ALFA International
THE GLOBAL LEGAL NETWORK

# 2023 Construction Law Seminar

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## Could've, Would've, Should've

*What to do when a construction issue arises and properly documenting for future resolution/litigation.*


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# Introduction

"It's not what happened, but what you are able to prove happened that is important."

J. Snowden Stanley, a founding member of the ALFAC construction practice group, used to preach this maxim to clients and young attorneys alike. Indeed, whether it is addressing an injury/damage causing incident, delay claim, or potential error or defect allegation, there is little that is more important to the future litigation than proper documentation and retention of the information and evidence. Any eventual arbitration or litigation regarding the event is likely years away, but the opportunity to gather information and record what is happening on site in real time is now (and fleeting). The panel presentation will be a discussion of past experiences with these situations and claim outcomes. These materials serve to provide in writing certain associated considerations and best practices.

# Job Site Accidents

The aftermath of any construction site incident can be chaotic. From the catastrophic to the seemingly minor, there is often a flurry of necessary activity and important decisions to be made including potential retention of outside counsel or third-party investigators/experts. Because these decisions need to be made under pressure and time constraints it is important to consider in advance and be prepared.

Factors for consideration

- Stop all work?
- Who should handle investigation?
- Written incident report? What level of detail?
- Obtain written or recorded statements from witnesses?
- Hire an attorney?
- Hire an expert?
- Material or real evidence storage and preservation.
- Avoiding claim of spoliation.

In reality, the decisions can be easier when addressing a very serious accident/incident than they are in responding to a seemingly minor event or one lacking an apparent injury. In all instances, however, care should be taken to handle the response in a manner consistent with company policy if one exists. If an investigation or accident response differs from the requirements or guidance of the established company policy it will raise questions with any Judge, jury, or arbitrator. If you are finding that in the course of accident/incident response the individuals tasked with the assignment are not conforming to company policy, consider modification of the policy or steps necessary to ensure compliance.

## *Serious injury/large scale property damage*

OSHA notification is required when an employee fatality occurs, suffers a work-related hospitalization, amputation, or loss of an eye. A fatality must be reported to OSHA within 8 hours, while in-patient hospitalization, amputation, or eye loss must be reported within 24 hours.[i]

If OSHA reporting is required and you or your insured have any responsibility for the job site, the area of the incident or the tools/equipment involved you will want to consult with counsel immediately and likely hire an engineer or other appropriate expert. Involvement of counsel at the outset will assist in navigating legal issues and also draw a bright line for purposes of work product protection of the investigation. Indeed, even if the occurrence does not involve an OSHA reportable injury but you are reasonably certain due to the manner of incident or type of injury that litigation is likely to result, similar steps should most likely be taken.

Likewise in any obvious large scale property damage claim the investment in outside counsel and one or more appropriate experts is likely to pay dividends when defending or pursuing the claim weeks, months or quite likely years later.

## *Seemingly less serious or unknown level of injury*

More difficult questions can present themselves when responding to incidents resulting in seemingly less severe injuries. An incident resulting in a sprain or strain or other injury that does not require immediate medical attention can later mushroom into a claim of permanent injury. Likewise, an occurrence with seemingly nominal property damage could later involve lost profits or other consequential damages claims. It can be difficult and costly (and possibly counter-productive, depending on the relative size and scope of the project) to do a full-scale investigation and response with outside counsel and retained expert for every "incident." As such, experienced in-house counsel, safety and risk personnel and/or claim professionals must make informed decisions on limited information and no two situations may be the same.

As such, the following are the panel's recommended best practices in dealing with any job site incident:

### Create an incident report

While the specific items and content to be included can be discussed and debated, there is significant value in preparing a timely incident report. Nearly all such reports prepared without involvement of outside counsel will be deemed to be created in the regular course of business and discoverable in litigation. As such, care should be taken not to make statements or opinions about root cause or assessments of fault. There is, however, significant value in documenting facts that could later be in dispute and material:

- Date of the incident
- Time of the incident
- Specific location on site where incident occurred
- Names of witnesses or individuals in the vicinity of the location
- What injury or property damage informed of or observed

The decision to take and include witness statements within such an incident report is more complicated and should likely be made on an incident-by-incident basis.

