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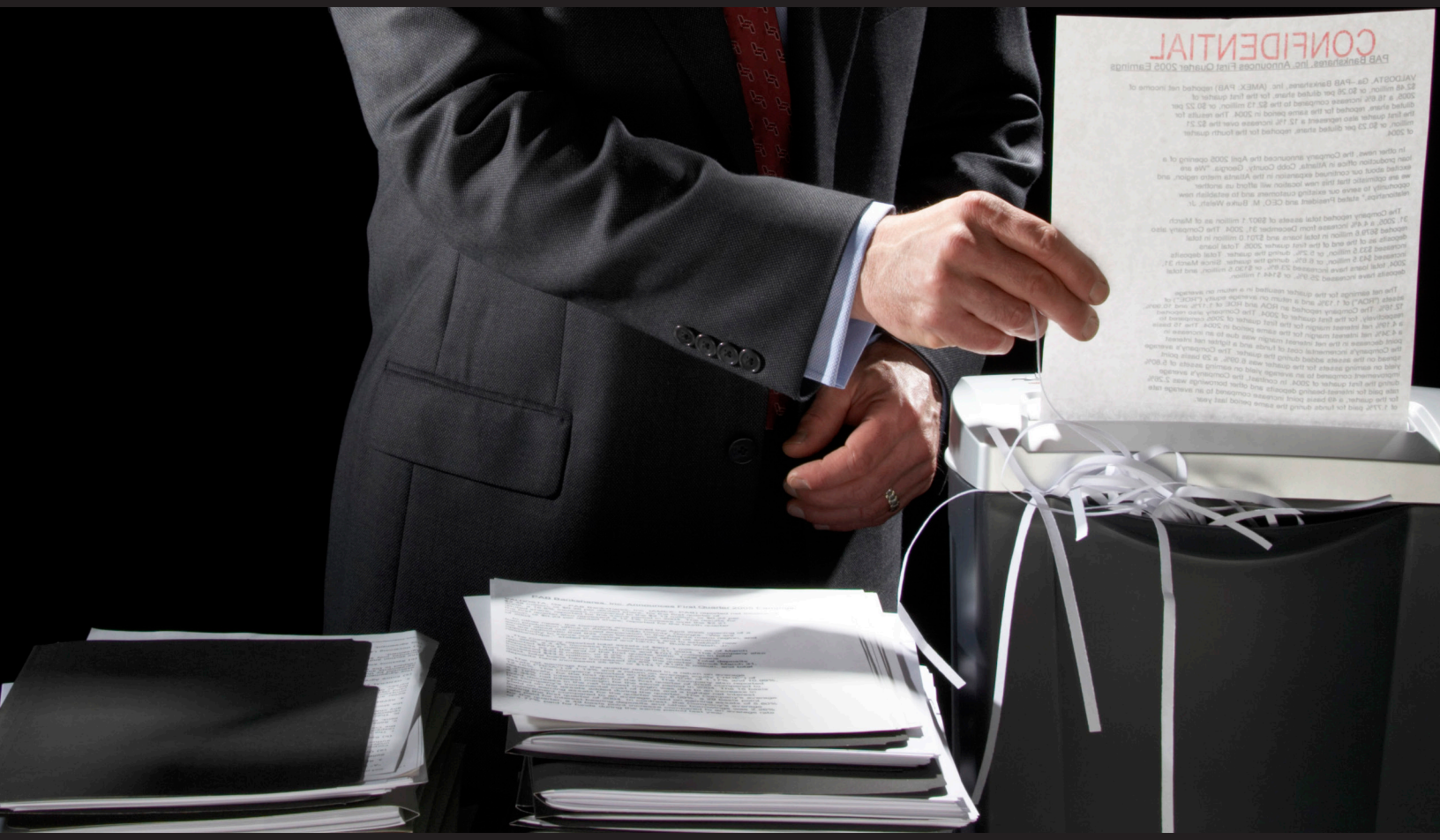
SPOLIATION OF EVIDENCE
Compendium *of* Law



SUMMER 2021

SPOLIATION OF EVIDENCE

Compendium *of* Law

In 1984, California was the first state to recognize the tort of spoliation. *See Smith v. Superior Court*, 151 Cal.App.3d 491, 198 Cal. Rptr. 829, 831 (1984). The majority of jurisdictions that have subsequently examined the issue, however, 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 either first party or third party claims for spoliation. *See Temple Cmty. Hosp. v. Super. Ct.*, 20 Cal 4th 464, 84 Cal. Rptr. 2d 852, 976 P.2d 223, 233 (1999) and *Cedars-Sinai Med. Ctr. v. Super. Ct.*, 18 Cal. 4th 1, 74 Cal. Rptr. 2d 248, 954 P.2d 511, 521 (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 those states that have examined the issue of spoliation.

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Alabama

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. To maintain the claim, the accuser must show "actual knowledge of pending or potential litigation," rather than knowledge litigation had commenced. *Killings v. Enterprise Co., Inc.,* 9 So.3d 1216, 1222 (Ala. 2008).

Smith established a test to determine when a party could be liable for negligent spoliation of evidence. 771 So. 2d at 432 (analyzing 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.

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 (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). *See also Wal-Mart Stores*, *supra*, 789 So. 2d at 176; *Christian v. Kenneth Chandler Constr. Co*., 658 So. 2d 408, 412 (Ala. 1995); *Campbell v. Kennedy*, 275 So. 3d 507 (Ala. 2018).

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 or summary judgment may be warranted. *Iverson*, *supra*, *Story v. RAJ Properties, Inc.,* 909 So.2d 797, 802 (Ala. 2005). 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. Const., Inc.*, 901 So. 2d 84, 93-94 (Ala. 2004).

Alaska

FIRST PARTY INTENTIONAL TORT

In *Hazen v. Anchorage*, 718 P.2d 456 (Alaska 1986), the Alaska Court recognized a claim for first party intentional spoliation. The plaintiff was permitted to allege spoliation against a municipal prosecutor, who as an agent of the municipality (Anchorage), where an arrest tape was alleged to have been intentionally altered. 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 against the agent.

The Alaska Court addressed the elements of a claim for intentional spoliation in *Allstate Ins. Co. v. Dooley*, 243 P.3d 197 (Alaska 2010). It requires intentional action by one party to interfere with another party's ability to bring a civil cause of action. Moreover, plaintiff must show that a valid underlying cause of action is prejudiced by the destruction of evidence. Intentional concealment of evidence until it is naturally destroyed is also considered spoliation.

THIRD PARTY INTENTIONAL TORT

In, *Nichols, supra*, the Alaska Supreme Court also recognized intentional third party spoliation of evidence as a tort. Additionally, the *Hazen* Court recognized such a claim when it permitted the plaintiff to bring a claim against the individual police officers involved in her arrest.

The Alaska Supreme Court affirmed these holdings in *Hibbits v. Sides*, 34 P.3d 327 (Alaska 2001), where it confirmed the existence of a third party claim for intentional spoliation. 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.

NEGLIGENT SPOLIATION – BURDEN SHIFTING AND ADVERSE INFERENCE

In *Sweet v. Sisters of Providence*, 895 P.2d 484 (Alaska 1995), the Alaska Supreme Court held that it was proper to shift the burden of disproving negligence and causation to the hospital which failed to preserve its treatment records in violation of its record keeping duties. The Court has considered, but not yet approved, an adverse inference instruction as an alternate remedy for negligent spoliation, or announced the standard trial courts should use when deciding whether to give such an instruction. *Lindbo v. Colaska, Inc*., No. S-16054, 2018 WL 1441820, at *3 (Alaska Mar. 23, 2018); *See Todeschi v. Sumitomo Metal Mining Pogo, LLC,* 394 P.3d 562, 568, 577-78 (Alaska 2017).

The Alaska Court has rejected a first party claim for damages for negligent spoliation, holding that the burden-shifting remedy provided by *Sweet* provides an adequate remedy. *Nichols, supra*, 6 P.3d at 304. The Court has not formally decided whether to allow a cause of action for negligent third party spoliation. *See Sweet*, 895 P.2d at 493. The Court in dicta appears to suggest that it would likely disallow a separate third party action for negligent spoliation, however. *See Hibbits*, 34 P.3d at 329.

