Introduction

"Contra spoliatorem omnia praesumuntur."

More than 275 years ago, in *Armory v. Delamirie*, an English court confronted one of the first recorded instances of spoliation of evidence.[1] In that case, a chimney sweep found a jeweled ring and took it to a jeweler for appraisal. When the jeweler returned the ring without the stone, the chimney sweep brought an action to recover the gem. Since the jeweler had retained the stone, the judge instructed the jury to "presume the strongest against the [jeweler] and make the value of the best jewels the measure of . . . damages." The court announced the now familiar axiom that a party should be held accountable for improperly destroying evidence: "*Contra spoliatorem omnia praesumuntur*," *i.e.,* "All things are presumed against a spoliator."[2] In the nearly three centuries since *Armory*, courts and practitioners have wrestled with spoliation of evidence in the context of civil litigation.[3]

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1. 93 Eng. Rep. 664 (K.B. 1722). Spoliation, or the act of ruining, destroying, or spoiling something, is often misspelled and mispronounced as "spoilation." According to Bryan Garner, the difference between the form of the verb and the form of the noun "arises from the different paths by which the words came into English: in the 14th century, "spoil" was borrowed from the Old French ("espoille"). Whereas in the 15th century "spoliation" was borrowed from Latin ("spoliatio"). *Garner's Usage Tip of the Day, Miscellaneous Entries,* spoliation; despoliation; despoilment at http://www.lawprose.org/blog (Jan. 18, 2013).

2. *Id.*; *see also* Sullivan v. General Motors Corp., 772 F. Supp. 358, 360 (N.D. Ohio 1991) (noting that at common law "it was proper to presume that evidence which had been destroyed, or 'spoliated,' could be construed against the party responsible for the destruction of that evidence"); Welsh v. United States, 844 F.2d 1239, 1246 (6th Cir. 1988) (discussing the modern application of *Armory v. Delamirie*); Warner Barnes & Co. v. Kokosai Kisen Kabushiki Kaisha, 102 F.2d 450, 453 (2d Cir. 1939), *modified*, 103 F.2d 430 (2d Cir. 1939) ("When a party is once found to be fabricating, or suppressing, documents, the natural indeed, the inevitable, conclusion is that he has something to conceal, and is conscious of guilt.").

3. *See* Rex v. Arundel, 1 Hob. 109, 80 Eng. Rep. 258 (K.B. 1617). Early decisions by American courts in which the spoliation inference was considered include *Pizarro*, 15 U.S. 227 (1817) and *Hanson v. Lessee of Eustace*, 43 U.S. 653 (1844).

In 1940, the Fifth Circuit highlighted the negativity associated with the word "spoliation," describing it as a "word with evil connotations, . . . [that] dictionaries make. . . synonymous with pillaging, plundering, and robbing."[4]

Spoliation is "hardly confined to blockbuster events. Documents that should be produced in response to a discovery request are regularly shredded, altered, or suppressed."[5] An early study concluded that 50 percent of all litigators found spoliation to be either a frequent or regular problem.[6] But "[i]t appears to be as difficult to find a commentator who thinks evidence tampering is under control, as it is to find systematic empirical evidence confirming its ubiquity,"[7] since "[c]onclusive statistics that prove the frequency of spoliation in the civil litigation context are difficult to obtain."[8]

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2 John H. Wigmore, Evidence In Trials At Common Law 278, at 133 (Chadbourne Rev. ed. 1979) ("It has always been understood . . . that a party's *falsehood or other fraud* in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation . . . is receivable against him as an indication of his consciousness that his case is a weak or unfounded one.").

4. United Medical Supply Co. v. United States, 77 Fed. Cl. 257, 276 (Fed. Cl. 2007) (quoting Wichita Royalty Co. v. City Nat'l Bank of Wichita Falls, 109 F.2d 299, 302 (5th Cir. 1940)).

5. Charles W. Adams, *Spoliation Of Electronic Evidence: Sanctions Versus Advocacy,* 18 Mich. Telecomm. Tech. L. Rev. 1, 59 (Fall 2011) (citing Chris William Sanchirico, *Evidence Tampering*, 53 Duke L.J. 1215, 1218 (2004).

6. *See* Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 Cardozo L. Rev. 793 (1991). Professor Nesson acknowledges an overwhelming incentive for spoliation, because typically an opponent is unlikely to discover either the spoliated evidence or the act of spoliation itself. *See also* Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness Its Principal Problems and Abuses*, 1980 Am. B. Found. Res. J. 787, 829 (noting that it is "difficult to exaggerate the pervasiveness of evasive practices"); Edward J. Imwinkelried, *A New Antidote for an Opponent's Pretrial Discovery Misconduct: Treating the Misconduct at Trial as an Admission by Conduct of the Weakness of the Opponent's Case*, 1993 B.Y.U. L. Rev. 793, 794 (1993) (noting "deliberate obstructionism is common place").

