctrine of spoliation in a motor vehicle accident case. Moreover, good policy reasons counsel against the court adopting an evidentiary rule that would deter potential plaintiffs from repairing salvageable vehicles." *Id.* at 3.

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## LOUISIANA

**By David K. Groome, Jr. and Marc J. Yellin**

Under the Napoleonic Civil Code laws of Louisiana, spoliation of evidence may result in either an adverse evidentiary ruling or damages resulting from the tort of spoliation. The Louisiana Supreme Court has not definitively settled several spoliation issues. The five Appellate Courts agree that to receive an adverse inference, there must be an allegation that the defendant intentionally destroyed evidence, and the defendant can give no reasonable explanation for the destruction. *Willhite v. Thompson*, 962 So.2d 493, 42,395 (La App. 2 Cir. 8/15/07); *Brooks v. Christus Health Southwestern Louisiana*, 954 So.2d 393, 2006-1497 (La. App. 3 Cir. 4/4/07). Allegations of negligent conduct are insufficient. *Jackson v. Home Depot, Inc.*, 2007 WL 1300851 (La.App. 1 Cir.), 2006 - 1438 (La. App. 1 Cir. 5/4/07) (unreported). In *Everhardt v. Louisiana Dept. of Transp. and Development*, 2008 WL 484050 (La. App. 4 Cir. 2/20/2008) (not yet released for publication in the permanent law reports), one of the factors considered in ruling on a spoliation of evidence issue is whether the party having control over the evidence had an obligation to preserve the evidence at the time it was destroyed. This duty may arise from "a statute, a contract, a special relationship between the parties, or an affirmative agreement or undertaking to preserve the evidence." *Willhite*, 962 So.2d at 498. As an example, a violation of transportation guidelines, especially with respect to records retention, found in 49 CFR 379, 382.401, 391 and 395 may have adverse implications in Louisiana. The theory of spoliation of evidence does not apply where suit has not been filed and there is no evidence that a party knew suit would be filed when the evidence was discarded. *Longwell v. Jefferson Parish Hosp. Service Dist. No.1*, 970 So.2d 1100, 1104, 07 - 259 (La. App.5 Cir. 10/16/07) (citing *Desselle v. Jefferson Parish Hosp. Dist. No.2*, 887 So.2d 524 (La. App. 5 Cir. 10/12/2008).

For third party claims against non-litigants who dispose of evidence, an adverse inference is useless. All Louisiana Appellate Courts now recognize the tort of spoliation of evidence. There is significant conflict among the Appellate Courts on two issues: Whether the destruction/disposal of evidence must be intentional or simply negligent in order to trigger liability; and, whether the tort of spoliation is rooted in the general duty requirements of Louisiana Civil Code Article 2315, or whether a more specific duty must be found. Two cases are illustrative: The Louisiana Fifth Circuit holds that only intentional acts may trigger liability and bases the tort of spoliation on LA C.C. Article 2315. *Pham v. Contico Inter.*, 759 So. 2d 880 (La. App. 5 Cir. 3/22/00); The Second Circuit has held that the basis for tort spoliation is more particular than Article 2315. *Willhite*, 962 So.2d at 498. *Willhite* holds that once a specific duty, whether contractual, statutory, or other is found, only negligence is needed to trigger liability. Whether La. C.C. 2315 is the basis for this tort or a more specific duty is needed, and whether specific intent or negligence is the standard presents challenges to those conducting business in Louisiana.

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## MAINE

**By Blair A. Jones and Brett Leland**

The Maine Supreme Judicial Court has not, yet, ruled on the existence of a cause of action in tort for spoliation of evidence or for destruction of a cause of action. The United States District Court for the District of Maine has suggested that the proper remedy for spoliation is sanctions as opposed to an independent cause of action. *Gagne v. D.E. Jonsen, Inc.*, 298 F. Supp. 2d 145, 147 (D. Me. 2003).

There are no Maine state court cases addressing sanctions for spoliation. The First Circuit and the U.S. District Court for the District of Maine have, however, held that the District Court may sanction parties for spoliation. *See, e.g., Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 446 (1st Cir. 1997) (district court's authority to exclude evidence that has been improperly altered or damaged is a companion to the doctrine that permits an adverse inference from one side's destruction of evidence); *Elwell v. Conair, Inc.*, 145 F. Supp. 2d 79, 88 (D. Me. 2001) (same). The purposes of spoliation sanctions are to rectify prejudice the non-offending party may have suffered as a result of the loss of evidence and to deter future conduct, particularly deliberate conduct, leading to the loss of evidence. *Collazo-Santiago v. Toyota Motor Corp.*, 149 F.3d 23, 29 (1st Cir. 1998). Sanctions for spoliation may include dismissal of the case, the exclusion of evidence, or an adverse inference instruction. *Driggin v. Am. Sec. Alarm Co.*, 141 F. Supp. 2d 113, 120 (D. Me. 2000).

Factors to be considered in determining the appropriate sanction for spoliation include the degree of prejudice to the non-offending party and the degree of fault of the offending party. *Id.* at 447. Prejudice is a prerequisite for any sanction. *Elwell*, 145 F. Supp. 2d at 88. Bad faith is not required for lesser sanctions, such as exclusion of evidence, but a finding of some degree of fault, even if only negligence, makes imposition of sanctions more appropriate. *Driggin*, 141 F. Supp. 2d at 123; *see also Trull v. Volkswagen of Am., Inc.*, 187 F.3d 88, 95 (1st Cir. 1999) (upholding district court's exclusion of evidence for negligent spoliation). "[T]he most severe sanction of dismissal should be reserved for cases where a party has maliciously destroyed relevant evidence with the sole purpose of precluding an adversary from examining that relevant evidence." *Elwell*, 145 F. Supp. 2d at 88; *see also Collazo-Santiago*, 149 F.3d at 28 (noting that dismissal with prejudice is viewed as a harsh sanction that runs counter to the strong policy favoring disposition of cases on the merits).

A permissive adverse inference instruction is appropriate upon a proffer of evidence by the proponent of the instruction that the target party knew (i) of the litigation or the potential for litigation, and (ii) of the destroyed or altered evidence's potential relevance to the litigable claim. *Pelletier v. Magnusson*, 195 F. Supp. 2d 214, 236 (D. Me. 2002). The inference "springs from the commonsense notion that a party who destroys [evidence] (or permits it to be destroyed) when facing litigation, knowing the [evidence's] relevance to issues in the case, may well do so out of a sense that the

[evidence's] contents hurt his position.” *Id.* at 235 (quoting *Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173, 177 (1st Cir. 1998)).

The proponent of an adverse inference instruction does not need to offer direct evidence of a cover-up to set the stage for the inference. *Blinzler v. Marriott Int'l, Inc.*, 81 F.3d 1148, 1159 (1st Cir. 1996); *see also Nation-Wide Check Corp., Inc. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 217-18 (1st Cir. 1982). Also, “evidence that documents were destroyed in the ordinary course of business, pursuant to routine practice, is material to the inquiry, but the mere introduction of such evidence neither removes the question from the jury’s ken nor precludes the jury from drawing a negative inference.” *Id.* at 177.

In *Koken v. Auburn Mfg., Inc.*, Civ. 02-83-B-C, 2004 WL 51100, at \*4 (D. Me. January 8, 2004), *aff'd*, 2004 WL 2358194 (Oct. 15, 2004), the court rejected the argument that a duty to preserve evidence was contractually assumed through a subrogation provision. The provision at issue provided, “[i]n the event of any payment made hereunder, [the Insurer] shall be subrogated to all the Insured’s rights of recovery therefore against any person or organization. . . . The Insured shall do nothing after the loss to prejudice such rights.” It was argued that the “do nothing to prejudice” provision exposed the Insured to contract claims for damages for the Insured’s failure to preserve evidence material to claims against third-party tortfeasors. The Court disagreed, stating, “In my assessment, it would be offensive to the rules of construction applicable to insurance contracts for the Court to construe the ‘shall do nothing . . . to prejudice’ language as an actionable promise rather than a mere condition precedent to indemnification.”

The First Circuit has suggested that a defendant in a design defect case may have difficulty in establishing prejudice arising out of the destruction/loss of the subject product. Because a design defect is common to all products so designed, a defendant may be able to adduce evidence from other products with the same design to refute the plaintiff’s claims. *Collazo-Santiago*, 149 F.3d at 28-29.

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## MARYLAND

**By Andrew T. Stephenson**

There is no explicit duty in the rules or Maryland case law to preserve evidence in the civil context. The destruction, alteration or failure to preserve evidence by a party gives rise to inference or presumptions unfavorable to the spoliator, the nature of the inference being dependent upon the intent or motivation of the party. *See Anderson v. Litzenberg*, 694, A.2d 150, 1155, (Md. 1997) (quoting *Miller v. Montgomery County*, 494 A.2d 761 (Md. 1985), *cert. denied*, 498 A.2d 1185 (1985)).

The jury will be instructed that if they find the intent was to conceal the evidence, the destruction or failure to preserve must be inferred to indicate that the party believes that his or her case is weak and that he or she would not prevail if the evidence was preserved. If the jury finds that the destruction or failure to preserve the evidence was negligent, the jury may, but is not required to, infer that the evidence, if preserved, would have been unfavorable to that party.

Destruction of evidence may lead to sanctions like dismissal when addressed during discovery, while the same offense may raise only an evidentiary presumption when dealt with during trial. The Maryland Rules provide for a wide variety of sanctions, including the most severe penalties, for failures of discovery. *See* Md. Rule 2-433(a)(3). A trial court has broad discretion to fashion a remedy based on a party's failure to abide by the rules of discovery. Even though the Maryland Rules do not deal explicitly with the destruction of discoverable evidence, trial courts have the discretion to impose Rule sanctions for the destruction of evidence. *See Klupt v. Krongard*, 728 A.2d 727 (1999).

The U.S. District Court for Maryland laid out the consensus rules for sanctioning destruction of evidence. *See White v. Office of the Public Defender for the State of Md.*, 170 F.R.D. 138, 147-48 (D.Md.1997). The *White* Court identified four elements generally regarded as being prerequisite to a court's imposition of spoliation sanctions:

- (1) An act of destruction;
- (2) Discoverability of the evidence;
- (3) An intent to destroy the evidence;
- (4) Occurrence of the act at a time after suit has been filed, or, if before, at a time when the filing is fairly perceived as imminent.

*Id.* at 147. The Maryland courts have also followed these elements in imposing sanctions for spoliation of evidence. *See Klupt*, 728 A.2d at 737.

Maryland does not recognize a separate action for spoliation and there are no duties in Maryland imposed by statute or case law on a party who wants to dispose of potential evidence. However, the destruction of evidence or property without notice to the other party may lead to discovery sanctions and may give rise to an inference or

presumptions unfavorable to the spoliator. There is no reported case in Maryland where sanctions such as attorneys' fees or costs were awarded in the context of spoliation. The courts do have wide discretion to award appropriate sanctions for certain discovery failures under Maryland Rule 2-433. This rule also permits the court to award reasonable expenses, including attorneys' fees if a motion for sanctions for failure of discovery is granted.