Arizona

INDEPENDENT TORT ACTION

Arizona does not recognize an independent tort claim for either negligent or intentional spoliation of evidence. *Tobel v. Travelers Ins. Co.*, 988 P.2d 148, 156 (Ariz. Ct. App. 1999). *See also Lips v. Scottsdale Healthcare Corp.*, 229 P.3d 1008, 1009 (Ariz. 2010) (declining to recognize a tort of third-party negligent spoliation); *La Raia v. Superior Court,* 722 P.2d 286, 290 (Ariz. 1986) (rejecting the separate tort of first-party spoliation of evidence where tenant, who sued landlord for physical injuries sustained as a result of destruction of a can listing pesticides used to spray tenant's apartment, could instead obtain a complete remedy through a damages award in the underlying negligence suit).

SANCTIONS/ADVERSE INFERENCE

Issues concerning destruction of evidence and appropriate sanction are decided on a case by case basis, considering all relevant factors. S*ouza v. Fred Carriers Contracts, Inc.*, 955 P.2d 3, 6 (Ariz. Ct. App. 1997). The destruction of potentially relevant evidence occurs along a "continuum of fault—ranging from innocence through the degrees of negligence to intentionality," and the "resulting penalties vary correspondingly." *Id.* (*quoting Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir. 1988)). For example, "[t]he sanction of dismissal, though within the sound discretion of the trial court, is harsh and not to be invoked except under extreme circumstances." *Id*. at 5 (citations and internal quotations omitted).

Generally speaking, a party to a lawsuit's innocent failure to preserve evidence does not warrant sanction or dismissal. *Id*. at 6 (holding that dismissal is not warranted as a sanction for the unintentional destruction of relevant evidence after suit has been filed in a negligence case where the plaintiff did not willfully or volitionally destroyed the evidence or even know it was going to be destroyed). 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 is reasonably likely to be requested during discovery or is the subject of a pending discovery request. *Id*. If a litigant breaches this duty and does not properly preserve relevant evidence, the trial court has discretion to preserve sanctions. *Id*.

In deciding whether to allow an adverse inference instruction, the court considers whether the destruction of evidence was intentional or in bad faith "and whether the loss of evidence prejudiced the party seeking sanctions." *McMurtry v. Weatherford Hotel*, *Inc.*, 293 P.3d 520, 536 (Ariz. Ct. App. 2013).

ELECTRONICALLY STORED INFORMATION

Arizona Rule of Civil Procedure 37 addresses spoliation of electronically stored evidence ("ESI"). "A party or person has a duty to take reasonable steps to preserve electronically stored information relevant to an action once it commences the action, once it learns that it is a party to the action, or once it reasonably anticipates the action's commencement, whichever occurs first. A court order or statute also may impose a duty to preserve certain information." Ariz. R. Civ. P. 37(g)(A). "A person reasonably anticipates an action's commencement if . . . it knows or reasonably should know that it is likely to be a defendant in a specific action[,] or . . . it seriously contemplates commencing an action or takes specific steps to do so." *Id.* at 37(g)(B). When determining whether a party took reasonable steps to preserve relevant electronically stored information, the court should consider:

> the nature of the issues raised in the action or anticipated action, the information's probative value, the accessibility of the information, the difficulty in preserving the information, whether the information was lost as a result of the good-faith routine operation of an electronic information system or the good-faith and consistent application of a document retention policy, the timeliness of the party's actions, and the relative burdens and costs of a preservation effort in light of the importance of the issues at stake, the parties' resources and technical sophistication, and the amount in controversy.

Id. at 37(g)(1)(C)(ii).

If ESI that should have been preserved be lost because a party failed to take reasonable steps to preserve it, "a court may order additional discovery to restore or replace it." *Id*. at 37(g)(2). "If the information cannot be replaced or replaced through additional discovery," and the loss of this information prejudices a party, the court "may order measures no greater than necessary to cure the prejudice." *Id*. If it is found that the "party acted with the intent to deprive another party of the information's use in the litigation," the court may "presume that the lost information was unfavorable to the party," give an adverse inference instruction, or, "upon also finding prejudice to another party, dismiss the action or enter a default judgment." *Id*. A party's "failure to respond to discovery is neither mitigated nor excused by claims that the discovery sought is objectionable." *Id*. at 37(f)(2). The court also has broad authority to sanction for untimely disclosures, but is subject to review for abuse of discretion. *Id*. at 37(d). Permitting untimely disclosed information into evidence that results in prejudice might be an abuse of discretion. *Id*. at 37(c)(1)

Arizona Rule of Civil Procedure 26.1 requires the prompt disclosure of "the existence, location, custodian, and general description of any tangible evidence, documents, or electronically stored information that the disclosing party plans to use at trial" or that "may be relevant to the subject matter of the action." *Id*. at 26.1(a)(8–9). Discovery should be proportional to a robust follow-up to an initial disclosure. *Id*. at 26.2. Parties may also subpoena ESI using the procedures specified in Arizona Rule of Civil Procedure 45. Courts are empowered to "allocate the costs, expenses, and attorney fees of discovery or disclosure among the parties as justice requires." *Id*. at 37 (comments).

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 App. 2003). An aggrieved party can request that a jury be instructed to draw a negative inference against the spoliator. *Id.; Super. Fed. Bank v. Mackey*, 84 Ark. App. 1, 25-26, 129 S.W.3d 324,340 (Ark. App. 2003).

A circuit court, however, is not required to make specific findings of bad faith on the part of the spoliator prior to instructing the jury on spoliation of evidence. *Bunn Builders, Inc., v. Womack*, 2011 Ark. 231 (2011)(unreported in S.W.3d).

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. Sup.Ct.*, 18 Cal.4th 1, 74 Cal.Rptr.2d 248, 258, 954 P.2d 511 (1998). However, there California courts have found that when one party makes a promise to preserve evidence, and it is then destroyed, and the other party relied to its' detriment on that promise, there may still be a tort available. *See Cooper v. State Farm Mut. Auto. Ins. Co*., 177 Cal.App.4th 876 (2009).

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 (1999).

NO TORT OF NEGLIGENT SPOLIATION

The California Court of Appeal extended these decisions to preclude causes of action for negligent spoliation by first or third parties. *See Forbes v. County of San Bernardino*, 101 Cal. App.4th 48, 123 Cal.Rptr.2d 721, 726-27 (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*, 954 P.2d 511, 517 (Cal. 1998). 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. *See* California Evidence Code § 413 (evidence which one party has destroyed or rendered unavailable is inferred as unfavorable to that party.);

(2) Discovery sanctions under California Code of Civil Procedure § 2023.030;

(3) Disciplinary action against the attorneys. See Cal. Rules Prof. Conduct, rule 5-220 and Cal. Bus. & Prof. Code § 6077, 6106;

(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 con- duct.)

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.

The Federal District Court 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. *Id.*

While no California State Curt has a addressed the issue, the Federal District Court in Central California has decided the issue as it believed the California Supreme Court would do. *Roach v. Lee,* 369 F.Supp.2d 1194 (1194).

Colorado

DEFINITION

A litigant is susceptible for penalties if they "destroy[] evidence [which] was relevant to pending, imminent, or reasonably foreseeable litigation." *Castillo v. Chief Alternative, LLC.*, 140 P.3d 234, 236 (Colo. App. 2006). "The court is not limited to imposing a sanction only for intentional spoliation, but may impose one based upon mere negligence." *Pfantz v. Kmart Corp.*, 85 P.3d 564, 568-69 (Colo. App. 2003).

ADVERSE INFERENCE /OTHER SANCTIONS

Colorado Courts' authority to impose sanctions for spoliation of evidence is based on the Courts' inherent authority. *Warembourg v. Excel Electric, Inc.*, 471 P.3d 1213, 1217 (Colo. App. 2020). As a result, "[j]udges have the power to enter a broad range of penalties against spoliators, depending on whether the destruction of the evidence was intentional, the prejudice to the other party, how spoliation affects the judicial process, and whether lesser sanctions would be effective." *Id*. These sanctions range from "monetary sanctions to the most drastic sanction of all – the entry of a default judgment." *Id*. Adverse inference is considered to fall in the middle of the spectrum of sanctions. *Id*.

