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Spoliation of Evidence: Will the New Millennium See a Further Expansion of Sanctions for the Improper Destruction of Evidence?

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SPOLIATION OF EVIDENCE: WILL THE NEW MILLENNIUM SEE A FURTHER EXPANSION OF SANCTIONS FOR THE IMPROPER DESTRUCTION OF EVIDENCE?

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I. INTRODUCTION

Spoliation of evidence is the "failure to preserve property for another's use as evidence in pending or future litigation."[1] Although it can occur in any civil matter, it is especially noteworthy in the products liability context for two reasons. First, the impact of spoliation is enhanced in products liability cases because a claim or defense is often based, and sometimes is solely dependent upon, a single piece of evidence—especially where a manufacturing defect is alleged. Second, because of the unique importance of physical evidence in such cases, spoliation occurs more often in products liability lawsuits than in any other type of civil litigation.[2]

The purpose of this article is to fully familiarize products liability lawyers with this important subject. Part II discusses the duty to preserve evidence and when that duty arises. Part III examines the repercussions of engaging in spoliation, including sanctions, independent civil liability, criminal charges, and professional discipline. Part IV examines the defenses typically raised by defendants. Part V discusses where this changing area of the law may be headed over the next several years. Finally, Part VI discusses what every products liability lawyer should know to protect their clients and themselves from the penalties of engaging in spoliation of evidence.

1. Federated Mut. Ins. Co. v. Litchfield Precision Components Inc., 456 N.W.2d 434, 436 (Minn. 1990) (quoting *County of Solana v. Delancy*, 264 Cal. Rptr. 721, 724 n.4 (Cal. Ct. App. 1989)). *See also* BLACK'S LAW DICTIONARY 1401 (6th ed. 1990) (defining spoliation as "the destruction of evidence. It constitutes an obstruction of justice.").

2. Maria A. Losavio, *Synthesis of Louisiana Law on Spoliation of Evidence—Compared to the Rest of the Country, Did We Handle It Correctly?*, 58 LA. L. REV. 837, 837 (Spring 1998).

II. DUTY TO PRESERVE EVIDENCE

The duty to preserve evidence is an absolute prerequisite for imposing sanctions on a party for spoliation. Whether this duty exists is influenced by several factors, including: (1) when the spoilator received notice that a lawsuit was imminent; (2) the spoilator's relation to the litigation; and (3) whether the spoilator destroyed the evidence in question pursuant to an established records policy.

A. Triggering The Duty: Litigants vs. Non-Litigants

Both litigants and non-litigants have, under certain circumstances, a duty to preserve evidence. Whether or not the party is a litigant or potential litigant greatly impacts the breadth of the duty and when the duty arises.

Courts are far more likely to impose a duty to preserve evidence on persons and entities who are or may become litigants. For example, the duty automatically arises when a party serves or is served with a judicial or administrative complaint.[3] In such a situation, the party has actual knowledge that litigation has begun, and is therefore bound to preserve all discoverable evidence. However, this duty also arises where litigation is reasonably foreseeable, but has not yet officially commenced. There are many situations where there are pre-litigation communications between and among the parties that demonstrate that, at the time of the communications, the parties anticipated a lawsuit.[4] The duty also arises when a party is on notice of a potential action because it has a history of lawsuits concerning a particular product or matter and could reasonably expect to be drawn into litigation concerning the same or similar matters.[5] Thus, the duty to preserve evidence is triggered not only by the commencement of litigation, but also when a party is on notice that litigation is "likely to be commenced."[6] Obviously, whether this standard has been met is a factual question than can only be answered on a case-by-case basis.[7] Generally, courts decline to find a duty in situations where the possibility of litigation is merely re-

3. Jeffrey S. Kinsler & Anne R. Keyes MacIver, *Demystifying Spoliation of Evidence*, 34 TORT & INS. L.J. 761, 764 (Spring 1999).

4. *Id.*

5. *Id.*

6. *Id.* (citing Capellupo v. FMC Corp., 126 F.R.D. 545, 550-51 (D. Minn. 1989)).

7. *Id.* at 763.

mote or speculative.[8]

Different considerations apply when assessing the duty of third-parties. Courts are generally reluctant to impose a duty to preserve evidence on non-litigants because they neither initiated nor necessitated the lawsuit, and imposing such a duty on them would interfere with their right to control and dispose of their personal property.[9] For example, numerous courts have held that neither ordinary tort law nor a state's workers' compensation act imposes a duty on employers to preserve evidence that might be used in an employee's third party claim against a product manufacturer or other defendant.[10] However, there are exceptions to this general rule where a third-party is already bound to preserve evidence for another by statute,[11] contract, agreement, or special relationship. In many cases, courts have held a third-party accountable for spoliation.[12]

At least one state also recognizes a duty to preserve evidence where the third-party receives a specific request to preserve a particular item, or voluntarily undertakes to preserve the evidence and induces reliance on the part of another.[13]

B. Limiting The Duty: Records Retention Policies

Given the expansive, open-ended foreseeability standard imposed on potential litigants (and, in some cases, third parties) for preserving evidence, many entities have adopted document retention policies in an effort to shield themselves from sanctions and/or civil liability for spoliating evidence. However, while a well-drafted and properly administered policy minimizes the possibility that a court will find that discarded documents were destroyed in bad faith, where a document retention policy is drafted for an improper purpose or blindly administered, it is of little use, and may lure its sponsor into a false sense of security.

The leading case in this regard is *Lewy v. Remington Arms Co.*,

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8. *Id.* at 764.

9. Bart S. Wilhoit, *Spoliation of Evidence: The Viability of Four Emerging Torts*, 46 UCLA L. REV. 631, 657 (Dec. 1998).

10. Losavio, *supra* note 2, at 852.

11. For example, many state statutes require the retention of a patient's medical records and x-rays for a specified period of time. Losavio, *supra* note 2, at 850.

12. Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177, 1183 (Kan. 1987).

