In-depth Examination of the Law Regarding Spoliation in State and Federal Courts

by
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"Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."[1] Spoliation can be intentional, willful and in bad faith or inadvertent or careless rising only to the level of simple negligence. The degree of intention or negligence implicit in an act of spoliation or the severity of the consequence of an act of spoliation has resulted in the courts fashioning a diverse array of sanctions and penalties the objective of which is to penalize and deter. These remedies encompass dismissal of claims or defenses, adverse inferences, creation of independent tort claims to imposition of criminal contempt. This article explores the rationale and elements of spoliation claims, the sanctions utilized by state and federal courts to penalize and curb spoliation as well as the state of the law of spoliation in family law cases.

I. The Duty to Preserve Evidence

A. *What Is the Duty?*

A legal duty exists to preserve evidence over which a party has control and reasonably knows or can reasonably foresee is material to a potential or pending legal dispute. The duty of preservation of evidence has long been recognized by the judicial system and can arise from statutory authority, case law, local, state or federal procedural rules, the inherent authority of the court

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1 West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999).

and/or ethical considerations imposed on counsel.[2] Where a party or its agents or a non-party fail to preserve or actively destroy evidence which the party/non-party has a duty to preserve, the party/non-party has committed spoliation.

B. *When Does the Duty Arise?*

The duty to preserve evidence most frequently arises after a lawsuit has been filed, and defendant(s) receive service of the complaint, plaintiff's are served with the answer and/or counterclaims, or, with regard to non-parties a *subpoena duces tecum* typically accompanied by a document request or Rule 30(b)(6) deposition notice is served, which provide express notice of pending litigation.[3] However, a majority of courts hold that a duty to preserve evidence can arise prior to litigation, when a defendant or non-party receives pre-litigation communications or once it becomes reasonably certain that an action will be filed. Where the time the duty to preserve arises may be ambiguous, particularly prior to a complaint being filed, the duty to preserve relevant information attaches at the time litigation is "reasonably anticipated."[4] In *Zubulake v. UBS Warburg LLC* (*Zubulake IV*),[5] one of the leading cases on spoliation, the U.S. District Court for the Southern District of New York held that the duty to preserve evidence in the pre-litigation context arises "when a party should have known that the evidence may be relevant to future litigation."[6] The court noted that this inquiry would be specific to the facts of each individual case.[7] Thus, in terms of when the duty to preserve evidence arises, courts must make a

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2 Danis v. USN Commc'ns, Inc., 2000 U.S. Dist. LEXIS 16900, No. 98 C 7482, 2000 WL 1694325, at 32 (N.D. Ill. Oct. 20, 2000) ("The Court's authority to sanction a party for the failure to preserve and/or produce documents is both inherent and statutory."); Kaiser v. Kaiser, 868 So. 2d 1095 (Ala. Civ. App., 2003); *see also* Diersen v. Walker, No. 00 C 2437, 2003 U.S. Dist. LEXIS 9538, at 5 (N.D. Ill. June 6, 2003).

3 Rena Durrant, Developments in the Law: *Spoliation of Discoverable Electronic Evidence*, 38 LOY. L.A. L. REV. 1803, 1807-08 (2005).

4 Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

5 *Id.*

6 *Id.* at 216 (quotation omitted).

7 *See id.* at 216-18 (duty to preserve potentially relevant evidence arose ten (10) months prior to commencement of litigation and four to five months prior to filing complaint with EEOC).

specific factual inquiry on a case-by-case basis regarding the precise knowledge a party or non-party charged with spoliation had about a potential claim and when the knowledge was acquired.

In a recent case addressing the "reasonably anticipated" standard, one court held that "[a] general concern over litigation does not trigger a duty to preserve evidence."[8] However, the outside constraints of when litigation can be reasonably anticipated are not well defined. Generally courts have held that the time frame for the duty to preserve evidence arises substantially before the commencement of litigation in various factual scenarios.[9] Factors to consider in determining when the duty to preserve evidence arises include "the level of knowledge within the organization about the claim [or potential claim], the risk to the organization of the claim, the risk of losing information if a litigation hold is not implemented, and the number and complexity of sources where information is reasonably likely to be found."[10] For a non-party, courts are hesitant to impose a duty to preserve evidence absent a special relationship or circumstance,[11] such as when the individual or business is served with a subpoena or when there exists a statutory or contractual duty to maintain information.[12]

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8 Realnetworks, Inc. v. DVD Copy Control Ass'n, Inc., 2009 WL 1258970 (N.D. Cal. May 5, 2009).

9 Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc., 621 F. Supp. 2d 1173 (D. Utah 2009) (citing 103 Investors I, L.P. v. Square D Co., 470 F.3d 985 (10th Cir. 2006)).

10 Conor R. Crowley, et al., *The Sedona Commentary on Legal Holds: The Trigger and the Process*, The Sedona Conference (2007).

11 *See, e.g.,* Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177, 1179 (Kan. 1987) ("Absent some special relationship or duty arising by reason of an agreement, contract, statute, or other special circumstance, the general rule is that there is no duty to preserve possible evidence for another party to aid that other party in some future legal action against a third party.").

12 Paul G. Lannon, Jr., *Practice Tips: The Duty to Preserve Electronic Evidence: When it Is Triggered and How to Satisfy It*, 51 B.B.J. 13, 13 (2007) (citing Keene v. Brigham and Women's Hospital, Inc., 439 Mass. 223, 235 (2003), in which the court recognized that defendant hospital's duty to preserve medical records arose not only from its awareness of potential litigation, but also from its statutory duty to "keep records of the treatment of the cases under their care," and Fletcher v. Dorchester Mutual Insurance Co., 773 N.E.2d 420 (Mass. 2002), recognizing situations in which "[a] third-party witness may also agree to preserve an item of evidence and thereby enter into an enforceable contract.").

In *Willard v. Caterpillar*,[13] the California Court of Appeals noted that:

> [t]he wrongfulness of evidence destruction is tied to the temporal proximity between the destruction and the litigation interference and the foreseeability of the harm to the nonspoliating litigant resulting from the destruction. There is a tendency to impose greater responsibility on the defendant when its spoliation will clearly interfere with the plaintiff's prospective lawsuit and to impose less responsibility when the interference is less predictable.[14]

A defendant or third party can be put on notice that litigation should be "reasonably anticipated," upon receipt of pre-litigation correspondence relative to a potential claim, such as a pre-litigation hold letter or notice for preservation of evidence, or through pre-filing settlement negotiations. In *Wiginton v. CB Richard Ellis*,[15] the court held that the defendant's receipt of a pre-litigation hold letter provided sufficient notice to alert the defendant to the types of documents the plaintiff might seek in discovery, thus precipitating the defendant's duty to preserve documents and information of the nature and categories outlined in the letter.[16] However, the court interpreted defendant's duty more broadly than mere compliance with the specific terms of the pre-litigation hold letter, and extended the duty to preserving evidence the defendant "had notice would likely be the subject of discovery requests."[17]

C. *On Who Is the Duty Imposed?*

Both lawyers and their clients have an affirmative duty to preserve potentially relevant evidence.[18] An additional duty is

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13 40 Cal. App. 4th 892 (Cal. Ct. App. 1995).

