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SPOLIATION OF EVIDENCE IN ALL 50 STATES

In 1984, California was the first state to recognize the tort of spoliation. *Smith v. Superior Ct.*, 151 Cal. App.3d 491, 198, Cal. Rptr. 829, 831 (Cal. 1984). However, the majority of jurisdictions that have subsequently examined the issue have declined to create or recognize such a tort. Only Alabama, Alaska, Florida, Indiana, Kansas, Louisiana, Montana, New Mexico, Ohio, and West Virginia have explicitly recognized some form of an independent tort action for spoliation. California overruled its precedent, and declined to recognize first-party or third-party claims for spoliation. *Temple Cmty. Hosp. v. Superior Ct.*, 20 Cal.4th 464, 84 Cal. Rptr.2d 852, 976 P.2d 223, 233 (Cal. 1999); *Cedars-Sinai Med. Center v. Superior Ct.*, 18 Cal.4th 1, 74 Cal. Rptr.2d 248, 954 P.2d 511, 521 (Cal. 1998).

Generally those states that have recognized or created the tort of spoliation in some form, limit such an action to third-party spoliation of evidence related to pending or actual litigation. First-party spoliation claims are those claims for destruction or alteration of evidence brought against parties to underlying litigation. Conversely, third-party spoliation claims are those destruction or alteration of evidence claims against non-parties to underlying litigation. Moreover, most of these states generally hold that third-party spoliator must have had a duty to preserve the evidence before liability can attach. The majority of states that have examined this issue have preferred to remedy spoliation of evidence and the resulting damage to a party's case or defense, through sanctions or by giving adverse inference instructions to juries.

Sanctions can include the dismissal of claims or defenses, preclusion of evidence, and the granting of summary judgment for the innocent party. The following is a compendium of decisions for the states that have examined the issue of spoliation.

ALABAMA

Definition: Alabama defines spoliation as: *"an attempt by a party to suppress or destroy material evidence favorable to the party's adversary."* *May v. Moore*, 424 So.2d 596, 603 (Ala. 1982); *Wal-Mart Stores, Inc. v. Goodman*, 789 So.2d 166, 176 (Ala. 2000).

Third-Party Tort: *Smith v. Atkinson*, 771 So.2d 429, 438 (Ala. 2000), holds that spoliation may be a basis for a cause of action where a third-party has negligently destroyed material evidence, but states that adverse inference instruction and discovery sanctions are the remedy when spoliation is charged against an opposing party. *Smith* established a test to determine when a party could be liable for negligent spoliation of evidence. *Smith*, at 771 So.2d at 432, analyzes the concepts of duty, breach, and proximate cause. With respect to proximate cause, it held: *"in order for a plaintiff to show proximate cause, the trier of fact must determine that the lost or destroyed evidence was so important to the plaintiff's claim in the underlying action that without that evidence the claim did not survive or would not have survived a motion for summary judgment under Rule 56, Ala. R. Civ. P." Smith*, at 771 So.2d at 434.

In order for a defendant to show proximate cause, the trier of fact must determine that the lost or destroyed evidence was so important to the defense in the underlying action that without that evidence the defendant had no defense to liability. *Id.*

Adverse Inference: If the trier of fact finds a party guilty of spoliation, it is authorized to presume or infer that the missing evidence reflected unfavorably on the spoliator's interest. *McCleery v. McCleery*, 200 Ala. 4, 75 So. 316 (Ala. 1917). Spoliation *"is sufficient foundation for an inference of [the spoliator's] guilt or negligence." May v. Moore*, 424 So.2d 596, 603 (Ala. 1982); *Goodman,* supra*; Christian v. Kenneth Chandler Constr. Co*., 658 So.2d 408, 412 (Ala. 1995).

Sanctions: Spoliation can have special consequences, *i.e*., sanction under Rule 37, Ala. R. Civ. P., when a party frustrates a discovery request by willfully discarding critical evidence subject to a production request. *Iverson v. Xpert Tune, Inc.*, 553 So.2d 82 (Ala. 1989). In such a situation, where the plaintiff is guilty of spoliation, the sanction of dismissal of the claim may be warranted. *Iverson*, supra. Dismissal for failure to comply with a request for production may be warranted even when there was no discovery pending or even litigation underway at the time the evidence in question was discarded or destroyed. *Vesta Fire Ins. Corp. v. Milam & Co. Constr., Inc.*, 901 So.2d 84, 93 -94 (Ala. 2004).

ALASKA

First-Party Intentional Tort: In *Hazen v. Anchorage*, 71 P.2d 456 (Alaska 1986), the plaintiff was permitted to allege spoliation against a municipal prosecutor, who was not a party to the underlying civil suit, but was an agent of the municipality (Anchorage). Furthermore, in *Nichols v. State Farm & Cas. Co.*, 6 P.3d 300 (Alaska 2000), the court implied that spoliation of evidence by a party's agent creates a claim for first-party spoliation. Additionally, the *Hazen* court permitted the plaintiff to bring a claim against the individual police officers involved in her arrest (third-party spoliation).

Third-Party Intentional Tort: In *Nichols,* the Alaska Supreme Court explicitly recognized intentional third-party spoliation of evidence as a tort. These previous holdings were relied on by the Alaska Supreme Court in *Hibbits v. Sides*, 34 P.3d 327 (Alaska 2001). In *Hibbits*, the Court held that when alleging third-party spoliation, a plaintiff must plead and prove that the defendant intended to interfere in his civil suit.

ARIZONA

Independent Tort Action: Arizona does not recognize an independent claim for either negligent or intentional spoliation of evidence. *Tobel v. Travelers Ins. Co.*, 988 P.2d 148, 156 (Ariz. App. 1999).

Sanctions/Adverse Inference: Generally speaking, innocent failure to preserve evidence does not warrant sanction or dismissal. *Souza v. Fred Carriers Contracts, Inc.*, 955 P.2d 3, 6 (Ariz. App. 1997). However, litigants have a duty to preserve evidence which they know or reasonably should know is relevant or reasonably calculated to lead to the discovery of admissible evidence and likely to be requested during discovery or the subject of a pending discovery request. *Id.*

Issues concerning destruction of evidence and appropriate sanctions therefore should be decided on a case-by-case basis, considering all relevant factors. *Id.* In doing so, the court noted the destruction of potentially relevant evidence occurs along a continuum of fault and the resulting penalties should vary correspondingly. *Id.,* quoting *Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir. 1988).

ARKANSAS

Definition: In Arkansas, spoliation is defined as *"the intentional destruction of evidence and when it is established, [the] fact-finder may draw [an] inference that [the] evidence destroyed was unfavorable to [the] party responsible for its action." Union Pacific R.R. Co. v. Barber*, 356 Ark. 268, 298, 149 S.W.3d 325, 345 (Ark. 2004).

Adverse Inference Instruction: Spoliation is the intentional destruction of evidence; when it is established, the fact-finder may draw an inference that the evidence destroyed was unfavorable to the party responsible for its

spoliation. *Tomlin v. Wal-Mart Stores, Inc.*, 81 Ark. App. 198, 100 S.W.3d 57 (Ark. 2003). An aggrieved party can request that a jury be instructed to draw a negative inference against the spoliator. *Id.; Superior Federal Bank v. Mackey*, 84 Ark. App. 1, 25-26, 129 S.W.3d 324, 340 (Ark. 2003).

Sanctions: Arkansas rules of civil procedure, professional conduct and criminal code are also available as sanctions both against attorneys and others who engage in spoliation of evidence. *Goff v. Harold Ives Trucking Co., Inc.*, 27 S.W.3d 387, 391 (Ark. 2000).

CALIFORNIA

First-Party Tort For Intentional Spoliation: The California Supreme Court has held that there is no tort *for "the intentional spoliation of evidence by a party to the cause of action to which the spoliated evidence is relevant [i.e., first-party spoliation], in cases in which ... the spoliation victim knows or should have known of the alleged spoliation before the trial or other decision on the merits of the underlying action." Cedars-Sinai Med. Ctr. v. Superior Ct.*, 18 Cal.4th 1, 74 Cal. Rptr.2d 248, 258, 954 P.2d 511 (Cal. 1998).

Third-Party Tort For Intentional Spoliation: The California Supreme Court has also held that there was no cause of action for intentional spoliation of evidence by a third-party. *Temple Cmty. Hosp. v. Sup. Ct.*, 20 Cal.4th 464, 84 Cal. Rptr.2d 852, 862, 976 P.2d 223 (Cal. 1999).

No Tort of Negligent Spoliation: The California Court of Appeals extended these decisions to preclude causes of action for negligent spoliation by first or third parties. *Forbes v. County of San Bernardino*, 101 Cal.App.4th 48, 123 Cal.Rptr.2d 721, 726-27 (Cal. 2002).

Sanctions: California recognizes the availability of standard non-tort remedies to punish and deter for the destruction of evidence. *Cedars-Sinai Medical Center v. Superior Court*, supra. The available remedies may include: (1) The evidentiary inference that the evidence which one party has destroyed or rendered unavailable was unfavorable to that party. California Evidence Code § 413 (evidence which one party has destroyed or rendered unavailable was unfavorable to that party); (2) Discovery sanctions under California Code of Civil Procedure § 2023; (3) Disciplinary action against the attorneys. Cal. Rules Prof. Conduct, Rule 5-220 and Cal. Bus. & Prof. Code §§ 6077 and 6106; and (4) Criminal penalties for destruction of evidence under California Penal Code § 135 (criminalizes the spoliation of evidence, which creates an effective deterrent against this wrongful conduct).

