SPOLIAT

In a premises case, ensuring that key evidence is preserved is your first goal. But if spoliation occurs, know your options for moving forward.

"Spoliation" is the destruction of or failure to preserve evidence that is necessary to anticipated or pending litigation.[1] This simple definition belies a multi-dimensional and constantly evolving matrix of remedies, claims, rules, intent levels, and causes of action.[2] Although spoliation theory did not exist at common law due to its conflict with property rights, every U.S. jurisdiction—in different ways—has developed some form of spoliation rights and remedies.[3] In each jurisdiction, the duty to not destroy one's own property and instead to preserve it for the potential benefit of another individual or entity is anchored by the "reasonable foreseeability" that the evidence is essential to future judicial proceedings.[4]

I O N IN THE DIGITAL AGE

By || Allegra C. Carpenter

And with modern technology generating massive amounts of critically important electronic evidence, every trial lawyer must be familiar with spoliation. In premises cases, this electronic evidence commonly comes from video footage, including traffic cameras, interior and exterior security cameras, and police lapel and dash cameras. Cell phones also generate potential evidence from cell tower location tracking to messaging, map, and health data accessible only on a smartphone or smart device. This digital evidence often is available only for a limited window of time and may be in the control of your client, likely defendants, or other third parties or witnesses. As the repository of potential digital evidence grows, best practices for the preservation of such data are in flux and subject to further technological and legal developments.[5]

After litigation has been initiated, the duty to preserve is apparent and accepted, particularly when formal discovery requests have asked for the object, items, or data.[6] But the duty to preserve before initiation of a lawsuit is harder to ascertain and largely centers on whether the property owner knew or should have known the object would be needed in litigation.[7] In the event that spoliation occurs, be prepared to bring a claim against the spoliator to limit the negative effects on your case.

Take Steps to Preserve Evidence

Having evidence in hand almost always is superior to a spoliation claim, so find ways to ensure preservation. A well-drafted preservation of evidence (POE) letter is crucial and should be sent as soon as possible. A POE letter serves two purposes: to preserve the evidence (and perhaps even acquire it) and to tee up a spoliation remedy should the holder of the evidence destroy, alter, or "lose" the data. To be useful and enforceable, POE letters must be specific: They should individually identify the categories of information sought, contain reasonable time frames, contemplate the volume of data being requested, and offer assistance or accommodations to ease the burdens of production.

For example, in a premises liability case, the letter should include the name, venue, and essential elements of the litigation, with sufficient specificity to allow the landowner to have a basic understanding of the subject matter, scope, and relevant time period. Additionally, the letter should indicate that a potential legal claim involving premises liability exists, creating the need for the recipient to take steps to preserve relevant material. Identification of the types of material to be preserved, including video, audio, paper or electronic documents, voicemail, email, and photographs also should be incorporated into the letter. Making sure video has been preserved by the landowner is pivotal in premises cases as "video evidence can be the deciding factor."[8] The letter's recipient should also be informed that its normal retention policy should be suspended for all of the requested material.

It is never a bad idea to include an "everything" catchall, but very specific requests must be the focus. A good rule of thumb is to craft the POE letter like a formal discovery request that would be upheld by a court. Just as a discovery request for "any and all evidence" often does not suffice in discovery, such broad requests are likely to fail as support for spoliation.[9]

However, because preservation demands generally occur before formal litigation is underway, courts are wary of POE demands that impose unreasonable costs on (as of yet) non-parties or third parties.[10] Offers to shoulder expenses or to work out the least burdensome method of preservation will go a long way. For example, for video evidence, offer to hire and pay a professional to download the data or secure a cloud-based storage service or provide external storage drives.

Sample POE letter. It is difficult to craft a template POE letter because each letter must be tailored to the jurisdiction and the facts and circumstances of your case, but here is a start:

