

USLAW
**SPOLIATION
OF EVIDENCE**
COMPENDIUM



USLAW SPOILIATION OF EVIDENCE COMPENDIUM

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 Community Hosp. v. Superior Court*, 20 Cal4th 464, 84 Cal. Rptr2d 852, 976 P.2d 223, 233 (1999) and *Cedars-Sinai Med. Center v. Superior Court*, 18 Cal.4th 1, 74 Cal.Rptr2d 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 the states that have examined the issue of spoliation.

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Alabama

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

THIRD PARTY TORT

Smith v. Atkinson, 771 So.2d 429, 438 (Ala.2000), holds that spoliation may be a basis for a cause of action where a *third party* has negligently destroyed material evidence, but states that adverse inference instruction and discovery sanctions are the remedy when spoliation is charged against an opposing party.

Smith established a test to determine when a party could be liable for negligent spoliation of evidence. 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).

SANCTIONS

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

Alaska

FIRST PARTY INTENTIONAL TORT:

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

THIRD PARTY INTENTIONAL TORT

In, *Nichols* the Alaska Supreme Court explicitly recognized intentional third party spoliation of evidence as a tort.

These previous holdings were relied on by the Alaska Supreme Court in *Hibbits v. Sides*, 34 P.3d 327 (Alaska 2001). In *Hibbits*, the Court held that when alleging third party spoliation, a plaintiff must plead and prove that the defendant intended to interfere in his civil suit.

Arizona

INDEPENDENT TORT ACTION

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

SANCTIONS/ADVERSE INFERENCE:

Generally speaking, innocent failure to preserve evidence does not warrant sanction or dismissal. *Souza v. Fred Carriers Contracts, Inc.*, 955 P.2d 3, 6 (Ariz. App. 1997). However, litigants have a duty to preserve evidence which they know or reasonably should know is relevant or reasonably calculated to lead to the

discovery of admissible evidence and is reasonably likely to be requested during discovery or is the subject of a pending discovery request. *Id.*

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

Arkansas

DEFINITION

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

ADVERSE INFERENCE INSTRUCTION

Spoliation is the intentional destruction of evidence; when it is established, the fact-finder may draw an inference that the evidence destroyed was unfavorable to the party respon-

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

SANCTIONS

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

California

FIRST PARTY TORT FOR INTENTIONAL SPOILIATION

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).

THIRD PARTY TORT FOR INTENTIONAL SPOILIATION

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 SPOILIATION

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 was unfavorable to that party.);

- (2) Discovery sanctions under California Code of Civil Procedure / 2023;
- (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 conduct.)

POST JUDGMENT TORT OF SPOILIATION

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. As a consequence, this court must decide this issue as it believes the California Supreme Court would do. *HS Servs., Inc. v. Nationwide Mut. Ins. Co.*, 109 F.3d 642, 644 (9th Cir.1997).

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

Colorado

ADVERSE INFERENCE

Colorado recognizes adverse inference as a sanction for intentional destruction of evidence. The state of mind of the party that destroys the evidence is an important consideration in determining whether adverse inference is the appropriate sanction.

In addition, in order to remedy the eviden-

tiary imbalance created by the loss or destruction of the evidence, an adverse inference may be appropriate even in the absence of a showing of bad faith. *Id.* Special caution must be exercised to ensure that the inference is commensurate with the information that was reasonably likely to have been contained in the destroyed evidence. *Pfantz v. Kmart Corp.*, 85 P.3d 564 (Colo. Ap.. 2003).

Connecticut

ADVERSE INFERENCE

Although Connecticut has recognized that an adverse inference may be drawn when relevant evidence is intentionally destroyed the Courts have also recognized as a general rule that the inference is a permissive one. *Leonard v. Commissioner of Revenue Services*, 264 Conn. 286, 306, 823 A.2d 1184, 1197 (Conn.,2003).

An adverse inference may be drawn against a party who has destroyed evidence only if the trier of fact is satisfied that the party who seeks the adverse inference has proven three things:

- (1) The spoliation must have been intentional.
- (2) The destroyed evidence must be relevant to the issue or matter for which the party seeks the inference
- (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 SPOILIATION

Delaware decline to recognize a separate cause of action for 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.