Post Judgment Tort of Spoliation: California courts have not addressed the issue whether a tort for intentional spoliation of evidence exists *"in cases of first-party spoliation in which the spoliation victim neither knows nor should have known of the spoliation until after a decision on the merits of the underlying action." Cedars-Sinai Med. Ctr.*, 74 Cal. Rptr.2d at 258 n. 4, 954 P.2d 511 (Cal. 1998). As a consequence, this court must decide this issue as it believes the California Supreme Court would do. *HS Servs., Inc. v. Nationwide Mut. Ins. Co.*, 109 F.3d 642, 644 (9th Cir. 1997).

The Federal District Court in Central California concluded that the California Supreme Court would not recognize an intentional spoliation of evidence tort where the spoliation victim did not know nor should have known of the spoliation until after a decision on the merits of the underlying action. *Roach v. Lee*, 369 F. Supp.2d 1194, 1203 (C.D. Cal. 2005).

COLORADO

Adverse Inference: Colorado recognizes adverse inference as a sanction for intentional destruction of evidence. The state of mind of the party that destroys the evidence is an important consideration in determining whether adverse inference is the appropriate sanction. In addition, in order to remedy the evidentiary imbalance created by the loss or destruction of the evidence, an adverse inference may be appropriate even in the absence of a showing of bad faith. *Id*. Special caution must be exercised to ensure that the inference is commensurate with

the information that was reasonably likely to have been contained in the destroyed evidence. *Pfantz v. K-Mart Corp.*, 85 P.3d 564 (Colo. App. 2003).

CONNECTICUT

Adverse Inference: Although Connecticut has recognized that an adverse inference may be drawn when relevant evidence is intentionally destroyed, the courts have also recognized as a general rule that the inference is a permissive one. *Leonard v. Commissioner of Revenue Services*, 264 Conn. 286, 306, 823 A.2d 1184, 1197 (Conn. 2003). An adverse inference may be drawn against a party who has destroyed evidence only if the trier of fact is satisfied that the party who seeks the adverse inference has proven three things: (1) the spoliation must have been intentional; (2) the destroyed evidence must be relevant to the issue or matter for which the party seeks the inference; and (3) the party who seeks the inference must have acted with due diligence with respect to the spoliated evidence. *Beers v. Bayliner Marine Corp.*, 236 Conn. 769, 777-78, 675 A.2d 829 (Conn. 1996).

DELAWARE

Tort of Spoliation: Delaware declines to recognize a separate cause of action for negligent or intentional spoliation. *Lucas v. Christiana Skating Center, Ltd.*, 722 A.2d 1247, 1250 (Del. 1998).

Sanctions: Criminal Penalty: 11 Del. C. § 1269(2), Tampering with physical evidence, states that *"a person is guilty of tampering with physical evidence when ... believing that certain physical evidence is about to be produced or used in an official proceeding or a prospective official proceeding, and intending to prevent its production or use the person suppresses it by any act of concealment, alteration or destruction, or by employing force, intimidation or deception against any person."*

Adverse Inference: Where a litigant intentionally suppresses or destroys pertinent evidence, an inference arises that evidence would be unfavorable to his case. *Lucas v. Christiana Skating Center, Ltd.*, 722 A.2d 1247, 1250 (Del. 1998).

FLORIDA

No Independent Cause of Action For First-Party Spoliation: The Florida Supreme Court determined in *Martino v. Wal-Mart Stores, Inc.*, 908 So.2d 342 (Fla. 2005), that the remedy against a first-party defendant for spoliation of evidence is not an independent cause of action for spoliation of evidence. This holding clarified a split regarding the tort of spoliation between the 3rd and 4th District Courts of Appeals.

Third-Party Tort of Spoliation: The holding in *Martino* is limited to first-party spoliation. Florida Appellate Courts have recognized an independent claim for spoliation against third-parties. *Townsend v. Conshor, Inc.*, 832 So.2d 166, 167 (Fla. Dist. Ct. App. 2002); *Jost v. Lakeland Reg'l Med. Ctr., Inc.*, 844 So.2d 656 (Fla. 2d DCA 2003). Third-party spoliation claims, however, do not arise until the underlying action is completed. *Lincoln Ins. Co. v. Home Emergency Servs., Inc.*, 812 So.2d 433, 434-435 (Fla. Dist. Ct. App. 2001). In order to establish a cause of action for spoliation, a party must show: (1) the existence of a potential civil action, (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action, (3) destruction of that evidence, (4) significant impairment in the ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages. *Jost v. Lakeland*, 844 So.2d 656, 657-685 (Fla.2d DCA 2003). The third-party tort of spoliation can also be maintained against an employer otherwise immune under the Exclusive Remedy Rule. In *Builder's Square, Inc. v. Shaw*, 755 So. 2d 721, 724 (Fla. Dist. Ct. App. 1999), an employee of Builder's Square successfully maintained a suit based on the tort of spoliation against his employer, who was aware of the injury yet destroyed or disposed of the evidence (ladder), thereby making the plaintiff's case impossible to prosecute. Spoliation is established where the moving party demonstrates, (1) the missing or destroyed evidence existed at one time, (2) the non-moving, allegedly spoliating party had a duty preserve the evidence, and (3) the allegedly spoliated evidence was *crucial* to the movant's ability to prove a *prima facie* case

or defense. *Walter v. Carnival Corp.,* 2010 WL 2927962,(S.D. Fla. 2010); *QBE Ins. Corp. v. Jorda Enterprises, Inc.,* 2012 WL 948838 (S.D. Fla. 2012).

Sanctions: In *Public Health Trust v. Valcin*, 507 So.2d 596, 599 (Fla. 1987), the court held that when evidence was intentionally lost, misplaced, or destroyed by one party, trial courts were to rely on sanctions found in Fla. R. Civ. P. 1.380(b)(2), and that a jury could well infer from such a finding that the records would have contained indications of negligence. If the negligent loss of the evidence hinders the other party's ability to establish a *prima facie* case, then a rebuttable presumption of negligence for the underlying tort will be applied. This presumption and sanction were upheld in *Martino v. Wal-Mart Stores, Inc.*, 908 So.2d 342, 346-47 (Fla. 2005).

GEORGIA

Third-Party Tort of Spoliation: The Georgia Court of Appeals declined to recognize an independent third-party tort for spoliation of evidence. *Owens v. Am. Refuse. Sys., Inc.*, 244 Ga.App. 780, 536 S.E.2d 782 (Ga. 2000).

First-Party Tort of Spoliation: In *Gardner v. Blackston*, 185 Ga.App. 754, 365 S.E.2d 545 (Ga. 1988), the Court stated in *dicta* that Georgia law does not recognize spoliation of evidence as a separate tort. In *Sharpnack v. Hoffinger*, 231 Ga.App. 829, 499 S.E.2d 363 (Ga. 1998), the Court again reviewed the issue, but since the Court had already determined that the plaintiff in the case had assumed the risk of his injury, he could not establish a meaningful link between his underlying claims and the alleged spoliation. Therefore, the appellate court affirmed the grant of summary judgment.

Sanctions: Georgia courts have the authority to impose sanctions to remedy the prejudice from the spoliation of evidence. *R.A. Siegel Co. v. Bowen*, 539 S.E.2d 873, 877 (Ga. Ct. App. 2000). Sanctions range from adverse inference, dismissal and exclusion of evidence. *Chapman v. Auto Owners Ins. Co.*, 469 S.E.2d 783, 784 (Ga. Ct. App. 1996); *Cavin v. Brown*, 538 S.E.2d 802, 804 (Ga. Ct. App. 2000).

Courts will look to a variety of factors in determining which sanctions to impose, including: (1) whether the party seeking sanctions was prejudiced as a result of the destruction of the evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the party that destroyed the evidence acted in good or bad faith; and (5) the potential for abuse of expert testimony about the evidence was not excluded. *Bridgestone/Firestone North Am. Tire, L.L.C. v. Campbell*, 574 S.E.2d 923, 926 (Ga. Ct. App. 2002); *Chapman*, 469 S.E.2d at 785.

HAWAII

Tort of Spoliation: Hawaii courts have not resolved whether Hawaii law would recognize a tort of spoliation of evidence. *Matsuura v. E.I. du Pont de Nemours and Co.*, 102 Haw. 149, 168, 73 P.3d 687, 706 (Haw. 2003).

IDAHO

Tort of Spoliation: Idaho courts have discussed this tort, but have not formally recognized it. In *Yoakum v. Hartford Fire Ins. Co*., 129 Idaho 171, 177-178, 923 P.2d 416, 422-423 (Idaho 1996), the court found that assuming Idaho law would recognize the tort of spoliation, it would require the willful destruction or concealment of evidence. In this particular case, the court found that the plaintiffs had not demonstrated that the defendants destroyed any evidence which would justify holding them liable for this tort.

Evidentiary Rules/Sanctions: Idaho courts have recognized the spoliation doctrine as a form of admission by conduct. *"By resorting to wrongful devices, the party is said to provide a basis for believing that he or she thinks the case is weak and not to be won by fair means…Accordingly, the following are considered under this general category of admissions by conduct:…destruction or concealment of relevant documents or objects." Courtney v. Big O Tires, Inc.*, 139 Idaho 821, 824, 87 P.3d 930, 933 (Idaho 2003), citing *McCormick On Evidence*, 4th Ed. § 265, pp. 189-94 (1992) As an admission, the spoliation doctrine only applies to the party connected to the loss or

destruction of the evidence. *"Acts of a third person must be connected to the party, or in the case of a corporation to one of its superior officers, by showing that an officer did the act or authorized it by words or other conduct. Furthermore, the merely negligent loss or destruction of evidence is not sufficient to invoke the spoliation doctrine. Moreover, the circumstances of the act must manifest bad faith. Mere negligence is not enough, for it does not sustain the inference of consciousness of a weak case." Id*.