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## MASSACHUSETTS

**By Andrew J. Fay**

Massachusetts affords a greater range of remedies for spoliation than the majority of jurisdictions, which limit relief to permitting an adverse inference against the responsible party. *Gath v. M/A-COM, Inc.*, 802 N.E.2d 521 (2003). In Massachusetts, the general rule as to spoliation is that persons who are actually involved in litigation (or know that they will likely be involved) have a duty to preserve evidence for use by others who will also be involved in that litigation. Where evidence has been destroyed or altered by persons who are parties to the litigation, or by persons affiliated with a party (in particular, their expert witnesses), and another party's ability to prosecute or defend the claim has been prejudiced as a result, *Fletcher v. Dorchester Mut. Ins. Co.*, 773 N.E.2d 420 (2002), the judge has the discretion to craft a remedy addressing the precise unfairness that would otherwise result. *Westover v. Leiserv, Inc.*, 64 Mass.App.Ct. 831 N.E.2d 400, 404 (2005) (quoting *Fletcher*, 773 N.E.2d 425-26). Absent a subpoena duces tecum, a person who is not a party to litigation has no legal duty to preserve evidence. *Fletcher*, 773 N.E.2d at 424-25. The question of spoliation is addressed to a trial judge's broad discretion to make evidentiary rulings, including the power to exclude evidence that would unfairly prejudice an opposing party. *Gath*, 802 N.E.2d at 525. Generally, the judge should impose the least severe sanction necessary to remedy the prejudice to the nonspoliating party. *Keene v. Brigham and Women's Hosp., Inc.*, 786 N.E.2d 824, 833 (2003). The extreme sanction of dismissal or default judgment must be predicated on a finding of willfulness or bad faith. *Id.* An independent action for spoliation is not recognized in Massachusetts, *Fletcher*, 773 N.E.2d at 425-26, nor is it cognizable under the unfair business practice laws (M.G.L. c. 93A). *Gath*, 802 N.E.2d at 534.

There is no reported Massachusetts case that discusses spoliation in the context of commercial transportation. However, a few cases involving automobile accidents have addressed the issue. In *Nally v. Volkswagen of America, Inc.*, 539 N.E.2d 1017 (1989), the decedent was killed in a car accident and a wrongful death suit was brought on his estate's behalf against Volkswagen. The estate alleged that there were "defects in the rear seat and the hatchback latching systems" of the Volkswagen. *Id.* at 1018. Volkswagen argued that testing done by the estate's expert resulted in the destruction of these systems. The trial court excluded any testimony from the expert and later entered summary judgment for Volkswagen. On appeal the Supreme Judicial Court vacated and remanded so that the trial court could hold an evidentiary hearing concerning the circumstances surrounding the alleged spoliation. The Court however made it clear that where spoliation is found a court "should preclude the expert from testifying as to his or her observations of such items before he or she altered them and as to any opinion based thereon." *Id.* at 1021-22. As a rationale, the Court stated that "[a]s a matter of sound policy, an expert should not be permitted to intentionally or negligently destroy or dispose of such evidence, and then to substitute his or her own description of it." *Id.* at 1022.

In another wrongful death action stemming from an automobile accident, *Bolton v. Massachusetts Bay Transp. Authority*, the decedent's estate alleged that the cause of the decedent's death was the malfunction of the brakes on the MBTA bus involved in the accident. 593 N.E.2d 248, 249 (Mass. App. Ct. 1992). Ten days after the accident, the bus was inspected by the Department of Public Utilities and the brakes were found to be working properly. *Id.* at 248. In response to a letter notifying the MBTA that the bus should be preserved, Defense counsel erroneously informed counsel for the estate that the bus involved in the accident had been scrapped. Before the falsity of this information was rectified however, the bus was indeed subsequently scrapped. The estate never had an opportunity to inspect the bus. The trial judge allowed the estate's motion to prohibit the inspector of the bus for the Department of Public Utilities from testifying to the results of his physical inspection of the bus after the accident. *Id.* at 249.

On appeal, the MBTA argued that the spoliation rule "should not apply to an expert employed by an independent State agency such as the Department of Public Utilities, whose chief concern is the general safety of the public, and that, absent a showing of bad faith, the defendant should be free to dispose of its vehicles involved in an accident after the completion of their inspection by an appropriate Federal or State agency, without the imposition of any sanctions." *Id.* The Appeals Court rejected that argument, affirmed the decision of the trial court while focusing on the prejudice that would befall the estate rather than the fact it was an independent state inspector who conducted the examination. The Court stated that "the actions of the defendant had the effect of reserving to itself all expert testimony based upon the physical inspection of the bus after the accident[.]" and that "[t]he trial judge's exclusion of the testimony of the inspector from the Department of Public Utilities merely prevented the defendant from exploiting its unwarranted advantage." *Id.* at 249-50.

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## MICHIGAN

**By Jerry R. Swift**

When there is pending litigation, there is a duty to preserve evidence, independent of any request to produce that evidence pursuant to discovery rules. Whether the evidence was destroyed or lost accidentally or in bad faith is irrelevant. *Hamann v. Ridge Tool Co.*, 539 N.W.2d 753 (Mich. Ct. App. 1995). The duty to preserve extends to evidence a party knows or should know is relevant, even though no action has been commenced and there is only a potential for litigation. *Brenner v. Kolk*, 573 N.W.2d 65 (Mich. Ct. App. 1997). There may be a duty to preserve even when technically no evidence is lost or destroyed. See *Bloemendaal v. Town & Country Sports, Inc.*, 659 N.W.2d 684 (Mich. Ct. App. 2002) (where an expert failed to measure the torque required to remove a bearing adjustment nut during disassembly, the court held spoliation had occurred by the failure to measure the torque).

The policy reasons for creating evidentiary presumptions against parties who are guilty of spoliation “are more compelling where the evidence is withheld in violation of a statutory duty to produce it.” *Johnson v. Secretary of State*, 280 N.W.2d 9 (Mich. 1979). A failure to follow a party’s document retention policy has also been the basis for a claim of spoliation. See *Clark v. Kmart Corporation*, 640 N.W.2d 892 (Mich. Ct. App. 2002) (on remand).

Absent an assumption by a third party to preserve evidence, or a duty imposed by statute or regulation, the duty to preserve potential evidence does not appear to extend to third parties. See *Panich v. Iron Wood Products Corporation*, 445 N.W.2d 795 (Mich. Ct. App. 1989). No case in Michigan has recognized a separate action for spoliation.

The Michigan standard jury instructions allow the jury to draw the inference the evidence would have been adverse to a party who is in control of the evidence and fails to produce it at trial. See M Civ JI 6.01; *Clark v. Kmart Corporation*, 640 N.W.2d 892, 895 (2002) (on remand). When there has been an intentional spoliation, a presumption arises that the evidence was adverse to the spoliator and shifts the burden of proof to the spoliator to prove the evidence was not adverse. See *Lagalo v. Allied Corporation*, 592 N.W.2d 786, 789 (Mich. Ct. App. 1999) (on remand).

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## MINNESOTA

**By John R. Crawford**

Under Minnesota law, sanctions may be imposed for spoliation of evidence regardless of intent. *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995). A finding of bad faith or willfulness is not required, and “inadvertence or negligence” in the destruction of evidence is sufficient for a finding of spoliation. *Id.* The trial court has “broad authority in determining what, if any, sanction is to be imposed for spoliation of evidence.” *Wajda v. Kingsbury*, 652 N.W.2d 856, 860 (Minn. Ct. App. 2002).

The determination as to specific sanctions imposed for the spoliation of evidence focuses on the prejudice to the opposing party and whether the opposing party gains an evidentiary advantage by failing to preserve evidence. *Foust v. McFarland*, 698 N.W.2d 24, 30 (Minn. Ct. App. 2005); *Himes v. Woodings-Verona Tool Works, Inc.*, 565 N.W.2d 469, 471 (Minn. Ct. App. 1997). Factors such as the nature of the item lost and the potential for remediation of the prejudice are implicit in the court’s determination of prejudice. *Patton*, 538 N.W.2d at 119.

The trial court must select the least restrictive sanction necessary under the circumstances in order to offset the prejudice suffered by the opposing party. *Patton*, 538 N.W.2d at 118; *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66, 71-72 (Minn. Ct. App. 1998).

Minnesota also permits the jury to draw an unfavorable inference from the “failure to produce evidence in the possession and under the control of a party to litigation.” *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 436 (Minn. 1990) (citing *Kmetz v. Johnson*, 113 N.W.2d 96, 100 (Minn. 1962)). However, “Minnesota does not recognize an *independent* spoliation tort.” *Foust*, 698 N.W.2d at 30 (emphasis in original).

On appeal, a trial court’s sanction for spoliation of evidence is subject to an abuse-of-discretion standard. *Patton*, 538 N.W.2d at 119; *Hoffman*, 587 N.W.2d at 71-72. As the Minnesota Supreme Court stated in *Patton*, “One challenging the trial court’s choice of a sanction has the difficult burden of convincing an appellate court that the trial court abused its discretion – ‘a burden which is met only when it is clear that no reasonable person would agree [with] the trial court’s assessment of what sanctions are appropriate.’” *Patton*, 538 N.W.2d at 119 (quoting *Marrocco v. General Motors Corp.*, 966 F.2d 220, 223 (7<sup>th</sup> Cir. 1992)).

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## MISSISSIPPI

**By W. Scott Welch and Frederick Salvo**

In Mississippi, some courts have concluded that only the intentional spoliation of evidence by a party will give rise to an inference that the evidence destroyed was unfavorable to the party responsible for the destruction. *Tieken v. Clearing Niagara, Inc.*, 1997 WL 88180 (N.D. Miss. 1997) (stating that such an inference arises “only where the spoliation or destruction was intentional and indicates fraud and a desire to suppress the truth . . . .”) (citing *Wilson v. State*, 661 So. 2d 1109, 1115 (Miss. 1993)(Smith, J., dissenting) (quoting *Washington v. State*, 478 So. 2d 1028, 1032 (Miss. 1985)); *Stahl v. Wal-Mart Stores, Inc.*, 47 F. Supp. 2d 783, 786 (S.D. Miss. 1998). *Accord Estate of Perry v. Mariner*, 927 So. 2d 762, 767 (Miss. App. 2006); *Mississippi Dept. of Transp. v. Trosclair*, 851 So. 2d 408, 415 (Miss. App. 2003) (citing *Stahl* and finding that intentional conduct is necessary for an adverse inference); *Cox v. State*, 849 So. 2d 1257, 1266 (Miss. 2003) (criminal case).

However, the Mississippi Supreme Court has indicated that intentional conduct is not required in order for an adverse inference to be raised as “[r]equiring an innocent litigant to prove fraudulent intent . . . would result in placing too onerous a burden on the aggrieved party . . . .” *Thomas v. Isle of Capri Casino*, 781 So. 2d 125, 133-34 (Miss. 2001). See *DeLaughter v. Lawrence County Hosp.*, 601 So. 2d 818, 822 (Miss. 1992) (stating that when medical record is unavailable due to negligence, “an inference arises that the record contained information unfavorable . . . and the jury should be so instructed”); *Young v. Univ. of Miss. Med. Center*, 914 So. 2d 1272, 1277 (Miss. App. 2005) (“finding of spoliation may be supported by intentional or negligent destruction of evidence”). Mississippi courts have yet to grant summary judgment as a sanction for negligent spoliation, however, they have done so in cases involving intentional conduct. See *Baggett v. Yamaha Motor Co.*, 3:06cv184-TSL-JCS, January 11, 2008. There exists no independent cause of action for either intentional or negligent spoliation of evidence. *Dowdle Butane Gas Co., Inc. v. Moore*, 831 So. 2d 1124, 1135 (Miss. 2002); *Richardson v. Sara Lee Corp.*, 847 So. 2d 821, 823-24 (Miss. 2003).