ADVERSE INFERENCE

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

Florida

NO INDEPENDENT CAUSE OF ACTION FOR FIRST PARTY SPOILIATION

The Florida Supreme Court determined in *Martino v. WalMart 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 SPOILIATION

The holding in *Marino* 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 156, 167 (Fla. Dist. Ct. App. 2002); *Jost v. Lakeland Reg'l Med. Ctr., Inc.*, 844 So.2d 656 (Fla.2d DCA 2003). Third party spoliation claims, however, do not arise until the underlying action is completed. *Lincoln Ins. Co. v. Home Emergency Servs., Inc.*, 812 So. 2d 433, 434-435 (Fla. Dist. Ct. App.. 2001). In order to establish a cause of action for spoliation, a party must show: (1) the existence of a potential civil action, (2) a legal or contractual duty

to preserve evidence which is relevant to the potential civil action, (3) destruction of that evidence, (4) significant impairment in the ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages. *Jost v. Lakeland*, 844 So. 2d 656, 657-685 (Fla. 2d DCA 2003).

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. WalMart Stores Inc.*, 908 So.2d 342, 346-47 (Fla. 2005).

Georgia

THIRD PARTY TORT OF SPOILIATION

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

FIRST PARTY TORT OF SPOILIATION

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

SANCTIONS

Georgia courts do have the authority to impose sanctions to remedy the prejudice from the spoliation of evidence. *R.A. Siegel Co.*

v. Bowen, 539 S.E.2d 873, 877 (Ga. Ct. App. 2000). Sanctions range from adverse inference, dismissal and exclusion of evidence. *Chapman v. Auto Owners Ins. Co.*, 469 S.E.2d 783, 784 (Ga. Ct. App. 1996); *see also, Cavin v. Brown*, 538 S.E.2d 802, 804 (Ga. Ct. App. 2000). Courts will look to a variety of factors in determining which sanctions to impose, including:

- (1) whether the party seeking sanctions was prejudiced as a result of the destruction of the evidence;
- (2) whether the prejudice could be cured;
- (3) the practical importance of the evidence;
- (4) whether the party that destroyed the evidence acted in good or bad faith; and
- (5) the potential for abuse of expert testimony about the evidence was not excluded.

Bridgestone/Firestone North Am. Tire, L.L.C. v. Campbell, 574 S.E.2d 923, 926 (Ga. Ct. App. 2002); *Chapman*, 469 S.E.2d at 785.

Hawaii

TORT OF SPOILIATION

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

Idaho

TORT OF SPOILIATION:

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

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

Illinois

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. 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 SPOILIATION

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. *Glottzbach, CPA v. Froman*, 827 N.E.2d 105, 108 (App. 2005). To determine the existence of a duty Indiana Courts balance three factors: (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns. *Id.* However, this balancing test is to be used only in those instances where the element of duty has not already been declared or otherwise articulated. *Id.*

Indiana Code section 35-44-3-4 provides that a person who...alters, damages, or removes any

record, document, or thing, with intent to prevent it from being produced or used as evidence in any official proceeding or investigation...commits obstruction of justice." This is a class D felony.

SANCTIONS

Indiana Courts may also sanction parties, but not third parties, for the spoliation of evidence through:

- (1) evidentiary inferences that the spoliated evidence was unfavorable to the responsible party,
- (2) sanctions for discovery violation under Indiana Trial Rule 37(B), which authorizes courts to respond with sanctions which include among others, ordering that designated facts be taken as established, prohibiting the introduction of evidence, dismissal of all or part of an action, rendering judgment by default against a disobedient party, and payment of reasonable expenses including attorneys' fees, and
- (3) discipline for spoliating attorneys under Indiana Rules of Professional Conduct.

Iowa

SANCTIONS

Evidence of spoliation may allow an inference that “a party who destroys a document with knowledge that it is relevant to litigation is likely to have been threatened by the document.” *Lynch v. Saddler* 656 N.W.2d 104, 111 (Iowa, 2003). Such inference may only be drawn when the destruction of relevant evidence was intentional, as opposed to merely negligent or the evidence was destroyed as the result of routine procedure. *Id.* . However,

such inference does not amount to substantive proof and cannot take the place of proof of a fact necessary to the other party’s cause. *Smith v. Shagnasty’s Inc.*, 2004 WL 434160 (Iowa App. 2004). Interestingly, the evidentiary inference is imposed both for evidentiary and punitive reasons. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 721 (Iowa 2001). Adverse inference instructions should be utilized prudently and sparingly. *Lynch v. Saddler*, 656 N.W.2d 104, 111 (Iowa 2003).

