

***The Negligent Spoliation of Electronic Information;
Practical Advice for Successfully Preserving Digital Data.***

DEAN A. GONSOWSKI

Fios, Inc.

Texas Office:

2109 Commerce Street

Dallas, TX 75201

dgonsowski@fiosinc.com

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I. INTRODUCTION¹

It has long been the rule that spoliators of evidence should not be able to benefit from their wrongdoing.² This notion is embodied in the maxim *omnia presumuntur contra spoliatores*, meaning "all things are presumed against a despoiler or wrongdoer."³ While this ancient principle seems fairly straightforward, it presents a host of challenges in today's rapidly evolving digital world. Currently, "individuals and corporations increasingly do business electronically—using computers to create and store documents, make deals, and exchange e-mails," and, as a result, "the universe of discoverable material has expanded exponentially."⁴ Unfortunately, what is becoming a frightening reality in this predominantly digital era is that a host of innocent and/or negligent acts can create unwanted evidence spoliation. And needless to say, being on the wrong side of the dreaded "spoliation presumption" can make prevailing in the courtroom exceedingly difficult.⁵

This article will begin by defining spoliation and discussing the duty to preserve electronic evidence. It will then focus on several areas of negligent spoliation, which arise out of the handling or mishandling of electronic evidence. Specific scenarios include the initial handling/preservation of electronic evidence, the inability to turn off presumptively valid document retention/destruction policies and the seemingly innocent, ongoing use of computer systems. The triggers for preserving such evidence and penalties for spoliation also will be examined. Finally, we will present a series of preventative steps that counsel can take to help prevent negligent spoliation and its potential, attendant sanctions.

II. SPOLIATION DEFINED (DESTRUCTION VS. THE FAILURE TO PRESERVE)

The spoliation of evidence frequently carries with it a series of pitfalls for the offending party and its attorneys. Sanctions range from adverse inferences (at either the case or the issue level), preclusion of evidence (including preclusion of expert or other forms of testimony), monetary sanctions, dismissal, default judgment, and summary judgment in favor of the prejudiced party.⁶ In fact, a number of jurisdictions support a separate cause of action in tort,⁷ as well as criminal penalties in egregious circumstances.⁸ Finally, the newly enacted Sarbanes-

Oxley Act complicates matters by adding a new set of regulations and criminal sanctions into the mix.

Historically, Courts have found spoliation in two related, but distinct, areas: (1) the "willful" / "intentional" destruction of evidence⁹ and (2) the failure to preserve evidence (referred to herein as "negligent" spoliation)¹⁰ where a finding of bad faith is not necessary.¹¹ For the most part, this article will focus on the second category because "negligent" spoliation has become increasingly problematic given the proliferation of electronic evidence and computerized information storage systems.

The policy against spoliation is grounded in the judicial recognition that spoliated evidence may be the best (and sometimes only) evidence as to what has really occurred. As such, there is arguably an inherent unfairness in allowing a party to benefit from their destructive conduct. Courts have repeatedly noted that spoliation sanctions stem from recognition that a party who has notice that evidence is relevant to litigation and who proceeds to destroy evidence is more likely to have been threatened by that evidence than a party in the same position who does not destroy evidence.¹² Policy considerations also weigh against spoliators since the spoliation of evidence increases the risk of an erroneous legal decision. Finally, spoliation often increases the costs of litigation since the parties may attempt to reconstruct the destroyed evidence or develop other evidence that may be less accessible.

III. THE DUTY TO PRESERVE EVIDENCE

The origin of the duty to preserve potential evidence arises from both common law and the American Bar Association ("A.B.A."). The A.B.A. standard states that "[w]hen a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents and of the possible consequences of failing to do so."¹³ This obligation to preserve applies equally to "information contained or stored in an electronic medium or format, including a computer word-processing document, storage medium, spreadsheet, database and electronic mail."¹⁴

Numerous courts have stated that the duty to preserve electronic evidence is not a passive obligation. Rather, it must be discharged "actively."¹⁵

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Fortunately, while this active duty to preserve evidence is a broad mandate, it does not require a litigant to keep every electronic file.¹⁶ However, a litigant is under a duty to preserve what it “knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.”¹⁷

It is important to keep in mind the distinction between the “preservation” of evidence and the “production” of preserved evidence. While this article won’t address the production aspect in detail, it should be noted that the preservation of potentially relevant evidence does not necessarily mandate its production. The usual range of objections (e.g., burden, expense, relevance, privilege, etc.) still apply and can be argued with vigor. But, if potential evidence is not preserved at the outset, the evidence may be later presumed relevant and harmful to the case at hand.

IV. ELECTRONIC DATA IS FUNDAMENTALLY DIFFERENT

Currently, over 93 percent of all documents created are in digital form.¹⁸ This fact, combined with the fact that only 30 percent of all documents are ever printed, has created a reality in which most documents exist only in electronic form, ranging from emails to memos to PowerPoint presentations. These wholly electronic files are inherently intangible, being comprised of a series of electronic ones and zeros. Because of the ephemeral nature of this burgeoning class of digital media, electronic files are easily created and duplicated. Conversely, they are also easily altered, lost and destroyed. As such, the new digital era has created a host of ways for clients and their lawyers to unintentionally spoliating electronic evidence.

As we enter the 21st century, it is well established that electronic information is discoverable to the same degree as traditional, paper-based documents.¹⁹ However, from an evidentiary standpoint, electronic evidence is fundamentally different from its traditional, “physical” counterpart. On one hand, electronic information usually is linked to “meta” data (or data about the data) that describes the content, quality, condition, availability and other characteristics of content. Meta data can be particularly valuable because it may reveal

information about the content itself. For instance, the “creation date” of a document may be more important than the words contained in the document, since the content itself may not be in dispute. Similarly, meta data provides (among other things) the ability to tell when, and if, a specific email was ever read; questions that may be critical to a particular litigation strategy.

Additionally, electronic evidence is much more functional and more easily searchable than traditional forms of physical evidence. As courts examine the spoliation of electronic documents, the argument that the physical equivalent of the electronic evidence could be produced is sometimes unpersuasive. At least one court has focused on the malleability of electronic evidence in holding that computerized records have “evidentiary unique value distinct from the hard copy records” since they made the information more readily accessible.²⁰ The ability to search documents electronically becomes increasingly vital as the proliferation of data and the ease of storage make it possible to produce terabytes of data in response to discovery requests.²¹

V. NEGLIGENT SPOILIATION

The most severe sanctions, such as entry of default judgment and criminal punishment, are generally reserved for the intentional destruction of digital evidence.²² However, numerous courts have shown a willingness to issue significant sanctions for the negligent destruction of data, including fines, attorneys’ fees, as well as the dreaded “spoliation inference.”²³

This article breaks down the areas of negligent spoliation into different subcategories, including the initial preservation of electronic evidence, the ongoing use of computer systems, and the continued use of document retention/destruction systems after being put on notice of a claim.

