SPOLIATION OF EVIDENCE:
Technology and Business Litigation Present New Challenges

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Phillip B. Philbin
HAYNES AND BOONE, L.L.P.
901 Main Street, Suite 3100
Dallas, Texas 75202-3789
Telephone: (214) 651-5684
Telecopy: (214) 200-0672
philbinp@haynesboone.com

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SPOLIATION OF EVIDENCE:
Technology and Business Litigation Present New Challenges[1]

With the maturation of the electronic age, a shredder is no longer needed for documents to be destroyed. Electronic data is easily created, transferred, stored, and deleted. Discovery of electronic information is on the rise. As a result, counsel need to know:

- What data do I have?
- What data do I have to keep?
- What happens if data gets deleted?

While this issue has arisen in products liability cases for some time, other areas of litigation are beginning to address this issue, including intellectual property litigation, business litigation, and securities litigation. Significant portions of a case can be affected by the destruction of evidence. This paper will address the general issues regarding spoliation.[2]

1. Introduction

a. What is Spoliation?

i. **Definition.** Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence, in pending or future litigation.[3] The primary reasons courts control the destruction of evidence include:

(1) promoting accuracy in fact-finding;
(2) restoring the prejudiced party to the same position with respect to its ability to prove its case that it would have held if there had been no spoliation;
(3) serving as retribution against the immediate wrongdoers; and
(4) managing cases on a crowded docket.[4]

ii. **Examples in Business and Technology Cases.** Spoliation is no longer limited to products liability. As the amount of electronic evidence continues to increase dramatically, business and technology cases are beginning to see increasing chains of destruction of that evidence. While spoliation can certainly apply to paper documents, the computer makes "deleting" electronic information so much easier than destroying a document. The following examples are intended to point out areas to investigate for spoliation of electronic evidence in business and technology cases:

(1) E-Mail. Employees' communications may be relevant in any kind of business or technology case. The dangers of such communications are that the employees who use e-mail may not know that their mail might be discoverable in a lawsuit and typically use e-mail in a very casual, informal manner. Many employees may not even consider e-mail to be written or documentary evidence. E-mail is easily forwarded and/or downloaded to computers outside of the internal network. Companies should be advised to learn the details about how their electronic mail is saved and stored after it has been read and "trashed" by its employees, including the electronic mail that might have been downloaded to the employees' home computers and laptops. Once the e-mail is outside the network, deletion from the network will not eliminate these remote copies.

(2) Computer Databases. From research and development to sales and marketing, a company's databases contain valuable information relevant to many issues in business and technology cases.

When a database is "deleted," often all that has happened is the pointer to where the data is stored has been erased. With modern recovery methods, data can frequently be restored even though the company thought it had been deleted. This type of recovery opens a whole new field of discovery--obtaining access to the opponent's hard drives and/or mainframe computers.

(3) Accounting/Financial Records. Many companies use computers in managing their accounting and financial records. These records are often highly relevant in the assessment of damages. Further, the company may have prepared forecasts, estimates, or other models, that utilize databases to drive the spreadsheets. All of this evidence can be very useful in establishing damages, costs, and other financial facts.

(4) Word Processing. Almost every major company utilizes a word processing program to create documents in electronic form. Copies of those documents are stored on floppy disks and hard drives. Archival copies are made to back up the entire system. Copies are also attached to e-mails and sent inside and outside the company. Keeping track of every copy is virtually impossible.

Many companies also have implemented specialized programs for scanning and managing documents. These programs are complicated by employees having remote access to the document management programs, resulting in documents existing in a number of different drafts and versions.

(5) Internet. Many companies have established websites on which they publish articles, press releases, and other corporate information. Because the documents on these websites are owned and published by the company, the implications of spoliation may extend to changes made to the company's website.

b. **How Does Spoliation Occur?** Spoliation can occur as soon as it is reasonably foreseeable that a lawsuit will be filed. While the following examples relate to spoliation by the defendant, plaintiff is equally subject to a claim of spoliation.

i. **"The Smoking E-Mail."** In a tortious interference with prospective business relations, for example, a former employee of the prospective third party testified in a deposition that he received an e-mail message from an employee of the defendant. The content of the message constituted tortious interference with the prospective business relationship between plaintiff and the third party. Plaintiff filed discovery requests directing defendant to produce all electronic mail messages authored by defendant that related to plaintiff. In an effort to avoid producing the tortious message, defendant deleted the message from all mailboxes and denied writing such a message. Plaintiff moved to compel the backup tapes of defendant's electronic mail and recovered the "smoking e-mail" before it was overwritten. Alternatively, plaintiff could have moved to compel the former employee's laptop computer, since she routinely downloaded her e-mail.

ii. **The Updated Website.** In a copyright infringement action, plaintiff alleged that defendant copied and used one of its copyrighted cartoon characters. In its effort to assess damages, plaintiff filed discovery requests asking for copies of all documents using its reproduction of plaintiff's character. While the discovery requests were pending, defendant's marketing department updated its website on the Internet. In doing so, defendant erased all reproductions of plaintiff's character on its web site. At the end of the day, plaintiff would want to know how many times hits were recorded on the website to establish the number of publications of the character.

iii. The Document Destruction Policy. In a patent infringement case, the alleged infringer electronically documented the development history of the allegedly infringing product. Plaintiff filed discovery requests demanding computer databases and other electronically stored material. Defendant's lawyers objected to the discovery and requested extensions of time to respond. As part of its normal operating policy, defendant's computer backup system has a rolling retention policy, meaning that its tapes are rotated monthly and routinely re-used every month. While the discovery requests are pending, defendant's document destruction policy causes the entire development history to be deleted.

c. Scope of Article

i. Business and Technology Disputes. This article focuses on the spoliation of electronic evidence and other documents in such areas of law as intellectual property litigation, securities litigation, antitrust litigation, breach of contract, tortious interference, fraud, defamation, employment discrimination, etc.

ii. Outside the Scope of the Article. Spoliation can occur, however, in any kind of lawsuit. While not within the scope of this article, spoliation issues are prevalent in such areas of law as products liability[5] and medical malpractice.[6]

iii. Organization of the Article. The article reviews the wide range of remedies imposed by courts in response to claims of spoliation, such as the recognition of independent tort, the use of an adverse inference jury instruction, the dismissal or default of the spoliator's case, the imposition of monetary sanctions, or even the institution of criminal proceedings against the spoliator. The article concludes with certain practical considerations including how to avoid spoliation, when to raise the issue of spoliation, which remedy will be most effective against a spoliator, and how to request that remedy.