13. Johnson v. United Services Automobile Ass'n, 79 Cal. Rptr. 2d 234, 239 (Cal. Ct. App. 1998).

Inc.[14] In *Lewy*, the plaintiff brought a product liability action against a gun manufacturer alleging that he sustained injuries when one of the manufacturer's guns fired upon the release of its safety.[15] During the course of discovery, the plaintiff was unable to obtain several documents which were destroyed in accordance with the manufacturer's document retention policy.[16] Under the terms of the document retention policy, all product complaints and gun examination reports were destroyed after three years, absent any action concerning a particular record.[17] Notwithstanding this policy, the trial court instructed the jury that it could infer that the missing evidence was unfavorable to the manufacturer.[18] On appeal, the Eighth Circuit declined to determine the appropriateness of the instruction because of the limited record before it.[19] However, it stated that a manufacturer's document retention policy would be insufficient to shield it from liability if it was drafted for an improper purpose or blindly administered:

> In cases where a document retention policy is instituted in order to limit damaging evidence available to potential plaintiffs, it may be proper to give an instruction similar to the one requested by the Lewys. Similarly, even if the court finds the policy reasonable given the nature of the documents subject to the policy, the court may find that under the particular circumstances certain documents should have been retained notwithstanding the policy. For example, if the corporation knew or should have known that the documents would become material at some point in the future then such documents should have been preserved. Thus, a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy.[20]

Consequently, the Court instructed the trial court on remand to consider the following factors in determining whether the manufacturer spoliated evidence notwithstanding its document retention policy: (1) whether the policy was reasonable under the facts and circumstances; (2) whether lawsuits concerning the com-

14. 836 F.2d 1104, 1104 (8th Cir. 1988).
15. *Id.* at 1105.
16. *Id.* at 1111.
17. *Id.*
18. *Id.*
19. *Id.* at 1112.
20. *Id.* at 112.

plaint or related complaints had been filed; and (3) whether the policy was instituted in bad faith.[21]

Armed with theses guidelines, another court has found such policies are not a defense to claims for spoliation of records.[22] Therefore, although the disposal of documents pursuant to a written policy is less likely to result in sanctions than sporadic purges of the same material,[23] a document retention policy is not necessarily a safe harbor from spoliation liability, and should not be regarded as such.

III. REPERCUSSIONS OF ENGAGING IN SPOLIATION OF EVIDENCE

Over the past few decades, courts across the country have taken an increasingly harsh line against parties that have engaged in spoliation of evidence.[24] If the trend continues, new guidelines for punishing spoliators have emerged, including the emergence of an independent tort of spoliation[25]. Currently, the repercussions of spoliating evidence range from (1) sanctions in a pending civil case to (2) independent legal liability to (3) criminal charges to (4) professional discipline.

A. Sanctions In A Pending Lawsuit

Courts have broad discretion in imposing sanctions for spoliation of evidence. Because spoliation of evidence clearly violates the spirit of discovery, a wide range of sanctions may be imposed under the Rules of Civil Procedure, including dismissal of the lawsuit, entry of a default judgment, exclusion of evidence and testimony, and assessing monetary penalties. Typically, Rule 37 provides the vehicle for imposing such sanctions. However, courts are not limited by Rule 37 and may use their inherent authority to exclude spoliated evidence as well.[26] Regardless of what penalties the court imposes,

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21. *Id.*

22. Willard v. Caterpillar, Inc., 48 Cal. Rptr. 2d 607, 607 (Cal. Ct. App. 1995).

23. Phoebe L. McGlynn, *Spoliation in the Product Liability Context*, 27 U. MEM. L. REV. 663, 689 (Spring 1997).

24. Scott S. Katz & Anne Marie Muscaro, *Spoilage of Evidence - Crimes, Sanctions, Inferences and Torts*, XXIX, TORT & INS. L. J., 50 (Fall 1993).

25. The trend to adopt a "new" tort of spoliation continues. As recently as December of 1999, the Montana Supreme Court adopted as an independent cause of action the torts of intentional and negligent spoliation of evidence. *See Oliver v. Stimson Lumber Co.*, 993 P.2d 11, 11 (Mont. 1999).

26. Lawrence Solum & Steven Marzen, *Truth & Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L. J. 1086, 1096 n.50 (1987) (summarizing cases

its decision will not be reversed unless it abuses its discretion—a standard which is met only when it is clear that no reasonable person would agree with the trial court's assessment of what sanctions are appropriate.[27]

1. Dismissal/Default Judgment

One of the most severe sanctions within the court's power when a party spoliates evidence is dismissal of the entire action or entry of a default judgment.[28] Because this sanction is so extreme, it is reserved for only the most egregious offenses, and may not be imposed if there is a lesser, but equally efficient remedy available.[29] However, courts have not hesitated to impose this penalty against flagrant spoliators.[30]

For example, in *Computer Assoc. Int'l v. Am. Fundware*,[31] the plaintiff filed a complaint against American Fundware alleging copyright infringement and unfair competition. After the complaint was filed, American Fundware destroyed the source code for the computer program in question. The court held that the destruction was intentional and entered judgment against American Fundware.[32] Although less common, the same penalty has been imposed against plaintiffs who spoliate evidence as well. In *Marrocco v. General Motors Corp.*,[33] the Seventh Circuit dismissed the plaintiffs' products liability claim where the plaintiffs' experts secretly conducted "private" tests which resulted in damage to the allegedly defective vehicle, in direct contravention of the court's ear-

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applying the "inherent power" doctrine in the spoliation context). *See also* Patton v. Newmar Corp., 538 N.W.2d 116, 119 (Minn. 1995) (noting that Minnesota courts may exercise their "inherent power" in spoliation cases).

27. *Patton*, 538 N.W.2d at 119 (quoting Marrocco v. Gen. Motors Corp., 966 F.2d 220, 223 (7th Cir. 1992)).

28. Capellupo v. FMC Corp., 126 F.R.D. 545, 552 (D. Minn. 1989).

29. *Id.*; *see also Henry v. Joseph*, No. C2-98-181, 1998 WL 481932, at *4 (Minn. Ct. App. Aug. 18, 1998) ("The power to sanction must be tempered by the duty to impose the least restrictive sanction available under the circumstances") (quoting Bachmeier v. Wallwork Truck Ctrs., 507 N.W.2d 527, 533 (N.D. 1993))

30. *E.g.*, Marrocco v. Gen. Motors Corp., 966 F.2d 220, 220 (7th Cir. 1992) (dismissing one claim in consolidated appeal; entering default judgment against defendant on the other claim); Cabinetware, Inc. v. Sullivan, 22 U.S.P.Q.2d 1686, 1686 (E.D.Cal. 1991) (default judgment); Computer Assoc. Int'l v. Am. Fundware, 133 F.R.D. 166, 170 (D. Colo. 1990) (same); Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 109 (S.D. Cal. 1987) (same).

31. *Computer Assoc. Int'l, supra* note 30.