There may certainly be circumstances where a party's willful, intentional, and unjustifiable destruction of evidence that the party knows is material to pending or reasonably foreseeable litigation may so prejudice an opposing party that sanctions such as those listed in Rule 37(b) of the Idaho Rules of Civil Procedure are appropriate. *Id.*

ILLINOIS

Tort of Negligent Spoliation: The Supreme Court of Illinois has declined to recognize spoliation of evidence as an independent tort and instead held that a spoliation claim can be stated under existing negligence principles. *Dardeen v. Kuehling*, 213 Ill.2d 329, 335, 821 N.E.2d 227, 231, 290 Ill. Dec. 176, 180 (Ill. 2004); *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267 (Ill. 1995), *as modified on denial of reh'g* (June 22, 1995). In order to state a negligence claim, a plaintiff must allege that the defendant owed him a duty, that the defendant breached that duty, and that the defendant's breach proximately caused the plaintiff damages. The Court tailored the duty element to spoliation claims: *"The general rule is that there is no duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, a contract, a statute or another special circumstance. Moreover, a defendant may voluntarily assume a duty by affirmative conduct. In any of the foregoing instances, a defendant owes a duty of due care to preserve evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." Id.* This claim requires conduct that *is "deliberate [or] contumacious or [evidences an] unwarranted disregard of the court's authority"* and should be employed only *"as a last resort and after all the court's other enforcement powers have failed to advance the litigation." Adams v. Bath and Body Works, Inc.*, 358 Ill. App.3d 387, 392, 830 N.E.2d 645, 651-655, 294 Ill. Dec. 233, 239 - 243 (Ill. App. 1st Dist. 2005).

Sanctions: Sanctions for discovery violations are imposed pursuant to Supreme Court Rule 219. Sanctions for spoliation require mere negligence, the failure to foresee *"that the [destroyed] evidence was material to a potential civil action". Dardeen*, 213 Ill.2d at 336, 290 Ill. Dec. 176, 821 N.E.2d 227. Rule 219(c) permits sanctions only where a party unreasonably fails to comply with a discovery order and that a *"party who had nothing to do with the destruction of evidence cannot be said to have unreasonably failed to comply with a discovery order"* because *"[b]efore noncompliance can be unreasonable, a party must have been in a position to comply".* A party confronted with the loss or destruction of relevant, material evidence at the hands of an opponent may either: (1) seek dismissal of his opponent's complaint under Rule 219(c); or (2) bring a claim for negligent spoliation of evidence. The mode of relief most appropriate will depend upon the opponent's culpability in the destruction of the evidence. There are circumstances when destroying potential evidence before a request for preserving it was ever made can lead to sanctions even if there is no specific statute that required that records be kept. The Illinois Supreme Court noted that failure to produce relevant evidence because it was destroyed prior to filing a lawsuit can be sanctioned because of the duty a potential litigant owes to preserve relevant and material evidence. *Shimanovsky v. General Motors Corp.*, 692 N.E.2d 286 (Ill. 1998). The Court reversed a dismissal of the case as a sanction for pre-suit destructive testing by the plaintiff, but agreed that a sanction was warranted as the sanction must consider the level of prejudice to the opposing party. There is no specific sanction that is mandated as sanctions are in the court's discretion and the court must consider several factors, according to *Shimanovsky:* (1) the surprise to the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party's objection to the testimony or evidence; and (6) the good faith of the party offering the testimony or evidence.

INDIANA

Tort of Spoliation: If an alleged tortfeasor negligently or intentionally destroys or discards evidence that is relevant to a tort action, the plaintiff in the tort action does not have an additional independent cognizable claim against the tortfeasor for spoliation of evidence. *Gribben v. Wal-Mart Stores, Inc.*, 824 N.E.2d 349, 355 (Ind. 2005).

Third-Party Tort of Spoliation: Negligent or intentional spoliation of evidence is actionable as a tort only if the party alleged to have lost or destroyed the evidence owed a duty to the person bringing the spoliation claim to have preserved it. *Glotzbach, CPA v. Froman*, 827 N.E.2d 105, 108 (Ind. App. 2005). To determine the existence of a duty Indiana courts balance three factors: (1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and (3) public policy concerns. *Id.* This balancing test is to be used only in those instances where the element of duty has not already been declared or otherwise articulated. *Id.* Indiana Code § 35-44-3-4 provides *that "a person who…alters, damages, or removes any record, document, or thing, with intent to prevent it from being produced or used as evidence in any official proceeding or investigation…commits obstruction of justice."* This is a class D felony.

Sanctions: Indiana courts may also sanction parties, but not third parties, for the spoliation of evidence through: (1) evidentiary inferences that the spoliated evidence was unfavorable to the responsible party; (2) sanctions for discovery violation under Indiana Trial Rule 37(B), which authorizes courts to respond with sanctions which include among others, ordering that designated facts be taken as established, prohibiting the introduction of evidence, dismissal of all or part of an action, rendering judgment by default against a disobedient party, and payment of reasonable expenses including attorneys' fees; and (3) discipline for spoliating attorneys under Indiana Rules of Professional Conduct.

IOWA

Sanctions: Evidence of spoliation may allow an inference *that "a party who destroys a document with knowledge that it is relevant to litigation is likely to have been threatened by the document." Lynch v. Saddler,* 656 N.W.2d 104, 111 (Iowa 2003). Such inference may only be drawn when the destruction of relevant evidence was intentional, as opposed to merely negligent or the evidence was destroyed as the result of routine procedure. *Id.* However, such inference does not amount to substantive proof and cannot take the place of proof of a fact necessary to the other party's cause. *Smith v. Shagnasty's, Inc*., 2004 WL 434160 (Iowa App. 2004). Interestingly, the evidentiary inference is imposed both for evidentiary and punitive reasons. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 721 (Iowa 2001). Adverse inference instructions should be utilized prudently and sparingly. *Lynch*, supra.

KANSAS

Tort of Spoliation: In *Koplin v. Rosel Well Perforators, Inc.*, 241 Kan. 206, 734 P.2d 1177 (Kan. 1987), the Kansas Supreme Court considered the certified question of whether Kansas would recognize a common law tort action for intentional interference with a civil action by spoliation of evidence under the facts presented. The Supreme Court of Kansas concluded that absent some independent tort, contract, agreement, voluntary assumption of duty, or some special relationship of the parties, the new tort of spoliation of evidence should not be recognized in Kansas under the facts presented. *Id* at 215, 734 P.2d at 1177. Consequently, the U.S. District Court for Kansas held that the Supreme Court of Kansas would recognize the tort of spoliation under some limited circumstances. *Foster v. Lawrence Memorial Hosp.*, 809 F. Supp. 831, 838 (Kan. 1992).

Adverse Inference Instruction: Kansas law generally provides *that "failure to throw light upon an issue peculiar with any parties' own knowledge or reach raises a presumption open to explanation, of course, that the concealed information was unfavorable to him."* Kansas utilizes a pattern jury instruction, K.P.J.I. § 102.73, borrowed from the Illinois Jury Instruction for "Inferences Arising from Failure to Produce Evidence." The applicable jury instruction, K.P.J.I. § 102.73, provides*: If a party to [the] case has failed to offer evidence within*

his power to produce, you may infer that the evidence would have been adverse to that party, if you believe each of the following elements: (1) The evidence was under the control of the party and could have been produced by the exercise of reasonable diligence. (2) The evidence was not equally available to an adverse party. (3) A reasonably prudent person under the same or similar circumstances would have offered if (he) (she) believed it to be favorable to him. (4) No reasonable excuse for the failure has been shown.

KENTUCKY

Tort of Spoliation: Kentucky does not recognize separate torts for either first-party or third-party spoliation of evidence. *Monsanto Co. v. Reed*, 950 S.W.2d 811, 815 (Ky. 1997).

Sanctions/Adverse Inference: The court counteracts a party's deliberate destruction of evidence through evidentiary rules, civil sanction, and missing evidence instructions. *Id.*

LOUISIANA

Tort of Spoliation: Recognizing a claim in tort for spoliation of evidence presents a relatively new concept in Louisiana jurisprudence and has been the subject of recent consideration in Louisiana courts. *Pham v. Contico Intern., Inc.,* 759 So.2d 880 (La. App. 2000). Prior to being discussed as a tort, the term *"*spoliation of evidence" appeared in Louisiana jurisprudence along with the evidentiary theory of an adverse presumption. *Rodriguez v. Northwestern National Ins. Co.,* 358 So.2d 1237 (La. 1978); *Babineaux v. Black,* 396 So.2d 584 (La. App. 1981) *Miller v. Montgomery Ward & Co.,* 317 So.2d 278 (La. App. 1975). In those cases where it was proven that a party had destroyed, altered, concealed, or failed to produce evidence relevant to the pending civil claim, and they could not reasonably explain their actions, Louisiana courts have sanctioned the party by instructing the jury of the adverse presumption that had the evidence in question been presented, it would be unfavorable to the party spoliator. *Williams v. General Motors Corp.*, 639 So.2d 275 (La. App. 1994). An allegation that the plaintiff's claim has been impaired by the loss of evidence which "might" have proven a cause of action if such evidence was available is speculative at best and insufficient to support a recovery in tort. However, the right of an individual to institute a tort action against someone who has impaired the party's ability to institute or prove a civil claim due to negligent or intentional spoliation of evidence is recognized. *Guillory v. Dillard's Dep't Store, Inc.*, 777 So.2d 1, 5 (La. App. 2000). However, in 2015, the Louisiana Supreme Court announced that the *negligent* spoliation of evidence is so unintentional an act that any recognition of the tort by the courts would not act to deter future conduct, but would, rather, act to penalize a party who was not aware of its potential wrongdoing in the first place. This is particularly true in the case of negligent spoliation by a *third party*, who is not vested in the ultimate outcome of the underlying case, and thus, has no motive to destroy or make unavailable evidence that could tend to prove or disprove that unrelated claim. This factor weighs in favor of a no-duty rule. *Reynolds v. Bordelon*, 172 So.3d 589 (La. 2015). The Supreme Court held that an insurance company could not be held liable for negligent spoliation of evidence when it fails to preserve a vehicle after an accident took place until that vehicle could be inspected for defective equipment. A motorist who was involved in motor vehicle accident sued his auto insurer and the custodian of his vehicle after the accident for negligent spoliation of evidence, stemming from their failure to preserve the vehicle after the accident until it could be inspected for defective equipment. The court dismissed the claim and the Supreme Court affirmed, holding that no cause of action exists for negligent spoliation of evidence, overruling *Carter v. Exide Corp.,* 661 So.2d 698 (La. App. 1995), but did allow a breach of contract action to proceed. The Louisiana Supreme Court refused to recognize a duty to preserve evidence in the context of negligent spoliation.

