Victor Stanley, Inc. v. Creative Pipe, Inc., MJG-06-2662 Appendix A to Memorandum, Order and Recommendation: Spoliation Sanctions by Circuit

aw		Can conduct be		Culpability and p	prejudice requirement	\$		Culpability and
Circuit Case law	Scope of Duty to Preserve	culpable per se without consideration of reasonableness?	For sanctions in general	for dispositive sanctions	for adverse inference instruction	for a rebuttable presumption of relevance	What constitutes prejudice	corresponding jury instructions
First	It is a duty to preserve potentially relevant evidence a party owns or controls and also a duty to notify the opposing party of evidence in the hands of third parties. <i>Velez v.</i> <i>Marriott PR</i> <i>Mgmt., Inc.</i> , 590 F. Supp. 2d 235, 258 (D.P.R. 2008).	This specific issue has not been addressed.	"The measure of the appropriate sanctions will depend on the severity of the prejudice suffered." <i>Velez</i> <i>v. Marriott PR</i> <i>Mgmt., Inc.,</i> 590 F. Supp. 2d 235, 259 (D.P.R. 2008). "[C]arelessness is enough for a district court to consider imposing sanctions." <i>Driggin v. Am.</i> <i>Sec. Alarm Co.,</i> 141 F. Supp. 2d 113, 123 (D. Me. 2000).	"severe prejudice or egregious conduct" <i>Driggin v. Am. Sec.</i> <i>Alarm Co.</i> , 141 F. Supp. 2d 113, 123 (D. Me. 2000).	"does not require bad faith or comparable bad motive" <i>Trull v.</i> <i>Volkswagon of</i> <i>Am., Inc.</i> , 187 F.3d 88, 95 (1st Cir. 1999); <i>Oxley v.</i> <i>Penobscot County</i> , No. CV-09-21- JAW, 2010 WL 3154975 (D. Me. 2010).	Whether relevance can be presumed has not been addressed.	When spoliation substantially denies a party the ability to support or defend the claim <i>Velez v. Marriott PR</i> <i>Mgmt., Inc.</i> , 590 F. Supp. 2d 235, 259 (D.P.R. 2008).	Intentional spoliation; permissive adverse inference if the jury finds that the spoliator knew of the lawsuit and the documents' relevance when it destroyed them <i>Testa v. Wal-</i> <i>Mart Stores,</i> <i>Inc.</i> , 144 F.3d 173, 178 (1st Cir. 1998).

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	Documents that	Yes; specific	"[D]iscovery	"willfulness, bad	Gross negligence	Bad faith or gross	When spoliation	Grossly
	are potentially	actions, such as the	sanctions	faith, or fault on	Pension Comm. of	negligence	substantially denies	negligent
	relevant to	failure "to issue a	may be imposed	the part of the	the Univ. of	Pension Comm. of	a party the ability to	conduct;
	likely litigation	written litigation	upon a party	sanctioned party"	Montreal Pension	the Univ. of Montreal	support or defend	permissible
	"are considered	hold," constitute	that has	Dahoda v. John	Plan v. Banc of	Pension Plan v. Banc	the claim	inference of
	to be under a	gross negligence	breached a	Deere Co., 216	Am. Sec., 685 F.	of Am. Sec., 685 F.	Pension Comm. of	"the relevance
	party's control,"	per se.	discovery	Fed. App'x 124,	Supp. 2d 456, 478-	Supp. 2d 456, 467	the Univ. of	of the missing
	such that the	Pension Comm. of	obligation not	125, 2007 WL	79 (S.D.N.Y.	(S.D.N.Y. 2010).	Montreal Pension	documents and