32. *Id.* at 170.

33. *Marrococo, supra* note 30..

lier protective order. Consequently, parties that intentionally spoliate evidence do so at considerable peril to their case.

2. Exclusion Of Evidence And Related Testimony

Although courts are typically reluctant to dismiss a case or enter a default judgment on the basis of spoliated evidence, they often achieve the same result by excluding spoliated evidence and any testimony related to such evidence at trial. This sanction can be especially devastating in a products liability case where the plaintiff is relying almost exclusively on expert testimony concerning a single piece of evidence to prove his or her case. For example, in *Patton v. Newmar Corp.*,[34] the plaintiffs brought a personal injury action for injuries Mrs. Patton sustained when she fell from a motor home that they alleged was defectively designed by the defendant manufacturer. Due to the plaintiffs' negligence, the motor home was lost between the time of her injury and the time of trial, thereby precluding the defendant from examining the vehicle to determine whether certain "modifications" that the plaintiffs made to the vehicle were actually the cause of her injuries.[35] As a result, the trial court decided to exclude the testimony of the plaintiffs' expert who had reviewed the motor home.[36] Without the testimony, the plaintiffs could not survive the defendant's summary judgment motion and the case was dismissed.[37] Although the Minnesota Court of Appeals reversed the trial court's decision on the grounds that it had a duty to impose a less restrictive sanction than dismissal,[38] the Minnesota Supreme Court reinstated the trial court's grant of summary judgment because "dismissal was not itself a sanction, but only the inevitable consequence of the plaintiffs' failure, without evidence of the physical condition of the product itself, to raise genuine issues of material fact with regard to their claim of design defect liability."[39]

34. 538 N.W.2d 116, 117 (Minn. 1995).
35. *Id.* at 117-18.
36. *Id.* at 118.
37. *Id.*
38. 520 N.W.2d 4, 8 (citing Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 79 (3rd Cir. 1994); Dillon v. Nissan Motor Co., 986 F.2d 263, 267-68 (8th Cir. 1993); Capellupo v. FMC Corp., 126 F.R.D. 545, 550 (D. Minn. 1989); Nevada Power v. Fluor Ill., 837 P.2d 1354, 1359 (Nev. 1992); Stubli v. Big D Int'l Trucks Inc., 810 P.2d 785, 786 (Nev. 1991)).
39. 538 N.W.2d at 118.

3. Adverse Evidentiary Inference

Since the plaintiff bears the burden of proof on most issues, exclusion of evidence is generally not an effective remedy where a *defendant* destroys evidence, unless the evidence is strictly relevant to an affirmative defense upon which the defendant bears the burden of proof. In the more typical situation where a defendant destroys or conceals evidence critical to the plaintiff's case, courts often choose to draw an adverse inference against the spoliator.[40] Under this scenario, the party bearing the burden of proof is allowed to introduce evidence of the allegedly destroyed materials. The opposing party may then rebut this evidence.[41] If the opposing party fails at rebuttal, the judge may instruct the jury to infer that the destroyed evidence would be unfavorable to the spoliator.[42] The justification for this inference is two-fold: first, if the litigant destroys evidence, it is likely that the evidence was detrimental; and second, it deters spoliation by placing the risk of an adverse judgment on the spoliator.[43] Moreover, the spoliation inference protects the victim by remedying the wrong committed by the spoliator.

4. Monetary Sanctions

Finally, courts may also require spoliators to pay monetary sanctions for their destruction or concealment of evidence. These monetary sanctions may reflect (1) the fees and costs for investigating, researching, preparing, and arguing evidentiary motions and motions for sanctions, (2) the fees and costs of depositions, interrogatories, and supplemental discovery costs associated with willful concealment; and (3) the unnecessary consumption of the court's time and resources.[44] In especially egregious cases of misconduct,

40. In fact, the Eighth Circuit has held that it is improper for the trial court not to draw an inference against the spoliator. Alexander v. Nat'l Farmers Org., 687 F.2d 1173, 1199 (8th Cir. 1982), *cert. denied*, 461 U.S. 937, 937 (1983).

41. State v. Langlet, 283 N.W.2d 330, 334 (Iowa 1974).

42. *Id.* (noting that the appellate court found error in the trial court's failure to give a jury instruction "that spoliation of evidence creates an inference that the evidence would not have supported the charge against" the party opposite the spoliator). *See also* Vazquez-Corales v. Sea-Land Serv., 172 F.R.D. 10, 15 (D.P.R. 1997); Howell v. Maytag, 168 F.R.D. 502 (M.D. Pa. 1996); Prudential Ins. Co. v. Lawnsdail, 15 N.W.2d 880, 883 (Iowa 1944).

43. Nation-wide Check Corp. v. Forest Hills Distrib. Inc., 692 F.2d 214, 218 (1st Cir. 1982).

44. Capellupo v. FMC Corp., 126 F.R.D. 545, 552-53 (D. Minn. 1989); *see also*

these monetary sanctions may be even be multiplied in order to adequately punish the spoliator and deter further transgressions.[45] Thus, the monetary penalties levied against spoliators can be substantial. For example, in *In re Prudential Co. of America Sales Litigation*,[46] the court imposed a $1 million sanction against Prudential for failing to adequately preserve evidence pursuant to a court order, even though its conduct was not intentional.[47]

B. Independent Civil Liability

Aside from traditional spoliation remedies, an increasing number of states are beginning to recognize independent claims for spoliation of evidence—either in tort or for breach of contract. In addition, other existing causes of action may also serve as a basis for liability.

1. Spoliation Tort

As yet, no independent claim for spoliation of evidence exists under federal law.[48] However, spoliation has been recognized as a distinct tort in several state jurisdictions based on either negligence or intentional misconduct. Although Minnesota is not among them, the Minnesota Supreme Court has left the door open for adopting either of these causes of action in the future.

a. Intentional Spoliation

California became the first state to recognize an independent cause of action for intentional spoliation of evidence in *Smith v. Superior Court*.[49] In *Smith*, the plaintiff was injured by another vehicle's wheel that flew off the vehicle and crashed through her windshield.[50] The dealer who sold the car retained the wheel, promising

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Nat'l Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 558-59 (N.D.Cal. 1987).

45. *Capellupo*, *supra* note 44 at 553 (multiplying attorney's fees for all motions touching upon the issue of document destruction by a factor of two).

46. 169 F.R.D. 598, 617.

