St. Mary's Law Journal

Volume 26 | Number 2 Article 4

1-1-1995

The Spoliation Tort: An Approach to Underlying Principles.

Steffen Nolte

ARTICLES

THE SPOLIATION TORT: AN APPROACH TO UNDERLYING PRINCIPLES

STEFFEN NOLTE*

---

* Assistant Professor, Institute of International Law, Munich University (Germany); Ph.D. Candidate, University of Augsburg; J.D., Ludwig-Maximilians University Munich School of Law. This Article was prepared while the author served as a visiting scholar at the University of California at Berkeley. The author thanks Professors Richard Buxbaum and James Gordley for their support and Anna Maria Sala and Jukka Maehoenen for their comments on prior drafts.

I. INTRODUCTION

Destruction or spoliation of evidence[1] in civil litigation has undermined the integrity of the adversary system, thus raising serious public policy concerns. This phenomenon, which emerged in reaction to widespread discovery abuse, represents a means of "stonewalling" otherwise valid discovery methods[2] and frustrates the central purpose of liberal discovery. Litigants have increasingly exploited loopholes in traditional legal remedies to render discoverable evidence permanently unavailable to both the adverse party and the court.[3] To preclude the use of such loopholes, however, courts in seven states have recognized spoliation of evidence as a common-law tort. California first recognized the spoliation cause of action, calling it the tort of "interference with prospective civil litigation by spoliation of evidence" or simply the "tort of spoliation."[4] Subsequent case law suggests a hesitant, yet positive trend in other jurisdictions toward the adoption of this new tort action.[5]

The spoliation inference[6] and court sanctions[7] serve as the traditional procedural remedies to combat spoliation of evidence in civil litigation. Although deterring, compensating, and promoting accurate fact-finding are the avowed purposes of these remedies, such

---

1. The terms "destruction" and "spoliation" of evidence are synonymous and interchangeable. The term "evidence" as used by the courts in the context of spoliation is determined by the scope of Rules 26(a) and (b) of the Federal Rules of Civil Procedure or the comparable state procedural rules. Discoverable materials include all information relevant to the subject matter that need not be admissible at trial, but appear to be reasonably calculated to lead to the discovery of admissible evidence. FED. R. CIV. P. 26(a)-(b).

2. FRANCIS HARE ET AL., CONFIDENTIALITY ORDERS § 5.7, at 82 (1988).

3. JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE § 1.1, at 4 (1988). Note the distinction between concealment or suppression of evidence and spoliation. With concealment or suppression, the evidence may still be produced at trial.

4. Smith v. Superior Court, 198 Cal. Rptr. 829, 832 (Ct. App. 1984).

5. *See* Terry R. Spencer, *Do Not Fold, Spindle or Mutilate: The Trend Towards Recognition of Spoliation as a Separate Tort*, 30 IDAHO L. REV. 37, 39 (1994) (identifying trend toward recognition of spoliation as ground for civil recovery).

6. The common law maxim *omnia praesumuntur contra spoliatorem*, cited in the English landmark decision of *Armory v. Delamirie*, 93 Eng. Rep. 664 (K.B. 1722), is known as the spoliation inference in American common law. Lawrence Solum & Stephen Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1087 n.3 (1987).

7. *See* FED. R. CIV. P. 11, 37(b) (providing for court-ordered sanctions when deponent or party fails to comply with prior court order). The latest amendments to the Federal Rules of Civil Procedure, effective December 1, 1993, altered discovery sanctions for noncompliance and added automatic disclosure requirements. *See* FED. R. CIV. P. 26(a), 37.

remedies fail to adequately confront willful spoliation.[8] Because of the difficulty in uncovering a clandestine spoliation act, a strong incentive still exists to choose spoliation over the procedural and substantive consequences of disclosing sensitive or potentially incriminating information. Although willfully spoliated evidence is generally presumed detrimental to the spoliator's case,[9] producing the incriminating "smoking gun" at trial may increase the spoliator's risk of an adverse verdict. Indeed, if the spoliator destroys the incriminating evidence and is subsequently detected, traditional procedural remedies could lead to the same result.[10] Fur-

---

8. Barker v. Bledsoe, 85 F.R.D. 545, 547–48 (W.D. Okla. 1979); *see also* Dale A. Nance, *Missing Evidence,* 13 CARDOZO L. REV. 831, 862 (1991) (asserting that interest in proper adjudication outweighs suppression of evidence); Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need For Vigorous Judicial Action,* 13 CARDOZO L. REV. 793, 807 (1991) (encouraging change in judicial response to evidence spoliation); Dale A. Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents,* 61 TEX. L. REV. 1185, 1239 (1983) (noting inadequacies of 1983 version of Federal Rule of Civil Procedure 37).

9. *See, e.g.*, Synanon Church v. United States, 820 F.2d 421, 428 (D.C. Cir. 1987) (presuming that willfully destroyed document necessarily prejudiced government's case); Wong v. Swier, 267 F.2d 749, 759–60 (9th Cir. 1959) (restating presumption against despoiler that truth would be conclusively proven by destroyed evidence); Computer Assoc. Int'l, Inc. v. American Fundware, Inc., 133 F.R.D. 166, 170 (D. Colo. 1990) (inferring adverse effect on party who withholds relevant, material evidence); Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 133 (S.D. Fla. 1987) (drawing inference that destroyed documents were relevant); Association of Radiation Survivors v. Turnage, 115 F.R.D. 543, 557 (N.D. Cal. 1987) (mandating strongest possible inferences in favor of aggrieved party); *see also Barker*, 85 F.R.D. at 547–48 (averring that presumption against spoliator is insufficient to protect against such conduct and suggesting specific remedial steps to rectify prejudice caused by negligent or intentional destruction of evidence); Public Health Trust v. Valcin, 507 So. 2d 596, 599–601 (Fla. 1987) (rejecting conclusive presumption against hospital that failed to produce evidence peculiarly within its knowledge in favor of rebuttable presumption); Ramirez v. Otis Elevator Co., 837 S.W.2d 405, 408 (Tex. App.—Dallas 1992, writ denied) (presuming that destroyed evidence was unfavorable to spoliating party).

10. *See, e.g.*, Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change,* 31 VAND. L. REV. 1295, 1326 (1978) (concluding that economic consideration may outweigh timely compliance with discovery mandated by rules of procedure); Dale A. Nance, *Missing Evidence*, 13 CARDOZO L. REV. 831, 862 (1991) (stating that even theoretical winner should not be allowed to suppress evidence because it interferes with tribunal's capacity); Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need For Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 807 (1991) (urging change in judicial attitudes to combat strategic spoliation); Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective,* 67 CAL. L. REV. 264, 278–79 (1979) (averring to lack of incentive to comply with discovery rules when strong economic incentive exists to resist); *see also* Anderson v. Beatrice Foods Co., 900 F.2d 388, 395 (1st Cir.) (refusing to deem concealment of report as fraud on court), *cert. denied*, 498 U.S. 891 (1990); Lafarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334, 1338–39 (9th Cir.

thermore, traditional procedural remedies inadequately deter third-party spoliators.

Remedies provided by rules of legal ethics and criminal laws are similarly insufficient to prevent spoliation. Legal ethics rules contain inadequate sanctions and lack precise definitions of spoliating conduct.[11] Criminal obstruction-of-justice statutes provide only theoretical deterrence, as the absence of case law demonstrates, and frustrate the goal of creating a favorable settlement climate during pretrial discovery.[12] In effect, traditional procedural and nonprocedural remedies are flawed by their limited scope, their inadequate preventive effect, and their failure to provide the victim with just compensation.

This Article discusses the spoliation tort's function as a viable and indispensable instrument that effectively addresses issues surrounding destruction of evidence in civil litigation. Supplementing current procedural remedies, the spoliation tort promotes the policy considerations of accurate fact-finding, compensation, and deterrence. Courts have identified spoliating conduct as injury to a property interest that warrants legal protection. In light of the need for legal protection, this Article examines the spoliation tort's development in jurisdictions addressing the new tort and analyzes the elements of intentional and negligent spoliation. Moreover, this Article advocates adoption of foreseeability of harm to the plaintiff as the governing standard to safeguard liberal discovery. The spoliation tort promotes the compelling public policy of

---

1986) (denying vocation of arbitration award when party failed to allege fraud in newly discovered evidence claim); Dempsey v. Associate Aviation Underwriters, 147 F.R.D. 88, 91 (E.D. Pa. 1993) (denying relief from judgement to party asserting materiality of letter as newly discovered evidence).

11. *See* Note, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665, 1669 (1979) (recognizing ethical problems regarding duty to preserve evidence); Andrea H. Rowse, Comment, *Spoliation: Civil Liability for Destruction of Evidence,* 20 U. RICH. L. REV. 191, 198 (1985) (noting that recognizing spoliation tort would alleviate lawyers' ethical confusion). *See generally* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 12.3.5, at 643–46 (1986) (describing dilemmas lawyers face regarding destruction or suppression of evidence).

12. *See* Dale A. Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1220 (1983) (considering settlement posturing and concluding that criminal suit for destruction of evidence would hinder settlement efforts).

preventing spoliating conduct.[13] By providing comprehensive protection and deterrence against the destruction of evidence, this tort offers the only viable remedy against such discovery abuses.

II. Overview of the Spoliation Tort

A. *Historical Development*

1. The Landmark Decision of *Smith v. Superior Court*

In the 1984 case of *Smith v. Superior Court*,[14] the California Court of Appeal first explicitly recognized the spoliation tort. After an oncoming truck's left wheel became disengaged and impacted plaintiff's vehicle, plaintiff suffered permanent blindness and an impaired sense of smell. Immediately following the accident, the truck was towed to a dealer who had previously customized the truck with special deep-dish mag wheels. The dealer subsequently agreed with plaintiff's attorney to preserve the wheel and any related parts as physical evidence. Plaintiff's technical experts needed this physical evidence for examination and testing. However, the dealer disposed of the evidence knowing that the wheel and the other parts were essential to plaintiff's civil action.[15]

The *Smith* court began its analysis by quoting Prosser and Keeton:

> "New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before. The intentional infliction of mental suffering, . . . the infliction of prenatal injuries, the alienation of the affections of a parent, . . . to name only a few instances, could not be fitted into any accepted classifications when they first arose, but nevertheless have been held to be torts. The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the

13. *See* Youst v. Longo, 729 P.2d 728, 735 (Cal. 1987) (acknowledging rare instances when public policies compel protection of speculative expectancies).

14. 198 Cal. Rptr. 829 (Ct. App. 1984).

15. *Smith*, 198 Cal. Rptr. at 831-32.

> mere fact that the claim is novel will not of itself operate as a bar to a remedy."[16]

The court analogized spoliation to the tort of intentional interference with prospective business advantage by comparing the opportunity to win a lawsuit with a "reasonable probability that a contract or profit would have been obtained."[17] The court concluded that a potential products liability case is a valuable probable expectancy justifying legal protection from interference.[18] According to the court, because a "large part of what is most valuable in modern life depends upon 'probable expectancies,' [and] as social and industrial life becomes more complex, the courts must do more to discover, define and protect them from undue interference."[19] *Smith* is now considered the landmark case for the tort of intentional spoliation.[20]

2. Case Law Prior to *Smith*

Although the *Smith* decision illustrates the California courts' progressive and innovative nature,[21] tort liability for destruction of evidence was not a novel concept. Common-law courts faced the issue of destruction of evidence in civil litigation as early as 1722.[22] Instead of instituting tort liability, however, early common-law courts adopted the spoliation inference as a procedural remedy. The spoliation inference allows the jury to draw negative inferences from spoliating conduct.[23]

---

16. *Id.* at 832 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 3-4 (4th ed. (1971)).

17. *Id.* at 836–37.

18. *Id.* at 837.

19. *Smith*, 198 Cal. Rptr. at 836 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 130, at 950 (4th ed. 1971)).

20. *See* Anthony C. Casamassina, Comment, *Spoliation of Evidence and Medical Malpractice*, 14 PACE L. REV. 235, 245 (1994) (noting that *Smith* established tort of spoliation of evidence).

21. John F. Medler, Jr., *Spoliation of Evidence in Civil Cases: What to Do When the Other Side Destroys Your Evidence*, ST. LOUIS B.J., Summer 1992, at 14, 18; Robert W. Thompson, *To the Prevailing Party Goes the Spoils: An Overview of an Emerging Tort in California,* 18 W. ST. U. L. REV. 223, 223 (1990).

22. *See* Armory v. Delamirie, 93 Eng. Rep. 664, 664 (K.B. 1722) (describing court's admonishment that failing to produce jewel allegedly disposed of prior to trial infers its superior quality).

23. Lawrence Solum & Stephen Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1087 (1987).

While an unreported 1834 decision addressed a tort action's ability to deter destruction of wills,[24] courts generally refused to extend the spoliation tort's scope to include other documents or physical evidence. In 1895, the California Supreme Court described spoliation of wills as a "tortious act";[25] nevertheless, ninety years passed before the *Smith* court recognized the spoliation tort as an independent action.[26] During this period, various courts considered the possibility of creating a spoliation tort. In the 1959 decision of *Agnew v. Parks*,[27] the court addressed whether a criminal law code gave rise to a spoliation cause of action. Moreover, in *Pirocchi v. Liberty Mutual Insurance Co.*[28] and *Parker v. Thyssen Mining Construction, Inc.*,[29] the courts held that a person who voluntarily assumes control of evidence also assumes a duty of reasonable preservation. Because of either missing facts or procedural sidestepping, however, all three decisions failed to establish a cause of action for spoliation.[30] Furthermore, in *Fox v. Cohen*,[31] the Illinois Appellate Court considered the imposition of tort liability for breach of a statutory record-retention duty, but dismissed the case because of the uncertainty of damages.[32] Finally, in *Williams v. State*,[33] the California Supreme Court considered, but rejected, the plaintiff's argument that a highway patrolman investigating a traffic accident owes a duty to preserve evidence.[34]

Although these cases show that the idea of tort liability for spoliation of evidence in civil litigation existed prior to *Smith*, that deci-

---

24. Harris v. Harris, 26 N.Y. 433, 437–38 (1863); *see* Heirs of Adams v. Adams, 22 Vt. 15, 18 (1849) (referring to unreported 1834 case of *Mead v. Heirs of Langdon*); *see also* Estate of Legeas v. Connolly, 256 Cal. Rptr. 117, 119–20 (Ct. App. 1989) (providing survey of respective case law).

25. Fox v. Hale & Norcross Silver Mining Co., 41 P. 308, 322 (Cal. 1895).

26. *See Smith*, 198 Cal. Rptr. at 836–37 (creating cause of action for spoliation in 1984).

27. 343 P.2d 118 (Cal. Dist. Ct. App. 1959).

28. 365 F. Supp. 277 (E.D. Pa. 1973).

29. 428 So. 2d 615 (Ala. 1983).

30. *See Pirocchi*, 365 F. Supp. at 281–82 (refusing to create spoliation tort based on affidavits and depositions presented to court); *Parker*, 428 So. 2d at 628 (declining to establish cause of action based on facts presented); *Agnew*, 343 P.2d at 124 (finding that plaintiff failed to state cause of action despite five attempts to amend pleadings).

31. 406 N.E.2d 178 (Ill. App. Ct. 1980).

32. *Fox*, 406 N.E.2d at 179–83.

33. 664 P.2d 137 (Cal. 1983).

34. *Williams*, 664 P.2d at 142–43.

sion referred only to *Williams*.[35] By failing to address precedent, the *Smith* court created the misconception that the spoliation tort was a radical judicial innovation. Nevertheless, *Smith* became the landmark case for this tort action.

3. Current Trends

Of the twenty-three jurisdictions that have addressed spoliation as an independent tort, seven have judicially accepted it. Other jurisdictions have recognized the spoliation tort, but have refused to explicitly adopt it for various reasons, including the availability of alternative remedies, factual insufficiencies, deficiencies in proximate causation, the speculative nature of damages, and the absence of an identifiable duty. The remaining jurisdictions have expressly declined to adopt this cause of action. The Appendices to this Article detail the assorted positions of the states that have addressed the spoliation tort.

Because adequate time must pass before a majority of jurisdictions recognize an emerging tort,[36] the spoliation tort has only begun to penetrate the legal landscape. Although spoliation recently emerged as a common-law tort action, it has already affected legal practice outside courtrooms by triggering settlements based upon potential tort liability, even in jurisdictions that have not yet addressed the tort.[37] The court decisions that have avoided deciding whether to recognize the spoliation tort provide some indication that those jurisdictions might recognize the tort in the future.[38]

---

35. *See Smith*, 198 Cal. Rptr. at 833 (noting that *Williams* paved way for negligent spoliation cause of action).

36. For example, although almost all states have recognized the tort of intentional interference with contractual rights, the Louisiana Supreme Court has only recently adopted this tort. *See* 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228, 232 (La. 1989) (holding that, when corporate officer's actions exceed authority or injure corporation, "the officer should be responsible for his intentional acts of interference with the contract rights of another").

37. *See* Taylor v. Ford Motor Co., 408 S.E.2d 270, 271 (W. Va. 1991) (noting that suit in third-party spoliation case against spoliating insurance carrier originally settled for $980,000).

38. *See* Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177, 1178–83 (Kan. 1987) (examining other states' interpretations of spoliation of evidence, yet refusing to apply concept to instant case because court found no duty or special relationship between parties). *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 3, at 19 (5th ed. 1984) (stating that "[d]evotion to precedent is one thing; distrust of new ideas is quite another, . . . which has made [the law] change slowly").

B. *Nature of the Tort*

The spoliation tort is an interference tort, defined as intentional or negligent interference with a prospective civil action by destruction of evidence.[39] The tort promotes the right to prevail in a lawsuit—an interest worthy of protection.[40] In *Smith v. Superior Court*,[41] the California Court of Appeal analogized intentional spoliation to the tort of intentional interference with prospective business advantage.[42] One year later, in *Velasco v. Commercial Building Maintenance Co.*[43] that court extended the protection of the right to prevail to encompass negligent interference. The court compared the negligent spoliation tort to the tort of negligent interference with prospective economic advantage as explicated in another California case, *J'Aire Corp. v. Gregory*.[44]

Controversy exists regarding whether interference with the right to prevail in a lawsuit infringes on a personal or property interest. In *Coca-Cola Bottling Co. v. Superior Court*,[45] the California Court of Appeal ruled that spoliation interferes with a prospective economic advantage because the spoliation victim stands to gain if the civil action against a third party or an opposing party can be

---

39. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 130, at 140-41 (5th ed. Supp. 1988) (noting courts' recognition of spoliation as another noncommercial expectancy deserving protection).

40. *See* Coca-Cola Bottling Co. v. Superior Court, 286 Cal. Rptr. 855, 864 (Ct. App. 1991) (noting that damages are in nature of irreparable disruption of third-party action); Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434, 439 (Minn. 1990) (finding that destruction of evidence disregards judicial procedures and offends notions of fair play); *see also* James F. Thompson, Comment, *Spoliation of Evidence: A Troubling New Tort*, 37 U. KAN. L. REV. 563, 565 (1989) (recognizing willingness by some commentators to embrace spoliation tort because other means proved insufficient to deter destruction of damaging or embarrassing evidence).

41. 198 Cal. Rptr. 829 (Ct. App. 1984).

42. *See Smith*, 198 Cal. Rptr. at 836 (finding these torts to be closely analogous). A decade prior to *Smith*, the California Supreme Court established the tort of intentional interference with prospective business advantage. *See* Buckaloo v. Johnson, 537 P.2d 865, 872 (Cal. 1975) (finding free competition as most significant justification for tort of interference with prospective advantage). Almost all jurisdictions have since recognized this tort. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 130, at 1005-08 (5th ed. 1984) (recognizing tort's history and noting existence of formidable body of case law).

43. 215 Cal. Rptr. 504 (Ct. App. 1985).

44. 598 P.2d 60 (Cal. 1979).

45. 286 Cal. Rptr. 855 (Ct. App. 1991).

proved.[46] Thus, spoliation of evidence in civil litigation constitutes an injury to a property interest.[47]

C. *Elements*

While some jurisdictions have adopted both the intentional and negligent forms of the spoliation tort, others have chosen one form or the other.[48] The elements of each are discussed below.

1. Intentional Spoliation

Although the *Smith* decision created the tort of intentional spoliation of evidence, another California case, *County of Solano v. Delancy*,[49] first explicitly outlined this tort's elements.[50] The elements of the tort of intentional spoliation are: (1) pending or probable litigation involving the plaintiff; (2) knowledge by the defendant of the existence or likelihood of the litigation; (3) intentional acts of spoliation by the defendant designed to disrupt the plaintiff's case; (4) disruption of the plaintiff's case; and (5) damages proximately caused by the defendant's acts.[51]

Jurisdictions recognizing the intentional spoliation tort have adopted these elements.[52] For example, utilizing the destruction-of-evidence elements enumerated in *Delancy*, the New Jersey Superior Court affirmed an appellate court's creation of the tort of

---

46. *See Coca-Cola Bottling Co.*, 286 Cal. Rptr. at 863 (differentiating between injury to person and injury to person's property interests).