### Take photographs / identify any surveillance or security video footage

Much the same as a straightforward collection of factual information via incident reports, there is little downside to obtaining video of the incident or taking photographs of the scene as it existed at or near the time of the incident. While such photographs or videos may not ultimately be beneficial to your position they will aid in any evaluation of the matter as well as allow for proper context when witnesses or injured parties are providing recollections of the incident.

Assess potential for any loss of evidence or lost opportunity of others to review / inspect

In responding to any incident or occurrence it is necessary to determine if there is any item, equipment or other instrument of real evidence that should be secured and retained. A broken ladder, damaged vehicle, malfunctioning tool, or failed weld might be intimately involved in how an occurrence took place. If such real evidence exists, it should be collected and preserved in such a way as to avoid alteration or degradation. If it can be done without significant costs or disruption of other work, evidence should be retained until claim resolution. If storage would be burdensome or impossible, care should be taken to provide an opportunity to inspect with reasonable notice to any interested party.

## Spoliation

As noted above, one important consideration in gathering and preserving evidence is avoiding spoliation of evidence or the claim of spoliation by an opposing party. A brief overview of the treatment of spoliation in select states is set out below, but consult the ALFA attorney in the relevant jurisdiction when a specific question regarding spoliation arises.

### *California*

#### Spoliation standard

California courts have given mixed messages about whether there is a tort for the intentional Spoliation of evidence. *Compare Cedars-Sinai Med. Ctr. v. Sup.Ct.*, 18 Cal.4th 1, 954 P.2d 511 (1998) (holding that there is no tort for "the intentional spoliation of evidence by a party to the cause of action to which the spoliated evidence is relevant, in cases in which ... the spoliation victim knows or should have known of the alleged spoliation before the trial or other decision on the merits of the underlying action") with *Cooper v. State Farm Mut. Auto. Ins. Co.*, 177 Cal.App.4th 876 (2009) (stating that where one party promises to preserve evidence, and it is then destroyed, and the other party detrimentally relied on that promise, there may be a tort available).

There is no tort for negligent Spoliation, however. See *Forbes v. County of San Bernardino*, 101 Cal. App.4th 48, 123 Cal.Rptr.2d 721, 726-27 (2002).

#### Potential sanctions.

California recognizes several remedies that seek to punish and deter the intentional Spoliation of evidence. See *Cedars-Sinai Med. Ctr.,* 18 Cal.4th at 11, 954 P.2d at 517.

In Cedars-Sinai, the Court stated that "chief among" these remedies is "the evidentiary inference that evidence which one party has destroyed or rendered unavailable was unfavorable to that party." *Id.* This evidentiary inference is set forth in West's Ann. Cal. Evid. Code § 413, CA EVID § 413.

The court notes other sanctions to be "State Bar of California disciplinary sanctions that can be imposed on attorneys who participate in the Spoliation of evidence" and cites Bus. & Prof. Code, § 6106 and Rules Prof. Conduct, rule 5–220 as authority. *Id.*

Also, there are discovery sanctions under California Code of Civil Procedure §2023.030.

The court also states that there are criminal penalties for Spoliation in the California Penal Code § 135 ("Every person who, knowing that any book, paper, record, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, willfully destroys or

conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor.")

## *Florida*

### Spoliation standard

Florida does not recognize the duty to preserve evidence at common law. The court in *Peña v. Bi-Lo Holdings, LLC*, stated that the duty must originate in a contract, statute, or discovery request. 304 So.3d 1254 (Fla. 3rd DCA 2020).

In cases of first party Spoliation, there is no independent cause of action for Spoliation of evidence. *Martino v. Wal-Mart Stores Inc.*, 908 So.2d 342 (Fla. 2005).

However, Florida Appellate Courts have recognized an independent claim for third party Spoliation. *Townsend v. Conshor, Inc.*, 832 So.2d 166, 167 (Fla. 2nd DCA 2002). But these cannot be initiated until the underlying claim is resolved. *Lincoln Ins. Co. v. Home Emergency Servs., Inc.*, 812 So.2d 433, 434-435 (Fla. 3rd DCA 2001).