> *To [Future Defendant/Third Party]:*
>
> *Re: Demand for Preservation of Potential Evidence*
>
> *Evidence that is needed to prove legal claims and likely will be utilized at trial is protected under the law of the state of [Z]. This letter is to demand preservation of the following items [X], which we understand to be in your possession or control and which may be highly relevant to future litigation.*
>
> *[LIST OUT "X" IN DETAIL]*
>
> *This further notifies you that destruction, mutilation, alteration, or loss of X will irreparably harm this or other potential plaintiffs with potential claims against [you and/or others], and thus destruction, alteration, or loss of X will result in legal claims for damages being sought against you, monetary sanctions, and legal instructions to be read to the jury that [your/your company's] failure to preserve X can be assumed to mean that [you/your company] considered the evidence to be unfavorable to you.*
>
> *If there are any expenses or difficulties with preserving X safely and intact until such time as it can be provided to us or inspected by us, please let me know. We will work with you to assist in preserving X, including but not limited to paying reasonable expenses associated with this preservation demand.*
>
> *When you receive this letter, it should be provided to all people who may be at risk of either intentionally or inadvertently violating the preservation demand. People with access to X should be notified to take all action to not destroy, lose, or alter X. This letter should be provided to the highest levels of your organization and to your legal counsel.*

Uncover Spoliation

Send discovery requests as early as possible since there is little doubt that a formal discovery request triggers an obligation not to destroy the subject matter of the requested discovery.[11] But an excellent method of revealing

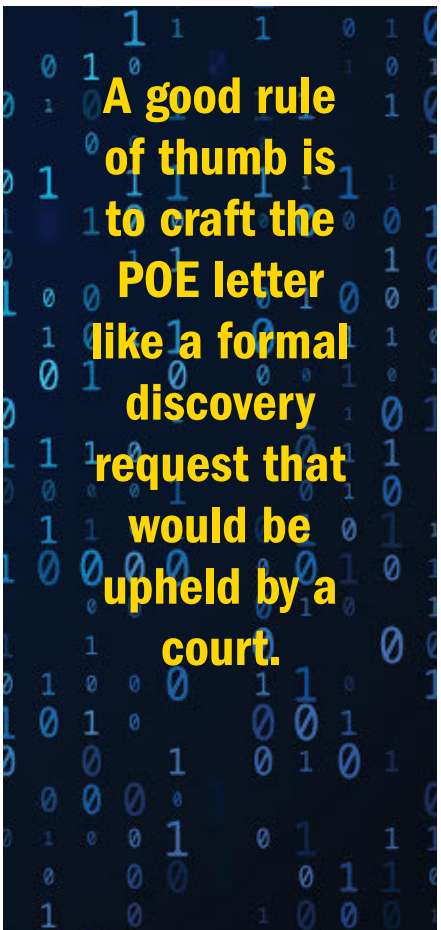
whether and when evidence was destroyed is through a Federal Rule of Civil Procedure (FRCP) 30(b)(6) notice. Most jurisdictions have a civil rule of evidence similar to Federal Rule of Evidence 30, so the deposition method also may be used in state court.

For example, in a premises liability case, a Georgia trial court found that Walmart officials had destroyed video after a letter regarding a potential lawsuit had been sent.[12] Walmart's 30(b)(6) representative testified during her deposition that the normal policy for retaining documents and materials relating to claims is seven years, so the court found that Walmart did not follow its own policy and that its actions amounted to spoliation.[13] This notice demands production of evidence in a setting that enables you to ascertain all of the particulars regarding the custody and treatment of that evidence by the defendant or a third party.

Resendez v. Smith's Food & Drug Centers, Inc. offers a good example of how to do this in a premises case.[14] *Resendez* involved a trip-and-fall at a grocery store. A 30(b)(6) deposition of the store manager established that the store destroyed highly relevant surveillance video. Specifically, the deposition was used to establish the following facts that were needed to pursue a spoliation sanction:

- video surveillance cameras were in the area where the incident occurred
- the cameras were functioning properly
- the cameras would have captured the plaintiff's incident
- the cameras would have captured prior inspections and sweeps of the area
- the cameras would have captured the plaintiff walking in and falling, the investigation, the plaintiff after the fall, the identity of the person spilling the water before the fall, the employee performing the inspections, and the plaintiff leaving the store
- the defendant's policy and procedure was to preserve surveillance video one hour before and one hour after an incident
- the person responsible for reviewing and preserving the surveillance video for the incident could not recall whether she had reviewed and preserved the surveillance video
- no surveillance video had been produced
- the grocery store did not have any video of the incident
- the grocery store did not have a satisfactory explanation for the missing evidence.[15]

The court in *Resendez* concluded that the grocery store had a duty to preserve the video—depriving a litigant of access to clearly relevant evidence undermines the integrity of judicial proceedings and the purpose of a trial, which is the search for truth.[16] The court rejected the grocery store's argument that it is "not a perfect world" and concluded that the company exhibited cavalier disregard of legal preservation duties.[17]



Spoliation Frameworks

When the desired evidence is not properly preserved, knowledge of your jurisdiction's spoliation law is critical.

