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Lose the Evidence, Lose Your Case: Understanding and Avoiding Spoliation of Evidence

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I.
Introduction

Remedies and penalties for the loss, alteration, or destruction of relevant evidence are rapidly developing areas of law in several states, with increasingly serious consequences. Known as spoliation, evidence loss or destruction may be punishable in a number of ways. Courts may issue monetary, evidentiary, issue or even terminating sanctions to punish and deter spoliation by a party to litigation. Criminal and disciplinary penalties have developed to punish those involved in spoliation, including attorneys. Where there is a duty to preserve evidence, spoliation may be punishable in future litigation, even if no case is pending when it occurs.

Some jurisdictions recognize spoliation as an independent tort. Where a party, or even a non-party, intentionally destroys evidence, it is subject to judicial punishment. In addition, courts have recently held that a cause of action may be stated against a party or non-party who only negligently causes the spoliation of evidence. The negligent loss or destruction of electronic evidence, in addition to physical and documentary evidence, has become widely punishable. In states where spoliation is not a separate tort, sanctions against parties who lose or destroy evidence are still potentially sought.

This Article first provides a brief survey of the history of the doctrine of spoliation. It then addresses the different ways in which courts and agencies across the country have dealt with spoliation. Finally, to assist attorneys defending cases where spoliation may be a concern, this Article provides some practical guidelines for preventing spoliation claims.

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II.
History

The consequences of spoliation can be derived from the Latin phrase "*omnia praesumuntur contra spoliatorem*" which means "all things are presumed against a wrongdoer."[1] The inference that evidence lost or destroyed by a party must have been unfavorable to that party has been recognized for centuries, beginning in England. Later, the doctrine developed in California and then spread throughout the United States.

For example, in the 18th century English case *Armory v. Delamirie*,[2] a chimney sweep sought to recover a jewel he had given to a jeweler for appraisal. In *Armory*, when the jeweler failed to produce the jewel at trial, the court instructed the jury "that unless the [jeweler] did

[1] Trevino v. Ortega, 969 S.W.2d 950, 952 (Tex. 1998)

[2] 93 Eng. Rep. 664 (1722 K.B.).

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produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him and make the value of the best jewels the measure of their damages . . . ."[3]

The court in 19th century California expressed a similar view in *Fox v. Hale & Norcross S.M. Co*.[4] The court stated, "[t]he presumption *contra spoliatorem* also arises when a party to a suit or controversy willfully destroys or suppresses . . . and will justify a court or jury in drawing the most unfavorable inference . . . ."[5]

Today, the spoliation doctrine is extensively applied. Remedies have expanded from the imposition of an inference against a spoliating party to a wide variety of other possible sanctions. Sanctions are imposed pursuant to common law, the court's inherent power or where specifically provided for in a criminal or discovery statute.

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[3] *Id.*

[4] 41 P. 308, 322 (Cal. 1895).

[5] *Id.* (internal citation and quotations omitted).

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Spoliation was recognized as an independent tort in 1984 by a California Court of Appeal,[6] before the California Supreme Court overruled it in 1998.[7] Other states have recognized spoliation as an independent tort, although the majority of states and federal courts do not. Initially, only intentional spoliation was independently actionable. Within the last two decades, negligent spoliation has been recognized as forming the basis of a separate cause of action.

III.
Remedies Across the United States

A. *Sanctions*

The most common remedies for spoliation are sanctions. These may take the form of adverse jury instructions, evidentiary, issue, monetary or terminating sanctions. Nearly all states and federal circuits have developed case law recognizing sanctions in the form of adverse jury instructions against spoliating parties.

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[6] Smith v. Superior Court, 198 Cal. Rptr. 3d 829, 837 (1984).

[7] Cedars-Sinai Med. Ctr. v. Superior Court, 74 Cal. Rptr. 2d 247, 258 (1998).

Authority for such sanctions may be based on the court's inherent power. Some state legislatures have also codified authority for spoliation sanctions. For example, in California, Evidence Code section 413 provides that the trier of fact may consider willful suppression of evidence to draw inferences against a party.

State courts have also determined that the intentional destruction of evidence after litigation has commenced qualifies as a "misuse of the discovery process" under the Discovery Act.[8] As such, it is subject to a full range of sanctions, including evidentiary, issue, monetary and terminating sanctions.[9] Sanctions are not limited to litigants and attorneys may be subject to penalties including disbarment for destroying or discarding evidence.[10] Further, a spoliator may be subject to felony prosecution for obstruction of justice.[11]

One of the main factors courts consider before deciding whether sanctions are proper and which sanction is most appropriate is the culpability of the spoliator. In general, culpability is evaluated on a sliding scale of mere negligence, gross negligence, recklessness, bad faith, and intentional misconduct.

