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The Duty to Preserve ESI (Its Trigger, Scope, and Limit) & the Spoliation Doctrine in Maryland State Courts

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ARTICLE

THE DUTY TO PRESERVE ESI (ITS TRIGGER, SCOPE, AND LIMIT) & THE SPOLIATION DOCTRINE IN MARYLAND STATE COURTS

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INTRODUCTION

Under the ancient doctrine *omnia praesumuntur contra spoliatem*, "[a]ll things are presumed against the spoliator."[2] That inference "rests upon a logical proposition that one would ordinarily not destroy evidence favorable to him [or her] self."[3] The corollary is that a person will preserve that which is beneficial to his or her case.[4]

The spoliation doctrine can be traced back to the 1722 English case of *Armory v. Delamirie*.[5] American courts began addressing spoliation in 1794;[6] however, in modern times the doctrine has become more nuanced and complex than a mere Latin phrase. It is particularly important in the area of

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[2] Cecil Cnty. Dept. of Soc. Servs. v. Russell, 159 Md. App. 594, 618, 861 A.2d 92, 106 (2004); *see also* Miller v. Montgomery Cnty., 64 Md. App. 202, 214, 494 A.2d 761, 768 (1985).

[3] *Russell*, 159 Md. App. at 618, 861 A.2d at 106; *see also Miller*, 64 Md. App. at 214, 494 A.2d at 768.

[4] Anderson v. Litzenberg, 115 Md. App. 549, 562, 694 A.2d 150, 156 (1997).

[5] Armory v. Delamarie, Eng. Rep. 664 (K.B. 1722), *described in* MANAGING E-DISCOVERY, *supra* note 1.

[6] MANAGING E-DISCOVERY, *supra* note 1, at 751 n.12 (citing Bd. of Justices v. Fennimore, 1 N.J.L., 1794 WL 507 (N.J. 1794)); *see also* M. KOESEL AND T. TURNBULL, SPOLIATION OF EVIDENCE, at xv n.3 (ABA 3d ed. 2013) (referring to the 1800's).

electronically stored information ("ESI") because of the unique characteristics of that medium.

ESI, and its component and related metadata, is easily destroyed or altered. Frequently, such metadata is either irrelevant or unimportant; however, often it has substantive relevance and, almost invariably, it is valuable when ESI is loaded into software for litigation review. Further, changes to metadata may call the authenticity of files and their contents into question.[7]

Metadata may be changed through mere inattention, human error, or negligence. For example, opening an electronic document will likely alter the "date accessed" metadata. Copying it will likely change the "date created." Routine software or hardware upgrades may alter metadata without malevolent intent. Scheduled operation of a defragmentation program, which is commonly provided with computer operating systems to increase efficiency, may overwrite data.[8]

Sometimes, however, the changes are not inadvertent. Freeware may be used to intentionally change a file's attributes.[9] Additionally, modern word processing software often includes metadata "scrubbers" that are capable of removing information stored with the electronic document.[10]

Paradoxically, it is sometimes difficult to destroy ESI, even with malevolent intent.[11] Although it is fragile, ESI is also persistent—it is often stored in multiple locations and forms. For example, in *Zubulake v. UBS Warburg, LLC*, Ms. Zubulake proved spoliation because she had printed

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[7] One "way in which electronic evidence may be authenticated under Rule 901(b)(4) is by examining the metadata for the evidence." Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 547 (D. Md. 2007) (referring to Fed. R. Evid. 901(b)(4)); *see also* Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 532 (D. Md. 2010).

[8] In the current version of Microsoft Windows, a search for "defragmentation" will open the Disk Defragmenter, which may be run on command or on a periodic basis. *What is Disk Defragmentation?*, WINDOWS.MICROSOFT.COM, http://windows.microsoft.com/en-us/windows/what-is-disk-defragmentation#1TC=windows-7 (last visited Mar. 3, 2015).

[9] For example, "Attribute Changer 7.11" advertises that it can change a file's date and time stamps. FILEHIPPO, http://filehippo.com/download_attributechanger (last visited Mar. 3, 2015). "If you just want to replace the item's stored time stamp information with the current time frame, you can quickly do that by using the pop-up menu. It allows you to do that for selected fields only or for all the fields in one click." SOFTPEDIA, http://www.softpedia.com/get/System/File-Management/Attribute-Changer.shtml (last visited Mar. 3, 2015).

[10] J. SAMMONS, THE BASICS OF DIGITAL FORENSICS 74 fig. 5.3 (Syngress 2012). For example, in the recent version of Microsoft Word, clicking on the "File" tab will lead to an icon to "check for issues." That icon will permit the user to locate, and remove, possibly hidden data from the document.

[11] Describing a failed attempt to destroy ESI, The Honorable Paul W. Grimm wrote: "At the end of the day, this is the case of the 'gang that couldn't spoliate straight.'" *Victor Stanley*, 269 F.R.D. at 501.

copies of emails that UBS Warburg failed to produce.[12] Additionally, deleted data may be forensically recoverable. Even "wiping" software that is designed to overwrite data may leave tell-tale traces of erasure in a computer's registry file.[13]

Spoliation may be considered the flip side of the duty to preserve potentially responsive information. If there is no duty to preserve information, destruction or loss of it cannot be spoliation.[14] Both are common law doctrines that have received attention in countless federal decisions, and they are the subject of a pending proposal to revise the Federal Rules of Civil Procedure.[15]

In light of the January 2008 ESI amendments to the Maryland Rules, the body of federal law, the common law and ethical requirements[16] governing preservation of potentially discoverable information and evidence, and several

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[12] 217 F.R.D. 309, 313 (S.D.N.Y. 2003) ("In fact, Zubulake knew that there were additional responsive e-mails that UBS had failed to produce because she herself had produced approximately 450 pages of [printed] e-mail correspondence.") (subsequent history omitted).

[13] Craig Ball, *Musings on Electronic Discovery*, pp. 110, 201 (2008), *available at* http://www.craigball.com/BIYC.pdf.

[14] In *Columbia Town Center Title Co. v. 100 Inv. Ltd. P'ship*, the Court of Special Appeals of Maryland made clear that destruction that occurs before the duty to preserve is triggered is not spoliation: "[T]his is not a spoliation case. The files were destroyed before appellants knew there was a title problem." Columbia Town Ctr. Title Co. v. 100 Inv. Ltd. P'ship, 203 Md. App. 61, 83, 36 A.3d 985, 988 n.6 (2012), *aff'd in part, rev'd in part,* 430 Md. 197, 80 A.3d 1 (2013); *accord* First Mariner Bank v. Resolution Law Grp., P.C., CIV. MJG-12-1133, 2014 WL 1652550, at *8-9 (D. Md. Apr. 22, 2014).

[15] *See e.g.*, Charles S. Fax, *Less Is More: Proposed Rule 37(e) Strikes the Right Balance*, LITIG. NEWS, Summer 2014, at 18, *available at* http://www.americanbar.org/content/dam/aba/publications/litigation_news/summer14.pdf; Charles S. Fax, *Proposed Changes to Federal Rules Prompt Pushback*, LITIG. NEWS, Spring 2014, at 18, *available at* http://www.americanbar.org/content/dam/aba/publications/litigation_news/spring14.pdf; Charles S. Fax, *Big Changes on the Horizon for Federal Rules*, LITIG. NEWS, Winter 2014, at 20, *available at* http://www.americanbar.org/content/dam/aba/publications/litigation_news/winter14.pdf. *See generally* Leslie Wharton & Stephanie Weirick, *Duty to Preserve: Best Practices, Spoliation, Sanctions, and the Safe Harbor Provision*, *in* MANAGING E-DISCOVERY, *supra* note 1, ch. 8.

[16] For a discussion of ethical issues in connection with ESI, see generally Md. R. Prof. Conduct 3.4(a) (lawyer shall not "unlawfully obstruct another party's access to evidence or unlawfully alter or destroy material with potential evidentiary value"); Dennis P. Duffy & Courtney I. Barton, *Ethics in E-Discovery*, *in* MANAGING E-DISCOVERY, *supra* note 1, ch. 29; PAUL W. GRIMM & LISA M. YURWIT, ELECTRONICALLY STORED INFORMATION IN MARYLAND AND FEDERAL COURTS: DISCOVERY, ADMISSIBILITY AND ETHICS Ch. 7 (MICPEL 2008); JOHN M. BARKETT, THE ETHICS OF E-DISCOVERY (ABA 2009).

Maryland decisions involving ESI,[17] Maryland courts and practitioners should consider the development of the duty to preserve and the spoliation doctrine in Maryland courts.[18]

II. OVERVIEW AND SUMMARY

There are several salient concepts. First, when is the common law duty to preserve triggered? Second, what is its scope and what are its limits? Third, if the duty to preserve is breached, what degree of culpability and prejudice will support what type of sanction? The answers are deceptively simple.

The duty is triggered when litigation is reasonably anticipated. It extends to potentially responsive information. It is limited by concepts of proportionality and reasonableness; perfection is not required. When breached, there may be a need to level the playing field. That may implicate a wide range of sanctions based on a fact-sensitive inquiry.[19]

Many Maryland appellate courts have relied on the four-step analysis of *White v. Office of the Public Defender*, a 1997 federal decision.[20] A persuasive body of recent case law suggests that spoliation decisions should be made using what is essentially a three-step analysis: (1) Was the duty to preserve breached?—(a) Was the duty triggered? (b) If so, what is the scope of the duty? (c) What are the limits on the scope of the duty?—(2) Was there a sufficiently culpable state of mind? (3) If the innocent party was prejudiced, what sanction, if any, is appropriate?

This article will examine the duty to preserve in Section III. Then, Section IV will define spoliation. Sections V through VIII will explain the state of the Maryland spoliation doctrine, providing analysis under both the Maryland Rules and decisions of Maryland courts. Section IX will then suggest a three-step analysis for approaching spoliation issues. Finally, the article will end on a cautionary note.

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[17] E.g., Sublet v. State, 2015 WL 1826582 (Md. Apr. 23, 2015) (authentication of text messages).

[18] "[O]pting out by seeking refuge in the state court system is no longer an option." J. Mark Coulson, *Maryland Courts No Longer Safe Haven for E-Discovery Resistors*, 43 MD. BAR J. 32, 35 (2010).

[19] THE SEDONA CONFERENCE, *The Sedona Conference Commentary on Legal Holds: The Trigger & The Process*, 11 SEDONA CONF. J. 265, 269 (2010) [hereinafter *Sedona Conference Commentary*].

[20] City Homes v. Hazelwood, 210 Md. App. 615, 670, 63A.3d 713, 746 (2013), cert. denied, 432 Md. 468, 69 A.3d 476 (2013), citing Klupt v. Krongard, 126 Md. App. 179, 194-97, 728 A.2d 727, cert. denied, 355 Md. 612, 735 A.2d 1107 (1999), both in turn citing White v. Office of the Pub. Defender, 170 F.R.D. 138 (D. Md. 1997).