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## MISSOURI

**By Kurt A. Schmid**

In Missouri, if potential relevant evidence is found to have been “spoliated,” a judge will apply the “adverse inference rule.” When a judge applies the rule, he or she instructs the jury to make the inference that the missing evidence would have proved that which the party hoping to present the evidence wished to prove. *Garrett v. Terminal R. Ass’n of St. Louis*, 259 S.W.2d 807, 812 (Mo. 1953). “Spoliation” of evidence includes its alteration or destruction. *Baughner v. Gates Rubber Co.*, 863 S.W.2d 905, 907 (Mo. Ct. App. 1993). “Spoliation” has also been defined to include failure to produce evidence to another party upon request or account for it at trial. *State ex rel. St. Louis County Transit Co. v. Walsh*, 327 S.W.2d 713 (Mo. Ct. App. 1959). A party wishing to prove to a judge that another party spoliated evidence must do so with a showing of fraud and a desire to suppress the truth on the part of the spoliating party. *Morris v. J.C. Penney Life Ins. Co.*, 895 S.W.2d 73, 77 (Mo. Ct. App. 1995). A showing of simple negligence is not enough. *Brissette v. Milner Chevrolet Co.*, 479 S.W.2d 176, 182 (Mo. Ct. App. 1972).

In *DeGraffenreid v. R.L. Hannah Trucking Co.*, 80 S.W.3d 866 (Mo. Ct. App. W.D. 2002)(overruled on other grounds), a trucking company’s driver suffered a stroke while driving for the company. The driver brought a workers’ compensation claim against the company and requested copies of his driver’s logs, telephone logs, payroll records, and freight bills from the company. The company produced many of these documents, but it did not produce a complete copy of telephone logs from a relevant period of time.

Though an ALJ found in favor of the company, the Workers’ Compensation Commission reversed the ALJ’s ruling and found in favor of the (then deceased) employee’s estate. The Commission found that the company spoliated the requested telephone records. In support of this finding, the Commission cited the company’s failure to produce the telephone records despite numerous requests by the employee for a two year period. The Commission also cited the deposition testimony of one of the company’s representatives. During the deposition, the company representative stated the records were “all stored in a whole separate building. Because like I said, I’m not even—I don’t even have to have them. I just don’t throw them away, and they’re stored in boxes and boxes and boxes, so I’ll need a while.” *DeGraffenreid*, 80 S.W.3d at 874.

As the fact finder, the Commission applied the “adverse inference rule” set forth above and found that the telephone logs would have proved that the employee was driving for hours in excess of limits set by federal law. On appeal, the court did find that the Commission misapplied the adverse inference rule. The court held that the rule should only have allowed the Commission to find that the employee made phone calls to the employer during the time period for which telephone logs were not produced. The rule should not have allowed the Commission to find what was an ultimate issue in the

case—that the employee was driving for longer hours than what is allowed by federal regulations. *DeGraffenreid*, 80 S.W.3d at 877-88. However, the court did not disturb the Commission’s ruling.

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## Montana

### By Gig Tollefson

Montana recognizes the torts of negligent and intentional spoliation of evidence as independent causes of action. *Oliver v. Stimson Lumber Co.* 993 P.2d 11 (Mont. 1999). Notably, the Montana Supreme Court has held that these claims should only be directed against third parties responsible for preserving evidence and not against parties in litigation who intentionally or negligently destroy evidence. *Id.* at 32. In this regard, the Court reasoned that a separate tort action against a party in litigation who compromises or otherwise destroys evidence is unnecessary because district court judges are “well equipped under the Montana Rules of Civil Procedure” to impose sanctions against the offending party, including “entering default when the circumstances justify such relief.” *Id.*

In order for a claimant to prevail on a claim for negligent spoliation of evidence against a third party, the following elements must be met:

- (1) the existence of a potential civil action;
- (2) a legal or contractual duty to preserve evidence relevant to that action;
- (3) destruction of that evidence;
- (4) significant impairment of the ability to prove the potential civil action;
- (5) a causal connection between the destruction of the evidence and the inability to prove the lawsuit;
- (6) a significant possibility of success of the potential civil action if the evidence were available; and
- (7) damages.

*Id.*, at 19, ¶ 41.

With regard to the second element of the claim, a third party will be deemed to have undertaken a duty to preserve evidence when: (1) the third party volunteers to undertake the preservation of evidence and a person reasonably relies on the guarantee to his/her detriment; (2) the third party enters into an agreement to preserve the evidence; (3) there is a specific request to the third party to preserve the evidence; or (4) there is a duty to preserve based upon a “contract, statute, regulation, or some other special circumstance/relationship.” *Id.* at 20, ¶ 42.

In order to prevail on a claim of intentional spoliation of evidence, a claimant must prove:

- (1) the existence of a potential lawsuit;
- (2) the defendant's knowledge of the potential lawsuit;
- (3) the intentional destruction of evidence designed to disrupt or defeat the potential lawsuit;
- (4) disruption of the potential lawsuit;
- (5) a causal relationship between the act of spoliation and the inability to prove the lawsuit; and
- (6) damages.

*Id.* at ¶ 56.

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## NEBRASKA

**By Richard J. Gilloon and James A. Craig**

The general rule in Nebraska is that intentional spoliation or destruction of evidence raises a presumption or an inference that the evidence at issue would have been unfavorable to the spoliator's case. *Richter v. City of Omaha*, 729 N.W.2d 67, 72 (Neb. 2007) (citing *State v. Davlin*, 639 N.W.2d 631, 648 (Neb. 2002)); *see also Trieweiler v. Sears*, 689 N.W.2d 807, 840 (Neb. 2004). The Nebraska Supreme Court has stated that the rationale for the rule is that intentional destruction of evidence is equated to "an admission by conduct" that the spoliator's case is weak. *Davlin*, 639 N.W.2d at 648 (citing *State v. Langlet*, 283 N.W.2d 330, 333 (Iowa 1979)). Thus, under Nebraska law, a spoliation presumption or inference is not appropriate unless the spoliator intentionally destroyed the evidence at issue. *Id.* Specifically, in *Davlin* the Nebraska Supreme Court stated that such a presumption or inference arises only where the spoliation or destruction (1) "was intentional," and (2) "indicates fraud and a desire to suppress the truth." *Id.* (citing *Jackson v. State*, 791 So. 2d 830 (Miss. 2001)) (emphasis omitted); *cf. SDI Poerating P'ship, L.P. v. Neuwirth*, 973 F.2d 652, 655 (8th Cir. 1992) (applying Nebraska law) (stating adverse inference may arise where destruction was intentional, fraudulent, or done with desire to conceal truth).

While the Eighth Circuit Court of Appeals, applying Nebraska law, has recognized that the creation of an inference against a party that has wrongfully destroyed or withheld evidence is only one of many sanctions available to the courts, the Court of Appeals affirmed the trial court's refusal to enforce such an inference, and affirmed its narrow ruling excluding specific testimony and evidence directly related to the destroyed evidence (electrical wiring, suspected of causing a fire, that had been destroyed by the defense expert before the plaintiff's expert could submit it to testing). *See SDI*, 973 F.2d at 655. This narrow exclusion of evidence was upheld despite the trial court's explicit finding that the defendant did not act in bad faith. However, because there are relatively few Nebraska cases addressing this issue, a Nebraska court may very well, under the right circumstances, impose harsher sanctions upon a party that wrongfully destroys or withholds evidence, such as imposing adverse evidentiary rulings, monetary sanctions, or dismissal.

Although a few states and the District of Columbia have recognized an independent tort for spoliation of evidence, to date these authors are not aware of any Nebraska cases recognizing such a cause of action.

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## NEVADA

**By Jonathan B. Owens**

Spoliation of evidence, in civil litigation, means destruction, loss or alteration of evidence. This can occur intentionally or negligently. There are three different types of civil discovery sanctions that a court may impose upon a party for spoliation of evidence: 1) the spoliation inference, 2) preclusion of evidence in the form of testimony of expert witnesses, or 3) dismissal of the claim.

The spoliation inference is the most common sanction ordered in cases involving lost or destroyed evidence. This sanction allows the jury to draw an unfavorable inference against the party responsible for the spoliation. The Nevada Supreme Court held,

where relevant evidence which would properly be part of the case is within the control of the party whose interest would naturally be to produce it, and he fails to do so, without satisfactory explanation, the jury may draw an inference that such evidence would have been unfavorable to him.

*Reingold v. Wet N' Wild Nevada, Inc.*, 944 P.2d 980 (Nev. 1997).

When a court decides that an adverse inference is not a sufficient sanction for the spoliation of evidence, the court may take the additional step of precluding the introduction of evidence through the testimony of expert witnesses who have had the opportunity to examine the evidence prior to its destruction or loss. Though this sanction should only be ordered when substantial prejudice would result to the offended party, a court may order the preclusion even when the spoliation is negligent or inadvertent. Additionally, the sanction may be ordered in cases where the spoliation occurred prior to litigation. The Nevada Supreme court stated that where a party is on notice of potential litigation, the party is subject to sanctions for actions taken which prejudice the opposing party's discovery efforts. *Fire Ins. Exch. v. Zenith Radio Corp.*, 747 P.2d 911 (Nev. 1987).

The most severe discovery sanction is dismissal of the claim. Dismissal should only be ordered when a less severe sanction will not operate to ease the prejudice suffered by the non-delinquent party. Dismissal must be just, relate to the claims at issue, and must be imposed only after careful consideration of all relevant factors. The sanction must be supported by an express, careful and preferably written explanation of the court's analysis. *Stubli v. Big D. Inter'l Trucks*, 810 P.2d 785 (Nev. 1991). In *Stubli*, the Nevada Supreme Court set forth a non-exhaustive list of factors to consider when deciding whether dismissal is proper. The factors include: (1) The degree of willfulness of the offending party; (2) the extent to which the non-offending party would be prejudiced by a lesser sanction; (3) the severity of the sanction relative to the severity of the discovery abuse; (4) whether the evidence has been irreparably lost; (5) the policy favoring

adjudication on the merits; (6) whether the sanction unfairly operates to penalize the party for misconducts of the attorney; and (7) the need for deterrence. *Id.* at 787.

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## NEW HAMPSHIRE

**By Marc R. Scheer and Gregory Sargent**

The New Hampshire Supreme Court has not yet decided whether spoliation of evidence is an independent tort. *Rodriguez v. Webb*, 680 A.2d 604, 606-07 (N.H. 1996). The Supreme Court has, however, held that a party may request a jury instruction regarding the adverse inference that may be drawn due to another party's spoliation of evidence. *Id.* at 607. The *Rodriguez* Court did not state what a party must show to prove a spoliation claim, except to state that if destruction of evidence is intentional and not a matter of routine, the jury may infer that the destroyed evidence would have favored the plaintiff's case. *Id.* The Court approved of the following spoliation instruction in *Murray v. Developmental Servs. of Sullivan County*, 818 A.2d 302, 308 (N.H. 2003):

Evidence has been presented that certain records or documents may have been intentionally lost or destroyed by the defendant. The defendant denies that any records or documents were intentionally lost or destroyed, and to the extent that documents or records are missing, the defendant has presented evidence suggesting innocent explanations.