A. THE INITIAL PRESERVATION OF ELECTRONIC EVIDENCE

At the initial discovery phase, and even prior to litigation, care must be taken to properly handle digital evidence. Similar to Heisenburg’s “Principle of Uncertainty” (a physics postulate which holds that the mere act of looking at something changes its state) the simple act of turning on a computer alters a number of files, potentially spoiling the digital evidence.

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Opposing experts/counsel may argue that this alteration removes the back-up copy from the scope of FRCP 1001(d),²⁴ which provides that copies are admissible to the same degree as an original.

As such, the first type of inadvertent spoliation often occurs when a well-meaning Information Technology or Human Resources professional goes into a machine to back-up, copy or review electronic files. This mishandling violates a primary rule of computer forensics (“first: do no harm”).

In order to handle electronic evidence properly, several steps should be taken. The first step is to have a standard operating procedure that monitors the chain of custody for the information that is to be captured. Next, specific hardware/software tools should be employed to create a “bit stream” (or mirror) image of the subject system. This imaging process copies a piece of media as a series of ones and zeros, instead of only copying information the operating system reports as existing. A “bit stream” image is the type of image most forensic examiners utilize and is routinely accepted by courts as a valid forensic process. Once properly preserved, the mirror image can be used for an in-depth privilege review, document production, and forensic analysis, all without impairing the authenticity of the initial digital files.²⁵

For example, in *Taylor v. State*, a criminal case for possession of child pornography, the data on the defendant’s hard drive was in dispute since the State reluctantly acknowledged that it had committed errors in preserving the electronic data.²⁶ The State’s errors included not transferring the data onto a new or clean hard drive during the “imaging” process, but rather onto another hard drive that had been used in a different pornography case. The reviewing court ordered that an exact forensic copy of hard drive should have been produced for review by the defendant’s expert, and as such reversed the conviction and remanded for a new trial.

B. ONGOING USE OF SYSTEMS

Another fundamental tenet of computer forensics holds that “deleted” files are not really deleted. When a user attempts to “delete” an electronic file the computer system merely marks that area on the hard drive as being “open” for the writing

of another file. In other words, “[a] deleted file is not a deleted file, it is merely organized differently.”²⁷ The ramification of this fact, forensically, is that “deleted” computer files remain recoverable within a system for a period of time (i.e., until the computer needs the hard drive space to write a new file). Only then is the “deleted” file actually destroyed. As such, the computer inherently destroys “recoverable” electronic files by virtue of its ongoing operation.

In *Antioch v. Scrapbook Borders, Inc.*, the court recognized this fact by stating that “Defendants may have relevant information, on their computer equipment, which is being lost through normal use of the computer.”²⁸ Similarly, in *R.S. Creative Inc. v. Creative Cotton Ltd.*, the parties recognized the need to protect electronic evidence and stipulated to the non-use of the relevant systems until they were examined by a computer forensic expert.²⁹ The subsequent violation of this agreed-upon stipulation factored into the Court finding evidence spoliation and levying the sanction of dismissal.

For the foregoing reasons, parties concerned about spoliation should consider seeking an injunction³⁰ or other court order to prevent the inadvertent destruction of digital data that will occur simply with the continued use of systems containing relevant data.³¹ As a precursor step, a concerned party should also consider sending opposing counsel a preservation letter that will formally put the other side on notice to stop using potentially relevant systems. Preservation letters are discussed in greater detail below.

C. CONTINUED USE OF DOCUMENT RETENTION/DESTRUCTION POLICIES

Corporations often keep both electronic and physical records for a number of reasons. In addition to maintaining the corporation’s ongoing operations, records retention enables a corporation to comply with the range of legal requirements that are imposed by statutes and regulations (both state and federal).³² Since keeping every document is cumbersome and expensive, most corporations utilize document retention and destruction policies to retain a manageable and regulatorily-mandated subset of documents.³³

Despite recent high-profile document-shredding incidents, courts have nevertheless upheld

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the validity of “bona fide, consistent and reasonable” document retention/destruction policies, even where these policies ultimately destroy evidence relevant to litigation.³⁴ Unfortunately, like all subjective reasonableness standards, there are no bright-line tests. Therefore, the “reasonableness” of any particular document retention program for electronic data will require an analysis of particular facts and circumstances, focusing on applicable policies/procedures and the company's adherence to them.

Beyond the destruction of documents that fall under state or federal mandates, if a corporation destroys data plausibly within the scope of any potential litigation, it is opening itself up to sanctions for the spoliation of evidence. A number of companies have been accused of intentionally destroying evidence, even though they claimed they were simply following their standard procedures of overwriting backup tapes. Not surprisingly, the backup tapes that were overwritten (by their presumptively valid document retention/destruction plans) contained information assumed to be relevant to the ongoing litigation.

Companies can get into trouble when they continue to use their existing backup tapes in a rotation that ultimately copies new data over electronic data that was expressly ordered preserved and/or arguably should have been preserved since it pertained to ongoing litigation. Re-circulating backup tapes is a common practice with most companies, due to cost saving measures. Yet, failing to suspend the backup process long enough to ensure that relevant data is preserved can result in a range of spoliation penalties. In a number of recent cases, courts have held that litigants have a duty to interrupt regular recycling practices if the party knows or should know that the documents may be material to a future dispute. (See subsequent discussion on “triggers.”)

While “pausing” the valid and systematic destruction of electronic documents seems simple, implementation can often be quite complex. And, if implementation fails, the corporation, its senior management, and counsel may all be sanctioned. Often times this failure occurs when the corporation does not establish a comprehensive document retention policy that has been communicated to and is accessible to its employees. Admonishing the defendant for negligently failing to preserve evidence,

the Court in *Lewy v. Remington Arms Co.* concluded that “a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy.”³⁵ Similarly, in *In re Prudential Insurance Co. Sales Practices Litigation*, the court found that while the respondent did not act willfully in the destruction of data that should have been preserved, it nevertheless imposed a sanction of \$1,000,000 plus attorneys' fees.³⁶ See also *U.S. v. Koch Industries, Inc.*, where the court allowed the plaintiffs to inform the jury about the backup tapes that were destroyed and to explain the impact of the destruction on their case.³⁷

Companies evaluating their document retention/destruction policies, therefore, should consider seriously whether a judge and jury will consider such policies “reasonable” in the context of pending or ongoing litigation. Corporations on notice of *potential* litigation, which may involve a request for their data, may arguably have a duty to preserve backup tapes. For example, in an indictment against Texaco executives for the willful destruction of data, the government found fault with the destruction of documents “likely to be requested” by plaintiffs in the future.³⁸

Having accepted the obligation to retain electronic evidence, the subject company should not remain passive. Instead, senior management with notice of discovery obligations should communicate those obligations to employees that are in possession of discoverable materials. In order to avoid a “haphazard”³⁹ or “uncoordinated”⁴⁰ approach to document destruction/retention that often results in significant spoliation sanctions:

1. The corporation should caution employees that any willful or deliberate violation of promulgated guidelines concerning document retention could result in serious disciplinary action, up to and including termination and sanctions provided for by the Federal Rules of Civil Procedure, civil contempt for violation of an Order of the Court, or criminal contempt pursuant to 18 U.S.C. § 401(3).
2. The corporation should notify employees how to report evidence of document destruction, for example, through the use of a telephone hotline.
3. The corporation should provide the names and telephone numbers of individuals to contact in

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the event that questions arise about document retention, and designate a primary contact source for information about document preservation.