Jurisdictions differ regarding the degree of culpability required for the type of sanctions to be imposed. For example, an adverse inference will not be applied in Mississippi without fraudulent intent.[12] On the other hand, in Colorado, an adverse inference may be assigned to a negligent spoliator.[13] In New York summary judgment has been granted as a sanction for negligent spoliation.[14]

The second important factor when considering sanctions is the amount of prejudice caused to the innocent party. In the Nevada case *Fire Insurance Exchange v. Zenith Radio Corp.*,[15] an insurer brought an action to recover damages caused by a fire in an insured's house allegedly caused by a television. After the insurer's expert investigated the television, it was destroyed. The insurer's action was filed against the television manufacturer and retailer about two years later.

When it was discovered through discovery requests that the television had not been preserved, the trial court granted the manufacturer's motion for sanctions, excluding the report of the insurer's expert. Since the insurer had insufficient evidence without its expert's report, the court also granted the manufacturer's motion for summary judgment.

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[8] *See, e.g.*, Cal. Civ. Proc. Code § 2023.010; Cedars-Sinai Med. Ctr.*,*74 Cal. Rptr. 2d at 528.

[9] *See, e.g.*, Cal. Civ. Proc. Code § 2023.030; Ill. S. Ct. Rule 219.

[10] *See* Gribben v. Wal-Mart Stores, Inc., 824 N.E.2d 349, 351 (Ind. 2005); Ind. Professional Conduct Rules 3.1, 3.3, 3.4(a), 3.4(b), and 8.4.

[11] *See Gribben*, 824 N.E.2d at 351 (citing Ind. Code §§ 35-44.1-2-1, 35-44.1-2-2 (LexisNexis 2009 & Supp. 2012).

[12] Tolbert v. State, 511 So. 2d 1368, 1372-73 (Miss. 1987).

[13] People *ex rel.* A.E.L. v. M.E.C., 181 P.3d 1186, 1196 (Colo. App. 2008).

[14] Amaris v. Sharp Elecs. Corp., 758 N.Y.S.2d 637, 638 (N.Y. App. Div. 2003).

[15] Fire Ins. Exch. v. Zenith Radio Corp., 747 P.2d 911 (Nev. 1987).

The Nevada Supreme Court was unpersuaded by the insurer's argument that the television was not within its control when litigation discovery was requested. The court held that the insurer was on notice of a potential action when its investigation revealed an alternate source of liability. Thus, the insurer was subject to sanctions for the destruction of the television, which prejudiced defendants' discovery efforts in the litigation. The court affirmed the discovery sanction, made pursuant to Nevada Civil Procedure Rule 37 and affirmed the judgment against the insurer.

In federal courts, Rule of Civil Procedure 37 authorizes imposing sanctions on a party who fails to obey an order to provide discovery. The possible sanctions are not limited to those listed in the rule, which include contempt of court. Where there has been no discovery order violated, the federal court's right to impose sanctions for spoliation arises from its "inherent power to control the judicial process and litigation . . . ."[16] In diversity suits, the majority of courts hold that federal law governs the imposition of sanctions,[17] although some apply state law.[18]

Federal circuits also differ as to whether bad faith is required before an adverse inference jury instruction may be given, or whether negligent spoliation is sufficient. Jurisdictions that will give an adverse instruction for negligent spoliation without bad faith include the Second, Fourth and Ninth Circuits,[19] district courts in the Third and Eleventh Circuits have begun to make the interpretation that bad faith is not required,[20] and the possibility that there may be policy reasons for not requiring bad faith has been articulated in the First Circuit.[21]

B. *Independent Torts and Causes of Action*

A minority of states currently recognize spoliation as an independent tort or cause of action. Such claims are more common against third-party spoliators, since litigation sanctions are available against parties. Alaska, Louisiana, West Virginia, and Ohio are among the states that recognize claims against both first and third-party spoliators.[22]

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[16] Silvestri v. General Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001).

[17] *See, e.g.*, Hodge v. Wal-Mart Stores, Inc., 360 F.3d 446, 449-50 (4th Cir. 2004).

[18] *See* Nationwide Mut. Fire Ins. Co. v. Ford Motor Co., 174 F.3d 801, 804 (6th Cir. 1999).

[19] *See*, *e.g.*, Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002); Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995); Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993).

[20] Brown v. Chertoff, 563 F. Supp. 2d 1372, 1381 (S.D. Ga. 2008); MOSAID Techs. Inc. v. Samsung Elecs. Co., 348 F. Supp. 2d 332, 338 (D.N.J. 2004).