Kansas

TORT OF SPOILIATION

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, 734 P.2d at 1177.

Consequently, the U.S. District Court for Kansas held that the Supreme Court of Kansas would recognize the tort of spoliation under some limited circumstances. *Foster v. Lawrence Memorial Hosp.*, 809 F.Supp. 831, 838 (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 pre-

sumption open to explanation, of course, that the concealed information was unfavorable to him.” Kansas utilizes a Patter 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 a party to [the] case has failed to offer evidence within his power to produce, you may infer that the evidence would have been adverse to that party, if you believe each of the following elements:

- (1) The evidence was under the control of the party and could have been produced by the exercise of reasonable diligence.
- (2) The evidence was not equally available to an adverse party.
- (3) A reasonably prudent person under the same or similar circumstances would have offered if (he) (she) believed it to be favorable to him.
- (4) No reasonable excuse for the failure has been shown.

Kentucky

TORT OF SPOILIATION

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

SANCTIONS/ADVERSE INFERENCE

Rather, the court counteracts a party's deliberate destruction of evidence through evidentiary rules, civil sanction, and missing evidence instructions. *Id.*

Louisiana

TORT OF SPOILIATION

Louisiana courts have recognized the right of an individual to institute a tort action against someone who has impaired the party's ability to institute or prove a civil claim due to negligent or intentional spoliation of evidence. See *Guillory v. Dillard's Dept. Store, Inc.*, 777 So.2d 1,3 (La.App. 3 Cir. 2000); *McCool v. Beauregard Memorial Hosp.*, 814 So.2d 116, 118, (La.App. 3 Cir., 2002).

A plaintiff asserting a state law tort claim for spoliation of evidence must allege that the defendant intentionally destroyed evidence. *Desselle v. Jefferson Hosp. Dist. No. 2*, 887 So.2d 524, 534 (La.App. 2004). Allegations of negligent conduct are insufficient. *Quinn v. RISO Investments, Inc.*, 869 So.2d 922 (La. App.

2004). Where suit has not been filed and there is no evidence that a party knew suit would be filed when the evidence was discarded, the theory of spoliation of evidence does not apply. *Desselle v. Jefferson Hosp. Dist. No. 2*, 887 So.2d at 534.

ADVERSE INFERENCE

The tort of spoliation of evidence has its roots in the evidentiary doctrine of "adverse presumption," which allows a jury instruction for the presumption that the destroyed evidence contained information detrimental to the party who destroyed the evidence unless such destruction is adequately explained. *Guillory v. Dillard's Dept. Store, Inc.*, 777 So.2d 1,3 (La.App. 3 Cir. 2000).

Maine

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

SANCTIONS

The remedy for spoliation of evidence is sanctions, including “dismissal of the case, the exclusion of evidence, or a jury instruction on the spoliation inference.” *Id.* This view of the doctrine is not consistent with the existence of an independent cause of action arising out of such deliberate conduct. Rather, the injured party may seek sanctions that will affect its claims or defenses. *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, 559, 694 A.2d 150,155 (Md.App.,1997). The presumption that arises from a party's spoliation of evidence cannot be used as a surrogate for presenting evidence of negligence in a prima facie case.

SANCTIONS

Maryland courts have condoned discovery sanctions as remedies for spoliation of evidence. See *Klupt v. Krongard*, 728 A.2d 727, 738 (Md. Ct. Spec. App. 1999). The ultimate sanction of dismissal or default when spoliation may be imposed when the spoliation involves:

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

White v. Office of the Public Defender, 170 F.R.D. 138, 147 (D.Md. 1997). One Court noted that the greatest of sanctions is appropriate when the conduct demonstrates willful or contemptuous behavior, or a deliberate attempt to hinder or prevent effective presentation of defenses or counterclaims. *Manzano v. Southern Md. Hosp., Inc.*, 698 A.2d 531, 537 (Md. 1997).

