NAVIGATING THE PAPER (OR ELECTRONIC) REALITY WE CALL PROOF: AVOIDING AND DEFENDING SPOLIATION CLAIMS

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Aside from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence. Our adversarial process is designed to tolerate human failings: Erring judges can be reversed; uncooperative counsel can be shepherded; and recalcitrant witnesses can be compelled to testify. When critical documents or things go missing, however, judges and litigants descend into a world of ad hocery and half measures and our civil justice system suffers.[1]

Spoliation of evidence, in simple terms, is the intentional destruction of evidence. The concept can be traced to English common law and is best exemplified in *Armory v. Delamarie,*[2] a case born of a crooked jeweler's attempt to swindle a young chimneysweep. The trouble began when the chimneysweep found a ring bearing what appeared to be a costly gemstone. He took it to a jeweler to evaluate the gem's quality. The jeweler inspected the gem and refused to return it to the chimneysweep. The chimneysweep sued the jeweler, who failed to produce the pilfered gem at trial. Given the jeweler's failure to turn over the gem, the court instructed the jury "that unless the defendant did produce the jewel, and shew it not be the finest water, you should presume the strongest against him and make the value of the best jewels the measure of their damages."[3] In so doing, the court permitted the jury to make what contemporary attorneys will recognize as an adverse inference against the jeweler, an evidentiary principle premised on the legal notion *omnia praesumunter contra spolatorem*—all things are presumed against a wrongdoer.

Fast forward a few centuries and jump across the pond. In 2010, Mark Pappas, president of Creative Pipe, Inc., attempted to stonewall his oppo-

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1 United States Med. Supp. Co. v. United States, 77 Fed. Cl. 257, 259 (2007).

2 1 Strange 505, 93 Eng. Rep. 664 (KB 1722).

3 *Id*.

nent, Victor Stanley, Inc., in a copyright infringement lawsuit by leading Creative Pipe employees in a systematic campaign of adverse evidence destruction.[4] Mr. Pappas and his team deleted files, destroyed or lost a key external hard drive, failed to preserve data despite plaintiff's preservation demand, conducted a server migration without preserving all existing files, and employed programs that made deleted files unrecoverable despite production orders to the contrary. Labeling Mr. Pappas's efforts "the single most egregious example of spoliation . . . in any case that I have handled or in any case described in the legion of spoliation cases I have read in nearly fourteen years on the bench," a justifiably angry U.S. District Court Judge Paul W. Grimm ordered Mr. Pappas jailed,[5] a spoliation sanction attorneys may not recognize as being available to the court.

Although there is no reliable data demonstrating the frequency of spoliation claims, the longstanding presence of such claims in American jurisprudence cannot be overlooked. Attorneys must appropriately preserve evidence because potential exposure to sanctions for the loss of relevant evidence can be substantial. How can attorneys help insulate their clients from spoliation claims? What policies and practices should be implemented with respect to document retention, particularly with the advent of electronically stored information? What damage control measures are available when documents go missing or are destroyed? This article explores how the law of spoliation has developed in Indiana courts and suggests preventive policies and mitigation strategies to assist Indiana attorneys with documents and other items that create the "reality we call proof."[6]

I. WHAT IS SPOLIATION OF EVIDENCE?

A. DUTY TO PRESERVE DOCUMENTS

At its core, our civil discovery system is a fact-gathering exercise. Rules govern how information is to be preserved and later produced in civil litigation.[7] A party has a duty to preserve evidence when it knows, or should know, that litigation is imminent.[8] The duty to preserve evidence is broad and encompasses any relevant evidence that the nonpreserving party knew or reasonably could foresee would be relevant to the action. This duty attaches, at the latest, when a plaintiff informs a defendant of her potential claim.[9] Once a party has notice of the threat of litigation, and therefore the

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4 Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497 (D. Md. 2010).