14 *Id.* at 923.

15 229 F.R.D. 568, 94 Fair Empl.Prac.Cas. (BNA) 627, N.D.Ill., August 10, 2004 (NO. 02 C 6832).

16 *Id.* at 14 ("[T]he [pre-litigation hold letter] is significant because it alerted [defendant] to the types of electronic information (within the realm of all relevant documents) that were likely to be requested during discovery. Ultimately, [defendant's] duty was not to comply with the [pre-litigation hold letter], but to preserve evidence that it had notice would likely be the subject of discovery requests. [Defendant] cannot now claim that it did not know that electronic data (such as e-mails or Internet use records) were likely to be the subject of discovery requests.").

17 *Id.* at 13-14.

18 Lannon, *supra* note 12, at 13-14.

imposed on lawyers, as officers of the court, to preserve potential evidence, advise clients of the existence and content of letters requesting preservation of data and information, temporary restraining orders, orders of preservation and potential penalties for failing to comply. ABA Model Rule 3.4, which is codified in many states' Rules of Professional Conduct, instructs that "[a] lawyer shall not . . . unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value[ ] . . . or assist another person to do any such act[.]"[19] In addition to the Model Rules of Professional Conduct, the American Bar Association has adopted civil discovery standards, including Standard Number 10, entitled "Preservation of Documents," which instructs attorneys to inform clients of the duty to preserve potentially relevant documents when litigation is probable.[20] In litigation involving computer-based discovery, "attorneys on both sides have a heightened responsibility to inform their clients of the duty to preserve potential evidence."[21] One way to avoid sanctions and accusations of spoliation in cases involving electronic discovery is to hold a conference between the parties early in the case and agree upon the nature and scope of documents that should be preserved.[22] Pursuant to the new federal discovery rules, parties are required to participate in a Rule 26(f) conference prior to electronic discovery. Since many states model their rules of civil procedure on the federal rules, there is a probability that this requirement will ultimately be adopted by some.[23] However, absent the conference requirement this strategy assumes a level of computer expertise and cooperation which may not exist.[24]

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19 ABA Model Rule of Professional Conduct, *Fairness to Opposing Party and Counsel*, 3.4(a) (2003).

20 ABA Civil Discovery Standards, No. 10 (August 2004).

21 Kenneth J. Withers, *Computer-Based Discovery in Federal Civil Litigation*, SF97 ALI-ABA 1079, 1085 (2001).

22 *Id.*

23 *See, e.g.,* Sutton v. Duke, 176 S.E.2d 161, 163 (N.C. 1970).

24 Withers, *supra* note 21. *See id.* The author notes that "[a]n informal meeting between the opposing sides' computer experts will probably accomplish more than a meeting of the lawyers." *Id.* at 1088.

D. *Scope of Duty To Preserve Evidence*

1) *Generally*

The duty to preserve evidence includes evidence that may be "relevant" to the litigation.[25] Relevancy is defined by the evidentiary rules in each jurisdiction, and most, if not all, state rules of evidence define "relevancy" as "[e]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[26] Rule 26 of the North Carolina Rules of Civil Procedure, modeled after the Federal Rules of Civil Procedure, is typical, and reads as follows:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.[27]

For purposes of the preservation of evidence, the rules of discovery are to be broadly construed, and relevance for purposes of preservation of evidence is broader than for purposes of trial. "Once the duty to preserve arises, a litigant is expected, at the very least, to 'suspend its routine document and retention/destruction policy and to put in place a litigation hold.'"[28] The evidentiary definition of relevancy and the procedural application of relevancy in the discovery context thus prescribes the outside parameters of the documents, data and information that the recipient of a pre-litigation hold letter (or other notification of imminent or pending litigation) must preserve. Notably, the test of relevancy and the scope of documents that may be considered relevant is and should be more objective than subjective. "A party cannot destroy documents based solely on its own version of the proper scope of the complaint."[29] Accordingly, the

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25 Drew D. Dopkin, *Linking the Culpability and Circumstantial Evidence Requirements for the Spoliation Inference*, 51 DUKE L.J. 1803, 1809 (2002).

26 N.C. GEN. STAT. § 8C-1, Rule 401 (2007).

27 *See id*. at § 1A-1, Rule 26 (2007).

28 ACORN v. County of Nassau, 2009 U.S. Dist. LEXIS 19459 (E.D.N.Y. Mar. 9, 2009) (quoting Zubulake, 220 F.R.D. at 218).

29 Diersen, 2003 U.S. Dist. LEXIS 9538 at 5.

potential causes of action and, as well, the potential legal and factual issues will primarily determine the relevancy and consequently the scope of the preservation obligation.

Although the scope of the duty to preserve is expansive, a party or non-party does not have to go to "extraordinary measures" to preserve all potential evidence.[30] Nor does it have to preserve every single scrap of paper in its business.[31] A party or non-party must preserve evidence of which it has notice is reasonably likely to be the subject of a discovery request, even prior to the receipt of such request.[32] In addition to a potential spoliator being responsible for the preservation of evidence over which a it has direct control, many courts have extended the duty to preserve evidence to evidence which a party at least has access to or over which a party maintains indirect or legal control.[33] However, "[t]he scope of the duty to preserve evidence is not boundless. A 'potential spoliator need do only what is reasonable under the circumstances.'"[34]

2) *Electronic Discovery*

As the use of computers became more pervasive, cases that analyzed the scope of the duty to preserve evidence increasingly focused on stored electronic or digital communications or information, including e-mail, word-processed documents, spreadsheets, and internet records.

Relevant information and data stored electronically is discoverable.[35] The fact that relevant electronic data and information is discoverable gives rise to a duty on the part of clients, litigants, counsel and ancillary non-parties to preserve data and

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30 China Ocean Shipping Co., 1999 WL 966443 at *3.

31 Danis, 2000 U.S. Dist. LEXIS 16900 at 99.

32 Cohn v. Taco Bell Corp., No. 92 C 5852, 1995 U.S. Dist. LEXIS 12645 (N.D. Ill. 1995); Wm. T. Thompson, Co. v. Gen. Nutrition Corp., 593 F. Supp 1443, 1445 (C.D. Cal. 1984).

