

2005

## Spoilation of Evidence: Proposals for New York State

James T. Killelea

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

---

### Recommended Citation

James T. Killelea, *Spoilation of Evidence: Proposals for New York State*, 70 Brook. L. Rev. (2005).  
Available at: <https://brooklynworks.brooklaw.edu/blr/vol70/iss3/8>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

# Spoliation of Evidence

## PROPOSALS FOR NEW YORK STATE\*

The destruction of evidence, commonly known as spoliation, has become an increasing problem in civil litigation today.<sup>1</sup> Commentators have noted that “we live in an era of spoliation”<sup>2</sup> and that “deliberate obstructionism is commonplace.”<sup>3</sup> One study indicates that approximately one-half of litigators consider spoliation a frequent or regular occurrence.<sup>4</sup> Another study points to actual incentives to alter evidence pending trial.<sup>5</sup> Spoliation has also been at the center of recent, well-publicized criminal cases involving Martha Stewart<sup>6</sup> and Arthur Andersen.<sup>7</sup> While the manner of

---

\* © 2005 James T. Killelea. All Rights Reserved.

<sup>1</sup> MARGARET M. KOESEL, DAVID A. BELL & TRACEY L. TURNBULL, *SPOILIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION* xi (2000) (characterizing spoliation as an “unfortunate reality of modern-day civil litigation”).

<sup>2</sup> Gregory P. Joseph, *Rule Traps*, LITIG. A.B.A., Vol. 30, No.1, at 9 (Fall 2003) (noting that “parties long not so much for documentary evidence as for evidence that documents have been destroyed”).

<sup>3</sup> Edward J. Imwinkelried, *A New Antidote for an Opponent's Pretrial Discovery Misconduct: Treating the Misconduct at Trial as an Admission by Conduct of the Weakness of the Opponent's Case*, 1993 BYU L. REV. 793, 794 (1993).

<sup>4</sup> Terry R. Spencer, *Do Not Fold Spindle or Mutilate: The Trend Towards the Recognition of Spoliation as a Separate Tort*, 30 IDAHO L. REV. 37, 39 (1993).

<sup>5</sup> Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 795 (1991) (claiming that much incentive to spoliate exists because spoliation is unlikely to be discovered).

<sup>6</sup> Martha Stewart was found guilty of conspiracy, obstruction of justice and two counts of making false statements over the sale of 4,000 shares of ImClone Systems stock. See *Martha Stewart Found Guilty on all Counts*, March 6, 2004, available at <http://www.cnn.com/2004/LAW/03/05/stewart.main/> (last visited Feb. 21, 2005). The obstruction charge included the “altering of evidence” involving allegedly altered phone logs and notes to which Ms. Stewart had access. See Constance L. Hays,

spoliation—from deleting e-mails to shredding documents—may differ, its effect on the underlying case is the same: loss of evidence prevents a party from adequately proving or defending a claim at trial.<sup>8</sup> Furthermore, destruction of evidence violates the spirit of liberal discovery, offends notions of fair play, and generally undermines the efficacy of the adversarial system.<sup>9</sup>

In response to spoliation, courts have developed an array of remedies against the spoliator including sanctions, adverse inference instructions, criminal penalties and even a separate tort of spoliation.<sup>10</sup> However, the use of such remedies varies widely across jurisdictions,<sup>11</sup> causing a variety of problems as courts fail to agree on choice-of-law principles when spoliation issues emerge.<sup>12</sup>

Two particular problems have developed with the New York courts' approach to remedying spoliation. First, New York courts employ the remedy of the adverse inference instruction with little, if any, regard to its potentially drastic effects. The instruction, which asks a jury to view the destroyed evidence as inherently adverse to the spoliator's case, is apt to produce unduly harsh consequences, especially when the spoliator is

---

*Prosecutor Says Martha Stewart Spun Web of Lies About Shares*, N.Y. TIMES, Jan. 28, 2004, at C1.

<sup>7</sup> The accounting firm Arthur Andersen, LLP was convicted for criminal obstruction of justice under the United States Code (U.S.C.). Andersen was found guilty of destroying accounting documents (paper and electronic) pertaining to its troubled client, the Enron Corporation. At the time the documents were destroyed, Andersen was aware that the Securities and Exchange Commission was investigating Enron. See generally John Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 FORDHAM J. CORP. & FIN. L. 721 (2003).

<sup>8</sup> See Spencer, *supra* note 4, at 38.

<sup>9</sup> Randi D. Bandman & Jay M. Du Nesme, *Recent Developments in the Area of Spoliation of Evidence*, SCO1 A.L.I.-A.B.A. CONTINUING LEGAL EDUC. 463, 465 (July 1997) (describing how “destruction of evidence undermines the integrity of the legal system, a system that was designed to promote a society that expects that its citizens will take responsibility for and own up to their actions.”).

<sup>10</sup> Jeffrey S. Kinsler & Anne R. Keyes MacIver, *Demystifying Spoliation of Evidence*, 34 TORT & INS. L.J. 761, 774-75 (1999). See discussion *infra* Part III.

<sup>11</sup> David A. Bell, Margaret M. Koesel & Tracey L. Turnbull, *Let's Level the Playing Field: A New Proposal for Spoliation of Evidence Claims in Pending Litigation*, 29 ARIZ. ST. L.J. 769, 791 (1997) (“Thus far, judicial treatment of spoliation claims arising in the context of pending litigation has been inconsistent.”).

<sup>12</sup> CHARLES T. MCCORMICK ET AL., MCCORMICK ON EVIDENCE § 265, at 193-94 (John W. Strong ed., 4th ed. 1992) [hereinafter MCCORMICK] (“This area of the law appears to be in the process of rather rapid change, although the patterns of the new order are not yet entirely clear.”).

merely negligent.<sup>13</sup> For example, a jury may find against a spoliator merely because he altered evidence and not because he was liable in the underlying suit. A Southern District of New York court noted that the “adverse inference instruction often ends litigation—it is too difficult a hurdle for the spoliator to overcome.”<sup>14</sup> Until New York state courts recognize this hurdle, they risk unjustly penalizing spoliation parties.

Second, New York does not recognize a separate tort for spoliation by first parties<sup>15</sup> and has recognized the tort by third parties in only a handful of cases.<sup>16</sup> In defense of this position, the state courts believe that the traditional remedies are adequate in addressing the destruction of evidence.<sup>17</sup> While this may hold true for first-party spoliation, it does not for third-party spoliation. Because third-party spoliators are not recognized by the court as parties to a lawsuit, they are beyond

---

<sup>13</sup> See Mary Kay Brown & Paul D. Weiner, *Digital Dangers: A Primer on Electronic Evidence in the Wake of Enron*, 74 PA. B.A.Q. 1, 7 (Jan. 2003) (listing “severe sanctions, such as adverse inference instructions” imposed by courts when “relevant electronic evidence was not preserved, or was intentionally destroyed”).

<sup>14</sup> See *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 219 (S.D.N.Y. 2003) (remarking that the adverse inference instruction has an “in terrorem” effect and is an extreme sanction and should not be given lightly).

<sup>15</sup> Spoliation by an opposing party to an actual or potential lawsuit is known as “first-party” spoliation, while spoliation by a nonparty, (i.e., stranger to the lawsuit) is referred to as “third-party” spoliation. See generally *Fairclough v. Hugo*, 616 N.Y.S.2d 944 (App. Div. 1994) (refusing to recognize an independent cause of action for first-party spoliation where plaintiffs failed to establish that the alleged failure to preserve evidence would make it extremely difficult or impossible for the plaintiffs to establish their claim for malpractice); *Pharr v. Cortese*, 559 N.Y.S.2d 780, 782 (Sup. Ct. 1990) (declining to create a first-party spoliation tort in medical malpractice case unless duty to preserve evidence exists).

<sup>16</sup> Most such cases are limited to instances where an employee sues his employer for spoliation of evidence and resulting impairment of the employee's claim against a third-party tortfeasor. See, e.g., *Ripepe v. Crown Equip. Corp.*, 741 N.Y.S.2d 64 (App. Div. 2002); *Curran v. Auto Lab Serv. Ctr.*, 721 N.Y.S.2d 662 (App. Div. 2001); *DiDomenico v. C & S Aeromatik Supplies*, 682 N.Y.S.2d 452 (App. Div. 1998); *Vaughn v. City of New York*, 607 N.Y.S.2d 726 (App. Div. 1994). But see *Weigl v. Quincy Specialties Co.*, 601 N.Y.S.2d 774, 776 (App. Div. 1993) (declining to recognize a tort of third-party spoliation where university discarded lab coat in student's suit against coat manufacturer). See also discussion of Modified Recognition of Third-Party Spoliation *infra* Part IV.C.

<sup>17</sup> See, e.g., *Simet v. Coleman Co., Inc.* 778 N.Y.S.2d 367 (App. Div. 2004) (rejecting cause of action for spoliation while noting that court has discretion to impose sanctions for the destruction of evidence); *Metlife Auto & Home v. Joe Basil Chevrolet, Inc.*, 753 N.Y.S.2d 272, 282 (App. Div. 2002) (declining to recognize a cause of action for spoliation of evidence and, instead, relying on “the comparative advantages of remedying any injury through the imposition of carefully chosen and specifically tailored sanctions within the context of the underlying action.”); *Pharr*, 559 N.Y.S.2d at 782 (noting that the traditional sanctions imposed on spoliators are adequate in remedying victims of spoliation); *Weigl*, 601 N.Y.S.2d at 775.

the reach of typical remedies available to such parties.<sup>18</sup> New York courts are thus unable to sanction third parties.<sup>19</sup> In spite of these policies, or perhaps because of them, many plaintiffs continue to bring claims asking New York courts to recognize a separate cause of action for spoliation. With few exceptions, however, the courts continually refuse to recognize such a tort,<sup>20</sup> and consequently New York risks allowing such parties to go unpenalized when they destroy evidence.

Part I of this Note examines the basic elements of spoliation and discusses when the duty to preserve evidence arises and how courts determine whether spoliated evidence is relevant to issues at trial. Part II considers the traditional remedies employed against spoliation and their respective shortcomings. This part will give special attention to the adverse inference instruction, which is the most commonly used remedy and indeed the most controversial, especially in view of its potentially drastic effects on the litigating parties. Part III chronicles the development of the spoliation tort and analyzes the advantages and inherent problems in recognizing it. Part IV surveys the status of the treatment of spoliation in the New York court system, focusing on the state's use of the adverse inference instruction as well as its refusal to adopt the separate tort of spoliation. Finally, in light of emerging trends in combating spoliation, Part V suggests that New York should utilize the adverse inference instruction more cautiously and recognize a separate tort for third-party spoliation.

## I. ELEMENTS OF SPOLIATION

Spoliation is “[t]he intentional destruction of evidence . . . or the significant and meaningful alteration of a document or

---

<sup>18</sup> See Jonathan Judge, *Reconsidering Spoliation: Common-Sense Alternatives to the Spoliation Tort*, 2001 WIS. L. REV. 441, 442. See also *Elias v. Lancaster Gen Hosp.*, 710 A.2d 65, 67-68 (Pa. Super. 1998) (stating that “traditional remedies would be unavailing, since the spoliator is not a party to the underlying litigation.”).

<sup>19</sup> *MetLife Auto & Home*, 753 N.Y.S.2d at 276 (App. Div. 2002) (declining to recognize a duty to preserve evidence as a basis for imposing tort liability for a negligent or reckless act of spoliation committed by a third party to the underlying claim where third party made voluntary promise and undertaking to do so). See *infra* note 225 and accompanying text.

<sup>20</sup> See, e.g., *Fairclough v. Hugo*, 616, N.Y.S.2d 944 (App. Div. 1994) (referring to the *Pharr* decision, rejecting on the facts an independent claim for intentional spoliation of evidence by a third party (other than by an employer)); *Steinman v. Barclays Bank*, 715 N.Y.S.2d 841 (App. Div. 2000) (rejecting on the facts an independent claim for intentional spoliation of evidence by a third party); *Weigl*, 601 N.Y.S.2d at 776 (refusing to recognize cause of action for spoliation).

instrument.”<sup>21</sup> Because this definition is somewhat narrow and may not, for example, include situations where documents have been routinely discarded, many jurisdictions recognize a broader definition to include the losing, discarding, or giving away of evidence.<sup>22</sup> New York, for example, broadly defines spoliation as “the destruction or significant alteration of evidence or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.”<sup>23</sup> Furthermore, though originally identified as the intentional destruction of evidence, spoliation now includes negligent or unintentional destruction of evidence.<sup>24</sup> Jurisdictions, however, are not in full agreement as to what constitutes spoliation.<sup>25</sup> Some courts are more willing to find instances of spoliation than others, representing a disagreement among courts as to the relative importance of a victim’s right to be compensated and the potential for unduly burdening the alleged spoliator.