To establish a Spoliation claim, the following elements must be met: "(1) existence of a potential civil action, (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action, (3) destruction of that evidence, (4) significant impairment in the ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages." *Continental Insurance Co. v. Herman*, 576 So.2d 313, 315 (Fla. 3d DCA 1990).

### Potential sanctions

Florida courts have stated that "even in the absence of legal duty, though, the spoliation of evidence results in an adverse inference against the party that discarded or destroyed the evidence." *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 391 (Fla. 2015).

Courts can "impose sanctions, including striking pleadings, against a party that intentionally lost, misplaced, or destroyed evidence, and a jury could infer under such circumstances that the evidence would have contained indications of liability." *Id.* (citing *Martino v. Wal–Mart Stores, Inc.*, 908 So.2d 342, 346 (Fla.2005)).

In the case of negligent destruction, "a rebuttable presumption of liability may arise." *Id.*

In *Nationwide Lift Trucks, Inc. v. Smith*, 832 So.2d 824 (Fla. 4th DCA 2002), the court stated that the propriety of sanctions for failing to preserve evidence depends on: 1) the willfulness or bad faith of the responsible party, 2) the extent of the prejudice suffered by the other party, and 3) what is required to cure the prejudice.

## *New York*

### Spoliation standard

There is no independent cause of action for third party negligent Spoliation. See *MetLife Auto & Home v. Joe Basil Chevrolet, Inc.*, 1 N.Y.3d 478, 807 N.E.2d 865, 775 N.Y.S2d 754 (2004).

However, where there is spoliation by an employer, there may be a cause of action where it impairs an employee's right to sue a third party. See *DiDomenico v. C & S Aeromatik Supplies*, 252 A.D.2d 41, 682 N.Y.S.2d 452 (2d Dept.1998).

### Potential sanctions

C.P.L.R. § 3126 allows sanctions, including dismissal for a party's failure to disclose relevant evidence. *Met-Life*, 1 N.Y.3d at 482-83. The court will impose "carefully chosen and specifically tailored sanctions within the context of the underlying action" to remedy spoliation of evidence. A party may be granted summary judgment when the other side negligently fails to preserve crucial evidence. *Amaris v. Sharp Elecs.*, 758 N.Y.S.2d 637 (N.Y. App. Div. 2003). However, the court suggested in *Mylonas v. Town of Brookhaven*, 759 N.Y.S.2d 752, 753-754 (N.Y. App. Div. 2003), that awarding summary judgment to the plaintiff for the defendant's intentional destruction of evidence might be too harsh.

## Texas

### Spoliation standard

Texas courts engage in a two-part analysis to analyze Spoliation: "(1) the trial court must determine, as a question of law, whether a party spoliated evidence, and (2) if spoliation occurred, the court must assess an appropriate remedy." *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9, 14 (Tex. 2014).

Under the first step, "the court must find that (1) the spoliating party had a duty to reasonably preserve evidence, and (2) the party intentionally or negligently breached that duty by failing to do so." *Id.*

Under the second step, once spoliation is established, "the trial court has broad discretion to impose a remedy that, as with any discovery sanction, must be proportionate; that is, it must relate directly to the conduct giving rise to the sanction and may not be excessive. Key considerations in imposing a remedy are the level of culpability of the spoliating party and the degree of prejudice, if any, suffered by the nonspoliating party." *Id.*

There is no independent cause of action for negligent or intentional Spoliation of evidence by the parties in litigation. *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 18 (Tex. 2014); *Trevino v. Ortega*, 969 S.W.2d 950, 951 (Tex. 1998).

### Potential sanctions

Texas courts have held that "While the spectrum of remedies that may be imposed range from an award of attorney's fees to the dismissal of the lawsuit, the harsh remedy of a spoliation instruction is warranted only when the trial court finds that the spoliating party acted with the specific intent of concealing discoverable evidence, and that a less severe remedy would be insufficient to reduce the prejudice caused by the spoliation." *Id.*

## *Pennsylvania*

### Spoliation standard

Spoliation of evidence is not recognized as a separate cause of action under Pennsylvania law. *Elias v. Lancaster Gen. Hosp.*, 710 A.2d 65, 68 (Pa. Super. Ct. 1998).