III. THE DUTY TO PRESERVE: ITS TRIGGER, SCOPE, AND LIMITS

A. The Common Law Duty to Preserve is Triggered by the Reasonable Anticipation of Litigation

As a general principle, "[u]nless otherwise required by law, no individual or entity is required to preserve records."[21] The common law duty to preserve is triggered when litigation becomes reasonably anticipated.[22] Sedona Conference Guideline 1 states that there is reasonable anticipation when there is a credible probability that an organization will become involved in litigation.[23] Guideline 4 suggests that this an objective determination to be made in good faith after a reasonable evaluation.[24] There is no one-size-fits-all checklist.[25]

B. The Scope of the Duty Encompasses Potentially Responsive Information

Determining the scope of the duty to preserve has been described as one of the most vexing issues in e-discovery.[26] As noted by The Honorable Shira A. Scheindlin, while the duty's "broad contours" are "relatively clear," the obligation "cannot be defined with precision."[27]

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[21] PAUL R. RICE, ELECTRONIC EVIDENCE: LAW AND PRACTICE (ABA 2d ed. 2008). For additional detail, see Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381, 388 n.27 (2008) [hereinafter Grimm et al., *Proportionality*]. As with any general rule, there are a number of exceptions. S*ee, e.g.*, Lewy v. Remington Arms Co., Inc., 836 F.2d 1104 (8th Cir) (remanding for factual determination of whether facially neutral destruction policy was an artifice to evade duty to preserve information about alleged unsafe firearm).

[22] For a discussion of the multiple sources of the duty other than common law, see Grimm et al., *Proportionality*, *supra* note 21, at 388-39. The discussion in this article is limited to the common law duty to preserve.

[23] *Sedona Conference Commentary*, *supra* note 19, at 269. Publications of the Sedona Conference are cited extensively in comments to the January 2008 amendments to the Maryland Rules. A prior iteration of the Sedona Commentary required a credible "threat," and that reference has properly been removed.

[24] *Id*. at 270.

[25] *Id*. at 271 (providing concrete examples of fact patterns that would, or would not, trigger the duty).

[26] Grimm et al., *Proportionality*, *supra* note 21, at 385 (quotation to Kenneth Withers omitted).

[27] *Id*. at 392-93 (citing to Scheindlin, J.).

The duty has been described as a duty to preserve "potentially relevant evidence."[28] Thus, it has been linked to the scope of discovery.[29] While that is a helpful rule of thumb, it is often too narrow because information that need not be produced in discovery may be subject to the duty to preserve. To provide one example, a backup tape may be subject to the duty to preserve but, because it may be costly to restore, may not be subject to the duty to produce.[30] Further, because the parameters of discovery are often unclear, defining the scope of the duty to preserve in terms of the scope of discovery may be of little practical assistance.[31] This dilemma may lead a potential litigant to over-preserve, unreasonably increasing the cost of litigation.[32]

C. Proportionality Limits the Scope of the Duty

It is axiomatic that the law should not compel a litigant to spend $50,000 preserving information for a $5,000 case.[33] That axiom illustrates the principle of proportionality. In the discovery context, it is embodied in the cost-benefit analysis of Maryland Rule 2-402(b).[34]

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[28] *Id*. at 396 (quoting Paul Rice) (internal quotations omitted). Restricting the duty to "evidence" may be too narrow.

[29] *Id*. at 385, 396 (citation omitted).

[30] Two conceptual examples, among others, may be found in Maryland Rules 2-402(b)(1) and 2-402(b)(2). Under Rule 2-402(b)(2) information that is not readily accessible due to undue burden or cost may not need to be produced in discovery, yet it may be subject to the duty to preserve. Similarly, information that need not be produced under the cost-benefit test of Rule 2-402(b)(1) may still be subject to the duty to preserve.

[31] Grimm et al., *Proportionality*, *supra* note 21, at 397.

[32] *Id.* at 403, 407, 411.

[33] *Id.* at 407-11; *accord* Theodore Hirt, *Applying "Proportionality" Principles in Electronic Discovery – Lessons for Federal Agencies and Their Litigators*, U.S. ATTORNEYS' BULL., May 2011, at 46-47, *available at* http://justice.gov/usao/eousa/foia_reading_room/usab5903.pdf.

[34] Maryland Rule 2-402(b) provides:

> The court shall limit the frequency or extent of use of the discovery methods otherwise permitted under these rules if it determines that (A) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (C) the burden or cost of the proposed discovery outweighs its likely benefit, taking into account the complexity of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

It has been suggested that proportionality and cost-benefit analysis provide the best tools for analyzing and limiting the scope of the duty to preserve.[35] For example, Sedona Conference Guideline 6 suggests that the duty to preserve be "applied proportionately."[36] A corollary is that perfection is not required; reasonable efforts are.[37] When information that should have been preserved is not, the failure may present an issue of spoliation.

IV. DEFINITION OF SPOLIATION

Spoliation has been described as a word with "evil connotations."[38] In *Keyes v. Hereman*, the Court of Special Appeals of Maryland defined spoliation as the intentional destruction, mutilation, alteration, or concealment of evidence, usually a document.[39] In *Cost v. State*, the Court of Appeals of Maryland wrote that the "term 'spoliation,' moreover, is often associated with egregious or bad faith actions, and not for cases involving negligent destruction or loss."[40]

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[35] Grimm et al., *Proportionality*, *supra* note 21, at 405. See *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008), and *Marens v. Carrabba's Italian Grill, Inc.*, 196 F.R.D. 35 (D. Md. 2000), for examples of cases applying proportionality analysis.

[36] *Sedona Conference Commentary*, *supra* note 19, at 270.

[37] *See, e.g.*, Michael D. Berman, *What Does "The Making of a Surgeon" Have to Do With ESI and "Software Glitches?*", MICHAEL D. BERMAN BLOG (July 15, 2011), http://www.esi-mediation.com/what-does-%e2%80%9cthe-making-of-a-surgeon%e2%80%9d-have-to-do-with-esi-and-software-glitches/ (demonstrating that perfection is not, and never has been, the applicable standard in evaluating ESI issues). Similarly, Sedona Principle 5 provides for "reasonable and good faith" efforts to preserve, and states that "it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant electronically stored information." THE SEDONA CONFERENCE, THE SEDONA CONFERENCE DATABASE PRINCIPLES ADDRESSING THE PRESERVATION AND PRODUCTION OF DATABASES AND DATABASE INFORMATION IN CIVIL LITIGATION 189 (2014 ed.), *available at* https://thesedonaconference.org/system/files/sites/sedona.civicactions.net/files/private/drupal/filesys/publications/The%20Sedona%20Conference%20Database%20Principles_2014%20Edition.pdf.

[38] MARGARET M. KOESEL & TRACEY L. TURNBULL, SPOLIATION OF EVIDENCE, xvi (Daniel F. Gourash ed., ABA 3d ed. 2013) (quoting United Med. Supply Co. v. U.S., 77 Fed. Cl. 257, 276 (Fed. Cl. 2007) (internal citations and quotations omitted)).

[39] Keyes v. Lerman, 191 Md. App. 533, 537, 992 A.2d 519, 522 (2010) (quoting BLACK'S LAW DICTIONARY 1437 (8th ed. 2004)).

[40] Cost v. State, 417 Md. 360, 369, 10 A.3d 184, 190 (2010).

Other definitions do not include the word "intentional,"[41] and some courts have found spoliation based on negligence.[42] The Sedona Conference glossary states: "Spoliation is the destruction of records or properties, such as metadata, that may be relevant to ongoing or anticipated litigation, government investigation or audit."[43] The Sedona Conference has also suggested that in order for there to be spoliation, there must be a "knowing violation of an established duty" or "a reckless disregard amounting to gross negligence."[44]

The spoliation doctrine has been variously recognized as an independent tort, a defense to recovery, an evidentiary inference or presumption, a discovery sanction, a substantive rule of law, and a rule of evidence or procedure.[45] Spoliation is not an independent tort in Maryland.[46]

Colloquially, one person's trash is another person's treasure.[47] One ESI decision suggested:

> Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence. Our adversarial process is designed to tolerate human failings—erring judges can be reversed, uncooperative counsel can be shepherded, and recalcitrant witnesses compelled to testify. But, when critical documents go missing, judges and litigants alike descend into a world of ad

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[41] Miller v. Montgomery Cnty., 64 Md. App. 202, 214, 494 A.2d 761, 767-68 (1985). *See generally* Leslie Wharton & Stephanie Weirick, *Duty to Preserve: Best Practices, Spoliation, Sanctions, and the Safe Harbor Provision*, *in* MANAGING E-DISCOVERY, *supra* note 1, ch. 8, at 234.

[42] *See generally* Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 542-53 (D. Md. 2010) (for a chart of the varying culpability standards in federal courts across the nations).

[43] THE SEDONA CONFERENCE, THE SEDONA CONFERENCE GLOSSARY: E–DISCOVERY & DIGITAL INFORMATION MANAGEMENT 48 (2d ed. 2007), *available at* http://www.thesedonaconference.org/content/misc Files/TSCGlossary_12_07.pdf, *quoted in Victor Stanley,* 269 F.R.D. at 516.

[44] THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: SECOND EDITION, BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 70 (2d ed. June 2007), *available at* https://thesedonaconference.org/system/files/sites/sedona.civicactions.net/files/private/drupal/filesys/publications/TSC_PRINCP_2nd_ed_607.pdf.

[45] Klupt v. Krongard, 126 Md. App. 179, 198, 728 A.2d 727, 736 (1999).

[46] *See* Goin v. Shoppers Food Warehouse, 166 Md. App. 611, 890 A.2d 894 (2006); Md. Jockey Club of Balt. City, Inc. v. Balt. Gas & Elec. Co., No. 2364, 2002 WL 32123994 (Md. Ct. Spec. App. Dec. 17, 2002); Miller v. Montgomery Cnty., 64 Md. App. 202, 494 A.2d 761 (1985); Peamon v. H&S Bakery, Inc., et al., No. 8-487, 2008 WL 6843228 (Md. Cir. Ct. Balt. Cnty. July 17, 2008).

[47] United Med. Supply Co. v. U.S., 77 Fed. Cl. 257, 258 (2007).

> hocery and half measures—and our civil justice system suffers.[48]

V. THE SPOLIATION DOCTRINE UNDER THE MARYLAND RULES

The Maryland Rules were amended as of January 1, 2008, to address electronic discovery.[49] Maryland Rule 2-433(a) authorizes a court to impose such orders as are "just" in regard to a failure of discovery.[50] It has been held to permit spoliation sanctions.[51]

Maryland Rule 2-433(b) provides a limited "safe harbor," by precluding spoliation sanctions, "under these Rules," if ESI "is no longer available as a result of the routine, good-faith operations of an electronic information system," except under exceptional circumstances.[52] The limits of the protection afforded by Maryland Rule 2-433(b) have been authoritatively well-described elsewhere.[53] As noted therein, the protection does not apply if there are exceptional circumstances, a term that is not defined. Further it applies only to routine, good faith losses. Finally, and perhaps most importantly, "the limitation on the court's ability to sanction for the loss or destruction of ESI under amended Md. Rule 2-433(b) is to the imposition of sanctions 'under this rule.' The court still retains its inherent authority to impose sanctions for a failure to preserve, in appropriate circumstances."[54] Thus, the Maryland Rule 2-433 "safe harbor" provides no protection from sanctions under sources of authority that are not based on the Maryland Rules, nor does it provide protection after litigation has become reasonably anticipated.