Colorado recognizes adverse inference as a sanction for intentional destruction of evidence. *Aloi v. Union Pacific Railroad Corp.*, 129 P.3d 999 (2006). The purpose of the inference is "both to punish a party who has spoiled evidence and to remediate the harm to the injured party from the absence of that evidence." *Castillo v. Chief Alternative, LLC.*, 140 P.3d 234, 235 (Colo.App.2006)(*citing Pfantz v. Kmart Corp.*, 85 P.3d 564 (Colo. App.2003)).

The state of mind of the party that destroys the evidence is an important consideration in determining whether adverse inference is the appropriate sanction. *Aloi, supra* (holding that there is no legal distinction between wilful destruction and destruction in bad faith for this purpose).

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.*

Furthermore, a determination that the destroyed evidence would have likely been relevant and introduced at trial is another factor in favor of the adverse inference. *Id.*

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 (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.

(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 (1996).

Delaware

TORT OF SPOLIATION

Delaware has declined to recognize a separate cause of action for either negligent or intentional spoliation. *See Lucas v. Christiana Skating Center, Ltd.*, 722 A.2d 1247,1250 (1998).

SANCTIONS

Criminal penalty:
11 Del. C. § 1269(2), making evidence tampering a felony, states that "[a] person is guilty of tampering with physical evidence when...[b]elieving 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."

DUTY TO PRESERVE

The duty to preserve evidence is triggered "upon the discovery of facts and circumstance that would lead to a conclusion that litigation is imminent or should otherwise be expected." *Triton Const. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *8 (Del. Ch. May 18, 2009), *aff'd*, 988 A.2d 938 (Del. 2010); *see also Beard Rsch., Inc. v. Kates*, 981 A.2d 1175, 1194 (Del. Ch. 2009) ("To impose monetary sanctions, this Court need only find that a party had a duty to preserve evidence and breached that duty. Essentially, this means that negligence alone may be sufficient to support the imposition of monetary sanctions.")

Once spoliation is determined, application of the following factors dictates the appropriate sanction:

1. The culpability or mental state of the party who destroyed the evidence;
2. the degree of prejudice suffered by the complaining party; and
3. the availability of lesser sanctions which would avoid any unfairness to the innocent party, while, at the same time, serving as a sufficient penalty to deter the conduct tin the future.
Beard Rsch., 981 A.2d at 1189.

The available sanctions include: shifting of costs and fees, adverse inference, and default judgment. *Beard Rsch*., 981 A.2d at 1190.

ADVERSE INFERENCE

When a litigant "act[s] with a mental state indicative of spoliation," an adverse inference is appropriate to discourage destruction of probative evidence "without penalizing innocent persons who simply seek to get rid of old files in the ordinary course of business that they have no duty to retain." *Sears, Roebuck and Co. v. Midcap*, 893 A.2d 542, 548 (2006). Adverse inference instruction requires a finding that the party intentionally or recklessly destroyed the evidence. *Id*.

DEFAULT JUDGMENT

To impose a default judgment, the spoliator must have acted "willfully or in bad faith and intended to prevent the other side from examining the evidence." *Beard Rsch.*, 981 A.2d at 1190.

District of Columbia

Cause of Action

Negligent or reckless spoliation of evidence is an independent and actionable tort in the District of Columbia and allows a plaintiff to pursue a claim against someone who "negligently or recklessly destroyed or allowed to be destroyed evidence that would have assisted the plaintiff in pursuing a claim against a third party." H*olmes v. Amerex Rent-A-Car*, 710 A.2d 846, 848 (D.C. 1998). To prevail on a claim for spoliation of evidence, a plaintiff must prove:

> (1) [the] 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 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.

Cook v. Children's Nat. Medical Center, 810 F. Supp.2d. 151, 155 (D.D.C. 2011), *citing Holmes,* 710 A.2d at 854.

SANCTIONS

Sanctions available when a party establishes spoliation include "the assessment of fines or attorneys' fees and costs, the preclusion of certain lines of argument that might have been advanced by the culpable party, and/or the issuance of an instruction informing jurors that they may draw an adverse inference from the spoliator's actions." *Chen v. District of Columbia*, 839 F. Supp. 2d 7, 12 (D.D.C. 2011).

The party requesting spoliation sanctions must prove three elements by a preponderance of evidence:

> ((1) The party having control over the evidence had an obligation to preserve it when it was destroyed or altered; (2) [t]he destruction or loss was accompanied by a 'culpable state of mind;' [and] (3) the evidence that was destroyed or altered was 'relevant' to the claims or defenses of the party that sought the discovery of the spoliated evidence, to the extent that a reasonable factfinder could conclude that the lost evidence would have supported the claims or defense of the party that sought it.

Id. at 13, *citing Mazloum v. D.C. Metro. Police Dep't*., 530 F. Supp. 2d 282, 291 (D.D.C. 2008); see *Mannina v. District of Columbia*, 437 F. Supp 3d. 1, 6 (D.D.C. 2020).

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 Third and Fourth 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. 2nd DCA 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. 3rd DCA 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. at 657-685.

Amerisure Insurance Co. v. Rodriguez, 255 So. 3d 502 (Fla. 3rd DCA 2018):
"Third-party spoliation claims" occur when a person or an entity, though not a party to the underlying action causing the plaintiff's injuries or damages, lost, misplaced, or destroyed evidence critical to that action. Third-party spoliation claims should generally be abated or dismissed until the underlying tort claim is resolved.

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 at 346-47.

League of Women Voters of Florida v. Detzner, 172 So. 3d 363 (Fla. 2015):
Even in the absence of a legal duty, the spoliation of evidence results in an adverse inference against the party that discarded or destroyed the evidence. Courts may impose sanctions, including striking pleadings, against a party that intentionally lost, misplaced, or destroyed evidence, and a jury could infer under such circumstances that the evidence would have contained indications of liability. If evidence was negligently destroyed, a rebuttable presumption of liability may arise. An adverse inference may arise in any situation where potentially self-damaging evidence is in the possession of a party and that party either loses or destroys the evidence.

Landry v. Charlotte Motor Cars, LLC, 226 So. 3d 1053 (Fla. 2nd DCA 2017):
To impose spoliation sanctions, the trial court must determine whether: (1) the evidence existed at one time, (2) the spoliator had a duty to preserve the evidence, and (3) the evidence was crucial to an opposing party's ability to prove its prima facie case or a defense. Sanctions may generally be appropriate when a party has spoliated, lost, or misplaced evidence. When there is a basis for imposing spoliation sanctions, the appropriate sanction varies according to (1) the willfulness or bad faith, if any, of the party who lost the evidence, (2) the extent of the prejudice suffered by the other party, and (3) what is required to cure the prejudice.

LEGAL DUTY

Peña v. Bi-Lo Holdings, LLC, 304 So. 3d 1254 (Fla. 3rd DCA 2020):
Because a duty to preserve evidence does not exist at common law, the duty must originate either in a contract, a statute, or a discovery request. The adverse inference jury instruction regarding spoliation of evidence does not relieve a party from its burden of proof at trial.

Shamrock-Shamrock, Inc. v. Remark, 271 So. 3d 1200 (Fla. 5th DCA 2019):
Member of city planning board, as a nonparty, did not have duty to preserve evidence in connection with property owner's action against city and planning board challenging zoning department's denial of property owner's request to rezone property to allow it to construct hotel and marina; although member was aware of underlying litigation, there was no statute, contract, or discovery request that would impose clearly-denied duty on her to preserve any potentially-relevant evidence, and thus board member was not liable for spoliation of evidence based on her actions in destroying old computer after having received deposition request from owner in the litigation brought against city. There are innumerable circumstances in which a nonparty to litigation may have evidence relevant to a case and may know of its relevance, but that knowledge, by itself, should not give rise to a duty to safeguard the evidence in anticipation of litigation.