A plaintiff asserting a state law tort claim for spoliation of evidence must allege that the defendant *intentionally* destroyed evidence. *Desselle v. Jefferson Hosp. Dist. No. 2*, 887 So.2d 524, 534 (La. App. 2004). Allegations of negligent conduct are insufficient. *Quinn v. RISO Investments, Inc.*, 869 So.2d 922 (La. App. 2004). Where suit has not been filed and there is no evidence that a party *knew* suit would be filed when the evidence was discarded, the theory of spoliation of evidence does not apply. *Desselle v. Jefferson Hosp. Dist. No. 2*, 887 So.2d at 534.

Adverse Inference: The tort of spoliation of evidence has its roots in the evidentiary doctrine of "adverse presumption," which allows a jury instruction for the presumption that the destroyed evidence contained information detrimental to the party who destroyed the evidence unless such destruction is adequately explained. *Guillory,* supra.

MAINE

Tort of Spoliation: The Maine Law Court has apparently never recognized such a cause of action, for spoliation of evidence. *Gagne v. D.E. Jonsen, Inc.*, 298 F. Supp.2d 145, 147 (D. Me. 2003); citing *Butler v. Mooers*, 2001 WL 1708836 (Me. Super., June 13, 2001), at 1. In addition, federal courts sitting in Maine have identified spoliation as a doctrine intended *"to rectify any prejudice the non-offending party may have suffered as a result of the loss of evidence and to deter any future conduct, particularly deliberate conduct, leading to such loss of evidence." Driggin v. American Sec. Alarm Co.*, 141 F. Supp.2d 113, 120 (D. Me. 2000).

Sanctions: The remedy for spoliation of evidence is sanctions, including "dismissal of the case, the exclusion of evidence, or a jury instruction on the spoliation inference." *Id.* This view of the doctrine is not consistent with the existence of an independent cause of action arising out of such deliberate conduct. Rather, the injured party may seek sanctions that will affect its claims or defenses. *Pelletier v. Magnusson*, 195 F. Supp.2d 214, 233-37 (D. Me. 2002); *Elwell v. Conair, Inc.*, 145 F. Supp.2d 79, 87-88 (D. Me. 2001).

MARYLAND

Adverse Inference/Presumption: In *Miller v. Montgomery County*, 64 Md. App. 202, 214-15, 494 A.2d 761, *cert. denied*, 304 Md. 299, 498 A.2d 1185 (Md. 1985), Judge Bloom, writing for the Supreme Court of Maryland, explained the effect spoliation of evidence might have on the spoliator's case as follows: *The destruction or alteration of evidence by a party gives rise to inferences or presumptions unfavorable to the spoliator, the nature of the inference being dependent upon the intent or motivation of the party. Unexplained and intentional destruction of evidence by a litigant gives rise to an inference that the evidence would have been unfavorable to his cause, but would not in itself amount to substantive proof of a fact essential to his opponent's cause. Under Miller, an adverse presumption may arise against the spoliator even if there is no evidence of fraudulent intent. Anderson v. Litzenberg*, 115 Md. App. 549, 559, 694 A.2d 150, 155 (Md. App. 1997). The presumption that arises from a party's spoliation of evidence cannot be used as a surrogate for presenting evidence of negligence in a *prima facie* case.

Sanctions: Maryland courts have condoned discovery sanctions as remedies for spoliation of evidence. See *Klupt v. Krongard*, 728 A.2d 727, 738 (Md. Ct. Spec. App. 1999). The ultimate sanction of dismissal or default when spoliation may be imposed when the spoliation involves: (1) a deliberate 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 filing is fairly perceived as imminent. *White v. Office of the Public Defender*, 170 F.R.D. 138, 147 (D. Md. 1997). One court noted that the greatest of sanctions is appropriate when the conduct demonstrates willful or contemptuous behavior, or a deliberate attempt to hinder or prevent effective presentation of defenses or counterclaims. *Manzano v. Southern Md. Hosp., Inc.*, 698 A.2d 531, 537 (Md. 1997).

MASSACHUSETTS

Tort of Spoliation: In *Fletcher v. Dorchester Mut. Ins. Co.*, 437 Mass. 544, 773 N.E.2d 420 (2002), the Massachusetts Supreme Court declined to recognize an action in tort for spoliation of evidence.

Sanctions: The Massachusetts Supreme Court has recognized that Massachusetts courts have remedies for spoliation of evidence, *i.e.*, exclusion of testimony in the underlying action, dismissal, or judgment by default. *Gath v. M/A-Com, Inc.*, 440 Mass. 482, 499, 802 N.E.2d 521, 535 (Mass. 2003). Sanctions should be carefully tailored to remedy the precise unfairness occasioned by the spoliation. *Id.* at 426; *Keene v. Brigham & Women's*

Hosp., Inc., 786 N.E.2d 824, 833-34 (Mass. 2003). Sanctions may be imposed even if the spoliation of evidence occurred before the legal action was commenced, if a litigant knows or reasonably should know that the evidence might be relevant to a possible action. *Stull v. Corrigan Racquetball Club, Inc.*, 2004 WL 505141 (Mass. Super. 2004).

MICHIGAN

Tort of Spoliation: Michigan does not recognize spoliation of evidence as a separate tort. *Panich v. Iron Wood Prods. Corp.*, 445 N.W.2d 795 (Mich. Ct. App. 1989). However, Michigan has never explicitly refused to consider spoliation of evidence as an actionable tort claim if the right facts were present. *Wilson v. Sinai Grace Hosp*., 2004 WL 915044 (Mich. App. 2004).

Adverse Inference/Presumption: Spoliation of evidence is controlled by a jury instruction, M. Civ. J.I.2d 6.01(d), which provides that a trier of fact may infer the evidence not offered in a case would be adverse to the offending party if: (1) the evidence was under the offending party's control; (2) could have been produced by the offending party; (3) that no reasonable excuse is shown for the failure to produce the evidence. When these three elements are shown, a permissible inference is allowed that the evidence would have been adverse to the offending party. However, the trier of fact remains free to determine this issue for itself. *Lagalo v. Allied Corp.*, 592 N.W.2d 786, 789 (Mich. Ct. App. 1999).

When there is evidence of willful destruction, a presumption arises that the non-produced evidence would have been adverse to the offending party, and when left unrebutted, this presumption requires a conclusion that the unproduced evidence would have been adverse to the offending party. *Trupiano v. Cully*, 84 N.W.2d 747, 748 (Mich. 1957). Generally, where a party deliberately destroys evidence, or fails to produce it, courts presume that the evidence would operate against the party who destroyed it or failed to produce it. *Johnson v. Secretary of State*, 406 Mich. 420, 440, 280 N.W.2d 9 (Mich. 1979); *Berryman v. K Mart Corp.*, 193 Mich.App. 88, 101, 483 N.W.2d 642 (Mich. 1992); *Ritter v. Meijer, Inc.*, 128 Mich.App. 783, 786, 341 N.W.2d 220 (Mich. 1983). It is well-settled that only when the complaining party can establish *"intentional conduct indicating fraud and a desire to destroy [evidence] and thereby suppress the truth"* can such a presumption arise. *Trupiano v. Cully*, 349 Mich. 568, 570, 84 N.W.2d 747 (Mich. 1957), quoting 20 *Am. Jur., Evidence*, § 185, p. 191; *Lagalo v. Allied Corp.*, 233 Mich.App. 514, 520, 592 N.W.2d 786 (Mich. 1999).

MINNESOTA

Tort of Spoliation: Minnesota does not recognize an independent spoliation tort. *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 437 (Minn.1990).