Spoliation liability arises from a party’s duty to preserve evidence.<sup>26</sup> For example, the duty automatically emerges when a party serves or is served with a judicial or administrative complaint.<sup>27</sup> In such a situation, the party has actual knowledge

<sup>21</sup> BLACK’S LAW DICTIONARY 1401 (6th ed. 1990) (citation omitted). *See also* John K. Stipancich, *The Negligent Spoliation of Evidence: An Independent Tort Action May Be the Only Acceptable Alternative*, 53 OHIO STATE L.J. 1135 (1992) (defining spoliation generally).

<sup>22</sup> *See* Phoebe L. McGlynn, *Spoliation in the Products Liability Context*, 27 U. MEM. L. REV. 663, 665 (1997).

<sup>23</sup> *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999).

<sup>24</sup> The Sixth Circuit has arguably adopted the broadest interpretation of spoliation, stating that “destruction of potentially relevant evidence obviously occurs along a continuum of fault ranging from innocence through the degrees of negligence to intentionality.” *See* Shannon D. Hutchings, *Tortious Liability for Spoliation of Evidence*, 24 AM. J. TRIAL ADVOC. 381, 382 (2000) (citing *Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir. 1988)).

<sup>25</sup> For example, jurisdictions do not agree on whether “concealment” of evidence constitutes spoliation. *See, e.g.*, *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1308 (11th Cir. 2003) (concealment does not constitute spoliation of evidence under Florida law); *Nix v. Hoke*, 139 F. Supp. 2d 125, 135 (D.D.C. 2001) (concealment and alteration are included in the definition of “willful destruction of evidence” under Ohio law). This difference is most likely due to the fact that concealed evidence has not been destroyed and may still be produced at trial. *See* Steffen Nolte, *The Spoliation Tort: An Approach to Underlying Principles*, 26 ST. MARY’S L. J. 351, 408 (1994).

<sup>26</sup> KOESEL, BELL & TURNBULL, *supra* note 1, at 1.

<sup>27</sup> *See* *Scott v. I.B.M. Corp.*, 196 F.R.D. 233,248-49 (D.N.J. 2000) (noting that a duty arises to preserve evidence whenever a party has been served with a complaint). *See also* Margaret O. Frossard and Neal S. Gainsberg, *Spoliation of Evidence in Illinois: The Law After Boyd v. Traveler’s Insurance Co.* [sic], 28 LOY. U. CHI. L.J. 685 (1997) (“[A] duty to preserve evidence may arise through an agreement, a contract, a statute . . . or another special circumstance.”) (citing *Boyd v. Travelers Ins. Co.*, 652

that litigation has begun and is therefore bound to preserve all discoverable evidence.<sup>28</sup> A majority of courts have also held that a duty exists as soon as it is “reasonably foreseeable” that a lawsuit will ensue and that the evidence will be discoverable in connection with that suit.<sup>29</sup> A duty does not arise, then, if litigation is “merely possible” as opposed to litigation that is “likely to be commenced.”<sup>30</sup> Furthermore, a duty to maintain evidence may also be imposed by statute, regulation, or the ethical duties of the profession.<sup>31</sup> Finally, the duty may attach if the party voluntarily assumes such a duty, as when a business implements a formal document retention policy.<sup>32</sup>

The duty to preserve electronic evidence under a document retention policy is particularly troubling in light of increased reliance on computer data.<sup>33</sup> Given the routine destruction of information stored on computers in the ordinary course of business pursuant to retention policies,<sup>34</sup> it is difficult

---

N.E.2d 267, 270-71 (Ill. 1995)).

<sup>28</sup> *Scott*, 196 F.R.D. at 249.

<sup>29</sup> See *Shamis v. Ambassador Factors Corp.*, 34 F. Supp. 2d 879, 888-89 (S.D.N.Y. 1999); *Kronisch v. United States*, 150 F.3d 112, 126-27 (2d Cir. 1998) (destruction of records may be found by a jury to be in anticipation of litigation, notwithstanding that no litigation, administrative action or congressional investigation had commenced). Furthermore, the moving party does not need to prove that the actual person who destroyed the evidence had notice of the litigation. See *Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173, 178 (1st Cir. 1998) (“The critical part of the foundation that must be laid depends on institutional notice—the aggregate knowledge possessed by a party and its agents, servants and employees.”).

<sup>30</sup> *Willard v. Caterpillar, Inc.*, 48 Cal. Rptr. 2d 607, 620-21 (Ct. App. 1995) (Defendant manufacturer destroyed documents in the ordinary course of business relating to a thirty-five-year-old product over which it had never been sued. Such destruction did not constitute spoliation of evidence because, in the court’s view, the mere possibility of future litigation was not enough.). *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 73 (S.D.N.Y. 1991) (“[T]he obligation to preserve evidence even arises prior to the filing of a complaint where a party is on notice that litigation is likely to be commenced.”). *Shaffer v. RWP Group, Inc.*, 169 F.R.D. 19, 24 (E.D.N.Y. 1996) (finding of spoliation where defendant destroyed documents after receiving complaint which alerted defendant that such documents were relevant and likely to be sought in discovery). See also *Nolte*, *supra* note 25, at 378.

<sup>31</sup> KOESEL, BELL & TURNBULL, *supra* note 1, at 4, 8.

<sup>32</sup> *Id.* at 9.

<sup>33</sup> Mark D. Robins, *Computers and the Discovery of Evidence – A New Dimension to Civil Procedure*, 17 J. MARSHALL J. COMPUTER & INFO. L. 411, 421 (1999) (describing spoliation of electronic evidence as particularly thorny in the context of computer-related evidence). See generally Lawyer Lounge, an Internet resource center focusing on law office technology, which publishes an interactive page on electronic discovery, at <http://lawyerlounge.com/ediscovery> (last visited Jan. 20, 2005).

<sup>34</sup> In assessing a document retention policy’s legal sufficiency, a court considers whether it is “reasonable” in light of the nature of the information. See Kenneth K. Dort & George R. Spatz, *Discovery in the Digital Era: Considerations for Corporate Counsel*, 20 No. 9 COMPUTER & INTERNET LAW. 11, Sept. 2003, at 16 (citing *Lewy v. Remington Arms*, 836 F.2d 1104 (8th Cir. 1988)). For example, if the

to establish that such destruction amounts to spoliation.<sup>35</sup> In particular, companies have a responsibility to suspend a document retention policy in the face of litigation to avoid spoliation charges.<sup>36</sup> However, in some circumstances, courts have noted that this responsibility falls on the victim of alleged spoliation, thus creating confusion over which party must protect against routine destruction. The failure to save electronic evidence, whether before or during discovery, then, can be extremely harmful to a party's case.

Courts are generally reluctant to impose a duty to preserve evidence on third parties because they neither initiated nor necessitated the lawsuit.<sup>37</sup> Such courts generally concur that imposing such a duty on non-litigants is unfair since it would interfere with their right to control and dispose of their personal property.<sup>38</sup> However, exceptions to this general rule include third parties who are already bound to preserve evidence by statute, contract, agreement, or special relationship.<sup>39</sup> In such instances, courts have held a third party accountable for spoliation.<sup>40</sup>

---

information would likely be the subject of a dispute, it would be unreasonable to discard this data. *Id.* (citing *Lewy*, 836 F.2d at 1112). Second, the court should determine whether a company instituted the document retention policy in bad faith. See Patrick Grady, *Discovery of Computer Stored Documents and Computer Based Litigation Support Systems: Why Give Up More than Necessary?* 14 J. MARSHALL J. COMPUTER & INFO. L. 523, 539-40 (1996) (noting that courts look unfavorably at companies that appear to have instituted policies only to limit the amount of damaging evidence otherwise available).

<sup>35</sup> Ironically, it is very common for a company to have a document retention policy in place but not to follow it. In *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, for example, the court observed that if the defendant, Fluor, had followed its document retention policy, the emails subject to the discovery dispute would have been destroyed, and the issue would have been moot. *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, 52 Fed. R. Serv. 3d 168, 171 (E.D. La. 2002). Instead, Fluor's failure to follow its own policies resulted in the expenditure of considerable time and money in discovery disputes over the production of emails that should have been destroyed in the first place. *Id.*

<sup>36</sup> See Dort & Spatz *supra* note 35, at 16.

<sup>37</sup> Bart S. Wilhoit, *Spoliation of Evidence: The Viability of Four Emerging Torts*, 46 UCLA L. REV. 631, 657 (1998). See also discussion of the tort of spoliation in relation to third parties *infra* at III.C.

<sup>38</sup> For example, numerous courts have held that neither ordinary tort law nor a state's workers' compensation act imposes a duty on employers to preserve evidence that might be used in an employee's third-party claim against a product manufacturer or other defendant. See Maria A. Losavio, *Synthesis of Louisiana Law on Spoliation of Evidence - Compared to the Rest of the Country, Did We Handle It Correctly?*, 58 LA. L. REV. 837, 852 (1998).

<sup>39</sup> KOESEL, BELL & TURNBULL, *supra* note 1, at 12 (citing *Koplin v. Rosel Well Perforators, Inc.*, 734 P.2d 1177, 1179 (Kan. 1987)).

<sup>40</sup> See *Johnson v. United Services Automobile Ass'n*, 79 Cal. Rptr. 2d 234, 239 (Ct. App. 1998) (recognizing a duty to preserve evidence where the third-party insurer



Regardless of how the duty to preserve is defined, the spoliated evidence must still be relevant, discoverable, and material to a party's claim.<sup>41</sup> A court usually determines "whether there is any likelihood that the destroyed evidence would have been of the nature alleged by the party affected by its destruction."<sup>42</sup> However, the effect of spoliation is, by its very nature, speculative.<sup>43</sup> As one court has noted, "[w]hen attempting to determine the effect of missing evidence, 'courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.'"<sup>44</sup> The burden thus falls on the prejudiced party to produce evidence suggesting that the destroyed evidence was relevant to substantiating its claim and would have been included in the case had it not been destroyed.<sup>45</sup> Once this burden has been overcome, a court is then faced with the formidable challenge of imposing an appropriate remedy.

## II. TRADITIONAL REMEDIES FOR THE SPOILIATION OF EVIDENCE

When evidence is spoliated, courts have imposed traditional remedies against the spoliating party. These include an adverse inference instruction and sanctions such as dismissal, issue preclusion, summary judgment for the defendant and, in some cases, criminal penalties.<sup>46</sup> The remedy a court chooses is intended to serve three purposes: deterrence, punishment, and remediation.<sup>47</sup> For example, the court in

---

accepts a specific request to preserve a particular vehicle, thus inducing reliance on the part of another); *Brown v. City of Delray Beach*, 652 So. 2d 1150, 1154 (Fla. Dist. Ct. App. 1995) (cause of action upheld against local police department for negligently disposing of evidence after plaintiff's attorney had requested access to the evidence while it was in possession of the police).

<sup>41</sup> *Kinsler & MacIver*, *supra* note 10, at 768.

<sup>42</sup> *Kronisch v. United States*, 150 F.3d 112, 127 (2d Cir. 1998).

<sup>43</sup> *See Nolte*, *supra* note 25, at 400 (noting impossibility of ascertaining extent to which spoliation harmed underlying action).

<sup>44</sup> Robert D. Peltz, *The Necessity of Redefining Spoliation of Evidence Remedies in Florida*, 29 FLA. ST. U. L. REV. 1289, 1337 (2002) (citing *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988) (citations omitted)).

<sup>45</sup> *Youngblood*, 488 U.S. at 58.

<sup>46</sup> *Kinsler & MacIver*, *supra* note 10, at 774-75.

<sup>47</sup> *Kronisch*, 150 F.3d at 126. *See also* *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (noting that while a district court has broad discretion in choosing an appropriate sanction for spoliation, the applicable sanction is intended to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine).