Georgia

THIRD PARTY TORT OF SPOLIATION

In *Owens v. Am. Refuse Sys., Inc.*, 244 Ga.App. 780 (2000), the Georgia Court of Appeals declined to recognize an independent third-party tort for spoliation of evidence. While a number of states have recognized causes of action for third-party spoliation of evidence (including many in the years since *Owens* was decided), neither a statute nor any ruling of the Georgia Supreme Court has established third-party negligent spoliation of evidence as an independent tort in this state. *Phillips v. Owners Ins. Co.*, 342 Ga.App. 202, 204–05 (2017) (internal citations omitted).

FIRST PARTY TORT OF SPOLIATION

Likewise, dicta in *Gardner v. Blackston*, 185 Ga.App. 754, 755 (1) (1988) (physical precedent only), suggests that spoliation of evidence is not recognized as an independent cause of action in Georgia, even as a remedy between parties to underlying litigation. *Phillips v. Owners Ins. Co.*, 342 Ga. App. 202, 204–05 (2017) (internal citations omitted). Much like the lack of establishment of an independent third-party tort of spoliation, to date, no statute or ruling of the Georgia Supreme Court has defined or established an intentional, independent tort of spoliation in Georgia.

SANCTIONS

In Georgia, when a party brings an allegation of spoliation of evidence, the initial threshold determination itself consists of a two-part test: (1) is the evidence at issue 'necessary' to the litigation; and (2) was there 'contemplated or pending litigation' at the time of alleged spoliation. If both prongs are not met, then there is no "spoliation" and by definition no sanctions can be applied.

Upon a finding that spoliation did occur, the court must determine whether spoliation sanctions are warranted. In making this determine, Georgia courts consider several factors including: (1) whether the party seeking sanctions (i.e. the non-spoliating party) 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 spoliator acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence was not excluded. *Amli Residential Properties, Inc. v. Georgia Power Co.,* 293 Ga.App. 358, 361 (2008).

Spoliation issues often arise before trial, and sanctions for spoliation may include the removal of certain evidence and issues from the jury's consideration. It is the trial court's responsibility to determine what evidence the jury may hear and which issues the jury must resolve. Therefore, the court has the authority to make factual findings necessary to determine whether to impose sanctions for spoliation. *Bouve & Mohr, LLC v. Banks*, 274 Ga.App. 758, 762 (2005). For example, in *Wal-Mart Stores, Inc. v. Lee*, 290 Ga.App. 541 (2008), the court was permitted to make factual findings and allow specific claims such as punitive damages to automatically proceed to the jury for their consideration.

Under Georgia law, spoliation of relevant evidence warrants the imposition of sanctions including: (1) entry of judgment in favor of the plaintiff; (2) exclusion of evidence or disallowing a party to contest a certain fact; or (3) a jury instruction that the spoliation of evidence raises a presumption against the spoliator. *Bridgestone/Firestone North American Tire, LLC v. Campbell*, 258 Ga.App. 767 (2002). Generally, the most severe sanction available for spoliation in Georgia is the Court striking the spoliating-party's pleading(s).

Hawaii

TORT OF SPOLIATION

Hawaii courts have not resolved whether Hawaii law would recognize a tort of spoliation of evidence. *See Matsuura v. E.I. du Pont de Nemours and Co.*, 102 Hawaii 149, 168, 73 P.3d 687, 706 (2003).); *Jou v. Adalian,* 2017 WL 2990280, D.Hawai'i, July 13, 2017.

SANCTIONS/ADVERSE INFERENCE

Under Haw. R. Civ. P. Rule 37(b)(2), Hawaii circuit courts have wide-ranging authority to impose sanctions for the spoliation of evidence, and to "make such orders . . . as are just," including the dismissal of claims, in response to discovery violations. *Stender v. Vincent*, 92 Hawai'i 355, 362 (2000) Generally, sanctions under Rule 37(b) do not apply unless a prior court order for discovery has been violated. *Stender* at n.6. A circuit court also has the power to fashion a remedy to cure prejudice suffered as a result of another party's loss or destruction of evidence. *Id*. at 362; see also Haw. Rev. Stat. § 603-21.9. An adverse inference jury instruction is one such remedy. *Stender* at 362. Discovery sanctions serve various purposes: punitive, deterrent, and remedial; bad faith or intentionality is not required for their imposition, as even nonintentional spoliation creates an unfair disadvantage. *Id*. at 364.

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 (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 (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. *Id.* 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. *Id.* 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 conscious- ness 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;* Idaho R.Civ. P. 37.

THIRD PARTY TORT OF SPOLIATION:

In 2019, Idaho formally adopted the tort of spoliation when committed by a third party. *Raymond v. Idaho State Police,* 165 Idaho 682, 686, 451 P.3d 17, 21 (2019). In adopting the tort, the *Raymond* Court provided two axiomatic principles. *Id*. First, that the tort is intentional, requiring proof of an improper motive or improper means in accomplishing the act. *Id*. Second, the tort must be committed by a third party. The *Raymond* Court limited its adoption to third-party actors because Idaho already provides a remedy for first-party spoliation. *Id*. "The remedy for such first-party misdeeds is not an independent cause of action. Rather, it results in the remedy of instructing the jury that it may reasonably infer that evidence deliberately or negligently destroyed by a party was unfavorable to that party's position." *Id*. Thus, the Court reaffirmed that the tort adopted is to "provide an aggrieved plaintiff a cause of action against a third party for intentional, egregious conduct that adversely impacts the plaintiff's cause of action against another." *Id*.

In order to establish a cause of action for spoliation, a party must show: (1) a pending or probable lawsuit involving the plaintiff; (2) the defendant's knowledge of the potential or probable lawsuit; (3) the wrongful destruction, mutilation, alteration, or concealment of evidence by the defendant 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 disruption to the lawsuit; and (6) damages proximately caused by defendant's acts. *Raymond*, 165 Idaho at 687, 451 P.3d at 22.

Illinois

The Supreme Court of Illinois has held that 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.

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 (2004). 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. *Id* 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. 1 Dist. 2005).

SANCTIONS

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.

Indiana

TORT OF SPOLIATION FIRST PARTY

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. WalMart Stores, Inc.*, 824 N.E.2d 349, 355 (Ind. 2005).

THIRD PARTY

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 (App. 2005). However, this case has been overturned on appeal – specifically, the appeals court clarified that claims against an employer for destroying evidence that would have been helpful in a workers compensation action could not stand. *Glotzbach v. Froman*, 854 N.E.2d 337 (2006). Additionally, dicta indicates that there may be a desire to end third party spoliation entirely. *Id. See also Howard Regional Health System v. Gordon*, 952 N.E.2d 182 (Ind. 2011).

Additionally, the criminal code labels obstruction of justice as a Level 6 Felony, and defines the crime as:

> Anyone 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.

Ind. Code. Ann. § 35-44.1-2-2 (West).

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.

Gribben, 824 N.E.2d at 351.

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) (overruled on other grounds by *Smith v. Shagnasty's Inc.*, 688 N.W.2d 67 (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 v. Saddler*, 656 N.W.2d 104, 111 (Iowa 2003).

Kansas

TORT OF SPOLIATION

In *Koplin v. Rosel Well Perforators, Inc.*, 241 Kan. 206, 734 P.2d 1177 (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, 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 (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, KPJI 102.73, borrowed from the Illinois Jury Instruction for "Inferences Arising from Failure to Produce Evidence." The applicable jury instruction, KPJI 102.73, provides:

"If you find there is evidence that would help explain an issue and that a party has control over that evidence, but has not presented it, you are to presume that the evidence is unfavorable to that party, unless you find that a reasonable excuse for not presenting the evidence has been shown." Importantly, the "Notes on Use" provided by the Kansas Judicial Council specifically states: "The Committee recommends that this instruction should seldom be given because these matters would be addressed in closing argument."