33 Cyntegra, Inc. v. Idexx Labs., Inc., 2007 U.S. Dist. LEXIS 97417 (C.D. Cal. 2007) (citations omitted).

34 Hirsch v. General Motors Corp., 628 A.2d 1108, 1122 (N.J. Super. Ct. Law Div. 1993) (quoting County of Solano v. Delancy, 264 Cal. Rptr. 721, 731 (Cal. App. 1989)).

35 FED. R. CIV. P. 34, Notes of Advisory Committee on 2006 amendments.

information that is or may be relevant to the issues raised in pending or foreseeable litigation.

In December 2006, several amendments to the Federal Rules of Civil Procedure concerning "the discovery of electronically stored information went into effect,"[36] including revisions and additions to Rules 34, 26, 16, and 37.[37] The amendments covered, *inter alia*:

> 1) the definition of discoverable material;
> 2) early attention to issues relating to electronic discovery, including the format of production;
> 3) discovery of electronically stored information from sources that are not reasonably accessible;
> 4) the procedure for asserting claim of privilege or work product protection after production; and
> 5) a "safe harbor" limit on sanctions for the loss of electronically stored information as a result of the routine operation of computer systems.[38]

Federal Rule 34 provides that a "party may serve on any other party a request to produce of electronic data, including writings, drawings, graphs, charts, photographs, sound recordings, images," and other data or data compilations "stored in any medium from which the information can be obtained."[39] Federal Rule 26 provides that the parties should meet prior to discovery to discuss issues related to electronic discovery, such as whether there will be e-discovery, the burdens associated with the production of electronic information, the preservation of information, and any agreements concerning privileges.[40] Rule 16 governs pretrial conferences and states that the judge shall enter a scheduling order which may, among other things, provide for disclosure or discovery of electronically stored information.[41] Federal Rule 37(e) provides that spoliation sanctions are not permitted

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36 Susan Grimes, *Electronic Discovery: The Rules and Aspects of an Effective Electronic Discovery System*, 27 ADVOCATE 1 (Apr. 2009).

37 *Id*.

38 K&L Gates, Electronic Discovery Law Blog, *E-Discovery Amendments to the Federal Rules of Civil Procedure Go Into Effect Today*, *available at* http://www.ediscoverylaw.com/2006/12/articles/news-updates/ediscovery-amendments-to-the-federal-rules-of-civil-procedure-go-into-effect-today/ (Dec. 1, 2006).

39 Grimes, *supra* note 36, at 1.

40 *Id.*

41 *Id*.; FED. R. CIV. P. 16 (2007).

where there is a finding that the spoliating party acted in good faith, and the information was lost "as a result of the routine operation of a storage system."[42]

Whereas the former version of Rule 26(b)(2) required parties to preserve all evidence, the amendment provides:

> A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify terms and conditions for such discovery.[43]

This amendment will most likely have the effect of narrowing sanctionable behavior.[44]

In addressing the level of culpability required for a court to impose discovery sanctions, some jurisdictions require only a showing that the spoliating party was negligent, and do not require a finding of bad faith as a prerequisite to "permit a jury to draw an adverse inference from the destruction or spoliation against the party or witness responsible for that behavior."[45] Many courts do not require a finding of "evil intent" but merely "responsibility and control."[46] However, in the context of electronic discovery, courts are less willing to apply a negligence standard, given the routine destruction of information stored on computers in the ordinary course of business pursuant to a company's routine retention policies. A survey of sixty-six written opinions involving the issue of sanctions since January 1, 2000, demonstrated that "the profile of a typical sanctioned party is a defendant that destroys electronic information in violation of a court order, in a manner that is willful or in bad faith, or causes prejudice to the opposing party."[47] Although Federal Rule 37 may curtail sanctions for information lost due to a corporate re-

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42 Andrew Hebl, *Spoliation of Electronically Stored Information, Good Faith, and Rule 37(e)*, 29 N. ILL. U. L. REV. 79 (2008).

43 FED. R. CIV. P. 26 c(b)(2) (2007).

44 Durrant, *supra* note 3, at 1829.

45 Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993).

46 Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc., 621 F. Supp. 2d 1173, 1193 (D. Utah 2009).

47 Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 MICH. TELECOMM. TECH. L. REV. 71, 80 (2004).

tention policy,[48] "parties run the risk of heightening judicial suspicion when they conveniently tailor their document retention policies to reflect their litigation strategies."[49]

a. *Recent Developments in E-discovery*: *Appointing a Neutral Expert*

In cases involving electronic discovery, several courts have held that it is proper to appoint a neutral expert to manage the electronic discovery process.[50] Although courts are often reluctant to refer dispositive issues to a third party, special masters are frequently used by courts where the issues are very complicated and the litigation is extensive and complex.[51] For example, in *Simon Property Group v. mySimon, Inc.*,[52] the court ordered the plaintiff to select and pay for an expert to oversee mirror imaging of hard drives. Similarly, in *Playboy Enterprises, Inc. v. Welles*,[53] the court ordered a computer forensic specialist to serve as an officer of the court and to create and provide a copy of defendant's hard drive to her attorney for review and production.[54] Courts have relied on the expert report in determining the appropriate sanctions for a spoliating party.[55]

II. Remedies for Discouraging and Punishing Spoliation

Beginning in 1722, courts have allowed juries to infer that destroyed evidence would have a negative impact on the destroying party's case.[56] One of the first cases dealing with this

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48 Hebl, *supra* note 42, at 83.

49 Durrant, *supra* note 3, at 1810.

50 Lorne B. Gold, *Plaintiff's Motion to Compel Discovery*, 29 FAM. ADV. 22 (2007).

51 In re Sunrise Sec. Litig., 124 F.R.D. 99, 100 (E.D. Pa. 1989) (citations omitted).

52 194 F.R.D. 639 (S.D. Ind. 2000).

53 60 F. Supp. 2d 1050 (S.D. Cal. 1999).

54 *Id*. at 1058.

55 Lisa M. Arent, et. al., *Ediscovery: Preserving, Requesting & Producing Electronic Information*, 19 SANTA CLARA COMPUTER & HIGH TECH. L.J. 131, 145 (2002) (citing Munshani v. Signal Lake Venture Fund II, 2001 Mass. Super. LEXIS 496, 3-4 (Oct. 9, 2001)).