2. Spoliation as an Independent Tort [7]

a. State Law. The tort of spoliation has evolved as an independent cause of action under state common law in certain states. Because many business and technology lawsuits arise in federal courts and because the tort of spoliation is a substantive claim, federal district courts must determine the appropriate state's law to apply. In making its determination, the court must apply the choice of law rules of the forum in which it sits.[8] Federal district courts employ the standards that have

been developed by the states for determining which state's law will control in tort-based claims.[9]

i. **Reasoning for Developing a New Tort.** In a recent case in the development of the tort of spoliation, the District of Columbia Court of Appeals recognized the need for an independent tort of spoliation. The court reasoned that some remedy should be available to those whose expectancy of recovery has been eliminated through the acts of others.[10]

b. Elements of the Claim

i. **Intentional Spoliation.** The exact wording of the elements may differ slightly from state to state, but the elements are essentially as follows:[11]

(1) Pending or Probable Litigation. The duty to preserve evidence arises as soon as it is reasonably foreseeable that legal proceedings will be instituted, even if this foreseeability occurs before any legal proceedings are formally instituted.[12] The reasonably foreseeable litigation must have some value (i.e., not frivolous).

(2) Knowledge of the Existence or Likelihood of Litigation. The duty attaches when the spoliator knew or should have known that litigation is likely to be instituted.[13]

(3) Intentional Destruction of Evidence. Destruction of evidence includes physical destruction and also such acts as alteration or removal of evidence beyond the reach of the court.[14] The act is "intentional" if the spoliator undertakes the act with the purpose of destroying or altering something that the spoliator knows to be evidence or potential evidence.[15] The scope of evidence protected is that evidence that is discoverable and reasonably foreseeable to be relevant (not necessarily admissible).

(4) Actual Disruption of the Plaintiff's Case. If the absence of the destroyed evidence affects plaintiff's presentation of its case, plaintiff's case has been disrupted.

(5) Damages Proximately Caused by the Acts of Spoliation. Damages must be proved with as much accuracy as reasonably possible. Mere uncertainty as to the amount of damages, however, will not preclude recovery. As long as the evidence affords a basis for

estimating damages with some degree of certainty, it will support an award.[16]

ii. Negligent Spoliation. Some states have chosen to recognize the tort of negligent spoliation either (i) in addition to, or (ii) as an alternative of the tort of intentional spoliation. Likewise, the exact wording of the elements may differ slightly from state to state, but the elements are essentially as follows:[17]

(1) Existence of a Potential Civil Action.[18] The tort of negligent spoliation of evidence is dependent on an underlying action or prospective civil litigation.[19]

(2) Legal or Contractual Duty to Preserve Evidence Relevant to the Potential Civil Action. In addition, the duty created when litigation is reasonably foreseeable, is the duty to preserve evidence may arise through an agreement, a contract, a statute, or another special circumstance.[20] A spoliator may voluntarily assume a duty by affirmative conduct.[21]

(3) Destruction of That Evidence.[22]

(4) Significant Impairment in the Ability to Prove the Lawsuit.[23]

(5) Causal Relationship Between the Destroyed Evidence and the Inability to Prove the Lawsuit. A plaintiff need not prove that he would prevail in the underlying action but for the destruction of the evidence. Rather, the plaintiff must show that but for the defendant's loss or destruction of the evidence, the plaintiff had a reasonable probability of succeeding in the underlying action.[24]

(6) Damages.[25]

c. Affirmative Defenses.[26] In some instances, a party defending against an independent tort action for spoliation may be able to establish an affirmative defense against the claim. Examples of such affirmative defenses include:

i. Statute of Limitations. The spoliator may assert that the spoliation victim did not bring its claim for spoliation within the statute of limitations applicable to property rights under state law. This statute of limitations applies because spoliation of evidence constitutes injury to a property interest.[27]

ii. **Permission.** The spoliator may be excused from destroying evidence when it obtains permission from the presiding court, or even a related government agency.[28]

iii. **Privilege.** Because the evidence must be discoverable[29] in a spoliation claim, privileged material is technically outside of the scope of the spoliation claim.[30] This technicality does not authorize potential spoliators to destroy material claimed as privileged. If a document is allegedly privileged, the potential spoliator may challenge the party's right to the privileged document in accordance with procedural rules.[31]

d. **Summary of the Individual States' Recognition of Spoliation as an Independent Tort.** This section does not purport to be a comprehensive report on every state that has or has not recognized the independent tort of spoliation. Rather, it is intended to provide a sample of the leading cases that have been faced with the opportunity to recognize the independent tort, specifically focusing on the business and technology cases, if any.

i. **States Recognizing Intentional and Negligent Spoliation**

(1) Only Ohio[32] has recognized causes of action for both intentional and negligent spoliation.

ii. **States Recognizing Intentional Spoliation Only**

(1) Alaska,[33] New Jersey,[34] and New Mexico[35] have recognized a cause of action for intentional spoliation.

iii. **States Recognizing Negligent Spoliation Only**

(1) Illinois,[36] Florida,[37] and the District of Columbia[38] have recognized a cause of action for negligent spoliation.

iv. **States Declining to Recognize Either Intentional or Negligent Spoliation**. The following states have had the opportunity to recognize the existence of the independent tort of spoliation but declined:

Alabama[39]; Arizona[40]; Arkansas[41]; California[42]; Colorado[43]; Delaware,[44] Georgia[45]; Idaho[46]; Indiana[47]; Iowa[48]; Kentucky[49]; Louisiana[50]; Maryland[51]; Minnesota[52]; Missouri[53]; New York[54]; Pennsylvania[55]; and Texas.[56]

The state courts have espoused a variety of reasons for declining to recognize the existence of an independent tort: (i) adequate discovery and evidentiary remedies for spoliation already exist; (ii) the tort is inherently speculative in nature; (iii) the absence of an identifiable duty; and (iv) the policy of finality of judgments and judicial economy would be violated.[57]