*Pastorello v. City of New York*,<sup>48</sup> a recent New York case, imposed a sanction designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.<sup>49</sup>

#### A. *Federal and State Remedies*

The remedy available to the nonspoliating party also is influenced by the forum where the spoliation occurs.<sup>50</sup> For example, state courts usually apply the substantive law of the forum to spoliation claims.<sup>51</sup> Federal courts, on the other hand, have divergent views. Some hold that spoliation during pending litigation is substantive and governed by state law, while others consider spoliation a procedural matter under the rules of federal procedure.<sup>52</sup> Thus, similar facts may lead to different results depending upon the law of the state, and whether the action is brought in federal or state court.<sup>53</sup> The distinction is significant as it can mean the difference between a case surviving and being dismissed.<sup>54</sup>

In theory, courts have broad discretion in imposing sanctions for spoliation of evidence.<sup>55</sup> In practice, they are faced with procedural constraints.<sup>56</sup> For example, Federal Rule 37 permits a court to sanction a party who spoliates evidence in

<sup>48</sup> No. 95 Civ. 470(CSH), 2003 WL 1740606 (S.D.N.Y. Apr. 1, 2003).

<sup>49</sup> *Id.* at \*7 (quoting *West*, 167 F.3d at 779 (quoting *Kronisch*, 150 F.3d at 126)).

<sup>50</sup> KOESEL, BELL & TURNBULL, *supra* note 1, at 2.

<sup>51</sup> *Id.*

<sup>52</sup> Cecilia Hallinan, *Balancing the Scales After Evidence is Spoiled: Does Pennsylvania's Approach Sufficiently Protect the Injured Party?* 44 VILL. L. REV. 947, 951-52 (1999); *Moyers v. Ford Motor Co.*, 941 F. Supp. 883, 884 (E.D. Mo. 1996) (holding that federal law applies as sanctions are within court's inherent powers); *Allstate Ins. Co. v. Sunbeam Corp.*, 865 F. Supp. 1267, 1278 (N.D. Ill. 1994) (noting that the duty to preserve a defective product is a substantive issue to be decided by state law), *aff'd*, 53 F.3d 804 (7th Cir. 1995).

<sup>53</sup> KOESEL, BELL & TURNBULL, *supra* note 11 at 775.

<sup>54</sup> *Id.* n.23 (citing Hank Grzlak, *Federal, State Courts at Odds on Spoliation*, PENN. L. WKLY., July 22, 1996 at 1 (explaining that in Pennsylvania, "if a key piece of evidence is missing in state court, the case has a good chance of being dismissed, even if the allegedly defective part is preserved," whereas "[i]n federal court, the judge will impose some type of sanction, but the case is likely to survive").

<sup>55</sup> Judge, *supra* note 18, at 446.

<sup>56</sup> Dale A. Nance, *Missing Evidence*, 13 CARDOZO L. REV. 831, 865 (1991).

response to discovery and evidentiary requests.<sup>57</sup> However, Rule 37 usually will not apply to spoliation that occurs prior to litigation because the rule only governs sanctions for violations of a court order.<sup>58</sup> Rule 37 is thus designed to enforce compliance with discovery rules rather than to punish the wrongdoer.<sup>59</sup>

To address pre-litigation spoliation, courts have relied on their “inherent power” to control the judicial process and litigation.<sup>60</sup> The power is limited, however, to measures necessary to redress conduct “which abuses the judicial process.”<sup>61</sup> Though commentators have noted that some judges may be uncomfortable relying on inherent authority,<sup>62</sup> the inherent powers have proven effective in permitting court-ordered sanctions.<sup>63</sup> In addition, some federal laws,<sup>64</sup> and many ethical rules, impose similar duties.<sup>65</sup> Many state statutes authorize criminal sanctions against a party who destroys evidence.<sup>66</sup> Regardless of their source of power, courts have significant latitude in deciding which discovery sanctions are appropriate under the circumstances.<sup>67</sup>

<sup>57</sup> FED. R. CIV. P. 37(b)(2) (authorizing sanctions for violations of discovery orders). Note that most states have a rule modeled after Rule 37. In New York, for example, N.Y. C.P.L.R. 3126 (McKinney 2003) allows the court to impose penalties when parties refuse to comply with discovery or disclosure orders.

<sup>58</sup> Hutchings, *supra* note 24, at 400-01 (citing FED. R. CIV. P. 37).

<sup>59</sup> See Robinson v. Transamerica Ins. Co., 368 F.2d 37, 39 (10th Cir. 1966) (explaining that FED. R. CIV. 37(d) secures compliance with discovery rules, rather than punishing parties); In re Marriage of Lai, 625 N.E.2d 330, 334 (Ill. App. Ct. 1993) (“The purpose of discovery sanctions is to coerce recalcitrant parties to cooperate in accomplishing the required discovery, not to punish.”).

<sup>60</sup> United States v. Shaffer Equip. Co., 11 F.3d 450, 462 (4th Cir.1993) (recognizing “that when a party deceives a court or abuses the process at a level that is utterly inconsistent with the orderly administration of justice or undermines the integrity of the process, the court has the inherent power to dismiss the action.”).

<sup>61</sup> Chambers v. NASCO, Inc., 501 U.S. 32, 45 (1991) (Kennedy, J., dissenting) (recognizing the inherent power of the courts to fashion appropriate sanctions for conduct that disrupts the judicial process).

<sup>62</sup> Judge, *supra* note 18, at 447 (citing *Chambers*, 501 U.S. at 61).

<sup>63</sup> *Id.*

<sup>64</sup> See, e.g., Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1519 (2002).

<sup>65</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.4 (2003) (“A lawyer shall not . . . unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value.”).

<sup>66</sup> See Cassandra G. Sasso & Mary Price Birk, *Discovery and Spoliation Issues in the High-Tech Age*, COLO. LAW., Sept. 2003, at 81, 82. Moreover, because spoliation in the majority of states is a mere misdemeanor, a spoliator will likely prefer this minor criminal sanction as opposed to the risk of an enormous civil money judgment. See Jay E. Rivlin, *Recognizing an Independent Tort Action Will Spoil a Spoliator's Splendor*, 26 HOFSTRA L. REV. 1003, 1017 (1998).

<sup>67</sup> See Henderson v. Tyrrell, 910 P.2d 522, 531 (Wash. Ct. App. 1996) (“A trial

Nonetheless, a court will not always sanction a spoliating party.<sup>68</sup> Rather, courts typically attempt to balance a number of factors in determining whether sanctions for prelitigation document destruction are appropriate.<sup>69</sup> New York courts, for example, simply ask whether a particular sanction is prejudicial and fair.<sup>70</sup> This may explain why New York acts with relative impunity when applying the sanction of the adverse inference instruction.<sup>71</sup> California courts, on the other hand, take a more precise approach in trying to arrive at an appropriate sanction. They apply a balancing test that consists of four factors: (1) the nature and seriousness of the harm to the injured party; (2) the nature and significance of the interests promoted by the actor's conduct (was it unfair or immoral?); (3) the character of the means used by the actor; and (4) the actor's motive (was the destruction of the records primarily to prevent their use in litigation?).<sup>72</sup> California's approach, then, offers a more tailored and, perhaps, more exacting and efficient remedy than that of New York's.<sup>73</sup>

---

court's decision regarding sanctions for discovery violations . . . [is] discretionary, and will not be disturbed on appeal absent a showing of abuse of discretion." See also *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 707 (1982); *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 167 F.R.D. 90, 102 (D. Colo. 1996).

<sup>68</sup> See *Kinsler & MacIver*, *supra* note 10, at 766-67.

<sup>69</sup> *Id.* See also *Alliance to End Repression v. Rochford*, 75 F.R.D. 438, 441 (N.D. Ill. 1976) (citing *Black v. United States*, 389 F.Supp. 529 (D.D.C. 1975)).

<sup>70</sup> *Fada Indust., Inc. v. Falchi Bldg. Co.*, 730 N.Y.S.2d 827, 828 (Sup. Ct. 2001) ("In deciding whether to impose sanctions for spoliation of evidence, courts will look to the extent that the spoliation of evidence may prejudice a party, and whether a particular sanction will be necessary as a matter of elementary fairness.").

<sup>71</sup> See discussions of adverse inference instruction *infra* Part II.B and New York's Approaches to Spoliation *infra* Part IV.

<sup>72</sup> *Willard v. Caterpillar*, 48 Cal. Rptr. 2d 607, 621-26 (Cal. App. 1995). See *Kinsler & MacIver*, *supra* note 10, at 766-67 (discussing how California courts balance competing interests in deciding whether to impose sanctions for spoliation). Although the elements establishing a basis for imposition of sanctions are not settled, the prevailing consensus of courts is that sanctions are appropriate when a party (1) destroys discoverable matter (2) under its control (3) which the party knew or should have known (4) was relevant to pending, imminent or reasonably foreseeable litigation. See *JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE* § 3.8 (1989).

<sup>73</sup> Other factors that courts employ include the culpability of the spoliating party, the prejudice to the non-offending party, the degree of interference with the judicial process, whether lesser sanctions will remedy any harm and deter future acts of spoliation, whether evidence has been irretrievably lost, and whether sanctions will unfairly punish a party for misconduct by the attorney. However, as one court explained, "[t]hese factors do not constitute a rigid test; rather, they represent criteria for the . . . court to consider prior to imposing . . . a sanction." *Ehrenhaus v. Reynolds* 965 F.2d 916, 921 (10th Cir. 1992) (considering whether dismissal was proper based on spoliation).

### B. *Adverse Inference Instruction*

The adverse inference jury instruction is the most common and, arguably, most controversial, remedy for spoliation.<sup>74</sup> Under this remedy, the court instructs the jury to presume that destroyed evidence, if produced, would have been adverse to the party that destroyed it.<sup>75</sup> As one court has noted, “[i]t is a well-established and long-standing principle of law that a party’s intentional destruction of evidence relevant to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction.”<sup>76</sup>

For example, when a defendant destroys only records relating to a particular transaction on which the plaintiff is suing, there is a strong inference that those records would have demonstrated the defendant’s liability.<sup>77</sup> Similarly, the destruction of documents in violation of a document retention policy gives rise to an inference that such documents were unfavorable to the party who destroyed them.<sup>78</sup> In *Latimore v. Citibank Fed. Sav. Bank*, for instance, the court found that “[t]he violation of a record-retention regulation creates a presumption that the missing record contained evidence adverse to the violator.”<sup>79</sup> The inference, as a result, has remedial, punitive and deterrent objectives.<sup>80</sup> The remedial

<sup>74</sup> One of the earliest and most-cited decisions to recognize the adverse inference instruction was *Armory v. Delemirie*, 93 Eng. Rep. 664 (K.B. 1722). In that case, a young chimney sweep found a ring with a jewel and asked a jeweler to appraise its value. The jeweler returned the ring to the boy but had removed the jewel, claiming at trial that it had been misplaced. The court held that unless the jewel was produced, the jury could presume it to be of the highest value possible for its size. The court, then, assumed that the jeweler would have produced the jewel had it been less valuable. *Id.*

<sup>75</sup> JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 291 (James H. Chadbourn rev. 1979).

<sup>76</sup> *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).

<sup>77</sup> *Nation-Wide Check Corp. v. Forest Hills Distrib.*, 692 F.2d 214, 217-18 (1st Cir. 1982).

<sup>78</sup> See *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 109 (2d Cir. 2001) (citing *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 716 (7th Cir.1998)) (“The violation of a record[-]retention regulation creates a presumption that the missing record contained evidence adverse to the violator.”); *Favors v. Fisher*, 13 F.3d 1235, 1239 (8th Cir. 1994) (because employer violated record retention regulation, plaintiff “was entitled to the benefit of a presumption that the destroyed documents would have bolstered her case.”); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1419 (10th Cir. 1987). See *supra* notes 34-39 and accompanying text for a discussion of document retention policies relating to electronic evidence.

<sup>79</sup> *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 716 (7th Cir. 1998).

<sup>80</sup> JAMES WM MOORE, *MOORE’S FEDERAL PRACTICE* § 37.121 (3d ed. 1997). See also *Pastorello v. City of New York*, No. 95 Civ. 470(CSH), 2003 WL 1740606 at \*8

effect is designed to restore the prejudiced party to its previous position, as if the spoliation had not occurred.<sup>81</sup> The punitive and deterrent effect is supposed to discourage and punish spoliation by placing the risk of an erroneous judgment on the party who wrongfully created such a risk.<sup>82</sup> This often creates an unavoidable incentive for the spoliating party to settle where such party might otherwise have gone to trial. Regardless of these objectives, the instruction still allows a spoliating party to survive a motion for summary judgment or a motion to dismiss. The spoliation inference does, however, have its limitations.