47. Similarly, in a recent case involving another corporate defendant, DuPont was required to pay $1.5 million in fines and lawyers' fees for intentionally withholding evidence. Rolin P. Bissel & James L. Holston, *Spoliation of Evidence: Recent Expansion of an Old Theory*, Washington Legal Foundation, Contemporary Legal Notes Series, No. 29 (Sept. 1998).

48. Kinsler & MacIver, *supra* note 3, at 777.

49. 198 Cal. Rptr. 829, 829 (Cal. Ct. App. 1984).

50. *Id.* at 831.

to allow the plaintiff's experts to examine it.[51] The dealer then lost or destroyed the wheel and the vehicle, and the plaintiff sued the dealer for intentionally destroying the evidence.[52] Adopting the tort of intentional spoliation, the California Court of Appeals explained that "a prospective civil action...is a valuable 'probable expectancy' that the court must protect from the kind of interference alleged herein."[53] The California Supreme Court has since overruled the Court of Appeals' holding and no longer recognizes this tort, but several other states have adopted a cause of action for intentional spoliation of evidence in the wake of *Smith*.[54] Although the elements of this tort vary from state to state, the following elements are often considered:

1) pending or probable civil litigation;
2) knowledge by the spoliator that litigation is pending or probable;
3) willful destruction of evidence;
4) intent to interfere with the victim's prospective civil suit;
5) a causal relationship between the evidence destruction and inability to prove the lawsuit; and
6) damages.[55]

b. Negligent Spoliation

California also became the first jurisdiction to recognize the tort of negligent spoliation in *Velasco v. Commercial Building Maintenance Co.*[56] In *Velasco*, an exploding bottle injured the plaintiffs. The plaintiff's attorney put the bottle fragments in a paper bag on his desk. That night, the building maintenance company disposed of the bag while cleaning the attorney's office. The plaintiff then sued the building maintenance company for negligent spoliation of evidence. Following the reasoning of *Smith*, the California Court of

51. *Id.*
52. *Id.*
53. *Id.* at 837.
54. *E.g.*, Hazen v. Municipality of Anchorage, 718 P.2d 456, 463(Alaska 1986), St. Mary's Hosp., Inc. v. Brinson, 685 So. 2d 33, 35 (Fla. Dist. Ct. App. 1996); Foster v. Lawrence Memorial Hosp., 809 F.Supp. 831, 836 (D.Kan. 1992), DeLaughter v. Lawrence County Hosp., 601 So.2d 818, 823 (Miss. 1992), Oliver v. Stinson Lumber Co., 993 P.2d 11, 11 (Mont. 1999); Viviano v. CBS Inc., 597 A.2d 543, 550 (N.J. Super. Ct. App. Div. 1991); Coleman v. Eddy Potash, Inc., 905 P.2d 185, 185 (N.M. 1995); Smith v. Howard Johnson Co., 615 N.E.2d 1037, 1037 (Ohio 1993).
55. Wilhoit, *supra* note 9, at 644 (noting that courts in Kansas, New Jersey, New Mexico, and Ohio have settled on these elements).
56. 215 Cal. Rptr. 504, 504 (Cal. Ct. App. 1985).

Appeals permitted the claim.[57] Since *Velasco*, a handful of other states have also adopted a cause of action for negligent spoliation of evidence, including Florida,[58] Idaho,[59] Montana,[60] and Illinois.[61] The elements of this cause of action are:

1) the existence of a potential civil action;
2) a legal or contractual duty to preserve evidence relevant to the potential action;
3) destruction of that evidence;
4) significant impairment in the ability to prove the lawsuit;
5) a causal relationship between the destruction and inability to prove the lawsuit;
6) damages.[62]

c. Minnesota Remains Undecided

Although not adopted as a separate tort in Minnesota, negligent and intentional spoliation were discussed in *Federated Mut. Ins. Co. v. Litchfield Precision Components.*[63] In *Federated*, a fire occurred at a facility owned by the defendant (Litchfield) that destroyed property owned by a third party. The third party's insurer, Federated, paid the value of the destroyed property and then retained an investigator to determine the cause of the fire. In the meantime, Litchfield hired an investigator of its own and removed part of the evidence to a warehouse. The evidence was subsequently destroyed. Believing that the spoliation nullified its subrogation claim against Litchfield, Federated ceased pursuing its subrogation claim and asserted new causes of action against Litchfield for both negligent and intentional spoliation of evidence. After reviewing several cases in other jurisdictions that considered similar claims, the Minnesota Supreme Court declined to decide whether or not to recognize either cause of action. According to the court, Federated's claims were premature because resolution of Federated's underlying subrogation claim was necessary to demonstrate actual harm

57. At the present time, this cause of action is suspect but remains viable in California because the California Supreme Court has not expressly rejected it.
58. Bondu v. Gurvich, 473 So. 2d 1307, 1313 (Fla. Dist. Ct. App. 1984).
59. Murray v. Farmer's Ins. Co., 796 P.2d 101, 106 (Idaho 1990)
60. Oliver v. Stinson Lumber Co., 993 P.2d 11 (Mont. 1999).
61. Rodgers v. St. Mary's Hosp. 597 N.E.2d 616 (Ill. 1992).
62. Continental Ins. Co. v. Herman, 576 So. 2d 313, 315 (Fla. Dist. Ct. App. 1990).
63. 456 N.W.2d 434, 434 (Minn. 1990).

and prevent speculative recovery.[64] Thus, it remains uncertain whether spoliation of evidence is cognizable as an independent tort claim in Minnesota.

2. Other Tort Actions

The Supreme Court's opinion in *Federated Mutual* suggests that other, existing causes of action may also provide a basis for liability of spoliation of evidence. According to the court, "an action for negligent spoliation could be stated under existing law without creating a new tort."[65] For example, the court noted that, as an agent of Litchfield and custodian of the evidence, the law firm representing Litchfield's insurer could be joined in a bailment action.[66] On similar grounds, a law firm that loses or mishandles evidence that has a bearing on a claim or defense asserted by its client might be liable for legal malpractice.[67] Consequently, even if a given jurisdiction does not recognize a discrete cause of action for negligent and/or intentional spoliation, parties that mishandle, conceal, or destroy evidence may be independently liable under other theories as well.