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[48] *Id*. at 258-59.

[49] J. Mark Coulson, *Maryland Courts No Longer Safe Haven for E-Discovery Resistors*, 43 MD. B. J. 32 (2010) (discussing a number of Maryland Rules that apply specifically to ESI).

[50] Md. Rule 2-433(a).

[51] Klupt v. Krongard, 126 Md. App. 179, 194, 728 A.2d 727, 734 (1999).

[52] *See* Md. Rule 2-433(b).

[53] GRIMM & YURWIT, *supra* note 16, ch. 1, at 1-20; *see also* Chambers v. NASCO, Inc., 501 U.S. 32, 43-46 (1991) (discussing a court's inherent powers); *Klupt*, 126 Md. App. at 196-97, 728 A.2d at 735 (discussing inherent authority of the courts to regulate discovery). *See generally* Leslie Wharton & Stephanie Weirick, *Duty to Preserve: Best Practices, Spoliation, Sanctions, and the Safe Harbor Provision*, *in* MANAGING E-DISCOVERY, *supra* note 1, ch. 8, at 235 n.45.

[54] GRIMM & YURWIT, *supra* note 16, at 8 (citing Weaver v. ZeniMax Media, Inc., 175 Md. App. 16, 923 A.2d 1032, *cert. denied*, 401 Md. 174, 931 A.2d 1097 (2007) (recognizing the trial court's inherent authority to impose sanctions for spoliation of evidence that took place prior to the commencement of litigation and, hence, outside the reach of the rules of procedure); *Klupt*, 126 Md. App. 179, 728 A.2d 727 (holding that the circuit court had inherent authority to impose sanctions for destruction of evidence)).

Like the Federal Rules, the Maryland Rules do not specify when a spoliation motion must be filed. Unlike their federal counterparts, Maryland courts have not addressed when a spoliation motion should or must be filed, or when it should be decided.[55] Guideline 2 of the Proposed Revisions to the Discovery Guidelines of the Maryland State Bar suggests that attorneys propose milestone dates for spoliation motions.[56]

VI. THE SPOLIATION DOCTRINE IN THE COURT OF APPEALS OF MARYLAND

A. Antecedents of the Modern Doctrine of Spoliation

Maryland courts have addressed spoliation since at least the 1880's. In an early spoliation case, *Love v. Dilley*, the decedent had left money to his beneficiaries, but advancements made to them during his life were to be deducted from the corpus so that equal shares would be left.[57] Notes showing advancements to one group existed; notes to the other group were destroyed.[58]

In essence, the papers favorable to Barney Dilley and his group were preserved but those that were unfavorable had gone missing. The court determined that the loss was designed to prevent equitable distribution.[59] The Court of Appeals of Maryland wrote: "There could be but one conceivable purpose in putting these papers out of the way. The spoliation, by whomsoever committed, was intended to promote the interest of Barney Dilley, the Edwards, and the Everetts, by relieving them from the necessity of bringing them into the hotchpot."[60]

The court then addressed the remedy:

> It is our duty to prevent the contemplated injustice by all the legitimate means in our power. Exact justice is out of the question; it has been prevented by the destruction of the means of attaining it. We can, however, charge these [spoliating] parties with such sums as the evidence shows they

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[55] *See, e.g.*, Michael D. Berman, *Timing of Spoliation Motions: Goodman v. Praxair Services, Inc.*, *in* MANAGING E-DISCOVERY, *supra* note 1, app. C (discussing the time at which a spoliation motion should or must be filed).

[56] MARYLAND STATE BAR ASSOCIATION, PROPOSED REVISIONS TO THE DISCOVERY GUIDELINES OF THE MARYLAND STATE BAR, at 3 (2014), *available at* http://www.msba.org/uploadedFiles/MSBA/Member_Groups/Sections/Litigation/GuidelinesDRAFT061214.pdf.

[57] Love v. Dilley, 64 Md. 238, 1 A. 59, 59-60 (1885), *modified*, 64 Md. 238, 4 A. 290 (1886).

[58] *Id.* at 239, 1 A. at 59-60.

[59] *Id.*

[60] *Id.*

> received from Joseph Dilley in his life-time, and *require them to exonerate themselves* by proper proof.[61]

It reasoned that "the blame must rest on those who have destroyed or concealed the evidence . . . ."[62] The court permitted the non-spoliating party to rely on secondary evidence:

> Of course, if [the decedent's] notes and papers could be obtained, there could not be the least difficulty in ascertaining these different amounts, and in making a perfectly fair division of his property among his children. But as in some instances they have disappeared, we are of necessity obliged to rely upon the more uncertain and unsatisfactory evidence set forth in the record. It is morally impossible that our conclusions should be accurate. We at best can only hope to make an approximation to true results. But the blame must rest on those who have destroyed or concealed the evidence which would remove all obscurity on the subject; and when, from the want of this proof, we fall into errors, the loss will justly fall on those whose misconduct has destroyed the means of arriving at the truth.[63]

In an early application of the modern adverse inference doctrine, the Court of Appeals of Maryland wrote *in odium spoliatoris omnia præsumuntur*.[64] It explained:

> If a person is proved to have defaced or destroyed any written instrument, a *presumption* arises that if the truth had appeared it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance, and, accordingly, slight evidence of the contents of the instrument will usually, in such a case, be sufficient. In dealing with the difficulties of this case we have endeavored to draw from the competent evidence in the record only such conclusions as seemed to us legitimate and reasonable.[65]

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[61] *Id*. at 291, 1 A. at 64 (emphasis added).
[62] *Id*. at 239, 1 A. at 60.
[63] *Love*, 64 Md. at 239, 1 A. at 60.
[64] *Id*. at 246, 1 A. at 64 (internal quotations and citations omitted).
[65] *Id*. (internal quotations and citations omitted) (emphasis added).

B. The Modern Doctrine of Spoliation

In *Cost v. State*, the Court of Appeals of Maryland stated that "'spoliation' is often used in civil cases, where parties withhold or destroy evidence strategically."[66] *Cost* was a criminal case; however, the court contrasted the civil spoliation doctrine with the criminal "missing evidence" analysis.[67] Cost was convicted after allegedly stabbing a fellow inmate. The State took certain physical evidence into custody and later discarded it. The court held that it was error to refuse Cost's request for a jury instruction: "Maryland recognizes some form of jury instructions regarding missing or destroyed evidence in both civil and the criminal contexts. In the civil context, we give a jury instruction for the 'spoliation of evidence' where a party has destroyed or failed to produce evidence."[68] The court then quoted the pattern civil jury instruction:

> The destruction of or the failure to preserve evidence by a party may give rise to an inference unfavorable to that party. If you find that the intent was to conceal the evidence, the destruction or failure to preserve must be inferred to indicate that the party believes that his or her case is weak and that he or she would not prevail if the evidence was preserved. If you find that the destruction or failure to preserve the evidence was negligent, you may, but are not required to, infer that the evidence, if preserved, would have been unfavorable to that party.[69]

The *Cost* court rested its analysis on the principle that "one does not ordinarily withhold evidence that is beneficial to one's case."[70] It emphasized that: "The instruction does not require that a jury make an adverse inference in situations involving the spoliation of evidence; rather, it merely permits

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[66] Cost v. State, 417 Md. 360, 369, 10 A.3d 184, 190 (2010).

[67] This article addresses only civil cases. In the criminal context, the Court of Appeals of Maryland has described the term "spoliation" as imprecise and misleading. *Cost*, 417 Md. at 369, 10 A.3d at 190. For some opinions addressing the doctrine in the criminal context, see *Patterson v. State*, 356 Md. 677, 694-99, 741 A.2d 1119, 1128-30 (1999) (due process); *Butler v. State*, 214 Md. App. 635, 662-64, 78 A.3d 887, 903-04 (2013) (alleged unavailable witness); *Hajireen v. State*, 203 Md. App. 537, 558-61, 39 A.3d 105, 118-20 (2012); *Grymes v. State*, 202 Md. App. 70, 113-14, 30 A.3d 1032, 1057 (2011); and *Tetso v. State*, 205 Md. App. 334, 45 A.3d 788 (2012).

[68] *Cost*, 427 Md. at 370, 369 A.3d at 190.

[69] *Id.*

[70] *Id.* at 370, 369 A.3d at 190 (quoting Anderson v. Litzenberg, 115 Md. App. 549, 562, 694 A.2d 150, 156 (1997)).

such an inference."[71] The Court of Appeals of Maryland explained: "For the judicial system to function fairly, one party in a case cannot be permitted to gain an unfair advantage through the destruction of evidence."[72]

The Court of Appeals of Maryland has repeatedly stated that the spoliation doctrine does not provide substantive proof.[73] Instead, the destruction of evidence after a duty to preserve has arisen raises an inference that the destroyed evidence was unfavorable to the spoliator. Further, in the unique context of a spoliated will, the will's contents may be proven by secondary

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[71] *Id*. at 370-71, 396 A.3d at 190-91 (explanatory footnote omitted) (citing Joseph F. Murphy, MARYLAND EVIDENCE HANDBOOK § 409 (4th ed. 2010) ("Destruction of evidence permits, but does not require, an inference that the evidence would have been unfavorable to the position of the party who destroyed the evidence.")).

[72] *Cost*, 427 Md. at 381, 396 A.3d at 197.

[73] On the issue of substantive proof, the Court of Appeals of Maryland has written, "Even in evidence spoliation cases, the fact finder is not permitted to find the destruction of evidence to be substantive proof that the evidence was unfavorable." Bereano v. State Ethics Comm'n, 403 Md. 716, 747, 944 A.2d 538, 556 (2008). "Although an inference arises from the suppression of evidence by a litigant that this evidence would be unfavorable to his cause, it is well settled that this inference does not amount to substantive proof and cannot take the place of proof of a fact necessary to the other party's case." Maszczenski v. Myers, 212 Md. 346, 355, 129 A.2d 109, 114 (1957) (citations omitted); *accord* Larsen v. Romeo, 254 Md. 220, 228, 255 A.2d 387, 391 (1969) ("As a general rule, an inference arises from the suppression or destruction of evidence by a litigant that such evidence would be unfavorable to his case. However, this inference does not amount to substantive proof and can not take the place of proof of a fact necessary to the other party's case.") (citation omitted). Similarly, the Court of Special Appeals has stated that:

> [A] presumption does not necessarily shift the burden of persuasion. Rather, it merely satisfies the burden of going forward on a fact presumed and may satisfy the burden of persuasion if no rebuttal evidence is introduced by the other side. When the responding party introduces rebutting evidence, the presumption often is sufficient to generate a jury question on the issue, despite the fact that the beneficiary of the presumption has not produced any other evidence on the subject. . . . Stated differently, the party favored by the presumption is not relieved of the requirement of presenting evidence to establish a prima facie case as to those issues for which he bears the burden of proof if the adverse party sufficiently rebuts the presumption.