47. *Id.* at 864; *see also* Augusta v. United Serv. Auto. Ass'n, 16 Cal. Rptr. 2d 400, 404 (Ct. App. 1993) (reiterating that spoliation cause of action involves injury to property interest); Jablonski v. Royal Globe Ins. Co., 251 Cal. Rptr. 160, 168–69 (Ct. App. 1988) (discussing injury that results from inability to present relevant evidence because of its destruction).

48. *See* Velasco v. Commercial Bldg. Maintenance Co., 215 Cal. Rptr. 504, 506 (Ct. App. 1985) (establishing tort of negligent spoliation); Smith v. Superior Court, 198 Cal. Rptr. 829, 837 (Ct. App. 1984) (creating tort of intentional spoliation). *Compare* Bondu v. Gurvich, 473 So. 2d 1307, 1312–13 (Fla. Dist. Ct. App. 1985) (adopting negligent spoliation tort) *with* Hazen v. Municipality of Anchorage, 718 P.2d 456, 464 (Alaska 1986) (recognizing intentional spoliation tort).

49. 264 Cal. Rptr. 721 (Ct. App. 1989).

50. However, because of a depublication order by the California Supreme Court, *Delancy* has no binding precedential value. *See infra* notes 60-61 and accompanying text.

51. *Delancy*, 264 Cal. Rptr. at 729.

52. *See Hazen*, 718 P.2d at 463–64 (accepting *Smith*'s analysis as persuasive); Smith v. Howard Johnson Co., 615 N.E.2d 1037, 1038 (Ohio 1993) (establishing elements for willful destruction of evidence).

willful concealment of evidence.[53] These elements apply to adverse parties and independent third-party spoliators when the spoliating party would benefit from destroying evidence. In addition to *Delancy*'s elements, the Kansas Supreme Court requires a specific duty to preserve evidence for intentional spoliation by a third party.[54]

2. Negligent Spoliation

In the 1985 decision of *Velasco v. Commercial Building Maintenance Co.*,[55] the California Court of Appeal established the tort of negligent spoliation. In *Velasco*, the plaintiff sustained personal injuries from an exploding bottle. The plaintiff took the remnants of the bottle to his attorney, who placed the fragments in a paper bag on top of his desk. After the building's janitorial service cleaned the office, the bag disappeared. The plaintiff alleged that the maintenance company was responsible for the loss of the evidence because its agents had carelessly disposed of the paper bag.[56] Analogizing the tort of negligent spoliation to the tort of negligent interference with prospective economic advantage, the court stated that "for the reasons described in *Smith v. Superior Court* and *Williams* we hold that a cause of action may be stated for negligent destruction of evidence needed for prospective civil litigation."[57] Florida followed suit a few months later.[58]

Four years later, in *Delancy*, the California Court of Appeal provided the first precise definition of the elements of negligent spoli-

---

53. *See* Hirsch v. General Motors Corp., 628 A.2d 1108, 1125 (N.J. Super. Ct. App. Div. 1993) (declaring that intentional concealment constitutes cause of action). The *Hirsch* court listed the elements of the analogous tort of fraudulent concealment of evidence as: (1) a legal obligation to disclose evidence to the plaintiff; (2) materiality of the evidence to the plaintiff's case; (3) inability of the plaintiff to readily learn of the concealed information without defendant's disclosure; (4) intentional nondisclosure by the defendant; and (5) the nondisclosure proximately caused damages to the plaintiff. *Id.* The court noted that the first element "corresponds to the first two enumerated elements espoused in *Count of Solano v. Delancy*." *Id.*

54. *See* Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177, 1181–82 (Kan. 1987) (noting that, absent duty to preserve evidence, defendant enjoys absolute right to preserve or destroy own property).

55. 215 Cal. Rptr. 504 (Ct. App. 1985).

56. *Velasco*, 215 Cal. Rptr. at 505.

57. *See id.* at 506.

58. *See Bondu*, 473 So. 2d at 1312–13 (accepting negligent spoliation as new cause of action).

ation.[59] This decision developed a unique legal history of its own. When the Supreme Court of California declined review, it ordered the case to be "not officially published," thereby preventing its use as citable precedent for California courts.[60] Because of the depublication order, California was left without an authoritative determination of the elements of the negligent spoliation tort other than those provided, somewhat loosely, in *Williams v. State*[61] and *Velasco*.

---

59. *See Delancy*, 264 Cal. Rptr. at 729 (promulgating specific elements of negligent spoliation claim).

60. *See* County of Solano v. Delancy, No. S013565, 1990 Cal. LEXIS 488, at *1 (Cal. Feb. 1, 1990) (ordering that opinion be "not officially published"). California Rule of Court 977(a) provides that an unpublished opinion "shall not be cited or relied on by a court or a party in any other action or proceeding." CAL. R. CT. 977(a) (1994). The California Supreme Court orders some 100 opinions to be depublished annually, exceeding the number of cases the California Supreme Court decides each year by written opinion. *See* Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 LOY. L.A. L. REV. 1033, 1035 (1993). Thus, depublication is a major tool used by the California Supreme Court to shape California law. Some commentators question the constitutionality and efficiency of depublication. *See id.* at 1037–42 (describing constitutional ramifications of depublication as overstepping judicial power). In a recent decision, the California Supreme Court acknowledged a pertinent court rule on the effects of a depublication order and stated that such orders "shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion." People v. Saunders, 853 P.2d 1093, 1098 n.8 (Cal. 1993), *cert. denied*, 114 S. Ct. 1101 (1994). A dispute exists concerning whether a depublication order sends positive or negative messages regarding the weight given to the appellate court's ruling, and this latest decision provides no additional guidance. *See* Stephen R. Barnett, *Depublication Deflated—The California Supreme Court Punctures Its own Balloon,* S.F. DAILY J., Nov. 10, 1993, at 4 (concluding that California Supreme Court restricted depublication to narrow rationale espoused in Rule 979(e)). *Compare* Robert W. Thompson, *To the Prevailing Party Goes the Spoils: An Overview of an Emerging Tort in California*, 18 W. ST. U. L. REV. 223, 241–42 (1990) (noting that California Supreme Court, while ordering *Delancy* depublished, apparently approved of result) *with* Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 CAL. L. REV. 514, 514–15 (1984) (declaring that courts issue depublication orders because appellate court opinion is significantly wrong or misleading in some respect). As a consequence, California courts may render similar decisions based on the same reasoning and may even reach the identical conclusion as *Delancy*, but may not give precedential weight to the depublished opinion. *See* Stephen R. Barnett, *Depublication Deflating: The California Supreme Court's Wonderful Law-Making Machine Begins to Self-Destruct*, 45 HASTINGS L.J. 519, 544 (1994) (asserting that depublication order merely has negative effect of making decision uncitable as precedent).

61. 664 P.2d 137 (Cal. Ct. App. 1983).

In 1991, the Florida District Court of Appeal defined the elements of negligent spoliation in *Continental Insurance Co. v. Herman*.[62] The court stated:

> [W]e hold now that the elements of a cause of action for negligent destruction of evidence are: (1) existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and (6) damages.[63]

Jurisdictions that recognize the negligent spoliation tort employ the same rationale used by the Florida court.[64] Courts that reject this tort apply the Florida criteria when discussing whether the facts of a particular case would justify the recognition of the tort of negligent spoliation.[65]

Other than California and Florida, only Illinois[66] and Kansas[67] have adopted a tort action for negligent spoliation of evidence. Although the Kansas Supreme Court, in *Koplin v. Rosel Well Perforators*,[68] deferred recognizing the negligent spoliation tort "for another day," a Kansas federal district court embraced the negligent spoliation tort action.[69]

---

62. 576 So. 2d 313 (Fla. Dist. Ct. App. 1991).

63. *Continental Ins. Co.*, 576 So. 2d at 315.

64. *See, e.g.*, Foster v. Lawrence Memorial Hosp., 809 F. Supp. 831, 837–39 (D. Kan. 1992) (concluding that Kansas courts would recognize spoliation of evidence action given proper fact scenario); Augusta v. United Serv. Auto. Ass'n, 16 Cal. Rptr. 2d 400, 404 (Ct. App. 1993) (noting analogy of spoliation tort to action for interference with prospective economic advantage); Coca-Cola Bottling Co. v. Superior Court, 286 Cal. Rptr. 855, 861 (Ct. App. 1991) (acknowledging separate and distinct nature of spoliation tort relative to action for physical injury); Rodgers v. St. Mary's Hosp., 597 N.E.2d 616, 619–20 (Ill. 1992) (finding that private cause of action exists based on statutory duty for hospital to maintain X-rays for minimum of five years or for indefinite period if notified of impending litigation).

65. *See, e.g.*, Olson v. Grutza, 631 A.2d 191, 195 (Pa. Super. Ct. 1993) (acknowledging elements of spoliation cause of action established in *Continental Insurance Co.*, but holding that plaintiffs' claim failed to satisfy Pennsylvania joinder rule).

66. *See Rodgers*, 597 N.E.2d at 622 (applying negligence criteria to loss or destruction of evidence when duty to preserve evidence is clearly established).

67. *See Foster*, 809 F. Supp. at 837-39 (denying summary judgment on supposition that Kansas Supreme Court would consider negligent spoliation tort under appropriate facts).

68. 734 P.2d 1177 (Kan. 1987).

69. *Foster*, 809 F. Supp. at 838.

III. The Duty to Preserve Evidence

Most courts that have addressed, but not adopted, the spoliation tort have confronted the question of negligent rather than intentional spoliation.[70] These courts stopped short of creating the new tort, basing their decisions on the absence of elements required in any tort action, such as injury, certainty of damages, or proximate causation. Other courts have refused to recognize the tort because of insufficient facts.[71] The duty to preserve evidence, however, has become the most frequent stumbling block to the creation of the tort of negligent spoliation.[72] As the central and most decisive ele-

---

70. *See, e.g.*, Wilson v. Beloit Corp., 921 F.2d 765, 767 (8th Cir. 1990) (refusing to find either statutory or common-law duty to preserve evidence in Arkansas); Quinones v. United States, 492 F.2d 1269, 1276–77 (3d Cir. 1974) (distinguishing negligent failure to maintain employment records from elements of libel and slander to determine employer's duty to preserve records in Pennsylvania); Edwards v. Louisville Ladder Co., 796 F. Supp. 966, 967–72 (W.D. La. 1992) (discussing elements necessary for negligence action and failing to find existence of duty to support negligent spoliation); Pirocchi v. Liberty Mut. Ins. Co., 365 F. Supp. 277, 281–82 (E.D. Pa. 1973) (reviewing summary judgment motion under microscope of traditional negligence elements); Murphy v. Target Prod., 580 N.E.2d 687, 688–90 (Ind. Ct. App. 1991) (examining facts in context of traditional negligence elements and finding that no independent duty to preserve evidence exists); Panich v. Iron Wood Prods. Corp., 445 N.W.2d 795, 797 (Mich. Ct. App. 1989) (finding no common-law duty owed by employer to employee to preserve evidence); Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434, 436 (Minn. 1990) (refusing to create separate tort for spoliation of evidence and stating that ordinary negligence action would provide adequate redress); Brown v. Hamid, 856 S.W.2d 51, 57 (Mo. 1993) (en banc) (declining recognition of negligent maintenance of medical records when plaintiff fails to show nexus between missing records and losing her malpractice action); Weigl v. Quincy Specialties Co., 601 N.Y.S.2d 774, 776–77 (Sup. Ct. 1993) (disallowing action for spoliation of evidence, but affirming New York's recognition of action against employer for negligently or intentionally impairing employee's right to sue third-party tortfeasor); Pharr v. Cortese, 559 N.Y.S.2d 780, 782 (Sup. Ct. 1990) (withholding recognition of spoliation action based on failure to show injury); *Olson*, 631 A.2d at 193 (denying permission to join additional defendants in spoliation action, but recognizing elements of cause of action as delineated in *Continental Insurance Co.*).

71. *See, e.g.*, Unigard Sec. Ins. Co. v. Lakewood Eng. & Mfg. Corp., 982 F.2d 363, 370–71 (9th Cir. 1992) (asserting that facts did not necessitate consideration of new tort); Crosby v. Cable Network News, Inc., No. 88-0903, 1990 U.S. Dist. LEXIS 3401, *11 (D.D.C. Mar. 29, 1990) (refusing to recognize new tort because of lack of duty between parties); Gardner v. Blackstone, 365 S.E.2d 545, 546 (Ga. Ct. App. 1989) (finding no evidence of spoliation); *Pharr*, 559 N.Y.S.2d at 782 (rejecting plaintiff's claim since injury was not proved); Diehl v. Rocky Mountain Communications, Inc., 818 S.W.2d 183, 184 (Tex. App.—Corpus Christi 1991, writ denied) (finding that claimant did not allege facts that would show viable cause of action).

72. *See Wilson*, 921 F.2d at 767 (refusing to impose duty on employer to preserve parts of machine that injured worker); *Edwards*, 796 F. Supp. at 971 (asserting that Louisiana law requires existence of special relationship before imposing duty); Koplin v. Rosel Well

ment,[73] the duty to preserve evidence raises several troubling questions: *What* constitutes a duty to preserve evidence? *Who* owes this duty? *When* does this duty attach?

The relationship between the individuals involved determines what constitutes a duty to preserve evidence. The common law has developed the concept of relative duty, which requires a specific relationship between plaintiff and defendant.[74] Because "negligence in the air" does not trigger tort liability, the defendant must be under an obligation that benefits the particular plaintiff.[75] In other words, a duty arises only when the plaintiff is entitled to legal protection from the defendant's conduct.[76] To identify a novel duty, however, courts must always consider the changing nature of the tort.[77]

In *Continental Insurance Co. v. Herman,*[78] the Florida District Court of Appeal utilized contractual and legal duties to identify a duty to preserve evidence.[79] While a contractual duty to preserve evidence is easily discerned in most cases, legal duties are usually more difficult to ascertain. Legal duties are derived from many dif-

---

Perforators, Inc., 734 P.2d 1177, 1179 (Kan. 1987) (holding that special relationship creates duty to preserve evidence); *Murphy*, 580 N.E.2d at 690 (recognizing that no common-law duty exists requiring employer to preserve potential evidence in employee's possible third-party action); *Panich*, 445 N.W.2d at 799–801 (Murphy, J., dissenting) (examining whether duty to preserve evidence exists in employment context); *Brown*, 856 S.W.2d at 57 (emphasizing that Missouri law does not impose duty on physician to maintain medical records); *Diehl*, 818 S.W.2d at 184 (arguing that plaintiff failed to demonstrate duty owed by employer).

73. *See* Favaloro v. S/S Golden Gate, 687 F. Supp. 475, 480–81 (N.D. Cal. 1987) (rejecting spoliation claim because tanker, which sunk fishing boat, owed no duty to preserve evidence for subsequent Coast Guard investigation); Reid v. State Farm Mut. Auto. Ins Co., 218 Cal. Rptr. 913, 918 (Ct. App. 1985) (reviewing whether insurance company owed duty to preserve automobile involved in collision); Velasco v. Commercial Bldg. Maintenance Co., 215 Cal. Rptr. 504, 506 (Ct. App. 1985) (asserting that reasonable maintenance employee would not believe that disposing of broken bottle was destroying evidence).

74. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 357 (5th ed. 1984) (noting confusion produced by concept of relative duty).

75. FREDERICK POLLOCK, THE LAW OF TORTS 468 (13th ed. 1929).

76. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 357 (5th ed. 1984). *See generally* Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1026–35 (1928) (discussing factors judges use to determine existence of duty).

77. William L. Prosser, Palsgraf *Revisited*, 52 MICH. L. REV. 1, 12–15 (1953).

78. 576 So. 2d 313 (Fla. Dist. Ct. App. 1991).

79. *See Continental Ins. Co.*, 576 So. 2d at 314–15 (examining agreement to prevent destruction of automobile).

ferent sources, including statutes, procedural rules, special relationships between parties, and the foreseeability of harm to the plaintiff. However, shifting the focus of examination from contractual duties to the broad range of legal duties has generated increasing controversy because of tort law's gradual expansion of the elements required for legal duties.[80] This controversy is especially applicable to foreseeability of harm because it is the farthest reaching legal duty relating to the preservation of evidence.[81]

A. *Contractual Duty*

A contract provides one traditional legal duty to preserve evidence. In *Miller v. Allstate Insurance Co.*,[82] the plaintiff, who had been involved in an automobile accident, orally agreed with her insurance company to relinquish possession of her damaged car. In exchange, the insurance company orally agreed to preserve the car for the plaintiff's products liability action against the car's manufacturer. The insurance company, however, breached the agreement by selling the car to a salvage yard for disposal.[83] Identifying the oral agreement as a contract, the court concluded that a duty to preserve evidence may arise from a valid contract, a statute, or an administrative regulation. Accordingly, the court imposed a duty to preserve evidence on the insurer based on the oral contract.[84]

If an agreement constituted the exclusive requirement for a duty to preserve evidence, any party could avoid negligent spoliation liability by refusing to enter into such agreements. Therefore, the duty to preserve evidence must arise from other sources of law.

---

80. *See* John K. Stipanich, Comment, *The Negligent Spoliation of Evidence: An Independent Tort Action May Be the Only Acceptable Alternative*, 53 OHIO ST. L. REV. 1135, 1135 (1992) (noting spoliation may be only alternative in certain situations).

81. *See* Palsgraf v. Long Island R.R., 162 N.E. 99, 100 (N.Y. 1928) (emphasizing that liability will attach when possibility of accident was reasonably foreseeable and injury results). In *Palsgraf*, Judge Cardozo made foreseeability of harm the basis for the creation of a duty by stating that "[t]he risk reasonably perceived defines the duty to be obeyed." *Id.*

82. 573 So. 2d 24 (Fla. Dist. Ct. App. 1990).

83. *Miller*, 573 So. 2d at 26.

84. *Id.* at 27. Importantly, a contractual agreement also gives rise to an action in contract for spoliation of evidence. *See id.* (referring to rule established by courts which states that plaintiff "may waive the tort and sue in contract"). Because of the relaxed damages standard and the potential for punitive damages offered by the spoliation tort, however, the tort action provides the better remedy.

B. *Legal Duty*

A legal duty to preserve evidence may be derived from document-retention statutes, procedural rules, or other legal tenets such as the doctrine of "affirmative conduct" or the "special relationship" doctrine. However, these sources fail to provide a comprehensive standard of conduct for spoliation in the civil litigation context because they permit spoliating conduct that should be sanctioned.

1. Statutory Duties

a. Record-Retention Statutes and Regulations

A few courts have identified record-retention statutes and regulations as sources of a duty to preserve evidence. In *Bondu v. Gurvich*,[85] a medical malpractice case, the court identified an administrative regulation that required a hospital to preserve medical records. When the hospital breached this duty, the court allowed a tort action for negligent spoilation because the plaintiff could not prove her case without the records.[86] Other courts have identified similar record-retention statutes and regulations as establishing a duty to preserve evidence regarding private third persons.[87] Under the reasoning of these courts, the administrative duty to maintain documents gives rise to an independent tort action for negligent spoliation based on common-law negligence. Moreover, under the Restatement of Torts, courts may use a statute to determine the standard of conduct and duty in negligence cases. However, the plaintiff may only recover if the legislature enacted the statute to protect the class of persons in which the plaintiff is a member.[88] Because many record-retention statutes constitute administrative

85. 473 So. 2d 1307 (Fla. Dist. Ct. App. 1985).

86. *See Bondu*, 473 So. 2d at 1312 (noting administrative regulations that imposed duty on hospital to maintain records).

87. *See, e.g.*, De Vera v. Long Beach Pub. Transp. Co., 225 Cal. Rptr. 789, 793 (Ct. App. 1986) (identifying statute requiring carrier to exercise utmost skill); Fox v. Cohen, 406 N.E.2d 178, 182 (Ill. App. Ct. 1980) (recognizing requirement of record-retention statute that hospital maintain complete and accurate patient records).

88. RESTATEMENT (SECOND) OF TORTS § 286 (1965). Section 286 provides:

> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
>
> (a) to protect a class of persons which includes the one whose interest is invaded, and

regulations enforced exclusively by governmental departments, they cannot be identified as being designed to protect private third persons. Although most courts have failed to expressly address this problem when adopting a statutory standard of conduct,[89] the Supreme Court of Missouri, in *Brown v. Hamid*,[90] refused to establish tort liability based upon an administrative regulation requiring retention of medical records because the regulation was not designed to protect private, third-party patients from negligent record maintenance.[91]

A court may also apply the implication doctrine and find that, absent an existing common-law tort action, a record-retention statute alone implies an independent private cause of action even though it does not provide for civil liability. In *Rodgers v. St. Mary's Hospital*,[92] for example, the Supreme Court of Illinois applied the implication doctrine when addressing a record-retention regulation.[93]

(b) to protect the particular interest which is invaded and

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results.