Sanctions: Spoliation sanctions are typically imposed where one party gains an evidentiary advantage over the opposing party by failing to preserve evidence. *Himes v. Woodings-Verona Tool Works, Inc.*, 565 N.W.2d 469, 471 (Minn. App. 1997), *review denied* (Minn. 1997). This is true where the spoliator knew or should have known that the evidence should be preserved for pending or future litigation; the intent of the spoliator is irrelevant. *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995). When the evidence is under the exclusive control of the party who fails to produce it, Minnesota permits the jury to infer that *"the evidence, if produced, would have been unfavorable to that party."* *Litchfield Precision Components, Inc.,* 456 N.W.2d at 437. Furthermore, the propriety of a sanction for the spoliation of evidence is determined by the prejudice resulting to the opposing party. Prejudice is determined by considering the nature of the item lost in the context of the claims asserted and the potential for correcting the prejudice. *Patton*, 538 N.W.2d at 119. Adverse Inference Instruction Michigan, Civ. J.I.G. § 12.35, reads that, *"If either party does not produce evidence that the party could reasonably be expected to produce and intentionally destroys evidence which that party has been ordered to produce and fails to give a reasonable explanation, you may decide that the…evidence would have been unfavorable to that party."*

MISSISSIPPI

Tort of Spoliation: In *Dowdle Butane Gas Co. v. Moore*, 831 So.2d 1124, 1135 (Miss. 2002), the Mississippi Supreme Court refused to *"recognize a separate tort for intentional spoliation of evidence against both first and third-party spoliators.*" In *Richardson v. Sara Lee Corp.,* 847 So.2d 821, 824 (Miss. 2003), the Court likewise refused to recognize a separate tort for negligent spoliation of evidence.

Adverse Inference/Presumption: In *Stahl v. Wal-Mart Stores, Inc.*, 47 F.Supp.2d 783, 787 n. 3 (S.D. Miss. 1998), the court held that *"in the absence of bad faith – i.e., evidence of culpability on the part of the spoliator – then there can be no adverse influence or presumption…even when there is prejudice to the innocent party."* The Court further held *"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." Tolbert v. State*, 511 So.2d 1368, 1372-73 (Miss. 1987), quoting *Washington v. State*, 478 So.2d 1028, 1032-33 (Miss. 1985). *"Such a presumption or inference arises, however, only when the spoliation or destruction was intentional and indicates fraud and a desire to suppress the truth and it does not rise where the destruction was a matter of routine with no fraudulent intent.*" *Id.*

Sanctions: Spoliation remedies include discovery sanctions, criminal penalties or disciplinary actions against attorneys who participate in spoliation. *Dowdle*, supra. Mississippi recognizes a refutable "negative" or adverse inference against a spoliator. *Thomas v. Isle of Capri Casino*, 781 So.2d 125 (Miss. 2001).

MISSOURI

Adverse Inference: A party who intentionally destroys or significantly alters evidence is subject to an adverse evidentiary inference under the spoliation of evidence doctrine. *Baldridge v. Director of Revenue*, 82 S.W.3d 212, 222 (Mo. App. 2002). *"[T]he destruction of written evidence without satisfactory explanation gives rise to an inference unfavorable to the spoliator."* G*arrett v. Terminal R. Ass'n of St. Louis*, 259 S.W.2d 807, 812 (Mo. 1953). *"Similarly, where one party has obtained possession of physical evidence which [the party] fails to produce or account for at the trial, an inference is warranted against that party." State ex rel. St. Louis County Transit Co. v. Walsh*, 327 S.W.2d 713, 717 (Mo. App. 1959). *"[W]here one conceals or suppresses evidence such action warrants an unfavorable inference." Id.* at 717-18.

When an adverse inference is urged, it is necessary that there be evidence showing intentional destruction of the item, and also such destruction must occur under circumstances which give rise to an inference of fraud and a desire to suppress the truth. In such cases, it may be shown by the proponent that the alleged spoliator had a duty, or should have recognized a *duty*, to preserve the evidence. *Morris v. J.C. Penney Life Ins. Co.*, 895 S.W.2d 73, 77-78 (Mo. App. 1995). *"Since the doctrine of spoliation is a harsh rule of evidence, prior to applying it in any given case, it should be the burden of the party seeking its benefit to make a prima facie showing the opponent destroyed the missing [evidence] under circumstances manifesting fraud, deceit or bad faith." Baldridge,* supra. Simple negligence is not sufficient to apply the Adverse Inference Rule. *Brissette v. Milner Chevrolet Co.*, 479 S.W.2d 176, 182 (Mo. App. 1972).

MONTANA

Tort of Spoliation: Montana courts have adopted the torts of both intentional and negligent spoliation against third parties. Negligent spoliation of evidence consists of the following elements: (1) existence of a potential civil action; (2) 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) causal connection between the destruction of the evidence and the inability to prove the lawsuit; (6) significant possibility of success of the potential civil action if the evidence were available; and (7) damages. *Gentry v. Douglas Hereford Ranch, Inc.*, 1998 Mont. 182, 290 Mont. 126, 962 P.2d 1205 (Mont. 1998); *Oliver v. Stimson Lumber Co.,* 297 Mont. 336, 345-354, 993 P.2d 11, 18-23 (Mont. 1999). Intentional spoliation consists of the following elements: (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.*

Under Montana law, the tort of spoliation of evidence (whether intentional or negligent) requires "the existence of a potential lawsuit." *Oliver v. Stimson Lumber Co.*, 297 Mont. 336, 993 P.2d 11, 21 (Mont. 1999). Spoliation of evidence can only occur in connection with some other lawsuit; it is intrinsically bound up in the same transaction as the underlying lawsuit. *Smith v. Salish Kootenai College*, 378 F.3d 1048, 1058 (9th Cir. Mont. 2004).

NEBRASKA

Adverse Inference: When intentional destruction of evidence is established, the fact finder may draw the inference that the evidence destroyed was unfavorable to the party responsible for its destruction. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (Neb. 2002); *Trieweiler v. Sears*, 268 Neb. 952, 992, 689 N.W.2d 807, 843 (Neb. 2004).

NEVADA

Tort of Spoliation: Nevada does not recognize a separate tort for first-party or third-party spoliation of evidence. *Timber Tech Engineered Bldg. Products v. The Home Ins. Co.*, 55 P.3d 952, 953-54 (Nev. 2002). However, a negligence claim for spoliation may exist where the circumstances of the case show that the defendant owed a duty to the plaintiff to preserve evidence. *Contreras v. Am. Family Mut. Ins. Co.*, 135 F. Supp.3d 1208 (D. Nev. 2015).

Adverse Inference: *"It is well-established that a party is entitled to jury instructions on every theory of her case that is supported by the evidence." Bass-Davis v. Davis*, 117 P.3d 207, 209 (Nev. 2005). In *Reingold v. Wet 'N Wild Nevada, Inc.*, 113 Nev. 967, 970, 944 P.2d 800, 802 (Nev. 1997), the Nevada Supreme Court recognized that under N.R.S. § 47.250(3), when evidence is willfully destroyed, the trier of fact is entitled to presume that the evidence was adverse to the destroying party. It further held that evidence is "willfully" destroyed even if the evidence is destroyed pursuant to an established company policy. *Bass-Davis v. Davis*, 117 P.3d at 210.

NEW HAMPSHIRE

Adverse Inference: An adverse inference – that the missing evidence would have been unfavorable – can be drawn only when the evidence was destroyed deliberately with a fraudulent intent. *Rodriguez v. Webb*, 141 N.H. 177, 180, 680 A.2d 604 (N.H. 1996). The timing of the document destruction is not dispositive on the issue of intent, however, and an adverse inference can be drawn even when the evidence is destroyed prior to a claim being made. *Id.* at 178, 180, 680 A.2d 604; *Murray v. Developmental Services of Sullivan County, Inc.,* 149 N.H. 264, 271, 818 A.2d 302, 309 (N.H. 2003). Of particular importance when considering the appropriateness of spoliation sanctions are the prejudice to the non-offending party and the degree of fault of the offending party. *Collazo-Santiago v. Toyota Motor Corp.,* 149 F.3d 23, 28 (1st Cir. 1998). Bad faith is not essential to imposing a spoliation sanctions, but you must show at least carelessness and you must show prejudice. *MMG Ins. Co. v. Samsung Electronics Am., Inc.*, 2013 WL 1637139 (D.N.H. 2013).

NEW JERSEY

Adverse Inference/Sanctions: Spoliation of evidence in a prospective civil action occurs when evidence relevant to the action is destroyed, causing interference with the action's proper administration and disposition. *Manorcare Health v. Osmose Wood*, 336 N.J. Super. 218, 226, 764 A.2d 475, 479 (N.J. App. Div. 2001). In civil litigation, depending on circumstances, spoliation of evidence can result in a separate tort action for fraudulent concealment, discovery sanctions, or an adverse trial inference against the party that caused the loss of

evidence. *Rosenblit v. Zimmerman*, 166 N.J. 391, 400-06, 766 A.2d 749 (N.J. 2001). But, the Supreme Court of New Jersey held it didn't recognize a separate tort action for intentional spoliation. *Id.* at 404-405. An adverse inference instruction may be given during the underlying litigation whereby it is presumed the destroyed evidence would've been unfavorable to the destroyer. *Swick v. N.Y. Times*, 815 A.2d 508, 511 (N.J. 2003).

Discovery sanctions may include a designation that certain facts are taken as established, a refusal to permit the disobedient party to support or oppose claims or defenses, prohibiting the introduction of designated matters into evidence, dismissal of an action, or entry of judgment by default. *Id*. An appropriate remedy may include an award of counsel fees in exceptional cases, particularly where there is a finding of intentional spoliation and the non-spoliating party's ability to defend itself was compromised. *Grubbs v. Knoll*, 376 N.J. Super. 420, 435-436, 870 A.2d 713 (N.J. Super. A.D. 2005).