56 Bart S. Wilhoit, Comment, *Spoliation of Evidence: The Viability of Four Emerging Torts*, 46 UCLA L. REV. 631, 638 (1998) (citing 93 Eng. Rep.

adverse inference principle was *Armory v. Delamirie*.[57] In *Armory*, a chimney sweep found a jewel and took it to a jeweler to be appraised. The chimney sweep subsequently sued the jeweler for the loss of the jewel and the court held that he was entitled to an inference that the stone was "of the finest water."[58] Today, remedies for the spoliation of evidence fall into two general categories: sanctions and tort.[59] Those courts that reject an independent tort cause of action for spoliation center their rejection on the policy that existing remedies and sanctions are sufficient to address the destruction of evidence.[60]

A. *Sources of Authority*

A court's inherent authority to control litigation is often a basis for sanctions "even absent an antecedent order."[61] Many federal courts are informed by state law, and apply local rules, statutes or case law to the adjudication of a claim of spoliation of evidence and follow the range of appropriate sanctions used by the state court in its jurisdiction.[62] Thus spoliation remedies and sanctions arise from multiple sources including state statutes, regulations, and ethical rules.

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664 (K.B. 1722)); *see also* Scott S. Katz & Anne Marie Muscaro, *Spoliage of Evidence — Crimes, Sanctions, Inferences, and Torts*, 29 TORT & INS. L.J. 51 (1993) ("The concept of spoliation dates back to early English ecclesiastical law.")

57 1 Strange 505, 93 Eng. Rep. 664 (K.B. 1722).

58 Welsh v. United States, 844 F.2d 1239, 1246 (6th Cir. 1988); Nation-Wide Check Corp. v. Forest Hills Distribs. Inc., 692 F.2d 214, 218 (1st Cir. 1982).

59 Michael D. Starks, *Deconstructing Damages for Destruction of Evidence: Martino Eradicates the First-Party Tort of Spoliation of Evidence*, 80 FLA. B.J. 36, 38 (2006).

60 *See, e.g.,* Goff v. Harold Ives Trucking Co., Inc, 27 S.W.3d 387 (Ark. 2000) (relying on the California Supreme Court's reasoning in Cedars-Sinai Med. Ctr. v. Superior Court, 18 Cal. 4th 1, 954 P.2d 511, 74 Cal. Rptr. 2d 248 (1998), and citing cases from Connecticut, Delaware, Kentucky, Louisiana and Maryland, in which courts have declined to recognize an independent tort on the grounds that the evidentiary inference is a sufficient remedy).

61 Trigon Ins. Co. v. United States, 204 F.R.D. 277, 289 (E.D. Va. 2001).

62 United Med. Supply Co., Inc. v. United States, No. 03-289C, 77 Fed. Cl. 257, 266 (2007) (citing cases in which federal courts recognize principles of state law in forming the rules that apply to spoliation and the range of appropriate sanctions).

B. *Culpability Requirement for Sanctions: Innocence, Negligence, Recklessness, Intentional Conduct, or Bad Faith?*

In determining whether to impose sanctions on a spoliating party, courts first examine the degree of culpability of the spoliating party.[63] Courts recognize a broad spectrum of culpability as sufficient for imposing sanctions.[64] Some jurisdictions require a showing of bad faith before the imposition of a sanction,[65] whereas other courts are willing to impose sanctions merely upon a showing of negligence, with the level of fault affecting the severity of the sanction.[66] "Still other courts have applied spoliation principles without regard to either bad faith or negligence."[67] Many courts require at a minimum that the spoliating party be on notice that the evidence might be necessary to their adversary's claim.[68]

In *King v. American Power Conversion Corp.*,[69] the Fourth Circuit Court of Appeals broadly construed fault in the spoliation context.[70] Although the plaintiffs had done nothing wrong in *King*, indeed, they had taken affirmative steps to preserve the evidence, which was destroyed by a third party, the Fourth Circuit was influenced by the severe prejudice to the defendants.[71] The court found that plaintiffs were culpable in that they failed to alert the defendant of the potential claim or the location of the evidence.[72]

In *Residential Funding Corp. v. DeGeorge Financial Corp.*,[73] the Second Circuit Court of Appeals held that a trial

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63 Durrant, *supra* note 3, at 1816.

64 United Med. Supply Co., 77 Fed. Cl. at 266).

65 *See, e.g.,* Gentry v. Toyota Motor Corp., 471 S.E.2d 485 (Va. 1996).

66 United Med. Supply, 77 Fed. Cl. at 266 (citations omitted).

67 Robert D. Peltz, *The Necessity of Redefining Spoliation of Evidence Remedies in Florida*, 29 FLA. ST. U.L. REV. 1289, 1299 (2002) (citing *Vodusek*, 71 F.3d at 155-56).

68 *See* Anderson v. National R.R. Passenger Corp., 866 F. Supp. 937, 945-46 (E.D. Va. 1994), *aff'd*, 74 F.3d 1230 (4th Cir. 1996) (citation omitted).

69 181 Fed. Appx. 373 (4th Cir. 2006).

70 Kevin Eberle, *Spoliation in South Carolina*, 19 S.C. LAW. 26 (Sep. 2007) (discussing King, 181 Fed. Appx. 373).

71 *Id.*

72 *Id.*

73 306 F.3d 99 (2d Cir. 2002).

court has broad discretion in imposing sanctions against a party who has breached a discovery obligation, whether through bad faith and gross negligence, or by ordinary negligence, including delaying the start of a trial, declaring a mistrial, or proceeding at trial with an adverse inference instruction.[74] In light of its holding that the 'culpable state of mind' requirement is satisfied by a showing that the evidence was destroyed either knowingly or negligently, the appellate court remanded the case to the trial court for reconsideration of appropriate sanctions.[75]

In *Trigon Ins. Co. v. United States*,[76] the U.S. District Court for the Eastern District of Virginia held that the destruction of documents by defendant's litigation consultant pursuant to a document retention policy warranted a sanction of adverse inferences against defendant. The *Trigon* court stated that the imposition of sanctions for the destruction of evidence does not require a finding of bad faith, but that it does necessitate a showing of willful conduct resulting in the loss or destruction of the evidence.[77]

In *Lewy v. Remington Arms Co.*,[78] the Eighth Circuit Court of Appeals held that the adverse inference instruction is appropriate "if the corporation knew or should have known that the documents would become material at some point in the future" notwithstanding a corporate document retention policy.[79] The court stated that trial courts "should determine whether the document retention policy was instituted in bad faith."[80] In *Vodusek v. Bayliner Marine Corp.*,[81] the Fourth Circuit Court of Appeals applied the adverse inference to situations in which "the party knew the evidence was relevant to some issue at trial and that his

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74 *Id.* at 101.

75 *Id*.

76 Trigon Ins. Co. v. United States, 204 F.R.D. 277 (E.D. Va. 2001).

77 *Id.* at 287 (quoting *Vodusek*, 71 F.3d at 156).

78 836 F.2d 1104 (8th Cir. 1988).

79 *Id*. at 1112.