The Court states, however, that the factors to be considered in determining an appropriate sanction for failure to preserve evidence are: "(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) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct." *Eichman v. McKeon*, 2003 PA Super 185, ¶ 8, 824 A.2d 305, 313 (2003) (adopting the test of the Third Circuit in *Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76 (3rd Cir.1994)).

### Potential sanctions

A common sanction in Pennsylvania for Spoliation is an adverse inference jury instruction. *Eichman v. McKeon*, 2003 PA Super 185, ¶ 9, 824 A.2d 305, 313 (2003). On the other hand, the court views prohibiting expert testimony as an "extreme sanction." *Schroeder v. Com., Dep't of Transp.*, 551 Pa. 243, 250, 710 A.2d 23, 27 (1998).

## *Ohio*

### Spoliation standard

There is an independent tort for intentional Spoliation against primary and third parties in Ohio. *Smith v. Howard Johnson Co. Inc.*, 67 Ohio St.3d 28, 29, 615 N.E2d 1037 (1993). The elements are:

> "(1) Pending or probable litigation involving the plaintiff; (2) Knowledge on the part of the defendant that litigation exists or is probable; (3) Willful destruction of evidence by defendant designed to disrupt plaintiff's case; (4) Disruption of plaintiff's case; and (5) Damages proximately caused by defendant's acts." *Id.*

### Potential sanctions

Punitive damages may be awarded for Spoliation in medical malpractice actions. *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331 (Ohio App. 1994).

Ohio allows for discovery sanctions for an adverse party's willful and prejudicial failure to produce/preserve evidence. *Barker v. Wal-Mart Stores, Inc.*, 2001 WL 1661961, 7 (Ohio Ct. App. Dec. 31, 2001). It also allows for adverse jury instruction. *Tate v. Adena Regional Med. Ctr.*, 801 N.E.2d 930 (Ohio Ap. 2003).

## *Maryland*

### Spoliation standard

There is no general duty to preserve evidence in Maryland. See *Miller v. Montgomery* (stating that "the destruction or alteration of evidence by a party gives rise to inferences or presumptions unfavorable to the spoliator, the nature of the inference being dependent upon the intent or motivation of the party"). The possibility for sanction may arise even if there is no evidence of fraudulent intent. *Anderson v. Litzenberg*, 115 Md. App. 549, 561, 694 A.2d 150,155 (Md. App.,1997).

### Potential sanctions

Maryland court can impose a wide variety of discovery sanctions, and this "imposition of sanctions is within its wide discretion." See *Klupt v. Krongard*, 728 A.2d 727, 738 (Md. Ct. Spec. App. 1999). The authority to impose such sanctions is found in Md. Rule 2-433(a). It even holds for severe sanctions such as dismissal and default judgements. *Id.*

## *Tennessee*

### Spoliation standard

Rule 34A.02. of the Tennessee Code of Civil Procedure states "Rule 37 sanctions may be imposed upon a party or an agent of a party who discards, destroys, mutilates, alters, or conceals evidence."

"Under the doctrine of spoliation [of evidence], a trial court may draw a negative inference only where the spoliating party 'has intentionally, and for an improper purpose, destroyed, mutilated, lost, altered, or concealed evidence.'" *Tatham v. Bridgestone Americas Holding, Inc.*, 473 S.W.3d 734, 740 (Tenn. 2015), quoting *Bronson v. Umphries*, 138 S.W.3d 844, 854 (Tenn. Ct. App. 2003).

"[I]ntentional misconduct is not a prerequisite for a trial court to impose sanctions for the spoliation of evidence." *Tatham*, 473 S.W.3d at 746.

Tennessee does not recognize an independent cause of action for first party Spoliation of evidence because, in such cases, sanctions for the Spoliation generally can remedy any harm a plaintiff suffers by a defendant's actions. *Poynter v. General Motors Corp.*, 476 F. Supp. 2d 854 (E.D. Tenn. 2007).

### Potential sanctions

Caselaw suggests that courts have wide discretion to impose any kind of sanction. See *Id.* (stating that "the decision to impose sanctions for the spoliation of evidence is within the wide discretion of the trial court").