3. Breach Of Contract

A Florida court has allowed a plaintiff to proceed with a breach of contract spoliation action. In *Miller v. Allstate Ins. Co.*,[68] the plaintiff brought an action against her insurer for breaching a promise to return her wrecked automobile. The plaintiff planned to use the automobile as evidence in a products liability action against the manufacturer. Allstate had promised to preserve the automobile and make it available to the plaintiff's experts. In breach of that agreement, Allstate sold the car to a salvage yard. As a result, the plaintiff was precluded from bringing her products action. The Florida Court of Appeals remanded the action to the trial court for fact finding on breach of contract, recognizing that a breach of contract spoliation action is as viable as a spoliation action in tort. Although it does not appear that any other states have expressly

64. *Id.* at 439.
65. *Id.* at 436.
66. *Id.* at 437.
67. Scott S. Katz & Donna B. Wood, *Spoliation of Evidence: Let the Insurer Beware* (Feb. 24, 1995) at 24.
68. 573 So. 2d 24, 26 (Fla. Dist. Ct. App. 1990).

expressly recognized such a claim, this is probably due to lack of opportunity more than any doctrinal disinclination to do so.

C. *Criminal Charges*

Acts of spoliation are also punishable by criminal sanctions in several states.[69] For example, Minnesota Statatues section 609.63, subd. 1(7) provides that it is unlawful for anyone, "with intent to injure or defraud,...[to] destroy a writing or object to prevent it from being produced at a trial, hearing, or other proceeding authorized by law."[70] Violation of this provision is a felony. Persons who are found guilty "may be sentenced to imprisonment for not more than three years or to payment of a fine of not more than $5,000 or both."[71]

For the time being, however, the threat of criminal prosecution for spoliation of evidence in the civil arena appears to be more theoretical than real. Prosecutors are reluctant to pursue spoliation charges because their "[p]rosecutorial resources would risk quick depletion if abuses in civil proceedings—even the most flagrant ones—were the subject of criminal prosecutions."[72] Even if they were inclined to investigate such charges, the vast majority of spoliation statutes, unlike Minnesota's, only apply to the destruction of evidence in a *criminal* proceeding.[73] As a result, there have been no reported criminal convictions for the spoliation of evidence in civil litigation.[74] Moreover, in many states, the punishment for destroying evidence is relatively modest, and violators are only guilty of a misdemeanor.[75]

Nevertheless, criminal penalties for spoliation should not be totally disregarded. In a 1990 opinion, the Minnesota Supreme Court reminded litigants of the possibility of criminal penalties for spoliation in the context of a civil suit.[76] Moreover, in *United States v. Lundwall*,[77] a case arising out of the infamous Texaco race dis-

69. For a comprehensive listing of relevant statutes in various states, *see* McGlynn, *supra* note 23, at 668.

70. MINN. STAT. § 609.63, subd. 1(7) advisory committee comment.

71. MINN. STAT. § 609.63, subd. 1(7).

72. United States v. Lundwall, 1 F. Supp.2d 249, 254 (S.D.N.Y. 1998).

73. Losavio, *supra* note 2, at 867.

74. Katz & Wood, *supra* note 68, at 29.

75. McGlynn, *supra* note 23, at 669.

76. Federated Mut. Ins. Co. v. Litchfield Precision Components Inc., 456 N.W.2d 434 (Minn. 1990).

77. *Lundwall*, 1 F. Supp.2d 249 (S.D.N.Y. 1998).

crimination class action lawsuit, the court ruled that individuals who intentionally destroy or conceal documents during civil litigation may be prosecuted under federal law for obstruction of justice.[78] Thus, it is possible, although not likely, that the current trend toward imposing stiffer penalties for spoliation may eventually spill over into the criminal arena.

D. Professional Discipline

A lawyer's intentional destruction of relevant evidence is considered highly unethical by the courts.[79] Thus, attorneys who engage or assist in the spoliation of evidence are subject to professional discipline in addition to other penalties.[80] Under Model Rule 3.4 "A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unilaterally alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act."[81]

Although misconduct charges under this provision are rare, breach of Rule 3.4 can result in serious sanctions, including disbarment.[82] For example, in *In re Zeiger*,[83] the D.C. Court of Appeals suspended an attorney from practicing law for 60 days where he altered physician reports before turning them over to the other side. Moreover, even if misconduct does not result in professional discipline, attorneys who spoliate evidence may also be subject to malpractice liability if their misconduct results in sanctions that financially penalize their client or harm their client's case.[84] Consequently, attorneys who spoliate evidence do so at considerable peril to themselves as well as their clients.

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78. *Id.* Although the government was allowed to pursue its case, the defendants in *Lundwall* were ultimately acquitted.

79. *In re Williams*, 23 N.W.2d 4, 9 (Minn. 1946) ("The wilful participation by an attorney in the destruction or suppression of evidence which he knows may be required upon a trial, hearing, or other legal proceedings constitutes a breach of professional duty and subjects such attorney to discipline.").

80. *Federated Mutual*, 456 N.W.2d at 437.

81. MINN. R. PROF. CONDUCT 3.4.

82. Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511, 518 (Cal. 1998) (holding that "lawyers are subject to discipline, including suspension and disbarment, for participating in the suppression or destruction of evidence").

83. 692 A.2d 1351, 1353 (D.C. 1997).

84. Wilhoit, *supra* note 9, at 651-52.

IV. DEFENSES TO SPOLIATION OF EVIDENCE

A party who has breached its duty to preserve evidence may fall back on a number of possible defenses. For example, the spoliator may argue that it acted in good faith and did not intend to destroy discoverable evidence.[85] In addition, the spoliator may also argue that its conduct caused no harm to the opponent's case because the spoliated evidence was immaterial to the controversy.[86] Finally, the spoliator may rely on a "laches" defense where the non-spoliating party had a reasonable opportunity to independently examine the missing evidence before it was lost or destroyed.

A. *Good Faith*

One common defense that is raised by parties who are accused of spoliation is good faith. Traditionally, courts have been receptive to this argument where the non-spoliating party seeks an adverse evidentiary inference, reasoning that mere negligence does not indicate fraudulent behavior or suppression of the truth.[87] However, there is now a split in authority as to whether this is a valid defense.[88] Some courts continue to hold the traditional view that an adverse inference may only be drawn against the spoliator if the destruction of evidence was intentional.[89] Under this approach, "intentional" does not mean merely that the act of destruction or removal was willful, but rather that the act of destroying or removing the evidence was done for the purpose of rendering it useless to the other party in preparing its case.[90] However, other courts have adopted a different view, holding that reckless or even negligent conduct is sufficient to warrant an adverse evidentiary inference.[91]

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85. McGlynn, *supra* note 23, at 667.