If you find that those records or documents would have been relevant to this case, and that the defendant intentionally lost or destroyed them to keep the information secret, you may draw an unfavorable inference on account of there being missing documents or records. However, if you find there was an innocent explanation for the missing records or documents, or if you find these records or documents would not have been relevant to this case, you may not draw such an inference.

The Federal District Court of New Hampshire defines "spoliation" as the intentional, negligent, or malicious destruction of relevant evidence. *Trull v. Volkswagen of Am., Inc.*, U.S.D.C. (D.N.H. 1997) Civ. # 94-15-JD (unpublished opinion). Where relevant evidence is destroyed, the District Court may impose a range of sanctions, including dismissal of the case, the exclusion of the evidence, or a jury instruction on the "spoliation inference." *Id.*

The District Court has held that upon establishment of an adequate foundation, the trier of fact may infer that plaintiffs destroyed relevant evidence out of a realization that the evidence was unfavorable. *Mayes v. Black & Decker (U.S.), Inc.*, 931 F.Supp. 80 (D.N.H. 1996). The Court instructed that before such an inference may be drawn, there must be a sufficient foundational showing that the party who destroyed the evidence had notice of the potential claim and the item's potential relevance. *Id.* at 80. The Court instructed that the adverse inference only applied if the offending party knew the evidence was relevant and his or her willful conduct resulted in the loss or destruction. *Id.* Even under such circumstances, the adverse inference is permissive, not mandatory, and a fact finder is free to reject the inference. *Id.*

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## NEW JERSEY

**By Jeff Segal & Louis Dobi, Jr.**

In New Jersey, spoliation refers to the willful destruction or concealment of evidence by one party to impede the ability of another party to litigate a case. *See Jerista v. Murray*, 883 A.2d 350, 365 (N.J. 2005); *see also Rosenbilt v. Zimmerman*, 766 A.2d 749, 754-55 (N.J. 2001). The New Jersey courts typically allow aggrieved parties to address this behavior in three different ways. First, by allowing an adverse inference jury instruction; second, through traditional discovery sanctions; and third, in cases of spoliation by third parties, by allowing a civil cause of action for compensatory and punitive damages, where the facts merit such claims.

The adverse inference for spoliation has its roots in the common law. “Since the seventeenth century, courts have followed the rule ‘omni praesumuntur contra spoliatores.’” *Rosenbilt*, 766 A.2d at 754. This means in a case of spoliation, the jury is permitted to infer the evidence destroyed or concealed would not have been favorable to the spoliator. Therefore, New Jersey courts allow the aggrieved party to apply for an adverse inference charge. *Jerista*, 883 A.2d at 202; *Rosenbilt*, 766 A.2d at 754-55. The adverse inference charge is said to “even the playing field where evidence has been hidden or destroyed.” *Rosenbilt*, 766 A.2d at 754.

A second traditional approach in New Jersey for dealing with a party that willfully destroys evidence is a discovery sanction. *Id.* at 755; *see also Allis-Chalmers v. Liberty Mut.*, 702 A.2d 1336 (N.J. Super. Ct. App. Div. 1997). For example, New Jersey Rule 4:23-5 permits the court to enter an order dismissing the case of a party that failed to comply with discovery requests, or precluding another from relying on an affirmative defense that would have been supported by missing evidence. Further, under this rule, a party may apply to the court for an order establishing designated facts. *Rosenbilt*, 766 A.2d at 756.

Another permissible approach in New Jersey is the filing of a lawsuit seeking monetary damages for spoliation. *Id.* at 403. In *Rosenbilt*, the New Jersey Supreme Court enumerated a five-pronged cause of action against third party defendants based upon its review of *Viviano v. CBS, Inc.*, 597 A.2d 543 (N.J. Super. Ct. App. Div. 1991) (allowing compensatory and punitive damages in a case where plaintiff’s former employer fraudulently concealed the only available information relevant to plaintiff’s product liability case against the manufacturer of a press on which plaintiff was injured at work).<sup>1</sup> The five prongs are:

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<sup>1</sup> It is important to note the *Rosenbilt* decision specifically declined to recognize independent causes of action for spoliation against first parties to the litigation in which the sought after evidence was crucial.

- (1) That defendant in the fraudulent concealment action had a legal obligation to disclose evidence in connection with an existing or pending litigation;
- (2) That the evidence was material to the litigation;
- (3) That plaintiff could not have reasonably obtained access to the evidence from another source;
- (4) That defendant intentionally withheld, altered or destroyed the evidence with the purpose to disrupt the litigation;
- (5) That plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence defendant concealed.

*Rosenbilt*, 766 A.2d at 758. Such lawsuits allows plaintiff to recover compensatory damages and, if the requirements of the N.J. Punitive Damages Act are met, punitive damages. *Id.*

It is also important to note that New Jersey characterizes only intentional acts of destroying or withholding evidence as spoliation. Some jurisdictions, however, have crafted remedies in cases where parties negligently lose or damage trial materials. *See, e.g., Reilly v. Natwest Mkts. Group Inc.*, 181 F.3d 253, 267-68 (2d Cir. 1999) cert. denied, 528 U.S. 1119 (2000) (holding that “[t]rial judges should have the leeway to tailor sanctions to insure that spoliators do not benefit from their wrongdoing” and “that a finding of bad faith or intentional misconduct is not a sine qua non to sanctioning a spoliator with an adverse inference instruction”); *Sweet v. Sisters of Providence in Wash.*, 895 P.2d 484, 490-92 (Alaska 1995) (holding that defendant’s negligent or intentional spoliation of evidence relevant to plaintiff’s medical malpractice claim shifted burden of proof of legal causation and negligence away from plaintiffs); *Velasco v. Commercial Bldg. Maint. Co.*, 169 Cal. App. 3d 874, 877 (1985) (concluding “that a cause of action may be stated for negligent destruction of evidence needed for prospective civil litigation”); *Pub. Health Trust v. Valcin*, 507 So. 2d 596, 599-601 (Fla. 1987) (adopting rebuttable presumption of negligence where defendant health care provider could not produce key records in malpractice action).

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## NEW MEXICO

**By William S. Sowders and Tamara N. Cook**

The elements of the tort of spoliation of evidence were discussed in *Coleman v. Eddy Potash, Inc.*, 905 P.2d 185 (N.M. 1995). In *Torres v. El Paso Electric Co.*, 987 P.2d 386 (N.M. 1999), the Court discussed wrongful activity occurring prior to the filing of the Complaint and suggested that spoliation, “at least spoliation discovered prior to the trial, should be tried in conjunction with the underlying claim, rather than in a bifurcated or separate trial.” The Court in *Torres* indicated that the tort speaks to remedy acts taken with the sole intent to maliciously defeat or disrupt the lawsuit. It should be noted that the trial court may independently impose sanctions for destruction of evidence ranging from dismissal, or imposition of liability to instruct a jury regarding an inference arising from spoliation. See *Segura v. Kmart Corporation*, 62 P.3d 283 (N.M. 2002).

New Mexico’s uniform jury instructions concerning spoliation of evidence require that the party seeking a spoliation instruction must prove: (1) that the other party knew there was a law suit or potential law suit; (2) that the opposing party disposed of, destroyed, mutilated or significantly altered potential evidence; (3) that the opposing party by its conduct demonstrates a sole intent to disrupt or defeat a potential law suit; and (4) that the opposing party’s destruction or alteration of evidence resulted in the moving party’s inability to prove his or her case and that the moving party suffered damages as a result of the destruction or alteration. New Mexico recognizes a separate tort of spoliation of evidence. This actually gives a party who is unable to prove its case because of the loss or destruction of evidence a separate right of action against the alleged person or entity who disposed of, destroyed, mutilated or altered evidence. The finding of bad faith or evil motive is not a prerequisite to imposition of sanctions for the destruction of evidence under the Court’s inherent power. *Restaurant Management Co. v. Kidde-Fenwal, Inc.*, 986 P.2d 504 (N.M. 1999). Determining the degree of prejudice suffered by an opposing party as a result of spoliation of evidence, in weighing the sanction to be imposed, requires the Court to look closely at the relevance of the destroyed evidence to the various cause of action, and more specifically at the effect of the loss of evidence might have on the non-spoliating party’s ability to prepare and present a case. See *id.* New Mexico recognizes the court’s inherent power to impose sanctions up to and including dismissal for spoliation of evidence and other pre-litigation misconduct. *Martinez v. Martinez*, 945 P.2d 1034 (N.M. 1997). “[I]nherent powers must be exercised with restraint and discretion.” *Kidde-Fenwal, Inc.*, 986 P.2d at 508 (quoting *Chambers v. Nasco, Inc.*, 501 U.S. 32, 44 (1991). “In some cases a court may be justified in using its inherent power to dismiss.” *Id.* (citing *State v. Ahasteen*, 968 P.2d 328 (N.M. Ct. App. 1998). “[D]ismissal is an extreme sanction to be used only in exceptional cases.” *Id.* (quoting *State v. Bartlett*, 789 P.2d 627, 628 (N.M. Ct. App. 1990).

A three prong test is employed in deciding the appropriate sanction for spoliation of evidence. The court must decide: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and



(3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future. *Id.* New Mexico, by empowering the trial court to punish a spoliating party, allows the trial court to regulate the conduct of the parties prior to and during the discovery process. In addition, New Mexico recognizes the independent tort of spoliation of evidence.

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## NEW YORK

### **By Felice Cotignola and Harry Steinberg**

New York does not recognize an independent tort of spoliation against third parties for the loss or destruction of evidence and holds that spoliation sanctions against parties will only be imposed if the party claiming injury by the negligent or intentional loss or destruction of evidence is completely deprived of the ability to make out its claim or defense. In *Metlife Auto & Home v. Joe Basil Chevrolet, Inc.*, 807 N.E.2d 865 (N.Y. 2004), the Court of Appeals held that there could be no spoliation cause of action against an insurer who disposed of a vehicle because there was no relationship between the insurer and the litigants in the unrelated property damage case and, therefore, no duty to preserve the vehicle. In *Ortega v. City of N.Y.*, 876 N.E.2d 1189 (N.Y. 2007), the Court of Appeals went further and specifically "decline[d] to recognize spoliation as an independent tort claim" since the nature of the lost evidence is unknown and there would be no way to know whether the lost evidence would assist plaintiff or defendant rendering such a cause of action speculative.

Spoliation sanctions against a party will be imposed even if the loss or destruction of the evidence was negligent rather than willful and even if it was lost or destroyed before the spoliator became a party or was aware of any litigation. *Enstrom v. Garden Place Hotel*, 27 A.D.3d 1084 (N.Y. App. Div. 2006); *Baglio v. St. John's Queens Hosp.*, 303 A.D.2d 3413 755 N.Y.S.2d 427 (N.Y. App. Div. 2003). The ultimate sanction of striking a pleading is a drastic remedy that will only be imposed where a party is completely precluded by the loss or destruction from proving its claim or defense. *N.Y. Central Mutual Fire Ins. Co. v. Turnerson's Elec., Inc.*, 280 A.D.2d 652 (N.Y. App. Div. 2001); *Kirkland v. N.Y. City Hous. Auth.*, 236 A.D.2d 170, (N.Y. App. Div. 1997). A sanction lesser than dismissal will be ordered where the loss or destruction has not completely deprived an opposing party of establishing its claim or defense. *Dean v. Usine Campagna*, 44 A.D.3d 603 (N.Y. App. Div. 2007); *Linariello v. City Univ. of N.Y.*, 6 A.D.3d 192 (N.Y. App. Div. 2004). Sanctions will not be imposed if there is no pending litigation and the disposal was in good faith pursuant to normal business practices. *Steuhl v. Home Therapy Equip. Inc.*, 23 A.D.3d 825, (N.Y. App. Div. 2005); *Conderman v. Rochester Gas & Elec. Corp.*, 262 A.D.2d 1068 (N.Y. App. Div. 1999).