Anderson v. Litzenberg, 115 Md. App. 549, 564, 694 A.2d 150, 157 (1997).

evidence,[74] and the doctrine permits a presumption to supply the suppressed proof.[75]

In *Hoffman v. Stamper*, Hoffman (a defendant who was the appraiser in an alleged house-flipping scheme) destroyed documents "in direct violation of HUD and ethical requirements applicable to appraisers," and "deliberately destroyed all of his notes once [alleged flipper] Beeman's activities came to public attention."[76] The destruction was spoliation and raised an inference that the destroyed documents were unfavorable to Hoffman: "From that spoliation alone the jury was entitled to infer that those notes would have been detrimental to Hoffman's defense, that they would not have supported what he said from the witness stand."[77]

In *Larsen v. Romeo*, Romeo's tractor-trailer rear-ended Larsen's vehicle.[78] Romeo asserted that, in part, the incident was caused by sudden, unforeseeable failure of the truck's air brakes. After the collision, Romeo (or a mechanic)[79] took a piece of air hose from the tractor, observed a leak, and then threw it away. Larsen asserted that spoliation provided proof that the air hose had not failed. The court disagreed. It stated the general rule that suppression or destruction of evidence supports an inference that the evidence would have been unfavorable to the spoliator. It then stated that "this inference does not amount to substantive proof and cannot take the place of proof of a fact

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[74] For a discussion suggesting a greater role for secondary evidence in the sanctions analysis, see MICHAEL D. BERMAN & RACHEL A. SHAPIRO, *The Secondary Evidence Rule in Avoidance of Spoliation Sanctions*, *in* MANAGING E-DISCOVERY, *supra* note 1, ch. 10.

[75] The Court of Appeals of Maryland wrote, in the will context, that:

> [I]f necessary, the law will prevent the perpetration of a fraud by permitting a presumption to supply the suppressed proof. We cannot assent to the proposition that the statute is so rigid as to be the wrongdoer's most effective weapon. The misconduct once established to the satisfaction of the jury, it is no hardship to the wrongdoer to say, 'Produce the evidence in your possession, or we will presume that your opponent's contention is true.' When one deliberately destroys, or purposely induces another to destroy, a written instrument of any kind, and the contents of such instrument subsequently become a matter of judicial inquiry between the spoliator and an innocent party, the latter will not be required to make strict proof of the contents of such instrument in order to establish a right founded thereon.

Preston v. Preston, 149 Md. 498, 132 A. 55, 61 (1926).

[76] Hoffman v. Stamper, 385 Md. 1, 27, 867 A.2d 276, 292 (2005).

[77] *Id.*, 867 A.2d at 292.

[78] Larsen v. Romeo, 254 Md. 220, 255 A.2d 387 (1969).

[79] It was not clear whether Romeo or a mechanic had removed the piece of hose. *Romeo*, 254 Md. at 224.

necessary to the other party." It concluded that, at most, the inference would show "that that particular piece of hose, which may or may not have been part of the brake system, was not defective. Such an inference does not negate Romeo's testimony that his brakes failed."[80]

The *Larsen* court relied on *Maszczenski v. Meyers*, a decision in which a child was injured in a fall from a broken swing.[81] The defendant discarded a link from the chain that held the swing before the plaintiff could examine it.[82] The court noted no "statutory presumption here," and wrote:

> Probably Mr. Myers should not have disposed of the link. There is of course no evidence here that he disposed of the link intentionally for the purpose of concealing the fact that it had opened. It could hardly be contended that throwing away the broken link was sufficient evidence for the jury to find that an inspection of the link before the accident would have revealed the latent defect.

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[80] In explaining *Larsen*, the Court of Appeals of Maryland wrote:

> Both *Larsen* and *DiLeo* were cases in which one party destroyed potential evidence. Nonproduction of evidence does not automatically equate with destruction of evidence. Petitioner offers no evidence that the police purposely suppressed or destroyed the jacket. The record reveals that the police accurately reported the existence of the jacket during the inventory search of the vehicle. While the defendant may have considered the jacket to be relevant evidence, there is little evidence that the police considered it to be evidence, and ever held it as evidence. *Larsen* and *DiLeo* point to intent or motive behind the destruction as essential to the drawing of the inference. Therefore, those cases do not aid petitioner because, not only is there no evidence that the police destroyed the jacket, petitioner has not established what the police motive or intent behind destroying the jacket would be.

Patterson v. State, 356 Md. 677, 696, 741 A.2d 1119, 1129 (1999) (citing Dileo v. Nugent, 88 Md. App. 59, 592 A.2d 1126 (1991), *appeal dismissed*, 327 Md. 627, 612 A.2d 257 (1992); Larsen v. Romeo, 254 Md. 220, 255 A.2d 387 (1969)).

[81] Maszczenski v. Meyers, 212 Md. 346, 129 A.2d 109 (1957).

[82] The court wrote:

> The appellants in their brief admit: "It is true, as stated by the Court, that there was no evidence in the case to show that if an inspection was made 10 minutes before it broke would have disclosed it was going to break." However, they claim that this was because Mr. Myers threw away the broken link and they had no opportunity to examine it.

Id. at 354, 129 A.2d at 113.

The court noted that, although an inference may arise from suppression, it was well-settled that the inference is not substantive proof.[83]

VII. THE SPOLIATION DOCTRINE IN THE COURT OF SPECIAL APPEALS

DiLeo v. Nugent was a medical malpractice action.[84] A patient alleged that a therapist had participated in illicit drug use and had sexual contact with her.[85] He advised her to keep a journal and, during the nine month occurrence, the patient kept an 800-page journal. She destroyed it, after consulting an attorney, because she feared that she would commit suicide and the journal would upset her family.[86] The circuit judge instructed the jury that destruction of evidence gives rise to inferences unfavorable to the spoliator. Not only was that instruction held to be proper, it was also held to be proper to refuse to instruct on destruction with fraudulent intent because the patient provided explanations for her failure to produce the journal.[87]

Miller v. Montgomery County, involved an auto tort. One question was whether a minor movement controller component ("MM3") had caused an

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[83] *Id.* at 355, 129 A.2d at 114.

[84] DiLeo v. Nugent, 88 Md. App. 59, 592 A.2d 1126 (1991), *appeal dismissed*, 327 Md. 627, 612 A.2d 257 (1992).

[85] The therapist did not testify, and the court gave a "missing witness" instruction. The court wrote:

> When a party in a civil case refuses to take the stand to testify as to facts peculiarly within his knowledge, the trial court or jury may infer that the testimony not produced would have been unfavorable. The unfavorable inference applies, however, only where it would be natural under the circumstances for a party to speak, call witnesses or present evidence.

DiLeo, 88 Md. App. at 69, 592 A.2d at 1131. Because the events that occurred were within the therapist's "peculiar knowledge," the instruction was proper. Similarly:

> In a civil case it is well settled that failure of a party to produce an available witness who could testify on a material issue, if not explained, gives rise to an inference that the testimony would be unfavorable, and is a legitimate subject of comment by counsel in argument to the jury.

Hoverter v. Dir. of Patuxent Inst., 231 Md. 608, 609, 188 A.2d 696, 697 (1963) (commenting on failure to call a psychiatrist to testify in civil commitment hearing).

[86] *DiLeo*, 88 Md. App. at 70 n.5, 592 A.2d at 1131 n.5.

[87] As noted in *Patterson v. State*, "Nonproduction of evidence does not automatically equate to destruction of evidence." Patterson v. State, 356 Md. 677, 696, 741 A.2d 1119, 1129 (1999) (differentiating *Larsen* and *DiLeo* as "cases in which one party destroyed potential evidence").

intermittent red traffic light.[88] The plaintiff filed a count for fraudulent destruction of evidence, alleging that the MM3 was removed after the occurrence and the county had been in possession of, and altered, the MM3 before an expert could examine it. The court wrote:

> 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 . . . . [89]

The remedy would have been "appropriate jury instructions as to permissible inferences," and the court held that it was not error to sustain a demurrer to the separate count alleging spoliation.

Subsequently, in *Anderson v. Litzenberg*, Litzenberg obtained a verdict for damages arising out of a traffic accident. [90] While he was driving behind defendant's truck, a tarpaulin came loose from the truck and struck an oncoming vehicle. The oncoming vehicle lost control and crashed into Litzenberg. At the scene, a state trooper noted a frayed or broken cable that had been connected to the tarp. Thereafter, potential evidence was discarded:

> The tarp and cables remained on the truck until an adjuster for [defendant and employer of defendant truck driver] Bramble's insurer inspected the tarp system. After the inspection, Bramble maintenance personnel removed the tarp system and discarded its remnants except for a segment of cable that [Bramble's director of truck operations] Mr. Dimaggio had cut off. According to Mr. Dimaggio's trial testimony, he retained that particular segment of cable because he believed that it was the component of the tarp system that had failed. At trial, he ultimately conceded under cross-examination that he might have anticipated the possibility of a claim arising out

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[88] Miller v. Montgomery Cnty., 64 Md. App. 202, 494 A.2d 761 (1985), *cert denied*, 304 Md. 299 (1985). Prior to *Miller*, in *Burkowske v. Church Hosp. Corp.*, the court held that an adverse inference due to a hospital destroying a bench that had collapsed, resulting in personal injury would have been "unavailing" because "[a]t best, the unfavorable inference here would be that the bench was defective; no inference would necessarily arise that the hospital knew of the defect." Burkowske v. Church Hosp. Corp., 50 Md. App. 515, 524, 439 A.2d 40, 45 (1982), *cert. denied*, 293 Md. 331, 439 A.2d 40 (1982).

[89] *Miller*, 64 Md. App. at 214, 494 A.2d at 768.

[90] Anderson v. Litzenberg, 115 Md. App. 549, 694 A.2d 150 (1997).

> of the injuries caused by the tarp system's malfunction. At the time that Bramble discarded the remnants of the tarp system, however, no claims stemming from the 22 April accident were pending.[91]
> The relevant defendants (now appellants) challenged the jury instruction that "destruction of evidence by a person gives rise to an inference or presumption unfavorable to spoiler, and, secondly, if the intent was to conceal the nature of the defect the destruction must be inferred to indicate a weakness in the case."