4. The corporation should create “uniform” guidelines that represent the systematic process necessary to preserve documents, and identify the circumstances when a document may be discarded and the procedures to be employed
5. The notice to employees regarding document retention should be in emboldened or enlarged font to draw attention to the importance of the notice.
6. The corporation should prepare and utilize a document destruction index.
7. Distribution via email may not be sufficient, especially if all employees do not have access. Regular mail may be necessary.
8. During oversight and implementation, the corporation shouldn’t use a lay person to spearhead the effort.⁴¹

VI. PRESERVATION “TRIGGERS”

The Court's authority to sanction a party for failing to preserve documents is both inherent and statutory.⁴² Whether proceeding under Rule 37 of the Federal Rules of Civil Procedure or under a court's inherent powers, the analysis is essentially identical.⁴³ Still, some courts are reluctant to utilize Rule 37 in spoliation cases, and prefer instead to exercise their inherent supervisory power "to regulate litigation, preserve and protect the integrity of the proceedings before [them], and sanction parties for abusive practices."⁴⁴

Either way, the first step in the analysis is to determine whether the alleged spoliator was under sufficient notice to preserve information.⁴⁵ And while the “trigger” of that duty is often unclear, it is certain the court can levy spoliation sanctions even absent an antecedent order, delineating the types of evidence that should be preserved.⁴⁶

A. PRIOR TO THE COMPLAINT

Prior to receiving a complaint, many potential defendants would attempt to claim that they did not have sufficient notice, such that their duty to preserve evidence was therefore not triggered. In *Turner v. Hudson Transit Lines, Inc.*, the Court declared that the

“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.”⁴⁷ A trigger at this “likely” stage seems to comport with the mandates contained in the ABA guidelines, which suggest that document retention obligations are triggered when “litigation is probable.”⁴⁸

The duty to preserve evidence may or may not be triggered when a corporation is presented with a “demand letter,” since as some of the following cases discuss, the party not only needs to be on notice of the existence of a claim, but also needs to be informed about the types/sources of information that should be preserved. Otherwise, it can be argued that the duty, although triggered, is not delineated enough to allow the corporation to take concrete action.

B. AFTER THE COMPLAINT

In another line of cases, courts have held that the complaint itself serves to alert a party that certain information is relevant and likely to be sought in discovery.⁴⁹ The filing of the complaint likely serves as a more definite trigger for counsel, especially since the causes of action should provide some direction regarding the types/sources of digital information that should be preserved.⁵⁰ Assuming that the trigger may not have been met with the filing of a complaint, it is certainly activated upon the receipt of discovery, which presumably defines the custodians, locations, and types of electronic information that should be preserved.

C. AFTER A PRESERVATION ORDER

When a court enters a preservation order, defining the types of documents to be preserved, it marks a bright-line trigger.⁵¹ The subsequent failure to preserve data allows the court to levy punitive sanctions.⁵² In *Illinois Tool Works, Inc. v. Metro Mark Products, Ltd.*, plaintiffs filed a motion seeking sanctions for violation of an order requiring that all defendants preserve electronic data without any spoliation of any information.⁵³ As part of the preservation order, the defendants were ordered to “preserve the integrity” of the computers.⁵⁴ Unfortunately, when the defendants produced the relevant computer system for review it failed to function, even though it was operational only a few days beforehand. This failure alone violated the Court's order since the obligation to comply with a

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preservation order was viewed very strictly, such that "mere inadvertence or negligence" did not remove the case from sanctions under Rule 37.⁵⁵

VII. SPOILIATION PENALTIES

Once the court determines that spoliation has occurred, the sanction(s) chosen to penalize the conduct generally attempts to achieve deterrence and place the prejudiced party in the evidentiary position it would have been in, but for the spoliation.⁵⁶ Unfortunately, there is no single test that has been developed to apply to circumstances of spoliation. As explained in *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*: "There are obvious reasons which demonstrate why the criteria for sanctions cannot be reduced to a formula or standardized test. 'Determination of the correct sanction for a discovery violation is a fact-specific inquiry, and in making such a determination trial courts are accorded broad discretion.'"⁵⁷

Possible sanctions for the spoliation of evidence include adverse inferences or presumptions (at either the case or issue level), preclusion of evidence (including preclusion of expert or other forms of testimony), monetary sanctions, dismissal, default judgment, or the granting of summary judgment in favor of the prejudiced party.⁵⁸ In several jurisdictions, evidence spoliation may give rise to a separate cause of action in tort.⁵⁹

Adding to the dangers that spoliators face, potential violators generally do not get "one free bite," as is the case in some other legal scenarios, since a sanctioning court is not required "to fire a warning shot" before imposing a stiff sanction.⁶⁰ Nor must a court select the least drastic or most moderate sanction.⁶¹ The factors determining the seriousness of the sanctions include:

- (1) the degree of fault of the party who altered or destroyed the evidence;
- (2) the degree of prejudice suffered by the opposing party; and
- (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and serve to deter such conduct by others in the future.⁶²

When considering fault, courts assess each situation on a case-by-case basis, and have reasoned that sanctions may be warranted by a party's bad faith, gross negligence, or even negligence.⁶³ With respect to prejudice, courts determine whether there is "any likelihood that the destroyed evidence would have been of the nature alleged by the party affected by its destruction."⁶⁴ Ultimately, the burden falls on the party alleging prejudice to produce "some evidence suggesting that a document or documents relevant to substantiating his claim would have been included among the destroyed files."⁶⁵

A. THE "SPOILIATION INFERENCE"

When victimized, the aggrieved party may ask the court to instruct the jury that an adverse inference should be drawn from the fact that documents were destroyed. This penalty is often referred to as the "spoliation inference."⁶⁶ The penalty is based on both the remedial rationale that where evidence is destroyed the prejudiced party should be restored to the same position that they would have been in if there had been no spoliation, as well as a punitive rationale aimed at deterrence.⁶⁷ Use of the spoliation inference permits the jury to infer that the party who destroyed potentially relevant evidence did so out of a realization that the destroyed evidence was unfavorable.⁶⁸

Courts have struggled somewhat to determine the level of fault necessary as a prerequisite to imposing an adverse inference instruction on a spoliating party.⁶⁹ For instance, the Second Circuit employs a three-part test for determining whether an adverse inference charge is appropriate:

*"[A] party seeking an adverse inference instruction based on the destruction of evidence must establish (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"*⁷⁰

In articulating the meaning of "culpable state of mind," the Second Circuit ruled that a showing of bad faith or intentional misconduct is not required.⁷¹ The Second Circuit further explained that failures to produce potentially relevant evidence "occur along a

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continuum of fault—ranging from innocence through the degrees of negligence to intentionality.⁷² Ultimately, the Second Circuit determined that an adverse inference sanction "may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence."⁷³

Clearly then, a party who negligently destroys potentially relevant electronic evidence is at least in danger of suffering an adverse inference instruction in litigation. Unfortunately for the spoliating party, especially in cases where electronic evidence was negligently destroyed,⁷⁴ the spoliation inference (that the evidence was adverse) may not be factually accurate. And, in practice, this type of presumption may make proceeding to trial a very risky proposition.⁷⁵ In spite of the potentially devastating consequences of an adverse inference instruction, some courts have described the instruction as the "least restrictive sanction possible," and have referred to it as a "common penalty for spoliation."⁷⁶ Therefore, the dreaded "spoliation inference" might be the sanction of choice for many courts, even in a case of negligent spoliation, rising above other potential sanctions such as the preclusion of testimony, fines, or fees.