5 Jail time was contingent upon Mr. Pappas's payment of certain court-ordered monies. *Id.*

6 Zubulake v. UBS Warburg, LLC, 220 F.R.D 212 (S.D.N.Y. 2003).

7 IND. T. R. 26, 33, 34, 36, 37.

8 Trask-Morton v. Motel 6 Operating, L.P., 534 F.3d 672, 681 (7th Cir. 2008).

9 *Id.* at 681.

duty to preserve evidence that may be sought during discovery, the party should implement a plan to find and preserve relevant evidence.[10]

Spoliation of evidence is a failure to abide by this duty. Spoliation is "the intentional destruction, mutilation, alteration, or concealment of evidence."[11] Indiana courts uniformly condemn spoliation. The Indiana Supreme Court has recognized that

> intentional destruction of potential evidence in order to disrupt or defeat another person's right of recovery is highly improper and cannot be justified. The intentional or negligent destruction or spoliation of evidence cannot be condoned and threatens the very integrity of our judicial system. There can be no truth, fairness, or justice in a civil action where relevant evidence has been destroyed before trial. Destroying evidence can destroy fairness and justice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action. Destroying evidence can also increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence, which may be less accessible, less persuasive, or both.[12]

Although spoliation claims commonly involve missing or altered documents—both the paper-and-ink and electronic varieties—almost any item can be subject to a spoliation claim. Indiana's appellate courts have addressed spoliation claims involving dog restraining cables,[13] video recordings,[14] medical records,[15] braking systems,[16] and even motel room furniture and appliances.[17] Courts respond to spoliation with a variety of sanctions under Indiana Trial Rule 37, evidence preclusion, and adverse inference instructions (discussed further *infra*). The purposes for imposing spoliation sanctions include (1) deterring parties from engaging in spoliation, (2) placing the risk of erroneous judgment on the party who wrongfully created the risk, and (3) restoring "the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party."[18]

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10 Haraburda v. Arcelor Mittal USA, Inc., No. 2:11 CV 93, 2011 WL 2600756, at *1 (N.D. Ind. June 28, 2011).

11 Glotzbach v. Froman, 854 N.E.2d 337, 338 (Ind. 2006) (citing Cahoon v. Cummings, 734 N.E.2d 535, 545 (Ind. 2000) (quoting BLACK'S LAW DICTIONARY 1409 (7th ed. 1999)).

12 Gribben v. Wal-Mart Stores, Inc., 824 N.E.2d 349, 355 (Ind. 2005).

13 Thompson v. Owensby, 704 N.E.2d 134 (Ind. Ct. App. 1998).

14 Dawson v. Thornton's, Inc., 19 N.E.3d 337 (Ind. Ct. App. 2014).

15 Howard Reg'l Health Sys. v. Gordon, 952 N.E.2d 182 (Ind. 2011).

16 WESCO Distrib., Inc. v. ArcelorMittal Ind. Harbor, LLC, 23 N.E.2d 682 (Ind. Ct. App. 2014).

17 Kelley v. Patel, 953 N.E.2d 505 (Ind. Ct. App. 2011).

18 *Howard Reg'l Health Sys*, 952 N.E.2d 182.

B. FIRST-PARTY VERSUS THIRD-PARTY SPOLIATION CLAIMS

First-party spoliation involves evidence that has been negligently or intentionally destroyed by a party to the principle litigation.[19] Third-party spoliation[20] involves evidence that has been negligently or intentionally destroyed by a nonparty. Indiana currently recognizes no independent cause of action for first-party spoliation[21] but allows third-party spoliation claims under very narrow circumstances.[22]

1. Indiana Does Not Recognize an Independent Action for First-Party Spoliation

Although a few states recognize an independent tort claim for first-party spoliation, Indiana is not one of them. The Indiana Supreme Court drove home this point in response to a certified question from the United States District Court for the Southern District of Indiana in *Gribben v. Wal-Mart Stores, Inc.*[23] In that case, a plaintiff brought a slip-and-fall case in the U.S. District Court for the Southern District of Indiana against Wal-Mart after she sustained injuries when she fell while shopping.[24] She later moved to amend her complaint to add a claim for spoliation of evidence against Wal-Mart for failing to preserve a surveillance videotape that could have been relevant to her claim.[25] The federal court certified to the Indiana Supreme Court the following questions:

> 1. Does Indiana law recognize a claim for first-party spoliation of evidence; that is, if an alleged tort-feaser negligently or intentionally destroys or discards evidence that is relevant to a tort action, does the plaintiff in the tort action have an additional cognizable claim against the tort-feasers for spoliation of evidence?
> 2. If so, what are the elements of the tort, and must a plaintiff elect between pursuing the spoliation claim and using an evidentiary inference against the alleged tort-feaser in the underlying action?

The Indiana Supreme Court responded to each in the negative.[26] Citing alternatives, such as civil and evidentiary sanctions (explored *infra* SECTION C), the supreme court held that the availability of these remedies out-

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19 *Gribben,* 824 N.E.2d at 354.