Kentucky

TORT OF SPOLIATION

Kentucky does not recognize separate torts for either first party or third party spoliation of evidence. *Univ. Med. Ctr., Inc. v. Beglin,* 375 S.W.3d 783, 787–90 (Ky. 2011)

SANCTIONS/ADVERSE INFERENCE

Rather, the court counteracts a party's deliberate destruction of evidence through evidentiary rules, civil sanction, and missing evidence instructions. *Id.* (*citing Tinsley v. Jackson*, 771 S.W.2d 331 (1989)).

Louisiana

TORT OF SPOLIATION

In *Reynolds v. Bordelon*, the Louisiana Supreme Court held no cause of action exists for the negligent spoliation of evidence. 2014-2362 (La. 6/30/15); 172 So.3d 589, 592. The court reasoned that regardless of any alleged source of the duty, whether general or specific, public policy precludes the existence of a duty to preserve evidence. *Id*. Rather, Louisiana jurisprudence indicates that a party asserting a state law tort claim for spoliation of evidence must allege that the defendant intentionally destroyed evidence to deprive an opposing party of its use. *Tomlinson v. Landmark Am. Ins. Co*., 2015-0276 (La. App. 4 Cir. 3/23/16), 192 So. 3d 153; *Desselle v. Jefferson Hosp.* Dist. No. 2, 887 So.2d 524, 534 (La. App. 2004).

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 v. Dillard's Dept. Store, Inc.*,777 So.2d 1,3 (La. App. 3 Cir. 2000).

Maine

The Maine Law Court has never recognized spoliation of evidence as an actionable tort or a separate cause of action. *Cady v. Cumberland County Jail*, 2013 U.S. Dist. LEXIS 109195 *149 (Me. 2013); *Gagne v. D.E. Jonsen, Inc.*, 298 F.Supp.2d 145 (D. Me. 2003). 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. *See, e.g., 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 (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, 561, 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 Judicial Court declined to recognize an action in tort for spoliation of evidence.

SANCTIONS

The Massachusetts Supreme Judicial Court has recognized, however, that Massachusetts courts have remedies for spoliation of evidence, i.e., exclusion of testimony in the underlying action, permitting adverse inferences against the spoliator, allowance of evidence showing pre-accident condition of lost evidence and circumstances concerning how the evidence was spoliated, dismissal, or judgment by default. *See Gath v. M/A-Com, Inc.*, 440 Mass. 482, 499, 802 N.E. 2d 521, 535 (2003). The purpose of sanctions is to prevent unfair prejudice to the non-spoliator which may be occasioned by the lost/destroyed evidence. *Nally v. Volkswagen of America*, 405 Mass 191, 197-98 (1989). "The doctrine does not extend to a 'fault free destruction or loss of physical evidence." *Santiago v. Rich Products Corp*, 92 Mass. App. Ct. 577, 580 (2017), quoting from *Kippenhan v. Chaulk Services, Inc.*, 428 Mass 124, 127 (1998). Sanctions should be carefully tailored to remedy the precise unfairness occasioned by the spoliation. *Id.* at 426; *see also, Keene v. Brigham & Women's Hosp., Inc.*, 439 Mass 223, 234. 786 N.E.2d 824, 833-34 (Mass. 2003). Generally, "a judge should impose the least severe sanction necessary to remedy the prejudice to the non-spoliating party. *Gath* at 235 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). The extreme sanction of entering a dismissal or default judgment ordinarily will not be considered absent a finding of willfulness or bad faith. *Keene* at 235-236.

In *Com. v. Kee*, the Supreme Judicial Court made clear that if a defendant in a criminal case can demonstrate a reasonable possibility that missing evidence would have been favorable to him, the trial court has the discretion to issue a missing evidence instruction to the jury 449 Mass. 550, 558, 870 N.E.2d 57 (2007).

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. JI2d 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) (rejected on other grounds by *Mann v. Shisteric Enterprises,* Mich. App. NO. 210920, 2001 WL 1545906.

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 (1979); *Berryman v. K Mart Corp.*, 193 Mich. App. 88, 101, 483 N.W.2d 642 (1992); *Ritter v. Meijer, Inc.*, 128 Mich.App. 783, 786, 341 N.W.2d 220 (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 (1957), quoting 20 Am. Jur., Evidence, § 185, p. 191; *see also Lagalo v. Allied Corp.*, 233 Mich.App. 514, 520, 592 N.W.2d 786 (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. *See Himes v. Woodings-Verona Tool Works, Inc.*, 565 N.W.2d 469, 471 (Minn.App.1997), *review denied* (Minn. Aug. 26, 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 also permits the jury to infer that "the evidence, if produced, would have been unfavorable to that party." *Federated Mut.*, 456 N.W.2d at 437.

Further, 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

Minnesota Civ. JIG 12.35, reads that, "If either party does not produce evidence that the party could reasonably be expected to pro- duce" 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

Under current Mississippi law, there is no independent cause of action for a "spoliation of evidence" claim. *Bolden v. Murray*, 97 So. 3d 710, 717 (Miss. Ct. App. 2012) (citing *Richardson v. Sara Lee Corp.*, 847 So. 2d 821, 824 (Miss. 2003)); *see also Dowdle Butane Gas Co. v. Moore*, 831 So. 2d 1124, 1135 (Miss. 2002) ("We refuse to recognize a separate tort for intentional spoliation of evidence against both first and third-party spoliators.").

ADVERSE INFERENCE/PRESUMPTION

Spoliation or destruction of relevant evidence can raise a presumption, or, more properly, an inference, that this evidence would have been unfavorable to the case of the spoliator. A 2017 case from the Mississippi Supreme Court holds that both intentional and negligent loss of evidence is sufficient for a jury instruction on the negative spoliation inference. *Renner v. Retzer Res., Inc.,* 2017 Miss. LEXIS 450, *15 (Miss. Dec. 7, 2017).

Before Renner, the law had been that, to get an instruction, the non-spoliating party had to prove that the evidence was lost/destroyed intentionally, out of a "desire to suppress the truth." *Tolbert v. State*, 511 So. 2d 1368, 1372-73 (Miss. 1987). Two cases had carved out an exception to that rule, allowing a negative-inference instruction simply for negligent spoliation. However, both of those cases involved a statutory or other legal duty to preserve the evidence. *See Thomas v. Isle of Capri Casino*, 781 So. 2d 125, 133 (Miss. 2001) (gaming regulations requiring preserving slot machine when jackpot is hit); *DeLaughter v. Lawrence Cty. Hosp.*, 601 So. 2d 818, 821 (Miss. 1992) (statutes requiring hospitals to maintain medical records).

The *Renner* case does not make any such distinction. It is merely a premises liability case in which the alleged video footage of the incident was not preserved. So now, ALL lost evidence is fair game for a potential spoliation instruction.

SANCTIONS

Other spoliation remedies include discovery sanctions, criminal penalties or disciplinary actions against the attorneys who participate in spoliation. *Dowdle*, 831 So. 2d at 1127-28.

Missouri

ADVERSE INFERENCE

Spoliation is the intentional act of destruction or significant alteration of evidence. *State ex rel. Zobel v. Burrell,* 167 S.W.3d 688, 691 (Mo. banc 2005). The concealment or suppression of relevant evidence, or the failure to determine whether certain evidence exists may also constitute spoliation. *DeGraffenreid v. R. L. Hannah Trucking*, 80 S.W.3d 866, 874, 878 (Mo. App. W.D. 2002) (overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223, 225 (Mo. banc 2003)). The destructive act must be intentional; mere negligent destruction of evidence does not constitute spoliation. *Schneider v. G. Guilliams, Inc.*, 976 S.W.2d 522, 527 (Mo. App. E.D. 1998). The spoliator must destroy or alter the evidence under circumstances indicating fraud, deceit, or bad faith. *Id*. Under certain circumstances the spoliator's failure to adequately explain the evidence's destruction may give rise to an adverse inference. *Id*. at 527. The party seeking to invoke the doctrine bears the burden of making a prima facie showing of the spoliator's fraudulent intent. *DeGraffenreid*, 80 S.W.3d at 873.