B. ISSUE/EXPERT PRECLUSION

In addition to levying the spoliation inference, the court may also preclude an issue and/or an expert if the sponsoring party is guilty of spoliation.⁷⁷ In *Trigon Insurance Co. v. United States*, the court precluded an expert's "further participation in any aspect of the development and presentation of the expert testimony" due to actions "that caused the present spoliation and its uncooperative attitude in attempting remediation when asked to do so."⁷⁸

C. FINES AND FEES

Courts can also levy fines where the spoliation caused the opposing party to incur costs to either prove the spoliation or reconstruct the evidence. An award of costs serves both punitive and remedial purposes since it deters spoliation and compensates the aggrieved party for the additional costs incurred because of the spoliation. Such compensable costs may arise either from the discovery necessary to identify alternative sources of information, or from the investigation and litigation of the spoliation itself.⁷⁹

In *Trigon*, the court stated, "There has been significant expense in the briefing, deposing of experts, argument and hiring of computer forensics experts to adjudicate the issues considered herein."⁸⁰

D. DEFAULT JUDGMENT / DISMISSAL

The court's ability to enter a default judgment for noncompliance with an order to preserve evidence is based upon Rule 37, which authorizes "any order which is 'just.'"⁸¹ While draconian, a sanction of dismissal may be appropriate if it is proportionate to the infraction.⁸² To justify a dismissal or default judgment, the level of "fault" must reflect "extraordinarily poor judgment," "gross negligence," or "a flagrant disregard" of the duty to "preserve and monitor the condition of evidence which could be pivotal in a lawsuit."⁸³

For example, in *Metropolitan Opera Assoc., Inc. v. Local* the court found liability on the part of the defendants and ordered the defendants to pay the plaintiff's attorneys' fees necessitated by their discovery abuses. The court found that lesser sanctions (e.g., the spoliation inference or issue preclusion) would not be effective "because it is impossible to know what the Met would have found if the Union and its counsel had complied with their discovery obligations from the commencement of the action."⁸⁴

VIII. BURDEN OF PROOF

Issue-related sanctions, such as adverse inferences, preclusion of evidence, and jury instructions, do not require clear and convincing evidence, but may be imposed based on a "preponderance of the evidence" showing "that a party's misconduct has tainted the evidentiary resolution of the issue."⁸⁵ This is because issue-related sanctions are fundamentally remedial, rather than punitive, and do not preclude a trial on the merits. Fines, however, require a clear and convincing evidence standard under the *Shepherd* rationale because they are "fundamentally penal."

IX. PRACTICAL STEPS

A. SEND A PRESERVATION LETTER

Many corporations have given little thought to the retention and destruction of electronic files and

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may have been inadvertently storing vast amounts of electronic data over time.⁸⁶ This fact, combined with receipt of a well-timed preservation letter may inject a dose of reality to the litigation landscape since the costs of preservation may in some cases outweigh the damages sought in the subject litigation.⁸⁷ The primary goal for utilizing a preservation letter early on in a case is that it creates “notice,” thereby serving as a trigger of the duty to preserve electronic information. Because the case law is divided about when the duty to preserve is actually triggered (see above discussion), drawing a “bright-line” by sending a preservation letter may ultimately support downstream claims of spoliation if electronic documents are found to be intentionally or negligently deleted.

The preservation letter should identify specific categories of computer media and request the suspension of any destructive activity, including:

- Any activity that would alter or damage data including deleting, de-fragmenting⁸⁸, compressing data, or disposing of electronic media.
- Using anti-forensics software.⁸⁹
- Saving new data to media that already contains data.⁹⁰
- Installing new software.
- Selling, decommissioning or upgrading systems.
- "Recycling" tapes used for backup purposes so that old data is not overwritten.⁹¹

Consider filing a preservation letter as soon as practical, especially before propounding discovery. Use of the preservation letter may also help tee up expedited discovery and/or the *Ex Parte* seizure of electronic evidence (discussed below). Or, simply follow up with more specific discovery requests as knowledge of the issues and the adversary's records increases.

B. SEEK PROTECTIVE/PRESERVATION ORDERS

Given the fact that all litigants are automatically obligated to take appropriate measures to preserve documents that are likely to be relevant to discovery, some courts are reluctant to issue preservation orders, with the reasoning that “[t]o supplement every complaint with an order requiring

compliance with the Rules of Civil Procedure would be a superfluous and wasteful task, and would likely create no more incentive upon the parties than already exists.”⁹² Thus, in *Madden v. Wyeth*, the court denied plaintiffs' motion for a preservation order to “suspend all routine destruction of documents, including but not limited to recycling back-up tapes, automated deletion of e-mail, and reformatting computer hard drives.”⁹³ The court reasoned that the “mere possibility” that defendants might intentionally or unintentionally destroy relevant documents was insufficient to support a motion for a preservation order, without some indicia that the defendants would flaunt their obligation under the federal rules, or without some proof that the evidence might be lost or destroyed in another manner.⁹⁴

Therefore, when seeking a preservation order from the court, it is imperative to:

- Show why the evidence sought is likely to be destroyed, modified or concealed if notice of the lawsuit is given.
- Educate the court about importance of and anticipated problems with electronic evidence.

C. SEIZE ELECTRONIC EVIDENCE VIA AN EX PARTE SEIZURE ORDER

Pursuant to Rule 65(b) a court will grant an *ex parte* temporary restraining order if the requesting party can show that it will suffer immediate and irreparable injury absent the order, that there is a substantial likelihood that the requesting party will succeed on the merits, that threatened harm to the defendant is outweighed by the harm otherwise suffered by the requesting party, and that granting a temporary restraining order is in the public’s interest. The party must also support its claim that notice should not be given and post a bond in an amount deemed appropriate by the court.

Courts carefully scrutinize several issues in determining whether *ex parte* seizure is warranted, including the movant’s basis for believing the defendant will destroy evidence (bolstered by evidence that this defendant, or members of a class to which this defendant belongs, have destroyed evidence in the past) and whether the defendant is running a legitimate business that will be disrupted.⁹⁵ Merely the fact that evidence is in electronic form, which is easily deleted, is generally insufficient. It is

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relevant, however, if the accused individual has special skills that would enable the permanent deletion of evidence, and if there are no other potential sources of evidence.⁹⁶

X. CONCLUSION

Historically, it has been relatively difficult to accidentally destroy paper-based evidence. However, in this new digital era there are numerous ways for well-meaning parties to negligently destroy electronic evidence, thereby incurring a host of penalties from typically unsympathetic courts, ranging from adverse inferences, preclusion of evidence, monetary sanctions, dismissal, default judgment, or summary judgment. In order to truly navigate these treacherous waters, it is imperative for conscientious practitioners to work with their clients to develop proactive document preservation programs that not only identify the types of information that should be preserved, but which also suspends offending activities and notifies the enterprise of the larger preservation efforts. The decision to take a "passive" preservation approach is fraught with unnecessary risks to both the parties and the attorneys who represent them.