20 *Glotzbach*, 854 N.E.2d 377.

21 *Gribben*, 824 N.E.2d 349.

22 *Kelley*, 953 N.E.2d 505.

23 *Gribben,* 824 N.E.2d 349.

24 *Id*.

25 *Id*.

26 *Id*.

weighed the problems in recognizing spoliation as an independent tort. These problems include the uncertainty of harm, the speculative character of damages, the burden of duplicative litigation, and the societal costs of requiring persons to take extraordinary measures to preserve documents and material solely to avoid future spoliation litigation.[27] Forecasting a different treatment of third-party spoliation claims, the supreme court reasoned that "it may well be that the fairness and integrity of outcome and the deterrence of evidence destruction may require an additional tort remedy when evidence is destroyed or impaired by persons that are not parties to litigation and thus not subject to existing remedies and deterrence."[28] The Indiana Supreme Court recently affirmed its ruling in *Howard Regional Healthcare System v. Gordon*, where it refused to allow parents in a medical malpractice claim to bring a separate claim for spoliation of evidence against the defendant hospital for losing their son's medical records.[29]

2. Indiana Does Not Recognize an Independent Action for Third-Party Spoliation Absent an Independent Tort, Contract, Agreement, or Special Relationship

Indiana's longstanding sentiment has been that "in the absence of an independent tort, contract, agreement, or special relationship imposing a duty to the particular claimant," a cause of action for negligent or intentional third-party spoliation of evidence "is not and ought not be recognized in Indiana."[30] Advancing these claims is difficult but not impossible. Third parties in possession of documents or items that may be used as evidence should be wary.

Indiana first recognized a cause of action for third-party spoliation almost twenty years ago in *Thompson v. Owensby,*[31] a case involving a girl being mauled by a dog. The attack occurred when the dog broke through its restraining cable.[32] The girl and her parents sued the dogs' owners, the property owners, and the company they believed manufactured the dog restraining cable. The property owners carried homeowners insurance with Indiana Insurance Company.[33] During the course of its investigation into the claim, Indiana Insurance took possession of the restraining cable, and before the parents had a chance to examine or test it, the insurance com-

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[27] *Id*.

[28] *Id.* at 355.

[29] Howard Reg'l Health Sys. v. Gordon, 952 N.E.2d 182 (Ind. 2011).

[30] Murphy v. Target Prods., 580 N.E.2d 687 (Ind. Ct. App. 1991).

[31] 704 N.E.2d 134 (Ind. Ct. App. 1998).

[32] *Id.*

[33] *Id.*

pany lost it.[34] The parents and girl sued Indiana Insurance for negligence, contending that it had assumed a duty to safeguard the cable and that it breached the duty when it lost it.[35] They also claimed the loss of the cable adversely impacted their claims against the dog's owners and the restraining cable manufacturer.

Treading the well-worn path of *Webb v. Jarvis*, the Indiana Court of Appeals first examined whether Indiana Insurance owed a duty to the parents and girl and balanced three factors: (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns. Regarding the first factor, the court found that liability insurance carriers such as Indiana Insurance routinely take possession of documents and material during the investigation of claims. Indiana Insurance could "rationally be held to understand that once a claim is filed, there is a possibility of litigation concerning the underlying injuries." The court determined that Indiana Insurance's "knowledge and investigation of [the parents'] claim and its possession of what would be a key item of evidence in the event litigation ensued created a relationship between the Company and [the parents] that weighs in favor of recognizing a cognizable duty to maintain the evidence."[36] Finding the foreseeability factor likewise satisfied, the court of appeals explained that "it strains credulity to posit in a motion to dismiss that a liability insurance carrier could be unaware of the potential importance of physical evidence."[37] Further, the court noted that the insurance company's investigator took possession of the cable, stating that "if an insurance carrier's investigator deems certain relevant evidence important enough to be collected, it is foreseeable that the loss of the evidence would interfere with a claimant's ability to prove the underlying claim."[38] As to policy concerns, the court reasoned that "a liability insurance carrier would be hard-pressed to conduct business without some mechanism for collecting and preserving evidence" and that "when . . . the carrier is in a better position than the lay claimant to understand the significance of evidence and the need to maintain it, the carrier can validly be held to a duty to maintain evidence."[39]

Indiana courts are extremely reluctant to expand *Thompson*'s holding beyond its facts. No Indiana appellate decision has expanded the viability of spoliation causes of action since *Thompson.*[40] In *American National Prop-*

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[34] *Id*.