Tort of intentional spoliation of evidence. All jurisdictions recognize spoliation generally and offer remedies to resolve it. A few states have adopted a separate cause of action for spoliation, including a claim for damages based on the lost value to a lawsuit stemming from evidence destruction. California led the way in 1984, recognizing the separate tort of intentional spoliation of evidence.[18]

Other states, including Connecticut, Florida, Indiana, Louisiana, Montana, New Jersey, Ohio, and West Virginia,[19] followed California or developed their own hybrid theories, including negligent spoliation of evidence against the tortfeasor, intentional or negligent spoliation causes of action against a non-tortfeasor (third-party spoliator), or other variations.[20] Some states reject spoliation as an independent tort, whether brought against the original tortfeasor or a third party.[21] Decisions reveal the continued tension of achieving the proper balance between inherent property rights and duty to others, as well as courts' conceptual difficulty with how a jury might assess damages stemming from spoliation.[22]

Keep in mind that only about 11 jurisdictions recognize an independent tort of spoliation.[23] If you are filing your premises liability case in one of those jurisdictions, you must know the elements of such a claim, which, in the

case of a third-party spoliator, generally are: the existence of a potential civil action, the legal or contractual duty to preserve evidence that is relevant to the potential civil action, the destruction of the evidence, the significant impairment in the ability to prove the lawsuit, a causal relationship between the evidence destruction and the inability to prove the lawsuit, and damages.[24] Accumulate as much evidence as possible regarding the legal duty the property owner had to preserve the relevant evidence and the causal relationship between the destruction and the inability to prove the lawsuit.

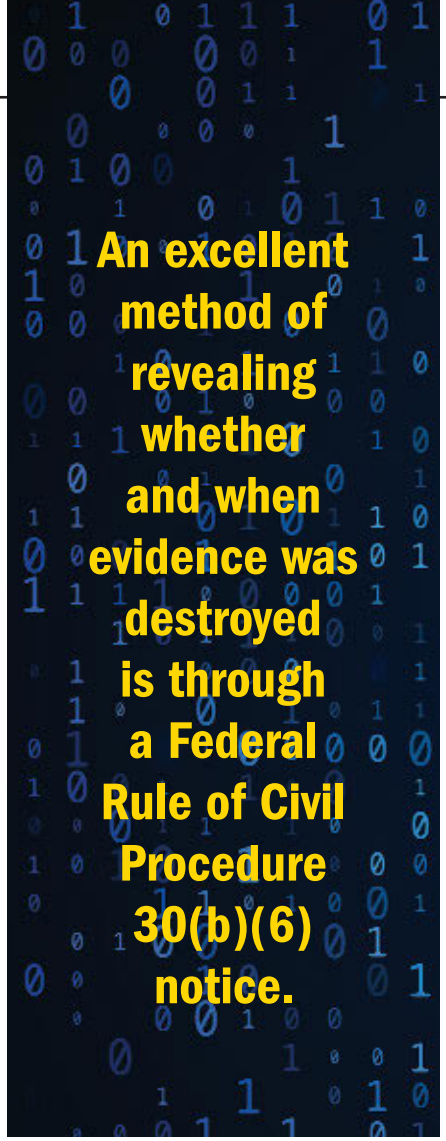
Sanctions. In most jurisdictions that do not recognize the independent tort, courts account for spoliation of evidence as a rule of evidence rather than a substantive claim or defense, and sanctions for failing to preserve the evidence is the only option.[25] In fact, one of the most important deterrents to spoliation is strong and targeted sanctions when spoliation occurs. Whether the spoliator is the defendant or a third party, courts will consider the nature and circumstances of a particular discovery failure; whether the lack of preservation included willfulness, bad faith, or other fault by the responding party; whether comparatively moderate sanctions are available and would be effective or whether the responding party has obtained satisfactory advance notice that more serious sanctions may be imposed; and the discovering party's possibility of prejudice because of the responding party's failure with respect to discovery.[26]

An appropriate sanction should be designed to discourage parties from participating in spoliation, put the risk of an inaccurate judgment on the spoliator, and, to the closest degree possible, reinstate the wronged party to the equivalent position they would have been in without the spoliation.