Most jurisdictions do not allow an adverse inference to substitute for an essential element of a plaintiff's or defendant's case.<sup>83</sup> Therefore, a plaintiff suffering from spoliation cannot build his case on the spoliation inference alone. For the underlying claim to be actionable, the plaintiff must also possess some concrete evidence that will support the claim.<sup>84</sup> Furthermore, the doctrine of adverse inferences cannot be applied to cases with third-party spoliators.<sup>85</sup> Thus, the court will give the instruction only when the spoliator is a party to the lawsuit.<sup>86</sup>

Although courts generally agree that an adverse inference instruction is appropriate when the spoliating party has violated a duty to preserve evidence, courts disagree on the

---

(S.D.N.Y. Apr. 1, 2003) ("An adverse inference charge as a spoliation sanction has two underlying rationales, the first being remedial, to restore the prejudiced party to its previous evidentiary position; and the second being punitive, to act as a deterrent."); *Shaffer*, 169 F.R.D. at 25 ("An adverse inference charge serves the dual purposes of remediation and punishment.").

<sup>81</sup> See generally *Kronisch*, 150 F.3d at 126 (stating that an adverse inference instruction serves the remedial purpose, "insofar as possible, of restoring the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.").

<sup>82</sup> *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 75 (S.D.N.Y. 1991) ("The adverse inference thus acts as a deterrent against even the negligent destruction of evidence.").

<sup>83</sup> *Kammerer v. Sewerage and Water Bd. of New Orleans*, 633 So.2d 1357, 1361 (La. Ct. App. 1994) ("The traditional rule at common law will not substitute the adverse inference for plaintiff's proof of an essential element of his or her case . . . .") (Walter, J., concurring).

<sup>84</sup> *Id.*

<sup>85</sup> Stefan Rubin, *Tort Reform: A Call for Florida to Scale Back its Independent Tort for the Spoliation of Evidence*, 51 FLA. L. REV. 345, 365 (1999) (stating that, when the spoliator is a third party, "an adverse inference against the spoliator would serve no purpose.").

<sup>86</sup> See discussion of Tort for Third-Party Spoliation *infra* Part III.C.

requisite level of culpability.<sup>87</sup> Some courts require the showing of “bad faith” or intentional destruction before giving a spoliation inference instruction.<sup>88</sup> Generally, few courts have ruled that negligence is enough to support the giving of the instruction.<sup>89</sup> Still other courts have yet to decide on a defined state of mind.<sup>90</sup> Evidence, then, can be spoliated along a full range of culpability—it can be destroyed innocently, negligently, recklessly, intentionally, or in bad faith.<sup>91</sup>

However, as one commentator has noted, as the culpability of the spoliating party decreases (from intent to innocence), so too does the appeal of the punitive and deterrent purpose underlying the inference.<sup>92</sup> For example, where a party intentionally destroys evidence, such conduct gives rise to a strong inference that the party itself thought the evidence would be so harmful to its case that it was worth the risk of getting caught to destroy it.<sup>93</sup> This intentional conduct should be punished in addition to placing the injured party in the same position it would have been absent the loss of evidence. Such punishment usually comes in the form of high damages

<sup>87</sup> See Drew D. Dropkin, *Linking the Culpability and Circumstantial Evidence Requirements for the Spoliation Inference*, 51 DUKE L.J. 1803, 1805 (2002).

<sup>88</sup> *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997); see also *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (plaintiff must show willful conduct resulted in the loss or destruction of evidence).

<sup>89</sup> See, e.g., *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002). See also *Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 219 (1st Cir. 1982) (bad faith not necessary to establish inference); *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 75 (S.D.N.Y. 1991) (in granting an adverse inference instruction based on the defendant’s negligent destruction of evidence, the court stated, “It makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently. . . . [T]he risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss”).

<sup>90</sup> *Hirsch v. Gen. Motors Corp.*, 628 A.2d 1108, 1117 (N.J. Super. Ct. 1993) (noting that courts disagree whether bad faith or negligence is required). Second Circuit cases also offer different and shifting standards. See *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 107-08 (2d Cir. 2001) (noting that the law in the Second Circuit is unclear on what state of mind a party must have when destroying evidence). Compare *Fujitsu Ltd. v. Federal Exp. Corp.* 247 F.3d 423, 436 (2d Cir. 2001) (requiring intentional destruction) with *Reilly v. Natwest Markets Group, Inc.*, 181 F.3d 253, 267 (2d Cir. 1999) (bad faith is not a “per se” rule, and gross negligence may suffice).

<sup>91</sup> It is difficult to establish a uniform principle because of the ongoing debate about the proper role of inferences, rebuttable presumptions, and shifting burdens of production and persuasion. Some courts use these phrases interchangeably while other courts distinguish them.

<sup>92</sup> KOESEL, BELL & TURNBULL, *supra* note 1, at 36-37 (quoting *Nation-Wide Check Corp.*, 692 F.2d at 218).

<sup>93</sup> See *Nesson*, *supra* note 5, at 796.

awarded by the jury.<sup>94</sup> Where the spoliation is merely negligent, however, a wrongdoer is arguably less culpable and should not be punished for acts that had no ulterior motive or purpose. Nevertheless, a jury could impose damages that had a punitive effect on even a negligent spoliator.<sup>95</sup> The argument that a stronger inference would be appropriate where the spoliation is intentional is a valid one.<sup>96</sup> For this reason, many courts require corroborating evidence of spoliation before imposing an adverse inference on negligent spoliators.<sup>97</sup> As for those courts which do impose the inference on negligent spoliators, many impose a rebuttable presumption, allowing the spoliator to rebut the testimony of the spoliation victim.<sup>98</sup> Thus, by permitting the defendant to give a reasonable explanation for the destruction

---

<sup>94</sup> Although no systematic studies exist showing that the adverse inference instruction induces a jury to award high damages, commentators and lawyers have noted the instruction's strong influence on jury decisions. For example, a jury returned a \$55.8 million verdict for four plaintiffs who were struck by a train after hearing evidence that the train company had destroyed important tapes between the conductor of the train and a dispatcher. The plaintiffs' lawyer noted that the adverse inference instruction conveyed to the jury the alleged institutionalization of spoliation in the upper echelons of rail companies and was key to cultivating large damage awards. See Nick Upmeyer, *Verdicts Involving Railroads Produce Millions – And Lessons on Evidence*, NAT'L L.J., Feb. 3, 2003, at C20. (citing *Barber v. Union Pacific*, No. CIV-98-312 (Ark. Cir. Ct. 2002)). Another train accident case drew a \$6 million verdict after the jury received an adverse inference instruction. According to the plaintiff's lawyer, the jury was "disappointed that the railroad not only destroyed the documents but then came in and tried to explain it away." See Howard Pankratz, *Injured Rail Worker Awarded \$6 Million*, DENVER POST, Sept. 22, 2002, at B4.

<sup>95</sup> Stipanovich, *supra* note 21, at 1151 (recognizing that damages are not only speculative, but can be extremely disproportionate to culpability of negligent party).

<sup>96</sup> See also Judge, *supra* note 18, at 445 (commenting that the adverse inference is predominantly applied to intentional destruction of evidence) (citing *Beers v. Bayliner Marine Corp.*, 675 A.2d 829, 832 (Conn. 1996)) (noting that courts generally require a showing that spoliation was intentional before drawing an adverse inference against the party who has destroyed evidence).

<sup>97</sup> *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 77 (S.D.N.Y. 1991) (noting that the "corroboration requirement is even more necessary where the destruction was merely negligent, since in those cases it cannot be inferred from the conduct of the spoliator that the evidence would even have been harmful to him."). *Residential Funding Corp. v. DeGeorge Financial Corp.* 306 F.3d 99, 108 (2d Cir. 2002) ("The sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence.").

<sup>98</sup> See generally *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 221 (S.D.N.Y. 2003) (noting that, in cases where bad faith is not clear, courts tend to favor a rebuttable presumption that the destroyed evidence was unfavorable to the party responsible for its absence). See also *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267, 271 (Ill. 1995) (stating that in a negligence action for the spoliation of evidence, a "plaintiff must demonstrate . . . that but for the defendant's loss or destruction of evidence, the plaintiff had a reasonable probability of succeeding in the underlying suit.").



of the evidence, the burden-shifting presumption is considered less severe for negligent spoliators.<sup>99</sup>

The determination of whether to apply an adverse inference instruction to the facts of a case is ultimately left to the jury.<sup>100</sup> For example, the jurors hear evidence by both parties relating to the factual question of whether the evidence was destroyed while in the control of the party against whom the inference would be drawn.<sup>101</sup> If the jury determines the evidence does not amount to spoliation, then they will be instructed by the court not to employ the adverse inference instruction.<sup>102</sup> If the jurors decide spoliation has occurred, they will factor the adverse inference into their deliberations.<sup>103</sup> In either instance, the jury is allowed to hear not only evidence of the underlying claim, but evidence of the purported spoliation as well. Potentially, then, the evidence of spoliation informs and influences a jury's decision as much, if not more so, than the underlying facts of the claim itself.<sup>104</sup>

This risk of unduly prejudicing the position of the spoliator is a valid reason for not using the adverse inference instruction.<sup>105</sup> For example, the inference has the potential to focus the jury's attention on the spoliation itself, which is a collateral issue, and thereby distract the jury from the actual merits of the case. To prevent such prejudice, under Rule 403 of

---

<sup>99</sup> In some instances, application of the rebuttable presumption is based on whether spoliation was committed by plaintiff or defendant, and not necessarily on the state of mind of the party who committed the act. Thus, destruction of evidence by the plaintiff often results in a jury instruction to draw an adverse inference while destruction by a defendant usually results in a jury instruction to view the inference as a rebuttable presumption. See Anthony J. Sebok, Spoliation in Modern Tort Litigation 4 (Nov. 12, 2003) (unpublished manuscript prepared for symposium on "Ethical Issues in Mass Torts and Product Liability Litigation," on file with author) (citing *Vodusek v. Bayliner Corp.*, 71 F.3d 148 (4th Cir. 1995) (citing Rule 37)); *Pastorello v. City of New York*, No. 95 Civ. 470(CSH), 2003 WL 1740606 at \*7 (S.D.N.Y. Apr. 1, 2003) (citing Rule 37); *Hulett v. Niagara Mohawk Power Corp.*, No. 92-7110, 2002 WL 31010983 (N.Y. Sup. Ct. Aug. 1, 2002).

<sup>100</sup> See GORELICK, *supra* note 72, § 2.2. Under Federal Rule of Civil Procedure 37 and analogous state rules, a court can instruct a jury to draw an adverse inference from the absence of material evidence. See *supra* text accompanying notes 59-61 (discussing power of court to sanction parties in violation of discovery orders under Federal Rule 37).

<sup>101</sup> See GORELICK, *supra* note 72, § 3.11.

<sup>102</sup> Even if a judge or magistrate determines that spoliation has occurred and orders an adverse inference instruction, the jury is nonetheless entitled to disregard it in making its decision. See *id.*

<sup>103</sup> See *id.*

<sup>104</sup> See Imwinkelried, *supra* note 3, at 804.

<sup>105</sup> DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 70 (rev. ed. 1985).

the Federal Rules of Evidence, a judge may exclude evidence of spoliation if he determines it would pose a substantial danger of “confusi[ng] . . . the issues . . . or misleading the jury.”<sup>106</sup> Nonetheless, in situations where evidence is not excluded, a jury might still be tempted to return a verdict adverse to the spoliating party as a means of punishing the party for the misdeed, even if the jurors were not convinced of the spoliator’s liability.<sup>107</sup> Thus, the probative value of using the inference might well be outweighed by the probative danger of unfairly penalizing the spoliator.

Rule 403 may be an effective tool for a party resisting the use of the inference when the evidence will distract the jury from the merits of the case.<sup>108</sup> The argument is convincing. For example, the question is not whether a defendant discarded train maintenance records, but whether a defendant was responsible for causing a train wreck that severely injured the plaintiff.<sup>109</sup> However, trial judges do not simply exclude evidence relating to an event other than the central historical event on the merits of the case under Rule 403. On the contrary, in product liability actions, plaintiffs frequently introduce evidence of other accidents involving the same or a similarly designed product.<sup>110</sup> Evidence of other accidents involving other victims is admissible to establish the existence of the defect in the product’s design.<sup>111</sup> Thus, though judges exercise discretion to exclude evidence of spoliation that is collateral to the main action, they may still employ the adverse inference instruction

<sup>106</sup> FED. R. EVID. 403. Under the legal relevance doctrine, codified in the Federal Rules of Evidence, a judge may exclude otherwise admissible, relevant evidence when she fears that the introduction of the evidence would generate “unfair prejudice” against the litigant.