[35] *Id.* at 138.

[36] *Id*.

[37] *Id.*

[38] *Id*.

[39] *Thompson*, 704 N.E.2d at 137.

[40] Kelley v. Patel, 953 N.E.2d 505, 505 (Ind. Ct. App. 2011).

erty & Casualty Co. v. Wilmoth,[41] for example, the Indiana Court of Appeals revisited the viability of third-party spoliation claims against liability insurers. The court of appeals, distinguishing *Thompson*, held that the third-party insurer had no duty to the claimant to preserve evidence "when no lawsuit had been filed, when the relevance of the evidence could not have been anticipated, and when [the insurer] never had possession of the evidence."[42] In *Kelley v. Patel*, the court held that the estate of a motel patron who died in a fire had no third-party spoliation claim against the motel's liability insurer when the motel's owner removed certain appliances from the motel because the insurer was not in exclusive possession of the appliances and there was no bad faith on the part of the insurer.[43] The court in *Kelley* noted that the estate was "not necessarily without other remedies" and stated that the plaintiff could seek an adverse inference instruction against the motel owners in its ongoing lawsuit with them. "While the record does not indicate the policy limits of [the insurance company's] contract with [the motel owners], an adverse inference against [the motel owner] as to spoliation works indirectly against [the insurance company] to the extent the policy limits cover the damages that may be assessed."[44]

C. EVIDENTIARY AND OTHER SANCTIONS: THE CULPABILITY CONTINUUM

Because Indiana courts recognize no independent tort claims for first-party spoliation, Indiana litigants are limited to non-tort remedies. The party raising a claim of spoliation must prove that (1) a duty to preserve evidence existed and (2) the alleged spoliator either negligently or intentionally destroyed, mutilated, altered, or concealed the evidence.[45] Indiana courts may impose a variety of sanctions under Indiana Trial Rule 37 or using their inherent authority to deter litigants and their attorneys from engaging in spoliation.[46] A court's authority to sanction under the inherent authority doctrine extends beyond circumstances involving the violation of a court order or discovery ruling.[47] Regardless of the method it elects to use, the court must ensure that any sanction it fashions is just in light of the

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[41] 893 N.E.2d 1068 (Ind. Ct. App. 2008), *trans. denied*.

[42] *Id.* at 1074.

[43] *Kelley*, 653 N.E.2d at 505.

[44] *Id*. at 511.

[45] Popovich v. Indiana Dept. of State Revenue, 17 N.E.3d 405, 410 (Ind. T. C. 2014).

[46] Gribben v. Wal-Mart Stores, Inc., 824 N.E.2d 349, 349 (Ind. 2005); Prime Mortgage USA v. Nichols, 885 N.E.2d 628, 650-51 (Ind. Ct. App. 2008).

[47] *Compare, e.g.*, West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir.1999) *with* Hatfield v. Edward J. DeBartolo Corp., 676 N.E.2d 395, 399 (Ind. Ct. App. 1997), *trans. denied*.

particular circumstances of the case.[48] A stand-alone finding of spoliation will not necessarily require the imposition of sanctions.[49]

A court has a host of remedies available when spoliation warrants sanctions. Such remedies include an adverse inference; that is, the inference that the spoliated evidence was unfavorable to the party responsible.[50] Other important responses exist under Trial Rule 37(B) and include ordering that designated facts be taken as established, prohibiting the introduction of evidence, dismissing of all or any part of an action, rendering a judgment by default against a disobedient party, and requiring payment of reasonable expenses, including attorneys' fees. Attorneys participating in spoliation run afoul of the Indiana Rules of Professional Conduct and subject themselves to disciplinary proceedings.[51]

In *Howard Regional Health System v. Gordon*, the Indiana Supreme Court offered guidance on appropriate sanctions for spoliation:

> Determining whether sanctions are warranted and, if so, what they should include, requires a court to consider both the spoliating party's culpability and the level of prejudice to the party seeking discovery. Culpability can range along a continuum from destruction intended to make evidence unavailable in litigation to inadvertent loss of information for reasons unrelated to the litigation. Prejudice can range along a continuum from an inability to prove claims or defenses to little or no impact on the presentation of proof. A court's response to the loss of evidence depends on both the degree of culpability and the extent of prejudice. Even if there is intentional destruction of potentially relevant evidence, if there is no prejudice to the opposing party, that influences the sanctions consequence. And even if there is an inadvertent loss of evidence but severe prejudice to the opposing party, that too will influence the appropriate response, recognizing that sanctions (as opposed to other remedial steps) require some degree of culpability.[52]