Id. Application of the Restatement of Torts establishes rebuttable "*prima facie* evidence of negligence," "evidence of negligence," or "negligence per se." *See* Ezra R. Thayer, Comment, *Public Wrong and Private Action,* 27 HARV. L. REV. 317, 317 (1914) (discussing complications of establishing civil liability upon violation of criminal statute during initial development of negligence tort); *see also* Osborne v. McMasters, 41 N.W. 543, 544 (Minn. 1889) (reiterating that violation of statute which creates legal duty "constitutes conclusive evidence of negligence, or, in other words, negligence *per se*"); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 229-30 (5th ed. 1984) (explaining establishment of negligence per se).

89. *See De Vera*, 225 Cal. Rptr. at 795 (failing to indicate whether administrative policy required bus company to maintain accident information); *Bondu*, 473 So. 2d at 1312–13 (agreeing that trial court erred in dismissing plaintiff's claim because Florida statutes provided viable cause of action); *Fox*, 406 N.E.2d at 182 (reversing trial court's dismissal of claim because Joint Commission of Accreditation of Hospitals required hospital to maintain medical records); Henry v. Deen, 310 S.E.2d 326, 334–35 (N.C. 1984) (asserting that North Carolina law prohibited parties from deliberately interfering with another party's attempt to gather evidence).

90. 856 S.W.2d 51 (Mo. 1993) (en banc).

91. *Brown*, 856 S.W.2d at 57.

92. 597 N.E.2d 616 (Ill. 1992).

93. *Rodgers*, 597 N.E.2d at 619.

b. Criminal Statutes

Courts may also apply the implication doctrine to determine whether a violation of criminal obstruction-of-justice statutes may result in civil liability.[94] This approach is necessary when the statute does not expressly provide a civil remedy. Courts must consider the statute's legislative history to determine whether implied congressional or legislative intent establishes tort liability.[95] However, obstruction-of-justice statutes require proof of intent to destroy evidence, a difficult standard to meet in spoliation cases. Consequently, these criminal statutes do not provide a useful standard of conduct for imposing civil liability.

2. Procedural Rules

In addition to contract and statutory duties, discovery rules may impose a duty to preserve evidence on adverse parties.[96] Failure to comply with a court order to produce evidence may result in court sanctions. Recent decisions have extended the courts' sanctioning power to acts of spoliation occurring prior to a court order.[97] Based upon their inherent powers, courts now apply sanctions to

---

94. *See* 18 U.S.C. §§ 1503, 1505, & 1512 (1988) (addressing obstruction of justice, influencing, and tampering).

95. Courts refer to this supposed legislative intent as implied, constructive, or presumed intent. *See, e.g., Rodgers*, 597 N.E.2d at 619 (listing necessary elements for implying legislative intent as: "(1) plaintiff is a member of the class for whose benefit the Act was enacted; (2) it is consistent with the underlying purpose of the Act; (3) plaintiff's injury is one the Act was designed to prevent; and (4) it is necessary to provide an adequate remedy for violations of the Act"); Board of Comm'rs v. Hatton, 427 N.E.2d 696, 703 (Ind. Ct. App. 1981) (using apparent intention of legislature in determining extent of county's duty under local statute to maintain hedges and fences along highway trimmed); Walker v. Bignell, 301 N.W.2d 447, 456 (Wis. 1981) (ascertaining legislative intent from history of applicable statute to impose civil liability on city for failure to cut vegetation by particular date).

96. Court sanctions do not apply to nonparties to the action. A subpoena duces tecum, pursuant to Rules 34(c) and 45 of the Federal Rules of Civil Procedure or comparable state rules, is the only viable instrument for creating a duty to preserve evidence for third parties.

97. *See* Helmac Prods. Corp. v. Roth (Plastics) Corp., 150 F.R.D. 563, 565–66 (E.D. Mich. 1993) (sanctioning principal shareholder and chief executive officer of defendant corporation for destroying documents prior to trial, even though these persons were not subject to court order); Graves v. Daley, 526 N.E.2d 679, 681–82 (Ill. App. Ct. 1988) (imposing sanction for destruction of allegedly defective furnace in products liability action despite lack of violation of specific court order).

destructive actions that occur during pending litigation[98] and to actions taken prior to the litigation's commencement.[99] Courts impose sanctions for conduct arising before the litigation when the spoliator "knew or should have known" about the potential or imminent litigation.[100] Because sanctions serve to enforce a party's right to view existing evidence, their availability creates a duty to preserve evidence.[101] Sanctions imposed upon litigating parties may also be imposed upon third parties, but a nonparty is under no obligation to preserve evidence in the absence of a subpoena duces

98. *E.g.*, Jeanblanc v. Oliver Carr Co., No. 91-0128 (JHG), 1992 U.S. Dist. LEXIS 10765, at *2 (D.D.C. July 24, 1992); Wm. T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443, 1445 (C.D. Cal. 1984); Bolton v. Massachusetts Bay Transp. Auth., 593 N.E.2d 248, 249 (Mass. App. Ct. 1992); Ramirez v. Otis Elevator Co., 837 S.W.2d 405, 409 (Tex. App.—Dallas 1992, writ denied); Milwaukee Constructors II v. Milwaukee Metro. Sewage Dist., 502 N.W.2d 881, 883 (Wis. Ct. App. 1993).

99. *E.g.*, Dillon v. Nissan Motor Co., 986 F.2d 263, 267 (8th Cir. 1993); Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 368–69 (9th Cir. 1992); *Helmac Prods. Corp.*, 150 F.R.D. at 565–66; Capellupo v. FMC Corp., 126 F.R.D. 545, 551 (D. Minn. 1989); Federal Ins. Co. v. Allister Mfg. Co., 622 So. 2d 1348, 1352 (Fla. Dist. Ct. App. 1993); American Family Ins. Co. v. Village Pontiac GMC, Inc., 585 N.E.2d 1115, 1117–18 (Ill. App. Ct. 1992); *Graves*, 526 N.E.2d at 681–82; Stubli v. Big D Int'l Trucks, Inc., 810 P.2d 785, 787 (Nev. 1991); Fire Ins. Exch. v. Zenith Radio Corp., 747 P.2d 911, 913–14 (Nev. 1987); Bachmeier v. Wallwork Truck Ctrs., 507 N.W.2d 527, 532–33 (N.D. 1993).

100. *See, e.g.*, *Dillon*, 986 F.2d at 267 (justifying sanctions against counsel and retained witness for destruction of evidence when both knew or should have known of imminent litigation); *American Family Ins. Co.*, 585 N.E.2d at 1118 (finding that plaintiffs should have known that potential defendants would want to inspect destroyed evidence); *Fire Ins. Exch.*, 747 P.2d at 914 (declaring that parties on notice of impending litigation face sanctions for actions that prejudice opponent's discovery efforts). The same standard applies to recent case law regarding the spoliation inference. *See, e.g.*, Welsh v. United States, 844 F.2d 1239, 1247 (6th Cir. 1988) (endorsing use of rebuttable presumption that switches burden to healthcare provider who negligently discards or loses records); *Wm. T. Thompson Co.*, 593 F. Supp. at 1455 (imposing duty on litigant to preserve documents and information relevant to impending litigation that litigant knows, or reasonably should know, are relevant); Applegate v. Seaborn, 477 N.E.2d 74, 76 (Ill. App. Ct. 1985) (Webber, J., dissenting) (arguing that plaintiff should suffer consequences of third-party destruction of evidence because plaintiff had duty to preserve evidence which plaintiff knew, or should have known, could be destroyed); Colfer v. Harmon, 832 P.2d 383, 385–86 (Nev. 1992) (affirming use of adverse presumption against party responsible for spoliating evidence of boundary line identified by fence despite destruction of fence prior to commencement of litigation).

101. *See* Petrik v. Monarch Printing Corp., 501 N.E.2d 1312, 1319 (Ill. App. Ct. 1986) (describing power of sanctions in enforcing litigant's "right to view existing evidence" and detailing discovery policies supporting their use).

tecum under Federal Rule of Civil Procedure 34(c) or the applicable state rules.[102]

Thus, a duty to preserve evidence based upon court sanctions may attach as soon as the spoliator, regardless of pending litigation, knew or should have known that she was destroying evidence relevant to possible future litigation. Importantly, this duty to preserve evidence is premised on the imposition of court sanctions; without sanctions, the duty does not exist. If spoliating conduct is sanctioned only upon court order, conduct that is equally destructive will go unpunished simply because no court order exists. This dichotomy provides inconsistent legal protection for the spoliation victim.

3. Affirmative Conduct

The doctrine of affirmative conduct provides another source of a duty to preserve evidence. The doctrine stems from the basic tort principle that one who volunteers to act, though gratuitous and without duty to do so, must act with due care and is liable for negligence if the conduct results in damages to another.[103] Voluntary assumption of a duty by affirmative conduct, known in common law as the good Samaritan rule,[104] requires a reasonable standard of care under all circumstances.[105]

Several courts have addressed this doctrine by deciding whether a spoliating party voluntarily assumed a duty to preserve evidence. In *Pirocchi v. Liberty Mutual Insurance Co.*,[106] a workers' compensation carrier took possession of and lost a chair that had collapsed at plaintiff's workplace, injuring the plaintiff. Without the chair,

---

102. *See* FED. R. CIV. P. 34(c) (stating that persons who are not parties to suit "may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45"); *see also* Murphy v. Target Prods., 580 N.E.2d 687, 690 (Ind. Ct. App. 1991) (concluding that Indiana common law imposes no duty on nonparties to preserve evidence).

103. Pirocchi v. Liberty Mut. Ins. Co., 365 F. Supp. 277, 281 (E.D. Pa. 1973).

104. *E.g.*, Williams v. State, 664 P.2d 137, 139 (Cal. 1983); *De Vera*, 225 Cal. Rptr. at 793; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 378 (5th ed. 1984).

105. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 382 (5th ed. 1984); *see* County of Solano v. Delancy, 264 Cal. Rptr. 721, 731–32 (Ct. App. 1989) (Anderson, P.J., dissenting) (citing good Samaritan rule against extension of tort liability to spoliation of evidence absent special relationship between parties).

106. 365 F. Supp. 277 (E.D. Pa. 1973).

the plaintiff could not successfully bring a products liability action against the chair's manufacturer.[107] Applying the doctrine of affirmative conduct, the court held that the compensation carrier owed a duty to preserve evidence once it took possession of the chair. However, whether the defendant actually fulfilled the duty to preserve the chair by acting reasonably became a question of fact for the jury.[108]

Two other courts have attempted to establish a duty to preserve evidence by affirmative conduct, but each dismissed the action for lack of sufficiently supportive facts.[109] In *Parker v. Thyssen Mining Construction, Inc.*,[110] the Alabama Supreme Court refused to impose a duty to preserve evidence because of the uncertainty of defining necessary conduct.[111] However, if the difficult evidentiary burden of proving affirmative conduct is met, this doctrine provides sufficient grounds to establish a duty to preserve evidence.

4. The Special Relationship Doctrine

A "special relationship" may impose a duty to preserve evidence. Under common law, a person generally has no duty to control the conduct of another or warn those endangered by another's conduct.[112] The special relationship doctrine represents an exception to that general rule. If the defendant has some special relationship to the person whose conduct needs to be controlled or to the foreseeable victim, a duty exists.[113] Courts developed this doctrine to impose a duty on parties who had specific knowledge of an

---

107. *Pirocchi*, 365 F. Supp. at 278.

108. *See id.* at 282 (denying defendant's motion for summary judgment on grounds that application of standard of conduct of reasonable person requires full exposition of all underlying facts and circumstances, which must be performed by jury).

109. *See Williams*, 664 P.2d at 142 (noting absence of duty to preserve evidence because "[t]here are no allegations that the officer assured [plaintiff], either expressly or impliedly, that they would do any of the acts [plaintiff] faults them for not doing, . . . nor, finally, is there any hint that they prevented plaintiff from conducting an investigation of her own"); Parker v. Thyssen Mining Constr. Inc., 428 So. 2d 615, 618 (Ala. 1983) (noting that "the existence of a voluntarily assumed duty through affirmative conduct is a matter for determination in light of all the facts and circumstances").

110. 428 So. 2d 615, 618 (Ala. 1983).

111. *Parker*, 428 So. 2d at 618.

112. *De Vera*, 225 Cal. Rptr. at 793; *Williams*, 664 P.2d at 139; RESTATEMENT (SECOND) OF TORTS §§ 314, 315 (1965).

113. RESTATEMENT (SECOND) OF TORTS §§ 315-320 (1965).

unreasonable risk of physical harm to another person.[114] In the context of spoliation in civil litigation, a special relationship may arise between (1) adverse parties, (2) a third party and the plaintiff, (3) a third party and the defendant, or (4) a third party and both plaintiff and defendant. In each of these four situations, the spoliator may owe a duty to preserve evidence.[115]

a. Special Relationship Between Third-Party Spoliator and Plaintiff

The most important situation arises when a special relationship exists between the third party spoliator and the plaintiff in the underlying action. Here, the third party destroys crucial evidence, impairing the plaintiff's ability to bring a successful action in the underlying lawsuit. For example, in *Reid v. State Farm Mutual Automobile Insurance Co.*,[116] the California Court of Appeal confronted a true independent third-party spoliator. The plaintiff was a permissive user of an automobile insured by the defendant insurance carrier. After an accident damaged the car, the insurance carrier disposed of it, hindering the plaintiff from bringing a products liability suit against the manufacturer.[117]

Noting that no contractual relationship existed between the plaintiff and the insurance carrier or the defendant insurer and the manufacturer, the court applied the special relationship doctrine and identified a duty to preserve evidence on the part of insurance

---

114. *See* Harpole v. Arkansas Dep't of Human Servs., 820 F.2d 923, 926 (8th Cir. 1987) (describing special relationship doctrine's development in context of providing medical care to prison inmates).

115. *See* Wilson v. Beloit Corp., 921 F.2d 765, 767 (8th Cir. 1990) (finding that, absent some special relationship, general rule is that one party need not preserve possible evidence for another party's future legal action against third party); Edwards v. Louisville Ladder Co., 796 F. Supp. 966, 969 (W.D. La. 1992) (noting that unless special relationship exists between parties, there is no duty to preserve possible evidence for future legal action); *De Vera*, 225 Cal. Rptr. at 793–95 (holding that special relationship between carrier and passenger requires common carrier to collect and preserve evidence concerning other vehicle and its driver for use by carrier's passengers in future civil litigation); Reid v. State Farm Mut. Auto. Ins. Co., 218 Cal. Rptr. 913, 922–24 (Ct. App. 1985) (discussing historical development of special relationship doctrine); *Williams*, 664 P.2d at 138 (determining that highway patrolman, stopping to aid motorist, does not, in itself, create special relationship which mandates particular duty).

116. 218 Cal. Rptr. 913 (Ct. App. 1985).

117. *See Reid*, 218 Cal. Rptr. at 567 (noting that claims representative learned of car's destruction more than one year after destruction occurred).

carrier.[118] Relying on *Tarasoff v. Regents of the University of California*,[119] the court concluded that foreseeability was the decisive requirement to establish a special relationship.[120] Applying the foreseeability element to third parties, the court required the third party to have actual knowledge of an unreasonable risk of harm.[121] Because the insurance carrier lacked actual knowledge of the plaintiff's potential claims, it could not foresee that disposing of the car might interfere with plaintiff's prospective lawsuit. Consequently, the court refused to impose a duty to preserve evidence on the insurance carrier.[122]

b. Limited Application of the Special Relationship Doctrine

Whether a duty to preserve evidence based on the special relationship doctrine exists turns on whether the spoliator can foresee that destroying particular evidence will interfere with another person's prospective lawsuit.[123] The existence of a special relationship is solely derived from, and based upon, the foreseeability of harm to the plaintiff. Courts, however, rarely utilize the special relationship doctrine to impose a duty to preserve evidence on third-party spoliators. Thus, one can argue that the special relationship doctrine has no merit of its own. Instead, the element of foreseeability is an independent, per se component necessary to create a duty to preserve evidence.

C. *The Essential Element: Foreseeability*

As addressed above, all the legal sources used to create a duty to preserve evidence inadequately protect against spoliation. Although public policy strongly favors fitting this conduct into the protective framework of the law, the mosaic of sources employed to create a duty to preserve evidence cannot combat all possible forms of spoliating conduct. The element of foreseeability cures

118. *Id.* at 922–23.
119. 551 P.2d 334 (Cal. 1976).
120. *Reid*, 218 Cal. Rptr. at 923.
121. *Id.* at 922.
122. *Id.*
123. *See id.* (emphasizing that foreseeability is central consideration in determining duty).

the deficiencies of other legal sources by providing the governing principle that encompasses all relevant spoliation in civil litigation.

1. Doctrinal Evolution of Foreseeability in Spoliation Cases

Judge Cardozo first explicitly referred to foreseeability of harm to the plaintiff in the context of a duty to establish tort liability in *Palsgraf v. Long Island Railroad.*[124] Although the requirement of foreseeability has served as a means to limit the duty for tort liability, it has also become an instrument to create such a duty. Judge Cardozo stated in *Palsgraf* that "[t]he risk reasonably to be perceived defines the duty to be obeyed."[125] Interpreting these words, the tortfeasor may reasonably perceive risk if the tortfeasor can reasonably foresee the kind of harm that occurs. Dean Prosser has similarly construed the *Palsgraf* language, stating that "[n]egligence must be a matter of some relation between the parties, some duty, which could be founded only on the foreseeability of some harm to the plaintiff in fact injured."[126] Many courts, primarily those of California, have adopted foreseeability of harm to the plaintiff as the primary element to create any such duty.[127] Even though these

---

124. 162 N.E. 99 (N.Y. 1928).

125. *Palsgraf*, 162 N.E. at 100.

126. William L. Prosser, Palsgraf *Revisited*, 52 MICH. L. REV. 1, 5 (1953).

127. *See, e.g.*, Burgess v. Superior Court, 831 P.2d 1197, 1205 (Cal. 1992) (listing factors considered in determination of duty and describing foreseeability of harm to plaintiff as first); Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 770 P.2d 278, 282 (Cal. 1989) (examining foreseeability of marital disruption when doctor informed husband of wife's misdiagnosed sexually transmitted disease); Elden v. Sheldon, 758 P.2d 582, 583 (Cal. 1988) (holding that "chief element in determining whether defendant owes a duty to another is foreseeability of the risk," absent overriding policy considerations); Becker v. IRM Corp., 698 P.2d 116, 128 (Cal. 1985) (stating general principle that defendant owes duty of care to persons foreseeably endangered by his conduct, including all risks which make conduct unreasonably dangerous); Hedlund v. Superior Court, 669 P.2d 41, 46 (Cal. 1983) (explaining that duty is primarily question of law and foreseeability of risk to person is principal consideration); Weirum v. RKO Gen., Inc., 539 P.2d 36, 39 (Cal. 1975) (writing that "foreseeability of the risk is a primary consideration in establishing the element of duty"); Rodriguez v. Bethlehem Steel Corp., 525 P.2d 669, 680 (Cal. 1974) (noting that foreseeability question is critical "to limit the otherwise potential infinite liability which would follow every negligent act"); Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968) (classifying foreseeability of harm to plaintiff as major consideration in determining liability); Dillon v. Legg, 441 P.2d 912, 919 (Cal. 1968) (listing foreseeability of plaintiff's harm as major consideration in departing from fundamental principle that persons are liable for injuries caused by their carelessness). Other jurisdictions have also adopted foreseeability as the primary element to create a duty. *See, e.g.*, Rodriguez v. Norfolk & Western Ry., 593 N.E.2d 597, 615 (Ill. App. Ct. 1992) (asserting that foreseeability is one of several

courts require adherence to many limiting prerequisites and policy considerations, they regard foreseeability as the decisive and central element to finding any duty.[128]

Foreseeability also constituted the crucial element in establishing the tort of negligent interference with prospective business advantage in *J'Aire Corp. v. Gregory*.[129] The Supreme Court of California held in *J'Aire* that foreseeability is the primary consideration necessary to establish both a duty and tort liability.[130] This evaluation apparently had a decisive impact on the reasoning of the California Court of Appeal in *County of Solano v. Delancy*,[131] which represents the first decision to base the duty to preserve evidence between parties primarily upon foreseeability without prior notice to the spoliating party.