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## NORTH CAROLINA

**By Celie B. Richardson**

The doctrine of spoliation of evidence in North Carolina is summarized in pattern jury instruction 101.39: Despoiled evidence is evidence that was in the exclusive possession of a party and has been lost, misplaced, suppressed, destroyed, or corrupted, even though the party was aware of another party's claim or defense. From this, the jury may infer, although it is not compelled to do so, that the evidence would be damaging to the party in possession of the evidence. The jury may give this evidence such force and effect as the jury thinks the evidence should have under the facts and circumstances.

The instruction further states that the inference of spoliation is permitted even though there is no evidence that the party acted intentionally, negligently, or in bad faith. The jury should not make the inference of spoliation if it finds that the despoiled evidence was equally accessible to both parties or that there is a fair, frank, and satisfactory explanation of what happened to the despoiled evidence.

The doctrine was fully discussed by the Court of Appeals of North Carolina in *McLain v. Taco Bell Corp.*, 527 S.E.2d 712 (N.C. Ct. App. 2000), *rev. denied*, 544 S.E.2d 563 (N.C. 2000), which provides the basis for the pattern instruction. Additional principles of the doctrine laid out in *McLain* include: The obligation to preserve evidence can arise before suit is filed, "where a party is on notice that litigation is likely to commenced." *Id.* at 718. The party on notice must do what is reasonable in the circumstances. *Id.* A party may also be guilty of spoliation if it is aware of events that may lead to litigation and destroys potentially relevant documents without a particularized inquiry. *Id.* Finally, if the request for a jury instruction on spoliation is supported by evidence, the trial court is required to give the instruction. *Id.* at 719.

In *Yarborough v. Hughes*, 51 S.E. 904 (N.C. 1905), the Supreme Court of North Carolina described the doctrine of spoliation of evidence as "well-settled," and it stated that the same "applies to the failure to call an available witness with peculiar knowledge of the fact to be established." *Id.* at 908.

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## NORTH DAKOTA

By Tamara L. Novotny

Sanctions may be imposed in North Dakota for the destruction of relevant evidence under the trial court's inherent powers and, consequently, are subject to reversal only upon a showing of an abuse of discretion. *See Bachmeier v. Wallwork Truck Ctrs.*, 507 N.W.2d 527, 532-533 (N.D. 1993) ("Bachmeier I"). Because spoliation sanctions are imposed under the court's inherent power the destruction need not be deliberate, malicious, willful or in bad faith; sanctions may be warranted for the negligent destruction of evidence. *Id.* A trial court has broad discretion in determining whether and what sanctions to impose. *Id.* at 534. The court's decision should be based on an analysis of all the circumstances presented in a particular case but, at the very least, must consider three factors:

1. The culpability, or state of mind, of the party against whom sanctions are being imposed;
2. The degree of prejudice against the moving party, including the impact it has on presenting or defending a case; and
3. The availability of less severe alternative sanctions.

*Id.*

The leading case on spoliation sanctions in North Dakota, *Bachmeier I*, is a case where the hub on a Kenworth tractor manufactured by PACCAR broke, causing the truck to leave the roadway where it then overturned and resulted in the death of a passenger, Bachmeier. Bachmeier's parents brought a wrongful death lawsuit against the truck's owner, whose insurer hired an engineer to examine and photograph the hub. Following settlement of this action, the truck's insurer gave the expert permission to dispose of the hub. Consequently, the hub was not available when Bachmeier's parents filed a design defect action against PACCAR.

PACCAR filed a motion for summary judgment arguing that without the hub Bachmeier could not prove a defect and, secondarily, Bachmeier's failure to preserve the hub resulted in unreasonable prejudice to PACCAR as it could not prove its lack of maintenance defense. *Id.* at 530. The trial court granted PACCAR's motion, however, the Supreme Court reversed and remanded for further analysis of the three factors above. *Id.* Given the technical nature of the claim, the appellate court also held that PACCAR needed to present expert testimony showing that the missing hub was essential to its defense; an attorney's representation of prejudice is not sufficient. *Id.* at 535. With submission of an expert affidavit, PACCAR's motion was again granted on remand and affirmed in *Bachmeier v. Wallwork Truck Ctrs.*, 544 N.W.2d 122 (N.D. 1996) ("Bachmeier II").

Summary judgment is the inevitable consequence of the evidence not existing and/or the culpable party being precluded from presenting evidence. *See Bachmeier II*, 544

N.W.2d at 127; *see also Country Side Mobile Home Park, Inc.*, 1998 WL 35151170 (N.D. Dist.) (granting spoliation motion by holding that as to the critical issue of whether control valve was installed in petroleum tank, its absence would be an undisputed fact at trial due to destruction and/or failure to preserve).

It does not appear to be particularly relevant whether the party against whom sanctions are sought had control over the evidence at the time of its destruction. *See Bachmeier I*, 507 N.W.2d at 534 (third party disposed of hub); *Belgarde v. Askim*, 636 N.W.2d 916 (N.D. 2001) (landlord alleged to have installed a defective stove moved for sanction of dismissal due to plaintiff's failure to request preservation of the stove which the landlord had destroyed).

North Dakota has not yet determined whether to recognize a tort action for spoliation. *See Simpson v. Chicago Pneumataic Tool Co.*, 693 N.W.2d 612, 617 (N.D. 2005).

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## OHIO

**By Richard P. Cuneo and Gayle K. Beier**

Spoliation of evidence is interference with or destruction of evidence. In Ohio, to recover on a claim for spoliation of evidence, a Plaintiff must prove, by the reponderance of the evidence, all of the following elements:

- (1) Pending or probable litigation involving the Plaintiff;
- (2) Knowledge on the part of the Defendant that litigation exists or is probable;
- (3) Willful destruction of evidence by Defendant designed to disrupt the Plaintiff's case;
- (4) Disruption of Plaintiff's case; and
- (5) Damage proximately caused by Defendant's acts.

Under current case law, the tort of interference with or destruction of evidence requires a showing of a willful (i.e. wrongful) destruction, alteration or concealment of evidence. The term "willful" contemplates more than mere negligence or failure to conform to standards of practice. It anticipates an intentional, wrongful act. *Drawl v. Cornicelli* (1997), 706 N.E.2d 849 (Ohio Ct. App. 1997).

A claim for spoliation of evidence may be maintained between the parties to the primary action and against third parties. It is brought at the same time and as part of the primary action. *Smith v. Howard Johnson Co., Inc.* 615 N.E.2d 1037 (Ohio 1993). A claim for spoliation of evidence may only be brought after the primary action has been concluded if the evidence of spoliation is not discovered until after the conclusion of the primary action. *Davis v. Wal-Mart Stores, Inc.* 756 N.E.2d 657 (Ohio 2001).

If the court does find that spoliation of evidence occurred because the offending party failed to preserve the evidence, then the court may impose a sanction that is proportionate to the seriousness of the infraction under the facts of the particular case. The Ohio Supreme Court has held that interference with evidence may be used as grounds for a claim for punitive damages.

Ohio does not treat transportation cases any differently than other cases for a spoliation of evidence claim. As long as all of the elements are met, a Plaintiff can recover on this claim.

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## **OKLAHOMA**

**By Harry A. Parrish**

Spoliation of evidence in Oklahoma occurs when evidence relevant to a prospective civil litigant is destroyed, adversely affecting the ability of the litigant to prove his or her case. *Patel v OMH Med. Ctr., Inc.*, 987 P.2d 1185 (Okla. 1999). The destruction must be intentional. *Beverly v Wal-Mart Stores, Inc.*, 3 P.3d 163 (Okla. 2000). If destruction of evidence occurs without a satisfactory explanation, this gives rise to an inference that the evidence would have been unfavorable to the spoliator. *Manpower, Inc. v Brawdy*, 62 P.3d 391 (Okla. Civ. App. 2002) (which extended the doctrine to workers' compensation cases). The inference is rebuttable.

Oklahoma courts have not addressed the issue of whether spoliation can constitute a separate cause of action. *Patel*, 987 P.2d at 1202 (noting that most states to consider the tort of spoliation have declined to recognize the cause of action).

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## OREGON

**By Brian B. Williams**

It is not clear whether an independent cause of action exists for negligent spoliation of evidence. *See, e.g., Marcum v Adventist Health System*, 215 Or. App. 166, 168 P.3d 1214 (2007)(and cases discussed therein), *review allowed*, 344 Or. 194, 179 P.3d 672 (2008).

Trial judges are permitted considerable discretion in dealing with discovery matters, and that discretion undoubtedly extends to spoliation.

A statutory presumption states that “evidence willfully suppressed would be adverse to the party suppressing it.” ORS 40.135. Spoliation is covered by two uniform civil jury instructions. Oregon judges typically have a strong preference to use the uniform instructions, and failing that, a custom instruction patterned on a uniform instruction. The uniform instructions follow.

“The Plaintiff contends that Defendant has willfully suppressed information by failing to preserve evidence in its sole control. The law recognizes a presumption that evidence willfully suppressed would be adverse to the party suppressing it. The Defendant contends that the loss of the evidence was unavoidable or accidental and that the information contained in that evidence was not adverse to Defendant. If you find that Defendant has willfully suppressed information by failing to preserve evidence in its sole control, then the Defendant has the burden of proving that the loss was unavoidable or accidental and that the information contained in that evidence was not adverse to Defendant.” UCJI No. 10.02; ORS 40.135, OEC 311(c).

“In evaluating the evidence, you may consider the power of each side to produce evidence. If weaker and less satisfactory evidence is offered by either party when it appears that the party could have produced stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.” UCJI Nol. 12.01.

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## PENNSYLVANIA

**By Kandice J. Giurintano**

Pennsylvania has adopted the Third Circuit's approach to the spoliation of evidence. *See Schmid v. Milwaukee Elec. Tool Corp.* 13 F.3d 76, 79 (3rd Cir. 1994). Determining what, if any, sanctions are appropriate for spoliation of evidence requires consideration of three factors: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by opposing party; and, (3) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct. *See Schroeder v. Pa. Dep't of Transp.*, 710 A.2d 23, 27 (Pa. 1998).

Evaluation of fault requires the consideration of two factors: (1) the extent of the offending party's duty or responsibility to preserve the relevant evidence; and, (2) the presence or absence of bad faith. *See Creazzo v. Medtronic, Inc.*, 903 A.2d 24, 29 (Pa. Super. 2006). A duty to preserve evidence exists where: (1) the party knows that litigation is pending or likely; and, (2) it is foreseeable that discarding the evidence would be prejudicial to an opposing party. *See id.* Pennsylvania courts do not recognize an independent cause of action for negligent spoliation of evidence by third parties. *See Elias v. Lancaster Gen. Hosp.*, 710 A.2d 65, 68 (Pa. Super. 1998).