¹ This article was co-written with Jessica Lee, Esq., a partner at Gibson, Dunn & Crutcher LLP. She works out of their Denver office and specializes in employment and general commercial litigation. She would like to extend thanks to Gibson, Dunn & Crutcher associate Danielle Kitson for her assistance. A shorter version of this article is slated for upcoming publication in the *Colorado Lawyer*.

² This common law doctrine is several hundred years old. See SPOILIATION OF EVIDENCE: TREND TO A NEW TORT, 2001, Podvey Sachs, Meanor, Catenacci, Coccoziello (<http://www.podveysachs.com/publications/pub12.htm>).

³ Black's Law Dictionary, 1086 (6th ed. 1997).

⁴ *Zubulake v. UBS Warburg LLC*, No. 02CV1243, 2003 WL 21087884, *1 (S.D.N.Y. May 13, 2003).

⁵ Some courts have described the dreaded spoliation presumption in "language evocative of Old Testament fury," explaining that "[t]he law, in hatred of the spoiler, baffles the destroyer, and thwarts his iniquitous purpose, by indulging a presumption which supplies the lost proof, and thus defeats the wrongdoer by the very means he had so confidentially employed to perpetrate the wrong." *Pastorello v. City of New York, et al.*, 2003 US Dist LEXIS 5231, *22 (S.D.N.Y. April 1, 2003) (quoting *Pomeroy v. Benton*, 77 Mo. 64, 86 (1882)).

⁶ Rule 37(b) specifically authorizes sanctions consisting of "an order establishing facts related to the discovery abuse, prohibiting the disobedient party from supporting or opposing related claims and defenses, striking out pleadings or parts thereof, or entering a default judgment against the disobedient party." *Pastorello*, 2003 US Dist LEXIS 5231 at *20-21. Courts also have authority to issue a variety of other sanctions based on their inherent supervisory power to sanction litigants for abusive practices. See *id.*

⁷ See SPOILIATION OF EVIDENCE: TREND TO A NEW TORT, 2001, Podvey Sachs, Meanor, Catenacci, Coccoziello.

⁸ *Indictment, U.S. v. Lundwall*, S-1 97 Cr. 211 (S.D.N.Y. 1997). Defendants were charged with seeking to impair a pending court proceeding through the intentional destruction of documents. "For a variety of reasons, the panoply of tools used to address civil discovery problems such as monetary sanctions, orders of preclusion, or dismissal of claims or defenses might at times be insufficient."

⁹ Spoliation is the willful destruction of evidence or the failure to preserve potential evidence for another's use in pending or future litigation. See, *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 778 (2nd Cir. 1999) ("Spoliation is 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."); *Rush v. Artuz, et al.*, 2003 US Dist. LEXIS 7158, *5 (S.D.N.Y. April 3, 2003); Black's Law Dictionary, 1401 (6th ed. 1997) (defining spoliation as "the intentional destruction of evidence..."). See also *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995); *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 78 (3rd Cir. 1994).

¹⁰ Spoliation includes negligent destruction or loss of tangible and relevant evidence which impairs a party's ability to prove or defend a claim. *U.S. v. Koch Industries Inc.*, 1998 WL 1744497 (N.D.Okla., 1998). *Talmadge v. State Farm Mutual Automobile Ins. Co.*, 107 F.3d 21, 1997 WL 73476, at *3 (10th Cir. 1997). It should be noted, however, that courts rarely impose sanctions in cases where a party accidentally loses documents or other forms of evidence, as opposed to intentionally or affirmatively destroying them, albeit innocently. See, e.g., *Med. Lab. Mgmt. Consultants v. Am. Broadcasting Co., Inc.*, 306 F.3d 806, 824 (9th Cir. 2002) (finding that trial court did not abuse its discretion by refusing to grant an adverse inference instruction, and noting that where "relevant evidence is lost accidentally or for an innocent reason, an adverse inference from the loss may be rejected"); *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 334 (3d Cir. 1995) (upholding trial court's denial of an adverse inference instruction where evidence was not intentionally lost, and where the responsible party searched for it, to no avail); *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 716

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(7th Cir. 1998) (finding that an adverse inference charge was not justified where the record's loss was inadvertent). In the realm of electronic evidence, then, courts would likely make a distinction between a party who *destroys* data through routine erasing of archival tapes, for instance, and a party who *loses* data by some other means, such as accidental loss, theft, or corruption of the tapes. *But see, Keene v. Brigham & Women's Hospital, Inc.*, 786 N.E.2d 824, 833-34 (Mass. 2003) (finding sanctions appropriate under spoliation doctrine where hospital lost records that it was under a statutory obligation to keep and maintain).

¹¹ *Glover v. B.I.C. Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993); *Rush*, 2003 US Dist LEXIS 7158 at *7-8 (noting that sanctions may be warranted with a showing of a party's "bad faith or even gross negligence").

¹² *Anderson v. National Railroad Passenger Corp.*, 866 F. Supp. 937, 945 (E.D. Va. 1994) (quoting *Nation-Wide Check Corp. v. Forest Hills Distributors, Inc.*, 692 F.2d 214, 218 (1st Cir. 1982)).

¹³ ABA Civil Discovery Std. 10 & 29(a)(i) (1999).

¹⁴ ABA 29(a)(i).

¹⁵ *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598, 615 (D.N.J. 1997). *See also Nat'l Assoc. of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 557-58 (N.D.Cal.1987) ("The obligation to retain discoverable materials is an affirmative one; it requires that the agency or corporate officers having notice of discovery obligations communicate those obligations to employees in possession of discoverable materials"); *Cohn v. Taco Bell Corp.*, 1995 WL 519968, *9 n. 3 (N.D.Ill.1995) (court did not "countenance" a "failure to warn its employees to preserve documents known to be relevant to the issues in the instant litigation"); *see generally Marrocco*, 966 F.2d at 224-25 (court awarded sanction where defendant acted with gross negligence in flagrantly disregarding its assumed duty to preserve and monitor the condition of physical evidence critical to plaintiffs' proof); *China Ocean Shipping Group Co. v. Simone Metals Inc.*, NO. 97 C 2694, 1999 WL 966443, *4 (N.D.Ill.1999) (defendant "took no specific, direct action to maintain and preserve" the evidence and "never directly contacted anyone ... to ensure" preservation); *Positran Mfg., Inc. v. Diebold, Inc.*, 2003 US Dist LEXIS 8114, *4 (D. Del. May 15, 2003) ("A party who has reason to anticipate litigation has an affirmative duty to preserve evidence which might be relevant to the issues in the lawsuit").