3. **Other Remedies for Spoliation.** As an alternative or in addition to bringing an independent cause of action for spoliation, a victim of spoliation may seek evidentiary or discovery remedies. Specifically, a party may request (i) an instruction that the jury make an adverse inference; (ii) preclusion of the spoliator's evidence; (iii) monetary sanctions; and (iv) dismissal or default of the spoliator's case. Various strategical reasons[58] may bear on which remedy and/or cause of action would be the most effective way for a victim to handle the spoliation.

a. **Authority for the Remedies.** Federal district courts have authority to grant various remedies for spoliation under the federal procedural rules and inherent authority of the federal courts. The authority typically arises from the court's ability to control discovery and the presentation of evidence. When looking for authority in state court, the rules relating to discovery sanctions and conduct of discovery and presentation of evidence are the best place to start.

i. **Procedural Rules Relating to Discovery.** Federal Rule of Civil Procedure 37(b) enumerates the available sanctions for abuses of the discovery process.[59] Rule 37 is typically limited to destruction of documents in violation of a specific court order.[60] At least one federal district court has held that Rule 37(b) authorizes sanctioning the destruction of documents.[61] The court in *Turner v. Hudson Transit Lines* noted that even though a party may have destroyed evidence prior to issuance of the discovery order and thus may be unable to obey, sanctions are still appropriate under Rule 37(b) because this inability was self-inflicted.[62]

ii. **Inherent Authority.** The more common authority under which courts impose sanctions for spoliation is their inherent authority. District courts possess the inherent authority to impose the FED. R. CIV. P. 37(b)(2) discovery sanctions if the circumstances so warrant.[63] District courts have determined that their inherent powers to sanction are broader and more flexible than the authority to sanction found in Rule 37.[64] Under their inherent powers, district courts may sanction conduct that falls outside the express terms of Rule 37, but would otherwise be sanctionable.[65] The court may properly look to Rule 37 as a guide to determine the appropriate level of response to the conduct or as a reinforcement to the court's

inherent powers.[66] Thus, Rule 37 and inherent powers are different routes by which the Court may reach essentially the same result.

iii. **Procedural Rules Relating to Evidence.** Under Rules 26 and 37 of the Federal Rules of Civil Procedure, district courts maintain broad control over issues regarding the admission and substance of the evidence to be presented at trial.[67] District judges are afforded broad discretion in fashioning remedies appropriate to the circumstances, and their decisions will be reviewed for an abuse of that discretion.[68]

b. **Determining the Appropriate Sanction.**[69] In determining whether or not to sanction and if so, what degree of sanction, trial courts typically balance the following factors:

i. **Duty to Preserve Evidence.** The threshold question to the district court's imposition of sanctions for spoliation of evidence is whether the spoliator had any duty to preserve the destroyed evidence.[70] If the spoliator knew or should have known that the destroyed evidence was relevant to pending, imminent, or reasonably foreseeable litigation, then the spoliator had a duty to preserve the evidence.[71]

ii. **Mental State of the Spoliator.** Sanctions may be imposed when the destruction of documents results from the willfulness, bad faith, or some fault of the spoliator ***other than*** involuntary compliance.[72] In determining the mental state of the spoliator, many factors should be considered, such as the spoliator's explanation for the destruction of the data, the sophistication of the spoliator, the spoliator's conduct in the course of discovery, if any, the nature of the underlying lawsuit, and the type of evidence involved. Therefore, such excuses (i) that the spoliator's document retention policies routinely delete data as part of a bona fide business practice; or (ii) that the preservation of such data would not be cost-effective and would be disruptive to the spoliator may not excuse the spoliator's culpable mental state.[73]

iii. **Prejudice to a Party.**[74] Prejudice means injury or detriment to a party, and in the context of sanctioning discovery violations, it necessarily includes an inquiry into the materiality and value of the destroyed evidence upon the ability of a victim to fully and fairly prepare for trial.[75] Prejudice may be manifested in a number of different ways:

(1) Attorney's fees and costs incurred to pursue a sanctions motion;
(2) Costs of reconstructing destroyed data where possible;

(3) Where a party is irremediably unable to deal with a given issue or issues; and

(4) Where the destruction bears on so many issues or on dispositive issues that a limited-issue related sanction will not adequately redress the destruction.[76]

iv. Impropriety of Lesser Sanctions.[77] To fulfill the purposes of sanctions, courts must use their broad discretion to select the least onerous sanction corresponding to the willfulness of the destructive act and the prejudice suffered by the victim.[78] The courts should tailor the remedy to the problem and balance between (i) the truth-finding process; and (ii) the parties' rights to a fair trial.[79]

c. Types of Remedies.[80]

i. Adverse Inferences.[81] "It is a maxim of law, bearing chiefly on evidence, but also upon the value of generally of the thing destroyed, that everything most to his disadvantage is presumed against the destroyer, *contra spoliatorem omnia praesumuntur.*"[82] The adverse inference provides the necessary mechanism for restoring the evidentiary balance after the occurrence of spoliation.

(1) Adverse Inference or Adverse Presumption. This sanction may be applied in one of two different forms: the adverse inference and the adverse presumption. A "presumption" is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action.[83] An "inference"is a logical and reasonable conclusion of fact not presented by direct evidence, but which, by process of logic and reason, a trier of fact may conclude exists from the established facts.[84] Usually, the primary goal of an "adverse inference" ruling is accurate fact-finding, while an "adverse presumption" holding is more likely to be used to punish the spoliator and compensate the injured party.[85]