Massachusetts

TORT OF SPOILIATION

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

SANCTIONS

The Massachusetts Supreme Court has recognized that Massachusetts courts have remedies for spoliation of evidence, i.e., exclusion of testimony in the underlying action, dismissal, or judgment by default. See *Gath v. M/A-Com, Inc.*, 440 Mass. 482, 499, 802 N.E.2d 521, 535

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

Michigan

TORT OF SPOILIATION

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). 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 un rebutted, 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 SPOILIATION

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

Michigan Civ. JIG 12.35, reads that, “If either party does not produce evidence that the party could reasonably be expected to produce” and intentionally destroys evidence which that party has been ordered to produce “and fails to give a reasonable explanation, you may decide that the...evidence would have been unfavorable to that party.”

Mississippi

TORT OF SPOILIATION

In *Dowdle*, the Mississippi Supreme Court refused to “recognize a separate tort for intentional spoliation of evidence against both first and third party spoliators.” *Dowdle Butane Gas Co. v. Moore*, 831 So.2d 1124, 1135 (Miss.2002).

In *Richardson* the Court likewise refused to recognize a separate tort for negligent spoliation of evidence. *Richardson v. Sara Lee Corp.* 847 So.2d 821, 824 (2003).

ADVERSE INFERENCE/PRESUMPTION

In *Stahl v. Wal-Mart Stores, Inc.*, the court held that “in the absence of bad faith – i.e., evidence of culpability on the part of the spoliator – then there can be no adverse influence or presumption...even when there is prejudice to the innocent party.” *Stahl v. Wal-Mart Stores, Inc.*, 47 F.Supp.2d 783, 787 n. 3 (S.D.Miss.1998). The court has further held that “it is a general rule that the intentional

spoliation or destruction of evidence relevant to a case raises a presumption, or, more properly, an inference, that this evidence would have been unfavorable to the case of the spoliator.” *Tolbert v. State*, 511 So.2d 1368, 1372-73 (Miss.1987) (quoting *Washington v. State*, 478 So.2d 1028, 1032-33 (Miss.1985)). “Such a presumption or inference arises, however, only when the spoliation or destruction was intentional and indicates fraud and a desire to suppress the truth, and it does not rise where the destruction was a matter of routine with no fraudulent intent.” *Id.*

SANCTIONS

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. Mississippi does recognize a refutable “negative” or adverse inference against a spoliator. *Thomas v. Isle of Capri Casino*, 781 So. 2d 125, 133 (Miss. 2001).

Missouri

ADVERSE INFERENCE

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

When an adverse inference is urged, it is necessary that there be evidence showing inten-

tional destruction of the item, and also such destruction must occur under circumstances which give rise to an inference of fraud and a desire to suppress the truth. In such cases, it may be shown by the proponent that the alleged spoliator had a duty, or should have recognized a duty, to preserve the evidence. *Morris v. J.C. Penney Life Insurance Co.*, 895 S.W.2d 73, 77-78 (Mo.App.1995).

“Since the doctrine of spoliation is a ‘harsh rule of evidence, prior to applying it in any given case it should be the burden of the party seeking its benefit to make a prima facie showing that the opponent destroyed the missing [evidence] under circumstances manifesting fraud, deceit or bad faith.’ *Baldrige v. Director of Revenue, State of Mo.*, 82 S.W.3d 212, 224 (Mo.App. W.D.,2002). Simple negligence, however, is not sufficient to apply the adverse inference rule. *Brissette v. Milner Chevrolet Co.*, 479 S.W.2d 176, 182 (Mo.App.1972).

Montana

TORT OF SPOILIATION

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

See Gentry v. Douglas Hereford Ranch, Inc., 1998 MT 182, 290 Mont. 126, 962 P.2d 1205

Oliver v. Stimson Lumber Co. 297 Mont. 336, 345-354, 993 P.2d 11,18 - 23 (Mont.,1999).