¹⁶ *See* 7 JAMES WM. MOORE et al., MOORE'S FEDERAL PRACTICE § 37.120 (3d ed. 1999) ("A party is not obligated to retain every document or tangible item that is in its possession, or subject to its control, after a complaint has been filed"); *see also Wm. T. Thompson Co. v. General Nutrition Corp., Inc.*, 593 F.Supp. 1443, 1455 (C.D.Cal. 1984) (same).

¹⁷ *Wm. T. Thompson, Co.*, 593 F.Supp. at 1455.

¹⁸ *See* Wendy R. Liebowitz, *Digital Discovery Starts to Work*, NAT'L L.J., Nov. 4, 2002, at 4.

¹⁹ *Crown Life Ins. v. Craig*, 995 F.2d 1376 (7th Cir. 1993).

²⁰ *Lombardo v. Broadway Stores, Inc.*, 2002 WL 86810 (Cal. Ct. App. Jan. 22, 2002). *See also, Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995 U.S. Dist. LEXIS 16355 (S.D.N.Y.) "Production of materials in hard copy form does not preclude a party from receiving the same information in electronic form."; *see also Cobell v. Norton*, 2002 U.S. Dist. LEXIS 5291 (D.D.C.) (request for permission to produce emails on paper draws sanctions) and *National Union Electric Corp. v. Matsushita Electric Industrial Co.* 494 F. Supp. 1257 (documents needed to be produced in electronic format in addition to physical form even though the cost was substantial).

²¹ A "terabyte" (one trillion bytes) of data is roughly equivalent to the textual content of a million books.

²² *See, e.g., Positran*, 2003 US Dist LEXIS 8114 at *5 (noting that where the conduct is "willful or in bad faith and intended to prevent the other side from examining the evidence, the court may impose the most severe sanction of them all—the outright dismissal of a claim or the entry of a default judgment").

²³ *See, e.g., Residential Funding Corp. v. DeGeorge Fin. Corp., et al.*, 306 F.3d 99, 108 (2d Cir. 2002) (noting that an adverse inference sanction may be appropriate in some cases involving the negligent destruction of evidence). On the other hand, some courts have refused to impose sanctions absent willful conduct. In *Carlucci v. Piper Aircraft Corp.*, the court stated that data destroyed pursuant to a "bona fide, consistent and reasonable document retention policy" might provide a justification for failing to produce requested documents. *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 483 (D.C.Fla. 1984).

²⁴ FRCP 1001(d) -- a "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

²⁵ *Playboy Enterprises, Inc. v. Welles*, 60 F.Supp.2d 1050, 1054-55 (S.D.Cal. 1999).

²⁶ *Taylor v. State*, 2002 WL 31318065 (Tex.App. Oct. 17, 2002).

²⁷ *State v. Townsend*, 2002 WL 31477600 (Wash. Nov. 7, 2002).

²⁸ *Antioch v. Scrapbook Borders, Inc.*, 2002 WL 31387731 (D.Minn. Apr. 29, 2002).

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²⁹ *R.S. Creative Inc. v. Creative Cotton Ltd.* (1999), 75 Cal.App.4th 486. "The parties had stipulated that Ms. Sebastian's computers would not be turned on or operated between April 29th and the time the expert for defendants could examine them. Contrary to the stipulation, they were operated during that time period, some files were entirely deleted during this period, and it is reasonably inferable that others were as well."

³⁰ In *Dodge, Warren & Peters Insurance Services, Inc. v. James W. Riley*, 130 Cal.Rptr.2d 385, 2003 WL 245586 (2003, Cal.App. 4 Dist.) the Plaintiff sought injunctive relief to "freeze" Defendants' electronically stored data so that it would be available for future discovery, claiming that even Defendants' innocent use of the computer systems could result in the destruction of potential evidence. The Court upheld the granting of injunctive relief, which prohibited employees from "destroying, deleting, or secreting" electronic evidence.

³¹ See *Kleiner v. Burns* (2000 D.Kan), 2000 WL 1909470 where the parties stipulated to a preservation order including the obligation to preserve relevant evidence including "data compilations, computerized data and other electronically-recorded information"

³² More than 2,500 potentially relevant laws impact the retention of electronic records if the company operates in all 50 states.

³³ *Kleiner v. Burns* (2000 D.Kan), 2000 WL 1909470 at FN7, citing Mark D. Robins, *Computers and the Discovery of Evidence--A New Dimension to Civil Procedure*, 17 J. Marshall J. Computer & Info. L. 411, 416-17 (1999). Back-up copies of files may be available as a result of formal or informal preservation of information. Formally, companies often make timed back-ups of all of the information stored on a computer network at given points. These archival tapes may be preserved for short periods of time as a source of memory in the event of an emergency such as accidental deletion or loss of important data. Subsequently, such tapes may be recycled for further archiving or other use. Archival tapes may also be preserved for longer periods of time either because of government-mandated recordkeeping requirements or simply for purposes of historical preservation. Informally, employees may make their own random back-up copies of files to guard against accidental deletion or system failure. These back-ups may employ different file names. Indeed, different versions of evolving documents may be saved under different file names. Consequently, there are several sources for retrieving deleted documents or drafts of documents. Archival tapes may contain final versions and drafts of documents that were subsequently deleted from the hard disk on a computer terminal or network file server. Similarly, copies or drafts of deleted documents may still be found on the hard disk of a computer terminal or network

file server under different file names than the file that was deleted.

³⁴ See *Carlucci* "the good faith disposal of documents pursuant to a bona fide, consistent and reasonable document retention policy" might actually provide a justification for failing to produce documents requested in the course of discovery.

³⁵ *Lewy v. Remington Arms Co.*, 836 F.2d 1104 (8th Cir. 1988).

³⁶ *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598, 615 (D.N.J. 1997).

³⁷ *U.S. v. Koch Industries Inc.*, 1998 WL 1744497 (N.D.Okla., 1998); *Lombardo v. Broadway Stores, Inc.*, 2002 WL 86810 (Cal. Ct. App. Jan. 22, 2002); *Computer Assoc. Int'l. v. American Fundware Inc.* (Colo.DC 1990), 133 F.R.D. 166. *Pennar Software Corp. v. Fortune 500 Sys. Ltd.*, 2001 WL 1319162 (N.D.Cal. Oct. 25, 2001). In a breach of contract suit, the Court imposed sanctions upon the Defendant in the form of attorney's fees for spoliating evidence, basing its findings on the Defendant's failure to present a maintenance policy, log files, or backup tapes that would track the website maintenance and deletion procedures.

³⁸ *Indictment, U.S. v. Lundwall*, S-1 97 Cr. 211 (S.D.N.Y. 1997).

³⁹ *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, at 615 "While there is no proof that Prudential, through its employees, engaged in conduct intended to thwart discovery through the purposeful destruction of documents, its haphazard and uncoordinated approach to document retention indisputably denies its party opponents potential evidence to establish facts in dispute."