(2) Inference Against Case or Issue. The inference can be made against an entire case or a single issue. The nature of the inference depends on the nature of the destroyed evidence. If the destroyed evidence bore on multiple issues or on dispositive issues, then a limited-issue related sanction would probably not adequately address the destruction.[86]

ii. **Preclusion of Evidence.** In other contexts, courts commonly preclude a spoliator from introducing certain evidence because the spoliator's conduct has unfairly prejudiced its adversary.[87] The preclusion of evidence remedy is the mirror image of the adverse inference remedy: evidence which was once in the power of one party to produce, but because of the conduct of the spoliator, cannot now be offered at trial.[88] The exclusion of the spoliator's evidence may be fatal to its case. When expert witness testimony is excluded, for example, the spoliator's case may be dismissed on summary judgment if the spoliator cannot prove its case without that expert evidence.[89]

iii. **Monetary Sanctions.**[90] The monetary sanction award of costs or attorneys' fees generally serves to compensate the victim of spoliation.[91] Monetary sanctions also can serve the deterrence function. In ordering punitive sanctions in the sum of one million dollars ($1,000,000) against the spoliator in a class action against life insurance company for deceptive sales practices, the district court stated that "[t]his sanction recognizes the unnecessary consumption of the Court's time and resources in regard to the issue of document destruction . . . informs [spoliator] and the public of the gravity of repeated incidents of document destruction . . . [and in] assessment of this monetary sanction, the Court has considered the financial worth of [spoliator] and the minimal financial impact this sanction will have on [spoliator's] financial stability."[92]

iv. **Dismissal or Default.** Courts have even held that the destruction of data warrants the "ultimate" sanction of dismissal or default and have exercised their inherent powers accordingly.[93] Default of defendant's case and dismissal of a plaintiff's case may be proper sanctions when the spoliator willfully destroys documents and records that deprive the victim of the opportunity to present critical evidence on its key claims to the jury.[94] A pattern of discovery order violations will also constitute an independent basis for imposing the sanctions of dismissal and default.[95]

v. **Criminal Penalties.** The federal obstruction of justice statute penalizes one who "corruptly . . . obstructs . . . or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice."[96] Several state obstruction of justice statutes similarly criminalize the act of destroying evidence relevant to a judicial proceeding.[97] Although the criminal penalties do not compensate the victim of spoliation, the obstruction of justice statutes are realistic means of deterring spoliation.[98] Another possible criminal punishment is contempt of court.[99]

4. Avoiding Spoliation

a. **Why? Ethical Problems and Professional Responsibilities.** Each state has adopted a version of either the *Model Rules of Professional Conduct* or the *Model Code of Professional Responsibility,* both of which contain provisions relating to spoliation. For instance, both the *Model Rules* and the *Model Code* contain general prohibitions against assisting or counseling illegal or fraudulent conduct,[100] and these prohibitions may be applicable for assisting or counseling in the act of destroying evidence under the obstruction of justice statutes.[101] Additionally, both the *Model Rules* and the *Model Code* contain more specific provisions relating to spoliation:

i. ***Model Rules of Professional Conduct.*** Rule 3.4(a) of the Model Rules of Professional Conduct states that "[a] lawyer shall not: unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act." The Comment to Rule 3.4(a) elaborates that "[t]he procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like."

ii. ***Model Code of Professional Responsibility.*** DR 7-102(A)(3) of the Model Code of Professional Responsibility states that "[i]n representation of a client, a lawyer shall not: . . . [c]onceal or knowingly fail to disclose that which he is required by law to reveal. Furthermore, DR 7-109(A) states that "[a] lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce."

b. **How? Document Retention Programs.** Document retention programs involve the selective retention and destruction of documents.[102] Formal document retention programs have many advantages: (i) routine destruction can lower storage costs by reducing the volume of retained documents; (ii) cataloguing and uniform filing can lower the cost of record retrieval; (iii) useful histories of key documents can be recorded; and (iv) legal exposure can be reduced.[103]

i. **Creation of Program.**

(1) Review Existing Plan. Process the company's computer system should first be profiled. This includes conducting an inventory of

the existing hardware, software, and available electronic media, as well as the existing stored information on floppy disks, hard disks, magnetic tapes, CD-ROMs, backup tapes, and archival tapes).

(2) Implement Formal Policies. In conducting a formal document retention program, the following guidelines should generally be followed:

(a) documents that must be maintained in accordance with applicable laws and regulations should be preserved as long as necessary;

(b) documents necessary for the conduct of business should be filed in a systematic manner and should be accessible when necessary;

(c) documents relevant to foreseeable or pending judicial, administrative, or congressional investigations or proceedings are identified and preserved;

(d) documents that must be maintained permanently are catalogued and reduced to microfilm or microfiche for easy storing or access; and

(e) all other documents are destroyed.[104]

ii. Enforcement of Program. Every employee should be adequately trained and should understand the significance of particular data and the consequences of its destruction. The company should establish or designate a specific department to ensure education about and compliance with the program.

iii. Suspension of Program. Especially with respect to litigation, the crucial feature of the document retention program is the ability to disable continuation of scheduled destruction procedures when necessary.[105]

5. Practical Considerations

a. Timing: When to Bring a Claim for the Tort of Spoliation?

i. During the Underlying Proceeding. If the spoliator is the plaintiff, then the victim can file a counterclaim as part of the underlying proceeding. Likewise, if the spoliator is the defendant, then the victim can amend its original pleading. A jury trying the concurrent claims in a single proceeding may be in the best position to determine the spoliation issues.[106]

(1) Otherwise Barred As Collateral Attack. Depending on the state's common law, an attack on the veracity of evidence that formed the basis for a judgment brought post-judgment may be barred as a collateral attack on a final judgment, regardless of whether the litigants are expressly seeking to have the prior judgment set aside.[107]

ii. Separate Post-Judgment Claim. Because of the perceived difficulty in establishing damages, some courts have suggested that the plaintiff must first receive an adverse final judgment in the underlying lawsuit due to the inability to prove the case before filing an action for spoliation.[108] This option must be weighed against the concerns outlined above.

b. Selection: Which Remedy Will Be Most Effective?

As previously noted, a victim of spoliation may choose from a number of remedies, including an independent cause of action. A spoliation cause of action may not be available, however, depending on the applicable state law. Before the spoliation victim makes its decision regarding which remedy to pursue, a number of factors should be considered. Most of these considerations correspond to the factors that courts review in assessing the appropriate sanction. In contemplating these issues ahead of time, the spoliation victim can avoid overstating the situation to the court or, on the other hand, can preclude the possibility of not requesting enough relief.

i. How Speculative are the Damages? When considering the option of bringing an independent cause of action, a victim of spoliation should always determine whether it can show how the spoliation damages are separable from plaintiff's underlying claims and the specific amount of damages.[109] Because the spoliator destroyed the evidence and such a damages calculation may be "sheer guesswork,"[110] many courts have relaxed the standard to a just and reasonable inference.[111] The damages standard is consistent with the policy that the tort of spoliation protects lost probable expectancies.[112]

ii. Proof of Injury

(1) What Evidence was Destroyed? The spoliation victim should consider whether the evidence would have been admissible, subject to discovery, and/or privileged.