Turning to the adverse inference, which—as *Armory v. Delamarie* illustrates—has been tripping up spoliators for centuries, Indiana courts permit

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48 *See* IND. T. R. 37(B)(2); Howard Reg'l Health Sys. v. Gordon, 952 N.E.2d 182, 189-90 (Ind. 2011) (stating that courts should "consider both the spoliating party's culpability and the level of prejudice to the party seeking discovery"); *Prime Mortgage,* 885 N.E.2d at 649 ("The only limitation on [a] court in determining an appropriate sanction is that the sanction must be just") (citation omitted).

49 *See Howard Reg'l Health Sys.,* 952 N.E.2d at 189-90; *see also* Smith v. Borg-Warner Auto. Diversified Transmission Prods. Corp.*,* No. IP 98-1609-C-T/G, 2000 WL 1006619, *7 (S.D. Ind. July 19, 2000) ("The measure of sanctions to be imposed, if any, must be proportionate to the conduct and circumstances justifying sanctions") (citation omitted).

50 *Gribben*, 824 N.E.2d 349.

51 IND. R. PROF'L CONDUCT 3.1, 3.3, 3.4(a), 3.4(b), 8.4.

52 *Gordon*, 952 N.E.2d at 189-90 (quoting Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 613 (S.D. Tex 2010).

it where a party in exclusive possession of facts or evidence suppresses those facts or evidence.[53] Under those circumstances, the Indiana courts allow the trier of fact to infer that the production of the evidence would be against the interest of the party that suppressed it.[54] While this rule does not relieve a party of the burden of proving its case, it may be considered as a circumstance in drawing reasonable inferences from the facts established.[55] This includes not only cases where evidence has been destroyed but also where it has been allegedly altered. In *Cahoon v. Cummings*, for example, a defendant physician in a medical malpractice case was alleged to have altered medical records by writing the words *Cline Scope* on an x-ray report.[56] The Indiana Supreme Court affirmed a trial court's instruction to a jury that "if you find that there are unexplained or intentional alterations of medical records by [defendant physician], you can presume that the evidence would have been unfavorable to [defendant physician] on the issue of proximate cause."[57]

This rule applies not only when a party actively prevents the disclosure of facts but also when the party merely fails to produce available evidence. A spoliating party may be subject to an adverse inference both for actions committed after the initiation of litigation and before the commencement of a lawsuit that the party knew or should have known was imminent.[58]

Indiana's Model Civil Jury Instructions specifically contemplate giving a spoliation instruction (where appropriate) at trial. Model Instruction 535 provides: "If a party fails to produce documents under the party's exclusive control, you may conclude that the documents the witness could have produced would have been unfavorable to the party's case." The instruction, according to Indiana's Model Civil Instructions Committee, "should only be given if the party requesting it gave the opposing party an opportunity to respond to a claim that he or she failed to produce evidence." The Committee noted, "some Indiana cases also appear to require that the party against whom the instruction is requested actively suppressed evidence" rather than negligently lost it.

In addition to civil and evidentiary sanctions, an egregiously culpable spoliator may also face criminal sanctions. Indiana Code § 35-44-3-4 provides that "a person who . . . alters, damages, or removes any record, document, or thing, with intent to prevent it from being produced or used as evidence in any official proceeding or investigation . . . commits obstruction of justice." This is a class D felony.

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53 Cahoon v. Cummings, 734 N.E.2d 535, 545 (Ind. 2000).

54 Porter v. Irvin's Interstate Brick & Block Co., 691 N.E.2d 1363, 1364-65 (Ind. Ct. App. 1998).

55 Great Am. Tea Co. v. Van Buren, 33 N.E.2d 580, 581 (Ind. 1941).

56 734 N.E.2d at 535.

57 *Id*.

58 *Id*.