7. Sanchirico, *supra* note 5, at 1218 n.4. For a detailed analysis of the empirical basis for the concerns voiced by commentators regarding evidentiary foul play, *see id.* at 1230, 1239.

8. Virginia L. H. Nesbitt, *A Thoughtless Act of a Single Day: Should Tennessee Recognize Spoliation of Evidence as an Independent Tort?* 37 U. Mem. L. Rev. 555, 558 (2007) (citing Sanchirico, *supra* note 5, at 1239).

Evidence tampering[9] has created headlines suggesting the production of evidence "is a game whose rules can be broken."[10] Discussing its impact in civil lawsuits, a regular commentator on litigation observed, "Spoliation, in case you haven't heard, is the newest battleground of contemporary litigation, now a continuing sideshow, if not the main event, in courtrooms across the country."[11]

Commenting on this trend, a district court observed that sanctions motions addressing claimed spoliation of evidence are serious business since, in addition to being time-consuming and costly, they nearly always "implicate professional and personal reputations." Beyond that,

> When proven, the spoliation of evidence can materially affect the disposition of the case on the merits and must be remedied. When it is not, the sting of the allegations remains, along with the lost time and unnecessary expenses attendant to litigating what turns out to have been a costly diversion. If such motions become part of the routine of litigation. . . , lawyers may begin to provide legal advice based less on a good faith sense of factual and legal proportionality regarding preservation obligations, and more out of a fear of hefty judicial sanctions if their judgment later turns out to have been incorrect when viewed with the benefit of hindsight. [12]

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9. The term evidence tampering refers to a range of activities "by which parties alter the natural evidentiary 'emissions' of the transactions and occurrences that may give rise to suit." SANCHIRICO, *supra* note 5, at 1218 n.4.

10. SANCHIRICO, *supra* note 5, at 1217. *See also* Bethany McLean & Peter Elkind, *The Smartest Guys In The Room The Amazing Rise and Scandalous Fall of Enron* 381-383 (Portfolio 2003) (discussing Arthur Andersen's document shredding, which reportedly ended only after it received a subpoena from the Securities and Exchange Commission even though the SEC had announced its planned inquiry earlier).

11. Robert E. Shapiro, *Advance Sheet: Conclusion Assumed*, 36 LITIGATION 59 (Spring 2010) (commenting on the headline-grabbing decisions that have created "fear and loathing by lawyers of the e-discovery quagmire, the concern that even their most diligent productions efforts will fail to deliver results. They despair of one day finding themselves standing before the judge, stuttering and sputtering in the efforts to explain why certain documents are just being produced or, worse, confirming their destruction, with no more excuse than that accidents sometimes happen and facing a certain outcome of sanctions or worse.").

12. Bozic v. City of Washington No. 2:11-cv-674, 2012 U.S. Dist. LEXIS 172316, *3-4 (W.D. Pa. Dec. 5, 2012) (citing *Electronic Spoliation Sanctions:*

The court expressed concern "if this comes to pass, no participant in our civil justice system will be well served because of the cost of "preventative 'over-preservation' . . . to both individuals and organizations."[13]

Although spoliation most often arises in litigation, it also can touch on other practice areas. For example, corporate counsel must prepare document retention policies and programs with spoliation issues in mind. Spoliation can affect plaintiffs, defendants, and even third parties who may be required to retain evidence if they are on notice of possible litigation.[14]

As with the first and second editions, this book is intended to serve as a guide for the litigation practitioner faced with the loss of evidence in a civil suit in a state or federal court. Among other key topics, the authors discuss recordkeeping obligations, the duty to preserve evidence, independent causes of action for the destruction of evidence, and available sanctions and other remedies for spoliation. There are practical tips for practitioners at the end of each substantive chapter.

Chapters Seven and Eight include a brief analysis of the state law of spoliation by jurisdiction and the law of each federal circuit to assist practitioners in locating key cases in specific jurisdictions. An annotated bibliography of treatises, law review articles, and practical publications is included for those seeking more detailed information on various spoliation issues.

Delete at Your Own Risk, Presentation to ABA Labor & Employment Law Section, ERR Committee, Mar. 27, 2010 (David J. Carr ed.) and Emery G. Lee III, *Motions for Sanctions Based Upon Spoliation Evidence in Civil Cases, Report to The Judicial Conference Advisory Committee on Civil Rules*, Fed. Jud. Center 2011, at 5).

13. *Id.*

14. *See* W. Russell Welsh & Andrew C. Marquardt, *Spoliation of Evidence*, 23 WTR BRIEF 9, *36 (1994) (noting "all corporations . . . must consider their potential exposure to legal liability resulting from the destruction of records"). *See, e.g.*, *In re* Prudential Ins. Co. of Am. Sales Practices Litig., 169 F.R.D. 598 (D.N.J. 1997), *rev'd on other grounds*, 133 F.3d 225 (3d Cir. 1998) (insurer sanctioned where company's top management recognized the company's obligation to preserve documents in connection with certain lawsuits, but no one actively formulated, implemented, or communicated document retention policy).