"[T]he analysis for the possible imposition of any sanction for the spoliation of evidence should be based upon a consideration of the totality of the circumstances." *Id.*

Most commonly courts will impose a sanction of adverse inference against the spoliator, however, greater sanctions may be available depending on the facts and circumstances. *Foley v. St. Thomas Hosp.*, 906 S.W.2d 448, 453-54 (Tenn. Ct. App. 1995).

## *Georgia*

### Spoliation standard

To prove Spoliation, the moving party must establish that (1) the evidence is necessary to litigation and (2) there was contemplated or pending litigation at the time of the alleged Spoliation. *Amli Residential Properties, Inc. v. Georgia Power Co.*, 293 Ga.App. 358, 361 (2008).

### Potential sanctions

"Where a party has destroyed or significantly altered evidence that is material to the litigation, the trial court has wide discretion to fashion sanctions on a case-by-case basis." *Id.*

Where the court finds that Spoliation did occur, it will consider factors to exercise such discretion. The factors include: "(1) whether the party seeking sanctions was prejudiced as a result of the destruction of the evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the party who destroyed the evidence acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence was not excluded." *Id.*

Dismissal of the case is the ultimate sanction. *Bridgestone/Firestone N. Am. Tire, LLC v. Campbell*, 258 Ga. App. 767, 771, 574 S.E.2d 923, 928 (2002). Other sanctions include exclusion from evidence or adverse inference through jury instruction. *Id.* at 927-28.

## *Massachusetts*

### Spoliation standard

The doctrine of Spoliation "does not extend to a 'fault free destruction or loss of physical evidence.'" *Santiago v. Rich Products Corp.*, 92 Mass. App. Ct. 577, 580 (2017), quoting *Kippenhan v. Chaulk Services, Inc.*, 428 Mass 124, 127 (1998).

Sanctions may be imposed even if Spoliation of evidence occurred before the legal action was commenced, if a litigant knows or reasonably should know that the evidence might be relevant to a possible action. *Stull v. Corrigan Racquetball Club, Inc.*, 2004 WL 505141 (Mass. Super. 2004).

There is no independent tort for Spoliation of evidence in Massachusetts. *Fletcher v. Dorchester Mut. Ins. Co.*, 437 Mass. 544, 773 N.E.2d 420 (2002)

### Potential sanctions

Massachusetts allows the following sanctions: exclusion of testimony in the underlying action, adverse inferences against the spoliator, allowance of evidence showing pre-accident condition of lost evidence and circumstances concerning how the evidence was spoliated, dismissal, or judgment by default. See *Gath v. M/A-Com, Inc.*, 440 Mass. 482, 488 (2003).

## *Arizona*

### Spoliation standard

"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.'" See *Souza v. Fred Carries Conts., Inc.*, 191 Ariz. 247, 250, 955 P.2d 3, 6 (Ct. App. 1997) quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y.1991).

### Potential sanctions

Arizona does not adopt a bright line rule for issuing sanctions for Spoliation. See *Souza,* 191 Ariz. at 250, 955 P.2d at 6 (stating that "[a]dopting inflexible, 'bright line' rules in this area, in our view, would be ill-advised.").

Instead, "issues concerning destruction of evidence and appropriate sanctions therefor should be decided on a case-by-case basis, considering all relevant factors." *Id.*

Looking to the facts of the case, the court in Souza found that plaintiff's negligent destruction of the evidence, rather than willful or volitional destruction, was not enough to impose a sanction of dismissal. *Id.*

The court considered whether to allow an adverse inference instruction in *McMurtry v. Weatherford Hotel, Inc.*, 293 P.3d 520, 536 (Ariz. Ct. App. 2013). It explained that in deciding whether to allow an adverse inference, it will consider "whether the loss of evidence prejudiced the party seeking sanctions" and if it was intentional or in bad faith. *Id.*

## *Virginia*

### Spoliation standard

Virginia recognizes the adverse inference doctrine for Spoliation claims. *Emerald Point, LLC v. Hawkins*, 808 S.E.2d 384, 392-93 (Va. 2017). The "evidence must support a finding of [1] intentional loss or destruction [2] to prevent its use in litigation."