In *Delancy*, the defendant suddenly lost control of his automobile while driving on a road in Solano County. In an action against the county, he claimed that the unsafe condition of the road caused the accident. The county requested production of the car for inspection, but the defendant failed to do so.[132] In reviewing the defendant's failure to preserve the car, the California Court of Appeal held that the defendant owed a legal duty to preserve this physical evidence,[133] basing this duty almost exclusively upon the foreseeable prejudice to the adverse party's case. The court noted that, when "spoliation of evidence enables the spoliator to, in effect, 'profit from his own wrong,' . . . a duty to preserve evidence

---

factors considered by Illinois courts in determining whether duty should be imposed on defendants); Dale v. E.R. Knapp & Sons, Inc., 433 S.W.2d 880, 883 (Ky. Ct. App. 1968) (noting that Kentucky Supreme Court recognizes relationship between proximate cause and foreseeability); Cameron v. Pepin, 610 A.2d 279, 282 (Me. 1992) (indicating that foreseeability is one of many factors to consider in determining duty); James v. Lieb, 375 N.W.2d 109, 114 (Neb. 1985) (accepting reasonable foreseeability as more logical method of establishing duty than artificial parameters drawn by "zone of danger"); Brammer v. Taylor, 338 S.E.2d 207, 215 (W. Va. 1985) (quoting *Palsgraf* for view that reasonable perception of risk defines duty); Robertson v. LeMaster, 301 S.E.2d 563, 568 (W. Va. 1983) (finding that employer could foresee that overworking employees created risk to others on highways when tired employees were sent home).

128. *See* County of Solano v. Delancy, 264 Cal. Rptr. 721, 730 (Ct. App. 1989) (hailing foreseeability of harm as most important factor).

129. 598 P.2d 60 (Cal. 1979).

130. *J'Aire*, 598 P.2d at 64.

131. 264 Cal. Rptr. 721 (Ct. App. 1989).

132. *Delancy*, 264 Cal. Rptr. at 723.

133. *Id.* at 730.

arises solely from foreseeability of the harm to the plaintiff."[134] Thus, the court created a duty to preserve evidence, based primarily upon the element of foreseeability.[135] Although this decision cannot be cited as precedent by California courts because of a depublication order, courts in other jurisdictions have considered its reasoning persuasive.[136] Other courts have agreed that the element of foreseeability of harm, although the most disputed element, is the decisive factor in analyzing whether a negligent spoliation action lies.[137]

2. Actual and Constructive Knowledge

Delancy, along with *Reid v. State Farm Mutual Automobile Insurance Co.*,[138] based the duty to preserve evidence primarily, and almost exclusively, on foreseeability. However, under these decisions, the foreseeability requirement differs depending on whether the spoliator is an independent third party or an adverse party. Under both decisions, an independent third-party spoliator must have actual knowledge of the relevance of evidentiary material in her possession to meet the foreseeability element. Absent notice to the third party, no duty to preserve evidence arises.[139] However, the *Delancy* decision, in contrast to *Reid*, relaxes the knowledge requirement for adverse parties. Instead of requiring actual knowledge of harm, *Delancy* requires mere constructive knowledge.[140]

---

134. *Id.* (footnote omitted).

135. In addition, the court required examination of policy considerations, set out in *Velasco v. Commercial Bldg. Maintenance Co.*, 215 Cal. Rptr. 504 (Ct. App. 1985), to create a duty to preserve evidence. These factors include "(1) the extent to which the transaction was intended to affect the plaintiff . . . (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct and (6) the policy of preventing future harm." *Delancy*, 264 Cal. Rptr. at 729 (alteration in original).

136. *See, e.g.*, Viviano v. CBS, Inc., 597 A.2d 543, 550 (N.J. Super. Ct. App. Div. 1991) (listing spoliation of evidence elements as stated in *Delancy*).

137. *See* Robert W. Thompson, *To the Prevailing Party Goes the Spoils: An Overview of an Emerging Tort in California*, 18 W. ST. U. L. REV. 223, 229 (1990) (declaring that foreseeability quickly became most critical factor in forming spoliation claim).

138. 218 Cal. Rptr. 913 (Ct. App. 1985).

139. *See Delancy*, 264 Cal. Rptr. at 729–30 (describing foreseeability of harm to plaintiff as resulting from notice to defendant).

140. *See id.* at 730 (concluding that defendant need only constructive notice); *Reid*, 218 Cal. Rptr. at 923 (noting defendant had no actual knowledge of additional claim).

One judge criticized the broad scope of the foreseeability criterion for constructive knowledge by adverse parties because "on a clear day you can foresee forever!"[141] This criticism stems from concerns that potential litigants will be forced to preserve physical evidence, transforming the landscape into "one giant junk yard."[142] However, litigation in California, where the spoliation tort was first created, does not support such concerns. The *Delancy* decision does not appear to extend the standard of conduct too far, especially if the foreseeability element is evaluated in light of other currently available remedies for spoliation by the adverse party.

Recently, courts have extended the applicability of the major procedural remedies, the spoliation inference and court sanctions, to negligent spoliation even though courts previously applied these remedies exclusively to intentional or bad faith spoliation.[143] Both

---

141. *Delancy*, 264 Cal. Rptr. at 731 (Anderson, P.J., dissenting).

142. *Id.*

143. Several courts have applied the spoliation inference to bad faith spoliation. *See, e.g.*, Eaton Corp. v. Appliance Valves Corp., 790 F.2d 874, 878 (7th Cir. 1986) (allowing judicial inference that destroyed evidence would harm destroying party); Coates v. Johnson & Johnson, 756 F.2d 524, 551 (7th Cir. 1985) (explaining that bad faith inference exists only when circumstances surrounding destruction of documents lead to conclusion that bad faith actually existed); S.C. Johnson & Son, Inc. v. Louisville & Nashville R.R., 695 F.2d 253, 258–59 (7th Cir. 1982) (writing that court must find bad faith in destruction of documents before court can infer that destroyed documents were unfavorable to destroying party); Allen Pen Co. v. Springfield Photo Mount Co., 653 F.2d 17, 23 (1st Cir. 1981) (holding that destruction of documents irrelevant to proving case is not indicative of bad faith); Berthold-Jennings Lumber Co. v. St. Louis I.M. & S. Ry., 80 F.2d 32, 42 (8th Cir. 1935) (stressing that "evil intent" must exist in destruction of documents before sanctions can be imposed), *cert. denied*, 297 U.S. 715 (1936); Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 133 (S.D. Fla. 1987) (requiring bad faith before imposing adverse inference). Other courts have used the inference regarding intentional spoliation. *See, e.g.*, Kammerer II v. Sewerage & Water Bd., 633 So. 2d 1357, 1358 (La. Ct. App. 1994) (writing that "intentional destruction" occurs for purpose of depriving opposing party of information); Williams v. General Motors Corp., 607 So. 2d 695, 697–98 (La. Ct. App. 1992) (stating that under Louisiana law, duty exists to preserve evidence solely based on statutory requirement); Moore v. General Motors Corp., 558 S.W.2d 720, 733 (Mo. Ct. App. 1977) (detailing that party destroying documents in bad faith is treated as admitting to opposing party's allegations). Other courts utilized discovery sanctions as remedies against bad faith and intentional spoliation. *See, e.g.*, Northern Assurance Co. v. Ware, 145 F.R.D. 281, 282 n.2 (D. Me. 1993) (advocating severe sanction of dismissal when party maliciously destroyed evidence); Headley v. Chrysler Motor Corp., 141 F.R.D. 362, 364 (D. Mass. 1991) (requiring authority from either supervisory court or from court's inherent power to apply sanction of dismissal for spoliation); Pittard v. Four Seasons Motor Inn, Inc., 688 P.2d 333, 337 (N.M. Ct. App. 1984) (authorizing court to direct verdict against spoliator when evidence exists demonstrating bad faith).

procedural remedies now apply when the spoliator "knew or should have known" the relevance of the destroyed evidence to some future litigation.[144] Moreover, a duty to preserve evidence attaches when the spoliator has actual knowledge because of some notification by the other party that evidentiary materials in his possession are relevant to future litigation. Thus, foreseeability of harm to the plaintiff is the necessary prerequisite to establish a duty to preserve evidence in civil litigation.[145]

3. Foreseeability as Governing Principle

Tort liability for spoliation of evidence in civil litigation achieves comprehensive protection for potential victims only if the duty to preserve evidence commences as soon as it is reasonably foreseeable that legal proceedings will be instituted.[146] As shown above, absent some agreement or statutory duty, the only approach to determining the existence of a duty to preserve evidence is the foreseeability criterion. Notice prior to litigation, the commencement of litigation, or specific court orders are distinct instances that provide actual knowledge to the adverse party. However, negligence law regularly utilizes the concept of constructive knowledge as the requisite notice.[147] The element of foreseeability provides the mechanism to establish prohibited conduct in spoliation cases, whereas the traditional sources of duty previously described consti-

144. Many courts have addressed the issue of inferences. *E.g.*, Berkovich v. Hicks, 922 F.2d 1018, 1023 (2d Cir. 1991); Jackson v. Harvard Univ., 900 F.2d 464, 469–70 (1st Cir.), *cert. denied*, 498 U.S. 848 (1990); Pressey v. Patterson, 898 F.2d 1018, 1021–22 (5th Cir. 1990); Welsh v. United States, 844 F.2d 1239, 1246–47 (6th Cir. 1988); Nation-Wide Check Corp. v. Forest Hills Distrib., Inc., 692 F.2d 214, 217–20 (1st Cir. 1982); Skeete v. McKinsey & Co., 91 CIV. 8093 (PKL), 1993 U.S. Dist. LEXIS 9099, at *10 (S.D.N.Y. July 7, 1993); Sullivan v. General Motors Corp., 772 F. Supp. 358, 360 (N.D. Ohio 1991); Barker v. Bledsoe, 85 F.R.D. 545, 547–48 (W.D. Okla. 1979); Thor v. Boska, 113 Cal. Rptr. 296, 300 (Ct. App. 1974); Williams v. Washington Hosp. Ctr., 601 A.2d 28, 31 (D.C. 1991); Battocchi v. Washington Hosp. Ctr., 581 A.2d 759, 765–66 (D.C. 1990); Public Health Trust v. Valcin, 507 So. 2d 596, 600 (Fla. 1987); *Kammerer II*, 633 So. 2d at 1367 (Plotkin, J., dissenting). Other cases have addressed discovery sanctions. *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, 1446 (C.D. Cal. 1984).

145. *See Delancy*, 264 Cal. Rptr. at 735 (Anderson, P.J., dissenting) (describing foreseeability as "cloudy if not zero" on facts of case).

146. JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE § 4.14, at 155 (1988).

147. *See* Smith v. Superior Court, 198 Cal. Rptr. 829, 832 (Ct. App. 1984) (noting complaint that defendant knew or should have known plaintiffs wished evidence to be maintained).

tute non-exhaustive remedies.[148] Thus, foreseeability cures the deficiencies of these more explicit sources of duty. If a jurisdiction decides for policy reasons to recognize a tort action for negligent spoliation, it is appropriate to transfer and apply the standard of conduct established for procedural remedies, such as the spoliation inference or court sanctions, to the standard of conduct for tort actions.

Whether a duty exists is intertwined with two other questions: whether the facts sufficiently establish the duty and when the duty attaches. In the case of actual knowledge required for third parties, the duty attaches the moment the plaintiff can prove the spoliator had actual notice of impending litigation. In cases in which constructive knowledge is sufficient to establish foreseeability, a thorough factual analysis of each case is necessary. Thus, reliance upon foreseeability as the governing principle in spoliation cases requires a fact-specific inquiry regarding whether the plaintiff has a cause of action.[149]

IV. Categories of Third-Party Spoliators and Their Duty to Preserve Evidence

Foreseeability provides a tool to address both adverse party and third-party spoliation. This part examines and evaluates recurring third-party spoliation causes of action.

A. *Insurance Carriers*

Many spoliation cases involve destruction of evidence by insurance carriers.[150] Insurance carriers are third parties to the in-

148. *See* John K. Stipanich, Comment, *The Negligent Spoliation of Evidence: An Independent Tort Action May Be the Only Acceptable Alternative*, 53 Ohio St. L. Rev. 1135, 1135 (1992) (hailing spoliation tort as sole remedy designed to protect all interests).

149. Robert W. Thompson, *To the Prevailing Party Goes the Spoils: An Overview of an Emerging Tort in California*, 18 W. St. U. L. Rev. 223, 242 (1990).

150. *See, e.g.*, Pirocchi v. Liberty Mut. Ins. Co., 365 F. Supp. 277, 282 (E.D. Pa. 1973) (declining to approve summary judgment motion because breach of duty is fact question); Rawlings v. Apodaca, 726 P.2d 565, 579 (Ariz. 1986) (holding that action in tort lies if special relationship between contracting parties exists and one party acts unfairly and dishonestly); Augusta v. United Serv. Auto. Assoc., 16 Cal. Rptr. 2d 400, 404 (Ct. App. 1993) (applying two-year statute of limitations to action based on insurance company's loss of evidence); Continental Casualty Co. v. Superior Court, 235 Cal. Rptr. 260, 262–63 (Ct. App. 1987) (barring claim for spoliation when action falls under exclusivity provisions of workers' compensation statute); Reid v. State Farm Mut. Auto. Ins. Co., 218 Cal. Rptr. 913,

sured's litigation against the tortfeasor who caused the insured injury. Insurers usually take possession of the physical evidence involved in the case and risk interference with the insured's prospective litigation when disposing of this evidence. Whether this sort of interference by the insurance carrier constitutes a breach of a duty to preserve evidence, however, is questionable. The contractual relationship between the insurance carrier and its client and the element of foreseeability are potential sources for establishing a duty to preserve evidence.

1. Implied Covenant of Good Faith and Fair Dealing

Although insurance contracts do not usually explicitly address the insurer's duty to preserve evidence for a client's prospective litigation against third-party tortfeasors, the implied covenant of good faith and fair dealing may impose such a duty. When applied to insurance policies, the implied covenant prohibits either party from acting to impair the other's rights to receive the benefits that flow from their agreement or contractual relationship.[151] An insur-

---

922 (Ct. App. 1985) (finding no duty for insurer to preserve evidence absent specific request to do so); Continental Ins. Co. v. Herman, 576 So. 2d 313, 315–16 (Fla. Dist. Ct. App. 1991) (finding that plaintiff's recovery in underlying action precluded spoliation claim); Miller v. Allstate Ins. Co., 573 So. 2d 24, 29 (Fla. Dist. Ct. App. 1990) (recognizing notion that damages need not be certain when there is opportunity to gain award or profit); Murray v. Farmers Ins. Co., 796 P.2d 101, 106 (Idaho 1990) (refusing to find liability when plaintiff introduced no evidence showing that attorney intentionally allowed destruction of evidence); Baugher v. Gates Rubber Co., 863 S.W.2d 905, 914 (Mo. Ct. App. 1993) (denying claim for spoliation against insurance company for lost evidence absent showing of harm); Hirsch v. General Motors Corp., 628 A.2d 1108, 1116 (N.J. Super. Ct. App. Div. 1993) (declaring that duty to preserve evidence may arise without agreement or order); Tomas v Nationwide Mut. Ins. Co., 607 N.E.2d 944, 949 (Ohio Ct. App. 1992) (concluding that plaintiff failed to show unsuccessful products liability action or basis for action).

151. *See Rawlings*, 726 P.2d at 569–71 (discussing covenant of good faith and fair dealing and holding that "one of the benefits that flow from the insurance contract is the insured's expectation that his insurance company will not wrongfully deprive him of the very security for which he bargained or expose him to the catastrophe from which he sought protection"); Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 686 P.2d 1158, 1166 (Cal. 1984) (discussing circumstances in which breach of implied covenant of good faith and fair dealing in commercial contract will give rise to tort action); *see also* Barney v. Aetna Casualty & Sur. Co., 230 Cal. Rptr. 215, 218 (Ct. App. 1986) (noting that cause of action for breach of implied covenant of good faith and fair dealing survives insured's death); Egan v. Mutual of Omaha Ins. Co., 620 P.2d 141, 145 (Cal. 1979) (interpreting obligations imposed by covenant of good faith and fair dealing in liability insurance policies), *cert. denied and appeal dismissed*, 445 U.S. 912 (1980).

ance contract creates duties between the insurer and insured similar to those of a fiduciary relationship.[152]

The courts that have addressed spoliation by insurance carriers have not yet resolved whether an insurance contract also creates a duty to preserve evidence for the insured's prospective litigation against the tortfeasor.[153] The implied covenant only encompasses the benefits flowing from the insurance policy and the objectives in its creation.[154] Because the insured's prospective third-party claim is not a benefit or an objective of the insurance policy, it is not covered by the implied covenant. Therefore, a duty to preserve evidence cannot be derived from the implied covenant of good faith and fair dealing. Instead, the existence of a contractual duty to preserve evidence depends on the specific agreement between the insurance carrier and the insured. Importantly, the insurance carrier has a contractual duty to preserve evidence for possible insurance claims brought against it by the policyholder.[155] This duty, however, does not extend to obligations to preserve evidence for the insured's third-party case.

2. Foreseeability by Insurance Carriers

The insurance carrier's duty to preserve evidence for the insured's action against the tortfeasor must be based on foreseeability. Applying foreseeability to third-party spoliators, actual knowledge by the insurance carrier appears to provide the appropriate standard of conduct. Thus, absent actual notice of the policyholder's intent to sue the third-party tortfeasor, no duty to preserve evidence arises for the insurance carrier.[156]

---

152. *E.g., Rawlings*, 726 P.2d at 569–71; *Seaman's Direct Buying Serv., Inc.*, 686 P.2d at 1166; *Egan*, 620 P.2d at 145.

153. *See Tomas*, 607 N.E.2d at 946–50 (identifying bailment, but dismissing case because of absence of proximate cause between unavailability of evidence and failure of underlying action); *see also Miller*, 573 So. 2d at 28–29 (describing plaintiff's relinquishment of physical evidence to insurance carrier to allow carrier to prepare its defense against third party, in exchange for promise to preserve evidence for plaintiff, as consideration giving rise to contract).

154. *Rawlings*, 726 P.2d at 569–70.

155. *See Continental Ins. Co.*, 576 So. 2d at 314 (recognizing contractual duty to preserve evidence).

156. *See Reid*, 218 Cal. Rptr. at 927 (holding that without specific request, insurance company has no duty to preserve evidence).

The nature of the insurance contract, however, provides a compelling reason to create an exception to the actual knowledge requirement. Indeed, the insurance carrier possesses almost exclusive control over the insurance case and is often more familiar with the merits of the prospective litigation than the policyholder. The requirement of constructive knowledge would impose a fair duty to preserve evidence, as long as this requirement is not as strict as for a fiduciary. Insurance carriers are not fiduciaries, but the constructive knowledge requirement would extend the insurance carrier's standard of care far beyond the requirements of the implied covenant. The alternative, however, imposes an equally burdensome obligation on the insured, requiring him to provide actual notice of intended third-party suits. Because the insurance carrier investigates and controls the case, the appropriate standard of conduct for an insurance carrier presents a knowledge requirement dilemma.

The insurer and the policyholder share the transaction costs involved in insurance-related spoliation cases. Resolution of the knowledge requirement problem should depend on the most efficient allocation of these costs.[157] Prior to the conclusion of the insurance case, the insurance carrier bears no transaction costs except those created by its duty to investigate and appropriately consider the insurance case to the degree necessary to foresee its insured's prospective third-party litigation. The policyholder, on the other hand, bears additional transaction costs for acquiring information from the insurer. If courts applied the constructive knowledge standard, the insurer would incur no additional transaction costs since the duty to foresee possible third-party action already exists. On the other hand, the policyholder would expend additional transaction costs if required to inform the insurer of prospective litigation. Therefore, the constructive knowledge standard of conduct presents the most efficient allocation of transaction costs.

After the conclusion of the case, however, the policyholder can judge the merits of possible claims against the tortfeasor. Because the policyholder solely determines whether an action will be brought, transaction costs increase for the insurance carrier. At

157. ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 477 (1988).

this juncture, the insurance carrier's foreseeability requirement should be reduced to the less stringent standard of actual knowledge, which would require the policyholder to notify the insurer before a duty to preserve evidence arises. Thus, to efficiently allocate the transaction costs involved in foreseeing prospective civil litigation, courts should impose a constructive knowledge requirement on the insurance carrier before resolution of the case, but apply the actual knowledge requirement afterward.

3. Spoliation by Defendant's Insurance Carrier

In cases in which the defendant's insurance carrier has destroyed evidence, the regular standard of conduct based on actual knowledge should apply. The insurance carrier does not have a contractual relationship with the victimized party and generally does not act on the defendant's behalf. If a contractual or agency relationship existed, however, courts should apply the constructive knowledge requirement to the insurance carrier.[158]

B. *Workplace-Related Spoliation*

1. Spoliation by Employers

Spoliation by employers constitutes a second category of third-party spoliation cases. In most of these cases, an employee suffers injuries from a defective product used in the workplace and subsequently intends to bring suit against the product manufacturer.[159] The employer, however, interferes by disposing of crucial physical

158. *See Reid*, 218 Cal. Rptr. at 924–27 (requiring actual knowledge for third-party spoliation action against insurance carrier without providing explanation for this conclusion).

