Contents

Dedications vii
About the Authors ix
About the Editor xi
Acknowledgments to the 2013 Edition xiii
Introduction xv

Chapter 1
The Duty to Preserve Evidence 1
Applicable Law 2
Triggering the Duty to Preserve Evidence 7
Other Sources of the Duty to Preserve Evidence 15
Scope of the Duty to Preserve 17
The Obligation to Supervise Preservation 24
Obligations to Preserve Evidence in the Possession of Third Parties 28

Chapter 2
Record Retention and Preservation Measures 35
Designing a Document Retention Program 40
Determining Retention Requirements 46
Suspension of a Document Retention Policy 50
Post-Trigger Preservation Measures 55
The Legal or Litigation “Hold” 56
Other Preservation Safeguards 58

Chapter 3
Remedies and Sanctions for Spoliation in Pending Litigation 61
Sources of Authority for Sanctions 62
Rules of Civil Procedure 62
Court’s Inherent Authority 64
Factors Courts Consider To Remedy Spoliation 67
Culpability of the Offender 70
The Degree of Prejudice Caused by the Spoliator 72
Remedies and Sanctions for Spoliation of Evidence 74
Adverse Jury Inference 74
Rationales for Imposing an Adverse Inference 75
Culpability Courts Require to Impose an Adverse Inference 76
Chapter 4

Independent Causes of Action for Spoliation

California Recognizes Spoliation as a Tort

Development of the Spoliation Tort After Smith v. Superior Court

Recognition of the Spoliation Tort After California Rejects It

The Negligent Spoliation Cause of Action

Spoliation Claims Against Third Parties

Elements of the Spoliation Tort

Problematic Elements of the Spoliation Tort

Willful Destruction Designed to Disrupt Plaintiff’s Case

Disruption of Plaintiff’s Case

Damage Proximately Caused By Spoliation

Determining the Measure of Damages

Unavailability of a Tort Claim to Defendants

When Should a Spoliation Tort Claim Be Raised

Chapter 5

Criminal Sanctions for Spoliation

Chapter 6

Statutory Recordkeeping Obligations

Chapter 7

The Developing Law of Spoliation in State Civil Courts

Alabama

Alaska

Arizona

Arkansas

California

Colorado

Connecticut

Delaware

District of Columbia

Florida

Georgia

Hawaii

Idaho

Illinois
Indiana 198
Iowa 202
Kansas 204
Kentucky 208
Louisiana 210
Maine 216
Maryland 217
Massachusetts 220
Michigan 223
Minnesota 227
Mississippi 229
Missouri 232
Montana 234
Nebraska 236
Nevada 238
New Hampshire 243
New Jersey 246
New Mexico 251
New York 252
North Carolina 257
North Dakota 260
Ohio 264
Oklahoma 268
Oregon 271
Pennsylvania 273
Rhode Island 276
South Carolina 278
South Dakota 280
Tennessee 282
Texas 286
Vermont 295
Virginia 296
Washington 301
West Virginia 304
Wisconsin 309
Wyoming 313

Chapter 8
The Developing Law of Spoliation in Federal Courts 317
First Circuit Court of Appeals 318
Second Circuit Court of Appeals 321
Third Circuit Court of Appeals 325
Fourth Circuit Court of Appeals 330
Fifth Circuit Court of Appeals 340
Sixth Circuit Court of Appeals 345
<table>
<thead>
<tr>
<th>Circuit Court of Appeals</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Seventh Circuit Court of Appeals</td>
<td>348</td>
</tr>
<tr>
<td>Eighth Circuit Court of Appeals</td>
<td>352</td>
</tr>
<tr>
<td>Ninth Circuit Court of Appeals</td>
<td>357</td>
</tr>
<tr>
<td>Tenth Circuit Court of Appeals</td>
<td>363</td>
</tr>
<tr>
<td>Eleventh Circuit Court of Appeals</td>
<td>367</td>
</tr>
<tr>
<td>District of Columbia Circuit Court of Appeals</td>
<td>373</td>
</tr>
<tr>
<td>Federal Circuit Court of Appeals</td>
<td>377</td>
</tr>
</tbody>
</table>

Bibliography 381

Table of Cases 391

Index 441