86. *Id.*

87. 29 Am. Jur. *Evidence* § 117 (1966); Katz & Muscaro, *supra* note 24, at 60 n.69 (citing Gumbs v. Int'l Harvester, Inc., 718 F.2d 896, 896 (3rd Cir. 1983) (holding that evidence accidentally destroyed does not give rise to adverse inference); *Vick v. Texas Employer's Comm.*, 514 F.2d 734, 737 (5th Cir. 1975) (destruction must be intentional); INA Aviation Corp. v. United States, 468 F. Supp. 695, 700 (E.D.N.Y. 1978) (unfavorable inference arises against a spoiler of evidence only if the destruction is intentional), *aff'd*, 610 F.2d 806, 806 (2nd Cir. 1979)).

88. Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 74 (S.D.N.Y. 1991).

89. E.g., Nationwide Mut. Fire Ins. Co. v. Ford Motor Co., 174 F.3d 801, 804 (6th Cir. 1999).

90. *Id.*

91. Kinsler & MacIver, *supra* note 3, at 776; *see, e.g.*, *Turner*, 142 F.R.D. at 74-75.

Moreover, even where an adverse evidentiary inference is not an appropriate remedy, other sanctions may still be available to correct the effects of unintentional spoliation.[92]

B. No Harm, No Foul

In contrast to "good faith," most if not all courts recognize an "absence of prejudice" or "absence of causation" defense. In fact, among those courts that do not recognize good faith as a defense, prejudice to the non-spoliating party is often cited as the reason why.[93] However, despite this unanimity of opinion, there is considerable disagreement concerning the appropriate causal test in spoliation cases. Some courts apply a strict test consistent with traditional negligence standards, and require the non-spoliating party to establish that the plaintiff would have won the underlying suit "but for" the spoliation.[94] In this regard, causation is not so much a defense as it is an essential element of the spoliation victim's motion or case. Jurisdictions adopting this view essentially require that the underlying claim be resolved before the spoliation claim is actionable.[95] On the other hand, some courts have adopted a weaker test that simply requires the non-spoliating party to show that "there is a reasonable possibility, based on concrete evidence, that access to the evidence which was destroyed or altered, and which was not otherwise obtainable, would produce evidence favorable to the objecting party."[96] Finally, at least one court has attempted to adopt a middle ground by engaging in a thoughtful analysis synthesizing these two approaches.[97] Under this approach, the plaintiff must demonstrate that (1) the underlying claim was significantly impaired due to the spoliation of evidence; (2) a proximate relationship exists between the projected failure of success in the action

92. Patton v. Newmar Corp., 538 N.W.2d 116, 119 (Minn. 1995) (exclusion of spoliated evidence and related expert testimony is an appropriate remedy even where such evidence is lost or destroyed through inadvertence or negligence rather than intentional misconduct) (citing *Dillon*, 986 F.2d at 267); Himes v. Woodings-Verona Tool Works, 565 N.W.2d 469, 470 (Minn. Ct. App. 1997) (same).

93. *Patton*, 538 N.W.2d at 119.

94. Wilhoit, *supra* note 9, at 646 (citing Baugher v. Gates Rubber Co., 863 S.W.2d 905, 909-10 (Mo. Ct. App. 1993)).

95. *Id. See also* Federated Mut. Ins. Co. v. Litchfield Precision Components Inc., 456 N.W.2d 434, 439 (Minn. 1990).

96. Nationwide Mut. Fire Ins. Co. v. Ford Motor Co., 174 F.3d 801, 804 (6th Cir. 1999).

97. Holmes v. Amerex Rent-A-Car, 710 A.2d 846 (D.C. Ct. App. 1998).

and the unavailability of the destroyed evidence; and (3) that the underlying lawsuit would enjoy a significant possibility of success if the spoliated evidence were still in existence.[98]

In the products liability context, the issue of causation or prejudice is especially relevant because there is generally less of a need for a specific piece of evidence in design defect cases than in manufacturing defect cases.[99] As the court noted in *Collazo-Santiago v. Toyota Motor Corp.*:[100]

> Clearly, if a product was manufactured defectively, its defect is likely to be particular to the individual product. Consequently, a party's examination of that product may be critical to ascertaining, among other things, the presence of the defect. In design defect cases, however, a party's examination of the individual product at issue may be of lesser importance as the design defect alleged can be seen in other samples of the product.[101]

Consequently, so long as the spoliating party is able to provide a copy of the missing piece of evidence, sanctions are less likely in a design defect case because it is harder for the injured party to show prejudice. Nevertheless, examination of the individual product in question may still be of significant import in certain design defect cases where, for example, the question of whether the alleged defect or some other factor caused a particular injury is at issue.[102]

C. *Laches*

Another defense closely related to the "absence of prejudice" defense is laches. Generally, a party may not seek to exclude spoliated evidence and related testimony where it had a reasonable opportunity to independently examine such evidence before it was lost or destroyed. Under these circumstances, sanctions are inappropriate because the loss of evidence would not have prejudiced the non-spoliating party but for its own failure to adequately examine the missing evidence while it was still available. For example, in

98. *Id.* at 852.

99. Patton v. Newmar Corp., 538 N.W.2d 116, 119 (Minn. 1995) (citing Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 80 (3rd Cir. 1994)); Hinze v. Man-Roland, Inc., No. C2-97-1496, 1998 WL 51466, at * 1 (Minn. Ct. App. Feb. 10, 1998) (unpublished opinion).

100. 149 F.3d 23, 23 (1st Cir. 1998).

101. *Id.* at 29; *see also* O'Donnell v. Big Yank, Inc., 696 A.2d 846, 849 (Pa. Super. Ct. 1997).

102. *Collazo-Santiago*, 149 F.3d at 29; *see also Patton*, 538 N.W.2d at 119.