159. *E.g.*, Wilson v. Beloit Corp., 921 F.2d 765, 766 (8th Cir. 1990); Parker v. Thyssen Mining Constr. Co., 428 So. 2d 615, 616–17 (Ala. 1983); Coca-Cola Bottling Co. v. Superior Court, 286 Cal. Rptr. 855, 856–57 (Ct. App. 1991); Jablonski v. Royal Globe Ins. Co., 251 Cal. Rptr. 160, 161–62 (Ct. App. 1988); Murphy v. Target Prods., 580 N.E.2d 687, 687–88 (Ind. Ct. App. 1991); Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177, 1178–79 (Kan. 1987); Panich v. Iron Wood Prods. Corp., 445 N.W.2d 795, 796 (Mich. Ct. App. 1989) (Murphy, P.J., concurring and dissenting); Coley v. Arnot Ogden Memorial Hosp., 485 N.Y.S.2d 876, 877–78 (App. Div. 1985); Diehl v. Rocky Mountain Communications, Inc., 818 S.W.2d 183, 183–84 (Tex. App.—Corpus Christi 1991, writ denied). Even though New York courts do not view spoliation of evidence as an actionable tort, they do recognize a common-law cause of action against an employer for negligently or intentionally impairing an employee's right to sue a third-party tortfeasor. *See* Weigl v. Quincy Specialties Co., 601 N.Y.S.2d 774, 777 (Sup. Ct. 1993) (requiring plaintiff to prove that spoliator intended destruction of evidence to impinge on plaintiff's right to sue third party).

evidence. Importantly, labor statutes govern the employer-employee relationship, and state workers' compensation laws define damages for work-related injuries.[160] Although these laws render the employer strictly liable for any work-related injury, they also provide an exclusive remedy rule that bars common-law remedies the employee may have against the employer.[161] The exclusive remedy rule applies only to injuries involving personal interests and not to those of property interests. Therefore, because spoliation constitutes an interference with a property interest, exclusive remedy rules do not preclude employee spoliation actions against employers.[162]

To date, courts have refused to impose a statutory or common-law duty to preserve evidence on the employer for the benefit of an employee's potential third-party action.[163] Over the last few decades, however, labor law has witnessed the emergence of new employee rights. In *Panich v. Iron Wood Products Corp.*,[164] one judge referred to these tremendous changes and criticized the courts' resistance toward recognition of an employer's duty to preserve evidence, stating that "'[a] common law duty exists when a court says it does because it thinks it should. By holding that no duty exists because no previous decision has recognized it, a court abdicates its judicial responsibility to a silent past.'"[165] This dissenting judge went so far as to suggest that the relationship between employer and employee was sufficient to impose upon the employer "some

160. Workers' compensation laws are primarily promulgated by state statute. Federal statutes govern federal employees, seamen, and harbor workers. JOHN G. TURNBULL ET AL., ECONOMIC AND SOCIAL SECURITY 317–19 (4th ed. 1973).

161. *E.g.*, CAL. LAB. CODE § 3601 (Deering 1991).

162. *See Coca-Cola Bottling Co.*, 286 Cal. Rptr. at 864 (declaring exclusive remedy provisions apply only in personal injury or death cases); *see also Jablonski*, 251 Cal. Rptr. at 169 (noting that reprehensible conduct by insurer takes spoliation outside of workers' compensation exemption); Continental Casualty Co. v. Superior Court, 235 Cal. Rptr. 260, 262 (Ct. App. 1987) (demonstrating that physical injuries are not protected by exception); *Weigl*, 601 N.Y.S.2d at 777 (recognizing that New York's tort for intentional destruction of evidence by employer falls outside ambit of workers' compensation ban on common-law remedies).

163. *E.g, Murphy*, 580 N.E.2d at 690; *Koplin*, 734 P.2d at 1183; *Panich*, 445 N.W.2d at 797 (Murphy, P.J., concurring and dissenting); *Coley*, 485 N.Y.S.2d at 878.

164. 445 N.W.2d 795 (Mich. Ct. App. 1989).

165. *See Panich*, 445 N.W.2d at 799 (Murphy, P.J., concurring and dissenting) (quoting Robertson v. Deak Perera (Miami), Inc., 396 So. 2d 749, 752 (Fla. Dist. Ct. App. 1981) (Schwartz, J., dissenting)).

obligation to ask the employee if he wanted the evidence preserved."[166]

Because there is no labor-law or common-law duty to preserve evidence, the employer can simply ignore an explicit request to preserve evidence by the employee.[167] Even if the employer has actual knowledge of the employee's intent to bring a third-party suit, no duty to preserve evidence exists. To avoid tort liability, the employer could simply refuse to enter into an evidence-preserving agreement.[168] In addition, the employer's destruction of evidence or its refusal to preserve evidence does not violate the implied covenant of the work contract because the benefits and objectives of the work contract do not encompass the employee's prospects in future civil litigation. A subpoena duces tecum, issued according to procedural discovery rules, provides the only possible means of imposing a duty to preserve evidence. However, because issuance of a subpoena requires a pending third-party action, a duty to preserve evidence based on a subpoena is of limited effect. Crucial evidence could be destroyed before the injured employee decides to initiate litigation.

Absent the rare situation when a contractual agreement, affirmative conduct,[169] statutory duty,[170] or subpoena gives rise to a duty to preserve evidence, the foreseeability standard provides the only appropriate protection against employer spoliation. Once again, the issue becomes whether foreseeability requires actual or constructive knowledge for third-party spoliators. Considering the same factors as those used in the insurance context, an employer is not as intimately familiar with the prospects of the employee's

166. *Id.* at 800.

167. *Id.* at 801.

168. No penalties, other than the spoliation inference and discovery sanctions, apply to individuals who are not parties to the underlying claim.

169. *See Parker*, 428 So. 2d at 616 (declaring that duty arising from affirmative conduct must be determined in light of facts and circumstances). The dual capacity doctrine makes the exclusive remedy rule inapplicable if the employer occupies a second capacity, in addition to that of employer, that confers on him obligations independent of those imposed by his capacity as employer. Thus, the exclusivity rules of the worker's compensation laws do not bar tort actions arising from a breach of an affirmative duty. *Coca-Cola Bottling Co.*, 286 Cal. Rptr. at 866.

170. *See Panich*, 445 N.W.2d at 798 (construing statutory duties that do not expressly impose duty to preserve evidence for benefit of employer's third-party claim restrictively because "the role of the judiciary is to construe statutes as intended by the Legislature, not to rewrite them").

third-party lawsuit as an insurance carrier investigating the case. In the employment relationship, discovery of prospective litigation against a tortfeasor involves higher transaction costs for the employer than the employee because the employer is not involved in the resolution of the compensation case or the third-party action.

Thus, efficient allocation of the transaction costs involved in labor-related spoliation cases suggests that courts should require actual knowledge by the employer. To impose a duty to preserve evidence upon the employer, the employee should give actual notice to the employer of the prospective litigation. In light of this evaluation, the proposal of the dissenting opinion in *Panich* that the employer is obligated to ask the employee if the evidence should be preserved must be rejected. This approach would create a duty to preserve evidence based upon constructive knowledge, which is inconsistent with the efficient allocation of transaction costs.

2. Spoliation by Workers' Compensation Carriers

The issue of spoliation also arises with workers' compensation insurance carriers.[171] Even though workers' compensation laws do not usually bar claims against third parties, this rule does not apply to carriers since they are presumed to stand "in the employer's shoes."[172] As a result, the exclusivity rule generally applies to claims against the compensation carrier. However, because spoliation constitutes an infringement of property interests, spoliation claims do not fall within this scope, allowing spoliation actions to be brought against the carrier as well as the employer.[173]

Absent an insurance carrier's contractual or affirmative duty to preserve evidence, an independent duty similar to that owed by an employer is viable since the carrier presumably occupies the position of an employer. Because the carrier is a third party, actual knowledge is required to establish the duty to preserve evidence. However, this theory fails to consider that, because of its investiga-

171. *See* Pirocchi v. Liberty Mut. Ins. Co., 365 F. Supp. 277, 279 (E.D. Pa. 1973) (analyzing carrier's loss of chair that had injured plaintiff when it collapsed); *Jablonski*, 251 Cal. Rptr. at 162 (considering loss of documents constituting evidence in workers' compensation case).

172. *Continental Casualty Co.*, 235 Cal. Rptr. at 261.

173. *See Coca-Cola Bottling Co.*, 286 Cal. Rptr. at 867 (allowing employee to pursue spoliation tort despite California's Workers' Compensation Act).

tion and familiarity with the merits of the case, the carrier stands in a far better position than the employer to reasonably foresee the prospects of the employee's third-party action. Therefore, consistent with the standards for other insurance carriers, constructive knowledge represents the appropriate standard for worker's compensation carriers prior to the resolution of the compensation case, and actual knowledge is proper after the case's resolution.

C. *Tort Liability of Attorneys*

1. Legal Malpractice Spoliation

Spoliation of evidence may also occur in legal malpractice scenarios when attorneys negligently damage their client's evidentiary material, impairing the client's ability to bring a successful action against an adverse party. In *Murray v. Farmers Insurance Co.*,[174] an insurance carrier took possession of the plaintiff's damaged automobile after a traffic accident, but agreed with the plaintiff's attorney to preserve the car for an investigation pursuant to a possible products liability action against the manufacturer.[175] After one year, the insurance carrier informed the attorney that the automobile would be salvaged unless he indicated that he needed additional preservation time. The attorney failed to respond to this notification, and the automobile, along with the client's opportunity to bring the products liability action, was destroyed.[176] Instead of explicitly recognizing the negligent spoliation tort, the court dismissed the case because proximate cause, the "universal" and "fundamental framework of negligence liability, was lacking."[177]

The spoliation tort could potentially evolve into a significant issue when lawyers are involved with the destruction of evidence. In traditional legal malpractice actions, the plaintiff must prove the merits of the "suit within the suit,"[178] establishing that the case

---

174. 796 P.2d 101 (Idaho 1990).

175. *Murray*, 796 P.2d at 103.

176. *Id.*

177. *Id.* at 107.

178. Richard G. Coggin, *Attorney Negligence . . . A Suit Within a Suit,* 60 W. VA. L. REV. 225, 225 (1958); *see* Paul G. Kerkorian, *Negligent Spoliation of Evidence: Skirting the "Suit Within the Suit" Requirement of Legal Malpractice Actions*, 41 HASTINGS L.J. 1077, 1078 (1990) (proposing development of new tort for negligent spoliation of evidence to avoid harsh effects of "suit within a suit" requirement); John M. Husband, Note, *Erosion of the Traditional Suit Within a Suit Requirement*, 7 U. TOL. L. REV. 328, 337–39 (1975)

would have prevailed by a preponderance of the evidence but for the attorney's negligence.[179] This requirement, however, creates an obstacle for the plaintiff's success in that the attorney's negligence may make the client's subsequent proof of the underlying case more difficult or even impossible.[180] The spoliation tort reduces the burden of proof for a successful legal malpractice suit because it relaxes the requirement for certainty of damages, defining them as an injury to the expectancy of recovery rather than the recovery per se.[181] The attorney-client relationship creates a duty to preserve evidence stemming from the fiduciary obligations imposed upon attorneys by law.[182] Thus, imposing a duty to preserve evidence based on foreseeability constitutes no impediment to bringing a tort action against an attorney for legal malpractice by spoliation.[183]

(discussing necessary elements to establish suit within suit). A plaintiff must establish four elements in a legal malpractice action: (1) that an attorney-client relationship existed; (2) that the attorney acted negligently or in breach of the contract; (3) that such acts were the proximate cause of plaintiff's damages; and (4) that but for defendant's conduct, the plaintiff would have been successful in the underlying claim. Godbout v. Norton, 262 N.W.2d 374, 376 (Minn. 1977), *cert. denied and appeal dismissed*, 437 U.S. 901 (1978). The "but for" element requires a "mini-trial" on the underlying action, known as the "suit within a suit."

179. *See* Togstad v. Vesely, 291 N.W.2d 686, 695 (Minn. 1980) (applying requirement in medical malpractice case that plaintiff must prove case would have prevailed but for defendant's negligence).

180. Erik M. Jensen, Note, *The Standard of Proof of Causation in Legal Malpractice Cases*, 63 CORNELL L. REV. 666, 672 (1978); *see* Lewis v. Collins, 349 So. 2d 444, 445 (La. Ct. App. 1977) (holding that plaintiff failed to prove injury resulted from accident on job after attorney failed to introduce certain medical records); Lewandowski v. Continental Casualty Co., 276 N.W.2d 284, 287–89 (Wis. 1979) (discussing attorney's failure to timely file action and consequences on client's subsequent malpractice claim).

181. *See* Smith v. Superior Court, 198 Cal. Rptr. 829, 835 (Ct. App. 1984) (declaring that damages need only be proven with reasonable certainty).

182. *See* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 11.1, at 631 (3d ed. 1989) (explaining that fiduciary obligation involves undivided loyalty and confidentiality); *see also* Paul G. Kerkorian, *Negligent Spoliation of Evidence: Skirting the "Suit Within a Suit" Requirement of Legal Malpractice Actions*, 41 HASTINGS L.J. 1077, 1092–93 (1990) (describing attorneys' duty to preserve evidence as "by no means a certainty").

183. *See generally* Paul G. Kerkorian, *Negligent Spoliation of Evidence: Skirting the "Suit Within the Suit" Requirement of Legal Malpractice Actions*, 41 HASTINGS L.J. 1077, 1092–98 (1990) (examining nature and extent of attorneys' duty to preserve evidence).

2. Liability to Nonclients

An attorney's tort liability for spoliation might arise outside the context of traditional legal malpractice. If an attorney actively participates in spoliation, or gives open or veiled advice designed to aid spoliation, the attorney and client are jointly liable as tortfeasors.[184] However, when the attorney negligently fails to inform the client of the legal obligation to preserve evidence, and the client subsequently destroys this evidence, whether a tort action for spoliation lies against the attorney remains unclear. Any such tort action would depend on whether the attorney owes an affirmative duty to counsel a client on the preservation of potentially relevant evidence for the benefit of an adverse party's case. If such an affirmative duty exists, the failure to counsel could result in an attorney's liability for spoliation by omitting this respective advice.

Although the contractual privity requirement for liability to third persons in the law of legal malpractice has declined, a current trend recognizes a duty beyond the privity of the attorney-client relationship.[185] Courts have extended tort liability for lawyers to third parties, arguing that the lawyer could have foreseen damages to the plaintiff.[186] Regardless of this development, no jurisdiction has yet recognized a negligent action in tort by a party against the adverse party's attorney.[187] However, some scholars, by applying the doctrine developed in *National Association of Radiation Survi-*

184. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 46, at 323 (5th ed. 1984) (explaining that "mere knowledge of each party of what the other is doing is sufficient 'concert' to make each liable for the acts of the other").

185. *E.g.*, Matthew R. Bogart, *Legal Malpractice For the Negligent Drafting of a Testamentary Instrument:* Schriener v. Scoville, 73 IOWA L. REV. 1231, 1231 (1988); Barbara L. Walker, *Attorney's Liability to Third Parties for Malpractice: The Growing Acceptance of Liability in the Absence of Privity*, 21 WASHBURN L.J. 48, 48–49 (1981).

186. RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE §§ 7.9, 7.11, at 375, 381 (3d ed. 1989).

187. *See, e.g.*, Bowman v. Two, 704 P.2d 140, 143 (Wash. 1985) (noting California's lead in holding attorneys liable to persons who are not their clients); Estate of Douglas, 428 N.Y.S.2d 558, 560 (Civ. Ct. 1980) (recognizing changing trend in New York law, which allows third persons not in privity with attorney to recover for negligence); Morales v. Field, 160 Cal. Rptr. 239, 243 (Ct. App. 1979) (viewing decision of duty to third party as judicial weighing of policy considerations); Held v. Arant, 134 Cal. Rptr. 422, 423 (Ct. App. 1977) (limiting lawyer's duty of care to intended beneficiaries of his action). *See generally* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 7.11, at 381–82 (3d ed. 1989) (explaining that no jurisdiction has recognized negligence claim by adversary in litigation).

vors v. Turnage,[188] have identified an attorney's duty to counsel clients on preserving evidence.[189] According to *Turnage*, corporate officers have an affirmative duty to communicate the duty to preserve evidence to employees in possession of discoverable material.[190] However, application of the *Turnage* doctrine fails to consider that clients, as opposed to employees, do not act on behalf of their legal counsel. Thus, this doctrine is not suited for application to the attorney-client relationship.

If an attorney's duty to advise a client to preserve potentially relevant evidence is based upon foreseeability, the appropriate standard of conduct would depend on whether counsel is in an adverse position or is a third party to the spoliation victim. Regardless of this determination, one must consider that spoliation by omission involves the potential that an attorney will be held responsible for a client's conduct. Generally, an attorney is not responsible for a client's conduct unless the attorney is aware of the client's criminal or fraudulent behavior. By imposing a duty on the attorney to advise clients against spoliation, the attorney would be forced not only to foresee the evidentiary material's relevance, but also predict the client's spoliating conduct. In light of professional ethics, imposing an affirmative duty upon an attorney to prevent a client's involvement in spoliation of evidence appears overly burdensome.

Importantly, the automatic disclosure requirements for basic information pursuant to the new Rule 26(a) of the Federal Rules of Civil Procedure may eventually further the development of attorney tort liability to an adverse party.[191] The automatic disclosure rules basically require counsel to anticipate potentially relevant information on behalf of the adverse party. Compliance with this obligation is tantamount to a duty that counsel reasonably foresee what information constitutes relevant evidentiary material for the adverse party's case. Whether the changes to the Federal Rules of Civil Procedure will create the basis for some tort duty owed by the

188. 115 F.R.D. 543, 557-58 (N.D. Cal. 1987).

189. JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE § 7.13, at 269 (1989).

190. *Turnage*, 115 F.R.D. at 558.

191. *See* FED. R. CIV. P. 26(a) (requiring parties to provide certain information to opposing parties "without awaiting a discovery request").

attorney to the adverse party as an officer of court remains uncertain.

D. *Immunity Versus Spoliation in Judicial Proceedings*

Another third-party spoliation situation arises when lay or expert witnesses to a civil trial destroy evidence. A conflict exists between a witness's spoliation of evidence and the witness's absolute immunity for statements made during the course of a judicial proceeding. Decisions initially addressing the spoliation tort in this context dealt with false statements by adverse parties.[192] These decisions determined that a false publication, regardless of its effect on the outcome, is absolutely protected by privilege if made during a judicial proceeding.[193] Thus, such false statements may not be used to establish a claim for spoliation of evidence. Privileges will not shield a spoliation claim, however, because physical and pivotal evidence to the action has been destroyed.[194]

This protection also applies to witnesses as potential third-party spoliators. In *Gootee v. Lightner*,[195] the California Court of Appeal held that the protective mantle of a testimonial privilege embraces not only the courtroom testimony of witnesses, but also work product prepared for witnesses' testimony.[196] Therefore, the failure of a witness to preserve work product generated in preparation for testimony is not subject to the spoliation tort as long as the destruction of the work product does not involve pivotal physical evidence. The *Gootee* court reasoned that public policy considera-

---

192. *See, e.g.*, Forberg v. Stumbos & Mason, 266 Cal. Rptr. 436, 438 (Ct. App. 1990) (addressing false statements made by defendants to conceal facts of accident and concluding that defendants acted in concert); Carden v. Getzoff, 235 Cal. Rptr. 698, 698–703 (Ct. App. 1987) (absolving expert accounting witness who manufactured evidence from tort liability to injured party).

193. *See Forberg*, 266 Cal. Rptr. at 442 (concluding that privilege protected spoliation claim); *Carden*, 235 Cal. Rptr. at 703 (declaring that even outrageous conduct is privileged).

194. Robert W. Thompson, *To The Prevailing Party Goes the Spoils: An Overview of An Emerging Tort in California*, 18 W. ST. U. L. REV. 223, 238–39 (1990); *see* Gootee v. Lightner, 274 Cal. Rptr. 697, 701–02 n.6 (Ct. App. 1990) (distinguishing cases involving destruction of notes drafted in preparation to testify and destruction of vehicle necessary to products liability action).

195. 274 Cal. Rptr. 697 (Ct. App. 1990).

196. *See Gootee*, 274 Cal. Rptr. at 701 (citing other California law that supports protection of preparatory activities). In *Gootee*, the court analyzed the testimonial privilege found in California Civil Code § 47(2). *Id.* at 698.

tions such as access to the courts, encouragement of witnesses to testify truthfully, and finality in litigation would suffer if a witness was exposed to civil litigation "merely because the witness failed to retain every note or paper, generated in anticipation of testifying, which an unhappy litigant surmises would have benefitted his cross-examination of the witness."[197]

Pivotal evidence consists of evidence that is independently significant, distinct from the witness's report and testimony. Absent this independent significance, third persons such as expert or lay witnesses and adverse parties are immune from spoliation claims. In such cases, the question of whether a duty to preserve evidence exists does not even arise.