(2) Adverse Inference v. Preclusion of Evidence. The spoliation victim should also consider what issue was affected by the destroyed evidence. If the spoliator destroyed evidence relating to its own issue that the evidence would have rebutted, then the spoliation victim could ask the court to preclude the spoliator's evidence on that issue. Such preclusion replaces the parties to a level playing field. If the spoliator destroyed evidence relating to its opposer's issue, then the spoliation victim could ask for an adverse inference jury instruction on that issue.

iii. Who Destroyed the Evidence? Party? Nonparty? Agent of the party? Did attorney participate in or counsel the destruction? A determination of the culpable parties may narrow the range of available options or expand the list of defendants.

iv. Timing of Destruction. Did the destruction occur before the suit was even reasonably foreseeable? Did it occur after the spoliator had informal notice of suit? Had the suit been formally commenced? Had the victim of spoliation served a formal document request covering the destroyed information? Had a motion to compel been filed? Had an order compelling production been issued? The victim should create a timeline and determine exactly where on the timeline the spoliation occurred.

v. Reason for Destruction. The reasons for the destruction given by the spoliator, if any, are also important. Did the spoliator destroy the evidence in bad faith, or was the destruction accidental? Were the documents destroyed pursuant to routine business activity? While a spoliator is unlikely to admit to destroying the evidence in bad faith, the victim should attempt to discover as many facts as possible regarding the spoliator's document retention policies and the circumstances surrounding the particular document production and destruction.

c. **Examples: How to Request Relief for Spoliation?**

i. **Petition for Spoliation.** The drafter should be certain to include factual support for and allegations of every element of the tort. Considering the relevant jurisdiction, the drafter may plead intentional spoliation, negligent spoliation, or both in the alternative. *See* Exhibit "A" for an example Petition for Spoliation.

ii. **Affirmative Defenses.** In its answer to a claim of spoliation, the drafter should of course include a general denial. If there are facts supporting any of the affirmative defenses, those defenses should also be included. *See* Exhibit "B" for a list of example Affirmative Defenses.

iii. **Motion for Sanctions for Spoliation.** The drafter should describe carefully the underlying facts and the specific remedies being requested. The drafter should also brief those factors that the courts will consider in assessing an appropriate sanction. *See* Exhibit "C" for an example Motion for Sanctions for Spoliation.

iv. **Proposed Preliminary Instruction on Spoliation.** The drafter should determine whether to propose an adverse presumption or an adverse inference. Similarly, the drafter should determine whether to propose an inference against a single issue or against the spoliator's entire case. Finally, the drafter should consider using any model jury instructions in the relevant jurisdiction. *See* Exhibit "D" for an example Proposed Preliminary Instruction on Spoliation.

CONCLUSION

Spoliation is easier to do than you might think. The information age has exponentially increased how much information is created, transferred, and deleted. From even before a lawsuit is filed, clients and their counsel need to be aware of the perils of destroying evidence. Document retention policies are good tools, but each policy must be flexible enough to avoid specific spoliation claims.

The advanced data retrieval techniques available today make proving spoliation easier. Especially in technical cases, the amount and scope of information stored in electronic format is vast. Marshaling that evidence to avoid spoliation is a complex task. With increasing frequency, courts are recognizing the significant impact spoliation has and attempting to level the playing field by using a myriad of remedies.

ENDNOTES

1. This paper represents the individual views of its author, Phillip B. Philbin, and does not purport to represent the views of Haynes and Boone, L.L.P. or any of its clients. The author would like to thank Christine L. Irish, an associate at Haynes and Boone, L.L.P., for her significant contribution to this paper.

2. Since the substantive law issues are based on state law, a specific investigation of the relevant state law is needed in each case. This paper does not attempt any analysis of a specific state. Rather, the paper is intended as a general overview of the issues.

3. *See Temple Community Hosp. v. Superior Court,* 51 Cal. Rptr.2d 57, 61 (Ct. App. 1996).

4. *See Gates Rubber Co. v. Bando Chem. Indus., Ltd.,* 167 F.R.D. 90, 105-06 (D. Colo. 1996).

5. *See, e.g.,* Monte E. Weiss, *Spoliation of Evidence: A New Defense in Products Liability Cases,* 70 WIS. LAW. 18 (May 1997) (discussing the need of product liability parties to be aware of the spoliation of evidence defense, when it should be raised, the risks of raising the defense, and how it can be defeated); Phoebe L. Mcglynn, *Spoliation in the Product Liability Context,* 27 U. MEM. L. REV. 663 (Spring 1997) (discussing spoliation liability and defenses and other remedies for spoliation in the product liability context).

6. *See, e.g.,* Maurice B. Graham & Michael D. Murphy, *Spoliation of Medical Records,* 52 J. MO. B. 87 (March/April 1996) (discussing the spoliation of evidence doctrine as applied in the medical negligence context); Anthony C. Casamassima, *Spoliation of Evidence and Medical Malpractice,* 14 PACE L. REV. 235 (Spring 1994) (discussing various remedies and policy reasons for controlling spoliation in medical malpractice actions).

7. *See infra* § 5.c.i. and Exhibit "A" for a sample petition for the tort of spoliation.

8. Although the *Erie* doctrine most often arises in diversity of citizenship cases, the *Erie* doctrine applies, whatever the ground for federal jurisdiction, to any issue of claim which has its source in state law. *See, e.g., Three Rivers Motor Co. v. Ford Motor Co.,* 522 F.2d 885, 888 n.1 (3d Cir. 1975) (applying *Erie* doctrine to determine what state law applies to pendant claim under federal antitrust jurisdiction); *Maternally Yours, Inc. v. Your Maternity Shop, Inc.,* 234 F.2d 538, 541 n.1 (2d Cir. 1956) (applying *Erie* doctrine to determine what state law applies to pendant claim under federal trademark jurisdiction).