Intentional spoliation consists of the following elements:

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

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

Nebraska

ADVERSE INFERENCE

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

Nevada

TORT OF SPOILIATION

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)

ADVERSE INFERENCE

“It is well established that a party is entitled to jury instructions on every theory of her case that is supported by the evidence.” *Bass-Davis*

v. Davis, 117 P.3d 207, 209 (Nev.,2005). In *Reingold v. Wet ‘N Wild Nevada, Inc.*, the Nevada Supreme Court recognized that under NRS 47.250(3), when evidence is willfully destroyed, the trier of fact is entitled to presume that the evidence was adverse to the destroying party. 113 Nev. 967, 970, 944 P.2d 800, 802 (1997). It further held that evidence is “willfully” destroyed even if the evidence is destroyed pursuant to an established company policy. *Bass-Davis v. Davis*, 117 P.3d at 210.

New Hampshire

ADVERSE INFERENCE

An adverse inference – that the missing evidence would have been unfavorable – can be drawn only when the evidence was destroyed deliberately with a fraudulent intent. *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).

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*, 815 A.2d 508, 511 (N.J. 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.2d 713,721 - 722 (N.J.Super.A.D.,2005).

New Mexico

TORT OF INTENTIONAL SPOILIATION

The New Mexico Supreme Court has recognized the tort of intentional spoliation of evidence. *Coleman v. Eddy Potash, Inc.*, 120 N.M. 645, 649, 905 P.2d 185, 189 (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 SPOILIATION

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

ADVERSE INFERENCE

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

SANCTIONS

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

New York

THIRD PARTY NEGLIGENT SPOILIATION

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.

SPOILIATION BY AN EMPLOYER

Spoilation by an employer may support a common law cause of action when such spoilation 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 spoilation of evidence when the employer was not on notice that evidence would be needed. *Monteiro v. R.D. Werner Co.*, 301 A.D.2d 636, 754 N.Y.S.2d 328 (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 spoilation of evidence. For instance, a defendant may be granted summary judgment when the plaintiff negligently fails to preserve crucial evidence. *Amaris v. Sharp Elecs.*, 758 N.Y.S.2d 637 (N.Y.App. Div. 2003). However, awarding summary judgment to the plaintiff for the defendant's intentional destruction of evidence may be too drastic a remedy. *Mylonas v. Town of Brookhaven*, 759 N.Y.S.2d 752, 753-754 in (N.Y.App. Div. 2003). But see *Herrera v. Matlin*, 758 N.Y.S.2d 7, 7 (N.Y.App. Div. 2003) – affirmed at 771 N.Y.S.2d 347 (N.Y.A.D. 2004) (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 (N.C.App.,2000)

“[T]o qualify for the adverse inference, the party requesting it must ordinarily show that the ‘spoliator was on notice of the claim or potential claim at the time of the destruction.’” *McLain*, 137 N.C.App. at 187, 527 S.E.2d at 718 (quotation omitted). The obligation to

preserve evidence may arise prior to the filing of a complaint where the opposing party is on notice that litigation is likely to be commenced. *Id.* The evidence lost must be “pertinent” and “potentially supportive of plaintiff’s allegations.” *Id.* at 188, 527 S.E.2d at 718. Finally, “[t]he proponent of a ‘missing document’ inference need not offer direct evidence of a coverup to set the stage for the adverse inference. Circumstantial evidence will suffice.” *Id.* at 186, 527 S.E.2d at 718; *Arndt v. First Union Nat. Bank*, 613 S.E.2d 274, 281 -283 (N.C.App.,2005)

North Dakota

Adverse Inference/Sanctions

Trial courts in North Dakota have the authority to sanction a party when key evidence is missing, “even where the party has not violated a court order and even when there has been a no finding of bad faith.” *Bachmeier v. Walkwork 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 prej-

udice 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 inherent power.” *Id.* at 125. Sanctions can include dismissal, preclusion of evidence, or adverse inference. *Id.* at 126.

Ohio

TORT OF SPOILIATION

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.E.2d 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).

SANCTIONS/ADVERSE INFERENCE

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

Oklahoma

TORT OF SPOILIATION

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

ADVERSE INFERENCE

“Spoliation occurs when evidence relevant to prospective civil litigation is destroyed, adversely affecting the ability of a litigant to prove his or her claim.” *Patel v. OMH Medical Center, Inc.*, 987 P.2d at 1202. If applicable, destruction of evidence without a satisfactory explanation gives rise to an inference unfavorable to the spoliator. *Manpower, Inc. v. Brawdy*, 62 P.3d 391, 392 (Okla. Ct. App. 2002).