	party has a duty	the Univ. of	only through	491846, at *1 (2d	2010).		Plan v. Banc of Am.	resulting
	to preserve	Montreal Pension	bad faith or	Cir. 2007) (quoting	,		Sec., 685 F. Supp.	prejudice to the
	them, "when	Plan v. Banc of	gross	West v. Goodyear	Negligence		2d 456, 479	Defendants,
	that party has	Am. Sec., 685 F.	negligence, but	Tire & Rubber Co.,	Residential		(S.D.N.Y. 2010).	subject to the
	the right,	Supp. 2d 456, 471	also through	167 F.3d 776, 779	Funding Corp. v.			plaintiffs'
	authority, or	(S.D.N.Y. 2010).	ordinary	(2d Cir. 1999)).	DeGeorge Fin.			ability to rebut
	practical ability		negligence."		Corp., 306 F.3d 99,			the presumption
	to obtain the		Residential		108 (2d Cir. 2002).			to the
	documents from		Funding Corp.					satisfaction of
	a non-party to		v. DeGeorge		Intentional conduct			the trier of
	the action."		Fin. Corp., 306		In re Terrorist			fact." Pension
	In re NTL, Inc.		F.3d 99, 113		Bombings of U.S.			Comm. of the
	Sec. Litig., 244		(2d Cir. 2002).		Embassies in East			Univ. of
	F.R.D. 179, 195				Africa, 552 F.3d			Montreal
	(S.D.N.Y.				93, 148 (2d Cir.			Pension Plan v.
	2007).				2008).			Banc of Am.
					,			Sec., 685 F.
	The duty							Supp. 2d 456,
	extends to key							478 (S.D.N.Y.
	players.							2010).
	Zubulake v.							, .
	UBS Warburg							
	<i>LLC</i> , 220							
pu	F.R.D. 212, 217							
Second	(S.D.N.Y.							
Š	2003).							
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	D. (NT	D . 1 6.34	The 1	NT 1'	XX71 + (1 + m + 1 + m + m)	Constitution of	Tutout's us1
	Potentially	No; conduct is	Bad faith	The degree of fault	Negligence	Whether relevance	Spoliation of	Intentional
	relevant	culpable if "party	Bensel v. Allied	is considered, and	Canton v. Kmart	can be presumed has	evidence that would	spoliation;
	evidence; "it is	[with] notice that	Pilots Ass'n,	dispositive	<i>Corp.</i> , No. 1:05-	not been addressed.	have helped a	permissible
	essential that	evidence is	263 F.R.D. 150,	sanctions "should	CV-143, 2009 WL		party's case	inference
	the evidence in	relevant to an	152 (D.N.J.	only be imposed in	2058908, at *2-3		In re Hechinger Inv.	Mosaid Techs.,
	question be	action either	2009).	the most	(D.V.I. July 13,		Co. of Del., Inc.,	Inc. v. Samsung
	within the	proceeds to destroy		extraordinary of	2009).		489 F.3d 568, 579	Elecs. Co., 348
	party's	that evidence or		circumstances," see			(3d Cir. 2007).	F. Supp. 2d
	control.""	allows it to be		Mosaid Techs., Inc.	Intentional conduct			332, 334
	Canton v.	destroyed by		v. Samsung Elecs.	Brewer v. Quaker			(D.N.J. 2004).
	Kmart Corp.,	failing to take		Co., 348 F. Supp.	State Oil Refining			
	No. 1:05-CV-	reasonable		2d 332, 335 (D.N.J.	Corp., 72 F.3d 326,			
	143, 2009 WL	precautions"		2004), but a	334 (3d Cir. 1995).			
	2058908, at *2	Canton v. Kmart		minimum degree of				
	(D.V.I. July 13,	Corp., No. 1:05-		culpability has not				
	2009) (quoting	CV-143, 2009 WL		been identified.				
	Brewer v.	2058908, at *3						
	Quaker State	(D.V.I. July 13,						
	Oil Refining	2009) (quoting						
	Corp., 72 F.3d	Mosaid Techs., Inc.						
	326, 334 (3d	v. Samsung Elecs.						