9. The district court typically asks where plaintiff's alleged injury occurred and whether this location has a nexus to the legal action. The district court also considers additional factors such as: the place where the conduct causing the injury occurred, the residence or place of business of the parties, and the place where the relationship is centered. Finally, the district court evaluates each factor's relative importance to the particular issue being litigated. *See, e.g.*, *Miller v. State*

Farm Mut. Auto. Ins. Co., 87 F.3d 822, 824 (6th Cir. 1996) (applying Ohio choice-of-law rules); *Gann v. Frueharf Corp.,* 52 F.3d 1320, 1324-25 (5th Cir. 1995) (applying Mississippi choice-of-law rules); *Hardee's of Maumelle, Ark., Inc. v. Hardee's Food Sys., Inc.,* 31 F.3d 573, 575 n.1 (7th Cir. 1994) (applying Indiana choice-of-law rules).

10. *Holmes v. Amerex Rent-A-Car*, 718 A.2d 846, 847 (D.C. 1998) (recognizing negligent or reckless spoliation as an independent tort). The United States Court of Appeals for the District of Columbia had certified questions regarding the availability of a spoliation cause of action. *Holmes v. Amerex Rent-A-Car*, 113 F.3d 1285 (D.C. Cir. 1997). The District of Columbia Court of Appeals held that negligent or reckless spoliation is an actionable tort in the District of Columbia. *Holmes,* 718 A.2d at 847. In *Holmes v. Amerex Rent-A-Car,* 180 F.3d 294 (D.C. Cir. 1999), the Court of Appeals applied the holding of the District of Columbia's highest court.

11. *See, e.g., Marinelli v. Mitts & Merrill,* 696 A.2d 55, 62 (N.J. Super. Ct. App. Div. 1997); *Coleman v. Eddy Potash, Inc.,* 905 P.2d 185, 189 (N.M. 1995); *Smith v. Howard Johnson Co.,* 615 N.E.2d 1037, 1038 (Ohio 1993).

12. *Hazen v. Municipality of Anchorage,* 718 P.2d 456, 458-59 (Alaska 1994).

13. JAMIE S. GORELICK, ET AL., DESTRUCTION OF EVIDENCE § 4.17 (1989).

14. *McGuire v. Acufex Microsurgical, Inc.,* 175 F.R.D. 149, 154 (D. Mass. 1997); *White v. Office of the Public Defender for the State of Maryland,* 170 F.R.D. 138, 148 (D. Md. 1997).

15. GORELICK, at § 4.17 (quoting W. KEETON, PROSSER AND KEETON ON TORTS § 8 (5th ed. 1984)).

16. *Vivano v. CBS, Inc.*, 597 A.2d 543, 551 (N.J. Super. Ct. App. Div. 1991).

17. *See, e.g., Bush v. Thomas,* 888 P.2d 936, 939 (N.M. Ct. App. 1994), *cert. denied,* 888 P.2d 466 (N.M. 1995); *Continental Ins. Co. v. Herman,* 576 So.2d 313, 315 (Fla. Dist. Ct. App. 1990), *rev. denied,* 598 So.2d 76 (Fla. 1991).

18. *See also supra* § 2.b.i.(1) for a discussion of when they duty to preserve evidence attaches.

19. *Sussman v. American Broadcasting Cos., Inc.,* 971 F. Supp. 432, 435-36 (C.D. Cal. 1997) (dismissing spoliation claim when the underlying claims of fraud, conspiracy, and invasion of privacy were dismissed, and thus, there was no longer prospective civil litigation to which such claims could attach).

20. *Boyd v. Travelers Ins. Co.,* 652 N.E.2d 267, 270 (Ill. 1995).

21. *Id.*

22. *See also supra* § 2.b.i.(3) for a discussion of "destruction."

23. *See also supra* § 2.b.i.(4) for a discussion of "actual disruption."

24. *Boyd,* 652 N.E.2d at 271, n.2.

25. *See also supra* § 2.b.i.(5) for a discussion of "damages."

26. *See infra* § 5.c.ii. and Exhibit "B" for a sample list of potential affirmative defenses to a claim of spoliation.

27. *See Temple Community Hosp. v. Superior Court,* 51 Cal. Rptr.2d 57, 61 (Ct. App. 1996) (applying two year statute of limitations applicable to property rights).

28. *See Coates v. Johnson & Johnson,* 756 F.2d 524, 551 (7th Cir. 1985) (affirming the spoliator's defense that the relevant personnel files in a Title VII action were destroyed only after the plant manager consulted with the EEOC/Affirmative Action coordinator regarding which files needed to be maintained in light of the pending action).

29. "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." FED. R. CIV. P. 26(b)(1).

30. *White v. Office of the Public Defender for the State of Maryland,* 170 F.R.D. 138, 148 (D. Md. 1997).

31. *See id.*

32. *Smith v. Howard Johnson Co.,* 615 N.E.2d 1037, 1038 (Ohio 1993) (recognizing both the intentional tort of spoliation and the negligent tort of spoliation).

33. *Sweet v. Sisters of Providence in Washington,* 895 P.2d 484, 492 (Alaska 1995) (declining to recognize the negligent tort of spoliation); *Hazen v. Municipality of Anchorage,* 718 P.2d 456, 463 (Alaska 1986) (recognizing the intentional tort of spoliation).

34. *Hirsch v. General Motors Corp.,* 628 A.2d 1108, 1115 (N.J. Super Ct. Law Div. 1993); *Viviano v. CBS, Inc.,* 597 A.2d 543, 549-550 (N.J. Super. Ct. App. Div. 1991), *cert. denied,* 606 A.2d 375 (N.J. 1992).

35. *Coleman v. Eddy Potash, Inc.,* 905 P.2d 185, 189-91 (N.M. 1995) (recognizing the intentional tort of spoliation and declining to recognize the negligent tort of spoliation as a separate tort).

36. *Chidichimo v. University of Chicago Press,* 681 N.E.2d 107, 110 (Ill. App. Ct. 1997); *Boyd v. Travelers' Ins. Co.,* 652 N.E.2d 267, 270 (Ill. 1995); *Anthony v. Security Pac. Fin. Servs.*

Inc., 75 F.3d 311, 317 (7th Cir. 1996).