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)

Pennsylvania

TORT OF SPOILIATION

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 SPOILIATION

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

There is no case law in South Carolina discussing spoliation of evidence, specifically. However, South Carolina apparently recognizes a type of adverse inference rule as it relates to loss or destruction of evidence.

Wisconsin Motor Corp. v. Green, 79 S.E.2d 718, 720-21 (S.C. 1954). It appears as though such inference may be given when a party does not provide an explanation for its failure to produce appropriate documents. *Id.*

South Dakota

ADVERSE INFERENCE

Under South Dakota law, if a party fails to present evidence or witnesses, such non-production justifies an inference that the evidence would be unfavorable. *Cody v. Leapley*, 476 N.W.2d 257, 264 (S.D.1991). “The non-production or suppression by a party of evidence which is within his power to produce and which is material to an issue in the case justifies the inference that it would be unfavorable to him if produced.” *Id.*; *Leisinger v. Jacobson*, 651 N.W.2d 693, 699, (S.D. 2002).

The burden of proof with respect to the adverse inference rule is on the spoliator to show that it acted in a non-negligent, good faith manner in destroying the document sought. *Wuest v. McKennan Hosp.*, 619 N.W.2d 682, 686 (S.D. 2000). The spoliator must show he acted in good faith without negligence or malice in destroying the evidence. *Id.* A jury is required to determine if the explanation given is reasonable and if so, may not infer that the missing information contained unfavorable evidence to the opposing party. *Id.*

Tennessee

ADVERSE INFERENCE

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

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

ADVERSE INFERENCE INSTRUCTION

A spoliation instruction is an instruction given to the jury outlining permissible inferences they may make against a party who has lost, altered, or destroyed evidence. *Brewer v. Dowling*, 862 S.W.2d 156, 159 (Tex.App.-Fort Worth 1993), *writ denied*. A party who has deliberately destroyed evidence is presumed to have done so because the evidence was unfavorable to its case. A trial judge has broad discretion in determining whether to provide a jury with a spoliation presumption instruction. *See Trevino v. Ortega*, 969 S.W.2d 950, 953 (Tex.1998); *Texas Elec. Co-op. v. Dillard*, 171 S.W.3d 201, 208 -209 (Tex.App.-Tyler,2005).

The intentional spoliation of evidence relevant to a cause raises a presumption the evidence would have been unfavorable to the

spoliators. *Id.* This presumption can be rebutted by evidence that the spoliation was not a result of fraudulent intent and does not apply when documents are merely lost. *Cresthaven Nursing Residence v. Freeman*, 2003 WL 253283, 8, 10 (Tex. Ct. App. Feb. 5, 2003). The presumption does not arise unless the party responsible for destruction of evidence had a duty to preserve it. *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 722 (Tex. 2003). However, such a duty arises “only when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim.” *Id.* A party need not take extraordinary measures to preserve evidence, but must exercise reasonable care in preserving evidence. *Trevino*, 969 S.W.2d at 951. A court may determine there is no breach of the duty to preserve evidence if the alleged spoliator offers an “innocent explanation” such as that the evidence was destroyed in an ordinary course of business. *Id.* Finally, the party alleging spoliation is not entitled to remedy unless it establishes prejudice. *Id.*

Utah

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

Vermont

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

Virginia

ADVERSE INFERENCE

Virginia law recognizes 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 may be applied in an existing action if, at the time the evidence was lost or destroyed, “a reasonable person in the defendant’s position should have foreseen that the evidence was material to a potential civil action.

In 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/REBUTTABLE PRESUMPTION

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 2. To remedy spoliation the court may apply a rebuttable presumption, which shifts the burden of proof to a party who destroys or alters important evidence.

In deciding whether to apply a rebuttable presumption in spoliation cases, two factors control: “(1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party.”

Marshall v. Bally's Pacwest, Inc., 94 Wash.App. 372, 381-383, 972 P.2d 475,480 (Wash.App. Div. 2,1999). In weighing the importance of the evidence, the court considers whether the adverse party was afforded an adequate opportunity to examine it. Culpability turns on whether the party acted in bad faith or whether there is an innocent explanation for the destruction. *Id.*

West Virginia

TORT OF SPOILIATION INTENTIONAL SPOILIATION

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 consists of:

- (1) a pending or potential civil action;
- (2) knowledge of the spoliator of the pending or potential civil action;
- (3) willful destruction of the evidence
- (4) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action;
- (5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action;
- (6) the party's inability to prevail in the civil action; and
- (7) damages.