	Cir. 1995))	Co., 348 F. Supp.						
q	,,	2d 332, 338 (D.N.J.						
Third		2004)) (emphasis						
I		added).						

	Documents that	The U.S. District	"only a	The court must "be	The court "must	Willful behavior	When spoliation	Willful
	are potentially	Court for the	showing of	able to conclude	only find that	Sampson v. City of	substantially denies	spoliation;
	relevant to	District of	fault, with the	either (1) that the	spoliator acted	Cambridge, 251	a party the ability to	adverse jury
	likely litigation	Maryland has	degree of fault	spoliator's conduct	willfully in the	F.R.D. 172, 179 (D.	support or defend	instruction, but
	"are considered	quoted Zubulake	impacting the	was so egregious as	destruction of	Md. 2008).	the claim	not the "series
	to be under a	<i>IV</i> , 220 F.R.D. at	severity of	to amount to a	evidence."		Goodman v. Praxair	of fact-specific
	party's control,"	220 ("Once the	sanctions"	forfeiture of his	Goodman v.		Servs., Inc., 632 F.	adverse jury
	such that the	duty to preserve	Sampson v. City	claim, or (2) that	Praxair Servs.,		Supp. 2d 494, 519	instructions"
	party has a duty	attaches, any	of Cambridge,	the effect of the	Inc., 632 F. Supp.		(D. Md. 2009);	that the plaintiff
	to preserve	destruction of	251 F.R.D. 172,	spoliator's conduct	2d 494, 519 (D.		Sampson v. City of	requested
	them, "when	documents is, at a	179 (D. Md.	was so prejudicial	Md. 2009).		Cambridge, 251	Goodman v.
	that party has	minimum,	2008) (using	that it substantially			F.R.D. 172, 180 (D.	Praxair Servs.,
	'the right,	negligent."). See	"fault" to	denied the			Md. 2008).	<i>Inc.</i> , 632 F.
	authority, or	Sampson v. City of	describe	defendant the				Supp. 2d 494,
	practical ability	Cambridge, No.	conduct ranging	ability to defend				523 (D. Md.
	to obtain the	WDQ-06-1819,	from bad faith	the claim."				2009).
	documents from	2008 WL 7514364,	destruction to	Silvestri v. Gen.				
	a non-party to	at *8 (D. Md. May	ordinary	Motors Corp., 271				
	the action.""	1, 2008) (finding	negligence).	F.3d 583, 593 (4th				
	Goodman v.	defendant's		Cir. 2001).				
	Praxair Servs.,	conduct negligent);						
	Inc., 632 F.	Pandora Jewelry,						
	Supp. 2d 494,	LLC v. Chamilia,						
	515 (D. Md.	LLC, No. CCB-06-						
	2009) (citation	3041, 2008 WL						
	omitted).	4533902, at *9 (D.						
		Md. Sept. 30,						
	It is also a duty	2008) (finding						
	to notify the	defendant's						
	opposing party	conduct grossly						
	of evidence in	negligent); cf.						
	the hands of	Goodman, 632 F.						
	third parties.	Supp. 2d at 522						
	Silvestri v. Gen.	(stating that						
	Motors Corp.,	defendant, "much						
	271 F.3d 583,	like the defendants						
	590 (4th Cir.	in Sampson and						
	2001).	Pandora, was						
		clearly negligent"						
	Duty extends to	because it failed to						
	key players.	implement a						
_	Goodman, 632	litigation hold, but						
Itl	F. Supp. 2d at	also explaining						
Fourth	512	why such action						
H		was negligent).						