<sup>107</sup> Lawrence Solum & Stephen J. Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1161 (1987).

<sup>108</sup> Imwinkelried, *supra* note 3, at 804.

<sup>109</sup> In case where jury returned verdict of \$30.1 million against railroad company for destroying tapes, plaintiff’s attorney noted that, “[The] fact [that the railroad company destroyed tapes] alone helped convince the jury that the rail company had something to hide.” See Upmeyer, *supra* note 94, at C20.

<sup>110</sup> Mary A. Parker & Susan Garner, *Special Evidentiary Issues in Products Cases*, TRIAL, Nov. 1991, at 41 (“[U]nder the case law and the Federal Rules of Evidence, evidence of similar accidents is normally admitted.”); see also Francis H. Hare, Jr. & Mitchell K. Shelly, *The Admissibility of Other Similar Incident Evidence: A Three-Step Approach*, 15 AM. J. TRIAL ADVOC. 541, 545-46 (Spring 1992) (“Courts have consistently held that evidence of other similar incidents is relevant to show either the existence of a defect or the relative danger of a condition or service.”).

<sup>111</sup> Imwinkelried, *supra* note 3, at 804 (noting that “from a jury’s point of view, there may be no more important evidence on the issue of the product’s defective condition than the performance and experience of that product in the real world.”).

when the destroyed evidence has significant probative worth on the historical merits of the case.<sup>112</sup>

Proponents of the adverse inference emphasize that it avoids the costs of collateral litigation (such as an independent tort action based on intentional or negligent spoliation).<sup>113</sup> Also, unlike the extreme remedies of dismissal or default judgment, the spoliation inference may be the most appropriate and proportional judicial response and may do the best job of fairly compensating the victimized party.<sup>114</sup>

Critics of the spoliation inference generally fall into two camps. The first camp claims that the inference fails to achieve the objectives of punishment and deterrence. In this regard, the inference is insufficient as a punitive remedy because, even in its strongest application, it merely levels the playing field.<sup>115</sup> Furthermore, the inference may even encourage a plaintiff with a weak case to simply lose or destroy the product, endure the spoliation inference, and take his or her chances with the jury.<sup>116</sup> Lastly, critics argue that the inference may be impotent as a deterrent because the jury has the discretion to dismiss the court's instruction outright.<sup>117</sup> Followers of this view, then, often see the inference as the least onerous sanction available to rectify spoliation.

The second camp sees the inference as having the potential to be one of the most severe responses to spoliation. For example, such commentators fear that juries will be unduly influenced by destruction of evidence and will unfairly penalize litigants by means of the adverse inference instruction.<sup>118</sup> These commentators also question the capacity of instructions on the scope of the inquiry to control the jury, particularly in cases in

---

<sup>112</sup> *Id.*

<sup>113</sup> See KOESEL, BELL & TURNBULL, *supra* note 1, at 40.

<sup>114</sup> *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 395 (1st Cir. 1990) (citations omitted).

<sup>115</sup> *Id.*

<sup>116</sup> See generally David H. Canter, *The Missing or Altered Product: Nightmare or Dream?* 26 SW. U. L. REV. 1051, 1061 (1997) (noting that after destroying evidence, plaintiffs can retain experts "who are able to forcefully argue their position without fear that defendant will have physical evidence to disprove theories." (citing *Bass v. General Motors*, 929 F.Supp. 1287, 1289 (W.D. Mo. 1996)).

<sup>117</sup> KOESEL, BELL & TURNBULL, *supra* note 1, at 174 (citing *Blinzler v. Marriot Int'l, Inc.*, 81 F.3d 1148 (1st Cir. 1996)).

<sup>118</sup> *Solum*, *supra* note 107, at 1093 (citing John MacArthur Maguire & Robert C. Vincent, *Admissions Implied from Spoliation or Related Conduct*, 45 YALE L.J. 226, 231 (1935)).

which the conduct of the spoliator was outrageous.<sup>119</sup> For these critics, the inference would be more appropriate if used in a criminal, as opposed to civil, context.<sup>120</sup>

### C. *Discovery and Evidentiary Sanctions*

The discovery sanction is more precise, more diverse, and more tailored to the facts of the case than an adverse inference instruction.<sup>121</sup> For example, courts can sanction spoliators by excluding evidence which is probative of the same issue or issues as the destroyed evidence, aiming to balance the parties' conflicting interests. This sanction applies by excluding direct testimony relating to the spoliated evidence and any reports or secondary evidence, such as photos of the scene, taken by the expert.<sup>122</sup> Excluding plaintiff's expert testimony is a less severe sanction than dismissal, yet the practical result is often the same. If a plaintiff cannot introduce expert testimony relating to the defective condition of a product, the court may grant summary judgment to the defendant because there is not enough evidence to proceed.<sup>123</sup> The plaintiff may, however, have other relevant evidence or may attempt to prove an alternative theory for the cause of the accident.<sup>124</sup>

The sanction of dismissing the entire action or entering a default judgment is among the most severe sanctions within the court's power for spoliation.<sup>125</sup> Because this sanction is so

<sup>119</sup> *Id.* (citing Maguire & Vincent, *supra* note 118, at 246).

<sup>120</sup> Such critics note that in criminal cases the courts frequently admit testimony about an accused's pretrial misconduct on the theory that the misconduct evidences the accused's consciousness of guilt. For instance, if the accused destroys or conceals incriminating physical evidence, the prosecution may use this to help prove the accused's culpability. By doing so, the prosecutor invites the jury to infer the accused's guilt from the accused's conduct. In effect, by acting in this manner, the accused "admits" his guilt. *See Imwinkelried, supra* note 3, at 796-97.

<sup>121</sup> *See* Judge, *supra* note 18, at 445-46.

<sup>122</sup> *See, e.g., N. Assurance Co. v. Ware*, 145 F.R.D. 281, 282 (D. Me. 1993) (finding that while dismissal would be too severe, exclusion of the evidence was appropriate despite the lack of any showing that plaintiff acted deliberately); *Headley v. Chrysler Motor Corp.*, 141 F.R.D. 362, 365-66 (D. Mass. 1991) (excluding plaintiff's expert evidence due to the prejudice to defendant and the advantage plaintiff would obtain otherwise); *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66, 72 (Minn. Ct. App. 1998) (excluding the testimony of the plaintiff's expert regarding the cause of the fire in plaintiff's garage after the evidence was destroyed).

<sup>123</sup> *See, e.g., Headley v. Chrysler Motor Corp.*, 141 F.R.D. 362, 366 n.18 (D. Mass. 1991); *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 369 (9th Cir. 1992).

<sup>124</sup> *See Unigard*, 982 F.2d at 370.

<sup>125</sup> *See generally Miller v. Time-Warner Communications, Inc.*, 1999 WL 739528 (S.D.N.Y. Sept. 22, 1999) (holding that dismissal is appropriate if there is a

extreme, it is reserved for only the most egregious offenses, and may not be imposed if there is a lesser, but equally efficient, remedy available.<sup>126</sup> However, some courts have not hesitated to impose this penalty against both plaintiff and defendant spoliators who were merely negligent.<sup>127</sup>

In New York, for example, the negligent disposal of evidence before an adversary has had an opportunity to inspect it will suffice to enter a dismissal of the case.<sup>128</sup> These sanctions may be imposed against parties to a lawsuit who violate the appropriate rules of discovery, or may even be imposed through the “inherent power” of the court itself.<sup>129</sup>

#### D. Criminal Penalties

In addition to discovery and evidentiary sanctions, many jurisdictions have obstruction of justice statutes that impose criminal liability on spoliators of evidence.<sup>130</sup> However, some courts have noted that obstruction of justice statutes do not provide sufficient deterrence because many violations are only misdemeanors.<sup>131</sup> Moreover, it appears that prosecutors are unlikely to pursue obstruction of justice claims against spoliators in civil proceedings.<sup>132</sup> Nonetheless, many federal

---

showing of willfulness, bad faith or fault on the part of the sanctioned party).

<sup>126</sup> See generally *Bachmeier v. Wallwork Truck Centers*, 507 N.W.2d 527 (N.D. 1993) (reversing dismissal and remanding for further proceedings for the consideration of less restrictive sanctions for negligent spoliation).

<sup>127</sup> Where plaintiff has negligently or intentionally destroyed relevant evidence, both federal and New York state courts will dismiss plaintiff's suit. See *Sebok*, *supra* note 99, at 4 (citing *Pucia v. Farley*, 261 A.D.2d 83, 85 (N.Y. App. Div. 1999)). Where defendant is the spoliator, however, federal courts are less willing to grant summary judgment for plaintiff, though New York courts have done this in some instances. *Id.* (citing *DiDomenico v. C & S Aeromatik Supplies, Inc.*, 252 A.D.2d 41, 53 (App. Div., 1998)). *But see Jones v. Goodyear Tire & Rubber Co.*, 137 F.R.D. 657 (C.D. Ill. 1991) (federal court granting plaintiff's motion for summary judgment).

<sup>128</sup> *Cummings v. Central Tractor Farm & Country Inc.*, 722 N.Y.S.2d 285 (App. Div. 2001) (holding that party need not act intentionally, contumaciously, or in bad faith in connection with loss or destruction of evidence to impose ultimate sanction of directing judgment against it or dismissing suit).

<sup>129</sup> See *Wilhoit*, *supra* note 37, at 649 (citing *Bachmeier*, 507 N.W.2d at 533).

<sup>130</sup> *Id.* at 650 (citing ARIZ. REV. STAT. § 13-2809 (2001); CAL. PENAL CODE § 135 (1999); and MINN. STAT. § 609.63(7)(2003)).

<sup>131</sup> See *Smith v. Superior Court*, 198 Cal. Rptr. 829, 835 (Ct. App. 1984) (“If crucial evidence could be intentionally destroyed by a party to a civil action who thereby stands to gain substantially monetarily by such destruction, the effect of a misdemeanor would be of minimal deterrence.”), *overruled by Cedars-Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511, 521 n.4 (Cal. 1998). For a discussion of *Smith*, see *infra* text and accompanying notes 140-145.

<sup>132</sup> See Sean R. Levine, *Spoliation of Evidence in West Virginia: Do Too Many Torts Spoliate the Broth?* 104 W. VA. L. REV. 419, 432-33 (2002) (citing *Smith*, 198 Cal.

obstruction of justice statutes have recently been amended under the Sarbanes-Oxley Act of 2002<sup>133</sup> which arguably makes the imposition of criminal sanctions a more viable option for prosecutors and courts alike.

### III. THE DEVELOPMENT OF THE SPOILIATION TORT

Courts in general have been cautious in recognizing or applying any independent tort of spoliation. In fact, only a few courts have developed a policy toward holding spoliators of evidence liable in tort.<sup>134</sup> Similar to judicial remedies, spoliation as a tort furthers the goals of deterrence, punishment and remediation. However, unlike such remedies, the separate tort allows recovery of punitive damages in addition to the originally contemplated damages.<sup>135</sup> As a result, advocates of the tort argue that a spoliator may be even more disinclined to destroy incriminating evidence considering he has much to lose.<sup>136</sup> States adopting the tort have noted that traditional remedies are inadequate as they do not fully compensate the spoliation victim.<sup>137</sup> Furthermore, the tort is the only remedy that allows a plaintiff to recover directly from third-party spoliators.<sup>138</sup> Ultimately, an independent tort of spoliation

---

Rptr. at 835) ("We know of no prosecution under California Penal Code section 135 – adopted in 1872 . . . for destroying or concealing documentary evidence relevant only to prospective civil action."). *See also* United States v. Lundwall, 1 F. Supp. 2d 249 (S.D.N.Y. 1998) (finding that civil discovery remedies might be insufficient at times, and that the federal obstruction of justice statute was applicable, regardless of the fact that it had never previously been used in a civil destruction of evidence context).

<sup>133</sup> The Sarbanes-Oxley Act, largely a response to the Arthur Andersen accounting scandal, imposes steep fines and up to twenty-year prison terms for anyone found guilty of destroying corporate audit records or altering, destroying, or falsifying documents to impede a contemplated or pending federal investigation, bankruptcy, or official proceeding. 18 U.S.C. § 1512, 1519, and 1520. For a brief explanation of the Andersen accounting scandal, *see* Chase, *supra* note 7, at 745-63.