The *Anderson* court relied on *Miller* for the proposition that a jury instruction was the proper remedy:

> *Miller* makes clear that two levels of inferences could have been drawn from Bramble's discarding most of the tarp system. If the jury concluded that Bramble's decision to throw away the tarp was merely the product of innocent mistake, the jury could still presume that, at the time of the accident, the tarp was in a defective, or otherwise unfavorable, condition. If, on the other hand, the jury was convinced that Bramble had a fraudulent intent to conceal the nature of the tarp's defective condition, the jury could also infer Bramble's consciousness of the fact that its case was weak. Thus, under *Miller*, an adverse presumption may arise against the spoliator even if there is no evidence of fraudulent intent. As such, the judge's revised instruction fully comported with our pronouncement of Maryland law concerning spoilation [sic] of evidence in *Miller* and was, therefore, an accurate statement of Maryland law on this issue.[92]

Thus, the *Anderson* court made clear that a showing of bad faith is not a prerequisite to an adverse inference against the spoliator: "Simply put, one does not ordinarily withhold evidence that is beneficial to one's case. Indeed, the converse is equally true: one maintains evidence that one believes will be beneficial to one's case."[93]

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[91] *Id*. at 558-59, 694 A.2d at 154-55. The court did not discuss whether litigation was reasonably anticipated.
[92] *Id.* at 561-62, 694 A.2d at 156.
[93] *Id*. at 562, 694 A.2d at 156; *cf.* Patterson v. State, 356 Md. 677, 696, 741 A.2d 1119, 1129 (1999) ("*Larsen* and *DiLeo* point to intent or motive behind the destruction as essential to the drawing of the inference. Therefore, those cases do not aid petitioner because, not only is there no evidence that the police destroyed the

In *Klupt v. Krongard*, dismissal of a counterclaim was affirmed due to the willful destruction of discoverable electronic evidence.[94] The spoliator was served with a discovery request for electronic records.[95] He had secretly tape-recorded a number of telephone conversations related to the invention at issue in the lawsuit, asserting that he was under the mistaken impression that only one party needed to consent to recording.[96] He then typed memoranda of the recordings and "destroyed the recordings after they had been sought in discovery."[97] After a number of disputes, "Klupt was forced to admit [in deposition] that he had tape-recorded his conversations with the appellees."[98] He eventually conceded that he destroyed them after the case had been pending for six months and after requests for production had been served.

The motion for sanctions asserted a course of deceptive conduct: "Klupt made surreptitious recordings of telephone conversations from which he made memoranda; he intentionally destroyed the tape recordings; he created dummy versions from the original memoranda; he withheld both the original and dummy memoranda; he falsely affirmed in his deposition that he had produced all documents."[99]

The court commenced its analysis by explaining the broad range of sanctions and discretion permitted under Maryland Rule 2-433.[100] It then wrote:

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jacket, petitioner has not established what the police motive or intent behind destroying the jacket would be.").

[94] Klupt v. Krongard, 126 Md. App. 179, 198, 728 A.2d 727, 736 (1999); City Homes, Inc. v. Hazelwood, 210 Md. App. 615, 700, 63 A.3d 713, 763, *cert. denied*, 432 Md. 468, 69 A.3d 476 (2013) (internal citations omitted).

[95] *Klupt*, 126 Md. App. at 185, 728 A.2d at 730.

[96] *Id.* at 185-86, 728 A.2d at 730.

[97] *Id.* at 188, 728 A.2d at 731.

[98] *Id.* at 189, 728 A.2d at 732.

[99] *Id*. at 190, 728 A.2d at 732.

[100] *Klupt*, 126 Md. App. at 194, 728 A.2d at 734. In addition to the sanctions discussed elsewhere in this article, the danger of spoliation may be a basis for requesting appointment of a receiver. Spivery-Jones v. Receivership Estate of Trans Healthcare, Inc., 438 Md. 330, 337, 342, 91 A.3d 1172, 1176, 1179 (2014); *cf.* Boland v. Boland, 423 Md. 296, 364, 31 A.3d 529, 570 (2011) (discussing failure to demonstrate fraud, spoliation, or imminent danger sufficient to appoint a receiver); First Union Sav. & Loan, Inc. v. Bottom, 232 Md. 292, 297, 193 A.2d 49, 52 (1963); Brown v. Brown, 204 Md. 197, 211, 103 A.2d 856, 863 (1954) (power is to be exercised with great caution). *See generally* Hagerstown Furniture Co. of Washington Cnty. v. Baker, 155 Md. 549, 549, 142 A. 885, 886 (1928); Williams v. Messick, 177 Md. 605, 608, 11 A.2d 472, 473 (1940) (on addressing waste by a controlling shareholder). For an opinion in the context of the statute of limitations, see *Haas v. Lockheed Martin Corp.*, 396 Md. 469, 499-500, 914 A.2d 735, 753 (2007) ("In the majority of instances, the time elapsed between the rendition of notice and effectuation of a termination is not so long as to foster relevant evidence

> The [Maryland] Rules do not deal explicitly with the destruction of discoverable evidence. But they do clearly allow for the dismissal of a party's claims for failure to respond to a request for production and for failure to obey an order compelling such a response or the actual production itself. Destruction of evidence such as was found in this case would render hollow any response to a request for production, even if timely filed, just as it would render an order to compel moot. If dismissal is permissible in those cases, it would seem to be a fortiori permissible in a case of destruction of discoverable evidence.[101]

The court looked to federal authority and concluded that the Maryland Rules also permitted sanctions for such destruction.[102]

The *Klupt* court found authority in two sources. First, the court concluded "that such an expansive reading of the discovery rules gives trial courts the discretion to impose Rule sanctions for the destruction of evidence, a discovery abuse not directly covered by the Rules."[103] It then wrote:

> Given the importance and novelty in Maryland of the issue of sanctions for destruction of discoverable evidence, we will not, however, rest our decision solely on this basis. Rather, we will also consider the inherent authority of the court to regulate the discovery process. When, as here, there is little Maryland precedent, we look to cases interpreting analogous federal rules.[104]

The court held that sanctions were supportable under the court's inherent power.

The *Klupt* court rejected the argument that the only sanction available for spoliation was an adverse inference. It held that the broad discretion conferred by the discovery rules permitted dismissal as a sanction. It also noted that:

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falling victim to fading memories, missing documentation, or other spoliation concerns.").

[101] *Klupt*, 126 Md. App. at 194, 728 A.2d at 734.

[102] *Id.* at 196-97, 728 A.2d at 735. For an alternative view of sanctions, *see* Charles S. Fax, "A Modest Proposal: Discard Spoliation Sanctions," Litigation News, Spring 2012, Vol. 37, No. 3 (proposing that "the court should dispense with sanctions and permit attorneys to offer evidence of spoliation at trial"). This is apparently what happened in *Jarrett v. State*, *infra* note 112.

[103] *Id*. at 195-96, 728 A.2d at 735.

[104] *Id*. at 196, 728 A.2d at 735; *accord* Weaver v. ZeniMax Media, Inc., 175 Md. App. 16, 923 A.2d 1032, *cert. denied*, 401 Md. 174, 931 A.2d 1097 (2007) (civil vigilante).

> [T]he destruction or spoliation of evidence doctrine is itself flexible and versatile. . . . Consequently, we see absolutely no contradiction in recognizing that destruction of evidence may lead to sanctions like dismissal when addressed during discovery, while the same offense may raise only an evidentiary presumption when dealt with during trial.[105]

The *Klupt* court stated that the discovery rules do not require a showing of prejudice to support a default judgment for failure to follow those rules.[106] Instead, the court required "some commensuration between the abusive [discovery] conduct and the sanction . . . ."[107] Because Klupt had acted willfully and contumaciously in destroying discoverable evidence with a hammer, that commensuration was present.

The interplay between discovery sanctions and inherent power was recently addressed in *City Homes v. Hazelwood.*[108] Noting that a court may impose sanctions under the Maryland Rules or through its inherent power, the *Hazelwood* court held that a litigant "did not appear to engage in spoliation"; however, the litigant failed to disclose "critically relevant and requested documents" to his opponent, despite having provided them to his experts.[109] That misconduct "interfered with the goal of the Circuit Court for Baltimore City, to provide meaningful access to the justice system by the timely, efficient and fair processing of all cases," and it was deemed unprofessional conduct to withhold critical documents.[110] Because the sanctioned attorney "fail[ed] to produce critical documents responsive to discovery requests," and to disclose the finding of the party's experts, the court reversed the imposition of sanctions under the circuit court's inherent power, and remanded for consideration of whether sanctions should be imposed under Maryland Rule 2-433.[111]

In *Hollingsworth & Vose Co. v. Connor,* the court addressed an unusual spoliation claim.[112] The survivors of a smoker, who was exposed to asbestos,

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[105] *Klupt*. 126 Md. App. at 198, 728 A.2d at 736. The court also rejected the contention that dismissal violated the constitutional right to trial by jury. *Id*. At 199, 728 A.2d at 736-37.

[106] *Id*. at 201, 728 A.2d at 738.

[107] *Id*.

[108] 210 Md. App. 615, 669, 63 A.3d 713, 745 (2013), *cert. denied,* 432 Md. 468, 69 A.3d 476 (2013).

[109] *Id*.

[110] *Id*. at 670, 63 A.3d at 745 (internal citations and quotations omitted).

[111] *Id*. at 670, 63 A.3d at 746. As to the proper form of a notice appealing the imposition of sanctions on an attorney, see *City Homes,* 210 Md. at 696-99, 63 A.3d at 761-63 (2013) (citing *Newman v. Reilly*, 314 Md. 364, 382-83, 386, 550 A.2d 959 (1988)), *cert. denied,* 432 Md. 468, 69 A.3d 476 (2013)).

[112] Hollingsworth & Vose Co. v. Connor, 136 Md. App. 91, 764 A.2d 318 (2000). *Hollingsworth* involved disposal of the decedent's body. *Id.* While "unusual," it is

buried the decedent.[113] One issue was whether the asbestos exposure was due to cigarette filters or, alternatively, occupational asbestos exposure. The defendants asserted spoliation based on the failure to remove and test lung tissue prior to burial. They requested that the body be exhumed, arguing "that availability of the lung tissue would have presented [them] with an opportunity to analyze the fiber burden of the tissue in order to determine the cause of the mesothelioma."[114] In short, they "accuse[d plaintiff] of deliberate spoliation of the evidence resulting from the burial of [the deceased] plaintiff's body without the removal and testing of [the deceased] plaintiff's lung tissue."[115]

In rejecting the argument, the court concluded that the defendants "astoundingly compare the burial of a loved one to the destruction of documents."[116] It wrote that plaintiff's family respected the rights of the deceased and "understandingly shrunk back from [defendants'] requests to exhume and disfigure the deceased plaintiff's body." It noted that "many dollars" were involved in the case.[117] "[N]onetheless, we do not place cash before conscience."[118] Despite the obvious "evidentiary value" of the body, the "deceased's family properly disposed of the body as would be expected in the circumstances." Notably, the court emphasized that the defendants had waited until after burial and requested exhumation. The court hinted that a similar request to obtain lung tissue prior to the funeral might have been granted.[119]

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not unique. In Jarrett v. State, 220 Md. App. 571, 104 A.3d 972 (2014), a criminal defendant unsuccessfully requested a missing evidence instruction because the State had permitted release and cremation of the skeletal remains of a murder victim, prior to an independent medical examination of them. The court held that it was not error to refuse to give the requested instruction. Defense counsel had argued that the State destroyed important evidence, and the court noted that an adverse inference may be drawn by the jury even in the absence of an instruction. *Jarrett*, 220 Md. App. at 580, 593, 104 A.3d at 977, 985 ("Indeed, despite the trial court's decision not to give a missing evidence instruction, the jury was still free to infer that the destroyed evidence would have been detrimental to the State's case."). The defendant was convicted of murdering his wife and, in a taped conversation with his son, the defendant agreed to help pay for the cremation that he now complained was prejudicial. *Jarrett*, 220 Md. App. at 579-80, 104 A.3d at 977. The court wrote that "the State had no affirmative duty to preserve the remains after the autopsy was completed." *Id*. at 595, 104 A.3d at 986. The *Jarrett* court, like the *Hollingsworth* court, stressed that human remains and "the emotional feelings of the living" relatives were involved. *Jarrett*, 220 Md. App. 595, 104 A.3d at 986, n.5; *cf. Hollingsworth*, 136 Md. App. at 137, 764 A.2d at 343.