80 *Id.* (citing Gumbs v. International Harvester, Inc., 718 F.2d 88, 96 (3rd Cir. 1983), in which the Third Circuit held that a presumption or inference arises "when the spoliation or destruction [of evidence] was intentional, and indicates fraud and a desire to suppress the truth, and it does not arise where the destruction was a matter of routine with no fraudulent intent.").

81 71 F.3d 148 (4th Cir. 1995).

willful conduct resulted in its loss or destruction" and not merely from a party's negligent loss or destruction of evidence.[82]

While there is no definitive set of factors used by courts in formulating appropriate sanctions, the assessment and impact of the sanctions imposed depends in large part on the perceived blameworthiness of the spoliating party, and on the degree of prejudice to the opposing party.[83]

C. *Burden of Proof*

Given the inherently speculative nature of spoliated evidence, it is not surprising that courts place the burden on the prejudiced party to show that the destroyed evidence is relevant to its claim.[84] Prior to the imposition of sanctions, the aggrieved party bears the burden of showing "a reasonable possibility" that the lost or destroyed evidence would have been favorable to his or her case.[85] In *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, the Colorado U.S. District Court recited Professor Wigmore's explanation of the burden of proof on the aggrieved party as follows:

> The failure or refusal to produce a relevant document, or the destruction of it, is evidence from which alone its contents may be inferred to be unfavorable to the possessor, *provided the opponent, when the identity of the document is disputed, first introduces some evidence tending to show that the document actually destroyed or withheld is the one* as to whose contents it is desired to draw an inference.[86]

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82 *Id.* at 157.

83 Trigon, 204 F.R.D. at 288 (quoting the primary considerations for sanctions set forth in Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76 (3rd Cir. 1994) as follows:

(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.)

84 James T. Killelea, *Spoliation of Evidence: Proposals for New York State*, 70 BROOK. L. REV. 1045, 1052 (2005) (citation omitted).

85 Gates Rubber Co. v. Bando Chem. Ind., 167 F.R.D. 90, 104 (D. Colo. 1996) (citations omitted).

86 *Id.* at 104 (quoting 2 *Wigmore on Evidence* § 291, p. 228 (Little Brown & Co.) (emphasis in original)).

In *Residential Funding Corp.*, discussed above, the defendants appealed the trial court's denial of their motion for an adverse inference instruction on the grounds that the opposing party had failed to produce certain emails prior to trial.[87] In addressing the standard for an adverse instruction, the Second Circuit Court of Appeals held that

> the party seeking an adverse inference must adduce sufficient evidence from which a reasonable trier of fact could infer that "the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction." . . . Courts must take care not to "hold[ ] the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed [or unavailable] evidence," because doing so "would subvert the . . . purposes of the adverse inference, and would allow parties who have . . . destroyed evidence to profit from that destruction."[88]

Nevertheless, some courts impose a more demanding requirement on the aggrieved party to make some showing as to the contents of the spoliated evidence before the jury instruction of the spoliation inference will be given.[89] For example, in *Turner v. Hudson Transit Lines, Inc.*,[90] the plaintiff sued the operator of a bus after the bus was involved in a collision on the New Jersey turnpike.[91] The plaintiff sought a spoliation inference for destruction of the bus maintenance records.[92] The court determined that the level of culpability in the destruction of the records was reckless, but concluded that "where . . . there is no extrinsic evidence whatever tending to show that the destroyed evidence would have been unfavorable to the spoliator, no adverse inference is appropriate."[93]

D. *Evidentiary Inferences and Presumptions*

In the modern era, the adverse inference—that the evidence which has disappeared or been destroyed would have been unfavorable or damaging to the opposing party's claims or defense—remains viable. It is arguably the primary nontort remedy uti-

87 *Residential Funding Corp*., 306 F.3d at 101.
88 *Id.* at 109 (quotations omitted).
89 Dopkin, *supra* note 25, at 1821.
90 142 F.R.D. 68 (S.D.N.Y. 1991).
91 Dopkin, *supra* note 25, at 1821 (discussing Turner).
92 *Id.*
93 Turner, 142 F.R.D. at 77.

lized by courts.[94] This inference shifts the burden of rebutting the inference to the spoliating party to prove that the evidence destroyed was either favorable to his or her case or irrelevant.

In *Chapman v. Auto Owners Insurance Co.,*[95] the Georgia Court of Appeals examined whether a rebuttable presumption against the spoliating party is a sufficient remedy for the aggrieved party or whether evidence should be excluded.[96] The court identified factors to be considered when determining whether the rebuttable presumption would be an adequate remedy, including: (1) whether the defendant 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 plaintiff acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence was not excluded.[97]

E. *Exclusion of Evidence*

In *Dillon v. Nissan Motor Co.*,[98] the magistrate judge found that the opposing party was prejudiced by the destruction of the evidence, and that plaintiffs' expert should be precluded from testifying regarding the destroyed evidence or offering into evidence exhibits related to such evidence.[99] On appeal, the Eighth Circuit Court of Appeals affirmed the exclusion of evidence on the grounds that, although there was no finding that plaintiffs acted in bad faith, they "knew or should have known" that the evidence would be relevant to imminent litigation.[100]

In *Schmid v. Milwaukee Electric Tool Corp.*,[101] the trial court excluded the testimony of plaintiff's expert in a products liability case on the grounds that the expert had destroyed the evidence during his examination of it. The Third Circuit reversed the trial court's exclusion of expert testimony, and articulated a

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94 Jason B. Hendren, *Spoliation of Evidence: Why This Evidentiary Concept Should Not Be Transformed Into Separate Causes Of Action*, 27 U. ARK. LITTLE ROCK L. REV. 281, 284 (2005) (citing *Goff*, 27 S.W.3d at 389).

95 469 S.E.2d 783 (Ga. Ct. App. 1996).

96 *Id.*

97 *Id*.

98 986 F.2d 263, 267 (8th Cir. 1993).

99 *Id*. at 269.

100 *Id.* at 268-69.

101 13 F.3d 76 (3d Cir. 1994).

three-part test to be used in determining whether to bar expert testimony: "(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 . . .".[102] The appellate court noted that plaintiff was proceeding under a design defect theory, as opposed to a claim that the particular saw that injured him was defectively manufactured.[103] Therefore, defendant was not as prejudiced by its inability to examine the particular saw that plaintiff's expert destroyed.[104]

The different results in these cases illustrate the subjectivity of the factual analysis the courts must employ in evaluating evidence of a spoliation claim. The determination of more or less culpability in regard to the destruction of evidence and the severity of the prejudice, or lack thereof to the opposing party are the primary drivers for selection of the appropriate sanction.