II. AVOIDING SPOLIATION CLAIMS: EVIDENCE RETENTION AND THE LITIGATION HOLD NOTICE

Spoliation should be avoided by both lawyer and litigant. Avoiding spoliation sanctions requires an understanding of the duty to preserve evidence and the implementation of practices and policies to ensure that relevant documents and other forms of evidence are retained when litigation is ongoing or anticipated. A party's duty to preserve physical evidence is triggered when litigation becomes reasonably foreseeable. Attorneys and litigants seeking to avoid spoliation claims should take immediate action to preserve and maintain evidence as soon as litigation appears likely. More often, this requires a good understanding of an attorney's duties with respect to electronically stored information ("ESI"). As evidenced in a now-infamous line of federal court cases on ESI and document production, *Zubulake v. USB Warburg, LLC*[59] and *Pension Committee of the University of Montreal v. Banc of America Securities,*[60] mishandling ESI can have serious consequences for attorneys.[61] Although outside the scope of this article, attorneys requesting or responding to a request for voluminous ESI should also have a good working knowledge of the cost-shifting paradigm governing ESI set forth in Federal Rule of Civil Procedure 26(b)(2) and detailed extensively in the *Zubulake* cases.

Once a party reasonably anticipates litigation, it must suspend its routine document retention-destruction policy and institute a litigation hold to ensure the preservation of relevant documents. A comprehensive document retention policy that provides for the application of litigation holds is critical in defending against spoliation claims. A litigation hold suspends routine destruction of evidence. A litigation hold notice, or preservation letter, is a written directive advising custodians of documents of certain documents and ESI to preserve potentially relevant evidence in the event of future litigation. Litigation hold letters acknowledge the possibility of future litigation and identify documents and ESI that must be preserved. Such letters identify custodians and trigger the duty to preserve relevant evidence. This type of notice may be sent either by adversaries or by attorneys to their own clients advising them of the need to preserve documents. Litigation hold notices should be specific to the case at issue, and litigants must take all necessary steps to adequately implement any litigation hold and ensure compliance with the hold.

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[59] Judge Shira Sheindlin's opinions in *Zubulake I* through *Zubalake V* are found at 217 F.R.D. 309; 2003 WL 21087136; 216 F.R.D. 212; and 229 F.R.D. 422.

[60] Case No. 05-9016, Rec. Doc. 320, *available at* 2010 WL 184312 (S.D.N.Y. Jan 15, 2010).

[61] For a good discussion of these cases and ESI generally, see Christopher M. Hannan,, *Zubulake Revisited Six Years Later*, 18(3) PRETRIAL PRACTICE AND DISCOVERY (Spring 2010).

- *Draft a defensible litigation hold notice*.[62] This includes making a reasonable effort to assess and define the claims and issues in the litigation in order to identify with reasonable particularity the documents to be retained. A litigation hold letter drafted too broadly results in unnecessary time and expense as irrelevent documents are unnecessarily preserved. A litigation hold letter that is too narrow renders litigants susceptible to spoliation claims.
- *Draft the litigation hold notice in plain language*.[63] A litigation hold letter that is impossible to understand will be impossible to implement and follow.
- *Train employees and monitor compliance*. Counsel should encourage and assist clients to ensure employees are trained on how to comply with the litigation hold, and compliance should be periodically monitored.
- *Lift the hold*. Institute policies and procedures for lifting the hold when the company no longer has a duty to preserve evidence.

While not an absolute safeguard, implementing these practices can be an effective risk management tool to lessen a litigant's susceptibility to spoliation claims.

III. Damage Control

Whether document retention policies are scrupulously followed or flagrantly disregarded, evidence gets lost. But not every lost piece of evidence will result in a spoliation sanction. A review of Indiana case law shows attorneys faced with spoliation motions at a point where a piece of evidence cannot be recovered should consider the following in formulating a response:

1) *Is plaintiff bringing an independent action for first-party spoliation?* If so, this is 100 percent defensible: Indiana refuses to recognize an independent cause of action for first-party spoliation.[64]
2) *If this is an independent action for third-party spoliation, does a duty exist?* Courts recognize a duty in the context of third-party spoliation claims only when given an independent tort, contract, or special relationship.[65] Where the existence of a

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62 Evidence Preservation Warfare: Ediscovery Lessons Learned from AMD v. Intel,: ACC Docket 28, no. 7 (September 2010).