37. *Sponco Mfg., Inc. v. Alcover,* 656 So.2d 629, 630 n.1 (Fla. Dist. Ct. App. 1995), *rev. dism'd,* 679 So.2d. 771 (Fla. 1996); *Continental Ins. Co. v. Herman,* 576 So.2d 313, 315 (Fla. Dist. Ct. App. 1990), *rev. denied,* 598 So.2d 76 (Fla. 1991).

38. *Holmes*, 718 A.2d at 847.

39. *Christian v. Kenneth Chandler Constr. Co.,* 658 So.2d 408, 413 (Ala. 1995).

40. *La Raia v. Superior Court in and for Maricopa County,* 722 P.2d 286, 290 (Ariz. 1986); *Dunlap v. City of Phoenix,* 817 P.2d 8, 12 n.4 (Ariz. Ct. App. 1990).

41. *Wilson v. Beloit Corp.,* 921 F.2d 765, 767-68 (8th Cir. 1990) (applying Arkansas law).

42. *Cedars-Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511, 521 (Cal. 1998).

43. *Moore v. United States Dep't of Agric. Forest Serv.,* 864 F. Supp. 163, 164 (D. Colo. 1994).

44. *Lucas v. Christiana Skating Ctr., Ltd.,* 722 A.2d 1247, 1250 (Del. Super. Ct. 1998).

45. *Gardner v. Blackston,* 365 S.E.2d 545, 546 (Ga. Ct. App. 1988).

46. *Murray v. Farmers Ins. Co.,* 796 P.2d 101, 107 (Idaho 1990).

47. *Levinson v. Citizen's Nat'l Bank of Evansville,* 644 N.E.2d 1264, 1268 (Ind. Ct. App. 1994); *Murphy,* 580 N.E.2d at 690.

48. *Meyn v. State*, 594 N.W.2d 31, 33 (Iowa 1999).

49. *Monsanto Co. v. Reed*, 950 S.W.2d 811, 815 (Ky. 1997).

50. *Edwards v. Louisville Ladder Co.*, 796 F. Supp. 966, 971 (W.D. La. 1992).

51. *Miller v. Montgomery County,* 494 A.2d 761, 767-68 (Md. Ct. Spec. App.), *cert. denied,* 498 A.2d 1185 (1985).

52. *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.,* 456 N.W.2d 434, 436 (Minn. 1990)

53. *Brown v. Hamid,* 856 S.W.2d 51, 56-57 (Mo. 1993); *Baugher v. Gates Rubber Co.,* 863 S.W.2d 905, 910 (Mo. Ct. App. 1993).

54. *Weigl v. Quincy Specialties,* 601 N.Y.S.2d 774, 776 (1993).

55. *Olson v. Grutza,* 631 A.2d 191, 195 (Pa. Super. 1993).

56. *Trevino v. Ortega,* 966 S.W.2d 950, 951 (Tex. 1998).

57. *See, e.g., Bush v. Thomas,* 888 P.2d 936, 939 (N.M. Ct. App. 1994); *Brown v. Hamid,* 856 S.W.2d 51, 56-57 (Mo. 1993); *Murphy v. Target Prods.,* 580 N.E.2d 687, 690 (Ind. Ct. App. 1991); *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.,* 456 N.W.2d 434, 436 (Minn. 1990).

58. *See infra* § 5.b. for a discussion of factors to consider in seeking the most effective remedy.

59. Rule 37(b) states that if a party fails to obey an order entered under Rule 26(f), the court may make orders including, but not limited to: (A) an order that the matters shall be taken to be established; (B) an exclusionary order; (C) an order striking the pleadings, defaulting, or dismissing the action; and (D) an order of contempt of court. *See* FED. R. CIV. P. 37(b)(2).

60. *See id.*

61. *Turner v. Hudson Transit Lines, Inc.,* 142 F.R.D. 68, 72 (S.D.N.Y. 1991).

62. *Id.*

63. *Chambers v. NASCO, Inc.,* 501 U.S. 32, 42 n.8 (1991) (noting that courts can invoke their inherent powers to sanction for discovery abuses even though Rule 37 authorizes sanctions for the same conduct); *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 764-67 (1980); *Barnhill v. United States,* 11 F.3d 1360, 1367 (7th Cir. 1993).

64. *See Gates Rubber Co. v. Bando Chem. Indus., Ltd.,* 167 F.R.D. 90, 107 (D. Colo. 1996); *Telectron, Inc. v. Overhead Door Corp.,* 116 F.R.D. 107, 126 (S.D. Fla. 1987).

65. *Gates Rubber Co.,* 116 F.R.D. at 107.

66. *Id.*

67. *See* FED. R. CIV. P. 26(b), 26(d), and 37(b).

68. *Glover v. Bic Corp.,* 6 F.3d 1318, 1329 (9th Cir. 1993).

69. *Schmid v. Milwaukee Elec. Tool Corp.,* 13 F.3d 76, 79 (3d Cir. 1994) (summarizing the key considerations in determining the appropriate spoliation sanction). Judge Politan poetically describes the relevant factors:

The Court, however, must now be objective
Because sanctions imposed are always elective
As a judicial measure they're not taken lightly --
Imposed only sparingly, fairly and rightly.
In the instant case the horse has not bolted;
The status quo has merely been jolted. . . .
The lawyers have failed to brief the concern
As to what, if anything, the jury might learn . . .
Was this spoliation? Or a calculated ruse
Designed to obstruct, to mislead, and confuse
The Court and the jury in their search for what's true?
Or was it maybe an innocent simple snafu?

Joe Hand Promotions v. Sports Page Café, Inc., 940 F. Supp. 102 (D.N.J. 1996).

70. *Shaffer v. RWP Group, Inc.,* 169 F.R.D. 19, 24 (E.D.N.Y. 1996); *Turner,* 142 F.R.D. at 72-73.

71. *ABC Home Health Servs. v. Int'l Bus. Machs. Corp.,* 158 F.R.D. 180, 182 (S.D. Ga. 1994).

72. *See Bouzo v. Citibank, N.A.,* 96 F.3d 51, 60 (2d Cir. 1996) (affirming the allowance of an adverse inference in a suit to enforce a letter of credit); *Century ML-Cable Corp. v. Carrillo*, 43 F. Supp.2d 176, 182-83 (D. Puerto Rico 1998) (entering default judgment against defendant for willfully destroying critical evidence in violation of court order).