F. *Dismissal of Lawsuit or Default Judgment*

Courts have been willing to apply the "ultimate" sanction of dismissal of the case in circumstances in which the "spoliator's conduct was egregious, the prejudice to the non-spoliating party was great, and imposing a lesser sanction would be ineffective to cure the prejudice."[105] In *Munshani v. Signal Lake Venture Fund II*,[106] the Massachusetts Court of Appeals affirmed dismissal of the plaintiff's case where the facts demonstrated that plaintiff produced a fraudulent e-mail in support of his motion to dismiss. The court held that the plaintiff "set in motion an unconscionable scheme calculated to interfere with the court's ability impartially to adjudicate a matter in accordance with applicable rules."[107] The court further affirmed the trial court's finding that the plaintiff not only fabricated the email, but additionally engaged in a scheme to attempt to hide the fabrication for several months.[108]

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102 *Id.* at 79.

103 *Id.*

104 *Id.*

105 Texas American National Gas Corp. v. Powell, 811 S. W. 2d 913, 917 (Tex. 1991).

106 805 N.E. 2d 998 (2004).

107 *Id.* at 1003.

108 *Id.*

In *Wm. T. Thompson Co. v. General Nutrition Corp.*,[109] the court affirmed sanctions of default and dismissal for the defendant's repeated violation of discovery orders. Although the court ordered the defendant to preserve all records that it maintained in the ordinary course of business, the defendant instructed its employees to continue the company's standard document retention and destruction policies. As a result, the company's employees deleted electronic documents that were not otherwise available.[110]

In *Professional Seminar Consultants, Inc. v. Sino Am. Tech. Exchange Council, Inc.*,[111] the Ninth Circuit Court of Appeals held that the U.S. District Court for the Northern District of California did not abuse its discretion in finding bad faith on the part of the defendants and ordering the extreme sanction of dismissal under Rule 37 of the Federal Rules of Civil Procedure. In that case, the trial court granted the plaintiff corporation's motion for sanctions under Rule 37(b), struck the defendant's counterclaim, entered a default judgment, and awarded the plaintiff $120,000 in special damages, $100,000 in general damages, and $400,000 in punitive damages based on the defendant's falsification of documents.[112] The Ninth Circuit reiterated the factors to be considered in fixing damages, including "(1) the nature of the defendants' acts; (2) the amount of compensatory damages awarded; and (3) the wealth of the defendants."[113] The court concluded that the damages awarded by the trial court were not unreasonable or excessive, and that the trial court did not abuse its discretion in granting the default judgment.[114]

In *Computer Assocs. International, Inc. v. American Fundware, Inc.*,[115] the court applied the spoliation doctrine to the de-

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109 593 F. Supp. 1443 (D. Cal. 1984).

110 *Id.* at 1456; *see also* National Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639 (1976) (considering whether the entry of a default judgment under Rule 37 in an antitrust action for the repeated failure to comply with discovery orders constituted an abuse of discretion, and finding that the court of appeals erred in reversing the order of the district court, as trial courts have broad discretion to impose sanctions under Rule 37).

111 727 F.2d 1470 (9th Cir. Cal. 1984).

112 *Id.*

113 *Id.* at 1473.

114 *Id.* at 1473-74.

115 133 F.R.D. 166 (D. Colo. 1990).

struction of electronic records and entered default judgment where the defendant "intentionally destroyed portions of the source code . . . after being served . . . and thus put on notice that the source code was irreplaceable evidence."[116] The court stressed that the defendants acted willfully and in bad faith, that the plaintiff was seriously prejudiced, and stated that default judgment was a last resort "to be invoked only if no lesser, yet equally effective, sanction is available."[117]

G. *Criminal Contempt*

In addition to civil sanctions, many state statutes penalize a party for the destruction of evidence through criminal contempt statutes.[118] In *Kaiser v. Kaiser*,[119] the Alabama Court of Appeals affirmed the trial court's finding of contempt where a husband destroyed audiotapes he had illegally made of his wife's telephone conversations.[120] The destruction occurred during litigation, after the husband had been ordered to produce the tapes. The trial court found the husband in criminal contempt and ordered him to pay a $2,500 fine. However, prosecution of spoliators for criminal contempt is rare,[121] and, because violations are typically only misdemeanors, this sanction is often considered insufficient to deter the spoliation.[122]

III. Independent Cause of Action

A. *Intentional Spoliation*

Over two hundred years after *Armory* was decided, an intermediate appellate court in California in *Smith v. Superior Court*[123] examined the issue of creating a tort for the intentional

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116 *Id.* at 169.

117 *Id*.

118 Wilhoit, *supra* note 56, at 650-51 (citing state statutes from California, Arizona and Minnesota); *see also* Katz, *supra* note 56 n.17 (citing various state criminal statutes).

119 868 So. 2d 1095 (Ala. Civ. App. 2003).

120 *Id.* at 1104.

121 Katz, *supra* note 56, at 54 (noting that, at the time the article was published, "there are no reported cases of any criminal convictions for the spoliation of evidence in civil litigation").

122 Wilhoit, *supra* note 56, at 650-51.

123 198 Cal. Rptr. 829 (Ct. App. 1984).

spoliation of evidence. In *Smith*, the primary issue concerned third party destruction of evidence. The court relied on the premise "for every wrong there is a remedy," and recognized an independent cause of action for the intentional spoliation of evidence.[124] In doing so, the court acknowledged that the extent and amount of damages in a spoliation case would be highly speculative.[125] However, the court relied on public policy and found that the court system must be protected from interference even though damages could not be stated with certainty.[126]

Initially, a small number of courts followed California's lead and embraced an independent cause of action for intentional spoliation.[127] However, in *Cedars-Sinai Medical Center v. Superior Court*,[128] the California Supreme Court revisited the issue of whether a cause of action for first-party intentional spoliation of evidence should be recognized. Contrary to *Smith*, the *Cedars-Sinai* court held that there is "no tort remedy for the intentional spoliation of evidence by a party to the cause of action to which the spoliated evidence is relevant 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."[129] The California Supreme Court later extended its holding in *Cedars-Sinai* to cases in which the person who destroys or suppresses the evidence is not a party to the underlying lawsuit.[130] California courts have also held that there is no tort liability for destruction of evidence against a public entity even though a statutory duty exists to preserve evidence.[131]

To date, although a large number of jurisdictions have considered the issue of an independent tort for spoliation, only a small minority of jurisdictions has adopted this remedy, and the overwhelming trend in recent years has been to reject an independent tort of spoliation of evidence. There is no federal tort of

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124 *Id.* at 832.

125 *Id.* at 837.

126 *Id.*

127 Hendren, *supra* note 94, at 282-83.

128 954 P.2d 511 (Cal. 1998).

129 *Id.* at 521.