NEW MEXICO

Tort of Intentional Spoliation: The New Mexico Supreme Court has recognized the tort of intentional spoliation of evidence. *Coleman v. Eddy Potash, Inc.*, 120 N.M. 645, 649, 905 P.2d 185, 189 (N.M. 1995) overruled on other grounds*, Delgado v. Phelps Dodge Chino, Inc.*, 34 P.3d 1148 (N.M. 2001). *Coleman* established the following elements for the tort of intentional spoliation of evidence: (1) the existence of a potential lawsuit; (2) the defendant's knowledge of the potential lawsuit; (3) the destruction, mutilation, or significant alteration of potential evidence; (4) intent on the part of the defendant to disrupt or defeat the lawsuit; (5) a causal relationship between the act of spoliation and the inability to prove the lawsuit; and (6) damages.

Tort of Negligent Spoliation: The Court in *Coleman* rejected a separate cause of action for negligent spoliation of evidence. *Coleman*, 120 N.M. at 650, 905 P.2d at 190 (stating that *"adequate remedies exist"* under *"traditional negligence principles"* and relying on *"the general expectation that an owner has a free hand in the manner in which he or she disposes of his or her property"*).

Adverse Inference: Where the actions of the spoliator fail to rise to the level of malicious conduct or otherwise meet the elements of the tort of intentional spoliation of evidence, New Mexico believes a more appropriate remedy would be a permissible adverse evidentiary inference by the jury in the underlying claim. This evidentiary inference could be accomplished through an instruction to the jury that it is permissible to infer that evidence intentionally destroyed, concealed, mutilated, or altered by a party without reasonable explanation would have been unfavorable to that party. Trial courts, in determining whether to give this instruction, should consider whether the spoliation was intentional, whether the spoliator knew of the reasonable possibility of a lawsuit involving the spoliated object, whether the party requesting the instruction *"acted with due diligence with respect to the spoliated evidence,"* and whether the evidence would have been relevant to a material issue in the case. *Torres v. El Paso Elec. Co.*, 987 P.2d 386, 401-407 (N.M. 1999).

Sanctions: New Mexico recognizes that spoliation of evidence may result in sanctions. These sanctions include dismissal or adverse inference. *Segura v. K-Mart Corp.*, 62 P.3d 283, 286-87 (N.M. 2002).

NEW YORK

Third-Party Negligent Spoliation: The New York Court of Appeals declined to recognize such a cause of action under the facts of *Met-Life Auto & Home v. Joe Basil Chev., Inc.*, 1 N.Y.3d 478, 807 N.E.2d 865, 775 N.Y.S.2d 754 (N.Y. 2004). The Court in this case focused its decision on the non-existence of a duty giving rise to preservation of evidence and the lack of notice to preserve the evidence militated against establishing such a cause of action.

Employer Spoliation: Spoliation by an employer may support a common law cause of action when such spoliation impairs an employee's right to sue a third-party tortfeasor. *DiDomenico v. C & S Aeromatik Supplies*, 252 A.D.2d 41, 682 N.Y.S.2d 452 (N.Y. 2nd Dept. 1998). In other instances, New York courts have specifically rejected a cause of action for spoliation of evidence when the employer was not on notice that evidence would be needed. *Monteiro v. R.D. Werner Co.*, 301 A.D.2d 636, 754 N.Y.S.2d 328 (N.Y. 2nd Dept. 2003) (employer had

no duty to preserve scaffold which allegedly caused plaintiff's injuries and employer was not on notice that an action was contemplated against a third-party).

Sanctions: C.P.L.R. § 3126 permits sanctions, including dismissal for a party's failure to disclose relevant evidence. *Met-Life*, 1 N.Y.3d at 482-83. New York courts will impose *"carefully chosen and specifically tailored sanctions within the context of the underlying action"* to remedy spoliation of evidence. For instance, a defendant may be granted summary judgment when the plaintiff negligently fails to preserve crucial evidence. *Amaris v. Sharp Elecs.*, 758 N.Y.S.2d 637 (N.Y. App. Div. 2003). However, awarding summary judgment to the plaintiff for the defendant's intentional destruction of evidence may be too drastic a remedy. *Mylonas v. Town of Brookhaven*, 759 N.Y.S.2d 752, 753-754 (N.Y. App. Div. 2003). But see *Herrera v. Matlin*, 758 N.Y.S.2d 7, 7 (N.Y. App. Div. 2003), aff'd 771 N.Y.S.2d 347 (N.Y. A.D. 2004) (physician's loss of records amounting to professional misconduct warranted striking of answer).

NORTH CAROLINA

Adverse Presumption/Inference: The North Carolina Supreme Court recognizes a permissive, rather than mandatory adverse inference may be drawn against a spoliator of evidence. *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 182-192, 527 S.E.2d 712, 715 - 721 (N.C. App. 2000). *"[T]o qualify for the adverse inference, the party requesting it must ordinarily show that the spoliator was on notice of the claim or potential claim at the time of the destruction." McLain*, 137 N.C. App. at 187, 527 S.E.2d at 718 (*quotation omitted*). The obligation to preserve evidence may arise prior to the filing of a complaint where the opposing party is on notice that litigation is likely to be commenced. *Id.* The evidence lost must be *"pertinent"* and *"potentially supportive of plaintiff's allegations." Id.* at 188, 527 S.E.2d at 718. Finally, *"[t]he proponent of a missing document inference need not offer direct evidence of a cover-up to set the stage for the adverse inference. Circumstantial evidence will suffice." Id.* at 186, 527 S.E.2d at 718; *Arndt v. First Union Nat. Bank*, 613 S.E.2d 274, 281-283 (N.C. App. 2005).

NORTH DAKOTA

Adverse Inference/Sanctions: Trial courts in North Dakota have the authority to sanction a party when key evidence is missing*, "even where the party has not violated a court order and even when there has been a no finding of bad faith." Bachmeier v. Wallwork Truck Ctrs.*, 544 N.W.2d 122, 124 (N.D. 1996). In sanctioning a party, the district court should at least consider *"the culpability, or state of mind, of the party against whom sanctions are being imposed; a finding of prejudice against the moving party, and the degree of this prejudice, including the impact it has on presenting or defending the case; and, the availability of less severe alternative sanctions." Id.* at 124-25. Trial courts have the *"duty to impose the least restrictive sanction available under the circumstances in the exercise of it's inherit power." Id.* at 125. Sanctions can include dismissal, preclusion of evidence, or adverse inference. *Id.* at 126.

OHIO

Tort of Spoliation: The Supreme Court of Ohio held that a cause of action exists in tort for intentional spoliation against parties to the primary action as well as third parties. *Smith v. Howard Johnson Co., Inc.*, 67 Ohio St.3d 28, 29, 615 N.E2d 1037 (Ohio 1993). The elements required are: (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 plaintiff's case; (4) disruption of plaintiff's case; and (5) damages proximately caused by defendant's acts.

Punitive Damages: The Ohio Supreme Court has determined that spoliation of evidence may be the basis of an award of punitive damages in an underlying medical malpractice action. *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331 (Ohio App. 1994).

Sanctions/Adverse Inference: Courts also recognize discovery sanctions for an adverse party's failure to provide evidence if the same was willful and prejudice is established. *Barker v. Wal-Mart Stores, Inc.*, 2001 WL 1661961, 7 (Ohio Ct. App. Dec. 31, 2001). Ohio uses Jury Instruction § 305.1. *Tate v. Adena Regional Med. Ctr.*, 801 N.E.2d 930 (Ohio App. 2003).

OKLAHOMA

Tort of Spoliation: In *Patel v. OMH Medical Center, Inc.*, 987 P.2d 1185 (Okla. 1999), the Oklahoma Supreme Court stated *"[n]either spoliation of evidence nor prima facie tort (for acts constituting spoliation of evidence) has ever been recognized by this court as actionable."* When there is destruction or spoliation of evidence, the Oklahoma Supreme Court has said *"it is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." Harrill v. Penn*, 273 P. 235 (Okla. 1927). Oklahoma's spoliation doctrine only applies when the evidence is in the custody of one of the parties and it can be shown that a person has attempted to destroy, suppress, alter, or fabricate the evidence. *Id*.

Adverse Inference: *"Spoliation occurs when evidence relevant to prospective civil litigation is destroyed, adversely affecting the ability of a litigant to prove his or her claim." Patel v. OMH Medical Center, Inc.*, 987 P.2d at 1202. If applicable, destruction of evidence without a satisfactory explanation gives rise to an inference unfavorable to the spoliator. *Manpower, Inc. v. Brawdy*, 62 P.3d 391, 392 (Okla. Ct. App. 2002). Spoliation of evidence without a satisfactory explanation gives rise to an inference unfavorable to the spoliator. See *Manpower, Inc. v. Brawdy*, 62 P.3d 391, 392 (Okla. App. 2002). A party asserting spoliation must establish negligent or willful destruction of evidence which impairs the party's ability to prove or defend a claim. *Barnett v. Simmons*, 197 P.3d 12, 25 (Okla. 2008).

OREGON

Tort of Spoliation: Although the Oregon Supreme Court has not addressed whether either intentional or negligent spoliation of evidence is recognized as an independent cause of action under state law, the Court of Appeals has suggested that such claims may exist. *Marcum v. Adventist Health System/West,* 168 P.3d 1214 (Or. App. 2007) (discussing negligent spoliation), *rev'd on other grounds,* 193 P.3d 1 (Or. 2008); *Classen v. Arete NW, LLC,* 294 P.3d 520 (Or. App. 2012) (discussing negligent and intentional spoliation and declining to "address the precise contours of a cognizable claim for spoliation under Oregon law"); *Blincoe v. Western States Chiropractic College,* 2007 WL 2071916 (D. Or. 2007) (concluding that Oregon law does not and would not recognize a tort of intentional spoliation of evidence). Although the Oregon appellate courts have not directly addressed the issue, they are likely to agree with the result reached by this court in the *Blincoe* case. As noted in *Classen,* even those "jurisdictions that recognize an independent claim for spoliation of evidence require the plaintiff to have first brought the underlying claim and lost or suffered diminution in its value" and "none has permitted a plaintiff to bring such claim after the statute of limitations on her underlying claims has expired...." *Nat'l Interstate Ins. v. Beall Corp.*, 2015 WL 1137440 (D. Or. 2015).