⁴⁰ *U.S. v. Koch Industries Inc.*, 1998 WL 1744497 (N.D.Okla., 1998). "The Court finds that Plaintiffs have failed to establish that KII, through its employees, engaged in conduct intended to thwart discovery of relevant evidence through the purposeful destruction of evidence. Nevertheless, KII's uncoordinated approach to document retention, especially documents potentially relevant to litigation, denied Plaintiffs potential evidence to establish the facts in dispute in this case."

⁴¹ *Metropolitan Opera Assoc., Inc. v. Local 100*, 2003 WL 186645 (S.D.N.Y. Jan. 28, 2003).

⁴² *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50-51, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); *Barnhill v. United States*, 11 F.3d 1360, 1368 (7th Cir. 1993).

⁴³ *Cobell v. Babbit*, 37 F.Supp.2d 6, 18 (D.D.C. 1999); *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 167 F.R.D. 90, 107 (D.Col. 1996).

⁴⁴ See *Pastorello*, 2003 US Dist LEXIS 5231 at *21 (quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D.

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68, 72 (S.D.N.Y. 1991)); see also *Chambers*, 501 U.S. 32, 46 (1991) (noting that the rules of civil procedure are not a substitute for the court's inherent power to sanction litigants).

⁴⁵ See *Rush*, 2003 US Dist LEXIS 7158 at *6 (explaining that the threshold question when considering sanctions for spoliation is whether the party destroying evidence had any obligation to preserve it; such obligation is triggered where the party is put on notice of the relevance and possible use of evidence in litigation, through a discovery request, the complaint itself, or some other form of notification prior to the filing of the complaint that litigation is expected).

⁴⁶ In *W.R. Grace*, 2000 U.S. Dist. LEXIS 18091, 2000 WL 1843258, the court stated that "while violation, through spoliation, of a court order directing production of discoverable evidence will support sanctions, the absence of such an order does not prevent sanctions based upon the court's inherent authority to control the litigation." See also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-45, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991); *Sassower v. Field*, 973 F.2d 75, 80-81 (2d Cir. 1992).

⁴⁷ *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991)).

⁴⁸ ABA Civil Discovery Std. 10 & 29(a)(i) (1999). "When a lawyer who has been retained to handle a matter learns that **litigation is probable** or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents and of the possible consequences of failing to do so." Emphasis added.

⁴⁹ *Danis v. USN Communications*, 2000 WL 1694325 (N.D. Ill. Oct. 23, 2000) at 33.

⁵⁰ See, e.g., *Cohn*, 1995 WL 519968

⁵¹ See, e.g., *Rush*, 2003 US Dist LEXIS 7158 at *7-8 (noting that defendant was bound by a court-ordered stipulation to preserve surveillance videotapes, when duly requested by plaintiff).

⁵² *Procter & Gamble Co. v. Haugen*, 179 F.R.D. 622 (D.Utah, 1998) where the court explained that, while the duty to preserve evidence exists independently of a court order, the presence of an order would have provided the basis necessary to judge respondent's conduct from a bad faith perspective.

⁵³ *Illinois Tool Works, Inc. v. Metro Mark Products, Ltd.*, 43 F.Supp.2d 951 (N.D.Ill.1999).

⁵⁴ *Illinois Tool Works, Inc. v. Metro Mark Products, Ltd.* 960-961 "The Court's October 23 order could not have been more clear: defendants were ordered 'to preserve the integrity of all computers that are at issue here without any spoliation of any information contained therein' Elaborating on that already-specific directive, the Court gave examples: "Don't pull the plug at the wrong time";

"Don't take a sledge hammer to it"; "I don't want it spoiled in any way, okay?" (*Id.* at 5). Under any version of events, defendants failed to comply with that order.'"

⁵⁵ *EEOC v. Sears Roebuck & Co.*, 114 F.R.D. 615, 626 (N.D.Ill. 1987).

⁵⁶ *Trigon Ins. Co. v. United States of America*, 204 F.R.D. 277 (2001); see also *West* 167 F.3d at 779 (explaining that sanctions for spoliation should serve "prophylactic, punitive, and remedial rationales," and should be designed to 1) deter, 2) place the risk of erroneous judgment on the spoliating party, and 3) restore the prejudiced party to the same position he would have been in but for the spoliation); *Pastorello*, 2003 US Dist. LEXIS 5231 at *23 (same).

⁵⁷ *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, 167 F.R.D. 90, 102 (D. Colo. 1996); *Ehrenhaus v. Reynolds*, 965 F.2d 916, 919 (10th Cir. 1992); *Med. Lab. Mgmt. Consultants v. Am. Broadcasting Co., Inc.*, 306 F.3d 806, 824 (9th Cir. 2002) (noting that a trial court's exercise of its power to sanction for spoliation is reviewed "only for abuse of discretion").

⁵⁸ See, e.g., *Rush*, 2003 US Dist LEXIS 7158 at *5-6.

⁵⁹ "Spoliation of Evidence- Trend to a New Tort. *State Survey Chart*" (2001) by Rebecca Levy-Sachs coauthored with William Clayton & Gregory Miller, Vol 49, No 2, FICC Quarterly. For a summary of various states' law on the recognition of a tort of spoliation, see Fischer, Thomas G., *Intentional Spoliation of Evidence, Interfering With Prospective Civil Action, as Actionable*, 70 A.L.R. 4th 984 (2001).

⁶⁰ *Hal Commodity Cycles Mgmt. Co. v. Kirsch*, 825 F.2d 1136, 1139 (7th Cir. 1987).

⁶¹ *Melendez v. Illinois Bell Telephone Co.*, 79 F.3d 661, 672 (7th Cir. 1996); but see *West*, 16 F.3d at 779-81 (reasoning that courts should only impose the "drastic remedy" of dismissal after considering alternative, less drastic sanctions, and vacating and remanding the trial court's dismissal of plaintiff's complaint where sanctions short of dismissal served the punitive, remedial, and prophylactic aims of the spoliation rules); *Pastorello*, 2003 US Dist LEXIS 5231 at *23-24; *Medina*, 2003 US Dist LEXIS 3203 at *5 (noting that the ultimate sanction of barring a plaintiff's claim is "disfavored," and citing to *Thompson v. Worker's Comp. Appeal Bd.*, 781 A.2d 1146, 1149 n.4 (PA. 2001) for the proposition that barring a claim is not ineluctably commanded by *Schmid*).

⁶² *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3rd Cir. 1994); *Medina v. Rose Art Indus., Inc.*, 2003 US Dist LEXIS 3203, *4-5 (E.D.Pa. February 28, 2003).

⁶³ *Rush*, 2003 US Dist LEXIS 7158 at *8; *Residential Funding Corp.*, 306 F.3d at 108.

⁶⁴ *Id.* at *8-9 (quoting *Byrnie v. Town of Cromwell*, 243 F.3d 93, 108 (2d Cir. 2001)). Courts also take into account

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whether the spoliating party afforded the other side a meaningful opportunity to examine the evidence in question before destroying it. See *Positran*, 2003 US Dist LEXIS 8114 at *7-8 (noting that at a minimum, an opportunity for inspection should be afforded before relevant evidence is destroyed).