If the trial court finds spoliation of evidence occurred and grants a party relief, the "spoliation doctrine" provides the trial court may grant an adverse evidentiary inference in favor of the opposing party as a remedy. *Baldridge v. Director Of Revenue*, 82 S.W.3d 212, 223 (Mo. App. W.D. 2002). The adverse inference holds the spoliator to admit the missing evidence would have been unfavorable to its position. *Garrett v. Terminal R. Ass'n of St. Louis*, 259 S.W.2d 807, 812 (Mo. 1953); *Schneider*, 976 S.W.2d at 526. "The adverse inference, however, does not prove the opposing party's case. Instead, the spoliator is left to determine whether any remaining evidence exists to support his or her claim in the face of the inference." *Id*. at 526.

The Western District addressed the extent of the remedy for spoliation in *DeGraffenreid*. In that case, a truck driver suffered a stroke in his parked truck. *DeGraffenreid*, 80 S.W.3d at 870. The driver filed a claim for workers' compensation, alleging the trucking company forced its drivers to drive more hours than federal regulations allowed, causing stress that contributed to the stroke. *Id*. In discovery, the driver sought a set of telephone logs maintained by the trucking company allegedly demonstrating the federal violation, but the trucking company failed to provide the complete logs without explanation. *Id*. at 873-74. The Workers' Compensation Commission ("the Commission") found the trucking company's failure to explain the missing logs triggered the spoliation doctrine, and as a result the trucking company was required to admit that driving in excess of federal regulations was a substantial factor in his stroke, entitling him to benefits. *Id*. at 871. On appeal, the Court agreed the spoliation doctrine was triggered, but held the Commission erred in the appropriate remedy. *Id*. at 875, 878. The Court reasoned that the spoliator is deemed to admit only that the document in question would state what the opposing party claims it states, not the ultimate conclusion of the claim. *Id*. at 877-78. Thus, it would be presumed that the driver drove in excess of the hours allowed by federal regulations, but the trucking company did not admit that the violation was a substantial factor in the stroke or automatically entitle the driver to benefits. *Id*. at 878.

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) a legal or contractual duty to pre-serve 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.

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., supra*. 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) (overturned on other issues by *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006)).

Nebraska

ADVERSE INFERENCE

Spoliation is the intentional destruction of evidence. *McNeel v. Union Pacific R. Co.*, 276 Neb. 143, 156, 753 N.W.2d 321, 333 (2008). The intentional spoliation or destruction of evidence relevant to a case raises an adverse inference, namely that this evidence would have been unfavorable to the case of the spoliator. *McNeel*, 276 Neb. at 156, 753 N.W.2d at 332. Accordingly, the proper remedy for spoliation of evidence is an adverse inference jury instruction. Daniel A. Morris, 2 Neb. Prac., Nebraska Trials § 18:15 (3d ed. Dec. 2020) (citing *McNeel*, 276 Neb. at 156, 753 N.W.2d at 332).

The rationale of the rule is that intentional destruction amounts to an admission by conduct of the weakness of one's own case. *McNeel*, 276 Neb. at 156, 753 N.W.2d at 332. Thus, "only intentional destruction support the rationale of the rule." *Id*. The Nebraska Supreme Court has explained that "[t]he inference does not arise where destruction was a matter of routine with no fraudulent intent because the adverse inference drawn from the destruction of evidence is predicated on bad conduct." *Id.; see also Hoffbauer v. Farmers Co-op*., Case No. A-11-962, 2012 WL 4795619, at *12 (Neb. App. Oct. 2, 2012).

SANCTIONS

Nebraska law provides for the imposition of sanctions in the event spoliation is established. If evidence is destroyed after the entry of a court order requiring the evidence to be produced during discovery, then a court may impose sanctions pursuant to Nebraska Court Rule of Discovery § 6-337(b)(2). However, even if the court has not entered a prior order, the court may impose sanctions pursuant to the court's inherent powers. *Schindler v. Walker*, 256 Neb. 767, 779, 592 N.W.2d 912, 920 (1999). As explained by the Nebraska Supreme Court, as a general rule, the range of sanctions imposed for violations of the discovery rules is a matter within the discretion of the trial court. *Schindler*, 256 Neb. at 778, 592 N.W.2d at 920. "A district court's inherent powers include the broad discretion to make discovery and evidential rulings conductive to the conduct of a fair and orderly trial. *Id*. at 779, 592 N.W.2d at 920.

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).

But "discovery sanctions are within the power of the district court." *GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 869, 900 P.2d 323, 325 (1995). The threshold question in any spoliation determination is "whether the alleged spoliator was under any obligation to preserve the missing or destroyed evidence." *Bass-Davis*, 122 Nev. 442, 450, 134 P.3d 103, 108 (Nev. 2006). Pursuant to Nevada law, a party is under a duty to preserve evidence which he knows or has reason to know is relevant. *GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 870, 900 P.2d 323, 325 (1995); *Mischler v. State of Nev.* Bd. of Med. Exam'rs, 109 Nev. 287, 294 (1993); Gallagher v. Crystal Bay Casino, LLC, 2010 U.S. Dist. LEXIS 124421, *6 (2010); Bass-Davis v. Davis, supra.

"Fundamental notions of fairness and due process require that discovery sanctions be just and that sanctions relate to the specific conduct at issue." *GNLV Corp., supra* (citation omitted). Nev. R. Civ. Pro. 37(b) lists possible sanctions a court may consider imposing, including an adverse inference, rebuttable presumption, and dismissal of the action.

ADVERSE INFERENCE VS. REBUTTABLE PRESUMPTION

"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,* 122 Nev. 442, 447, 134 P.3d 103, 106 (Nev. 2006. In *Bass-Davis*, the Supreme Court held that when evidence was negligently lost or destroyed, there is a permissible inference that missing evidence would be adverse to the party who lost the evidence, but when the evidence was willfully destroyed, then a rebuttable presumption would apply. *Id.*

DISMISSAL

an action "should be used only in extreme situations; if less drastic sanctions are available, they should be utilized." *Nevada Power v. Fluor Ill.*, 108 Nev. 638, 645, 837 P.2d 1354, 1359 (1992). The Nevada Supreme Court set out eight (8) factors to consider before ordering dismissal with prejudice as a discovery sanction:

> (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 dismissal relative to the severity of the abusive conduct;
>
> (4) whether evidence has been irreparably lost;
>
> (5) the feasibility and fairness of alternative and less severe sanctions, such as an order deeming facts relating to improperly lost or destroyed evidence to be admitted by the offending party;
>
> (6) the policy favoring adjudication on the merits;
>
> (7) whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney; and
>
> (8) the need to deter both the parties and future litigants from similar abuses.

Young v. Johnny Ribero Building, 106 Nev. 88, 92, 787 P.2d 777 (1990). The court further stated that "every order of dismissal with prejudice as a discovery sanction [must] be supported by an express, careful and preferably written explanation of the court's analysis" of the above factors. *Id.* at 93.

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. *See Rodriguez v. Webb*, 141 N.H. 177, 180, 680 A.2d 604 (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. *See 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 (2003).

In *Rodriguez*, the court specifically declined to answer whether or not New Hampshire would recognize an independent tort based on intentional spoliation of evidence. *Id.*

New Jersey

ADVERSE INFERENCE AND 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 (App. Div. 2001). In civil litigation, depending on the 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. *See Rosenblit v. Zimmerman*, 166 N.J. 391, 400-06, 766 A.2d 749 (2001). But, the Supreme Court of New Jersey held that it did not recognize a separate tort action for intentional spoliation. *Id.* at 404-05. An adverse inference instruction may be given during the underlying litigation whereby it is presumed the destroyed evidence would have been unfavorable to the destroyer. *See Swick v. N.Y. Times*, 357 N.J. Super. 371, 377, 815 A.2d508, 511 (App. Div. 2003). Discovery sanctions may include a designation that certain facts be 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 an entry of judgment by default. *Id.* An appropriate remedy may even include an award of counsel fees in exceptional cases, particularly where there is a finding of intentional spoliation and where the non-spoliating party's ability to defend itself was compromised. *Grubbs v. Knoll*, 376 N.J.Super. 420, 435-436, 870 A.2d713,721-722 (App. Div. 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.*, 905 P.2d 185, 189 (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*, 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, 406 (N.M. 1999) (overruled on other grounds by *Herrera v. Quality Pontiac*, 73 P.3d 181 (N.M. 2003)).