[113] *Hollingsworth*, 136 Md. App. at 137, 764 A.2d at 343.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.* at 138, 764 A.2d at 343.

[119] The court wrote:

Cecil County Department of Social Services v. Russell, involved allegations of sexual abuse of a minor for purposes of determining whether the alleged abuser should be entered on the child abuse registry.[120] During the abuse investigation, an interview with the adult had been recorded.[121] It was in the possession of law enforcement, but not produced at the hearing.[122] Instead, the Department of Social Services ("DSS") offered a sheriff's report, based in part on the recorded interview of the adult, without producing the tape itself.[123] The circuit court remanded in order to have the audiotape made part of the record. Affirming the remand, the court wrote in a footnote:

> We have been advised that the disputed audio tape has been destroyed. We do not know whether the destruction was intentional to avoid disclosure in this case, or whether it was done in the ordinary course of business. The better practice would be to preserve all potential evidence until all proceedings have been concluded.[124]

The court wrote that, if the audio recording was not produced on remand, there would be a presumption that it was unfavorable to DSS.[125] Because the

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> Appellants were certainly aware of the lethal nature of mesothelioma, and could have taken the procedural steps necessary, earlier in this action, in order to obtain or preserve the evidence they desired without having to ask for exhumation of the body. They elected not to go through discovery procedures to request a biopsy or for the preservation of the lung tissue. We find it unconscionable that they now denounce appellee's next of kin and counsel for 'deliberate spoliation of evidence,' simply because they arranged for their loved one's burial.

Hollingsworth, 136 Md. App. at 138, 764 A.2d at 343.

[120] Cecil Co. Dept. of Soc. Services v. Russell, 159 Md. App. 594, 861 A.2d 92 (2004).

[121] *Id.* at 599, 861 A.2d at 95.

[122] *Id.* at 600, 861 A.2d at 96.

[123] *Id.*

[124] *Id.* at 617, 861 A.2d at 106.

[125] The court explained:

> As we read *Miller* and *Anderson*, we conclude that, upon remand, the administrative law judge must make a factual determination regarding the circumstances of destruction of the audio tape. An intentional or willful destruction of the evidence could support a presumption unfavorable to the DSS; however, the mere inability to produce the audio tape would support an adverse inference rather than a presumption.

lawsuit turned on "little more than which of two persons is to be believed," the failure to produce the tape was prejudicial.[126] Interestingly, the court analogized to a criminal case: "Had Russell been charged with crimes as a result of the investigation, the State's Attorney would have been under a duty to disclose the audio tape."[127]

In *Spengler v. Sears Roebuck & Co.*, a trial court's decision not to instruct on spoliation was affirmed.[128] The holding was based on the requestor's failure to provide a factual predicate, and failure to show spoliation and prejudice. Only some of the documents that had been requested in discovery were produced; however, the jury had returned a verdict for the requestor.[129] On those facts, there was no prejudice shown and the decision not to instruct was affirmed.

In *Keyes v. Hereman*, a medical malpractice plaintiff sought a jury instruction on spoliation.[130] The defendant hospital's rules and regulations mandated preparation of a detailed operative report "as soon as possible."[131] There was, however, no such report in the plaintiff's records, nor was there any indication of one having been dictated. Plaintiff claimed that the lack of a report hindered her experts.[132] The circuit court declined to give an adverse inference instruction; however, it permitted plaintiff's counsel to argue spoliation to the jury.[133]

Id. at 618-19, 861 A.2d at 106-07.

[126] The court reasoned:

> [T]he audio tape provides the most accurate, contemporaneous record of Russell's statements to the investigators. If the investigators did not rely on the tape to make their reports, it would have been the best source for the preparation of accurate written reports. Likewise, fairness requires that Russell should have the opportunity to use the recording to test the statements and conclusions made by the investigators in their reports, and to test their credibility and recall, if necessary. During the administrative hearing, Russell's counsel demonstrated instances where discrepancies between his testimony and the investigators' statements concerning the interview might easily have been resolved."

Cecil Cnty. Dep't of Soc. Servs., 159 Md. App. at 613, 861 A.2d at 103.

[127] *Id.* at 613, 861 A.2d at 104.

[128] Spengler v. Sears Roebuck & Co., 163 Md. App. 220, 878 A.2d 628 (2005).

[129] *Id.* at 249, 878 A.2d at 645.

[130] Keyes v. Hereman, 191 Md. App. 533, 992 A.2d 519 (2010).

[131] *Id*. at 536, 992 A.2d at 521.

[132] *Id.*

[133] *Id.*; *see also supra* note 102.

In *Goin v. Shoppers Food Warehouse Corp.*, the court held that the spoliation doctrine was inapplicable where a store employee discarded a perishable item that was on the floor at the time that a customer slipped and fell.[134] The plaintiff alleged that the defendant had a legal duty to preserve the relevant evidence and that "they cleaned the floor where [plaintiff] fell, while she was still lying on the floor."[135] When the defendant moved for summary judgment, the plaintiff argued that the motion should be denied because of an adverse inference arising from spoliation. The circuit court granted summary judgment and the decision was affirmed.[136]

In affirming the trial court's decision, the appellate court wrote that "[t]here may indeed be a 'business premises slip and fall case' in which the doctrine of spoliation will prevent summary judgment in favor of the business," however, *Goin* was not that case. The court reasoned that there was "no evidence" that the employee was instructed to "get rid of" such material or acted under a policy to retain favorable, and discard unfavorable, evidence.[137] It left "to another day" whether there would be a different result if there was proof that a defendant's employee was instructed to keep favorable, and discard unfavorable, evidence.[138] The court wrote that, "[o]bviously, the preservation of items which might be relevant evidence in litigation is desirable."[139]

To similar effect, in another slip and fall case, *Maans v. Giant of Maryland, LLC*, a customer sued a grocery store.[140] The customer slipped and fell on liquid on the floor. While on the floor, she heard the assistant store manager tell someone who was holding a roll of paper towels "to get up all the water off the floor."[141] As in any slip and fall case, plaintiff had to prove notice of the unsafe condition. The store did not keep records of when the area was inspected, and plaintiff contended that the store's failure to maintain records made it impossible to prove a negligence case.[142] The court rejected that argument: "Under Maryland law, the owner/operator of a store has no duty to an invitee to keep records in order to lighten the invitee's burden of proving negligence."[143]

In accord with the court of appeals, in *Dobkin* the court of special appeals has, in dicta, cited out-of-state authority for the proposition that "spoliation by

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[134] Goin v. Shoppers Food Warehouse Corp., 166 Md. App. 611, 890 A.2d 894 (2006).
[135] *Id.* at 615, 890 A.2d at 896.
[136] *Id.* at 616, 890 A.2d at 897.
[137] *Id.*
[138] *Id*. at n.2.
[139] *Id.* at 618, 890 A.2d at 898
[140] Maans v. Giant of Maryland, LLC, 161 Md. App. 620, 871 A.2d 627 (2005), *cert denied*, 388 Md. 98, 879 A.2d 39 (2005).
[141] *Id.* at 624, 871 A.2d at 629.
[142] *Id.* at 625, 871 A.2d at 630.
[143] *Id.* at 635, 871 A.2d at 636. It does not appear that plaintiff argued that the post-injury clean-up of the water was spoliation.

itself did not create a triable issue."[144] Similarly, in *Meyer v. McDonnell,* the intermediate appellate court emphasized that, under *Maszczenski* and *Romeo,* the inference did not substitute for proof of a fact necessary to the party's case.[145]

In *Shpak v. Schertle*, however, a witness was permitted to testify that she had been threatened if she testified.[146] The court held that the testimony was admissible, writing that "testimony of spoliation is, in and of itself, substantive evidence in support of the other party's claim."[147] It also approved a jury instruction on spoliation: "If you find that a party tried to intimidate or to influence witnesses, you may consider the conduct as an indication of consciousness by that party that his or her case is weak or unfounded."[148]

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[144] Dobkin v. Univ. of Balt. School of Law, 210 Md. App. 580, 608, 63 A.3d 692, 708-09 (2013) (citing Reeves v. Transp., Inc., 111 Cal. Rept. 3d 896, 909 (2010)).
[145] Meyer v. McDonnell, 40 Md. App. 524, 529-31, 392 A.2d 1129, 1132-33 (1978).
[146] Shpak v. Schertle, 97 Md. App. 207, 629 A.2d 763 (1993), *cert. denied,* 333 Md. 201, 634 A.2d 62 (1993).
[147] *Id.* at 224, 629 A.2d at 772.
[148] The court wrote: "We conclude that the court properly instructed the jury on spoliation. The instruction, under *Meyer,* was an accurate statement of the applicable law and was generated by the evidence." *Id.* at 227-28, 629 A.2d at 774 (internal citations omitted). In another tampering case, the court wrote:

> [T]he conduct of appellee in attempting to intimidate Doctors Nystrom and Pizzi is admissible as tending to show his consciousness of the weakness of his case and a belief that his defense would not prevail without the aid of such improper and unfair tactics as those in which he engaged. This, in conjunction with the other evidence in the case, may lead to the further inference that appellee considers his case to be weak because he, in fact, is guilty of the negligence which appellant asserts he committed. Such inferences are, of course, merely permissible and the jury is free to either accept or reject them as it sees fit. . . . [O]ur holding is that the evidence in question had probative value insofar as it related to the appellee's consciousness of the weakness of his case and it could have been considered by the jury for that purpose. There was evidence that the operation caused the appellant's complaints. There was also evidence that the appellant's complaints were not true and that in any event they were not caused by the operation. We cannot say that the evidence of the doctor's misconduct in attempting to influence witnesses for the opposition would not have turned the scales of justice in the jury's mind if they had been properly instructed on the question. We therefore reverse.

Meyer, 40 Md. App. at 533-34, 392 A.2d at 1134.

VIII. THE SPOLIATION DOCTRINE IN THE CIRCUIT COURTS OF MARYLAND

While there is no comprehensive source of circuit court ESI spoliation opinions, a number of them are available.[149] Circuit courts have held that an adverse inference may, or may not, defeat summary judgment based on the unique facts of the case.

