THE LAW OF SPOLIATION

ISSUES OF ETHICS, EVIDENCE AND TORT LAW

Southeastern Admiralty Law Institute
Jacksonville, Florida
June 27, 2004

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The topic of this morning's "optional" session is spoliation, which in the legal sense is the loss, destruction or alteration of evidence. Specifically, this paper will analyze the legal issues of spoliation as a matter of ethics, evidence and tort law. The discussion will review the origin and elements of spoliation, examine its consequences under ethical, evidentiary and tort considerations, and conclude with some personal ruminations on professionalism.

I. SPOLIATION - ETYMOLOGY

Lawyers love Latin. We don't really understand it; but when in doubt and particularly in the presence of the innocent public, we resort to (or hide behind) our pet Latin phrases, such as, *res ipsa loquitur, forum non conveniens, res gestae, quantum,* and the ever popular *ejusdem generis* rule. When normal people catch on, lawyers (few of us who have ever heard of Cicero or read Ceasar's *Gallic Wars*) shorten, mutilate, and mis-pronounce Latin terms into legal vulgate, such as "race ipsa," "fnc," and the like.

All of which brings us, albeit circuitously, to the Roman roots for the English word "spoliation." Sometime during the darkness of the Middle Ages, future English speaking folk borrowed from the Latin verb *"spoliare,"* meaning to plunder or rob, to create the English verb "spoliate" and its progeny "spoliation" and "spoliator." In everyday usage, "spoliation" is the act of plundering, robbery, deprivation, sometimes associated with the spoils of war.[1] The legal definition - the destruction, loss, damage or alteration of evidence - obtains from its less common definition - the act of injury, especially beyond reclaim. Lest we forget its Roman origin, *Black's Law Dictionary* underscores its heritage, quoting the Latin maxim *"Omnia praesumuntur contra*

spoliatorem," or loosely, "all things are presumed to the disadvantage of the one who despoils or destroys," *i.e.,* the spoliator.

II SPOLIATION - ELEMENTS OF SPOLIATION

Although decisions greatly vary, the usual elements[2] of spoliation include the following:

1. The existence of pending or probable litigation;[3]
2. Knowledge of same by the spoliator;
3. The existence of a duty to protect or preserve evidence;
4. Intentional or negligent,[4] destruction, loss or alteration of evidence by one with such duty;
5. Causation; and
6. Disruption of, or harm to, a litigant's case.

The existence of a legal duty can arise under statute, regulation, written or oral contract, court order, discovery request, ethical rule, or document retention policies/requirements.[5] In absence of same, the existence of a legal duty by a spoliator in favor of the litigant is not always so clear-cut, though some authorities would infer the duty as merely incidental to the spoliator's knowledge of the possibility of litigation.[6] Some courts decline to find spoliation without an express duty, while others uphold a duty under common law or general principles of negligence, *i.e.*, due care under the circumstances.[7]

The existence of damages resulting from spoliation is self-evident in some cases. However, issues of causation and damages present difficult fact questions in others, particularly when the lost evidence is a remotely related to a claim or defense or is a secondary piece of circumstantial evidence. In many instances the actual harm to a claim or defense, the damages,

cannot be measured. Accordingly, some courts require that the impacted party present extrinsic evidence that lost evidence would have been helpful to its case or damaging to the spoliator's.[8]

III ETHICAL CONSIDERATIONS

Ethics is the easiest part of the paper. As lawyers, we are ethically bound to preserve and protect evidence. For example, the ABA Model Rule 3.4 of Professional Conduct prohibits a lawyer from unlawfully obstructing another party's access to evidence or altering, destroying or concealing a document or material having evidentiary value. These ethical rules underscore our sometimes ignored role as "officers of the court" bound to promote the fair administration of justice for the good of the public (or, *pro bono publico,* for you die-hard Latinates). Thus, a lawyer may not spoliate evidence or be complicit with others who do.[9]

Ethical considerations also prescribe the lawyer's affirmative obligations to protect evidence, as the property of clients or others. ABA Mode Rule 1.15(a) requires that a lawyer "shall hold property of clients and third-parties . . . in connection with a representation separate from the lawyer's property. . . . [P]roperty [other than funds] shall be identified as such and appropriately safeguarded." While this rule principally focuses on client funds and accounts, it is applicable to all types of client and third-party property, including evidence. Thus, a lawyer's negligent spoliation of evidence violates this duty and could provide the premise for ethical and malpractice proceedings.