Adverse Presumption: Oregon has a statutory provision allowing that willful suppression of evidence raises an unfavorable presumption against the party who suppressed it. O.R.S. § 40.135, Rule 311(1)(c); *Stephens v. Bohlman*, 909 P.2d 208, 211 (Or. Ct. App. 1996).

PENNSYLVANIA

Tort of Spoliation: Spoliation of evidence is not recognized as a separate cause of action under Pennsylvania law. *Elias v. Lancaster Gen. Hosp.*, 710 A.2d 65, 68 (Pa. Super. Ct. 1998).

Sanctions: Parties can be sanctioned for spoliation of evidence. *Id.* In Pennsylvania, spoliation provides that a party cannot benefit from its own withholding or destruction of evidence by creating an adverse inference that the evidence is unfavorable to that party. *Manson v. Southeastern Transp. Auth.*, 767 A.2d 1, 5 (Pa. 2001).

Whether and how to sanction a party is within the discretion of the court. *Eichman v. McKeon*, 824 A.2d 305, 312-314 (Pa. Super. Ct. 2003). A determination of the appropriate sanction requires the court to determine three factors: (1) the degree of fault of the parties who alter or destroy the evidence; (2) the degree of prejudice suffered by the opposing parties; (3) the availability of a lesser sanction that will protect the opposing parties' rights and deter future similar conduct. *Id*. (citing *Schroeder v. Commonwealth Dep't of Transp.*, 710 A.2d 23 (Pa. 1998) (adopting the test from *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3rd Cir. 1994)).

RHODE ISLAND

Tort of Spoliation: Neither the Rhode Island legislature or the courts have yet established or recognized the existence of an independent tort for spoliation of evidence. *Malinowski v. Documented Vehicle/Drivers Sys., Inc.*, 66 Fed. Appx. 216, 222 (R.I. 2003).

Adverse Inference: Rhode Island does recognize that an adverse inference may be given as spoliation of evidence instruction. *Mead v. Papa Razzi Restaurant*, 840 A.2d 1103, 1108 (R.I. 2004). The party seeking the spoliation of evidence has the burden of proof to establish that the destruction of evidence was deliberate or negligent. *Malinowski v. United Parcel Serv.*, 792 A.2d 50, 54-55 (R.I. 2002). Furthermore, it is not necessary to show bad faith by the spoliator to draw the adverse inference, however bad faith may strengthen the spoliation inference. *Kurczy v. St. Joseph's Veterans Ass'n, Inc.*, 820 A.2d 929, 946 (R.I. 2003).

SOUTH CAROLINA

Tort of Spoliation: There is no case law in South Carolina discussing spoliation of evidence, specifically. However, South Carolina apparently recognizes a type of Adverse Inference Rule as it relates to loss or destruction of evidence. *Wisconsin Motor Corp. v. Green*, 79 S.E.2d 718, 720-21 (S.C. 1954). It appears as though such inference may be given when a party does not provide an explanation for its failure to produce appropriate documents. *Id.*

SOUTH DAKOTA

Adverse Inference: Under South Dakota law, if a party fails to present evidence or witnesses, such non-production justifies an inference that the evidence would be unfavorable. *Cody v. Leapley*, 476 N.W.2d 257, 264 (S.D. 1991). "The non-production or suppression by a party of evidence which is within his power to produce and which is material to an issue in the case justifies the inference that it would be unfavorable to him if produced." *Id.; Leisinger v. Jacobson*, 651 N.W.2d 693, 699 (S.D. 2002). The burden of proof with respect to the adverse inference rule is on the spoliator to show that it acted in a non-negligent, good faith manner in destroying the document sought. *Wuest v. McKennan Hosp.*, 619 N.W.2d 682, 686 (S.D. 2000). The spoliator must show he acted in good faith without negligence or malice in destroying the evidence. *Id.* A jury is required to determine if the explanation given is reasonable and if so, may not infer that the missing information contained unfavorable evidence to the opposing party. *Id.*

TENNESSEE

Adverse Inference: 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. *Foley v. St. Thomas Hosp.*, 906 S.W.2d 448, 453-54 (Tenn. Ct. App. 1995); *Bronson v. Umphries*, 138 S.W.3d 844, 854 -855 (Tenn. Ct. App. 2003). In *Tatham v. Bridgestone Americas Holding, Inc*., 473 S.W.3d 734 (Tenn. 2015), the Tennessee Supreme Court addressed whether intentional misconduct is a prerequisite to imposing sanctions for spoliation of evidence. The Supreme Court held that a finding of intentional misconduct is not a necessary prerequisite to imposing sanctions. Its presence, however, is a relevant factor in the totality of the circumstances to consider when determining whether to impose sanctions.

TEXAS

Tort of Spoliation: Texas does not recognize an independent cause of action for intentional or negligent spoliation of evidence by parties to litigation. *Trevino v. Ortega*, 969 S.W.2d 950, 951 (Tex. 1998).

Adverse Inference Instruction: A spoliation instruction is an instruction given to the jury outlining permissible inferences they may make against a party who has lost, altered, or destroyed evidence. *Brewer v. Dowling*, 862 S.W.2d 156, 159 (Tex. App. - Fort Worth 1993), *writ denied.* A party who has deliberately destroyed evidence is presumed to have done so because the evidence was unfavorable to its case.

The Trevino Test. A trial judge has broad discretion in determining whether to provide a jury with a spoliation presumption instruction. *Trevino v. Ortega*, 969 S.W.2d 950, 953 (Tex. 1998); *Texas Elec. Co-op. v. Dillard*, 171 S.W.3d 201, 208-209 (Tex. App. – Tyler 2005). A party need not take extraordinary measures to preserve evidence, but must exercise reasonable care in preserving evidence. *Trevino*, 969 S.W.2d at 951. A court may determine there is no breach of the duty to preserve evidence if the alleged spoliator offers an "innocent explanation" such as the evidence was destroyed in an ordinary course of business. *Id.* Finally, the party alleging spoliation is not entitled to remedy unless it establishes prejudice. *Id.* Before a spoliation instruction can be submitted to a jury, the court must determine (1) whether there was a duty to preserve evidence, (2) whether the alleged spoliator breached that duty, either negligently or intentionally, and (3) whether spoliation prejudiced the non-spoliator's ability to present its case or defense. In evaluating prejudice, the court should take into consideration the relevance of the evidence, whether other evidence is available, and whether the evidence supported the key issues in the case.

The intentional spoliation of evidence relevant to a cause raises a presumption the evidence would have been unfavorable to the spoliators. *Id.* This presumption can be rebutted by evidence that the spoliation was not a result of fraudulent intent and does not apply when documents are merely lost. *Cresthaven Nursing Residence v. Freeman*, 2003 WL 253283, 8, 10 (Tex. Ct. App., Feb. 5, 2003).

The Johnson Test. The presumption does not arise unless the party responsible for destruction of evidence had a duty to preserve it. *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 722 (Tex. 2003). In *Johnson*, the court noted that spoliation instructions have been given either for (1) a party's deliberate destruction of relevant evidence; or (2) a party's failure to produce relevant evidence or explain its nonproduction. However, the court noted that such 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 evidence in its possession or control will be material and relevant to that claim." *Id.*

In *Brookshire Brothers v. Aldridge*, 438 S.W.3d 9 (Tex. 2014), the Supreme Court further clarified spoliation law in Texas. It is the responsibility of the trial court (not the jury) to decide whether there was spoliation. In order to support spoliation, (1) the party alleging same must show that the non-producing party has a duty to preserve evidence under the *Johnson* test, (2) the party alleging same must show that the non-producing party breached its duty to preserve material and relevant evidence, which occurs when it fails to exercise reasonable care to preserve that evidence, (3) the breach of duty may be either intentional or unintentional, and (4) there must be a direct relationship between the remedy and the act of spoliation. It cannot be excessive and must be "proportionate when weighing the culpability of the spoliating party and the prejudice to the non-spoliating party." To determine prejudice, the Supreme Court confirmed that the following factors must be considered: (1) the relevance of the spoliated evidence to the main issues in the case, (2) the harmful or helpful effect of the evidence on the underlying case of either party, and (3) whether the spoliated evidence was cumulative of other evidence. If the spoliation is intentional, that might be enough to support a finding that the evidence is both relevant and harmful to the spoliating party. Negligent spoliation would not be sufficient to determine this. Finally, a party may present indirect evidence to try to establish what the missing evidence would have shown, but the jury may not hear evidence unrelated to the merits of the case that tends to simply highlight the spoliating party's breach and culpability.

UTAH

There is no authority demonstrating that Utah has adopted the spoliation doctrine. *Burns v. Cannondale Bicycle Co.*, 876 P.2d 415, 419 (Utah App. 1994).

VERMONT

The only Vermont case discussing destruction of evidence requires that a party must have reason or obligation to preserve evidence before a *"presumption of falsity"* will arise. *Lavalette v. Noyes*, 205 A.2d 413, 415 (Vt. 1964).