In a recent ESI decision involving text messages and mobile devices, any inference raised by spoliation was insufficient to defeat a motion for summary judgment for misappropriation of trade secrets. In *Maryland Orthotics & Prosthetics Co., Inc. v. Metro Prosthetics, Inc.*,[150] as part of its response to a summary judgment motion, the plaintiff asserted spoliation based on deletion of text messages and attempting to wipe devices by resetting them, arguing "that Defendants Haun and Goller destroyed electronic information that provided evidence of their competitive activities."[151] In response, the defendants offered evidence that the destruction was not intentional and, instead, the data was auto-deleted.[152] The court suggested that the deletion and resets "may have innocent meanings . . . ." The court found that there was a genuine dispute of material fact regarding this allegation; however, because the information at issue was not a trade secret, the court held that even if an adverse inference was drawn, it would not prevent summary judgment on the trade secret claim.[153]

On the other hand, a spoliation issue was one factor that precluded summary judgment in *Estate of Delores Ethel Stray v. Kinali*.[154] State Farm's motion for summary judgment, asserting that a driver was not negligent in a fatal encounter with a pedestrian, presented issues of negligence and contributory negligence. The driver had left the scene and "tried to dispose of parts of the

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[149] Unfortunately, and due to the understandable demand on the resources of the circuit courts, many of the available decisions are conclusory. *See, e.g.*, Wynn v. MJ Harbor Hotel, No. N 24-C-08-001376 OT, 2010 WL 4567746 (Md. Cir. Ct. Balt. City Feb. 1, 2010); Jarvis v. Geico Ins. Co., 295923-V, 2009 WL 6652820 (Md. Cir. Ct. Montgomery Cnty. July 23, 2009); Pulte Home Corp. v. Parex, Inc., 223043-V, 2004 WL 5752514 (Md. Cir. Ct. Montgomery Cnty. Aug. 26, 2004); Stanton v. Legal Sea Foods, Inc., No. 24-C-03-005914, 2004 WL 5248867 (Md. Cir. Ct. Balt. City April 12, 2004); Shockley v. Chesser, 24-C-01-001037, 2002 WL 34227132 (Md. Cir. Ct. Balt. City Oct. 28, 2002).

[150] No. 03-C-12-1648, 2013 WL 8813708 (Md. Cir. Ct. Balt. Cnty., June 6, 2013) (Finifter, J.).

[151] *Id*. at *22.

[152] The court did not discuss whether the duty to preserve had been triggered. Nor did it analyze whether the auto-deletion was protected under the "safe harbor" provision of Maryland Rule 2-433(b). *Id.*

[153] *Id.* at *22.

[154] No. 10-9274, 2011 WL 7986596 (Md. Cir. Ct. Balt. Cnty. Sept. 12, 2011) (Fader, J.).

vehicle that hit the Decedent. . . ."[155] The "possible admission of spoliation evidence," in combination with other facts, defeated summary judgment.[156]

Circuit courts have been clear in requiring that a party seeking spoliation sanctions bears the burden of proving that the information that had to be preserved in fact existed.[157] In *Solesky v. Tracy*, the "pit bull" case that reached the Court of Appeals of Maryland,[158] the circuit court denied a spoliation motion against the landlord: "What the movant attempts to do is to equate the absence of records held by the landlord, and the absence of correspondence, etc. with a failure to preserve which the movant sees as equating to any intent to destroy evidence."[159] The court ruled that "[t]his is not a permissible inference under the circumstances" presented by an ill, eighty-nine year-old landlord.[160] The court wrote:

> [T]here is simply no evidence that the Landlord kept prior leases which were thrown away or pictures or anything else which were discarded in connection with this law case or the incident of the [pit bull] attack. Spoliation evidence has to have a nexus which is not evident from the information presented by the movant in support of the motion.[161]

The Court of Special Appeals of Maryland held that the circuit court did not abuse its discretion.[162] It noted that the landlord's counsel "explained that,

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[155] *Id.*

[156] *Id.*

[157] For a decision discussing the role of presumptions in the context of spoliated ESI, see *infra* note 175.

[158] Tracey v. Solesky, 427 Md. 627, 635-36, 50 A.3d 1075, 1079 (2012), *as amended on reconsideration*, (Aug. 21, 2012).

[159] Solesky v. Tracey, No. 8-3489, 2009 WL 8606518 (Md. Cir. Ct. Balt. Cnty. May 29, 2009) (Fader, J.).

[160] *Id.*

[161] *Id.*

[162] The intermediate appellate court wrote:

> The threshold inquiry is whether there was '[a]n act of destruction' of discoverable evidence on the part of the accused party. By necessity, this inquiry begins after the movant shows that the evidence actually existed in the first place. Here, however, the circuit court noted that there was no evidence that relevant documents or pictures existed. Because the court was not clearly erroneous in finding that the Soleskys' motion did not support a conclusion that unproduced documents having material relevance to this case had ever been in existence, the circuit court did not abuse its discretion in refusing to sanction Tracey for allegedly destroying evidence.

if there ever were any further documents, they had been lost." The landlord had moved into her mother's home and "the movers had lost many of her mother's things during the move, including her leasing files."[163] Additionally, a digital camera broke and was thrown away. While the Court of Appeals of Maryland granted certiorari on the spoliation issue, it did not reach it.[164]

To the same effect, in *Davies v. Salisbury State University*,[165] a university did not make a tape or transcript of a hearing, asserting that its due process rules prohibited it from doing so. Plaintiff asserted that the "failure to make a record of the proceeding should be comparable in effect to spoliation of evidence by the University, i.e. failure to create this evidence should be likened to destruction of such evidence if it had existed."[166] The court noted that plaintiff cited no authority, and rejected the argument.[167]

Digital recording systems were involved in *Ghee v. The Great Atlantic and Pacific Tea Company*.[168] Plaintiff contended that the defendant should be barred from offering evidence on what would have been shown by missing digital recordings, apparently asserting that the lack of the recordings was evidence of spoliation. The defendant asserted that it recycled recorded video after six months.[169] It proved that between the time plaintiff was discharged and the time plaintiff sued, the recording was erased. The court held: "The automatic re-recording on the medium would not appear to rise to the level to bar testimonial evidence of what occurred by those who participated, irrespective of what the recording may have shown. Plaintiffs motion is therefore denied."[170]

In *Corporate Healthcare Financing, Inc. v. Breedlove*, there was an allegation that an employee had improperly emailed company data to the

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Solesky v. Tracey, 198 Md. App. 292, 309, 17 A.3d 718, 728 (2011) (holding that a circuit court judge has great discretion in deciding whether to impose sanctions), *aff'd on other grounds,* 427 Md. 627, 50 A.3d 1075 (2012). *Solesky* was legislatively modified on an issue unrelated to ESI or this article. Md. Cts. & Jud. Proc. Art. §3-1901 Code Ann.

[163] *Solesky*, 198 Md. App. at 301-02, 17 A.3d at 724.

[164] Tracey v. Solesky, 427 Md. 627, 635, 50 A.3d 1075, 1079 (2012).

[165] No. C00-0592, 2002 WL 34148047 (Md. Cir. Ct. Wicomico Cnty. May 31, 2002) (Davis, J.).

[166] *Id.*

[167] *Id.* (holding that some record of the hearing was required).

[168] No. 24-C-09-001313, 2010 WL 2128987 (Md. Cir. Ct. Balt. City Apr. 1, 2010).

[169] *Id.*

[170] *Id.* The opinion in *Ghee* does not provide sufficient information to ascertain when the duty to preserve was triggered. Once triggered, the continuation of a policy of overwriting data might become indefensible. *See* Md. Rule 2-433(b) (protecting only routine, good faith destruction). If litigation was reasonably anticipated by the defendant prior to the commencement of the lawsuit, the holding may be questioned.

employee's personal email account.[171] The court authorized early, albeit limited, discovery because "identifying and segregating the data at issue early will prevent any spoliation or corruption of evidence, even of an unintentional nature, that may occur through simple continual usage of the home computer."[172]

IX. SUGGESTION FOR A THREE-STEP ANALYSIS

A number of Maryland courts have followed the 1997 federal decision in *White v. Office of Public Defender for the State of Md.*, when applying the spoliation doctrine.[173] Under *White* as applied in the Maryland courts, there are four elements for spoliation: (1) an act of destruction; (2) discoverability of the evidence; (3) an intent to destroy the evidence; and, (4) occurrence of the act at a time after suit has been filed, or, if before, at a time when the filing is fairly perceived as imminent.[174]

The cited application of *White* suggests that there must be an intent to destroy evidence. However, the jury instruction quoted in *Cost*—and other Maryland decisions such as *Miller* and *Anderson*—support spoliation sanctions for negligent or unintentional destruction of information, the loss of which is prejudicial.[175]

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[171] Corporate Healthcare Financing, Inc. v. Breedlove, No. 13-C-06-650047, 2006 WL 2400073 (Md. Cir. Ct. Howard Cnty. April 19, 2006) (Sweeney, J.).

[172] *Id.* at *3.

[173] Referring to *White*, the *Klupt* court wrote that the circuit court "wisely followed a recent decision of the U.S. District Court for Maryland, which clearly laid out the consensus rules for sanctioning destruction of evidence." Klupt v. Krongard, 126 Md. App. 179, 199, 728 A.2d 727, 737 (1999) (citing White v Office Pub. Defender, 170 F.R.D. 138, 147-48 (D. Md. 1997)); *accord* Hollingsworth & Vose Co. v. Connor, 136 Md. App. 91, 137, 764 A.2d 318, 343 (2000); Weaver v. ZeniMax Media, Inc., 175 Md. App. 16, 43, 923 A.2d 1032, 1048 (2007); *see* Homes v. Hazlewood, 210 Md. App. 615, 669, 63 A.3d 713, 746 (2013), *cert. denied*, 432 Md. 468 (2013) (citing *White*, 170 F.R.D. 138).

[174] *Klupt*, 126 Md. App. at 199, 728 A.2d at 737. After citing those elements, the *White* court wrote:

> [A] fifth element is in a sense always required, namely prejudice to the opposing party, since sanctions are not as a rule imposed where there has been no prejudice to a party. But since the extent of the prejudice bears more on the issue of the scope of the sanction to be imposed rather than the issue of whether any sanction should be imposed at all, discussion of that element may be deferred until the scope issue is addressed.

White, 170 F.R.D. at 147.

[175] "Prejudice" has been given a narrow definition in this context: "Spoliation of evidence causes prejudice when, as a result of the spoliation, the party claiming spoliation cannot present 'evidence essential to its underlying claim'." Victor

A persuasive body of recent case law suggests that spoliation decisions should be made using what is essentially a three-step analysis. First, was there a duty to preserve potentially responsive information? That question turns on (a) whether the duty was triggered, and, if so, (b) an analysis of its scope, and (c) proportionality limits to the scope. Second, if there was a breach of the duty, was it accompanied by a sufficiently culpable state of mind? Finally, was the loss prejudicial to the innocent party and, if so, what sanction is appropriate?[176]

Two goals of the spoliation doctrine should be to level the playing field and deter misconduct. For example, in *Cost*, the Court of Appeals of Maryland suggested that the overriding goal in assessing a spoliation issue should be to level the playing field when there is a prejudicial failure to preserve potentially responsive information.[177] In *Hoffman*, the court of appeals condemned destruction in violation of a regulatory and ethical duty to preserve that information, *i.e.*, deterrence.[178] Similarly, the wrongdoer in *Klupt* purposely and deceptively destroyed tapes well after a duty to preserve them had arisen—misconduct that needed to be deterred.[179]

The result in *Goin*, the grocery store slip-and-fall case, might be different under this three-step framework.[180] Instead of looking at what instructions were, or were not, given to the employee who destroyed the material that led to the slip-and-fall, a court might ask if the duty to preserve was triggered by the fall, *i.e.*, whether, under an objective standard, litigation was reasonably anticipated at the time that the plaintiff was lying injured on the floor.[181] If the

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Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 532 (D. Md. 2010) (citation omitted). The *Victor Stanley* decision discusses the presumptions applicable to a determination of prejudice that flow from intentional, as opposed to negligent, acts. *Id.*

[176] Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494, 509 (D. Md. 2009); *Victor Stanley*, 269 F.R.D. at 520; First Mariner Bank v. Resolution Law Grp., P.C., CIV. MJG-12-1133, 2014 WL 1652550 (D. Md. Apr. 22, 2014); *cf.* Harrell v. Pathmark, 2015 WL 803076, *4 (E.D. Pa. Feb. 26, 2015) (holding no sanctions in slip-and-fall case occurring in grocery store where the scene was photographed and video footage not preserved), *appeal filed*, __ F.3d __ (3d Circ. 2015). *See generally* L. WHARTON & S. WEIRICK, "DUTY TO PRESERVE: BEST PRACTICES, SPOLIATION, SANCTIONS, AND THE SAFE HARBOR PROVISION," *in* MANAGING E-DISCOVERY, *supra* note 1. MARGARET M. KOESEL & TRACEY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION, ch. 1 (Daniel F. Gourash ed., ABA 3d ed. 2013).