SANCTIONS

New Mexico recognizes that spoliation of evidence may result in sanctions. These sanctions include default judgment, dismissal, adverse inference or adverse instruction. *Segura v. K-Mart Corp*., 62 P.3d 283, 286-87 (N.M: Ct. App. 2002). In determining whether to impose sanctions and how severe those sanctions should be, courts should consider "(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." *Rest. Mgmt. Co. v. Kidde-Fenwal, Inc.*, 986 P.2d 504, 508 (N.M. Ct. App. 1999).

New York

THIRD PARTY NEGLIGENT SPOLIATION

The Court of Appeals of New York declined to recognize such a cause of action under the facts of *MetLife Auto & Home v. Joe Basil Chevrolet, Inc.*, 1 N.Y.3d 478, 807 N.E.2d 865, 775 N.Y.S2d 754 (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.

SPOLIATION BY AN EMPLOYER

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. *See DiDomenico v. C & S Aeromatik Supplies*, 252 A.D.2d 41, 682 N.Y.S.2d 452 (2d Dept.1998). But 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.D2d 636, 754 N.Y.S.2d 328 (2d 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

CPLR 3126 permits sanctions, including dismissal for a party's failure to disclose relevant evidence. *MetLife*, 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 (2d Dept. 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 (2d Dept. 2003). *But see Herrera v. Matlin*, 758 N.Y.S.2d 7, 7 (1st Dept. 2003) (physician's loss of records that amounted 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 (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 (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 (ND. 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 its 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 (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) (superseded on other grounds by *Cobb v. Shipman*, No. 211-T-0049, 2012 WL 1269128).

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 Ap. 2003).

Oklahoma

SPOLIATION IN OKLAHOMA

Spoliation "refers to the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Barnett v. Simmons*, 197 P.3d 12, 20 (Okla. 2008). "Spoliation includes the intentional or negligent destruction or loss of tangible and relevant evidence which impairs a party's ability to provide or defend a claim." *Id*.

TORT OF SPOLIATION

In *Patel v. OMH Medical Center, Inc.*, 987 P.2d 1185 (Okla. 1999), the Oklahoma Supreme Court stated that "[n]either spoliation of evidence nor prima facie tort (for acts constituting spoliation of evidence) has ever been recognized by this court as actionable." *Id*. at 1202.

RATHER, THE REMEDY IN OKLAHOMA IS AN ADVERSE INFERENCE FOR SPOLIATION

"Spoliation occurs when evidence relevant to prospective 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).

EXAMPLES OF ADVERSE INFERENCE SANCTIONS

Koch v. Koch Industries, Inc., 197 F.R.D. 488, 490 (N.D. Okla. 1999) involved an action by shareholders of a corporation alleging that an oil company and subsidiaries understated to the United States the quantity of crude oil and natural gas produced from federal and Indian lands. Plaintiffs therein alleged that defendant intentionally or negligently altered certain computer tapes containing evidence of the alleged misrepresentations. Plaintiffs requested sanctions for their costs in recreating two databases that they wished to use as evidence. "Given the culpability of Defendants' conduct and the prejudice suffered by Plaintiffs due to the loss of the Computer Tapes, the Court finds that Defendants should reimburse Plaintiff for the reasonable cost of creating the Federal/Indian Osage databases." *Koch*, at 491. "[T]he Court hereby finds that Defendants shall pay to Plaintiffs $200,000.00 as a sanction for the spoliation identified in the Court's previous findings and conclusions." *Id*. Further, the Court ruled " . . . Defendants are prohibited from using any exhibit or analysis prepared by using the spoliated Computer Tapes." *Id*.

See also, *Leach v. GS Legacy Corner LLC., Legacy Corner Apartments, et. al*., (Oklahoma County, Case No. CJ-2013-5011). Generally, Plaintiff Guy Leach resided in an apartment complex owned/operated by defendants. On September 25, 2012, Plaintiff was descending some stairs from his second floor apartment when a concrete step underfoot crumbled, causing Plaintiff to fall. Ultimately, Plaintiff developed Complex Regional Pain Syndrome (CRPS) that resulted in allegedly debilitating pain. During discovery it was revealed that Defendants and their insurance carriers (allegedly in concert with counsel) mishandled certain pieces of evidence and/or were intentionally selective about what evidence to preserve, and that the maintenance/repair logs for the apartment/stairs were not preserved and/or were destroyed. Plaintiff was able to show that the bulk of the evidence destruction/failure to preserve occurred after litigation was imminent or known. Based on Spoliation, the Court sustained a Motion for Sanctions and entered an Order against Defendants on the issue of liability, leaving only the amount of compensatory and punitive damages as issues for trial. The case proceeded to trial on those issues and the Jury returned a $6,000,000.00 verdict on compensatory damages and $6,000,000.00 in punitive damages ($12,000,000.00 total).

Oregon

ADVERSE PRESUMPTION

Oregon has a statutory provision allowing that willful suppression of evidence raises an unfavorable presumption against the party who suppressed it. Or. Rev. Stat. § 40.135, Rule 311(1)(c). *See also Stephens v. Bohlman*, 909 P.2d 208, 211 (Or. Ct. App. 1996). "For similar reasons, evidence that an alleged tortfeasor attempted to conceal the true cause of the injury at least permits a jury to draw an unfavorable inference." *Stephens*, 902 P.2d at 211.

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. May 7, 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 (3d Cir. 1994)).

Rhode Island

TORT OF SPOLIATION

Neither the Rhode Island legislature nor the courts have yet established or recognized the existence of an independent tort for spoliation of evidence. *See Malinowski v. Documented Vehicle/ Drivers Systems, Inc.*, 66 Fed. Appx. 216, 222 (2003).

ADVERSE INFERENCE

Rhode Island does recognize that an adverse inference may be given as a 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. *See Malinowski v. United Parcel Serv.*, 792 A.2d 50, 54-55 (R.I. 2002). Further, 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

NOT AN INDEPENDENT TORT

In 2011, the Supreme Court of South Carolina specifically choose not to recognize an independent tort for negligent spoliation of evidence, irrelevant of whether it was by a first or third party. *Cole Vision Corp. v. Hobbs*, 714 S.E.2d 537 (2011).

REMEDIES

Instead of establishing an independent tort, South Carolina recognizes several other remedies for spoliation – mainly striking pleadings, and adverse jury instructions. *Id*. at 541 (*citing Stokes v. Spartanburg Reg'l Med. Ctr.*, 368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct.App.2006); *QZO, Inc. v. Moyer*, 358 S.C. 246, 258, 594 S.E.2d 541, 548 (Ct. App.2004)).

ADVERSE INFERENCE

Where a party is in possession of evidence but does not make it available to the other party, then the party who sought the evidence is permitted a "negative inference" charge to the jury. If the party in possession simply cannot make the evidence available because the evidence was lost or destroyed, then the party seeking the evidence is entitled to a charge to the jury for it to consider the reasons why the evidence was not preserved, and may draw a negative inference if it so desires. *See Stokes v. Spartanburg Regional Medical Center*, 368 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006).

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)(overruled on other grounds).

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. *See 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).

Texas

TORT OF SPOLIATION

Texas does not recognize an independent cause of action for intentional or negligent spoliation of evidence by parties to litigation. *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 18 (Tex. 2014); *Trevino v. Ortega,* 969 S.W.2d 950, 951 (Tex. 1998).

SPOLIATION ANALYSIS

Spoliation analysis involves a two-step process performed by a trial court outside of the presence of the jury. A court first determines, as a question of law, whether a party spoliated evidence. If spoliation occurred, the court must then assess an appropriate remedy. To conclude a party spoliated evidence, a trial court must find that: (1) the spoliating party had a duty to reasonably preserve evidence, and (2) the party intentionally or negligently breached that duty by failing to preserve the evidence. *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 14 (Tex. 2014).