VIRGINIA

Adverse Inference: Virginia law recognizes spoliation or missing evidence inference, which provides that *"[w]here one party has within his control material evidence and does not offer it, there is [an inference] that the evidence, if it had been offered, would have been unfavorable to that party."* Charles E. Friend, *The Law of Evidence in Virginia §* 10-17, at 338 (5th Ed. 1999); *Jacobs v. Jacobs*, 218 Va. 264, 269, 237 S.E.2d 124, 127 (Va. 1977) (holding principle is an inference rather than a presumption). Further, Virginia acknowledges that spoliation issues also arise when evidence is lost, altered, or cannot be produced. *Wolfe v. Virginia Birth-Related Neurological Injury Comp. Program*, 40 Va. App. 565, 580-583, 580 S.E.2d 467, 475-476 (Va. App. 2003). A spoliation inference may be applied in an existing action if, at the time the evidence was lost or destroyed, *"a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action."*

In a third-party spoliation context, an employer has no duty to preserve evidence on behalf of an employee who seeks to bring a third-party claim. *Austin v. Consolidation Coal Co.*, 501 S.E.2d 161, 163 (Va. 1998). Under the Virginia Workers Compensation Act there is no duty imposed on an employer to preserve evidence. *Id.* at 163-64. However, this case applies only to an employer's duty to preserve evidence.

Admission (Party or Against Interest): In general, a party's conduct, so far as it indicates his own belief in the weakness of his cause, may be used against him as an admission, subject of course to any explanations he may be able to make removing that significance from his conduct… *"conduct showing the concealment or destruction of evidential material is…admissible; in particular the destruction (spoliation) of documents as evidence of an admission that their contents are as alleged by the opponents."* 1 Greenleaf Ev. (16 Ed.), § 195, at 325; *Neece v. Neece*, 104 Va. 343, 348, 51 S.E. 739, 740-41 (Va. 1905); *Wolfe,* supra.

WASHINGTON

Adverse Inference/Rebuttable Presumption: In *Pier 67, Inc. v. King County*, 89 Wash.2d 379, 573 P.2d 2 (Wash. 1977), the Court held*: "where relevant evidence which would properly 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, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him."* 89 Wash.2d at 385-86, 573 P.2d 2. To remedy spoliation the court may apply a rebuttable presumption, which shifts the burden of proof to a party who destroys or alters important evidence. In deciding whether to apply a rebuttable presumption in spoliation cases, two factors control*: "(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.,* 94 Wash. App. 372, 381-383, 972 P.2d 475, 480 (Wash. App. Div. 2, 1999). In weighing the importance of the evidence, the court considers whether the adverse party was afforded an adequate opportunity to examine it. Culpability turns on whether the party acted in bad faith or whether there is an innocent explanation for the destruction. *Id.*

WEST VIRGINIA

Tort of Spoliation - Intentional Spoliation: West Virginia does recognize a tort of intentional spoliation of evidence as an independent tort when committed by either a party to an action or a third-party. *Hannah v. Heeter*, 584 S.E.2d 560, 563-64 (W. Va. 2003). The elements of the tort of intentional spoliation consists of: (1) a pending or potential civil action; (2) knowledge of the spoliator of the pending or potential civil action; (3) willful destruction of the evidence (4) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; (5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action; (6) the party's inability to prevail in the civil action; and (7) damages. Once the first six elements are established, there arises a rebuttable presumption that but for the fact of the spoliation the party injured by the spoliation would have prevailed in the pending or potential litigation. *Id.* A "pending or potential civil action" exists when the plaintiff has actually filed a claim, or where there is evidence objectively demonstrating the possibility that plaintiff was likely to pursue a claim in the future. *Williams v. Werner Enterprises, Inc.*, 2015 WL 1000779 (W. Va. 2015).

Negligent Spoliation: West Virginia does not recognize spoliation of evidence as an independent tort when the spoliation is the caused by the negligence of a party to a civil action. *Id.*

Negligent Third-Party Spoliation: West Virginia does recognize spoliation of evidence as an independent tort when the spoliation is the result of negligence of a third-party and that third-party had a special duty to preserve the evidence. *Id.* The element of the tort of negligent spoliation of evidence by a third-party consists of: (1) the existence of a pending or potential civil action; (2) the alleged spoliator had actual knowledge of the pending or potential civil action; (3) a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption, or special circumstances; (4) spoliation of the evidence; (5) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; and (6) damages. (There arises a rebuttable presumption that but for the fact of the spoliation of evidence the party injured by the spoliation would have prevailed in the pending or potential civil litigation if the first five element are met). *Id.*

Punitive Damages: In actions of tort where willful conduct affecting the rights of others appears a jury may assess exemplary, punitive, or vindictive damages. *Id.*

Adverse Inference: A trial court may give an adverse inference jury instruction or impose other sanctions against a party for spoliation of evidence after considering: (1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for litigation; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in causing the destruction of the evidence. *Id.* The party requesting the instruction bears the burden of proof.

Sanctions: West Virginia Rules of Civil Procedure Rule 37 is designed to permit the use of sanctions against a party who refuses to comply with the discovery rules. *Id.*

WISCONSIN

Tort of Spoliation: Wisconsin has not recognized independent tort actions for the intentional and negligent spoliation of evidence. *Estate of Neumann ex rel. Rodli v. Neumann*, 242 Wis.2d 205, 244-249, 626 N.W.2d 821, 840 - 843 (Wis. App. 2001).

Adverse Inference: The trier of fact can draw an adverse inference from intentional spoliation of evidence. *Id.; Jagmin v. Simonds Abrasive Co.*, 61 Wis.2d 60, 80-81, 211 N.W.2d 810 (Wis. 1973). The Supreme Court affirmed the trial court's refusal to give an adverse inference instruction in the absence of clear, satisfactory and convincing evidence that the defendant had intentionally destroyed or fabricated evidence. *Jagmin*, supra.

Sanctions: Wisconsin trial courts have discretion in imposing sanctions for spoliation of evidence. However, a party's duty to preserve evidence is discharged once the party in possession has given reasonable notice of a possible claim, the basis for that claim, the existence of evidence relevant to the claim, and a reasonable

opportunity for inspection of the evidence. *American Family v. Golke Brothers*, 319 Wis.2d 397, 768 N.W.2d 729 (Wis. 2009); *State v. McGrew*, 646 N.W.2d 856 (Wis. Ct. App. 2002). However, sanctions cannot *"be considered unless there is clear and convincing proof that evidence was deliberately destroyed or withheld." Hoskins v. Dodge County*, 642 N.W.2d 213, 228 (Wis. Ct. App. 2002). When deciding whether and how to sanction a party who has destroyed evidence, Wisconsin courts consider the circumstances, including whether the destruction was intentional or negligent, whether comparable evidence is available, and whether at the time of destruction the responsible party knew or should have known that a lawsuit was a possibility. *Farr v. Evenflo Co., Inc.,* 287 Wis.2d 827, 705 N.W.2d 905 (Wis. 2005); *Id.* In *Garfoot v. Fireman's Fund Ins. Co*., 228 Wis.2d 707, 724, 599 N.W.2d 411 (Wis. Ct. App. 1999), the Court held that dismissal as a sanction for destruction of evidence requires a finding of egregious conduct, *"which, in this context, consists of a conscious attempt to affect the outcome of litigation or a flagrant knowing disregard of the judicial process."* The spoliation rule does not apply in administrative proceedings. *Yao v. Bd. of Regents of Univ. of Wis. Sys.*, 649 N.W.2d 356, 362 (Wis. Ct. App. 2002).

WYOMING

Tort of Spoliation: Rather than recognize an independent tort claim for fraudulent creation of evidence (or spoliation of evidence), Wyoming allows courts to draw an adverse inference against a party responsible for losing or destroying evidence. *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 775-776 (10th Cir. 1999) (applying Wyoming law).

Adverse Inference: It is well-settled that a party's bad-faith with holding, destruction, or alteration of a document or other physical evidence relevant to proof of an issue at trial gives rise to a presumption or inference that the evidence would have been unfavorable to the party responsible for its non-production, destruction, or alteration. The Wyoming Supreme Court stated that, *"for example, in a negligence action, where a party demonstrates that evidence was concealed or destroyed in bad faith (either deliberately or with reckless disregard for its relevance), that fact should be admitted, counsel should be permitted to argue the inference to the jury, the court should instruct the jury as to the inference, and the jury may infer that the fact would have helped prove negligence; a court's refusal may be an abuse of discretion. Indeed, some courts have held that such destruction creates a presumption that shifts the burden of production, or even persuasion, to the party responsible for the destruction." Abraham v. Great Western Energy, LLC*, 101 P.3d 446, 455-456 (Wyo. 2004).

Sanctions: *"Where the evidence, rather than being destroyed, has been tampered with in bad faith, a court has the option of excluding it, thus denying its use by the tampering party. Where the alteration is not in bad faith and is not so egregious, however, the evidence itself should be admitted, together with information relating to how it was altered, and counsel may argue the issue to the jury. Id. Where the loss or destruction of evidence is not intentional or reckless, by contrast, some courts give the trial court discretion to admit or exclude testimony relating to the missing evidence, and discretion to give or withhold a 'missing evidence' instruction and a court should refuse to give such instruction if the non-produced evidence is cumulative or of marginal relevance. Id."*

In a case that warrants imposition of a sanction against the spoliating party, the court may choose to instruct the jury on the "spoliation inference," *i.e*., inform jury that the lost evidence is to be presumed unfavorable to that party; preclude spoliating party from introducing expert testimony concerning testing on the missing product or other evidence concerning the product; or dismiss the plaintiff's claim or defendant's defense or grant summary judgment to the innocent party. *Abraham v. Great Western Energy, LLC*, 101 P.3d at 455-456, citing Richard E. Kaye, Annotation, *Effect of Spoliation of Evidence in Products Liability Action*, 102 A.L.R. 5th 99-100 (2002).