IV SPOLIATION AMID LITIGATION - TRADITIONAL REMEDIES

Spoliation, by legal definition, pertains to the loss of evidence - the stuff of trials. Thus, in most instances, spoliation is an issue addressed by the trial court when one party complains of prejudice resulting from the alteration or loss of evidence.

The English case *Armory v. Delamirie*[10] in 1722 addressed spoliation through evidentiary rules. The case involved an action in trover by the son of a chimney sweep. The lad had found a jewel piece and presented it to a jeweler for valuation. The jeweler refused to return it. Pratt, C.J. of The King's Bench in Middlesex upheld the right of the lad to maintain an action in trover against all (including the jeweler), but its rightful owners. However, its value could not be determined since the jeweler kept it, and the court instructed the jury that it was free to presume the jewel was of the highest value.

This evidentiary instruction to the trier of fact is typically referred to as the "spoliation inference." This inference or instruction is the most common response by trial judges to spoliation. Nonetheless, there is considerable disagreement as to the breadth of the inference, its effect on the parties' respective proof obligations, and whether rebuttal evidence is allowed.[11] Some commentators argue for an irrebutable presumption, while others contend that the spoliation inference should be substantially restricted or guided by new rules of evidence.[12]

In order to "level the playing field" between litigants when spoliation has occurred, trial courts also resort to various procedural, discovery and evidentiary rules as well as their "inherent powers" in the administration of justice.[13] These remedies include prohibition or limitation of expert or other testimony related to the spoliated evidence[14], monetary sanctions, such as paying for the restoration of the damaged evidence, awards of fees and costs to the party bringing the spoliation motion,[15] and even dismissal of the action and striking of defenses in egregious cases of willful spoliation.[16]

In most cases, the charge of spoliation relates to the loss or destruction of documents or physical evidence.[17] However, the issue is certainly one of great importance in cases involving

electronic evidence, e-mails, data bases, etc.[18] In personal injury practice, a few courts have addressed the contention of spoliation involving the claimant's physical condition. For example, when a plaintiff undergoes an invasive medical procedure before the defendant has an opportunity to conduct an independent medical evaluation or before plaintiff responds to an outstanding request for same, some defendants seek relief under spoliation remedies. Courts typically decline to recognize spoliation in such instances, but one court indicated that a spoliation inference would have been appropriate if the surgery was done while a defense request for evaluation was pending.[19]

V THE TORT OF SPOLIATION

The economic disasters of 2001 and 2002 have revealed some extreme and very public cases of spoliation of pre-litigation evidence, typically accounting and electronic records. In extreme cases, these acts are dealt with as criminal matters for obstruction of justice.[20] In the civil arenas, some writers argue that there is an ever-expanding practice of spoliation which cannot be remedied or deterred by traditional sanctions and evidentiary rulings. These authors contend that a broad tort remedy for spoliation is needed, concluding (somewhat simplistically in the undersigned's view) that specific remedies should be judicially created to right wrongs as a matter of public policy. Indeed, over the last two decades, a number of states have recognized a tort remedy for spoliation. California opened the door in 1984 when an appellate court first recognized the tort of spoliation under just such general principles. Quoting William L. Prosser, *Handbook of the Law of Torts* § 1, at 3 (4th de. 1971)), the California court announced:

> New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new

> cause of action, where none had been recognized before. The intentional infliction of mental suffering . . . the invasion of [the] right of privacy, the denial of [[the] right to vote, the conveyance of land to defeat a title, the infliction of prenatal injuries, the alienation of the affections of a parent, . . . to name only a few instances, could not be fitted into any accepted classifications when they first arose, but nevertheless have been held to be torts. The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.[21]

Though subsequent California intermediate courts joined in the new action, the California Supreme Court overruled the new action in 1998:

> The intentional destruction of evidence is a grave affront to the cause of justice and deserves our unqualified condemnation. There are, however, existing and effective nontort remedies for this problem. Moreover, a tort remedy would impose a number of undesirable social costs, as well as running counter to important policies against creating tort remedies for litigation-related misconduct.[22]

In spite of California's retreat and misgivings expressed here in Florida and elsewhere, several states currently permit tort actions for intentional and/or negligent spoliation.[23]

In those cases where the duty to preserve evidence arises under contract or statute, the legal relief is determined through application and interpretation of the pertinent statute and/or contract law. Courts, however, struggle when a tort remedy is sought in absence of a contractual or statutory obligation to protect evidence.[24] Nonetheless, a few courts have upheld this tort remedy as a matter of common law or as a traditional negligence claim. These courts, however, are clearly of a minority view.[25]

Many thorny issues arise once the tort door to the spoliation box is "opened." The Pandoric swarm of ancillary issues is practically endless, *i.e.*, should the spoliation tort action be tried with the underlying legal action; if so, how should a court protect against undue prejudice or influence with respect to the principal claim; does *respondeat superior* (more Latin) apply for employee's intentional spoliation contrary to the employer's policy, is there coverage for spoliation under property, WC/EL or CGL policies, does workers' compensation immunity apply to spoliating employers, is the damage one's litigious expectations a "property" loss or injury, and so forth.[26] In light of the foregoing, it is our view that spoliation is better dealt with by experienced trial judges utilizing the full panoply of the traditional remedies.

VI SPOLIATION AND PROFESSIONALISM

It is risky business to talk about professionalism in the practice of law. Any discussion of professionalism among lawyers is inherently fraught with substantial uncertainty and even disagreement about the meaning of the term. Nor can this uncertainty and disagreement be resolved by dictionary definitions, *i.e.*, the conduct, aims or qualities that characterize or mark a profession or a professional person.[27] It does not take Clarence Darrow to "cover a multitude of [unprofessional] sins" with such a standard for professionalism.

Query, then, is professionalism the utmost of ethical practice? After all, our former code of ethics is entitled, "*Rules of Professional Conduct*." Should one then infer that professionalism, in its essence, is the practice of law in strict conformity with our ethical rules? Hopefully, not. For many lawyers, professionalism thankfully embraces a higher goal and standard which we <u>should</u> observe for the betterment of the profession and ultimately the good of the public at large.

Professionalism thus honors and even elevates the profession, sometimes even to the detriment of the lawyer or client, and will always be an aspiration to the highest standards of our calling.

If the ethical issue of spoliation is very clear - cut, what does spoliation have to do with professionalism? Well, professionalism should guide us throughout the discovery and evidentiary process and help us curb our selfish inclination to "artful spoliation," the careful use of evasive verbiage which is not forthcoming and not entirely accurate. Consider sample areas where our advocacy directly conflicts with comprehensive, straight-forward representation. This can arise when surgery is rushed in a personal injury claim, in artful pleadings and discovery responses which obscure facts and the existence of potential evidence; the mid-trial red herrings and harangues of "missing" evidence in front of a jury without request for pre-trial consideration, and a host of other litigation tactics. While these tactics may not violate any rule of ethics, procedure, evidence or substance, they nonetheless undermine the professionalism of our discipline.

We are all confronted almost daily with the difficult choices as officers of the court and advocates. Real and perceived client expectations engender even greater pressure and stress. Hopefully, it is ultimately our professionalism - the respect we hold for our calling and our fellow practitioners - which will allow us to achieve that higher standard.

ENDNOTES

1. *Merrian Webster's Collegiate Dictionary* (10th ed. 1993).

2. At the outset, of course, the court must make a choice of law determination. Typically when raised as an issue of evidence or procedure, the law of the forum will govern. *King v. Illinois Central Railroad*, 337 F.3d 550 (5th Cir. 2003); *Park v. City of Chicago*, 297 F.3d 606 (7th Cir. 2002); *Green Leaf Nursery v. E.E. Dupont De Nemours & Co.*, 341 F.3d 1292 (11th Cir. 2003); see also: Phillip B. Philbin, "*Spoliation of Evidence and Retention of Evidence in a High Tech World,"* 2001 Judicial Section Annual Conference, (2001).