V. DAMAGES

A. *Speculativeness of Damages*

"The most troubling aspect in allowing a cause of action for . . . spoliation of evidence is the requisite tort element of damages."[198] Courts, troubled by the speculative nature of damages in spoliation cases, encounter difficulty in meeting the traditional damages standard under which a plaintiff must establish the fact and the amount of damages with reasonable certainty.[199] However, because the spoliator has destroyed evidence, determining the precise amount of damages may prove impossible for the plaintiff. As a result, the jury must "'quantify the unquantifiable.'"[200] As the Illinois Appellate Court, in *Petrik v. Monarch Printing Co.*,[201] stated:

> [I]t is impossible to know what the destroyed evidence would have shown. . . . It would seem to be sheer guesswork, even presuming that the destroyed evidence went against the spoliator, to calculate what it would have contributed to the plaintiff's success on the merits of the underlying lawsuit. Given that plaintiff has lost the lawsuit

197. *Id.* at 702.

198. Smith v. Superior Court, 198 Cal. Rptr. 829, 835 (Ct. App. 1984); *see also* Petrik v. Monarch Printing Corp., 501 N.E.2d 1312, 1320 (Ill. App. Ct. 1986) (considering calculation of damages as most difficult aspect of spoliation of evidence tort).

199. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30 (5th ed. 1984) (noting that actual loss is necessary in negligence cases).

200. Chris Goodrich, *Gone Today, Here Tomorrow*, CAL. LAW., June 1984, at 15 (quoting California attorney Raoul D. Kennedy).

201. 501 N.E.2d 1312 (Ill. App. Ct. 1986).

without the spoliated evidence, it does not follow that he would have won it with the evidence.[202]

The speculative nature of damages in spoliation cases influenced some courts to reject the new tort of spoliation until resolution of the underlying lawsuit, believing that the suit's completion would satisfy the certainty requirement for damages.[203] This requirement, however, is inconsistent with the spoliation tort as a tort of interference that protects lost probable expectancies and undermines the nature of the tort as an independent tort action.[204]

The California Court of Appeal may have had this evaluation in mind when, in *Smith v. Superior Court*,[205] it adopted an approach to overcome the speculative nature of damages in spoliation cases. Instead of insisting on the certainty criterion, the court relaxed the standard of proof from reasonable certainty to a just and reasonable inference regarding the amount of damages.[206] According to the court, barring a cause of action simply because of the speculative nature of damages is tantamount to finding that the interest invaded did not deserve legal protection.[207] Yet, relaxation of the damages standard was not a revolutionary invention by California courts; rather, the United States Supreme Court applied a relaxed damages standard as early as 1931. In *Story Parchment Co. v. Paterson Parchment Paper Co.*,[208] the Court held that parties cannot be denied the right to recover actual damages if these damages cannot be certainly measured because to do so would enable parties to profit by their own wrongs and invite depredation.[209] Fur-

---

202. *Petrik*, 501 N.E.2d at 1320.

203. *E.g.*, Bondu v. Gurvich, 473 So. 2d 1307, 1312 (Fla. Dist. Ct. App. 1984); *Petrik*, 501 N.E.2d at 1322; Fox v. Cohen, 406 N.E.2d 178, 183 (Ill. App. Ct. 1980); Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434, 438 (Minn. 1990); Baugher v. Gates Rubber Co., 863 S.W.2d 905, 913 (Mo. Ct. App. 1993).

204. Paul G. Kerkorian, *Negligent Spoliation of Evidence: Skirting the "Suit Within a Suit" Requirement of Legal Malpractice*, 41 HASTING L.J. 1077, 1101 (1990).

205. 198 Cal. Rptr. 829 (Ct. App. 1984).

206. *Smith*, 198 Cal. Rptr. at 836.

207. *Id.* at 835.

208. 282 U.S. 555 (1931).

209. *Story Parchment Co.*, 282 U.S. at 564; *see* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264–65 (1946) (applying lenient damages standard because failure to do so would encourage wrongdoing); Frito-Lay, Inc. v. So Good Potato Chip Co., 427 F. Supp. 677, 678 (D. Mo. 1977) (awarding damages despite impossibility of assessing exact damages). *See generally* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 124 (1969) (allowing jury to make just and reasonable estimates).

ther expanding the deterrence policies outlined by the Supreme Court more than six decades ago, the *Smith* court relied upon other tort actions in which damages are uncertain, but still recoverable.[210] *Smith*, therefore, relaxed the damages standard for tort spoliation on firmly established legal grounds.

Spoliation of evidence constitutes serious discovery abuse, violating the spirit of liberal discovery, orderly judicial procedures, and traditional notions of fair play in civil litigation.[211] Thus, the policy consideration of deterrence, as emphasized by the Supreme Court of California in *Youst v. Longo*,[212] constitutes an important factor or even a "social imperative" justifying relaxation of the damages standard.[213] In *Youst*, the court characterized the spoliation tort as the most speculative tort recognized by California courts, but justified ignoring the threshold requirement of reasonable probability of economic gain to prevent spoliation of evidence in light of compelling public policy concerns.[214]

Addressing the measure of damages in spoliation cases, the *Smith* court, relying on *Story Parchment Co.*, required that damages be quantified according to the evidence produced. Thus, the fact finder may draw a just and reasonable inference of the approximate amount of damages from the evidence introduced at trial.[215] This standard promotes a reasonable amount of accuracy without requiring that the precise amount of damages be shown. In *Petrik*, the Illinois Appellate Court provided similar suggestions regarding

---

210. *See Smith*, 198 Cal. Rptr. at 836 (listing many areas in which damages cannot be established with certainty, including wrongful death, personal injury, patent and copyright infringement, libel, slander, and invasion of privacy); *see also* Joseph E. Johnson & George B. Flanigan, *Economic Valuation for Wrongful Death*, 6 CAMPBELL L. REV. 47, 52–53 (1984) (explaining problems with forecasting future incomes). Relaxation of the damages standard has also occurred in antitrust cases. *See* Richard R. Rulon, *Proof of Damages for Terminated or Precluded Plaintiffs*, 49 ANTITRUST L.J. 153, 153–54 (1980) (discussing liberalization in standard of proof).

211. *See Petrik*, 501 N.E.2d at 1319 (criticizing any system that requires person to disclose location of discovery source, but allows person to destroy evidence beforehand).

212. 729 P.2d 728 (Cal. 1987). The California Supreme Court had the opportunity to create yet another tort analogous to that of spoliation, but declined to do so.

213. John K. Stipanich, Comment, *The Negligent Spoliation of Evidence: An Independent Tort Action May Be the Only Acceptable Alternative*, 53 OHIO ST. L.J. 1135, 1146 (1992).

214. *Youst*, 729 P.2d at 734–35.

215. *Smith*, 198 Cal. Rptr. at 835.

the method of quantifying damages.[216] Underlying the court's rationale was the assumption that the most elementary tenets of justice and public policy require the spoliator to bear the risk of the uncertainty of the ensuing wrong.[217] While fixing damages at a level consistent with the evidence produced at trial provides one alternative, testimony concerning the maximum possible damages consistent with the remaining evidence offers another. Furthermore, testimony may be elicited with respect to the damages that most likely would have been awarded based on objective criteria.[218] Thus, although the award of damages presents difficulties, it poses no insurmountable impediment to the creation of the spoliation tort.

B. *Punitive Damages*

The policy consideration of deterrence provides support for applying punitive damages to spoliation. When a defendant intentionally or willfully destroys evidence, the spoliation tort should give rise to punitive damages. Allowing punitive damages would potentially enable a party with an otherwise minimal claim against the spoliator to recover millions of dollars. Furthermore, in cases involving a defective product, or in any complex litigation, the spoliating party might be a multi-billion dollar corporation against whom such a recovery would be viable.[219]

Viviano v. CBS, Inc.[220] represents the only decision to address and assess punitive damages for spoliation. In *Viviano*, the plaintiff's employer willfully withheld a memorandum that contained highly incriminating information about a defective machine that injured the plaintiff at her workplace.[221] This memorandum would have been decisive in plaintiff's products liability lawsuit against the manufacturer of the machine.[222] In light of the deterrent na-

---

216. *See Petrik*, 501 N.E.2d at 1321 (suggesting costs and attorneys fees as another possible measure of damages).

217. *Id.*

218. Fox v. Hale & Norcross Silver Mining Co., 41 P. 308, 322 (Cal. 1895).

219. Robert W. Thompson, *To the Prevailing Party Goes the Spoils: An Overview of An Emerging Tort in California*, 18 W. ST. U. L. REV. 223, 242 (1990).

220. 597 A.2d 543 (N.J. Super. Ct. App. Div. 1991).

221. *Viviano*, 597 A.2d at 545.

222. *See id.* at 546 (quoting memorandum, which questioned effectiveness of safety mechanism).

ture of punitive damages, the court held that substantial evidence of intentional wrongdoing warrants the imposition of punitive damages.[223]

Although *Viviano* involved a typical third-party spoliation case, punitive damages should also be exacted from adverse party spoliators. Adverse parties who intentionally destroy evidence are more likely to benefit from this conduct than third parties. Moreover, the goal of deterring spoliation by adverse parties involves a greater social imperative than the goal of spoliation by third parties.[224] Safeguarding the civil adversary system from spoliation provides sufficient public policy considerations to justify deterring spoliation by the threat of punitive damages against adverse parties as well as third parties.

VI. POLICY CONSIDERATIONS

A. *Drawbacks of the Spoliation Tort*

Recognition of the spoliation tort could potentially undermine important public policy considerations. For example, creation of a new cause of action increases the likelihood of litigation.[225] With an increase in lawsuits, social costs would necessarily escalate as well.[226] Since recognition of any new cause of action provides the opportunity for litigation in areas that were once dormant, this argument alone cannot serve to prevent the acceptance of the spoliation tort. Additionally, commentators fear that the spoliation tort will conflict with the judicial system's goal of finality by creating endless litigation.[227] Although these concerns are justifiable, the

223. *Id.* at 552; *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984) (noting that courts permit punitive damages for intentional or deliberate conduct which has character similar to that of crime).

224. John K. Stipanich, Comment, *The Negligent Spoliation of Evidence: An Independent Tort Action May Be the Only Acceptable Alternative*, 53 OHIO ST. L.J. 1135, 1149 (1992).

225. Pati J. Pofahl, Comment, Smith v. Superior Court: *A New Tort of Intentional Spoliation of Evidence*, 69 MINN. L. REV. 961, 981 (1985).

226. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 479 (1988) (discussing nexus between litigation and social costs).

227. *See* Theresa M. Owens, Note, *Should Iowa Adopt the Tort of Intentional Spoliation of Evidence in Civil Litigation?*, 41 DRAKE L. REV. 179, 191 (1992) (citing potential for litigation and inconsistency with finality as reasons why courts may reject spoliation doctrine); James F. Thompson, Comment, *Spoliation of Evidence: A Troubling New Tort*, 37 U. KAN. L. REV. 563, 592 (1989) (fearing endless litigation and frivolous claims).

goal of justice should not be sacrificed for the goals of court efficiency and finality. Importantly, jurisdictions adopting the spoliation tort have not reported an avalanche of lawsuits reflecting endless litigation.

Creating a duty to preserve evidence in negligence cases presents the most serious challenge to the spoliation tort. Based on foreseeability issues, judges have criticized the duty to preserve evidence as immensely burdensome.[228] Judges have further denounced the duty as an interference with the right to dispose of one's own property.[229] However, if disposal of property unduly interferes with another's interest or is harmful, a cause of action in tort should lie.

Other critics of spoliation characterize the duty to preserve evidence as a perversion of the adversary system that would force the defendant to effectuate discovery for an adversary,[230] effectively creating a duty for the benefit of another.[231] As the *County of Solano v. Delancy*[232] court noted, the element of foreseeability places the "potential spoliator in the anomalous position of notifying a potential adversary about the existence of potential evidence. But the alternative is to condone spoliation of evidence in circumstances where it ought to be deterred."[233]

Predictions that the spoliation tort will eventually pervert the adversary system are unpersuasive. The tort imposes a duty to preserve, not disclose, possibly relevant evidentiary material in the possession of the potential spoliator. The duty to preserve evidence does not automatically constitute an obligation on the potential spoliator to notify the adverse party about the evidentiary material in her possession. Rather, the duty merely requires the potential spoliator to do what is essentially inherent in the adversary system—preserve evidence for production upon a proper discovery request by the opposing party.[234] This duty encompasses

---

228. *See* County of Solano v. Delancy, 264 Cal. Rptr. 721, 737 (Ct. App. 1989) (Anderson, P.J., dissenting) (characterizing burden as "Herculean" task).

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

230. *Delancy*, 264 Cal. Rptr. at 737 (Anderson, P.J., dissenting).

231. James F. Thompson, Comment, *Spoliation of Evidence: A Troubling New Tort*, 37 U. KAN. L. REV. 563, 591 (1989).

232. 264 Cal. Rptr. 721 (Ct. App. 1989).

233. *Delancy*, 264 Cal. Rptr. at 731.

234. *See, e.g.*, Struthers Patent Corp. v. Nestle Co., 558 F. Supp. 747, 765 (D.N.J. 1981) (punishing pre-litigation spoliation, because it placed spoliator "in a position where it could not comply with future discovery requests").

the traditional obligations to safeguard liberal discovery, follow orderly judicial procedures, and protect notions of fair play in the adversary system. Moreover, a potential spoliator need only act reasonably under the circumstances, and with few exceptions, a third party spoliator need not fear liability without actual notice. In addition, the latest amendments to Rule 26(a) of the Federal Rules of Civil Procedure impose a legal obligation on adverse parties to automatically disclose basic information regarding pending litigation, which, in essence, requires preservation of such information.[235] For these reasons, the assertion that the duty to preserve evidence as required by the negligent spoliation tort might pervert the adversary system is exaggerated.

Critics of the spoliation tort further allege that the spoliator is unfairly subjected to speculative damages because of the impossibility of ascertaining the extent to which the spoliation harmed the underlying action. Furthermore, critics contend that damage awards for spoliation may be inherently disproportionate to the culpability of a negligent spoliator.[236] Although no court has addressed this exact problem, the theory developed by the United States Supreme Court provides an appropriate standard to address the speculative character of damages resulting from spoliation.[237]

B. *Benefits*

Although drawbacks exist, the benefits of the spoliation tort far outweigh any negative consequences of its recognition. The spoliation tort perfectly supplements traditional remedies, which have

---

235. However, amended Federal Rule of Civil Procedure 26(a) creates two uncertainties. First, it is questionable to what extent the new automatic disclosure requirement involves the parties' duty to foresee what specific information is to be considered "basic." Second, whether any such duty extends to the time before the action is pending remains unclear. These questions cannot be addressed here. It can be noted that, with respect to the elaborate sanctioning mechanism provided in the newly amended Federal Rule of Civil Procedure 37(c)(1), these uncertainties might generate additional litigation to resolve disputes over discovery sanctions for noncompliance with the ill-defined duty to automatically disclose pursuant to Rule 26(a).

236. *See* John K. Stipanich, Comment, *The Negligent Spoliation of Evidence: An Independent Tort Action May Be the Only Acceptable Alternative*, 53 OHIO ST. L.J. 1135, 1151 (1992) (acknowledging that no court has yet addressed issue of disproportionate damages in spoliation context); *see also* Pomeroy v. Benton, 77 Mo. 64, 90 (1882) (providing example of early spoliation inference case).

237. *See* Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 564 (1931) (preferring speculative damages rather than encouraging wrongdoing).

proven ineffective in addressing the destruction of evidence. The monetary sanctions that accompany spoliation recovery serve to protect and compensate spoliation victims, as well as to deter future offenses.

1. Protection and Compensation

More effective than traditional remedies, the spoliation tort protects and compensates spoliation victims.[238] The tort of negligent spoliation also promotes the policy considerations of fairness and deterrence, principles that govern both modern negligence law and the legal remedies against spoliation in civil litigation. Thus, spoliation provides a "powerful alternative"[239] to the traditional remedies available for the recovery of damages by spoliation victims.

2. Deterrence

Most courts applying either the spoliation inference or court sanctions for intentional or bad faith spoliation focus on the deterrence policies. When particular evidence is severely detrimental to a party's case, there may be little incentive to preserve the evidence if production would cause the party to lose. The intentional spoliator risks an adverse verdict if he produces a "smoking gun" at trial; however, an adverse inference or a court sanction may lead to the same outcome. Given the difficulties in detecting clandestine spoliation acts and the procedural obstacles to proving them at trial, a risk-benefit analysis might encourage an adverse party to choose the spoliation alternative.[240] The bad faith spoliator has

238. *See* John K. Stipanich, Comment, *The Negligent Spoliation of Evidence: An Independent Tort Action May Be the Only Acceptable Alternative*, 53 OHIO ST. L.J. 1135, 1149–52 (1992) (analyzing drawbacks and benefits of recognizing spoliation tort). The spoliation inference and court sanctions tend to restore fairness to the trial, promoting accurate fact-finding rather than compensation for the victim.

239. Lawrence Solum & Stephen Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1106 (1987).

240. *See* Joseph Gastwirth, *Comment on Nesson*, 13 CARDOZO L. REV. 817, 826 (1991) (predicting that some lawyers may create, rather than destroy, evidence); Dale A. Nance, *Missing Evidence*, 13 CARDOZO L. REV. 831, 861–62 (1991) (noting that individuals in "legal right" may opt to suppress evidence to secure victory); Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need For Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 805 (1991) (discussing temptation of spoliation); Steven Shavell, *Optimal Sanctions and the Incentive to Provide Evidence to Legal Tribunals*, 9 INT'L REV. L. & ECON. 3, 4 (1989) (anticipating that individuals will calculate rewards and risks in deciding whether to commit act of spoliation).

nothing to lose and much to gain. Thus, conventional remedies such as the adverse inference or court sanctions provide only limited deterrence to willful spoliation.

The spoliation tort, however, provides a strong deterrent, even against willful spoliation. Tort liability for damages and punitive damages have a significant influence on any risk-benefit analysis. The potential for general or punitive damages significantly increases the severity of punishment, thereby increasing the liability a potential spoliator expects. In addition, a duty to preserve evidence based on foreseeability increases the likelihood of punishment. Thus, by increasing both the likelihood and severity of punishment, the spoliation tort forcefully deters spoliating conduct.

Smith v. Superior Court,[241] the case that created the spoliation tort, best illustrates the compelling deterrent effect of potential damage liability. In *Smith*, a truck dealer produced physical evidence that had previously disappeared when faced with defending a spoliation suit involving potential liability for damages. The case settled for a large sum of money. The evidence suddenly reappeared, suggesting that the defendant would not have lost the evidence if an expectation of tort liability had existed.[242]

3. Prevention

As noted above, the destruction of evidence manifests a shocking disregard for orderly judicial procedures, violates the spirit of liberal discovery, and ultimately undermines the core of the adversary system. Spoliation of evidence creates enormous costs for both the victimized party and the judicial system, prevents fair and proper adjudication of the issues, and interferes with the administration of justice. The proper administration of justice requires the prevention of spoliation in civil litigation. Prevention relies on remedies such as the spoliation inference, court sanctions, and the spoliation tort to deter the destruction of evidence, compensate the harmed party, and facilitate accurate fact-finding. The spoliation tort best achieves these policy goals. Providing the most protective

241. 198 Cal. Rptr. 829 (Ct. App. 1984).

242. *See* Chris Goodrich, *Gone Today, Here Tomorrow*, CAL. LAW., June 1984, at 15 (stating that after process concluded, missing evidence reappeared, and defendants settled for large amount of money).

and deterrent effect, the spoliation tort serves as an integrated tool to enforce and maintain the prevention of spoliation.

VII. CONCLUSION

Considering the substantive impact destruction of evidence in civil litigation has on the adversary system, the spoliation tort provides a comprehensive supplement to traditional remedies. In addition, its strong protective, deterrent, and preventive effects outweigh any of its potential drawbacks. The identification of spoliation as an infringement of a property interest, which protects the probable expectancy to win a lawsuit and deserves to be guarded from interference by adverse or third parties, appears inevitable in the highly litigious American society. Both the property interest and the precisely defined foreseeability criterion utilized to establish a duty to preserve evidence provide a starting point to address the creation of the spoliation tort in other jurisdictions. In the words of Prosser and Keeton, "changing social conditions lead constantly to the recognition of new duties."[243] Thus, it should only be a matter of time until courts shape the limits of the duty to preserve evidence to adequately protect the property interests of civil litigants.

243. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 359 (5th ed. 1984).

APPENDIX I:
JURISDICTIONS RECOGNIZING THE SPOLIATION TORT

Courts have identified the need to prevent spoliation of evidence. Nonetheless, traditional tort actions have failed to effect this end. Seven of the twenty-three jurisdictions considering spoliation of evidence as an independent tort have adopted it in some form.