	Party with	No: "Whether	"some degree of	Bad faith (and	Bad faith	"The Fifth Circuit has	When spoliation	Willful
	control over	preservation or	culpability"	prejudice)	Rimkus Consulting	not explicitly	substantially denies	spoliation; jury
	potentially	discovery conduct	Rimkus	Rimkus Consulting	Group, Inc. v.	addressed whether	a party the ability to	instruction
	relevant	is acceptable in a	Consulting	Group, Inc. v.	Cammarata, 688 F.	even bad-faith	support or defend	would "ask the
	evidence has a	case depends on	Group, Inc. v.	Cammarata, 688 F.	Supp. 2d 598, 617	destruction of	the claim	jury to decide
	duty to preserve	what is reasonable,	Cammarata,	Supp. 2d 598, 614	(S.D. Tex. 2010).	evidence allows a	Rimkus Consulting	whether the
	it; scope	and that in turn	688 F. Supp. 2d	(S.D. Tex. 2010).		court to presume that	Group, Inc. v.	defendants
	includes	depends on	598, 613 (S.D.	· · · · ·		the destroyed	Cammarata, 688 F.	intentionally
	evidence in	whether what was	Tex. 2010).			evidence was	Supp. 2d 598, 613	deleted emails
	possession of	done-or not done-				relevant or its loss	(S.D. Tex. 2010).	and attachments
	"employees	was proportional to				prejudicial."		to prevent their
	likely to have	that case and				Rimkus Consulting		use in
	relevant	consistent with				Group, Inc. v.		litigation."
	information,	clearly established				Cammarata, 688 F.		Rimkus
	i.e., 'the key	applicable				Supp. 2d 598, 617-18		Consulting
	players'"	standards." Rimkus				(S.D. Tex. 2010).		Group, Inc. v.
	Tango Transp.,	Consulting Group,						Cammarata,
	LLC v. Transp.	Inc. v. Cammarata,						688 F. Supp. 2d
	Int'l Pool, Inc.,	688 F. Supp. 2d						598, 620, 646
	No. 5:08-CV-	598, 613 (S.D. Tex.						(S.D. Tex.
	0559, 2009 WL	2010).						2010).
h	3254882, at *3							
Fifth	(W.D. La. Oct.							
I	8, 2009).							

							·	
	It is a duty to	This specific issue	Bad faith	willfulness, bad	Bad faith	"The spoliating party	When spoliation	Unintentional
1	preserve	has not been	(intentional)	faith, or fault	In re Global	bears the burden of	substantially denies	conduct;
-	potentially	addressed. In	destruction,	In re Global	Technovations,	establishing lack of	a party the ability to	permissible
	relevant	BancorpSouth	gross	Technovations,	Inc., 431 B.R. 739,	prejudice to the	support or defend	inference
	evidence that a	Bank v. Herter, 643	negligence, or	Inc., 431 B.R. 739,	782 (Bankr. E.D.	opposing party, a	the claim	Jain v.
I	party owns or	F. Supp. 2d 1041,	ordinary	779 (Bankr. E.D.	Mich. 2010).	burden the Sixth	Jain v. Memphis	Memphis
C	controls and to	1061 (W.D. Tenn.	negligence	Mich. 2010) (using		Circuit has described	Shelby Airport	Shelby Airport
r	notify the	2009), the court	In re Global	"fault" to describe	Bad faith not	as 'an uphill battle.""	Auth., No. 08-2119-	Auth., No. 08-
C	opposing party	quoted Zubulake	Technovations,	conduct ranging	required	Jain v. Memphis	STA-dkv, 2010 WL	2119-STA-dkv,
C	of evidence in	IV, 220 F.R.D. at	Inc., 431 B.R.	from intentional	Miller v. Home	Shelby Airport Auth.,	711328, at *4 (W.D.	2010 WL
t	the hands of	220 ("Once the	739, 780	conduct to ordinary	Depot USA, Inc.,	No. 08-2119-STA-	Tenn. Feb. 25,	711328, at *4-5
t	third parties.	duty to preserve	(Bankr. E.D.	negligence).	No. 3-08-0281,	dkv, 2010 WL	2010).	(W.D. Tenn.