130 Temple Cmty. Hosp. v. Superior Ct., 976 P.2d 223, 233 (Cal. 1999).

131 Forbes v. County of San Bernardino, 123 Cal. Rptr. 2d 721 (Cal. App. 4th Dist. 2002).

spoliation.[132] Among those states refusing to acknowledge an independent tort for first-party spoliation, in addition to California, are Alabama, Arizona, Georgia, Iowa, Pennsylvania, and Texas.[133] In reaching this conclusion, most states have found it unnecessary to recognize such a tort on the grounds that their existing laws provide ample remedies.[134] Likewise, many jurisdictions refuse to recognize a tort for spoliation when the spoliating individual or entity is a party to the underlying suit.[135]

Many jurisdictions have also rejected tort claims against third parties for the spoliation of evidence. For example, the Georgia Court of Appeals rejected the tort of third-party spoliation of evidence based on the traditional means of securing evidence available to a litigant, including such matters as a court order directing preservation of evidence or a contractual agreement with the property owner.[136] Along the same lines, Mississippi and Nevada have rejected an independent cause of action in cases in which the alleged spoliator is not a party to the underlying litigation.[137]

Those courts that reject the recognition of a new tort claim to address claims of spoliation uniformly hold that the availability of non-tort remedies which are already in existence to remedy spoliation make recognition of the tort unnecessary to protect the interests of the courts and the litigants in preventing the destruction of evidence.[138] Many courts have relied on the existing range of sanctions for discovery abuses, including dismissal of claims, exclusion of evidence, and instruction on the evidentiary

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132 Starks, *supra* note 59, at 38.

133 Goff v. Harold Ives Trucking Co., 27 S.W.3d 387, 390-91 (Ark. 2000).

134 Smith v. Atkinson, 771 So. 2d 429, 432 (Ala. 2000) (citations omitted).

135 Gribben v. Wal-Mart Stores, Inc., 824 N.E.2d 349 (Ind. 2005).

136 Owens v. Am. Refuse Sys. Inc., 536 S.E.2d 782, 784 (Ga. App. 2000).

137 Dowdle Butane Gas Co., Inc. v. Moore, 831 So.2d 1124, 1135 (Miss. 2002); Timber Tech Engineered Bldg. Prods. v. Home Ins. Co., 55 P.3d 952, 953-54 (Nev. 2002).

138 A typical expression of the sentiment behind this trend is in the Illinois Supreme Court's holding in Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 270 (1995), in which the court recognized that "[c]ourts have long afforded redress for the destruction of evidence and, in our opinion, traditional remedies adequately address the [spoliation of evidence problem.]"; s*ee also* Smith v. Atkinson, 771 So. 2d 429, 432 (Ala., 2000) (general principles of negligence law afford an Alabama plaintiff a remedy when evidence crucial to that plaintiff's case is lost or destroyed through the acts of a third party).

inference. Some courts have used contempt as a remedy or imposed other sanctions against attorneys, such as disbarment.[139]

Although many courts are hesitant to adopt a tort of intentional spoliation of evidence, a few jurisdictions recognize an independent cause of action for first-party intentional spoliation of evidence.[140] Among these jurisdictions are Alaska, Louisiana, New Mexico, Ohio and West Virginia.[141] In most jurisdictions recognizing the claim, the following elements are required to state a claim for intentional spoliation: "1) pending or probable civil litigation; 2) spoliator's knowledge that litigation is pending or probable; 3) willful destruction of evidence; 4) intent to interfere with the victim's prospective civil suit; 5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and 6) damages."[142]

Finally, several jurisdictions, including Connecticut, Idaho, Illinois, Missouri, New Hampshire, and Virginia, "have declined to reach the issue because the facts did not warrant the creation of a new tort."[143]

B. *Negligent Spoliation*

Many jurisdictions have refused to adopt a tort for negligent spoliation of evidence.[144] In jurisdictions that recognize the tort, such as Florida, Illinois, New Jersey, Kansas and the District of Columbia,[145] the majority have adopted the following elements:

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139 Paul W. Grimm, *Ethical Issues Associated With The Duty To Preserve Electronically Stored Evidence*, ALI-ABA Course of Study Materials, Course Number SK013 (2004); *see also* David F. Herr & Nicole Narotzky, *Sanctions In Civil Litigation: A Review Of Sanctions By Rule, Statute, And Inherent Power*, ALI-ABA Course of Study Materials, Vol. 2, Course Number SN009 (2007) (citing Eash v. Riggins Trucking Inc., 757 F.2d 557, 561 (3d Cir. 1985) (noting courts' inherent powers "to regulate the conduct of the members of the bar")); *Cedars-Sinai Med. Ctr.*, 74 Cal. Rptr. 2d at 255.

140 Pikey v. Bryant, 203 S.W.3d 817, 822 (Mo. App. 2006).

141 *Id.* (citations omitted).

142 Wilhoit, *supra* note 56, at 644.

143 Goff, 27 S.W.3d 387 (citations omitted).

144 Baugher v. Gates Rubber Co., 863 S.W.2d 905, 910-911 (Mo. Ct. App. 1993); Mendez v. Hovensa, L.L.C., 49 V.I. 826, 838-39 (D.V.I. 2008) ("The Court has not been able to identify a single jurisdiction in which a cause of action for negligent spoliation is cognizable against a first-party spoliator.")

145 Gregory P. Joseph, *Spoliation: Truth or Consequences*, ALI-ABA Course of Study Materials, Course Number SN063 (Feb. 2008) (the author

"(1) existence of a potential civil action, (2) a legal or contractual duty to preserve evidence that 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) resulting damages."[146] A potentially important difference between the tort of negligent spoliation and the tort of intentional spoliation is that courts recognizing negligent spoliation only require the civil litigation to be "potential" as opposed to "pending or probable."[147] "Although this could be seen as a significant difference, it is unclear if this is a meaningful or functional distinction as the courts appear to apply the two standards in the same manner. A number of courts that have declined to recognize a tort based on negligent spoliation have concluded that adequate remedies exist under traditional negligence principles to address these claims.[148] The Alabama Supreme Court reached this conclusion in *Smith v. Atkinson*, in which it held that general principles of negligence law afford a plaintiff a remedy when evidence crucial to that plaintiff's case is lost or destroyed through the acts of a third party.[149] The Atkinson court stated that in third party spoliation claims the courts will require proof of the following elements: "(1) that the defendant spoliator had actual knowledge of pending or potential litigation; (2) that a duty was imposed upon the defendant through a voluntary undertaking, an agreement, or a specific request; and (3) that the missing evidence was vital to the plaintiff's pending or potential action."[150] Proof of all three elements will raise a rebuttable presumption that but for the spoliation the plaintiff would have re-

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notes that these jurisdictions recognize the tort "where the spoliator owes the plaintiff a duty to preserve the evidence that is destroyed").