Pennsylvania trial courts are vested with the power to impose sanctions for spoliation of evidence. Typically, dismissal or summary judgment will not result unless the fault of the responsible party is severe or the prejudice against the opposing party is severe. *See Mt. Olivet Tabernacle Church v. Wiegand Div.*, 781 A.2d 1263, 1273 (Pa. Super. 2001). Dismissal and summary judgment are reserved for only the most egregious of conduct. *See Creazzo*, 710 A.2d at 29. Instead, the general rule is that the spoliation of evidence creates adverse inferences against the party responsible for the destruction or withholding of evidence. A jury may also be instructed that it may draw unfavorable inferences against the responsible party.

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## **RHODE ISLAND**

**By Gary N. Stewart**

In Rhode Island, under the spoliation doctrine: “the deliberate or negligent destruction of relevant evidence by a party to litigation may give rise to an inference that the destroyed evidence was unfavorable to that party. *Tancrelle v. Friendly Ice Cream Corp.*, 756 A.2d 744, 748 (R.I. 2000) (citing *R.I. Hosp. Trust Nat'l Bank v. Eastern Gen. Contractors, Inc.*, 674 A.2d 1227, 1234 (R.I. 1996)). Thus, based on this in order for a spoliation instruction to be proper, a party must show: 1) the evidence was relevant to the issue at hand; 2) it was destroyed deliberately or negligently; and 3) by a party to the litigation.

The Rhode Island Supreme Court has held that an adverse inference from spoliated evidence "ordinarily would arise where the act was intentional or intended to suppress the truth, but 'does not arise where the destruction was a matter of routine with no fraudulent intent.'" *Kurczy v. St. Joseph Veterans Ass'n, Inc.*, 820 A.2d 929, 946 (R.I. 2003) (quoting *State v. Barnes*, 777 A.2d 140, 145 (R.I. 2001)). Since trucking companies destroy logs and other information after a six month period as a matter of routine under the Federal Motor Carrier Safety Act, it is unlikely that a party in Rhode Island would be granted a spoliation instruction unless the above elements have been shown.

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## SOUTH CAROLINA

**By Kurt M. Rozelsky and Alex N. MacClenahan**

In federal diversity actions involving spoliation, state law applies where spoliation is considered substantive in nature. However, when considered procedural in nature, federal law applies. In the United States District Court for the District of South Carolina, as part of the Fourth Circuit, the issue of spoliation is a rule of evidence (i.e. procedural) and is governed by federal law. *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 449-450 (4th Cir. 2004).

There is no recognized duty to preserve potential evidence South Carolina state courts, however, South Carolina would likely follow the Fourth Circuit where the duty to preserve evidence arises as soon as a party “reasonably should know that the evidence may be relevant to anticipated litigation.” *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4<sup>th</sup> Cir. 2001). This duty exists even if a party does not own or control the evidence. *Id.* In such a situation, the party is obligated to provide the opposing party “notice of access to the evidence or the possible destruction of the evidence if the party anticipates litigation involving that evidence.” *Id.*

Although the South Carolina courts have not addressed whether the duty extends to evidence held by third parties, the courts would likely follow the Fourth Circuit that requires the preservation even if a party does not own or control the evidence. *Silvestri*, 271 F.3d at 591.

In addition, South Carolina courts have not specifically allowed a claim for spoliation where a party has failed to follow its document retention policy.

South Carolina courts have not imposed sanctions for failure to preserve property or information that a party was required by statute or regulation to retain. However, courts have reviewed spoliation issues under the general discovery sanctions set forth in Rule 37(b) of the South Carolina Rules of Civil Procedure, and issued an order prohibiting the destruction of specific evidence. In determining the appropriateness of a discovery sanctions generally, the South Carolina state courts should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice. *Griffin Grading and Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 511 S.E.2d 716 (S.C. Ct. App. 1999). Further, the courts have held that the sanction should be aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits of a case. *Id.*; *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 399 S.E.2d 439 (S.C. Ct. App. 1990). Where the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction. *Id.*; *Baughman v. Am. Tel. & Tel. Co.*, 410 S.E.2d 537 (1991).

In those instances, the court has specifically allowed a curative instruction that “when evidence is lost or destroyed by the party an inference may be drawn that the evidence which was lost or destroyed by that party would have been adverse to that party.” *Kershaw County Bd. of Educ. v. U.S. Gypsum Co.*, 396 S.E.2d 369, 372 (S.C. 1990). Also, the Fourth Circuit has held that a trial court may issue a curative instruction to the jury, withhold testimony regarding that evidence or even dismiss all claims to which that evidence is related. *Silvestri*, 271 F.3d at 591.

Under the Fourth Circuit analysis, before imposing sanctions, the court must find some degree of fault. *Silvestri*, 271 F.3d at 591. To justify dismissal, the trial court must also examine the conduct of the sanctioned party and the prejudice to the innocent party. *Id.* at 593. Sometimes less culpable conduct can warrant dismissal if the opposing party suffers extraordinary prejudice. *Id.* Likewise, if the sanctioned party’s conduct was especially egregious, dismissal may be warranted even if the opposing party did not suffer extraordinary prejudice. *Id.*

South Carolina does not have any rules of civil procedure specifically addressing spoliation of evidence. However, under Rule 37(b) of the South Carolina Rules of Civil Procedure, a court can issue the following sanctions for discovery abuse:

- (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
  - (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
  - (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
  - (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
- In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

S.C.R. Civ. P. R. 37(b).

Important to note, the selection of a sanction for discovery violations is within the trial court's discretion. *Griffin*, 511 S.E.2d at 718; *Kershaw*, 396 S.E.2d at 371. Also, on appeal, the court will not interfere with that decision unless the trial court abused its discretion. *Id.*; *Clark v. Ross*, 328 S.E.2d 91 (S.C. Ct. App.1985). An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court

was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law. *Id.*; *Dunn v. Dunn*, 381 S.E.2d 734, 735 (S.C. 1989).

Under South Carolina law, a jury may draw an inference that the lost evidence was adverse to that party. *Kershaw*, 396 S.E.2d at 372. However, it is uncertain whether such an instruction would be appropriate where there is not a court order in place prohibiting such destruction.

In the Fourth Circuit, a curative instruction authorizing the jury to infer that the missing evidence would have damaged the party's case is warranted if the evidence is relevant to an issue at trial and would have been introduced into evidence but for the spoliation. *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995).

The South Carolina courts have upheld a dismissal of an answer where a party intentionally destroyed data on a computer hard drive after the court ordered that it be maintained. *QZO, Inc. v. Moyer*, 594 S.E.2d 541 (S.C. Ct. App. 2004). The court noted that "[a]lthough it is a severe sanction, the Court strikes [the pleadings] ... in response to [the] intentional defiance of this Court's order ... and his willful destruction of evidence." *Id.*

Neither South Carolina nor the Fourth Circuit recognize an independent action for spoliation. *Kershaw*, 396 S.E.2d at 372; *Silvestri*, 271 F.3d at 591.

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## SOUTH DAKOTA

**By Jay Shultz**

In South Dakota, an instruction on the inference that may be drawn from the spoliation of evidence is proper only when substantial evidence exists to support a conclusion (1) that the evidence was in existence, (2) that it was in the possession or under the control of the party against whom the inference may be drawn, (3) that the evidence would have been admissible at trial, and (4) that the party responsible for destroying the evidence did so intentionally and in bad faith. *State v. Mulligan*, 736 N.W.2d 808, 822 (S.D. 2007); *State v. Engesser*, 661 N.W.2d 739, 755 (S.D. 2003).

When spoliation of evidence is established, a fact finder may infer that the evidence destroyed was unfavorable to the party responsible for its destruction. *Engesser*, 661 N.W.2d at 753.

A spoliation instruction is not appropriate when the destruction is not intentional. The same rule applies in criminal and civil cases. *Id.* at 754.

It is a general rule that the intentional spoliation or destruction of evidence relevant to a case raises a presumption, or, more properly, an inference, that this evidence would have been unfavorable to the case of the spoliator. Such a presumption or inference arises, however, only where the spoliation or destruction was intentional and indicates fraud and a desire to suppress the truth, and it does not arise where the destruction was a matter of routine with no fraudulent intent. *Id.* (quoting *Jackson v. State*, 791 So. 2d 830, 838 (Miss. 2001)).

Even when it is not proper for the trial court to give an adverse inference instruction, a defendant can still, when relevant evidence was destroyed or not presented, use the absence of that evidence in argument against the prosecution in a criminal case. *Id.* (citing *State v. Davlin*, 639 N.W.2d 631, 648 (Neb. 2002)).

The spoliation doctrine is “reserved for deliberate, intentional actions and not mere negligence even though the result may be the same as regards the person who desires the evidence.” *Id.* at 755 (quoting *Jagmin v. Simonds Abrasive Co.*, 211 N.W.2d 810, 821 (1973)).

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## TENNESSEE

By Charles R. Krivcher

By definition, “[s]poliation is the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *Clark Constr. Group, Inc. v. Memphis*, 229 F.R.D. 131 (W.D. Tenn. 2005) (citing *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)). Stated as an affirmative duty, *Clark* continues, “[a] party has a duty to preserve all evidence that it knows or should know is relevant to any present or future litigation.” *Clark*, 229 F.R.D. at 136 (citing *Silvestri v. General Motors, Corp.*, 271 F.3d 583, 591 (4th Cir. 2001)). While there have been many reported decisions in Tennessee with regard to spoliation of evidence and its consequences, the law has been in its present form since 2003 and reads as follows:

The doctrine of spoliation of evidence permits a court to draw a negative inference against a party that has intentionally, and for an improper purpose, destroyed, mutilated, lost, altered, or concealed evidence.

*Bronson v. Umphries*, 138 S.W.3d 844 (Tenn. Ct. App. 2003); *Leatherwood v. Wadley*, 121 S.W.3d 682 (Tenn. Ct. App. 2003).

Tennessee follows the majority rule in this regard. As was recently noted in an excellent treatise on the subject, “the trend of most jurisdictions is to eschew a separate tort action in favor of a negative inference instruction . . . .” Laura Ruhl Genson & Anita M. Kerezman, Eds., *Truck Accident Litigation*, Kenneth J. Allen & Bryan L Bradley, Ch. 7, *Spoliation of Evidence* 63 (2d ed. 2006). Further, “the inference is rebuttable and arises only when the spoliation occurs in circumstances indicating fraud and a desire to suppress the truth. It does not arise when the destruction was a matter of routine with no fraudulent intent.” *Southeast Mental Health Center v. Pacific Ins. Co.*, 439 F. Supp. 2d 831 (W.D. Tenn. 2006).

Two final items are noteworthy. First, the Tennessee Court of Appeals has declined to rule upon the issue of whether or not this state should recognize spoliation as an independent tort. *Trumbo, Inc. v. Witco Corp.*, 2003 WL 21946734 (Tenn. Ct. App. 2003). Second, the Supreme Court of Tennessee has denied the opportunity for appeal with regard to spoliation cases, strongly suggesting that this area of the law is very well settled in Tennessee.

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## TEXAS

**By David L. Sargent**

Texas does not recognize an independent tort for the spoliation of evidence. *Trevino v. Ortega*, 969 S.W.2d 950, 952 (Tex. 1998). Rather, trial courts are given broad discretion to address evidence spoliation through the use of jury instructions or other appropriate sanctions. *See id.* at 953.