Henry v. Joseph,[103] a Minnesota State Trooper was injured when he was struck by a minivan after stopping two vehicles for speeding. The trooper and the State of Minnesota[104] filed a claim against the defendant, who responded that she had tried to avoid him but that her brakes had failed. In support of her defense, the defendant sought to introduce the report of the State's expert, who examined her brakes the day after the accident and found that they locked up when they were applied. According to the expert, this problem could have caused her vehicle to spin as it did immediately prior to the accident. Two months after the accident, the defendant sold the minivan, and the trooper sought to exclude the expert's report on the grounds that the sale of the van constituted spoliation of evidence. The trial court agreed with the trooper, but on appeal, the Court of Appeals reversed. According to the Court of Appeals, the State's own expert witness had an opportunity to inspect and conduct tests on the brakes before the defendant's van was sold, and, as a result, neither the trooper nor the State suffered any prejudice.[105]

However, where the party in possession of evidence does not provide the other party with reasonable notice of its claim or defense, the laches defense does not apply. This exception to the laches defense is well-illustrated by the Minnesota Court of Appeals' holding in *Hoffman v. Ford Motor Co.*[106] In *Hoffman*, the plaintiffs brought a claim against Ford alleging that Hoffman's Taurus automobile started a fire in his garage. In response, Ford moved for spoliation sanctions against the plaintiffs on the grounds that they had destroyed the fire scene and altered the Taurus before Ford was given an opportunity to conduct its own, independent inspection. The record showed that the day after the fire, Hoffman made a phone call to the dealership where he had purchased the vehicle in order to cancel a service appointment and request copies of the sales invoice, loan papers, and warranty. During that conversation, he told the employee that "my new Ford Taurus started on fire in my garage and burned my whole house down."[107] However, he never alleged a breach of warranty or indicated that he was making,

103. No. C2-98-181, 1998 WL 481932, at *1 (Minn. Ct. App. Aug. 18, 1998).
104. The State's interest arose from its payment of Trooper Henry's medical expenses. *Id.* at *2.
105. *Id.* at *5.
106. 587 N.W.2d 66, 666 (Minn. Ct. App. 1998)
107. *Id.* at 68.

or might make, a claim. Nor did he request an inspection, a meeting, or any action beyond the delivery of the documents. After this conversation, neither Hoffman nor his insurer ever contacted the dealership again. Based on these facts, the Court of Appeals affirmed the trial court's decision to exclude the evidence in question and dismiss the lawsuit.[108] Consequently, it is imperative that parties in possession of evidence that may become the subject of a lawsuit provide reasonable notice to all relevant parties of their claims or defenses before testing, altering, or moving such evidence.

V. TRENDS

A. *Growing Satellite Litigation*

Among members of the legal community, there is a strong and growing perception that spoliation of evidence is a significant problem. In fact, one survey has found that fifty percent of all litigators now consider spoliation to be either a frequent or regular occurrence.[109] This perception, regardless of whether or not it is accurate, will almost certainly lead to an increase in spoliation claims over the next several years. In fact, there is already anecdotal evidence that spoliation is routinely alleged in Texas and other states.

This satellite litigation can, at times, overwhelm the original litigation and has the potential to impose significant burdens on judicial administration.[110] For example, in *Gates Rubber Co. v. Bando Chem. Indus. Ltd.*,[111] the merits of the litigation were put on hold for two years while the parties fought over spoliation issues. The fight culminated in a six week mini-trial at which 40 witnesses appeared and the court was presented with 50 binders full of documents. Similarly, in another recent lawsuit involving Prudential[112], the plaintiff's spoliation allegations triggered a hearing and investigation that resulted in 52 depositions, including the deposition of

108. *Id.* at 70-71 (citing Am. Family Ins. Co. v. Village Pontiac-GMC, Inc., 585 N.E.2d 1115, 1119 (Ill. Ct. App. 1992) (a simple telephone call to an automobile dealer from a distraught buyer claiming that her car caused a fire that damaged her home was insufficient notice to prevent spoliation sanctions); Hirsch v. Gen. Motors Corp., 628 A.2d 1108, 1124 (N.J. Super. Ct. 1993) (notice to manufacturer that car caught fire from an undetermined cause and that owner made insurance claim was insufficient notice to manufacturer of claim)).

109. Charles R. Nesson, *Incentives to Spoliate Evidence In Civil Litigation: The Need For Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 793 (1991).

110. *See generally* Bissel & Holston, *supra* note 47.

111. 167 F.R.D. 90, 90 (D.Col. 1996).

112. *In re Prudential Co. of America Sales Litigation*, 169 F.R.D. 598.

Prudential's CEO, CFO, and General Counsel.

Although these cases obviously represent the exception and not the rule, they pave the way for other litigants to raise their own, more limited spoliation claims in the future. Most of these claims will probably be asserted in good faith, but some may be speculative or premature, and could be asserted simply for the purpose of negotiating a favorable settlement.[113] As a result, *allegations* of spoliation, as well as actual spoliation of evidence, may be used increasingly as a litigation tactic.

B. Heightened Judicial Skepticism

This concern has caused California—the source of the independent spoliation tort—to reconsider its position. In *Cedars-Sinai Med. Ctr. v. Superior Court*,[114] the California Supreme Court overruled the Court of Appeals' decision fourteen years earlier in *Smith v. Superior Court*,[115] and held that a party may not bring a separate cause of action against a litigation adversary for intentional spoliation of evidence where the spoliation was or should have been discovered before the conclusion of the litigation. According to the court, several factors weighed against recognizing such a claim, including (1) the availability of other remedies; (2) the inherently difficult task of calculating damages; and (3) the prospect of meritless spoliation actions.[116] Shortly thereafter, in *Temple Community Hosp. v. Superior Court*,[117] the California Supreme Court extended its holding in *Cedars-Sinai*, and declined to recognize a cause of action for intentional spoliation against a third party. Although the California Court of Appeals still recognizes claims for *negligent* spoliation,[118] the *Cedars-Sinai* and *Temple Community Hospital* decisions cast a pall over this cause of action as well.[119] Thus, although courts

113. Well-supported charges of spoliation were the critical factor that led Texaco to offer $140 million to the plaintiffs in a recent race discrimination case. *Charges of Spoliation Lead to $140-plus Million Settlement of Race Discrimination Case*, N.Y. Times, Nov. 16, 1996 at 37.

114. 954 P.2d 511 (Cal. 1998).

115. *Id.*

116. *Cedars-Sinai*, 954 P.2d at 517-21.

117. 976 P.2d 223, 223 (Cal. 1999).

118. Hernandez v. Garcetti, 68 Cal.App.4th 675, 682 (Cal. Ct. App. 1998); Johnson v. United Serv. Auto. Ass'n, 67 Cal.App.4th 626, 632 (Cal. Ct. App. 1998)

119. To date, the California Supreme Court has yet to decide upon the viability of a cause of action for negligent spoliation of evidence. *See* Temple Community Hosp. v. Superior Court of Los Angeles, 976 P.2d 223, 227 n.3 ("As in *Cedars-Sinai*,...we are not called upon to determine whether a tort cause of action will lie

have taken an increasingly harsh line against spoliators over the last several years, the trend in favor of recognizing an independent cause of action for spoliation may be waning. In fact, less than one month after the California Supreme Court issued its decision in *Cedars-Sinai*, the Texas Supreme Court declined to recognize an independent cause of action for either intentional or negligent spoliation.[120] However, other states continue to recognize the new tort, and one can expect that litigants across the country will argue for establishment of the tort.