146 Wilhoit, *supra* note 56, at 645 (citing *Continental Ins. Co. v. Herman*, 576 So. 2d 313, 315 (Fla. Dist. Ct. App. 1990)).

147 *Id.* ("For intentional spoliation, courts have required that the underlying civil action be pending or probable. . . . For negligent spoliation, courts only require that the underlying civil litigation be potential.")

148 Coleman v. Eddy Potash, Inc., 905 P.2d 185, 190 (N.M. 1995).

149 771 So.2d 432, 432 (Ala. 2000).

150 *Id.* (noting that the requirement of foreseeability imposed by some courts in negligent spoliation cases potentially eliminates the distinction between the potential standard and the pending or probable standard).

covered in the underlying action.[151] In California, it appears that all variations of the spoliation tort may be dead.[152] Although New Mexico recognizes a tort against first and third parties for intentional spoliation, it has refused to adopt a cause of action for negligent spoliation.[153]

C. *Family Law and Electronic Discovery*

Litigation in the context of divorce and family law frequently involves electronic evidence, and it is well-established that this evidence is discoverable in the context of divorce and family law cases. For example, in *White v. White*, the court held that information stored on the husband's computer was not subject to suppression, and that the wife's access to the information was not without authorization because the husband had consented to the wife's access to his computer.[154] In *Byrne v. Byrne*,[155] the wife simply took her husband's laptop to obtain access to information on his finances and personal business records. The New York Supreme Court found that a laptop computer used by the husband, which was in the marital residence and confiscated by the wife, was akin to a filing cabinet, to which the wife clearly would have had access, and allowed discovery.[156] Likewise in *Stafford v. Stafford*,[157] the wife found a computer file on the family computer called "MY LIST," which was an inventory and description of the husband's sexual encounters with numerous women. The wife testified that she found this document on the family computer, and that it was similar to a notebook that she had discovered describing similar accounts in the husband's handwriting.[158] The Vermont Supreme Court held that the com-

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151 *Id*. at 432-433.

152 Coprich v. Superior Ct., 95 Cal. Rptr. 2d 884, 890 (Cal. Ct. App. 2000) (holding that no tort remedy exists in California for negligent spoliation); *see also* Penn v. Prestige Stations, Inc., 99 Cal. Rptr. 2d 602 (Cal. Ct. App. 2000) (deciding that policy reasons relied upon in *Cedars-Sinai* and *Temple Community* "arguably" defeat liability for negligent spoliation).

153 *See* Coleman, 905 P.2d at 190.

154 White v. White, 781 A.2d 85 (N.J. Super. Ct. 2001).

155 650 N.Y.S.2d 499 (N.Y. Misc. 1996).

156 *Id.* at 500.

157 641 A.2d 348 (Vt. 1993).

158 *Id*. at 349.

puter file was admissible.[159] Finally, in *Evans v. Evans*,[160] the North Carolina Court of Appeals held that the trial court did not err in admitting into evidence sexually explicit e-mails between the defendant wife and a physician in Chapel Hill.[161] The court noted that cases analyzing the Electronic Communications Privacy Act ("ECPA") provided that intercepted emails will not be admitted into evidence if the interception occurs "contemporaneously with transmission." The *Evans* court concluded that "the e-mails were stored on, and recovered from, the hard drive of the family computer. The e-mails were not intercepted at the time of transmission. Therefore, we hold the trial court did not admit the evidence in violation of the ECPA."[162]

D. *Developments in Family Law and Spoliation*

In family law cases, the question of when a spouse is put on notice of or can reasonably anticipate litigation for purposes of a spoliation claim is unclear. Does finding the business card of a divorce lawyer in her husband's pants pocket while doing the laundry put an errant wife on notice that litigation should be reasonably anticipated? Or can the wife erase the incriminating emails without fear of a spoliation charge? Does the fact that a husband leaves his wife and establishes another residence put the husband on notice that he should reasonably anticipate litigation? Or can the husband destroy photographs taken of him and his paramour? State appellate cases addressing spoliation in the family law context are at a premium. Notwithstanding, experience and anecdotal evidence indicates that spoliation issues are prevalent in domestic cases, primarily revolving around the destruction of electronic evidence such as emails, html and other files containing pornographic material downloaded from websites. The explosion of electronic data available and relevant to family law cases has led to increasing instances in which potential litigants intentional destroy electronic evidence in the form of email, photographs, text messages and other communications with third parties. If the computer or electronic device from which the data was deleted can be obtained, developments in

159 *Id.*
160 610 S.E.2d 264 (N.C. App. 2005).
161 *Id.* at 270-71.
162 *Id*.

computer forensics have allowed recovery of significant amounts of deleted or wiped data which could provide enough evidence in a spoliation claim of the content of the deleted data or information and justify imposition of an adverse inference or other sanction.

The state courts have not yet provided significant guidance in domestic cases when a finding of "reasonable anticipation of litigation" would be justified. Until state case law is significantly more developed, the law regarding spoliation as it has matured in the federal courts will be the source of guidance for state court decisions on this issue. The state courts in family law cases will have to resolve many of these questions on a case-by-case basis to develop a body of law that provides more guidance to the practitioner.

Since most claims in matrimonial cases are adjudicated in bench trials, there is little need for a curative jury instruction where spoliation of evidence has occurred. However, in making a record for appellate purposes where spoliation of evidence has occurred, counsel should request the court to draw an adverse inference against the spoliating party whether or not the court has imposed other sanctions.[163]

IV. Conclusion

The law of spoliation is evolving and state and federal courts address the various aspects of spoliation in a variety of ways. In the factual and subjective context in which spoliation claims are determined, the courts have exercised broad discretion in imposing and fashioning sanctions. As electronic discovery issues become more prevalent, it is important for attorneys to be aware of any potential duties of preservation that may arise, so that they can advise their clients accordingly and avoid sanctions. Lawyers should also be aware of their clients' routine document retention policies, because such policies do not necessarily shield a party from spoliation claims. Although many courts may be hesitant to recognize a separate cause of action for spoliation, it is clear that the remedies in this area are expanding and may be fatal to a

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163 Professional Seminar Consultants v. Sino Am. Technology Exch. Council, 727 F.2d 1470 (9th Cir. Cal. 1984) (affirming award of sanctions pursuant to Federal Rule of Civil Procedure 37(b) and entry of default judgment).

spoliator's case. In addition, lawyers should send notices to both parties and non-parties of pending or potential litigation, requesting the preservation of relevant evidence, as soon as possible so that evidence is preserved, or a claim for spoliation may be pursued.