3. For a discussion of federal sanctions for prelitigation spoliation, see, Iain D. Johnston, *"Federal Courts' Authority to Impose Sanctions for Prelitigation or Preorder Spoliation of Evidence"* 156 F.R.D. 313 (1994)

4. Courts typically categorize legal spoliation as either intentional or negligent although some jurisdictions also consider whether the spoliation was innocent, reckless or in bad faith. Obviously, the severity of the sanctions or consequences are greater when there is scienter or bad faith by the spoliator. See, *e.g.*, *Trigon Insurance Co. v. United States*, 204 F.R.D. 277, 286 (E.D. Va 2001).

5. See, *e.g.*, *Rockwell Int'l Corp. v. Menzies*, 561 So.2d 677 (Fla. 3d DCA 1990); *Brown v. City of Delray Beach*, 652 So.2d 1150 (Fla. 4th DCA 1995); *Miller v. Allstate Ins. Co.*, 573 So.2d 24 (Fla. 3d DCA 1990); *Builder's Square, Inc. v. Shaw*, 755 So.2d 721 (Fla. 4th DCA 1999) (imposing a statutory duty upon employer to preserve evidence critical to employee's potential third party claim via worker's compensation statute); *Valcin v. Pub. Health Trust*, 507 Fo.2d 596 (Fla. 1987); *Lewy v. Remington Arms*, 836 F.2d 1104 (8th Cir. 1988); *Prudential Ins. Co. Sale Practice Litigation*, 169 F.R.D. 598 (NJ.D. 1997) (absence of comprehensive document retention policy can result in sanctions); *Rambus, Inc. v. Infineon Technologies AG.,* ___ F.Supp.2d ___, 383590 WL 2004, (E.D. Va. 2004).

6. See, *e.g.*, *Hagopian v. Publix Supermarkets, Inc.*, 788 So.2d 1088 (Fla. 4th DCA 2001); *St. Mary's Hosp. v. Brinson*, 685 So.2d 33 (Fla. 4th DCA 1996); *Sponco Mfg., Inc. v. Alcover*, 656 So.2d 629 (Fla. 3d DCA 1995); *Trison*, 204 F.R.D. at 286-7; *Rambus*, *supra* at 20-24 (discussing the adoption of a document retention policy designed to deprive an adverse party of relevant evidence).

7. See, *e.g.,* Robert D. Peltz, *"The Necessity of Redefining Spoliation of Evidence Remedies in Florida,"* 29 Fla. St. U.L. Rev. 1289 (2002); *Lumberman's Mut. Ins. Co. v. Fla. Power & Light*

Co., 724 So.2d 69 (Fla. 3d DCA 1998); *Koplin*, 734 P.2d at 1177 (Kan. 1987); *Strasser v. Yalamanchi*, 783 So.2d 1087 (Fla. 4th Cir. DCA 2001); *Figgie Int'l Inc. v. Alderman*, 698 So.2d 563 (Fla. 3d DCA 1997); *Foster v. Lawrence Mem'l Hosp.*, 809 F.Supp. 831 (D. Kan. 1992); *Smith v. Atkinson*, 771 So.2d 429 (Ala. 2000); *Williams v. State*, 664 P.2d 137 (Cal. 1983).

8. *Schmidt v. Milwaukee Tool* Corp., 13 F.3d 76 (3rd Cir. 1994); *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68 (S.D.N.Y. 1991); *Nation-Wide Check Corp. v. Forest Hill Distribs., Inc.*, 692 F.2d 214, 218-19 (1st cir. 1982); *Stanojev v. Ebasco Servs., Inc.*, 643 F.2d 914, 923-24 (2d Cir. 1981); Drew D. Dropkin, "*Linking the Cuplability and Circumstantial Evidence Requirements for the Spoliation Inference,*" 51 Duke L.J. 1803 (2002).

9. *Rambus, supra* at 16-24, discussion spoliation as a basis to overcome the protection of the attorney-client privilege.