Before a court can reach a finding of discovery abuse constituting spoliation of evidence, the complaining party must establish that the nonproducing party had a duty to preserve the evidence in question. *Vela v. Wagner & Brown, Ltd.*, 203 S.W.3d 37, 58 (Tex. App. 2006). A duty to preserve evidence arises only when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that the evidence in its possession or control will be material and relevant to that claim. *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 722 (Tex. 2003). Courts employ an objective test to determine whether the party should have reasonably anticipated litigation – whether a reasonable person would conclude from the severity of the accident and other circumstances surrounding it that there was a substantial chance for litigation. *Texas Elec. Co-op v. Dillard*, 171 S.W.3d 201, 208 (Tex. App. 2005). This determination is a question of law for the court to decide. *Whiteside v. Watson*, 12 S.W.3d 614, 621-22 (Tex. App. 2000) (pet. vacated pursuant to settlement) (citing *Trevino*, 969 S.W.2d at 954-55 (Baker, J., concurring)).

When evidence becomes lost, altered, or destroyed due to the misconduct of a party, a Court has the discretion to fashion an appropriate remedy to restore the parties to a rough approximation of their position if all evidence were available. *TransAm. Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991); *Johnson*, 106 S.W.3d at 721. The appropriate remedy is to be fashioned on a case-by-case basis. *Johnson*, 106 S.W.3d at 721; *Trevino*, 969 S.W.2d at 953. Generally, the affected party may move for sanctions or request a spoliation presumption or instruction, depending on the circumstances. *Vela*, 203 S.W.3d at 58.

A common remedy is to provide the jury with a spoliation presumption instruction. *Johnson*, 106 S.W.3d at 721. Texas courts typically limit the use of a spoliation instruction to two circumstances: (1) the deliberate destruction of relevant evidence; and (2) the failure of a party to produce relevant evidence or explain its nonproduction. *Id.* In the case of deliberately destroyed evidence, the party is presumed to have done so because the evidence was unfavorable to its case. *Id.* at 721-22. Under the second circumstance, the same presumption arises because the party who controlled the missing evidence cannot explain its nonproduction. *Id.* at 722.

However, under either circumstance, the presumption may be rebutted with a showing that the evidence was not destroyed with a fraudulent intent or purpose.

*Cresthaven Nursing Residence v. Freeman*, 134 S.W.3d 214, 227 (Tex. App. 2003); *Odenez v. M.W. McCurdy & Co.*, 984 S.W.2d 264, 273 (Tex. App. 1998).

In cases involving the unintentional spoliation or the failure to produce evidence within a party's control, the rebuttable presumption that the missing evidence would be unfavorable to the nonproducing party does not arise unless the other party has introduced evidence harmful to its opponent. See *Ordenez*, 984 S.W.2d at 273, n. 11 (citing *Brewer v. Dowling*, 862 S.W.2d 156, 159 (Tex. App. 1993) (writ denied)). In that case, the failure of the opponent to rebut the harmful evidence with evidence in its control raises a presumption that the unproduced evidence would also be unfavorable. *Id.* Further, the presumption is not warranted if the nonproducing party testifies as to the substance or content of the missing evidence. *Brewer*, 862 S.W.2d at 159.

In rare, exceptional cases, the Texas Supreme Court has approved "death penalty" sanctions – *i.e.*, striking pleadings and dismissal of a party's case. *Cire v. Cummings*, 134 S.W.3d 835, 842-43 (Tex. 2004).

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## UTAH

**By Heinz J. Mahler**

Utah appellate courts have yet to specifically adopt the doctrine of "spoliation." The Utah Court of Appeals stated that the doctrine of "spoliation of evidence," holds that "where a party to an action fails to provide or destroys evidence favorable to the opposing party, the court will infer the evidence's adverse content . . . and such an inference will be drawn where one party wrongfully denies another the evidence necessary to establish a fact in dispute." *Burns v. Cannondale Bicycle Co.*, 876 P.2d 415, 419 (Utah Ct. App. 1994) (internal quotations omitted). However, the *Burns* court stated that Utah has yet to adopt this doctrine.

In *Burns*, a party brought suit against a bicycle maker and bicycle repairman for alleged defects in bicycle parts. 876 P.2d at 419. The plaintiff alleged spoliation because the repairman had allegedly thrown away the used parts after making repairs. *Id.* The court said spoliation would not apply where there was no indication that suit would be filed at the time that the repairs were made and there was no reason why the parts that were replaced should have been retained.

The Tenth Circuit (which includes Utah federal courts) has repeatedly considered issues of spoliation of evidence and, in doing so, has held that a spoliation sanction is proper where (1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence. See *Burlington Northern & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007); *103 Investors I, L.P. v Square D Co.*, 470 F.3d 985, 989 (10th Cir.2006).

It appears likely that a Utah court, when faced with a properly presented spoliation issue would apply the doctrine and impose sanctions as discussed on the Tenth Circuit cases. As such, where a party to a case knows or should know that litigation is imminent and destroys evidence relevant to that case, Utah courts would most likely impose sanctions against that party which may include either the exclusion of evidence relating to the destroyed evidence or jury instructions relating to the presumed adverse content of the destroyed evidence.

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## VERMONT

**By William D. Riley**

In a case involving Vermont law, the United States Court of Appeals for the Second Circuit defined spoliation to mean “the destruction or significant alteration of evidence, or failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc.*, 473 F.3d 450, 457 (2d Cir. 2007) (holding that District Court abused its discretion in restricting party’s ability to introduce expert testimony regarding alternative ignition sources of fire as sanction for party’s destruction of evidence). The United States District Court for the District of Vermont has identified three elements that must be established to make out a claim of spoliation. *Ross v. Int’l Bus. Mach. Corp.*, 2006 WL 197137 (D. Vt. 2006). First, it must be shown that “the party having control over the evidence . . . had an obligation to preserve it at the time it was destroyed. *Id.* Second, it must be established that “the evidence was destroyed with a culpable state of mind.” *Id.* Third, it must be shown that “the destroyed evidence was relevant to the other party’s claim or defense.” *Id.* “If a court finds that a party has engaged in spoliation, it has broad discretion to fashion an appropriate sanction.” *Id.*

The Vermont Supreme Court has observed in a number of cases that a jury may draw an inference that relevant evidence destroyed by a party would have been unfavorable to the party that destroyed the evidence. *See, e.g., Lavelette v. Noyes*, 205 A.2d 413, 415 (1964); *F.R. Patch Mfg. Co. v. Protection Lodge No. 213*, 60 A. 74, 84 (1903).

Although not explicitly stated, the Vermont Supreme Court, in *Menard v. Coop. Fire Ins. Ass’n of Vt.*, 592 A.2d 899 (1991), appeared to recognize the tort of negligent third party spoliation. *Id.* at 900 (affirming dismissal on proximate cause grounds of negligence claim against insurance company that lost outlet box alleged to have been cause of fire).

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## VIRGINIA

By Terrence L. Graves and Andrew H. D. Wilson

In Virginia, no statute governs spoliation or destruction of evidence. Virginia's Model Jury Instructions do not contain an instruction for spoliation of evidence.<sup>1</sup> Case law addressing the issue of spoliation of evidence is limited. Many earlier cases containing general principles with regard to the destruction of evidence have addressed the issue in the context of a "missing witness", as opposed to the loss or destruction of physical or documentary evidence. Three Virginia appellate opinions, however, are instructive.<sup>2</sup> These cases illustrate that under appropriate factual circumstances, Virginia will permit the fact finder to infer, as opposed to presume, that missing or destroyed evidence would have been unfavorable to the party responsible for its loss.

In *Blue Diamond Coal Co. v. Aistro*, 31 S.E.2d 297 (1944), the representative of an estate filed a wrongful death claim against her husband's employer arising from his alleged death as a result of carbon monoxide poisoning. The plaintiff was told by one of the employer's physicians that an autopsy of her husband would reveal whether or not he died of carbon monoxide poisoning. The plaintiff gave written authorization for an autopsy, but another employer physician failed to perform the autopsy, testifying that he never obtained permission from the employer to do so. A later autopsy performed after the husband was embalmed was unable to examine the deceased's blood in order to make the carbon monoxide poisoning determination. Following a jury verdict in favor of the plaintiff, the defendant employer appealed. On appeal, the Virginia Supreme Court held, in part, that the failure of the agents of the employer to permit the autopsy prior to the embalming process justified an inference that the employer thought that this evidence would be adverse to it. *Id.* at 299.

In *Wolfe v. Virginia Birth Related Neurological Injury Compensation Program*, 587 S.E.2d 467 (2003), the mother of a brain-injured infant filed a claim against the defendant program with the Virginia Workers' Compensation Commission contending that the brain injury was caused by oxygen deprivation during birth. The treating physician, who was a participant in the defendant program, did not request umbilical cord

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<sup>1</sup> For a proposed spoliation jury instruction, see RONALD J. BACIGAL, ET AL., VIRGINIA JURY INSTRUCTIONS, § 10.13 (2007-08 ed. 2007). The Virginia Model Jury Instructions do contain an instruction for the unexplained failure to produce an important witness. Virginia Model Jury Instructions, Jury Instruction Number 2.080. This instruction, however, has been criticized and the model jury instructions contain an admonishment that the instruction should be rarely given.

<sup>2</sup> The issue of spoliation also has been addressed by a Federal Court in Virginia, which defined spoliation as "the willful destruction of evidence or the failure to preserve potential evidence for another's use in pending or future litigation." *Trigon Inc. Co. v. United States*, 204 F.R.D. 277, 284 (E.D. Va. 2001). See also *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4<sup>th</sup> Cir. 1995).

blood gas testing after the infant's birth, which the claimant contended would have proven the infant suffered birth related oxygen deprivation. The Commission ruled that the claimant had failed to prove a birth related brain injury caused by oxygen deprivation, and the claimant appealed. On appeal, the claimant argued that she was entitled to an inference that the results of the umbilical cord blood gas testing would have proven that the infant suffered birth related oxygen deprivation. The Virginia Court of Appeals remanded the matter back to the Commission for a determination as to whether or not claimant had shown appropriate facts to justify an inference that the absent cord blood testing would have shown oxygen deprivation and, if so, whether the evidence, including the inference, was sufficient to prove claimant's entitlement to a statutory presumption and benefits under the defendant program. The court noted that Virginia law recognizes a spoliation or missing evidence inference (as distinguished from a presumption) where through intentional or negligent conduct such evidence is destroyed. The court held the claimant was entitled to the inference if the Commission found that through negligent or intentional conduct the treating physician failed to order the umbilical cord blood gas tests. The Commission noted that while the treating physician was not a party to the proceedings, he was a participant in the program and, based on public policy and other reasons, his conduct could be used to support an adverse inference in a claim under the program.