⁶⁵ *Id.* at *9.

⁶⁶ *Mayer v. Black & Decker*, 931 F.Supp. 80, 83 (D.N.H. 1996).

⁶⁷ *Rush*, 2003 US Dist LEXIS 7158, at *19.

⁶⁸ *Blinzler v. Marriott International, Inc.*, 81 F.3d 1148, 1158 (1st Cir. 1996).

⁶⁹ See, e.g., *Pastorello*, 2003 US Dist LEXIS 5231, at *29-30 (emphasizing that a party's failure to comply with its "obligation to preserve evidence is insufficient by itself to support an adverse inference charge," and that a party must also have acted "with a culpable state of mind") (quoting *Residential Funding Corp. v. DeGeorge Fin. Corp., et al.*, 306 F.3d 99, 107 (2d Cir. 2002)).

⁷⁰ *Residential Funding Corp.*, 306 F.3d at 107 (quoting *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107-12 (2d Cir. 2001)) (emphasis added). Although courts may only "venture guesses with varying degrees of confidence" as to what spoliated evidence may have revealed, they typically require at least some evidence to corroborate the relevancy and contents of the destroyed evidence, even if it is only circumstantial. See *Kronisch v. United States*, 150 F.3d 112, 127-28 (2d Cir. 1998) (holding that circumstantial evidence of the relevancy of destroyed evidence was sufficient); *Albee Tomato Co., Inc., et al. v. Korea Commercial Bank*, 2003 US Dist LEXIS 1616, *21 n12 (S.D.N.Y. February 5, 2003) (finding that there was insufficient evidence that destroyed records contained additional information relevant to the litigation, such that the prejudiced party could benefit from an adverse inference instruction).

⁷¹ See *Turner*, 142 F.R.D., at 76.

⁷² *Reilly v. Natwest Markets Group, Inc.*, 181 F.3d 253, 267-68 (2d Cir. 1999).

⁷³ *Residential Funding Corp.*, 306 F.3d at 108.

⁷⁴ Some courts have declined to invoke the "adverse presumption" against a party that had a reasonable explanation for the failure to produce evidence or where there was no evidence that the destruction of the evidence was motivated by a desire to deprive other litigants of access to it. *Allen v. Blanchard*, 99-0277 (La. App. 1 Cir. 03/31/00); *Hooker v. Super Products Corporation*, 98-1107 (La. App. 5 Cir. 6/30/99).

⁷⁵ 2 Wigmore on Evidence, § 285 at 192 (Chadbourn rev. 1979).

⁷⁶ *Oxford Presbyterian Church v. Weil-McLain Co., Inc.*, 815 A.2d 1094, 1105 (Pa. Super. 2003) (explaining further that other sanctions, such as striking expert testimony, are much more extreme).

⁷⁷ See, e.g., *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710, 719-21 (3d Cir. 1997) (barring the testimony of spoliator's expert witness).

⁷⁸ *Trigon* at 46. See also, *Dillon v. Nissan Motor Co.*, 986 F.2d 263 (8th Cir. 1993), where the court excluded testimony of an expert who had destroyed evidence, even though there was no violation of a court order.

⁷⁹ *Turner*, 142 F.R.D. at 77-8. Some courts have denied requests for monetary sanctions where there are no costs associated with spoliation, and have reasoned that such sanctions are "more typically awarded where the moving party has incurred costs." *Rush*, 2003 US Dist LEXIS 7158 at *18 (deeming monetary sanctions "inappropriate" where plaintiff proceeded *pro se* and did not allege that he had incurred any costs associated with the destruction of videotapes).

⁸⁰ *Trigon* at footnote 11.

⁸¹ *Societe Internationale Pour Participations Industrielles et Commerciales, S. v. Rogers*, 357 U.S. 197, 207, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958).

⁸² *Langley v. Union Elec. Co.*, 107 F.3d 510, 515 (7th Cir. 1997) ("An award of sanctions must be proportionate to the circumstances surrounding the failure to comply with discovery"); *Melendez*, 79 F.3d at 672 (same). See generally *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 395 (1st Cir. 1990) (judges must "take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms").

⁸³ *Marrocco*, 966 F.2d at 224; see also *West*, 167 F.3d at 779-80 (vacating the trial court's dismissal of plaintiff's complaint on spoliation grounds, and noting that dismissal is a "drastic remedy" that should only be imposed in "extreme circumstances, usually after consideration of alternative, less drastic sanctions") (quoting *John B. Hull, Inc. v. Waterbury Petroleum Prods, Inc.*, 845 F.2d 1172, 1176 (2d Cir. 1988)).

⁸⁴ *Metropolitan Opera Assoc., Inc. v. Local 100*, 2003 WL 186645 (S.D.N.Y. Jan. 28, 2003).

⁸⁵ *Shepherd*, 62 F.3d at 1478.

⁸⁶ "[T]he costs of storage are virtually nil. Information is retained not because it is expected to be used, but because there is no compelling reason to discard it." *Rowe Entertainment, Inc. v. The William Morris Agency*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002).

⁸⁷ In many cases, it may cost a corporation \$15,000-20,000 a month to simply stop recycling back-up tapes as part of their preservation efforts.

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⁸⁸ *RKI, Inc. v. Grimes*, 177 F.Supp.2d 859 (N.D. Ill. 2001). In a trade secret misappropriation action against Plaintiff's former employee, the Court found that the Defendant defragmented his home computer in an effort to prevent plaintiff from learning that he had deleted confidential information. The Court ordered the Defendant to pay \$100,000 in compensatory damages, \$150,000 in punitive damages, attorneys' fees, and costs.

⁸⁹ *Kucala Enterprises v. Auto Wax*, No. 02C1403 (N.D.IL. May 23, 2003).

⁹⁰ *Minnesota Mining & Mfg. v. Pribyl*, 259 F.3d 587 (7th Cir. 2001). Plaintiff brought suit against three former employees for misappropriation of trade secrets. The appellate court affirmed the trial court's negative inference instruction to the jury where one Defendant committed spoliation of evidence by downloading six gigabytes of music onto his computer, which destroyed numerous files sought by Plaintiff on the night before Defendant was to turn over his computer pursuant to the discovery request.

⁹¹ *U.S. v. Koch Industries Inc.*, 1998 WL 1744497 (N.D.Okla., 1998).

⁹² *Madden v. Wyeth*, 2003 US Dist. LEXIS 6427, *3 (N.D.Tex. April 16, 2003) (quoting *Hester v. Bayer Corp.*, 206 F.R.D. 683, 685 (M.D. Ala. 2001)).

⁹³ *Id.*

⁹⁴ *See id.* at *3-4.

⁹⁵ *See Adobe Systems*, 187 F.R.D. 636; *First Technology*, 11 F.3d at 650-52; *Matter of Vuitton et Fils S.A.*, 606 F.2d 1 (2d Cir. 1979); *Vuitton v. White*, 945 F.2d 569 (3d Cir. 1991).

⁹⁶ *See Adobe Systems*, 187 F.R.D. at 642-43