<sup>134</sup> *See* Smith v. Howard Johnson Co., 615 N.E.2d 1037, 1038 (Ohio 1993) (adopting the tort of willful spoliation and listing its elements). *See also* Nolte, *supra* note 25, at 359.

<sup>135</sup> *See* Nolte, *supra* note 25, at 402.

<sup>136</sup> In fact, damages in a spoliation action can amount to several millions of dollars. *See* Wilhoit, *supra* note 37, at 633-34 (citing Margaret Cronin Fisk, *Looking for a New Cause of Action?* NAT'L L.J., May 19, 1997, at A11 (describing one spoliation case in which the jury awarded the plaintiff \$9,000,000 and another case in which spoliation was a key factor in a \$12,000,000 settlement)).

<sup>137</sup> Rivlin, *supra* note 66, at 1005 (noting that court's remedial power is severely limited when spoliation is discovered after entry of final judgment); *see also* Stipanovich, *supra* note 21, at 1139 (discussing traditional remedies' inadequacy in compensating aggrieved party and deterring spoliator).

<sup>138</sup> *See supra* note 15 and accompanying text. *See also* discussion of tort of third-party spoliation *infra* Part III.B.

allows the injured party to bring an action against the spoliator for damages caused solely by evidence destruction.<sup>139</sup>

#### A. *Tort of Intentional Spoliation*

*Smith v. Superior Court*, a 1984 California case, is the landmark decision recognizing a tort action for the intentional spoliation of evidence.<sup>140</sup> Smith was severely injured when the wheel of an oncoming van broke loose and crashed through her windshield.<sup>141</sup> The van was brought to Abbott Ford, the garage which had originally put the wheels on the van in the accident. Abbott Ford, however, failed to retain the parts of the wheel involved in the accident after promising to do so.<sup>142</sup> Smith alleged that her expert needed the lost parts to determine the cause of the accident.<sup>143</sup> The California Court of Appeals found that Smith had stated a valid claim against Abbott Ford and, thus, created a new tort.<sup>144</sup> The court acknowledged that the most troubling aspect of allowing an intentional spoliation cause of action was the speculative nature of determining damages, yet concluded that the societal interest in deterrence outweighed the damages concern.<sup>145</sup> Only a few jurisdictions have followed *Smith's* lead and adopted the separate tort of intentional spoliation.<sup>146</sup> Although each jurisdiction employs a

<sup>139</sup> Levine, *supra* note 132, at 428 (citing *Coletti v. Cudd Pressure Control*, 165 F.3d 767 (10th Cir. 1999); *Temple Cmty. Hospital v. Superior Court*, 976 P.2d 223 (Cal. 1999); and *Trevino v. Ortega*, 969 S.W.2d 950 (Tex. 1998) as examples where the spoliation inference was used as the basis for denial of the recognition of a spoliation tort). See discussion of reasons for rejecting spoliation tort *infra* Part III.D.

<sup>140</sup> *Smith v. Superior Court*, 198 Cal. Rptr. 829 (Ct. App. 1984).

<sup>141</sup> *Id.* at 831.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 832 (quoting William Prosser, noting that “[n]ew and nameless torts are being recognized constantly,” and “[t]he common thread woven in all torts is the idea of an unreasonable interference with the interests of others”).

<sup>145</sup> *Smith*, 198 Cal. Rptr. at 835-36 (the court analogized the emerging tort to the recognized tort of intentional interference with prospective business advantage on the basis that the opportunity to win a lawsuit is the same type of “valuable probable expectancy” as the opportunity to obtain a contract).

<sup>146</sup> Courts in Alaska, Florida, Kansas, New Jersey, New Mexico, Montana and Ohio have recognized the tort of intentional spoliation. See *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 463 (Ak. 1986); *St. Mary's Hosp., Inc. v. Brinson*, 685 So. 2d 33, 35 (Fla. Dist. Ct. App. 1996); *Foster v. Lawrence Memorial Hosp.*, 809 F.Supp. 831, 836 (D. Kan. 1992); *Oliver v. Stinson Lumber Co.*, 993 P.2d 11, 11 (Mont. 1999); *Viviano v. CBS Inc.*, 597 A.2d 543, 550 (N.J. Super. Ct. App. Div. 1991); *Coleman v. Eddy Potash, Inc.*, 905 P.2d 185, 185 (N.M. 1995); and *Smith v. Howard Johnson Co.*, 615 N.E.2d 1037, 1037 (Ohio 1993). See also Margaret A. Egan, *Tort Law – Spoliators Beware, But Fear Not an Independent Suit*, 24 U. ARK. LITTLE ROCK L. REV. 233, 250

slightly different formulation, the general elements of the intentional spoliation tort include: (1) the existence of a potential civil action; (2) defendant's knowledge of the potential action; (3) destruction of evidence; (4) intent; (5) causal inability to prove the lawsuit or proximate cause; and (6) damages.<sup>147</sup>

### B. *Tort of Negligent Spoliation*

Five months after *Smith*, the Third District Court of Appeal in Florida recognized a separate cause of action for the negligent spoliation of evidence in *Bondu v. Gurvich*.<sup>148</sup> Bondu noted that a claim for negligent spoliation of evidence may only stand if the spoliator owed a duty to the plaintiff to preserve evidence.<sup>149</sup> Thus, negligent spoliation is characterized by a lack of intent and an explicit recognition to preserve evidence for another party's use.<sup>150</sup> A few states have followed Florida and recognized negligent spoliation of evidence as a cause of action.<sup>151</sup>

The recognition of intentional and negligent spoliation as a separate tort did not create the following that proponents of the tort had hoped for. In fact, the California Supreme Court overruled *Smith* fourteen years later in *Cedars-Sinai Med. Ctr.*

---

(2001) (noting that, similar to *Smith v. Superior Court*, courts recognizing the separate tort of spoliation have likened the harm arising from the destruction of evidence to that suffered by plaintiffs in cases involving intentional interference with prospective economic advantage).

<sup>147</sup> See Levine, *supra* note 132, at 422.

<sup>148</sup> 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984), *cert. denied*, 484 So. 2d 7 (Fla. 1986). *Bondu* involved a hospital that lost the plaintiff's anesthesia records and was subsequently unable to provide them to the plaintiff on his request. *Id.* at 1312.

<sup>149</sup> The defendant hospital in fact had such a duty to save Bondu's medical records. *Id.* at 1313.

<sup>150</sup> See Judge, *supra* note 18, at 449 (citing Continental Insurance Co. v. Herman 576 So. 2d 313, 315 (Fla. Dist. Ct. App. 1990)) (suggesting the following elements for the negligent spoliation of evidence tort: (1) the existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and (6) damages).

<sup>151</sup> Florida, Illinois, New Jersey, Kansas and the District of Columbia have recognized a cause of action for spoliation to include negligence as a basis of liability. See Digiulio v. Prudential Prop & Cas. Ins. Co. 710 So. 2d 3, 5 (Fla. Ct. App. 1998); Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 271 (Ill. 1995); Holmes v. Amerex Rent-A-Car, 180 F.3d 294, 295 (D.C. Cir. 1999) (holding that negligent or reckless spoliation of evidence is an independent and actionable tort). See *Foster*, 809 F. Supp. at 836 (recognizing cause of action for intentional and negligent spoliation of evidence).



*v. Superior Court*,<sup>152</sup> holding that a party may not bring a separate cause of action for intentional spoliation of evidence. The court weighed several factors such as: (1) the availability of other remedies; (2) the inherently difficult task of calculating damages; and (3) the prospect of meritless spoliation actions.<sup>153</sup> The court also noted that a separate tort imposes indirect costs in preservation of otherwise valueless evidence.<sup>154</sup> Although the California Court of Appeals still recognizes claims for negligent spoliation,<sup>155</sup> the *Cedars-Sinai* decision cast a pall over this cause of action as well.<sup>156</sup>

Despite courts' increasingly harsh approaches to spoliation over the last several years, the recent trend among jurisdictions has been to reject the tort as it relates to first parties.<sup>157</sup> Rather than recognize a new tort, courts have decided to employ court-enforced sanctions against the spoliator in the underlying litigation.<sup>158</sup> Courts have noted the costs to defendants as well as the speculative nature of spoliated evidence as additional reasons for not recognizing the tort.<sup>159</sup>

<sup>152</sup> 954 P.2d 511 (Cal. 1998).

<sup>153</sup> *Id.* at 515. The court thoroughly examined these three areas: (1) holding that a remedy for litigation-related misconduct should not create a "spiral of lawsuits" and should recognize the need for finality in adjudication; (2) holding that the non-tort remedies of evidentiary inference, discovery sanctions, disciplinary sanctions for attorneys involved, and criminal penalties seem sufficient; and (3) distinguishing an "uncertainty of the fact of harm" from mere uncertainty of amount of damages. The issue of harm to damages was too speculative for a tort remedy to solve. *Id.* at 515-16.

<sup>154</sup> *Id.* at 519.

<sup>155</sup> See, e.g., *Hernandez v. Garcetti*, 80 Cal. Rptr. 2d 443, 448 (Cal. Ct. App. 1998); *Johnson v. United Serv. Auto. Ass'n*, 79 Cal. Rptr. 2d 234, 239 (Cal. Ct. App. 1998).

<sup>156</sup> Some commentators see room for negligent spoliation claims, cautioning that the California Supreme Court would likely require the "legal duty" it mentioned at the start of its analysis. See Jerrold Abeles & Robert J. Tyson, *Spoil Sport*, L.A. LAW., Nov. 1999, at 41.

<sup>157</sup> In fact, less than one month after *Cedars-Sinai*, the Texas Supreme Court declined to recognize an independent cause of action for either intentional or negligent spoliation. See *Trevino v. Ortega*, 969 S.W.2d 950, 951 (Tex. 1998). Levine, *supra* note 132, at 421-22 (citing KOESEL, BELL & TURNBULL, *supra* note 1, at 64-66).

<sup>158</sup> See generally *Fletcher v. Dorchester Mut. Ins. Co.*, 773 N.E.2d 420 (Mass. 2002) (noting there is no cause of action for spoliation of evidence when appropriately tailored sanctions imposed in the underlying action are a more efficacious remedy for spoliation than allowing a separate, inherently speculative cause of action for such litigation misconduct).

<sup>159</sup> *Dowdle Butane Gas Co., v. Moore*, 831 So. 2d 1124, 1135 (Miss. 2002) (Supreme Court refused to recognize intentional spoliation of evidence against spoliators as independent cause of action, where there were sufficient other avenues and where costs to defendants and courts would have been enormous, particularly from risks of erroneous determinations of liability due to uncertainty of harm. The court also noted risk of excessive costs from extraordinary measures required to preserve, for indefinite periods, items for purposes of avoiding potential spoliation liability in future

Nonetheless, at least three courts have recognized the spoliation tort for claims against third-parties since 1998.<sup>160</sup>

### C. *Tort of Third-Party Spoliation*

The recent recognition of the tort of third-party spoliation may, indeed, be because it is the only remedy available against such spoliators. For example, because third parties are not part of the underlying, original lawsuit, inferences and sanctions cannot be used against them.<sup>161</sup> Therefore, without a third-party spoliation tort, "there may be no civil remedy to compensate a litigant who is victimized by a nonparty spoliator."<sup>162</sup> For this reason, even some of the tort's harshest critics support its use as protection against third-party spoliation.<sup>163</sup> Indeed, several jurisdictions recognize a tort for the negligent and/or intentional spoliation of evidence by third parties because of the perceived failure of traditional remedies in the third-party context.<sup>164</sup>

### D. *Challenges to Recognition of the Tort of Spoliation*

Recognizing the tort of spoliation, whether for first parties or third parties, causes three significant problems. First, it imposes a duty on the owner or custodian of the

---

litigation. Any benefits obtained by recognizing spoliation tort, noted the court, were outweighed by burdens imposed.)

<sup>160</sup> See, e.g., *Smith v. Atkinson*, 771 So. 2d 429, 432 (Ala. 2000); *Oliver v. Stimson Lumber Co.*, 993 P.2d 11, 18 (Mont. 1999); *Holmes v. Amerex Rent-A-Car*, 180 F.3d 294, 295 (D.C. Cir. 1999).