73. *See Computer Assocs. Int'l, Inc. v. American Fundware, Inc.,* 133 F.R.D. 166, 169 (D. Colo. 1990) (refusing to excuse defendant's destruction of historical electronic data even assuming the maintenance of only the most updated version of the requested data was a bona fide business practice).

74. *White v. Office of the Public Defender for the State of Maryland,* 170 F.R.D. 138, 151 (D. Md. 1997).

75. *Id.*

76. *Id.* (quoting JAMIE S. GORELICK, ET AL., DESTRUCTION OF EVIDENCE § 316 (1989)).

77. *In re Prudential Ins. Co. Sales Practices Litig.,* 169 F.R.D. 598, 616 (D.N.J. 1997).

78. *Gates Rubber Co. v. Bando Chem. Indus., Ltd.,* 167 F.R.D. 90, 106 (D. Colo. 1996).

79. *Id.*

80. *See infra* § 5.c.iii. and Exhibit "C" for a sample motion for sanctions. Judge Politan poetically describes the available remedies:

> *So now come defendants with their formal epistle*
> *Seeking several sanctions, including dismissal;*
> *Or, alternatively, they ask for a jury instruction*
> *Adversely inferring intended destruction*
> *Of relevant evidence; or else that the Court*
> *Preclude any mention of the [spoliated] report;*
> *And, finally, they ask -- along with preclusion --*
> *That monetary fines be imposed in profusion. . . .*

Joe Hand Promotions v. Sports Page Café, Inc., 940 F. Supp. 102 (D.N.J. 1996).

81. *See infra* § 5.c.iv. and Exhibit "D" for a sample Proposed Preliminary Instruction on Spoliation of Evidence.

82. *White v. Office of the Public Defender for the State of Maryland,* 170 F.R.D. 138, 150 n.9 (D. Md. 1997).

83. Randi D. Bandman & Jay M. Du Nesme, *Recent Developments in the Area of Spoliation of Evidence,* SC01 ALI-ABA 463, ALI-ABA Resource Materials (July 1997).

84. *Id.*

85. *Id.*

86. *See supra* § 3.b.iii for a discussion of the different manifestations of prejudice.

87. *Turner v. Hudson Transit Lines, Inc.,* 142 F.R.D. 68, 75 (S.D.N.Y. 1991).

88. *Id.*

89. *See Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Co.,* 982 F.2d 363, 368 (9th Cir. 1992).

90. *In re Prudential Ins. Co. Sales Practices Litig.,* 169 F.R.D. 598, 617 (D.N.J. 1997).

91. *Nat'l Assoc. of Radiation Survivors v. Turnage,* 115 F.R.D. 543, 558-59 (N.D. Cal. 1987) (reimbursing plaintiffs for all fees and costs incurred in depositions, discovery , preparation, the hearing, and other matters related to bringing the motion for sanctions; for all fees and costs incurred in ascertaining the documents destroyed during the defendant's purge and in reconstructing them; and for all fees and costs incurred as a result of defendant's failure to produce documents and information responsive to various discovery requests and supplemental

requests).

92. *Id.*

93. *See, e.g., Computer Assocs. Int'l, Inc. v. American Fundware, Inc.,* 133 F.R.D. 166, 168 (D. Colo. 1990); *Wm. T. Thompson Co. v. General Nutrition Corp.,* 593 F. Supp. 1443, 1455 (C.D. Cal. 1984).

94. *Wm. T. Thompson Co.,* 593 F. Supp. at 1456 (citing *Nat'l Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639 (1976)).

95. *Id.*

96. 18 U.S.C. § 1503 (1984).

97. *See, e.g.,* MD. CRIM. CODE ANN. § 27 (1982); MISS. CODE ANN. § 97-9-55 (1973); VT. STAT. ANN. tit. 13, § 3015 (1985).

98. In a race discrimination case, former executives of the defendant company were indicted on charges of obstructing justice when defendant failed to produce at least 1,064 pages of relevant documents and an audiotape revealed the executives discussing the shredding of documents. *See* Allanna Sullivan, *Texaco's Race-Bias Probe Finds 3 Executives Withheld Evidence,* WALL ST. J., July 15, 1997, at B3.

99. In an antitrust suit in the 1970's, one of the attorneys for the defendant company pled guilty to contempt of court when, in response to plaintiff's motion to discover all expert reports, he stated that a damaging report prepared by defendant's expert had been destroyed. *See* Stephen Gillers, *Legal Ethics: Everything a Lawyer Needs to Know and Should Not be Afraid to Ask,* 348 PLI/Lit 175, 180 (April 25, 1988).

100. Model Rule of Professional Conduct 1.2(d); Model Code of Professional Responsibility DR 7-102(A)(7).

101. *See supra* § 3.c.v. for a discussion of criminal penalties for spoliation.

102. Wayne F. Reinke, *Limiting the Scope of Discovery: The Use of Protective Orders and Document Retention Programs in Patent Litigation,* 2 ALB. L.J. SCI. & TECH. 175, 193-94 (1992).

103. Lawrence B. Solum & Stephen J. Marzen, *Destruction of Evidence,* 16 No. 1 Litigation 11, 15, 64-65 (Fall 1989).

104. *Id.*

105. *Id.*

106. *Boyd,* 652 N.E.2d at 272.

107. *Alliance Gen. Ins. Co. v. Thompson*, 127 F.3d 1104 (9th Cir. 1997).

108. *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.,* 456 N.W.2d 434, 439 (Minn. 1990); *Bondu v. Gurvich,* 473 So.2d 1307, 1311 (Fla. Dist. Ct. App. 1984).

109. *Foster v. Lawrence Mem. Hosp.,* 809 F. Supp. 831, 838-839 (D. Kan. 1992).

110. *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.,* 456 N.W.2d 434, 438 (Minn. 1990).

111. *See supra* § 2.b.i.(5) for a discussion of the damages calculation.

112. Paul Gary Kerkorian, *Negligent Spoliation of Evidence: Skirting the "Suit Within a Suit" Requirement of Legal Malpractice Actions,* 41 HAST. L.J. 1077, 1087-88 (April 1990).