Additionally, Virginia recognizes a negligence standard which results in the adverse inference for Spoliation. See *Wolfe v. Virginia Birth-Related Neurological Injury Compensation Program*, 40 Va. App. 565 (2003). "Spoliation encompasses conduct that is either . . . intentional or negligent." *Id.* at 581 (internal quotations omitted). "A Spoliation inference may be applied . . . if, at the time the evidence was lost or destroyed, a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." *Id.* at 581.

Virginia does not recognize a cause of action for Spoliation against an employer, though. *Austin v. Consolidation Coal Co.*, 501 S.E.2d 161, 163 (Va. 1998). This was only in the context of an employer preserving evidence for an employee's claim against a third party. *Id.*

### Potential sanctions

An inference is made that "the evidence, if it had been offered, would have been unfavorable to [the party that spoiled]." *Jacobs v. Jacobs*, 218 Va. 264, 269 (1977).

## *North Carolina*

### Spoliation standard

In North Carolina, the adverse inference for Spoliation is permissive rather than mandatory. *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 182-192 (2000). "[T]o qualify for the adverse inference, the party requesting it must ordinarily show that the 'spoilator was on notice of the claim or potential claim at the time of the destruction.'" *Id.* at 187 (quotation omitted).

In some instances, there is a duty to preserve evidence where the opposing party has been put on notice of the likelihood that litigation will occur. *Id.*

### Potential sanctions

"[W]here a party fails to introduce in evidence documents that are relevant to the matter in question and within his control . . . there is a presumption, or at least and inference that the evidence withheld, if forthcoming, would injure his case." *Id.* at 183.

## *Michigan*

### Spoliation standard

There is currently no independent tort of Spoliation in Michigan. *Panich v. Iron Wood Prods. Corp.*, 445 N.W.2d 795 (Mich. Ct. App. 1989).

The standard for Spoliation of evidence is in M. Civ. JI2d 6.01(d), a jury instruction rule. It states that a trier of fact

may infer the evidence not offered in a case would be adverse to the offending party if:

> "(1) the evidence was under the offending party's control, (2) could have been produced by the offending party, (3) that no reasonable excuse is shown for the failure to produce the evidence."

Where there is willful destruction, it is presumed that the non-produced evidence would have been adverse to the offending party, and when left unrebutted, this presumption requires a conclusion that the unproduced evidence would have been adverse to the offending party. *Trupiano v. Cully*, 84 N.W.2d 747, 748 (Mich. 1957).

### Potential sanctions

Michigan courts sanction Spoliation with an adverse inference instruction. See M. Civ. JI2d 6.01(d).

## *Wisconsin*

### Spoliation standard

Wisconsin courts do not recognize an independent action for either intentional or negligent spoliation. *Estate of Neumann ex rel. Rodli v. Neumann*, 242 Wis.2d 205, 244-249, 626 N.W.2d 821, 840 - 843 (Wis. App. 2001).

However, an adverse inference is allowed where intentional spoliation has been found. See *Jagmin v. Simonds Abrasive Co.*, 61 Wis. 2d 60, 81, 211 N.W.2d 810, 821 (1973) (stating that an adverse inference instruction "is reserved for deliberate, intentional actions and not mere negligence even though the result may be the same as regards the person who desires the evidence").

In order to allow an adverse inference instruction, it must be proven "to a reasonable certainty by evidence which was clear, satisfactory and convincing that the defendant intentionally destroyed, or fabricated evidence." *Id.*

The obligation to preserve evidence is discharged once the party in possession has provided reasonable notice of a potential claim, the claim's basis, evidence relevant to the claim, and a reasonable opportunity for inspection of the evidence. *American Family v. Golke Brothers*, 319 Wis.2d 397, 768 N.W.2d 729 (Wis. 2009).

### Potential sanctions

Wisconsin courts have discretion to impose sanctions and will consider the facts and circumstances of the case. *Farr v. Evenflo Co., Inc.*, 287 Wis.2d 827, 705 N.W.2d 905 (Wis. 2005). They have considered whether the destruction was intentional or negligent, whether comparable evidence is available, and whether the responsible party knew or should have known that a lawsuit was a possibility at the time of destruction. *Id.*

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[i] 29 CFR 1904.39