CALIFORNIA

In two decision rendered after *Smith v. Superior Court*,[244] *Velasco v. Commercial Building Maintenance Co.*[245] and *County of Solano v. Delancy*,[246] the California Court of Appeal widened the scope of the intentional tort of spoliation to include negligent spoliation. Although the *Delancy* court enumerated for the first time the elements of intentional and negligent spoliation,[247] the court's opinion was not published by order of the California Supreme Court.[248] Notwithstanding the depublication order, *Delancy* shaped the negligent spoliation tort in California and elsewhere. Intentional and negligent spoliation of evidence presently rest upon a well-established foundation in California case law.[249]

---

244. 198 Cal. Rptr. 829 (Ct. App. 1984); *see* discussion *supra* Part II (A).

245. 215 Cal. Rptr. 504 (Ct. App. 1985).

246. 264 Cal. Rptr. 721 (Ct. App. 1989).

247. *Delancy*, 264 Cal. Rptr. at 728-29.

248. County of Solano v. Delancy, No. S013565, 1990 Cal. LEXIS 488, at *1 (Cal. Feb. 1, 1990).

249. *See, e.g.*, Favaloro v. S/S Golden Gate, 687 F. Supp. 475, 480–81 (N.D. Cal. 1987) (recognizing existence of spoliation tort, but refusing to allow recovery based on facts); Augusta v. United Serv. Auto. Ass'n, 16 Cal. Rptr. 2d 400, 401 (Ct. App. 1993) (embracing spoliation cause of action for personal property injuries and applying two-year statute of limitations); Coca-Cola Bottling Co. v. Superior Court, 286 Cal. Rptr. 855, 867 (Ct. App. 1991) (requiring court to determine whether injury is to employee's person or to employee's personal property in spoliation cause of action); *Delancy*, 264 Cal. Rptr. 721, 728–29 (Ct. App. 1989) (analogizing spoliation tort and tort of intentional interference with potential benefits); Carden v. Getzoff, 235 Cal. Rptr. 698, 702 (Ct. App. 1987) (determining that cause of action for intentional spoliation of evidence was inappropriate because respondent's report was privileged communication); Continental Casualty Co. v. Superior Court, 235 Cal. Rptr. 260, 263 (Ct. App. 1987) (denying spoliation claim for personal injuries arising from work-related accident because no intent was shown); Reid v. State Farm Mut. Auto. Ins. Co., 218 Cal. Rptr. 913, 920 (Ct. App. 1985) (dismissing cause of action for

FLORIDA

The 1985 decision of *Bondu v. Gurvich*[250] made Florida the second jurisdiction to recognize the independent tort of spoliation. In *Bondu*, a hospital destroyed records crucial to a medical malpractice suit, preventing the plaintiff from obtaining the necessary expert testimony. Dismissal resulted. Plaintiff subsequently filed a second lawsuit asserting spoliation claims. Applying the reasoning set forth in *Smith* and in *Williams v. State*,[251] the District Court of Appeal held:

> If. . . an action for failure to preserve evidence or destruction of evidence lies against a party who has no connection to the lost prospective litigation, then, a fortiori, an action should lie against a defendant which, as here, stands to benefit by the fact that the prospect of successful litigation against it has disappeared along with the crucial evidence.[252]

Requiring the defendant to have a legal duty to preserve evidence for plaintiff to recover, the court identified a duty stemming from an administrative regulation mandating that hospitals maintain and furnish medical records. Subsequently, Florida courts firmly estab-

---

intentional destruction because no evidence supported claim); Velasco v. Commercial Bldg. Maintenance Co., 215 Cal. Rptr. 504, 506 (Ct. App. 1985) (listing foreseeability of harm to plaintiff as one criteria to consider in negligent destruction claim). Several California cases explicate the intentional spoliation tort. *See, e.g.*, Pau v. Yosemite Park & Curry Co., 928 F.2d 880, 886 (9th Cir. 1991) (requiring proof of intentional destruction and prejudice to lawsuit for success in intentional spoliation cause of action); Youst v. Longo, 729 P.2d 728, 734 (Cal. 1987) (analogizing tort of intentional spoliation and potential tort of interference with economic gain in sporting event); Walsh v. Caidin, 283 Cal. Rptr. 326, 328 (Ct. App. 1991) (finding that cremation of body prior to promised autopsy does not constitute spoliation of evidence because no right to autopsy gives rise to civil action); Gootee v. Lightner, 274 Cal. Rptr. 697, 701 (Ct. App. 1990) (holding that spoliation tort does not apply to witness's destruction of notes made in preparation to testify); Forberg v. Stumbos & Mason, 266 Cal. Rptr. 436, 442 (Ct. App. 1990) (denying spoliation claim based on concealment of photographs because real basis of action was underlying falsehoods and not destruction of photographs); Estate of Legeas v. Connolly, 256 Cal. Rptr. 117, 121 (Ct. App. 1989) (asserting that tort action for spoliation of evidence supported allowing cause of action for intentional spoliation of will); Jablonski v. Royal Globe Ins. Co., 251 Cal. Rptr. 160, 169 (Ct. App. 1988) (stating that intentional destruction of evidence that merely affects plaintiff's worker's compensation claim is addressable under statute and not through tort action).

250. 473 So. 2d 1307 (Fla. Dist. Ct. App. 1985).

251. 664 P.2d 137 (Cal. 1983).

252. *Bondu*, 473 So. 2d at 1312.

lished a tort action for negligent spoliation of evidence by adverse parties and third parties.[253]

ALASKA

In the 1986 decision of *Hazen v. Municipality of Anchorage*,[254] the Alaska Supreme Court followed California's lead and adopted the tort of intentional spoliation of evidence.[255] Relying on *Smith*, the court held that a common-law cause of action in tort exists for intentional spoliation.[256] *Hazen* involved a massage parlor owner who sued the Municipality of Anchorage for false arrest, malicious prosecution, and civil rights violations arising from the alleged alteration and destruction of an arrest tape. After the criminal charges against the plaintiff were dismissed, her lawyers requested that the tape be preserved for a possible civil action. When the plaintiff obtained the tape in response to a discovery request, it was inaudible.[257] The Alaska Supreme Court determined that plaintiff's prospective legal actions were valuable prospective expectancies and that intentional alterations of the arrest tape constituted an unreasonable interference with these expectancies.[258] Alaska adopted the intentional spoliation tort, but has not yet confronted the issue of negligent spoliation.

KANSAS

In 1992, Kansas became the next jurisdiction to embrace the negligent spoliation tort. In *Foster v. Lawrence Memorial Hospital*,[259] a doctor prepared a chronology of his treatment for a medical malpractice suit and subsequently discarded the personal notes he made when treating the plaintiff.[260] The United States District Court recognized that a prior state decision, *Koplin v. Rosel Well*

253. *See* Continental Ins. Co. v. Herman, 576 So. 2d 313, 315 (Fla. Dist. Ct. App. 1991) (recognizing spoliation as tort, but finding that plaintiff "suffered no significant impairment in an ability to prove the underlying lawsuit"); Miller v. Allstate Ins. Co., 573 So. 2d 24, 27 (Fla. Dist. Ct. App. 1990) (finding duty in valid contract between parties to lawsuit).

254. 718 P.2d 456 (Alaska 1986).

255. *See Hazen*, 718 P.2d at 463 & n.9 (recognizing spoliation as tort though neither party briefed issue on appeal).

256. *Id.* at 463.

257. *Id.* at 458–59.

258. *Id.* at 464.

259. 809 F. Supp. 831 (D. Kan. 1992).

260. *Foster*, 809 F. Supp. at 834.

Perforators, Inc.,[261] denied the plaintiff relief for a spoliation claim.[262] The *Koplin* court had concluded that "absent some independent tort, contract, agreement, voluntary assumption of duty, or special relationship of the parties, the new tort of 'the intentional interference with a prospective civil action by spoliation of evidence' should not be recognized in Kansas."[263]

The United States District Court noted that a fair reading of *Koplin* indicated that Kansas common law would recognize the spoliation tort if the factual circumstances gave rise to a specific duty to preserve evidence.[264] The court identified a statute that imposed a duty upon doctors to maintain treatment records for their patients.[265] Concluding that this statute created a specific duty to preserve evidence, the court explicitly recognized a tort action for negligent spoliation of evidence.[266]

Because federal court decisions generally cannot bind state courts, *Foster* is of little precedential value in Kansas. However, the court accurately applied the elements set forth by the Kansas Supreme Court in *Koplin*; when met, these elements should give rise to the spoliation tort.[267] Despite its lack of precedential value, this highly persuasive decision indicates that Kansas common law recognizes intentional and negligent spoliation when a duty to preserve evidence exists.

NEW JERSEY

A New Jersey appellate court addressed the question of whether New Jersey recognizes an independent tort action for intentional concealment of evidence in *Viviano v. CBS, Inc.*[268] In *Viviano*, a

---

261. 734 P.2d 1177 (Kan. 1987).

262. *See Foster*, 809 F. Supp. at 836 (analyzing *Koplin* court's rationale).

263. *Koplin*, 734 P.2d at 1183.

264. *Foster*, 809 F. Supp. at 838.

265. *See id.* at 834–35 (noting arguments for and against statute's application).

266. *See id.* at 838 (concluding that jury was entitled to consider facts surrounding destruction of defendant's notes).

267. *See Koplin*, 734 P.2d at 1183 (declaring that facts in that case did not give rise to spoliation tort).

268. 597 A.2d 543 (N.J. Super. Ct. App. Div. 1991). In *Trump Taj Mahal v. Costruzioni Aeronautiche Giovanni*, 761 F. Supp. 1143 (D. N.J. 1991), *aff'd*, 958 F.2d 365 (3d Cir.), *cert. denied*, 113 S. Ct. 84 (1992) the United States District Court rendered the first decision on tortious spoliation in New Jersey. However, the court abdicated its responsibility to decide a state law question and create this new tort action, "believing that role [to be] better suited to New Jersey state courts." *Trump Taj Mahal*, 761 F.2d at 1162. As a result

malfunctioning machine injured the plaintiff at work. The defendant employer failed to produce a highly incriminating memorandum containing key information that the plaintiff needed to bring a products liability action against the manufacturer.[269] Listing the elements of intentional spoliation enumerated by the *Delancy* court, the New Jersey court substituted concealment for destruction and created a cause of action for willful concealment of evidence.[270] Two years later, in *Hirsch v. General Motors Corp.*,[271] the Superior Court of New Jersey adopted *Viviano*'s rationale and held that an action for willful concealment of evidence may be brought against an adverse party or a third party.[272] However, the court expressly declined to recognize negligent concealment of evidence by an adverse party as an independent tort.[273] Furthermore, the court failed to address the question of whether this tort applies to independent third parties.

The difference between willful concealment and willful destruction of evidence is of questionable significance. Destroyed evidence is permanently lost, yet concealed evidence may still be introduced at trial. If courts impose sanctions for the less injurious conduct of concealment, it can be reasoned from an *argumentum a minore ad maius* that destruction, which is even more injurious, should be sanctioned as well. Thus, a tort action should also lie for destruction of evidence. The reasoning of the *Viviano* court supports this argument: If "concealment of evidence" is substituted for "destruction of evidence," all the elements of the tort of concealment of evidence correspond with the spoliation tort.[274] The similar character of concealment and destruction and the *argumentum a minore* both support the extension of the tort recognized in New Jersey to willful acts of destruction of evidence. Although the

---

of the Federal Court's unlawful abdication of responsibility, other courts could not even cite this decision as authority regarding the tort's non-existence in New Jersey at that time. JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE § 4.11J, at 68 (Supp. 1994).

269. *See Viviano*, 597 A.2d at 546 (relating that plaintiff, after being re-employed by defendant, found memorandum in her personnel file).

270. *Id.* at 549–50.

271. 628 A.2d 1108 (N.J. Super. Ct. App. Div. 1993).

272. *See Hirsch*, 628 A.2d at 1125 (clarifying New Jersey's approach to destruction of evidence).

273. *See id.* (stating that defendant's negligent spoliation of evidence constitutes discovery abuse).

274. *Viviano*, 597 A.2d at 550.

New Jersey Supreme Court attempted to clarify the confusion surrounding the law governing destruction of evidence,[275] it failed to achieve that goal.

ILLINOIS

The Supreme Court of Illinois, in *Rodgers v. St. Mary's Hospital*,[276] avoided the question of whether an independent tort action for spoliation of evidence exists.[277] Rather, the court held that an administrative regulation commanding hospitals to maintain medical records implies a private right of action if certain requirements are met.[278] According to the court, the doctrine of implication by statute arises if the plaintiff meets a four-factor test in addition to the regular elements of a tort action: (1) the plaintiff is a member of a class for whose benefit the statute was enacted; (2) the action is consistent with the statute's purpose; (3) the injury is one the statute is designed to prevent; and (4) a need exists to provide an adequate remedy for violations of the statute.[279] In so holding, the Illinois Supreme Court created an implied cause of action for de-

275. *Hirsch*, 628 A.2d at 1125.

276. 597 N.E.2d 616 (Ill. 1992).

277. *See Rodgers*, 597 N.E.2d at 616 (deciding case on narrow grounds based upon X-Ray Retention Statute). Prior to *Rodgers*, two Illinois appellate court decisions neared recognition of the full-scale tort of spoliation. *See* Petrik v. Monarch Printing Corp., 501 N.E.2d 1312, 1321 (Ill. App. Ct. 1986) (declining to address possible recognition of spoliation tort because of absence of essential element); Fox v. Cohen, 406 N.E.2d 178, 183 (Ill. App. Ct. 1980) (implying existence of spoliation tort, but denying recovery because of speculative nature of damages).

278. *Rodgers*, 597 N.E.2d at 619–20.

279. *See id.* at 619 (outlining four-factor test originally established in *Corgan v. Muehling*, 574 N.E.2d 602 (Ill. 1991)); *see also* Cook v. Optimum/Ideal Managers, 473 N.E.2d 334, 340–41 (Ill. App. Ct. 1985) (declining to imply private right of action under workers' compensation statute); Sawyer Realty Group, Inc. v. Jarvis Corp., 432 N.E.2d 849, 853 (Ill. 1982) (recognizing implied right of action for damages when employer discharged employee for exercising workers' compensation rights). If no common-law duty of due care exists, rendering negligence per se unavailable, state courts sometimes imply a private cause of action into a statute. *See* Bob Godfrey Pontiac, Inc. v. Roloff, 630 P.2d 840, 847–51 (Or. 1981) (providing extraordinary analysis of attorneys' violation of statutory duty). The federal implication doctrine originated in *Texas & Pacific Railway Co. v. Rigsby*, 241 U.S. 33, 39–40 (1916). *See* Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 555 (1981) (attributing creation of federal implication doctrine to *Rigsby*); *see also* Cort v. Ash, 422 U.S. 66, 78 (1975) (delineating four considerations for implying private right of action in statute not expressly providing one). Negligence per se does not exist in federal law. Thus, when a question arises regarding whether a federal statute implies a private cause of action, congressional intent becomes paramount. *See* Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 557–58 (1981) (noting that one view of

struction of evidence based on the breach of a statutory duty to preserve evidence.

Importantly, *Rodgers* left two issues unresolved: whether the negligent spoliation tort exists absent a specific statutory duty to preserve evidence and whether intentional spoliation is a viable cause of action.[280] Answers can be implied, however, with regard to both issues. An earlier Illinois appellate decision indicates that Illinois is moving toward a well-defined negligent spoliation tort even without a statutory duty to preserve evidence.[281] This decision did not create a duty to preserve evidence strictly predicated on the existence of a document-retention statute.[282] Rather, it considered procedural rules as only one source of a duty to preserve evidence. As for the recognition of an intentional spoliation tort, the standard of conduct defined for negligent spoliation may apply by inference to intentional conduct as well. Thus, Illinois courts will probably adopt the tort of intentional spoliation once they are squarely confronted with the question.

OHIO

In the most recent explicit recognition of tort liability for spoliation of evidence, *Smith v. Howard Johnson Co.*,[283] the Ohio Supreme Court held that a tort action exists for willful destruction of evidence.[284] In *Howard Johnson Co.*, the court listed the elements of this tort and affirmed the findings of two preceding Ohio appellate courts.[285] Yet, by limiting the tort's scope to willful de-

---

judicial power to create implied rights of action revolves around construction of legislative intent).

280. *See* Pyles v. Volvo White Truck Corp., No. 91-C6674, 1991 U.S. Dist. LEXIS 18075, at *6–7 (N.D. Ill. Dec. 23, 1991) (noting that *Rodgers* court did not address intentional spoliation of evidence).

281. JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE § 4.10, at 152 (1988).

282. *See Petrik*, 501 N.E.2d at 1319 (finding that limiting analysis to discovery rules considers only pending litigation).

283. 615 N.E.2d 1037 (Ohio 1993).

284. *Howard Johnson Co.*, 615 N.E.2d at 1038.

285. *See id.* (holding that tort of interference with or destruction of evidence applies to parties in primary action and to third parties); Williams v. Dunagan, No. 15870, 1993 Ohio App. LEXIS 2430, at *5–6 (Ohio Ct. App. May 5, 1993) (deeming question of whether evidence in question actually caused accident as speculative and refusing to recognize spoliation tort); Tomas v. Nationwide Mut. Ins. Co., 607 N.E.2d 944, 950 (Ohio Ct. App. 1992) (determining that plaintiff failed to prove prejudice from trial court's refusal to recognize tort of spoliation of evidence).

struction of evidence, the Ohio Supreme Court declined to recognize the negligent tort of spoliation.[286]

286. *See Howard Johnson Co.*, 615 N.E.2d at 1038 (defining one element as willful destruction of evidence designed to disrupt plaintiff's case).

APPENDIX II: JURISDICTIONS INDIFFERENT TO THE SPOLIATION TORT

Courts in twelve other jurisdictions have addressed, but not adopted, the spoliation tort. These courts refused to create the spoliation tort for various reasons. Some courts found that, even if they were to recognize the tort, the particular facts would not support a spoliation action, or the alleged conduct fell within the realm of another tort action. Other cases involved facts insufficient to show proximate cause or damages. Most court decisions, however, regarded the facts as insufficient to give rise to a duty to preserve evidence.

GROUP A: ALTERNATIVE REMEDIES AND INSUFFICIENT FACTS

ARIZONA

La Raia v. Superior Court[287] represents Arizona's only opportunity to address tortious spoliation in civil litigation. In *La Raia*, the plaintiff became seriously ill after the landlord sprayed outdoor pesticide inside her apartment.[288] After the plaintiff initiated litigation, the landlord disposed of the pesticide container and claimed that he had used a product approved for indoor application.[289] The plaintiff's injury and complaint fell within the scope of a previously recognized tort action in Arizona—violation of the affirmative duty to aid a person harmed by the actor's conduct.[290] The Ari-

287. 722 P.2d 286 (Ariz. 1986) (en banc).

288. *La Raia*, 722 P.2d at 288. The landlord opted to authorize an unlicensed and untrained janitor to spray the plaintiff's apartment rather than contract with a pest control company. *Id.*

289. *Id.*

290. *See id.* at 290 (quoting RESTATEMENT (SECOND) OF TORTS § 99 (1965) and explaining erosion of common-law doctrine that there is no duty to help persons in peril). The Restatement provides:

> If the actor knows or has reason to know that by his conduct, whether tort or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent such further harm.

RESTATEMENT (SECOND) OF TORTS § 99 (1965).

zona Supreme Court refused to "invoke esoteric theories or recognize some new tort" since a remedy was available "well within the realm of existing tort law."[291] The court did not, however, preclude the possibility of recognizing the tort in the future.[292]

MASSACHUSETTS

In *Amarante v. Aetna Casualty & Surety Co.*,[293] the United States District Court for the District of Massachusetts considered whether Massachusetts would recognize spoliation as an actionable tort. In *Amarante*, the plaintiff's insurance carrier took possession of a vehicle involved in an accident. Although the plaintiff's attorney instructed the insurance carrier to preserve the vehicle in case a products liability action against the vehicle's manufacturer ensued, the insurance carrier disposed of it, allegedly prejudicing the plaintiff's tort claim.[294] Noting that "Massachusetts courts have not recognized the tort of 'spoliation' or suppression of evidence as a cause of action," the court relied on the traditional adverse inference.[295] The court further asserted that the United States District Court was not the proper forum to propose the spoliation tort.[296] Given this abdication of responsibility[297] and the fact that federal courts cannot make binding decisions for state courts, spoliation remains unaddressed in Massachusetts.

---

291. *La Raia*, 722 P.2d at 289.

292. Monica L. Klug, Note, *Torts—Arizona Should Adopt the Tort of Intentional Spoliation of Evidence*—La Raia v. Superior Court, 19 ARIZ. ST. L.J. 371, 388 (1987).

293. No. 87-1732-Z, 1988 U.S. Dist. LEXIS 10224 (D. Mass. Sept. 6, 1988).

294. *Amarante*, 1988 U.S. Dist. LEXIS 10224, at *5.

295. *Id.* at *8.