10. 93 Eng. Rep. 664 (K.B. 1722). Probably the first significant judicial attention to spoliation in America is Justice Story's admiralty decision in *The PIZARRO,* 15 U.S. (2 Wheat) 227, 4L. Ed. 226 (1817), which disallowed a claim of prize against a Spanish vessel seized during the War of 1812. While certain evidence regarding the ownership of the cargo was intentionally thrown overboard, Justice Story nonetheless returned the property to its claimants on the basis of vessel documentation, which overcame the suspicions created by the intentional destruction of evidence.

11. *Stevenson v. United Pacific Railroad Co.,* 354 F.3d (8th Cir. 2004); *Kronisch v. United* States, 150 F.3d 112 (2nd Cir. 1998); *Rice v. United States*, 917 F.Supp. 17 (D.C.D.C. 1996); *Nation-Wide Check*, 692 F.2d at 217-9.

12. *Id.,* see also, Drew D. Dropkin, "*Linking the Cuplability and Circumstantial Evidence Requirements for the Spoliation Inference,*" 51 Duke L.J. 1803 (2002); Donald H. Flanary, Jr. & Bruce M. Flowers, *Spoliation of Evidence: Let's Have a Rule in Response*, 60 Fed. Couns. J. 553 (1993).

13. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 3 L. Fd. 259 (1812); *Dillon v. Nissan Motor Co.*, 986 F.2d 263 (8th Cir. 1993); *Trigon*, 204 F.R.D. at 285; With reference to the jurisprudence in SEALI jurisdictions, see: *Smith v.* Atkinson, 771 So.2d 429 (Ala 2000); *In re E.I. du Pont de Nemours & Co.*, 918 F. Supp. 1524 (M.D. Ga. 1995), rev'd, 99 F.3d 363 (11th Cir. 1996); *Continental Ins. Co. v. Herman*, 576 S2d 313 (Fla App. 1990), *rev. denied,* 598 So.2d 76 (Fla. 1991); *Pham v. Contico International, Inc.*, 99-CA-945, (La. App. 5th Cir. 3/22/00); *Constans v. Choctaw Transport, Inc.*, 97-08639 La. App. 4th Cir. 12/23/97), *writ denied*, 98-0412 (La. 3/27/98); *Randolph v. General Motors Corp*., 646 So.2d 1019 (La. App. 1st Cir. 1994), *writ denied*, 651 So.2d 276 (La. 1995); *Allen v. Blanchard*, 99-0277 (La. App. 1st Cir. 03/31/00); *Valcin v. Public Health Trust*, 473 So.2d 1297; *Bondu v. Gurvich*, 473 So.2d 1307 (Fla. 3d DCA

1984); *Pub. Health Trust v. Valcin*, 507 So.2d 596, 599 (Fla. 1987); *Miller v. Allstate Insurance Co.*, 573 So.2d 24 (Fla. 3d DCA 1990); *Vega v. CSCS International*, 795 So.2d 164 (Fla. 3d DCA 2001); *Brown v. City of Delray Beach*, 652 So.2d 1150 (Fla. 4th DCA 1995); *Doe v. Celebrity Cruises*, 145 F.Supp. 2d 1337, (S.D. Fla. 2001), 2001 AMC 2672 (S.D. Fla. 2001); *St. Mary's Hospital, Inc. v. Brinson*, 685 So.2d 33 (Fla. 4th DCA 1996); *Bashir v. Amtrak*, 119 F.3d 929 (11th Cir. 1997); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995); *Vick v. Tex. Employment Comm'n*, 514 F.2d 734 (5th Cir. 1975); *Christian v. Kenneth Chandler Constr. Co.*, 658 So.2d 408, 413 (Ala. 1995); *Lucas v. Christiana Skating Ctr., Ltd.,* 722 A.2d 1247, 1250 (Del. Super. Ct. 1998); *Gardner v. Blackston*, 365 S.E.2d 545, 546 (Ga. Ct. App. 1988); *Trevino v. Ortega*, 969 S.W.2d 950, 951 (Tex. 1998); *Dowdle Butane Gas Co. v. Moore*, 831 So.2d 1124 (Miss. 2002).