The nature and severity of a sanction for spoliation of evidence depends on all of the above-mentioned factors, and typically, a court may[27]

- issue a monetary sanction
- find the transgressing party in contempt
- order that designated facts be taken as established or preclude the offending party from supporting or opposing designated claims or defenses
- prohibit the offending party from introducing designated matters into evidence
- strike part or all of the pleadings, dismiss part or all of the action, or enter a default judgment against the spoliating party
- initiate a disciplinary action against lawyers who engage in unethical acts that contribute to the improper spoliation of evidence
- instruct the jury that a party wrongfully lost or destroyed evidence or instruct the jury to presume that the lost or destroyed evidence would have been unfavorable to the party who committed the wrongful destruction, or both.

Amended Rule 37(e). Federal district courts historically had "broad discretion" in deciding whether and how to sanction parties for spoliation of evidence.[28] But in 2015, FRCP 37(e), which governs the failure to preserve electronically stored information (ESI), was amended to allow federal courts to impose sanctions for a party's failure to preserve ESI evidence when four conditions are met: the party failed to preserve evidence "that should have been preserved" in anticipation or conduct of litigation; the potential evidence was lost because the party failed to take reasonable steps to preserve it; the evidence cannot be restored or replaced through additional discovery; and another party was prejudiced by the loss.[29] If the court finds all four prerequisites, it may issue sanctions "no greater than necessary" to cure the prejudice.[30]



In short, sanctions under Rule 37(e) are authorized when the potential evidence is lost due to a party's failure to take "reasonable steps" to preserve it. The Judicial Conference Advisory Committee explained that because of the "ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible."[31]

However, Rule 37(e) retains the expectation and duty to maintain "the routine, good-faith operation of an electronic information system," and this duty is a "factor for the court to consider

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in evaluating whether a party failed to take reasonable steps to preserve lost information."[32]

Because "reasonable steps" to preserve discoverable evidence rather than perfection is the standard, the amended rule "is inapplicable when loss of information occurs despite a party's reasonable steps to preserve."[33] Although spoliation remedies continue to exist in federal court, the amendment elevates the necessity for building a record of knowing, unreasonable mishandling of relevant evidence.[34]

Evidentiary interference instruction for spoliation. When the spoliator is the defendant, a spoliation inference jury instruction may be available.[35] The spoliation inference either instructs or allows the jury to presume the destroyed or concealed evidence would have been unfavorable to the spoliator.[36] The inference "even[s] the playing field,"[37] by recognizing what is simply human nature: one would not ordinarily destroy evidence that helps one's case.[38]

Spoliation is a growing body of law designed to ensure that cases are decided on their merits rather than letting defendants hide the ball. If you discover a failure to properly preserve evidence in a case, use the tools available in your jurisdiction to stop spoliation from derailing your client's claims. T