<sup>161</sup> See *Levine*, *supra* note 132, at 438 n.128 (citing *Elias v. Lancaster Gen Hosp.*, 710 A.2d 65, 67-68 (Pa. Super. 1998)) (stating that "traditional remedies would be unavailing, since the spoliator is not a party to the underlying litigation."). See also *Levine*, *supra* note 132, at 441.

<sup>162</sup> See *Judge*, *supra* note 18, at 459.

<sup>163</sup> For example, one year after *Cedars-Sinai*, the California Supreme Court held in *Temple Community Hospital v. Superior Court* that no cause of action existed for the intentional spoliation of evidence by third parties. *Temple Community Hospital v. Superior Court*, 927 P.2d 223, 224 (Cal. 1999). However, the court was badly divided, with the author of *Cedars-Sinai* writing the dissenting opinion. The dissent noted that third-party spoliation is particularly troubling. See *id.* at 234-35.

<sup>164</sup> The District of Columbia, Montana, and Alabama have recognized a general tort action for spoliation, but only for nonparties. See, e.g., *Oliver*, 993 P.2d at 18 (recognizing tort of spoliation of evidence, which may be negligent or intentional, as "an independent cause of action" with respect to third parties); *Smith v. Atkinson*, 771 So.2d 429, 432 (Ala. 2000); *Continental Ins. Co. v. Herman*, 576 So. 2d 313, 315 (Fla. Dist. Ct. App. 1990); *Thompson ex rel. Thompson v. Owensby*, 704 N.E.2d 134, 136-40 (Ind. Ct. App. 1998). But see *Dowdle* 831 So.2d at 1135 (refusing to recognize intentional spoliation of evidence against first- and third-party spoliators as independent causes of action).

evidence to preserve it.<sup>165</sup> Arguably, this would “outweigh the owner or custodian’s general right to use, modify, or destroy his own property.”<sup>166</sup> Some courts, understandably, have been reluctant to find this duty in the absence of a relationship between the parties or a statutory mandate that the evidence be maintained for, and accessible to, the plaintiff.<sup>167</sup>

A second, and perhaps more troubling, problem is determining the requisite tort element of damages.<sup>168</sup> Because spoliation damages are speculative, courts have struggled to meet the traditional damages standard under which a plaintiff must establish the amount of damages with reasonable certainty.<sup>169</sup> In a sense, the jury must “quantify the unquantifiable.”<sup>170</sup> Some jurisdictions reject the tort of spoliation until resolution of the underlying suit, believing that the suit’s completion would satisfy the certainty requirement for damages.<sup>171</sup> Other courts have held that damages for spoliation should not be awarded in addition to damages on the underlying cause of action.<sup>172</sup> Commentators point out, however,

<sup>165</sup> See KOESEL, BELL & TURNBULL, *supra* note 1, at 54.

<sup>166</sup> BELL, KOESEL & TURNBULL, *supra* note 11, at 783 (citing *Ortega v. Trevino*, 983 S.W.2d 219, 222 (Tex. Ct. App. 1997)).

<sup>167</sup> See *Koplin v. Rosel Well Perforators, Inc.*, 734 P.2d 1177, 1181-82 (Kan. 1987).

<sup>168</sup> *Delgado v. Mitchell*, 55 S.W.3d 508, 512 (Mo. App. S.D. 2001) (stating that “a damage award must be based on more than a ‘gossamer web of shimmering speculation and finely-spun theory.’”); *Petrik v. Monarch Printing Corp.*, 501 N.E.2d 1312, 1320 (Ill. App. Ct. 1986) (noting calculation of damages as most difficult aspect of spoliation of evidence tort).

<sup>169</sup> See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 165 (5th ed. 1984) (noting that actual loss is necessary in negligence cases). See also *Foster v. Lawrence Memorial Hosp.*, 809 F. Supp. 381, 836 (D. Kan. 1992) (applying Kansas law and finding that plaintiffs’ inability to identify damages arising from spoliation of evidence that were distinct from those of their underlying malpractice claim deprived them of the ability to bring an independent action for spoliation).

<sup>170</sup> *Nolte*, *supra* note 25, at 394, (quoting Chris Goodrich, *Gone Today, Here Tomorrow*, CAL. LAW., June 1984, at 15 (quoting California attorney Raoul D. Kennedy)).

<sup>171</sup> See *e.g.*, *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 438 (Minn. 1990); *Baughner v. Gates Rubber Co.*, 863 S.W.2d 905, 913 (Mo. Ct. App. 1993); *Petrik*, 501 N.E.2d at 1322; *Bondu v. Gurvich*, 473 So. 2d 1307, 1312 (Fla. Dist. Ct. App. 1984). See also Paul Garry Kerkorian, *Negligent Spoliation of Evidence: Skirting the “Suit Within a Suit” Requirement of Legal Malpractice*, 41 HASTING L.J. 1077, 1101 (1990) (noting that this requirement, however, might be considered 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).

<sup>172</sup> *Callahan v. Stanley Works*, 703 A.2d 1014, 1019 (N.J. Super. Ct. App. Div. 1997) (worker’s spoliation damages would have to be reduced by the amount of the workers compensation lien).

that damages speculative by nature should not per se preclude a plaintiff from recovery.<sup>173</sup> Regardless of the uncertainty of damages, an injured person should not be denied relief.<sup>174</sup>

Third, courts rejecting an independent spoliation tort often stress the “important interest of finality in adjudication.”<sup>175</sup> A spoliation tort may lead to judicial inefficiency by re-litigating adjudicated issues.<sup>176</sup> Recognizing the tort could also violate long-standing principles of res judicata and collateral estoppel.<sup>177</sup> Arguably, this consequence only occurs when the spoliation tort is brought after the underlying action has ended, not when the tort is claimed in the original action.<sup>178</sup> Moreover, if non-tort remedies for spoliation are sufficient, recognizing a third-party spoliation tort might have little impact on the interest of finality in adjudication.<sup>179</sup>

Despite these arguments challenging the spoliation tort, the policy considerations of deterrence may provide support for wider recognition.<sup>180</sup> The possibility of punitive damages may do more to deter and prevent destruction of evidence than traditional remedies.<sup>181</sup> Conversely, allowing punitive damages could potentially enable a party with an otherwise minimal claim against the spoliator to recover excessive damages.<sup>182</sup>

<sup>173</sup> See Stipancich, *supra* note 21, at 1145-46.

<sup>174</sup> *Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) (“[W]here the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.”). See also *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65 (1946) (recognizing that the most elementary notions of public policy require the wrongdoer to “bear the risk of the uncertainty” which his own wrong has established).

<sup>175</sup> See, e.g., *Dowdle Butane Gas Co., Inc. v. Moore*, 831 So. 2d 1124, 1135 (Miss. 2002); *Cedars-Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511, 515-16 (Cal. 1998) (citing *Silberg v. Anderson*, 786 P.2d 365, 370 (Cal. 1990)).

<sup>176</sup> See Celcilia Hallinan, *Balancing the Scales After Evidence is Spoiled: Does Pennsylvania’s Approach Sufficiently Protect the Injured Party?* 44 VILL. L. REV. 947, 973-74 (1999).

<sup>177</sup> Rubin, *supra* note 85, at 367.

<sup>178</sup> Nolte, *supra* note 25, at 423.

<sup>179</sup> Rubin, *supra* note 85, at 366-67 (citing *Smith v. Superior Court*, 198 Cal. Rptr. 829, 833-34 (Ct. App. 1984)), *overruled by Cedars-Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511 (Cal. 1998).

<sup>180</sup> See Wilhoit, *supra* note 37, at 631.

<sup>181</sup> See Nesson, *supra* note 5, at 803; *Moskovitz v. Mt. Sinai Medical Ctr.*, 635 N.E.2d 331, 343 (Ohio 1994) (holding that the “act of altering and destroying records to avoid liability . . . is particularly deserving of punishment in the form of punitive damages.”).

<sup>182</sup> In fact, in cases involving a defective product, or in any complex litigation,

## IV. NEW YORK'S APPROACH TO SPOILIATION

The approach of New York state courts in addressing spoliation poses two problems. First, the courts do not take the culpability of a spoliator into account when determining what sanction to apply. Instead, New York simply asks whether a particular sanction is fair to the injured party and not unduly prejudicial to the spoliator.<sup>183</sup> This allows the court to fashion harsh sanctions, such as the adverse inference instruction, with relative impunity and not according to the culpability of the spoliator. Second, New York does not recognize the tort of third-party spoliation. By definition, third parties are not parties to an underlying suit and therefore are beyond the reach of traditional remedies for spoliation. Therefore, third-party spoliators often go unpunished in New York State.

A. *Use of Traditional Remedies*

Historically, New York decisions have applied strong sanctions even for inadvertent, negligent spoliation of evidence.<sup>184</sup> For example, in *Cummings v. Central Tractor Farm & Country Inc.*,<sup>185</sup> the court noted that a party need not act intentionally, contumaciously, or in bad faith in connection with loss or destruction of evidence to impose the ultimate sanction of striking the party's pleadings and directing judgment against it. New York has justified this severe approach because, as one court noted, it is the "unfairness [in] allowing a party to destroy evidence and then to benefit from that conduct or omission" that informs such decisionmaking.<sup>186</sup> This approach, however, produces two troubling consequences.

First, it allows New York to employ any sanction with relative impunity. Instead of balancing a list of factors, such as

---

the spoliating party might be a multi-million dollar corporation against whom such a recovery would be viable. See Robert Walter 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).

<sup>183</sup> See *supra* note 72 and accompanying text.

<sup>184</sup> See *Kirkland v. New York City Hous. Auth.*, 666 N.Y.S.2d 609, 611 (App. Div. 1997) (holding that housing authority's destruction of stove required dismissal of complaint as spoliation sanction, regardless of whether destruction was intentional or negligent). See *Squitieri v. City of New York*, 669 N.Y.S.2d 589, 590 (App. Div. 1998) ("[D]ismissal [is] warranted when discovery orders were not violated, and even when the evidence was destroyed prior to the action being filed . . . notwithstanding that the destruction was not malicious . . . or in bad faith." (citations omitted)).

<sup>185</sup> 722 N.Y.S.2d 285, 286 (App. Div. 2001).

<sup>186</sup> See *Kirkland*, 666 N.Y.S.2d at 611.

the spoliator's motive, as California does,<sup>187</sup> New York simply asks whether a sanction is fair to the injured party and not unduly prejudicial to the spoliator.<sup>188</sup> Thus, New York courts have used dismissal, the most severe of all sanctions, in cases based on merely negligent spoliation. Though this may seem fair and unprejudicial to New York courts, many other courts would disagree.<sup>189</sup>

Second, New York does not employ any kind of test before imposing the adverse inference instruction. Instead, it simply applies the inference if it believes dismissal would be too severe a sanction.<sup>190</sup> In fact, the New York Court of Appeals has rejected appellants' claims that the inference was an improper remedy for spoliation.<sup>191</sup> Though the inference may indeed be less harmful than the more severe sanction of dismissal,<sup>192</sup> its potentially onerous effects have been largely disregarded by New York courts.

#### B. *Refusal to Adopt Tort of First-Party Spoliation*

Almost all lower New York court decisions and many federal court decisions interpreting New York state law adhere to the majority view of courts throughout the country by denying a cause of action for spoliation.<sup>193</sup> The New York Supreme Court refused to adopt an independent tort for first-

<sup>187</sup> See *supra* text accompanying note 72.

<sup>188</sup> See *supra* note 70 and accompanying text.

<sup>189</sup> See *supra* text accompanying notes 69-72.

<sup>190</sup> *Metro. New York Coordinating Council on Jewish Poverty v. FGP Bush Terminal, Inc.*, 768 N.Y.S.2d 190, 191 (App. Div. 2002) (Because "disposed-of evidence was not key to the proof of plaintiff's case, the supreme court properly exercised its discretion in limiting its sanction against defendant Allboro for spoliation to an adverse inference charge.").

<sup>191</sup> *Barlow v. Werner Co.*, 743 N.Y.S.2d 731, 732 (App. Div. 2002) ("Because the plaintiffs' spoliation of evidence was unintentional and did not deprive the appellant of a means of establishing its defense, the Supreme Court providently exercised its discretion in . . . directing that a negative inference charge be given.").

<sup>192</sup> See *supra* text and accompanying notes 125-29 (discussing dismissal as "drastic" sanction).