296. *Id.*

297. A federal court may not refuse jurisdiction over a novel question of state law. *See* Meredith v. City of Winter Haven, 320 U.S. 228, 234 (1943) (requiring federal courts to decide issues of state law whenever necessary to render judgment). In the absence of a certification procedure, the federal court must resolve the state law issue even if state courts of that jurisdiction have not yet decided the legal matter in question. The federal district judge may consider the decisions of other states or scholarly writings, but may not abdicate the responsibility to decide the case at bar. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 4.6, at 221-22 (2d ed. 1993) (reminding federal courts that they may not refuse jurisdiction because no ascertainable state law on issue exists).

GEORGIA

In *Gardner v. Blackstone*,[298] the Georgia Court of Appeal refused to recognize spoliation of evidence as a separate tort.[299] The court noted, however, that the facts of the case did not support a finding of evidence destruction, precluding the adoption of a spoliation tort.[300] Although this decision holds that Georgia does not recognize the tort, it can also be interpreted as an acknowledgment that Georgia has not yet squarely addressed the issue.[301]

PENNSYLVANIA

The most recent decision addressing spoliation of evidence in Pennsylvania is *Olson v. Grutza*.[302] Noting that no prior Pennsylvania court had recognized a cause of action for spoliation of evidence,[303] the Superior Court of Pennsylvania failed to decide whether spoliation of evidence was a viable cause of action. The court instead relied on the condition of joinder, which also failed.[304] In dicta, however, the court indicated that it could not ascertain whether damages could be recovered in tort until the underlying case reached its conclusion.[305]

No other Pennsylvania state court decision provides authority concerning tortious spoliation; however, two decisions from the United States District Court for the Eastern District of Pennsylvania have applied Pennsylvania law to spoliation as tortious conduct.[306] In *Pirocchi v. Liberty Mutual Insurance Co.*,[307] the court analyzed the breach of a voluntarily assumed duty to preserve evidence by affirmative conduct, concluding that "a person who makes an engagement, even though gratuitous, and actually enters upon its performance, will incur tort liability if his negli-

298. 365 S.E.2d 545 (Ga. Ct. App. 1988).

299. *Gardner*, 365 S.E.2d at 546.

300. *Id.*

301. JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE § 4.11A, at 65 (Supp. 1994).

302. 631 A.2d 191 (Pa. Super. Ct. 1993).

303. *Olson*, 631 A.2d at 194.

304. *Id.* at 195.

305. *Id.* at 197 n.3.

306. These courts relied on the rule set forth in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

307. 365 F. Supp. 277 (E.D. Pa. 1973).

gence thereafter causes another to suffer damages."[308] The court left the factual determination to the jury.[309] In *Kent v. Costruzione Aeronautiche Giovanni Agusta, S.P.A.*,[310] an Italian manufacturer obtained possession of critical components of a crashed helicopter. Before the plaintiff could examine the helicopter's parts, the manufacturer sent them to Italy for destructive testing.[311] The court held that no Pennsylvania state court or Third Circuit federal court "has recognized a tort for intentional spoliation of evidence before or after *Pirocchi*, and . . . that the Pennsylvania Supreme Court would not recognize such a tort on the record in this case."[312] Given this prior history and the Pennsylvania Supreme Court decision in *Olson*, it remains uncertain whether Pennsylvania will recognize spoliation as a tort action.

WASHINGTON

In *Unigard Security Insurance Co. v. Lakewood Engineering & Manufacturing Corp.*,[313] the United States Court of Appeals for the Ninth Circuit briefly addressed a spoliation counterclaim by the defendant.[314] However, because the facts of the case did not indicate an injury to the defendant, the court refused to determine whether Washington common law would recognize the spoliation tort.[315] Therefore, the court declined to predict whether Washington would recognize the tort of spoliation of evidence in some appropriate future case.[316]

GROUP B: PROXIMATE CAUSATION AND SPECULATIVE DAMAGES

Other courts have avoided deciding whether to create the spoliation tort because of deficiencies in proximate causation or the speculative nature of damages.

---

308. *Pirocchi*, 365 F. Supp. at 281 (citing Pascarella v. Kelley, 105 A.2d 70 (1954)).
309. *Id.* at 282.
310. No. 90-2233, 1990 U.S. Dist. LEXIS 12583 (E.D. Pa. Sept. 19, 1990).
311. *Kent*, 1990 U.S. Dist. LEXIS 12583, at *20–21.
312. *Id.* at *29.
313. 982 F.2d 363 (9th Cir. 1992).
314. *Unigard Sec. Ins. Co.*, 982 F.2d at 371.
315. *Id.*
316. *Id.*

MINNESOTA

In *Federated Mutual Insurance Co. v. Litchfield Precision Components, Inc.*,[317] the Supreme Court of Minnesota addressed certified questions regarding whether Minnesota recognizes the tort of intentional or negligent spoliation.[318] In this case, a fire at facilities owned by Litchfield damaged property insured by Federated Insurance. After receiving notification of Federated Insurance's intent to pursue subrogation claims, Litchfield allowed the physical evidence to be discarded from the fire site.[319] After a comprehensive examination, the Minnesota Supreme Court concluded that "even if we were disposed to create a cause of action in tort of spoliation, this case is premature for such a determination" because "the creation of a new tort is a function properly reserved for the supreme court based upon appropriate facts and record."[320] The court also deemed the amount of claimed damages too speculative.[321] As a result, the court declined to create the tort of spoliation pending its evaluation in an appropriate procedural posture.[322] In addition to the majority's procedural pretext, the dissenting opinions refused to answer the questions posed by the trial court because they "asked essentially for advisory opinions."[323] Thus, this decision leaves the question of whether Minnesota will adopt the spoliation tort unanswered.

IDAHO

Idaho is another jurisdiction that has avoided creating the spoliation tort. In *Murray v. Farmers Insurance Co.*,[324] the plaintiff suffered serious injuries in an automobile accident and sought to bring a products liability action against the manufacturer.[325] Following the accident, the insurance carrier had the car towed to a salvage yard. The plaintiff's attorney asked the insurance carrier to preserve the car until an expert could examine it for litigation pur-

317. 456 N.W.2d 434 (Minn. 1990).
318. *Federated Mut. Ins. Co.*, 456 N.W.2d at 435.
319. *Id.* at 435–36.
320. *Id.* at 439.
321. *Id.*
322. *Federated Mut. Ins. Co.*, 456 N.W.2d at 439.
323. *Id.* at 440 (Simonett, J., dissenting).
324. 796 P.2d 101 (Idaho 1990).
325. *Murray*, 796 P.2d at 103.

poses. Despite an agreement to delay salvaging the vehicle, the insurance company destroyed the car.[326] While assuming that Idaho law embraced the tort of negligent spoliation of evidence, the Idaho Supreme Court stated that no "talismatic transformation of the title of the tort" could undermine the framework of universal negligence liability.[327] Concluding that "[n]egligence by any other name still requires proximate cause,"[328] the court dismissed the plaintiff's claim for lack of adequate causation.[329] Because the court declined to create the spoliation tort based on the facts of the case, this decision neither positively nor negatively impacts the recognition of the tort in Idaho common law.

GROUP C: NO IDENTIFIABLE DUTY TO PRESERVE EVIDENCE

Most courts that have avoided deciding whether to recognize a tort action for spoliation have been unable to identify a duty to preserve evidence. These courts have based their decisions on the absence of a duty imposed upon the spoliating party.

INDIANA

The Indiana Court of Appeals addressed the problem of a duty to preserve evidence in *Murphy v. Target Products*.[330] In *Murphy*, the employer failed to preserve a defective power saw the employee had used at his workplace, allegedly impairing the employee's potential third-party products liability action against the saw's manufacturer.[331] Relying on the Kansas Supreme Court's reasoning in *Koplin v. Rosel Well Perforators, Inc.*,[332] the court rejected the plaintiff's claim, unable to find a duty on the part of the employer to preserve potential evidence for the employee's possible third-party action.[333]

---

326. *Id.*

327. *Id.* at 107.

328. *Id.*

329. *Murray*, 796 P.2d at 107.

330. 580 N.E.2d 687 (Ind. Ct. App. 1991).

331. *Murphy*, 580 N.E.2d at 688.

332. 734 P.2d 1177 (Kan. 1987). The *Koplin* court refused to recognize a duty to preserve evidence "absent some independent tort, contract, agreement, voluntary assumption of duty, or special relationship of the parties." *Id.* at 1183.

333. *Murphy*, 580 N.E.2d at 690.

MICHIGAN

In Michigan, the Court of Appeals addressed the issue of tortious spoliation by a third party in *Panich v. Iron Wood Products Corp.*[334] In *Panich*, an electrical box exploded at the defendant's plant, injuring the plaintiff. While the plaintiff recuperated from his injuries, the defendant employer disposed of the electrical box. Importantly, the plaintiff had not asked his employer to preserve the box, nor had the employer assumed any duty to do so. Nevertheless, the plaintiff sued for intentional interference with his products liability action, alleging that the electrical box was crucial to his case.[335] Using reasoning similar to that of *Koplin,* the court concluded that absent an agreement between the parties, no duty to preserve evidence arose from the employer-employee relationship or under common law.[336] The court stated that it would consider creating a tort for spoliation of evidence in a third-party case if a duty to preserve evidence could be established. However, under these particular facts the court declined to create such a tort in Michigan.[337]

ARKANSAS

The only decision addressing the spoliation tort in Arkansas is *Wilson v. Beloit Corp.*,[338] which was litigated in federal court. As in *Panich*, the plaintiff sued his employer for losing defective machine parts that injured him. The missing physical evidence impaired the plaintiff's lawsuit against the machine manufacturer.[339] The court adopted the reasoning set forth in *Koplin*: Absent some independent tort, contract, agreement, voluntary assumption of duty, or special relationship, the court asserted, "there is no duty to preserve possible evidence for another party to aid that other party in some future legal action against a third party."[340] Thus, the court refused to recognize the spoliation tort absent an identifiable

334. 445 N.W.2d 795 (Mich. Ct. App. 1989).
335. *Panich*, 445 N.W.2d at 796.
336. *Id.* at 797.
337. *Id.* at 799.
338. 921 F.2d 765 (8th Cir. 1990).
339. *Wilson*, 921 F.2d at 766.
340. *Id.* at 767.

duty to preserve evidence.[341] As a federal decision, *Wilson* provides limited authority for Arkansas state courts. Furthermore, the decision only addresses third-party spoliation cases, leaving the issue of adverse parties unresolved in Arkansas.

TEXAS

The Corpus Christi Court of Appeals addressed the intentional spoliation tort in *Diehl v. Rocky Mountain Communications, Inc.*[342] In this workplace-related third-party spoliation case, physical evidence in possession of plaintiff's employer was stolen, allegedly hindering the plaintiff's ability to bring an action against the manufacturer.[343] In considering the propriety of summary judgment in favor of the employer, the court found that the plaintiff alleged insufficient facts to support the employer's duty to preserve potential evidence. Additionally, the court noted that no action had been brought against the manufacturer. Based on these findings, the court did not reach the issue of whether the spoliation tort exists in Texas.[344]

LOUISIANA

In Louisiana, only federal district courts have dealt with the issue of tortious spoliation.[345] In *Edwards v. Louisville Ladder Co.*,[346] a district court addressed Louisville's third-party claim against the plaintiff's employer to recover damages caused by the employer's negligent or intentional spoliation of evidence. The plaintiff's employer destroyed or misplaced the ladder from which the plaintiff

---

341. *See id.* at 768–69 (affirming summary judgment because trial judge did not abuse his discretion in determining which rule Arkansas Supreme Court would apply). Alisa Thorne-Corke, Note, *Altered or Absent Evidence: The Tort of Spoliation:* Wilson v. Beloit Corp., 43 ARK. L. REV. 453, 453 (1990) (noting court's holding and presenting argument for adoption of spoliation tort in Arkansas).

342. Diehl v. Rocky Mountain Communications, Inc., 818 S.W.2d 183 (Tex. App.—Corpus Christi 1991, writ denied).

343. *Diehl*, 818 S.W.2d at 184.

344. *Id.* at 184.

345. *See* Edwards v. Louisville Ladder Co., 796 F. Supp. 966, 971 (W.D. La. 1992) (finding proposed tort of spoliation of evidence because overly broad and expansive considering facts of instant case); Threlkeld v. Haskins Law Firm, No. 88-2392, 1991 WL 211520, at *1 (E.D. La. Sept. 27, 1991) (finding no authority in Louisiana's jurisprudence allowing spoliation of evidence claim). The *Threlkeld* opinion contains little information about the facts or nature of the spoliation issue. *Id.*

346. 796 F. Supp. 966 (W.D. La. 1992).

had fallen, thereby impeding Louisville's defense in the subsequent products liability suit.[347] The court was unable to identify an agreement between the employer and Louisville or any other special relationship that would impose a duty upon the employer to preserve the ladder as physical evidence.[348] Applying Louisiana law, the court reasoned that recognizing "Louisville's claim under these circumstances would require the adoption of a cause of action for spoliation of evidence as expansive or more expansive than any recognized in any jurisdiction in this country."[349] Furthermore, the court concluded that the Louisiana Supreme Court would not sustain the claim under the circumstances even if it were to recognize the spoliation tort action.[350] Although no Louisiana state court has addressed the tort of spoliation of evidence, the Louisiana Supreme Court has expressed its intent to move with caution in expanding tort responsibility.[351]

347. *Edwards*, 796 F. Supp. at 967.
348. *Id.* at 971.
349. *Id.*
350. *Id.* at 971–72.
351. *See* Great Southwest Fire Ins. Co. v. CNA Ins. Cos., 557 So. 2d 966, 969–70 (La. 1990) (noting court's hesitation to expand certain causes of action).

APPENDIX III: JURISDICTIONS REFUSING TO ADOPT THE SPOLIATION TORT

Courts in other jurisdictions have explicitly refused to recognize the spoliation tort for policy reasons. Some courts consider traditional remedies against destruction of evidence sufficient to protect spoliation victims and to deter future wrongdoers.

MARYLAND

The Maryland Court of Special Appeals expressly refused to adopt the tort of spoliation of evidence in *Miller v. Montgomery County*.[352] In *Miller*, the plaintiff was a passenger in an automobile that was hit at an intersection where the traffic light allegedly malfunctioned. Repairs by county employees to the signal made the signal's condition at the time of the accident unascertainable. The plaintiff amended his complaint to include an action for spoliation of evidence.[353] Finding that the spoliation inference provided an appropriate remedy for the party's destruction of evidence, the court concluded that no need existed justifying creation of a separate tort action.[354]

The *Miller* court noted, however, that it was "not called upon to decide whether intentional or negligent destruction of evidence by a stranger to the action would give rise to a separate cause of action against him."[355] The court's statement is logical since the spoliation inference applies only to parties and cannot serve as a remedy against independent third-party spoliators. Thus, *Miller* does not preclude a tort action for independent third-party spoliation in Maryland.

352. 494 A.2d 761 (Md. Ct. Spec. App. 1985).
353. *Miller*, 494 A.2d at 767.
354. *Id.* at 768.
355. *Id.* at 767–68.

NEW YORK

In New York, only two courts have squarely addressed spoliation as an actionable tort.[356] The New York Supreme Court refused to adopt an independent tort for spoliation of evidence in *Pharr v. Cortese*.[357] In the most recent case, *Weigl v. Quincy Specialties Company*,[358] the plaintiff was working with experimental material when her laboratory coat caught fire, burning her severely.[359] Despite the plaintiff's request that her employer preserve the coat to pursue legal remedies, the employer lost the coat. Referring to the *Pharr* decision, the court held that New York does not view spoliation of evidence as a cognizable tort.[360] However, utilizing another appellate court's findings on a similar issue, the *Weigl* court adopted a common-law cause of action allowing suit to be brought against an employer who negligently or intentionally impaired an employee's right to sue a third-party tortfeasor if a specific duty to preserve evidence can be identified.[361] The inconclusive nature of these decisions suggests that New York does not recognize an independent spoliation tort except for narrowly defined, work-related spoliation claims.[362]

MISSOURI

The most recent decision in Missouri addressing the issue of the spoliation tort is *Baugher v. Gates Rubber Co., Inc.*[363] After suffering a work-related injury, the plaintiff sued the workers' compensation carrier for impairing her third-party action against the manufacturer of the allegedly defective machine. According to the

356. Weigl v. Quincy Specialties Co., 601 N.Y.S.2d 774, 776 (Sup. Ct. 1993); Pharr v. Cortese, 559 N.Y.S.2d 780, 781 (Sup. Ct. 1990).

357. *See Pharr*, 559 N.Y.S.2d at 781 (declining to create spoliation tort in medical malpractice case unless duty to preserve evidence exists).

358. 601 N.Y.S.2d 774 (Sup. Ct. 1993).

359. *Weigl*, 601 N.Y.S.2d at 775.

360. *Id.* at 776.

361. *Id.* at 777 (citing Coley v. Arnot Ogden Memorial Hosp., 485 N.Y.S.2d 876, 878 (App. Div. 1985)).

362. *See Weigl*, 601 N.Y.S.2d at 777 (noting that New York does not recognize spoliation as actionable tort, but does recognize similar common-law action in employment setting). Another possible approach is the New York doctrine of the prima facie tort. *See* Cartwright v. Golub Corp., 381 N.Y.S.2d 901, 902 (App. Div. 1976) (defining prima facie tort as otherwise lawful act or series of acts committed to intentionally inflict harm, without excuse or justification, resulting in damages).

363. 863 S.W.2d 905 (Mo. Ct. App. 1993).

plaintiff, the workers' compensation carrier destroyed physical evidence important to her case against the manufacturer.[364]

The Missouri Court of Appeals used a three-step process to determine whether an action for spoliation of evidence existed. First, the court declined to recognize a tort action for intentional spoliation since insufficient evidence existed to support the alleged intent.[365] Contrary to the landmark decision of *Smith v. Superior Court*,[366] the court found that Missouri law required a strict standard of causation.[367] Second, the court was unable to analogize the negligent spoliation tort to the tort of negligent interference with prospective business advantage, as was done in California, because Missouri does not recognize the negligent interference tort.[368] In the final step, the court turned to basic common-law principles of negligence and concluded that "even if Missouri were to recognize an action for spoliation based on common law negligence," Missouri law would require that damages be established with certainty.[369] Because damages caused by interference with a prospective lawsuit cannot be predicted with certainty, a relaxed damages standard would have to apply; such a standard would not meet the certainty requirement and therefore would prohibit a spoliation claim against a nonparty until after the conclusion of the underlying action.[370]

Even though this decision does not address spoliation of evidence by parties or the possible resolution of the underlying action in a third-party spoliation case, Missouri's strict standard of causation would not recognize and protect probable expectancies.[371] Thus, it is unlikely that the Missouri Supreme Court will adopt any kind of spoliation tort when squarely confronted with the issue.

---

364. *Baugher*, 863 S.W.2d at 907.
365. *Id.* at 910.
366. 198 Cal. Rptr. 829 (Ct. App. 1984); *see* discussion *supra* Part II (A).
367. *Baugher*, 863 S.W.2d at 910.
368. *Id.*
369. *Baugher*, 863 S.W.2d at 914.
370. *Id.* at 910.
371. *Id.* at 912.

DISTRICT OF COLUMBIA

In *Wilder-Mann v. United States,*[372] the United States District Court resolved the question whether a spoliation cause of action exists under District of Columbia law.[373] The court referred to a District of Columbia appellate decision, *Battocchi v. Washington Hospital Center,*[374] which held that the spoliation inference is the exclusive remedy upon a finding of gross indifference to, or reckless disregard for, the relevance of evidence to a possible claim.[375] Citing another appellate decision which ruled that *Battocchi* "established the controlling law regarding the loss of evidence in a civil case" in the District of Columbia,[376] the *Wilder-Mann* Court stated that "we take the law of the appropriate jurisdiction as we find it; and we leave it undisturbed."[377] Therefore, the District of Columbia does not recognize the spoliation tort.

372. No. 87-2392 SSH, 1993 U.S. Dist. LEXIS 9166 (D.D.C. June 27, 1993).

373. *Wilder-Mann*, 1993 U.S. Dist. LEXIS 9166, at *2. The same finding applied to a previous decision. *See* Crosby v. Cable Network News, Inc., No. 88-0903, 1990 U.S. Dist. LEXIS 3401, at *11 (D.D.C. Mar. 29, 1990) (deciding that spoliation did not apply because defendant owed no duty to plaintiff).

374. 581 A.2d 759 (D.C. Cir. 1990).

375. *See Battocchi*, 581 A.2d at 766 (analyzing applicability of spoliation for hospitals losing or misplacing notes).

376. Williams v. Washington Hosp. Ctr., 601 A.2d 28, 31 (D.C. Cir. 1991).

377. *Wilder-Mann*, 1993 U.S. Dist. LEXIS 9166, at *3 (quoting Tidler v. Eli Lilly Co., 851 F.2d 418, 424–25 (D.C. Cir. 1988)).