In *Gentry v. Toyota Motor Corp.*, 471 S.E.2d 485 (1996), the plaintiff filed a products liability action against a car manufacturer arising out of an accident in which the plaintiff's vehicle suddenly accelerated. While conducting an inspection of the vehicle, an expert witness retained by the plaintiff, without authority or permission from the plaintiff or her attorneys, used a hacksaw to cut through and remove from the vehicle the temperature control cable and an accelerator pedal rod. The expert witness who removed the equipment was of the opinion that the temperate control cable impinged on the accelerator pedal rod, causing the sudden acceleration and the accident. Subsequently, the plaintiff proceeded with a different expert witness and a different theory as to the cause of the acceleration, namely a problem with the vehicle's carburetor. Plaintiff's second expert witness was of the opinion that nothing the earlier expert had done affected his opinions. The manufacturer's expert also came up with a separate theory as to how the accident occurred, and further testified that nothing the earlier expert had done affected his opinions. The trial court dismissed the plaintiff's action on the manufacturer's motion to dismiss for spoliation of evidence, and the plaintiff appealed. On appeal, the Virginia Supreme Court reversed. The Court noted that the record was unequivocal that the wrongful act in using the hacksaw to remove parts from the vehicle was committed by the expert without the consent or knowledge of the plaintiff or her attorney, and that neither the plaintiff nor her attorney had acted in bad faith. The Supreme Court also noted that the manufacturer could point to no prejudice as a result of the plaintiff's initial expert's conduct, as the subsequent expert witness opinions of both the plaintiff and the defendant were not affected by the earlier expert witness' destruction of the vehicle.

Virginia has not yet recognized a separate tort cause of action for the intentional or negligent destruction of evidence. See *Austin v. Consolidation Coal Co.*, 501 S.E.2d

161 (1998) (holding that no legal duty exists for an employer to preserve evidence for the benefit of an employee that could be used by the employee in a potential action against a third party).

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## WASHINGTON

**By Christopher W. Tompkins and Brandon R. Carroll**

Washington case law on spoliation is sparse. *Homeworks Constr. Co. v. Wells*, 138 P.3d 654, 656 (2006). No Washington case has definitively answered the question of whether spoliation is itself a tort that gives rise to damages. 5 WAPRAC 402.6. An unpublished opinion states: "Washington does not treat the destruction of evidence in a civil case as an intentional tort of spoliation for which a party can recover damages. See *Henderson v. Tyrrell*, (citation omitted). It is rather an evidence question. *Id.*" *Failing v. Degerstrom*, 1998 WL 130100 (Wash. Ct. App. 1998).

Washington courts have defined spoliation as "[t]he intentional destruction of evidence." *Henderson v. Tyrrell*, 910 P.2d 522, 531 (Wash. Ct. App. 1996) (citing Black's Law Dictionary 1401 (6th ed. 1990)). Spoliation occurs when "relevant evidence which would probably be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation[.]" *Henderson*, 910 P.2d at 531. Subsequent case law has not clarified "satisfactory explanation." *Id.* The *Henderson* court ambiguously stated, "the phrase certainly anticipates circumstances in which a party's actions are not so serious as to require a judicial remedy." *Id.*

The Washington Supreme Court has held that the *only* inference which the finder of fact may draw from the spoliation of evidence is that such evidence would be unfavorable. *Pier 67, Inc. v. King County*, 573 P.2d 2, 5 (Wash. 1977) (emphasis added). "[T]he adversary's conduct may be considered generally as tending to corroborate the proponent's case and to discredit that of the adversary." *Henderson*, 910 P.2d at 531. (citing 2 John W. Strong, McCormick on Evidence § 265, at 192 (4th ed. 1992)). In deciding whether to apply such a negative inference, the court looks to (1) the potential importance or relevance of the missing evidence, and (2) the culpability or fault of the adverse party. *Marshall v. Bally's Pacwest, Inc.*, 972 P.2d 475, 479-80 (Wash. Ct. App. 1999). In weighing the importance of the evidence, the court will consider whether the adverse party was afforded adequate opportunity to examine the evidence. [cite omitted]. Further, culpability turns on whether the party acted in bad faith, or whether there is an innocent explanation for the destruction of the evidence. *Marshall*, 972 P.2d at 480. (citing *Henderson*, 910 P.2d at 532-33).

In *Henderson v. Tyrrell*, the preeminent Washington spoliation case, the court refused to apply a negative inference against the plaintiff-owner of a vehicle which was destroyed two years after the accident. The court found "there was no evidence that the plaintiff acted in bad faith in destroying the car," despite the fact defense counsel requested, in writing, one year prior to the date of destruction, that plaintiff "preserve the [car] until further notice." *Id.* at 533. The court stated that the "real culprit here was the passage of time." *Id.* at 534.



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## WEST VIRGINIA

**By Patrick T. White**

In West Virginia, a party reasonably anticipating litigation must preserve relevant evidence. *Tracy v. Cottrell*, 524 S.E.2d 879, 887 (W. Va. 1999). A party's negligent failure to preserve evidence will not give rise to an independent tort, but its intentional destruction of evidence will give rise to the independent tort of intentional spoliation of evidence. *Hannah v. Heeter*, 584 S.E.2d 560, 566, 571 (W. Va. 2003). Spoliation of evidence – whether negligent or intentional – may result in an adverse jury instruction. *Id.* at 567.

The party asserting intentional spoliation of evidence bears the burden of proving six of the seven elements of that claim. *Hannah*, 584 S.E.2d at 573. After proving the first six elements, a rebuttable presumption arises that “but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the potential or pending litigation.” *Id.*

A court may deliver an adverse jury instruction for spoliation of evidence after considering four factors, on each of which the party seeking the instruction bears the burden of proof. *Hannah*, 584 S.E.2d at 567. The court should first consider the degree of control, ownership, possession or authority the party had over the destroyed evidence. *Id.* If all of these are absent, then further analysis is unnecessary and the court may not give an adverse jury instruction. *Id.* If any are present, then the court should next consider the prejudice to the opposing party as a result of the missing or destroyed evidence and whether the prejudice is substantial. *Id.* The court should consider whether the party could reasonably anticipate that the evidence would be needed during litigation. *Id.* Finally, the court should consider the party's degree of fault in causing the destruction of the evidence. *Id.*

Claims against third-parties for both intentional and negligent spoliation of evidence are viable in West Virginia. *Hannah*, 584 S.E.2d at 571 (W. Va. 2003).

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## WISCONSIN

**By Michael R. Vescio and Lew R. C. Bricker**

Under Wisconsin law, a party has a duty to preserve evidence essential to the claim litigated or expected to be litigated. *See City of Stoughton v. Thomasson Lumber Co.*, 675 N.W.2d 487, 500 (citing *Sentry Ins. Co. v. Royal Ins. Co.*, 539 N.W.2d 911 (Wis. Ct. App. 1995); *Garfoot v. Fireman's Fund Ins. Co.*, 599 N.W.2d 411 (Wis. Ct. App. 1999)).

When a party has caused the deliberate destruction of documents or other evidentiary materials, the court may find spoliation upon applying a two-part analysis, entailing consideration of: (1) whether the party responsible for the destruction of the evidence knew, or should have known, at the time it destroyed the evidence that litigation was a distinct possibility; and (2) whether the party responsible for the destruction of the evidence destroyed documents which it knew, or should have known, would constitute evidence relevant to the pending or potential litigation. *See Morrison v. Rankin*, 738 N.W.2d 588 (Wis. Ct. App.) (citing *Ins. Co. of N. Am. v. Cease Elec. Inc.*, 674 N.W.2d 886 (Wis. Ct. App. 2003), *aff'd*, 688 N.W.2d 462 (Wis. 2004)).

After a finding of spoliation, rulings on whether to grant relief, and on what relief to grant, are matters commended to the circuit court's discretion. *Garfoot*, 599 N.W.2d at 416. Wisconsin law currently gives its affirmative recognition only to two forms of relief founded on a finding of a spoliation of evidence: (1) the imposition of a sanction, including but not limited to dismissal and default; or (2) the spoliation inference. *See Neumann v. Neumann*, 626 N.W.2d 821, 841 (Wis. Ct. App. 2001). The Wisconsin Supreme Court has not yet ruled on whether state law will recognize an independent action in tort founded on spoliation, and absent some future recognition from the Supreme Court such tort actions are not cognizable. *See id.* (noting "Wisconsin has recognized the first two remedies," sanctions and the inference).

As for sanctions, the most serious sanction – dismissal – “requires a finding of egregious conduct, which means a conscious attempt to affect the outcome of litigation or a flagrant disregard of the judicial process.” *Thomasson Lumber Co.*, 675 N.W.2d at 500 (citing *Garfoot*, 599 N.W.2d at 419). If sufficient egregiousness or bad faith has been found, however, no proof of prejudice to the adverse party is required before imposing the sanction of dismissal. *Morrison*, 738 N.W.2d at 591. Other lesser sanctions might include an evidentiary sanction (*e.g.*, excluding all evidence concerning the condition of the destroyed matter, *see Sentry Insurance*, 539 N.W.2d 91, 916 (Wis. Ct. App. 1995), or perhaps a monetary sanction.

Insofar as the spoliation inference is concerned, if the court allows the instruction in its discretion, the trier of fact is permitted – but not required – to draw an inference

from the spoliation of evidence that the destroyed evidence would have been unfavorable to the party who destroyed it. *See Neumann*, 626 N.W.2d at 841.

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## WYOMING

By Greg Greenlee and Heather A. Zadina

There is a dearth of law in Wyoming on spoliation, and most of what exists is dated – one of the better reasoned cases, *Hay v. Peterson*, 45 P. 1073 (Wyo. 1896), is over a century old.

The only remedies for spoliation are to permit the fact finder to draw an adverse inference against the party responsible for losing or destroying the evidence, or to prohibit a party from using altered evidence. See, e.g., *Abraham v. Great Western Energy, LLC*, 101 P.3d 446, 455 (Wyo. 2004); *Studebaker Corp. of America v. Hanson*, 160 P. 336 (1916); *Coletti v. Cudd Pressure Control*, 165 F.3d 767, (10<sup>th</sup> Cir. 1999). The *Abraham* Court also indicated a possibility of sanctions, taking into consideration the following factors: (1) whether the innocent party was prejudiced by loss of the evidence; (2) whether this prejudice can be cured; (3) the practical importance of the lost evidence; (4) the fault of the spoliator; and (5) the least onerous sanction that will effectively deter the offending conduct. *Abraham*, at 456.

Spoliation as a separate tort has not yet been considered by the Wyoming Supreme Court. In an unpublished Tenth Circuit opinion, *Talmadge v. State Farm Mut. Auto. Ins. Co.*, 107 F.3d 21 (10<sup>th</sup> Cir. 1997), the Court, citing to a 1990 Florida intermediate appellate decision and a Kansas U.S. District Court opinion, stated that at a minimum, for a negligent spoliation claim, the following must be established: (1) existence of a potential civil action; (2) a legal or contractual duty to preserve evidence relevant to that 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. It should also be noted that the above elements are substantially identical to the requirements for any negligence claim - duty, breach, proximate cause and damages. See, e.g., *Turcq v. Shanahan*, 905 P.2d 47 (Wyo. 1997).

Currently, no Wyoming decisions specifically discuss spoliation of electronic evidence, however, U.S.D.C.L.R. 26.1(d)(3) provides some guidance regarding e-discovery. For example, a party seeking e-discovery is to notify the opposing party “immediately” identifying “as clearly as possible the categories of information sought.” To prevent claims of spoliation, counsel should agree upon steps to “segregate and preserve” electronic information; “the scope of e-mail discovery;” “email search protocol;” the extent to which “restoration of deleted information” and back-up data will be necessary” and “who will bear the costs.” The Rule also provides that counsel should “investigate their client’s information management system” to gain knowledge of its operation, information storage and retrieval and that “counsel shall reasonably review the client’s computer files” to ascertain their contents. Any such evidence to be used to support claims or defenses is to be disclosed in self-executing routine discovery. *Id.*

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