[177] Cost v. State, 417 Md. 360, 10 A.3d 184 (2010).

[178] Hoffman v. Stamper, 385 Md. 1, 867 A.2d 276 (2005).

[179] Klupt v. Krongard, 115 Md. App. 549, 694 A.2d 150 (1997).

[180] *See Goin* v. Shoppers Food Warehouse Corp., 166 Md. App. 611, 890 A.2d 894 (2006).

[181] One court suggested, "Even in a highly litigious community or culture, just because a person falls in a grocery store does not mean that litigation is imminent."

duty was triggered, the next question might have been to define its scope, *i.e.*, was the destroyed material relevant? Then, the court could consider proportionality, *i.e.,* the cost of preserving it. If the duty was breached, the next question would be whether the destruction was with a culpable state of mind and, under Maryland case law, even unintentional destruction may support some sanctions. Finally, a reviewing court would determine whether plaintiff had been prejudiced by the destruction. In short, was there a need to level the playing field?

Similarly, a different analysis might have led to a different result in *Maszczenksi v. Myers.*[182] There, a five-year-old, pupil fell when a swing at a private kindergarten broke. A short time before the event, some links in the chain had been replaced. The defendant testified that the spreader link "had no apparent defect and had nothing wrong with it . . . ."[183] After the fall, however, defendant found, but threw away, the broken link "because he had no reason to keep it."[184] Plaintiff's expert testified regarding spreader links, but "[h]e had, of course, never inspected the link in question here, and, of course, did not know[] whether it did in fact reopen."[185] Plaintiff complained that it lacked the evidence because the defendant had destroyed it. As noted above, the court wrote that there was no evidence that defendant "disposed of the link intentionally for the purpose of concealing the fact that it opened," and "[i]t could hardly be contended" that disposal of the link was sufficient to show that a pre-accident inspection would have revealed a defect.[186]

Under the three-step approach applied to the same facts, the first question would be whether litigation was reasonably anticipated when the swing broke and the child was injured, not whether the defendant had a reason to keep the broken link. Assuming that litigation was reasonably anticipated, the duty to preserve would be triggered, and the second question would be whether that duty was breached by throwing away the broken link. Clearly the link was relevant, and the cost of retaining it would not be disproportionate to the case. Those factors could support a conclusion of breach. If a breach was found, the next inquiry would be whether the breach was accompanied by a culpable state of mind. While the court determined that there was no evidence of disposal with intent to conceal a fact,[187] as noted above, many Maryland cases support spoliation sanctions for unintentional acts. Finally, the question would be whether the plaintiff was prejudiced because she could not produce evidence due to the defendant's destruction of the link. That appears to have

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Harrell v. Pathmark, 2015 WL 803076, *4 (E.D. Pa. Feb. 26, 2015), *appeal filed*, __ F.3d __ (3d Cir. 2015).

[182] 212 Md. 346, 129 A.2d 109 (1957).

[183] *Id*. at 349, 129 A.2d at 110-11.

[184] *Id*. at 350, 129 A.2d at 111.

[185] *Id.* at 351, 129 A.2d at 111.

[186] *Id*. at 355, 129 A.2d at 114.

[187] *Id.*

been the case in light of the expert's inability to examine the spreader link. Thus, application of the three-step analysis may have led to a different result in *Maszczenksi v. Myers*.[188]

X. CONCLUSION AND CAUTIONARY NOTE

There are good reasons to approach sanctions decisions with great caution.[189] They often arise in an unclear context: "Courts, lawyers, and litigants are, at the beginning of the twenty-first century, still . . . 'writing the book' on the use of electronic information in litigation."[190] Nevertheless, a few years ago, the Duke Law Journal reported that sanctions were at an "all-time high."[191] In this evolving context, sanctions may negatively impact civility and have the potential to unfairly destroy careers.

First, sanctions provide a civil law analog to the criminal *Brady*[192] attack. They permit civil litigators to prevail, not on the merits, but by attacking opposing counsel. The potential impact on civility is obvious.[193]

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[188] A different result might also have been reached in *Maryland Jockey Club of Baltimore City, Inc. v. Baltimore Gas & Elec. Co.*, No. 2364, 2002 WL 32123994 (Md. Ct. Spec. App. filed Dec 17, 2002). There, a defective electrical transformer malfunctioned during the Preakness. The owner and its insurer sued BG&E, which had removed and not preserved the parts that had malfunctioned. In pertinent part, the court construed the pleading to assert a separate tort of spoliation and correctly rejected that assertion.

[189] In the context of Maryland Rule 1-341, sanctions are an "extraordinary remedy" that are reserved "for the rare and exceptional case." Art Form Interiors, Inc. v. Columbia Homes, Inc., 92 Md. App. 587, 594-95, 609 A.2d 370, 374 (1992). "[J]udicial hindsight" is not permitted. Legal Aid Bureau, Inc. v. Bishop's Garth Associates Ltd. P'ship, 75 Md. App. 214, 222, 540 A.2d 1175, 1179 (1988) (referring to "judicially guided missiles"); *see also* Andrew J. Felser, *Guiding the Guided Missile*, The Baltimore Barrister, Fall 1988, at 19 ("One court has called these sanctions judicially guided missiles pointed at those who proceed in the courts without any colorable right to do so.").

[190] MANAGING E-DISCOVERY, *supra* note 1, at 748.

[191] Dan H. Willoughby et al., *Sanctions for E-Discovery Violations: By The Numbers*, 60 DUKE L.J. 789, 790 (2010) ("E-discovery sanctions are at an all time high."). The Willoughby article states that "there has been a significant increase in both motions and awards since 2004." *Id.* at 790-91. While "[m]arquee e-discovery disaster cases . . . are towering reminders of the most severe sanctions . . . [o]f greater concern to the average practitioner is the increasing frequency of sanction decisions." *Id.* at 792-93.

[192] Brady v. Maryland, 373 U.S. 83 (1963).

[193] In an earlier blog, the author explained:

> Sanctions motions in civil cases have developed a civil procedure analog to a *Brady* [*v. Maryland*, 373 U.S. 83 (1963)] attack on alleged prosecutorial misconduct. In short, under the sanctions rules, civil litigators could obtain a tactical advantage by alleging

Second, there is a substantial risk of error, and the impact can be irreparable. *Qualcomm Inc. v. Broadcom Corp.*, is illustrative.[194] In 2008, a United States Magistrate Judge "properly incensed" at counsel's conduct, imposed $8.5 million in sanctions and referred six attorneys to California Bar Counsel for possible disciplinary action.[195] That decision received wide publicity. On review, however, the District Judge ruled that the Magistrate Judge had erroneously analyzed privilege issues, prejudicing the lawyers, and vacated the sanctions decision.

A fifteen-month period of discovery followed.[196] Seven engineers, four attorneys and two paralegals were deposed. Following a three-day hearing, the court determined that the attorneys, although they acted in bad faith, should not be sanctioned. While the court remained critical of the previously-sanctioned attorneys, the court also described "an incredible lack of candor" by their former client in its discussions with them.[197]

By the time the sanctions were lifted, however, the attorneys' careers and personal lives had been devastated.[198] Several left their law firm "and never landed a job with a new firm."[199] Qualcomm's general counsel reportedly resigned shortly after the initial decision.[200] While no one is asserting that the attorneys were error-free, the collateral impact of an erroneous imposition of sanctions appears disproportionate to the flaws identified under the circumstances presented.[201]

> deficiencies in the performance of opposing counsel. The opposing attorney, countering such allegations, was often tempted to respond in kind. Civility suffered.

Michael D. Berman, *What Does 'The Making of a Surgeon' Have to Do With ESI and 'Software Glitches'*, (July 15, 2011), http://www.esi-mediation.com/what-does-%e2%80%9cthe-making-of-a-surgeon%e2%80%9d-have-to-do-with-esi-and-software-glitches/ (quotations omitted); *see also* Susan Souder & Karen M. Crabtree, *Sanctions in Litigation*, 23 MD. BAR J. 29 (1990) (noting that sanctions requests are examples of the erosion of courtesy and respect among attorneys); Albert D. Brault, *Maryland's Controversial Law of Sanctions*, 26 MD. BAR J. 19 (1993) (stating that the rule "has turned out to be an additional weapon in litigation").

[194] 2008 WL 66932 (S.D. Cal. Jan.7, 2008), *vacated and remanded in part*, 2008 WL 638108 (S.D. Cal. Aug. 18, 2008), *reconsideration denied*, 2008 WL 2705161 (S.D. Cal. Jul. 7, 2008), *appeal dismissed*, 327 Fed. Appx. 877, 2008 WL 1336937 (Fed. Cir. Aug. 18, 2008), *on remand*, 2010 WL 1336937 (S.D. Cal. Apr. 2, 2010).

[195] MANAGING E-DISCOVERY, *supra* note 1, at 707.

[196] *Id*. at 718.

[197] *Id*. at 719.

[198] *Id*. at 720 n.82.

[199] *Id*. (quoting Z. Elinson, *Lawyers in Discovery Scandal Say Qualcomm Lied*, Recorder (Nov. 3, 2009)).

[200] MANAGING E-DISCOVERY, *supra* note 1, at 720 n.82.

[201] For an older discussion of cases in which sanctions orders were reversed in Maryland, see Brault, *supra* note 193, at 24-26.

It is suggested that the formula described in cases such as *Victor Stanley* and *Praxair*[202] is a more modern and satisfactory description of when a breach of the duty to preserve supports spoliation sanctions.

[202] *See* Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494, 509 (D. Md. 2009); Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 520 (D. Md. 2010); First Mariner Bank v. Resolution Law Grp., P.C., CIV. MJG-12-1133, 2014 WL 1652550 (D. Md. Apr. 22, 2014). *See generally* WHARTON & WEIRICK, *supra* note 176.