<sup>193</sup> See, e.g., *Tiano v. Jacobs*, No. 98 Civ. 6229 DC, 2001 WL 225037, at \*4 (S.D.N.Y. Mar. 6, 2001); *Black Radio Network, Inc. v. NYNEX Corp.*, 44 F.Supp.2d 565, 586 (S.D.N.Y. 1999); *Tietjen v. Hamilton-Beach/Proctor-Silex, Inc.*, Nos. 97-CV-188 & 97-CV-949, 1998 WL 865586, at \*3 (N.D.N.Y. Nov. 25, 1998); *Whittlesey v. Espy*, No. 96 Civ. 0671, 1996 WL 689402, at \*1 (S.D.N.Y. Nov. 26, 1996) ("[P]laintiff cannot allege a separate cause of action based upon a defendant's spoliation of evidence."); *Mondello v. Dun & Bradstreet Corp.*, No. 94 Civ. 4383, 1996 WL 239890, at \*3 (S.D.N.Y. May 9, 1996) (noting that plaintiff cannot "state[ ] a claim for destruction of evidence under New York law").

party spoliation of evidence in *Pharr v. Cortese*.<sup>194</sup> Regardless of *Pharr*, plaintiffs continue to bring causes of action for spoliation in New York and, not surprisingly, most courts have continued rejecting them.<sup>195</sup> For example, in the recent case of *Hulett v. Niagara Mohawk Power Corporation*,<sup>196</sup> two infant plaintiffs who were struck and injured on railroad tracks<sup>197</sup> sought to assert a cause of action for first-party spoliation.<sup>198</sup> Plaintiffs claimed that the defendant railroad companies negligently destroyed dispatcher records relevant to their case.<sup>199</sup> The court found sufficient evidence to prosecute a cause of action based on negligence, but denied the spoliation claim because no prior relationship existed between the parties.<sup>200</sup> New York, then, has effectively precluded any plaintiff from bringing a cause of action based on first-party spoliation.

### C. *Modified Recognition of Third-Party Spoliation*

However, a few New York cases have acknowledged an independent cause of action for third-party spoliation.<sup>201</sup> Such cases mainly address the circumstance in which an employer is sued by his employee for spoliation of evidence and the resulting impairment of the employee's suit against a third-party tortfeasor. For example, in *DiDomenico v. C & S Aeromatik Supplies, Inc.*,<sup>202</sup> the court allowed the plaintiff to bring a separate direct cause of action against his employer where the employer impaired his right to sue a third-party tortfeasor by destroying all of the evidence. Even under that

<sup>194</sup> See *supra* note 15 and accompanying text.

<sup>195</sup> See *supra* note 20 and accompanying text.

<sup>196</sup> No. 92-7110, 2002 WL 31010983 (N.Y. Sup. Ct. Aug 1, 2002).

<sup>197</sup> *Id.* at \*1.

<sup>198</sup> *Id.* at \*7.

<sup>199</sup> The railroad companies were required to keep dispatcher records "for three years but they destroyed them prior to that date in contravention of their own policy as well as that of the Interstate Commerce Commission." *Id.* at \*6.

<sup>200</sup> *Id.* at \*8. The court also noted the typical considerations arguing against the creation of the spoliation tort such as the uncertainty of the existence or extent of damages; interference with a person's right to dispose of his property as he chooses; and inconsistency with policy favoring final judgement. *Id.* at \*8. See also discussion of separate tort of spoliation *supra* Part III.

<sup>201</sup> See, e.g., *Ripepe v. Crown Equip. Corp.*, 741 N.Y.S.2d 64, 66 (App. Div. 2002); *DiDomenico v. C&S Aeromatik Supplies, Inc.*, 682 N.Y.S.2d 452, 460 (App. Div. 1998); *Vaughn v. City of New York*, 607 N.Y.S.2d 726 (App. Div. 1994); *Weigl v. Quincy Specialties Co.*, 601 N.Y.S.2d 774, 776-77 (N.Y. Sup. Ct. 1993).

<sup>202</sup> 682 N.Y.S.2d at 460.

line of cases, however, the employer's duty to preserve evidence is limited.<sup>203</sup>

In the most recent case to recognize third-party spoliation, *Fada Industries, Inc. v. Falchi Building Co., L.P.*,<sup>204</sup> the court extended the employer/employee basis for third-party spoliation to that of an insurer/insured relationship.<sup>205</sup> In *Fada*, the court held that a cause of action may be asserted by an insured against his insurer where the insurer allegedly destroyed evidence crucial to the insured's defense in the underlying action.<sup>206</sup> However, even if a third-party spoliator is an insurer, there is no guarantee that a plaintiff will successfully bring a separate cause of action against such a third party.<sup>207</sup> Nonetheless, absent a special relationship between plaintiff and third parties, New York courts are unwilling to recognize a cause of action for third-party spoliation.<sup>208</sup>

---

<sup>203</sup> *Weigl*, 601 N.Y.S.2d at 777 (finding that New York does not recognize a separate tort of spoliation, but does recognize similar common law cause of action in employment law).

<sup>204</sup> 730 N.Y.S.2d 827 (N.Y. Sup. Ct. 2001).

<sup>205</sup> *Id.* A tenant sued the owner and manager of its building and a cotenant to recover for property damage caused by the cotenant's leaking water heater. Before commencement of that action, the cotenant's insurer took possession of the water heater, which subsequently was lost or destroyed while in the possession of an agent of the insurer. The cotenant impleaded its own insurer for its negligent loss of the water heater, theorizing that such loss had impaired its ability to defend the action and had prevented it from impleading the entities that negligently manufactured, installed or repaired the water heater. The insurer moved to dismiss the third-party complaint against it, but the court denied the motion, thereby sustaining the third-party claim for negligent spoliation of evidence/impairment of defense. *Id.* at 831

<sup>206</sup> *Id.* The court in *Fada* stated that "[t]he facts of [*Fada*] clearly support extending the *DiDomenico v. C & S Aeromatik Supplies* decision, which applies to an employer-employee relationship, to the insured-insurer relationship, and to the recognition of a negligent spoliation cause of action under circumstances such as those presented here." *Id.* at 838.

<sup>207</sup> *Sterbenz v. Attina*, 205 F. Supp. 2d 65, 72 (E.D.N.Y. 2002). Plaintiff sued the insurer and one of its claims agents, alleging spoliation of evidence and impairment of her products liability claim against the manufacturer of the car. The court for the Eastern District of New York granted the insurer's motion for summary judgment dismissing the action, declaring any claim for spoliation of evidence groundless under New York law and determining the insurer's conduct to have been reasonable in any event. *See id.* at 71-73.

<sup>208</sup> *See generally* *Steinman v. Barclays Bank*, 715 N.Y.S.2d 841 (App. Div. 2000), *dismissing appeal from*, 727 N.Y.S.2d 695 (2001) (rejecting on the facts an independent claim against Barclays Bank for intentionally withholding certain presumably canceled travelers' checks from third-party plaintiff).



## V. PROPOSALS

A. *Use of Spoliator's Culpability When Determining Sanctions and Applying Adverse Inference Instruction*

New York state courts might consider refining their approach to spoliation through greater consideration of the particular facts and circumstances of a given case. First, New York state courts should take the spoliators's culpability into account when fashioning a spoliation remedy. For example, New York federal courts consider the culpability of a spoliator as one of the most important factors in determining whether sanctions for spoliation are appropriate.<sup>209</sup> This means that a negligent spoliator would be much less likely to receive a harsh sanction, such as dismissal, than an intentional spoliator.

Second, New York state courts should apply a test before applying the adverse inference instruction. In New York federal courts, for example, the party seeking the instruction must establish the following three elements: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind"; and (3) that the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.<sup>210</sup> A "culpable state of mind" for purposes of a spoliation inference includes ordinary negligence.<sup>211</sup>

When the destruction is negligent, relevance must be proven by the party seeking the inference.<sup>212</sup> When evidence is destroyed in bad faith (i.e., intentionally or willfully), on the other hand, that fact alone is sufficient to demonstrate relevance.<sup>213</sup> By adopting a test similar to New York's federal courts for the adverse inference instruction, state courts would

---

<sup>209</sup> *Gates Rubber Co. v. Bando Chem. Indus.*, 167 F.R.D. 90, 102 (D. Colo. 1996) ("Two of the factors . . . have taken on greater importance in most of the cases on sanctions for spoliation: (1) the culpability of the offender, or the alleged mental state which gave rise to the destruction of evidence, and (2) the degree of prejudice or harm which resulted from the actions of the offender.").

<sup>210</sup> *See Byrne v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 107-08 (2d Cir. 2001).

<sup>211</sup> *See Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 109.

employ a more tailored and appropriate remedy, especially for negligent spoliators.

Finally, if New York is unwilling to apply such a test, it should at least require intent instead of negligence for the adverse inference instruction. In fact, few states besides New York have expanded the inference to negligent spoliation.<sup>214</sup> Were the inference merely remedial, as some commentators assume, then it might be a more appropriate remedy for a negligent offender.<sup>215</sup> Ultimately, New York's spoliation remedy should more closely correspond to the spoliator's culpability or scienter.<sup>216</sup>

### B. *Broader Recognition for Third Party Spoliation Tort*

New York must also recognize a broader tort of third-party spoliation. By limiting the tort to third parties who are employers or certain insurers, New York risks allowing the destruction of evidence by other classes of third parties to go unchecked. Furthermore, the state's refusal to recognize a tort for first-party intentional or negligent spoliation certainly does not preclude it from recognizing a tort for third-party spoliation. Thus, the court's recent statement in *Metlife Auto & Home v. Joe Basil Chevrolet, Inc.* that "it stands to reason that those courts that do not recognize [a tort for intentional or negligent spoliation] against a first party likewise would not recognize one against a third party" is unreasonable.<sup>217</sup> Because sanctions may not be levied upon a disinterested, independent third party, an independent tort action for third-party spoliation of evidence is the only means to deter the third-party destruction of evidence and to compensate the aggrieved party. Moreover, if courts believe that "[n]on-tort remedies for spoliation are sufficient in the vast majority of cases," then recognition of a third-party spoliation tort will have little overall impact on the interest of finality in adjudication.<sup>218</sup>

---

<sup>214</sup> See, e.g., *Farrell v. Connetti Trailer Sales, Inc.*, 727 A.2d 183, 186 (R.I. 1999); *Lagalo v. Allied Corp.*, 592 N.W.2d 786, 789 (Mich. Ct. App. 1999); *Squitieri v. City of New York*, 669 N.Y.S.2d 589, 590 (App. Div. 1998). Several federal circuit courts of appeal have followed suit. See *supra* notes 97-99 and accompanying text.

<sup>215</sup> *Dropkin*, *supra* note 87, at 1828.

<sup>216</sup> See *Peltz*, *supra* note 44, at 1336.

<sup>217</sup> 753 N.Y.S.2d 272, 276 (App. Div. 2002).

<sup>218</sup> See *Dowdle Butane Gas Co. v. Moore*, 831 So. 2d 1124, 1130, 1135 (Miss. 2002).

Unjust consequences will follow New York's refusal to expand the tort for third-party spoliation. Absent a third-party spoliation tort, the integrity of New York's judicial system could be jeopardized.<sup>219</sup> When evidence helpful to one party is absent, courts cannot administer even-handed justice.<sup>220</sup> Recognizing a tort for third-party spoliation would reduce spoliation by putting businesses, governmental entities, and individuals on notice that if they destroy evidence, serious consequences could result.<sup>221</sup> This effect would promote "an individual's due process right to have one's grievances heard by a court of competent jurisdiction utilizing all relevant evidence."<sup>222</sup> When squarely presented with this issue, New York courts would be wise to give serious consideration to the reasoning of jurisdictions that have recognized a tort for third-party spoliation. To do otherwise risks inviting destruction of relevant evidence by third parties and the perception that "individual due process rights are unimportant or are somehow being trampled by the judicial system itself."<sup>223</sup>

*James T. Killelea*<sup>†</sup>

---

<sup>219</sup> See Callahan v. Stanley Works, 703 A.2d 1014, 1017 (N.J. Super. Ct. Law Div. 1997).

<sup>220</sup> *Id.* (stating that spoliation "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.").

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* (citing Spencer, *supra* note 4, at 63).

<sup>223</sup> *Id.* at 1018.

<sup>†</sup> B.A., Bowdoin College; J.D. candidate, 2005, Brooklyn Law School. I would like to thank Professor Anthony J. Sebok for his guidance and support. Many thanks also to the Brooklyn Law Review staff, especially Timothy D. Sini, for their precise and insightful editing. Finally, much gratitude to my father and Erin McMurray for their encouragement, patience, and faith in me.