63 *Id.*

64 Gribben v. Wal-Mart Stores, Inc., 824 N.E.2d 349 (Ind. 2005).

65 Murphy v. Target Prods., 580 N.E.2d 687 (Ind. Ct. App. 1991).

duty is unclear, courts will apply *Webb v. Jarvis* to determine whether a duty exists between the parties in light of the circumstances.[66]

3) *If the claim involves alleged spoliation by a party to the principle litigation, when was the duty to preserve triggered?* The duty to preserve evidence arises only where litigation is ongoing or the spoliating party knew or should have known litigation was imminent.[67]
4) *Did the party who allegedly failed to preserve the evidence possess it exclusively?* A spoliation claim is viable only if the party who allegedly failed to preserve the evidence possessed it exclusively.[68]
5) *Is the evidence at issue physical or testimonial?* In the context of spoliation of evidence, "physical evidence is different from testimonial evidence."[69] For the spoliation doctrine to apply, the evidence must be exclusively possessed and must be made unavailable, destroyed, or altered. Physical evidence "is readily capable of being evaluated in terms of being exclusively possessed and being made unavailable, destroyed, or altered."[70] Testimonial evidence, on the other hand, "does not lend itself to being similarly evaluated."[71] In *Loomis v. Ameritech Corp*., for example, the Indiana Court of Appeals declined to hold that an attorney can exclusively possess testimonial evidence simply by meeting with a witness outside the presence of the opposing party.[72]
6) *What is the harm?* This consideration implicates the old "no harm, no foul" maxim. Unless a plaintiff alleging spoliation can demonstrate harm, his claim usually cannot succeed.[73]
7) *Was the alleged spoliation intentional or negligent?* Unless the alleged evidence destruction was intentional, Indiana case law suggests that an adverse inference is inappropriate.[74] In *Underwood v. Gale Tschuor Co., Inc.,* for example, the Indiana Court of Appeals upheld a trial court's refusal to give a plaintiff's adverse inference instruction to the jury where, among

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66 Thompson v. Owensby, 704 N.E.2d 134, 137 (Ind. Ct. App. 1998).

67 Porter v. Irvin's Interstate Brick & Block Co., 691 N.E.2d 1363 (Ind. Ct. App. 1998).

68 Loomis v. Ameritech Corp., 764 N.E.2d 658 (Ind. Ct. App. 2002).

69 *Id*.

70 *Id.* at 661.

71 *Id*.

72 *Id*. at 664.

73 J.S. Sweet Co. v. Sika Chem. Corp., 400 F.3d 1028 (7th Cir. 2005).

74 Underwood v. Gale Tschuor Co., Inc., 799 N.E.2d 1122 (Ind. Ct. App. 2003).

other things, there was no evidence to suggest that the defendant intentionally destroyed evidence when he painted a counterweight involved in the accident forming the basis of the litigation before plaintiff inspected it.[75]

8) *Was the evidence destroyed as a result of standard investigative procedures?* At least one Indiana case suggests that evidence that is destroyed as a result of standard investigative procedures cannot form the basis for a spoliation claim. In *Alsheik v. Guerrero*, for example, the Indiana Court of Appeals declined to find that a pathologist spoliated evidence when he destroyed sutures during the course of a routine autopsy where there was no evidence that the destruction was done for any reason other than the standard practice of investigative procedures, that is, for opening up the incision wound during an autopsy to evaluate if anything had gone wrong during surgery, and there was no evidence that the action was done negligently or intentionally to suppress the truth.[76]
9) *Was the allegedly spoliated evidence relevant to an issue in the case?* Evidence is relevant, pursuant to Indiana Evidence Rule 402, where two conditions are satisfied: (1) the evidence has any tendency to make a fact more or less probable than it would be without the evidence, and (2) the fact is of consequence in determining the action. Spoliation of evidence occurs only when one party destroys evidence relevant to an issue in the case.[77]

IV. Conclusion

In the age of electronic discovery and increasingly contentious litigation, attorneys can minimize the risk that they and their clients will face spoliation sanctions by providing proactive guidance on evidence retention policies. Where evidence has already been lost and attorneys find themselves with the *Armory v. Delamarie* jeweler for a client, Indiana law provides important guideposts for effectively defending the claim for sanctions.

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[75] *Id*.

[76] Alsheik v. Guerrero, 956 N.E.2d 1115, 1124 (Ind. Ct. App. 2011), *opinion aff'd in part, vacated in part*, 979 N.E.2d 151 (Ind. 2012).

[77] *Id.* at 988 (in a case involving the alleged spoliation of a tank, concluding that "spoliation of evidence does not apply in this case because the tank itself sheds no light on [plaintiff's] claims he owned it, protested its removal, or was assaulted").