C. Special Information Age Problems

The proliferation and changing forms of data in our information age will also have a bearing on spoliation law. For example, it is now possible to copy hundreds or even thousands of records onto a single CD-ROM. Given this technology, it makes sense to allow companies to electronically reproduce their records and destroy the originals in order to conserve space. In recognition of this fact, approximately 36 states have adopted either the current or former version of the Uniform Photographic Copies of Business and Public Records as Evidence Act, which allows companies to preserve evidence in non-paper form.[121] Among these states is Minnesota, whose Act provides as follows:

> If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, optical disk imaging, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law.[122]

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for negligent spoliation of evidence, so there is no need to discuss recent cases cited by the parties discussing such a tort claim.") (citations omitted).

120. Trevino v. Ortega, 969 S.W.2d 950, 951 (Tex. 1998).

121. Kinsler & MacIver, *supra* note 3, at 779-81.

122. MINN. STAT. § 600.135 (2000).

Moreover, even among those states that have not adopted the Uniform Act, preservation of documents in electronic form is probably allowed because such evidence would be admissible at trial as a "duplicate" of an original under Rules 1001(4) and 1003 of the Federal Rules of Evidence, which have been adopted in the remaining 16 states.[123] Consequently, less and less information will be retained in its paper form because there is no logical or legal reason for companies to retain paper originals where it is more economical and convenient for them to store the same information electronically.

The law is not quite as clear-cut regarding whether electronic documents may be copied onto paper and then deleted. In *Armstrong v. Executive Office of the President,*[124] the court determined that, under the Federal Records Act,[125] the Executive Office of the President was required to maintain e-mail not just in printout form, but in its original electronic form because the electronic version contained computer readable information that might not be reflected on the printed copies. In the wake of this decision, one commentator has noted that businesses may now have the obligation to preserve their electronic documents in both hard copy and in paper form, because the definition of a document under the Federal Records Act is nearly identical to the definition of a document under the Federal Rules of Civil Procedure.[126]

VI. PRACTICE TIPS

Given the significant and expanding remedies for spoliation, litigants and their attorneys have a strong incentive to preserve evidence in their possession and quickly examine evidence in the possession of other parties. Consistent adherence to the following guidelines will help minimize the risk of incurring such penalties.[127]

123. Kinsler & MacIver, *supra* note 3, at 781.

124. 810 F. Supp. 335, 339 (D.D.C. 1993), *aff'd,* 1 F.3d 1274, 1274 (D.C. Cir. 1993).

125. 144 U.S.C. § 3301.

126. Bissel & Holton, *supra* note 47 (citing J. Hetrick, *Spoliation: One of those Funny Words Lawyers Use...Or a Serious Legal Issue?,* 59 The Philadelphia Lawyer 3 (Fall 1996)).

127. The safeguards recommended in the following section generally mirror those proposed in the following articles and publications: Margaret Mary Meko, *Spoliation: It's Not Worth It?!,* LPBA Journal 14 (Fall 1998); Bissell & Holston, *supra* note 47; Barton C. Gernander, *Dealing with Skeletons in the Closet: Practical Effects of the Growing Trend Towards Recognition of Tort Actions for Spoliation of Evidence* (Spring

A. *When Client Is In Possession Of Evidence*

Advise your client to securely store all items and file all documents that are or could be the subject of litigation for at least the statute of limitations period. If this would be unworkable or excessively burdensome, advise your client to develop and follow a formal document retention policy. Memorialize the legitimate business purpose of this policy in writing and inform your client that adherence to such a policy will not protect it if it "knew or should have known" that certain documents would become material to litigation at some point in the future.

Permit only knowledgeable personnel (e.g., legal, patent, tax or trademark departments) to decide what constitutes foreseeable litigation and order any suspensions of the document retention policy. To the extent practicable, communicate all suspensions of the policy to affected personnel.

If litigation ensues, restrict access to these items and documents to the parties to the lawsuit and their representatives.

If your client needs to conduct a test that will result in damage to particular item, seek consent from the other parties. Provide them with written notice that they may participate in the test, and document their response. Photograph and videotape the condition of the item before, during and after testing, especially if the other parties are not present. Document the testing methodology and results.

If adverse parties request access to evidence in the possession of your client, ask them to agree, in writing, to preserve the evidence and refrain from conducting destructive tests without your client's consent. If they do not agree, obtain a court order that binds them in this manner.

Request other parties or potential parties to share the costs associated with storing and safeguarding particular items, or obtain a court order requiring them to bear these costs.

B. *When Another Party Is In Possession*

If litigation has not already ensued, put the other party on notice that you may file a claim or defense related to the evidence.

Request the other party, in writing, to preserve the evidence

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1995); Katz & Wood, *supra* note 68; Kinsler & MacIver, *supra* note 3; and ASTM Standard E860-97 (1999) (available at http://www.astm.org.html).

and permit you to inspect it. Document the party's response. If the other party does not agree to preserve the evidence voluntarily, move for a court order requiring it to do so.

Examine the evidence as quickly as possible. Photograph and videotape the evidence, and conduct all necessary tests and inspections within the deadlines imposed by the other party. If these deadlines are unreasonable, move for a court order extending the deadlines.

Request a role in all decisions regarding the storage and preservation of material evidence, and actively participate in negotiations concerning these issues.

If the other party objects to the cost of preserving the evidence, consider offering to pay part of the storage costs or even purchasing the evidence.

VII. CONCLUSION

As the new millennium begins, spoliation of evidence remains in the forefront of products liability law. It continues to provide a basis for the exclusion of expert testimony and other related evidence. Parties who engage in intentional spoliation may find their actions dismissed or so altered by their actions that they are impossible to defend. Courts and litigants alike continue to search for new means to punish spoliation, including the imposition of independent tort liability. Products liability practitioners would be well advised to consider the repercussions of the spoliation of evidence from the first moment they become involved in a product action. Steps should be taken to preserve evidence and litigants should be prepared to vigorously defend or pursue spoliation.

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