Once the first six elements are established, there arises a rebuttable presumption that but for the fact of the spoliation the party injured by the spoliation would have prevailed in the pending or potential litigation. *Id.*

NEGLIGENT SPOILIATION

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

NEGLIGENT THIRD PARTY SPOILIATION

West Virginia does recognize spoliation of evidence as an independent tort when the spoliation is the result of negligence of a third party and that third party had a special duty to preserve the evidence. *Id.*

The element of the tort of negligent spoliation of evidence by a third party consists of:

- (1) the existence of a pending or potential civil action;
- (2) the alleged spoliator had actual knowledge of the pending or potential civil action;
- (3) a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption, or special circumstances;

- (4) spoliation of the evidence;
- (5) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; and
- (6) damages. (There arises a rebuttable presumption that but for the fact of the spoliation of evidence the party injured by the spoliation would have prevailed in the pending or potential civil litigation if the first five element are met.) *Id.*

PUNITIVE DAMAGES

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

ADVERSE INFERENCE

A trial court may give an adverse inference jury instruction or impose other sanctions against a party for spoliation of evidence after considering:

- (1) the party's degree of control, ownership, possession or authority over the destroyed evidence;
- (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial;
- (3) the reasonableness of anticipating that the evidence would be needed for litigation; and
- (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in causing the destruction of the evidence. *Id.*

The party requesting the instruction bears the burden of proof.

SANCTIONS

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 SPOILIATION

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

ADVERSE INFERENCE

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

SANCTIONS

Wisconsin trial courts have discretion in imposing sanctions for spoliation of evidence. *See State v. McGrew*, 646 N.W.2d 856 (Wis. Ct. App. 2002). However, sanctions cannot "be considered unless there is clear and convincing proof that evidence was deliberately

destroyed or withheld." *Hoskins v. Dodge County*, 642 N.W.2d 213, 228 (Wis. Ct. App. 2002). When deciding whether and how to sanction a party who has destroyed evidence, Wisconsin courts consider the circumstances, including whether the destruction was intentional or negligent, whether comparable evidence is available, and whether at the time of destruction the responsible party knew or should have known that a lawsuit was a possibility. *Farr v. Evenflo Co., Inc.*, 2005 WL 1830908, 2, 2005 WI App 233. *Id.* In *Garfoot v. Fireman's Fund Ins. Co.*, 228 Wis.2d 707, 724, 599 N.W.2d 411 (Ct.App.1999), the court held that dismissal as a sanction for destruction of evidence requires a finding of egregious conduct, "which, in this context, consists of a conscious attempt to affect the outcome of litigation or a flagrant knowing disregard of the judicial process."

The spoliation rule does not apply in administrative proceedings. *Yao v. Bd. of Regents of Univ. of Wis. System*, 649 N.W.2d 356, 362 (Wis. Ct. App. 2002).

Wyoming

TORT OF SPOILIATION

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 -776 (10th Cir.1999) (Applying Wyoming law).

ADVERSE INFERENCE

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

SANCTIONS

"Where the evidence, rather than being destroyed, has been tampered with in bad faith, a court has the option of excluding it, thus denying its use by the tampering party. Where the alteration is not in bad faith and is not so egregious, however, the evidence itself should be admitted, together with information relating to how it was altered, and counsel may argue the issue to the jury. *Id.*

Where the loss or destruction of evidence is not intentional or reckless, by contrast, some courts give the trial court discretion to admit or exclude testimony relating to the missing evidence, and discretion to give or withhold a "missing evidence" instruction. And, a court should refuse to give such instruction if the nonproduced evidence is cumulative or of marginal relevance. *Id.*

In a case that warrants imposition of a sanction against the spoliating party, the court may choose to instruct the jury on the "spoliation inference," i.e., inform 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. *Abraham v. Great Western Energy, LLC*, 101 P.3d at 455 -456, citing Richard E. Kaye, Annotation, *Effect of Spoliation of Evidence in Products Liability Action*, 102 A.L.R. 5th 99-100 (2002)n.