14. *Unigard Security Ins. Co. v. Lakewood Engineering Mfr. Corp.*, 982 F.2d 363 (9th Cir. 1992); *Thompson v. United States Dept. of H&U Dev.*, 219 F.R.D. 93 (D.Md. 2003); *Dillon*, *supra*; see also the decisions of *American Gulf VII v. Otto Candies, Inc.,* Nos. 94-3905, 95-1666 (E.D. La. May 10, 1996 and Sept. 11, 1996) (wherein the trial court initially excluded the testimony of a metallurgist, but later modified the ruling to limit the testimony to photographic and visual inspections available to all parties). One of the difficult questions for the trial courts concerns whether to make a spoliation ruling independent of the adjucation on the merits or to submit all the evidence to the jury for a factual finding. See, *Caparotha v. Entergy Corp.*, 168 F.3d 754 (5th Cir. 1999) for the potential risks of submitting same to the jury.

15. *Stevenson*, 354 F.3d at 751.

16. See, *e.g.*, *Silvestri v. General* Motors, 271 F.3d 583 (4th Cir. 2001); *In re: Weclsher*, 121 F.Supp.2d 404 (D. Del. 2000); *Torres v. Matsushita Elec. Corp.*, 795 So.2d 164 (Fla. 3d DCA 2001); *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472 (S.D. Fla. 1984).

17. For a discussion of spoliation in maritime cases, see, *e.g., The PIZARRO*, *supra*; *Austerberry v. United States*, 169 F.2d 583 (6th Cir. 1948); *In re Wechsler*, 121 F.Supp.2d 404 (D. Del 200); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 151 (4th Cir. 1995); *Doe v. Celebrity Cruises*, 145 F.Supp. 2d 1337, (S.D. Fla. 2001), 2001 AMC 2672 (S.D. Fla. 2001); *In Re: Moran Towing,* No. CV-97-2272 (E.D.N.Y 10/22/01), an unpublished ruling, addressed spoliation of a damaged underwater power cable by its owner. The maritime defendant, allegedly liable for the damages, filed a spoliation motion which was ruled on the morning of trial. The trial judge held that the cable owner was precluded from offering any evidence with regard to the cable's condition outside of what the defense expert was able to see during his limited inspection, and further held that the jury would be permitted to make an adverse inference as to the cable's condition. The court also sanctioned the owner, granting attorney fees for the spoliation claim itself.

18. See, *e.g.*, *Residential Funding Corp. v. DeGeorge Financial Corp*., 306 F.3d 99 (2nd Cir. 2002); Phillip B. Philbin, "*Spoliation of Evidence and Retention of Evidence in a High Tech World,"* 2001 Judicial Section Annual Conference, (2001).

19. *Vega v. CSCS International*, 795 So.2d 164 (Fla. 3d DCA 2001); *Manpower, Inc. v. Brawdy*, 62 F.3d 391 (Okla App. 2002).

20. 18 U.S.C. § 1503 (2000), which prohibits the obstruction of justice, and 18 U.S.C. § 2071 (2000), which criminalizes the destruction, mutilation, or concealment of any document filed in a federal court or public office.

21. *Smith v. Superior Court*, 198 Cal. Rptr. 829 (Cal. Ct. App. 1984), overruled by *Cedars-Sinai Med. Ctr. v. Super. Ct.*, 954 P.2d 511 (Cal. 1998).

22. *Cedars-Sinai Medical Center v. Superior Court*, 954 P.2d 511, 512 (Cal. 1998).