[21] United States v. Laurent, 607 F.3d 895, 903 (1st Cir. 2010).

[22] *See* Hibbits v. Sides, 34 P.3d 327, 329 (Alaska 2001).

Like the differing standards for imposing sanctions, courts differ on whether a cause of action may be stated for negligent spoliation or whether intent is required. In Louisiana, Ohio and Montana, the spoliation must be intentional.[23] In Illinois, the courts state that spoliation is not a "separate" cause of action, however, in practice, a spoliator may be prosecuted under a cause of action for negligence.[24] In New Mexico, a separate cause of action may be stated for intentional spoliation and negligence spoliation may be actionable under general negligence principles.[25]

Generally, the plaintiff in a third party spoliation case must show the defendant had actual knowledge of the pending or potential litigation; that a duty to preserve the evidence was imposed through a statute, a voluntary undertaking, an agreement, or a specific request; and that the missing evidence was vital to the action.[26]

Courts differ regarding the measure of damages in spoliation cases. Damages may be the full amount recoverable at trial if the evidence was available,[27] or that amount may be modified by the probability of success. In some states, like Alabama, if the spoliator was willful, punitive damages can be assessed to punish and deter.[28]

C. *Electronic Evidence Considerations*

Electronic evidence is more easily subject to inadvertent loss and destruction than physical and documentary evidence. Willful destruction of electronic evidence is of course subject to harsh sanctions.[29] Whether to punish the negligent loss or destruction of electronic evidence, however, has been recently addressed.

Federal Rule of Civil Procedure 37(e) addresses negligent loss of electronic evidence, stating that courts should not impose sanctions "for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."

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[23] *See* Hannah v. Heeter*,* 584 S.E.2d 560, 572-73 (W. Va. 2003) (discussing case law from other jurisdictions); Smith v. Atkinson, 771 So.2d 429, 439-40 (Ala. 2000) (See, J., dissenting) (same); Smith v. Howard Johnson Co., 615 N.E.2d 1037, 1038 (Ohio 1993).

[24] Boyd v. Travelers Ins. Co*.,* 652 N.E.2d 267, 271 (Ill. 1995).

[25] Coleman v. Eddy Potash, Inc., 905 P.2d 185, 189 (N.M. 1995) (*overruled on other grounds by* Delgado v. Phelps Dodge Chino, Inc., 34 P.3d 1148, 1156-57 (N.M. 2001)).

[26] *Hannah,* 584 S.E.2d at 570; *Atkinson*, 771 So.2d at 435.

[27] Jones v. O'Brien Tire & Battery Service, Inc., 871 N.E.2d 98, 114 (Ill. App. Ct. 2007).

[28] City Bank v. Eskridge, 521 So.2d 931, 933 (Ala. 1988).

[29] *See, e.g.*, Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 533-38 (D. Md. 2010).

However, this rule does not provide much of a "safe harbor." Even a negligent failure to preserve electronic evidence where there is an affirmative duty to do so is punishable with sanctions.[30] Since 2003, states and federal courts have widely adopted the standard set forth in *Zubulake v. UBS Warburg LLC* stating, "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."[31]

IV.
How to Avoid Spoliation Claims

As a defendant, spoliation in your case can have numerous detrimental effects. Even if it does not result in direct punishment by the court, it can cause a jury to focus on the spoliation of evidence rather than on whether the client is liable.

To avoid spoliation claims, legal counsel should familiarize themselves with clients' electronic systems and processes. General and business counsel should encourage your clients to implement a retention policy and develop better hard copy and electronic document maintenance and preservation protocols.

If a future claim arising out of an accident or event is foreseeable, action should be taken to quarantine and preserve documents in hard copy or electronic form as soon as possible. Advise the client to maintain or hire an evidence storage room or facility for storage and to save pieces of equipment and parts involved in the incident.

If legal action is foreseeable, all electronic auto delete policies and programs should be suspended. A litigation hold letter advising employees to preserve evidence should be distributed. This letter should identify an obligation to appropriately preserve and retain any relevant information. "Preservation" should include taking reasonable steps to prevent the partial or full destruction of information. Remind the client that information may include videos, photographs, and e-mails as well as paper documents.

V.
Conclusion

The duty and standard of care required to preserve relevant evidence varies by jurisdiction, as do the consequences where spoliation occurs. Regardless of the jurisdiction, defense counsel may help prevent and successfully defend spoliation by demonstrating that the client took all necessary precautions to prevent spoliation, and that any loss inadvertently occurring did not prejudice any party.

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[30] Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 439-40 (S.D.N.Y. 2004).

[31] VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 939 N.Y.S.2d 321, 324 (N.Y. App. Div. 2012) (quoting Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)).

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