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Notes

1. *Demere Marsh Assocs., LLC v. Boatright Roofing & Gen. Contracting, Inc.*, 808 S.E.2d 1, 10 (Ga. Ct. App. 2017).
2. *See Klupt v. Krongard*, 728 A.2d 727, 736 (Md. Ct. Spec. App. 1999) ("[T]he destruction or spoliation of evidence doctrine is itself flexible and versatile. Various courts have recognized it as an independent cause of action, a defense to recovery, an evidentiary inference or presumption, and as a discovery sanction.").
3. *See Gayer v. Fine Line Const. & Elec., Inc.*, 970 So. 2d 424 (Fla. Dist. Ct. App. 2007).
4. *See Herster v. Bd. of Supervisors of La. State Univ.*, 72 F. Supp. 3d 627, 639 (M.D. La. 2014) (applying Louisiana law).
5. *See Brookshire Brothers, Ltd. v. Aldridge*, 438 S.W.3d 9, 14 (Tex. 2014).
6. *See Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001); *Kronisch v. United States*, 150 F.3d 112, 126–27 (2d. Cir. 1998).
7. *See Byrnie v. Town of Cromwell*, 243 F.3d 93, 107 (2d Cir. 2001); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216–17 (S.D.N.Y. 2003).
8. Lloyd N. Bell, *Proving Spoliation of Video Evidence*, Trial 38 (Aug. 2013).
9. *See Shakespear v. Wal-Mart Stores, Inc.*, 2013 WL 3270545, at *3 (D. Nev. June 26, 2013).
10. *See Rimkus Consulting Grp. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 533 (D. Md. 2010).
11. *See Compass Bank v. Morris Cerullo World Evangelism*, 104 F. Supp. 3d. 1040, 1051 (S.D. Cal. 2015); *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 73 (S.D.N.Y. 1991).
12. *See Wal-Mart Stores, Inc. v. Lee*, 659 S.E.2d 905, 908–09 (Ga. Ct. App. 2008).
13. *See id.* at 545.
14. 2015 WL 1186684 (D. Nev. Mar. 16, 2015). Note that the *Resendez* decision was issued before the 2015 amendments to Rule 37(e) and had a curious procedural history (remanded twice to state court), so whether the *Resendez* result would be the same now is unclear. But at a minimum, it is an excellent road map for how to approach spoliation sanctions in many U.S. jurisdictions.
15. *Id.* at *2–4.
16. *Id.*
17. *Id.* at *3 (internal cites and quotations omitted); *but see Heath v. Wal-Mart Stores East, LP*, 697 F. Supp. 2d 1373, 1379 (N.D. Ga. 2010) (In a Georgia trip-and-fall case, the court found that Walmart's failure to preserve surveillance tapes from approximately 11 minutes before the incident did not constitute spoliation of evidence even though the earlier tape may have contradicted a store employee's testimony that she had performed a safety check in addition to walking down the aisle approximately 12 minutes before the incident.).
18. *See Smith v. Super. Ct. of Los Angeles Cnty.*, 198 Cal. Rptr. 829 (Cal. Ct. App. 1984).
19. *See Morrissey-Manter v. St. Francis Hosp. & Medical Ctr.*, 142 A.3d 363, 383 (Conn. App. Ct. 2016); *Silhan v. Allstate Ins. Co.*, 236 F. Supp. 2d 1303, 1307–08 (N.D. Fla. 2002) (applying Florida law); *J.S. Sweet Co., Inc. v. Sika Chemical Corp.*, 400 F.3d 1028, 1032 (7th Cir. 2005) (applying Indiana law); *Herster v. Bd. of Supervisors of La. State Univ.*, 887 F.3d 177, 189 (5th Cir. 2018) (applying Louisiana law); *Smith v. Salish Kootenai College*, 378 F.3d 1048, 1055–56 (9th Cir. 2004) (applying Montana law); *In re Tri-State Armored Services, Inc.*, 332 B.R. 690, 707–10 (Bankr. D. N.J. 2005) (applying New Jersey law); *Ed Schmidt Pontiac-GMC Truck, Inc. v. Chrysler Motors Co., LLC*, 575 F. Supp. 2d 837, 840 (N.D. Ohio 2008) (applying Ohio law); and *Williams v. Werner Enters., Inc.*, 770 S.E.2d 532 (W. Va. 2015).
20. *See* 40 Eric M. Larsson, Cause of Action for Spoliation Evidence, Causes of Action 2d ed. 1, §§11–12 (Oct. 2018).
21. *Id.* Arizona, for example, does not recognize spoliation of evidence as an independent tort but acknowledges that "'litigants have a duty to preserve evidence which they know, 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.'" *McMurtry v. Weatherford Hotel, Inc.*, 293 P.3d 520, 535–36 (Ariz. Ct. App. 2013).
22. *See Torres v. El Paso Elec. Co.*, 987 P.2d 386, 402–03 (N.M. 1999), *overruled on other grounds*; *Herrera v. Quality Pontiac*, 73 P.3d 181 (N.M. 2003) (concluding that property interest, difficulty in assessing damages, and adequacy of existing remedies . . . while important considerations, are outweighed by the strong public policy disfavoring unjustifiable, intentional wrongs that cause harm to others).
23. Matthiesen, Wickert & Lehrer, *Spoliation of Evidence in All 50 States* (June 18, 2018), https://www.mwl-law.com/wp-content/uploads/2013/03/spoliation-of-laws-in-all-50-states.pdf.
24. *See, e.g.*, *Smith*, 198 Cal. Rptr. 829; *Morrissey-Manter*, 142 A.3d at 383.
25. *See* Matthiesen, Wickert & Lehrer, *supra* note 23.
26. *See generally Unigard Security Ins. Co. v. Lakewood Eng. & Mfg. Corp.*, 982 F.2d 363 (9th Cir. 1992); *Chin v. Port Authority of New York & New Jersey*, 685 F.3d 135 (2d Cir. 2012).
27. *See Torres*, 987 P.2d at 401–06; *see also Adkins v. Wolever*, 554 F.3d 650 (6th Cir. 2009).
28. *See id.*; *see also Fujitsu Ltd. v. Fed. Express*