A party alleging spoliation bears the burden of establishing that the nonproducing party had a duty to preserve the evidence. *Brookshire Bros.*, 438 S.W.3d at 20. The duty arises 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*. A "substantial chance of litigation" arises when "litigation is more than merely an abstract possibility or unwarranted fear." *Id*.

If a party has a duty to preserve evidence, a breach of that legal duty occurs by failing to exercise reasonable care to preserve the evidence. *Brookshire Bros*., 438 S.W.3d at 20-21. Breach of the duty to preserve may be either intentional or negligent. *Id*.

REMEDIES FOR SPOLIATION

Spoliation findings and any spoliation sanctions are to be determined by the trial judge, outside the presence of the jury. This requirement now exists under Texas law to avoid unfairly prejudicing the jury by the presentation of evidence of spoliation that is unrelated to the facts underlying the lawsuit. *Brookshire Bros*., 438 S.W.3d at 14. The remedy for spoliation must be proportionate; that is, it must relate directly to the conduct giving rise to the sanction and may not be excessive. *Brookshire Bros*., 438 S.W.3d at 21. Considerations in imposing a remedy are the level of culpability of the spoliating party and the degree of prejudice, if any, suffered by the nonspoliating party. *Id*.

Given the difficulty of conducting a prejudice analysis based on evidence that is no longer available for review, a party's intentional destruction of evidence may, "[a]bsent evidence to the contrary," be sufficient by itself to support a finding that the spoliated evidence is both relevant and harmful to the spoliating party. *Brookshire Bros*., 438 S.W.3d at 22. Whether the spoliated evidence is cumulative is, however, relevant to the question or prejudice. *Id*.

While the spectrum of remedies that may be imposed range from an award of attorney's fees to the dismissal of the lawsuit, the harsh remedy of a spoliation instruction is available only when: (1) the trial court finds that the spoliating party acted with the specific intent of concealing discoverable evidence, and that a less severe remedy would be insufficient to reduce the prejudice caused by the spoliation; or (2) on rare occasions, in which a party's negligent breach of its duty to reasonably preserve evidence irreparably prevents the nonspoliating party from having any meaningful opportunity to present a claim or defense. *Id*. at 14; 25. The concept of "willful blindness," where a party does not directly destroy evidence known to be relevant and discoverable, but nonetheless "allows for its destruction," is included within the category of "specific intent." *Brookshire Bros*., 438 S.W.3d at 24-25.

A trial court's finding of intentional spoliation, following the analytical framework set forth in the Texas Supreme Court's *Brookshire Bros*. opinion, "is a necessary predicate to the proper submission of a spoliation instruction to the jury." *Id*. at 25. If a trial court makes such a finding and concludes, as with any sanction, that a lesser remedy would be insufficient to ameliorate the prejudice, a trial court then has discretion in submitting an instruction. *Id*.

Utah

The Supreme Court of Utah has specifically declined to adopt an independent tort of spoliation – but based solely on the factual basis of the case presented. *Hills v. United Parcel Service, Inc.*, 232 P.3d 1049 (2010).

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).

This continued lack of case law is apparent in the very brief 2011 discussion of spoliation in the Supreme Court of Vermont. *Blanchard v. Goodyear Tire and Rubber*, 30 A.3d 1271, 1278 (2011). In *Blanchard,* the Court specifically acknowledges that there is no authority on the issue and declines to create it themselves.

Virginia

ADVERSE INFERENCE

Virginia law recognizes a 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); *see Jacobs v. Jacobs*, 218 Va. 264, 269, 237 S.E.2d 124, 127 (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 Compensation Program*, 40 Va.App. 565, 580-583, 580 S.E.2d 467,475 - 476 (Va.App.,2003). A spoliation inference in Virginia requires a showing by the party seeking such an inference that the party accused of spoliation acted with intentional conduct. *Emerald Point, LLC, v. Hawkins*, 808 S.E.2d 384, 392-93 (Va. 2017). The Virginia Supreme Court held that "evidence must support a finding of intentional loss or destruction to prevent its use in litigation before the court may permit the spoliation inference." *Id*.

In the 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] [c]onceal[ment] or destr[uction] [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.), sec. 195, at 325.

Neece v. Neece, 104 Va. 343, 348, 51 S.E. 739, 740-41 (1905); *Wolfe v. Virginia Birth-Related Neurological Injury Compensation Program*, 40 Va.App. 565, 580-583, 580 S.E.2d 467,475 - 476 (Va.App.,2003).

Washington

ADVERSE INFERENCE

In *Pier 67, Inc. v. King County*, 89 Wash.2d 379, 573 P.2d 2 (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 at 2. The phrase "satisfactory explanation" has been interpreted to mean that there are some situations in which a party may be excused for not preserving necessary, relevant evidence. *Henderson v. Tyrrell*, 80 Wash. App. 592, 607, 910 P.2d 522, 532 (1996).

REBUTTABLE PRESUMPTION

Additionally the court may apply a rebuttable presumption, which shifts the burden of proof to a party who destroys or alters important evidence. *Marshall v. Bally's Pacwest, Inc.*. 94 Wash. App. 372, 381-383, 972 P.2d 475,480 (1999).

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." *Id*. y. Whether the missing evidence is important or relevant depends on the particular circumstances of the case. *Henderson*, 80 Wash. App. at 607, 910 P.2d 522. In weighing the importance of the evidence, the court considers whether the adverse party was afforded an adequate opportunity to examine it. *Marshall*, 94 Wash. App. at 381-383, 972 P.2d 475. Culpability turns on whether the party acted in bad faith or whether there is an innocent explanation for the destruction. *Id*.; see *Tavari v. Walmart Stores, Inc.*, 176 Wash. App. 122, 123, 135, 307 P.3d 811, 818 (2013) (citing *Henderson*, 80 Wash. App. at 609, 910 P.2d 522).

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. *See Hannah v. Heeter*, 584 S.E.2d 560, 563- 64 (W.Va. 2003). The elements of the tort of intentional spoliation consist 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*.

NEGLIGENT SPOLIATION

West Virginia does not recognize spoliation of evidence as an independent tort when the spoliation is 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 elements of the tort of negligent spoliation of evidence by a third party consist 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 elements 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

Rule 37, of the West Virginia Rules of Civil Procedure, 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 (Ct. 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, 821 (1973). In *Jagmin*, 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*, 61 Wis.2d at 80-81, 211 N.W.2d at 8211.

SANCTIONS

Wisconsin trial courts have discretion in imposing sanctions for spoliation of evidence. *Morison v. Rankin*, 305 Wis. 2d 240, 251, 738 N.W.2d 588, 594 (Ct. App. 2007). In the case of deliberate destruction of documents, the court should consider a party's (1) knowledge that litigation was a possibility; and (2) knowledge that the evidence would be relevant to such litigation. *Id*. In addition to the adverse inference, in cases where the destruction demonstrates bad faith or egregious conduct, the court may direct a verdict in the other party's favor. Id. at 257.

In *Garfoot v. Fireman's Fund Ins. Co*., 228 Wis. 2d 707, 724, 599 N.W.2d 411, 419 (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."

Spoliation rules do not necessarily apply in administrative proceedings because "'common law or statutory rules of evidence' do not apply". *Yao v. Bd. of Regents of Univ. of Wis. System*, 256 Wis.2d 941, 953, 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 law allows courts to draw an adverse inference against a party responsible for losing or destroying evidence. *See Coletti v. Cudd Pressure Control*, 165 F.3d 767, 775 (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

In a case of bad faith tampering with evidence, a court has the discretion to exclude the evidence, but where not in bad faith, it may be admissible with a special instruction on the tampering. *Id*. When the evidence has been lost or destroyed without recklessness or intent, some courts may admit testimony relating to the missing evidence with an appropriate jury instruction. *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 the jury that the lost evidence is to be presumed unfavorable to that party; preclude the 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 the defendant's defense or grant summary judgment to the innocent party. Id. at .tn,C1dt5456 (citing Richard E. Kaye, Annotation, *Effect of Spoliation of Evidence in Products Liability Action*, 102 A.L.R. 5th 99-100 (2002)).