23. Alabama, *Smith v. Atkinson*, 771 So.2d 429 (Ala. 2000);Alaska, *Sweet v. Sisters of Providence in Washington*, 895 P.2d 484, 492 (Alaska 1995); *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 463 (Alaska 1986); District of Columbia, *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 847 (D.C. 1998); *Holmes v. Amerex Rent-A-Car*, 113 F.3d 1285 (D.C. Cir. 1997); *Holmes v. Amerex Rent-A-Car*, 180 F.3d 294 (D.C. Cir. 1999); Florida, *St. Mary's Hospital, Inc. v. Brinson*, 685 So.2d 33 (Fla. 4th DCA 1996); *Continental Ins. Co. v. Herman*, 576 S2d 313 (Fla App. 1990)*; Sponco Manufacturing, Inc. v. Alcover*, 656 So.2d 629 (Fla. 3d DCA 1995), *rev. denied*, 679 So.2d __ (Fla. 1996); Illinois, *Chidichimo v. University of Chicago Press*, 681 N.E.2d 107, 110 (Ill. App. Ct. 1997); *Boyd v. Travelers' Ins. Co.,* 652 N.E.2d 267, 270 (Ill. 1995); *Anthony v. Security Pac. Fin. Servs. Inc.*, 75 F.3d 311, 317 (7th Cir. 1996); Montana, *Oliver v. Stimson Lumber Co*., 993 P.2d 11, 19 (Mont. 1999); New Jersey, *Hirsch v. General Motors Corp*., 628 A.2d 1108, 1115 (N.J. Super Ct. Law Div. 1993); *Viviano v. CBS, Inc.*, 597 A.2d 543, 549-550 (N.J. Super. Ct. App. Div. 1991), *cert. denied,* 606 A.2d 375 (N.J. 1992); Ohio, *Smith v. Howard Johnson Co., Inc.*, 615 N.E.2d 1037 (Ohio 1993); *White v. Ford Motor Co.*, 755 N.E.2d 954 (Ohio Ct. App. 2001); and West Virginia, *Hannah v. Heeter*, 584 S.E.2d 560 (W. Va. 2003)

Louisiana is toying with recognition of this tort under Article 2315 of the Louisiana Civil Code, which is Louisiana's general codal provision for tort remedies, see, *e.g.*, *Quinn v. Riso Investments, Inc.*, 869 So.2d 922 (La. App. 4th Cir. 2004); *Guillory v. Dillard's Department Store*, 777 So.2d 1 (La. App. 3rd Cir. 2000); *Randolph v. General Motors Corp*., 646 So.2d 1019 (La. App. 1st Cir. 1994), *writ denied*, 651 So.2d 276 (La. 1995); *Carter v. Exedi Corp.*, 661 So.2d 698 (La. App. 2nd Cir. 1995); *Bethea v. Modern Biomedical Servs., Inc.*, 704 So.2d 252

(La. App. 3rd Cir. 1997); Hon. Karen Wells Roby, Pamela W. Carter, *"Spoliation, The Case of the Missing Evidence,"* 47 La. B.J. 222 (Oct. 1999).

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

25. For review of the competing arguments and policy consideration, see: Steffen Nolte, *The Spoliation Tort: An Approach to Underlying Principles*, 26 St. Mary's L.J. 351 (1995); and *Spoliation of Evidence: The Viability of Four Emerging Torts*, 3 46 U.C.L.A. L. Rew. 631 (1998); Robert D. Peltz, *"The Necessity of Redefining Spoliation of Evidence Remedies in Florida,"* 29 Fla. St. U.L. Rev. 1289 (2002); Steven Selsberg, Maelissa Lipman, *"My Dog Ate It: Spoliation of Evidence and the Texas Supreme Court's Ortega Decision,"* 62 Tex. B.J 1014 (Nov. 1999).

26. See, *e.g.*, *Fremont Casualty Insurance Co. v. Ace-Chicago Great Dane Corp.*, 739 N.E.2d 85 (Ill App. ____) (ruling that a WC/EL insurer had no duty to defend or indemnify because the damage to litigation expectations was not damages for bodily injury by accident or disease); *Norris v. Colony Insurance Co.*, 760 So.2d 1010 (Fla. App. 2000) (upholding a CGL insurer's duty to defend, but finding no coverage as the damage for the loss of evidence was not "property damage" as "physical injury to tangible property."); *Coleman v. Eddy Potash, Inc.*, 905 P.2d 185 (N.M. 1995) (holding that employee claim of intentional spoliation was not barred by workers' comp immunity).

27. *Webster, supra*, at 930.