Ĵ	Jain v.	attaches, any	Mich. 2010)		2010 WL 373860,	711328, at *2 (W.D.		Feb. 25, 2010).
1	Memphis	destruction of	(equating	Other cases in	at *1 (M.D. Tenn.	Tenn. Feb. 25, 2010).		
5	Shelby Airport	documents is, at a	intentional and	circuit define	Jan. 28, 2010).			
A	Auth., No. 08-	minimum,	bad faith	"fault" as				
2	2119-STA-dkv,	negligent."), but it	conduct).	"objectively	Ordinary			
2	2010 WL	also analyzed the		unreasonable	negligence			
7	711328, at *2	defendant's		behavior." E.g.,	Jain v. Memphis			
(W.D. Tenn.	conduct to make		BancorpSouth	Shelby Airport			
I	Feb. 25, 2010).	the finding that it		Bank v. Herter, 643	Auth., No. 08-			
		was "more than		F. Supp. 2d 1041,	2119-STA-dkv,			
Ι	Duty extends to	negligent."		1060 (W.D. Tenn.	2010 WL 711328,			
k	key players			2009); Jain v.	at *3 (W.D. Tenn.			
1	In re Nat'l			Memphis Shelby	Feb. 25, 2010);			
(Century Fin.			Airport Auth., No.	Forest Labs., Inc.			
1	Enters., Inc.			08-2119-STA-dkv,	v. Caraco Pharm.			
1	Fin. Inv. Litig.,			2010 WL 711328,	Labs., Ltd., No. 06-			
1	No. 2:03-md-			at *3 (W.D. Tenn.	CV-13143, 2009			
1	1565, 2009 WL			Feb. 25, 2010).	WL 998402, at *5-			
_	2169174, at *11				6 (E.D. Mich. Apr.			
Sixth	S.D. Ohio July				14, 2009).			
v 1	16, 2009).							

	Detector	N. D. I.	W/110 1 1 1	W/116 1 1 1	D. 16.4	TT	XX71	Caral
	Duty to	No: Breach is	Willfulness, bad	Willfulness, bad	Bad faith	Unintentional	When spoliation	Grossly
	preserve	failure to act	faith, or fault	faith, or fault	Faas v. Sears,	conduct is	substantially denies	negligent
	potentially	reasonably under	Jones v.	In re Kmart Corp.,	Roebuck & Co.,	insufficient for	a party the ability to	conduct; jury
	relevant	the circumstances	Bremen High	371 B.R. 823, 840	532 F.3d 633, 644	presumption of	support or defend	instruction to
	evidence party	Jones v. Bremen	Sch. Dist. 228,	(Bankr. N.D. Ill.	(7th Cir. 2008).	relevance	the claim	inform the jury
	has control over	High Sch. Dist.	No. 08-C-3548,	2007) (noting that		In re Kmart Corp.,	Krumwiede v.	of the
	Jones v.	228, No. 08-C-	2010 WL	fault, while based		371 B.R. 823, 853-54	Brighton Assocs.,	defendant's
	Bremen High	3548, 2010 WL	2106640, at *5	on reasonableness,		(Bankr. N.D. Ill.	L.L.C., No. 05-C-	duty and breach
	Sch. Dist. 228,	2106640, at *6-7	(N.D. Ill. May	is more than a		2007).	3003, 2006 WL	thereof
	No. 08-C-3548,	(N.D. Ill. May 25,	25, 2010)	"slight error in			1308629, at *10	Jones v.
	2010 WL	2010).	(stating that	judgment'")			(N.D. Ill. May 8,	Bremen High
	2106640, at *5	,	fault is based on	(citation omitted)			2006).	Sch. Dist. 228,
	(N.D. Ill. May	"The failure to	the				,	No. 08-C-3548,
	25, 2010).	institute a	reasonableness				When spoliation	2010 WL
	, ,	document retention	of the party's				substantially denies	2106640, at *10
		policy, in the form	conduct).				a party the ability to	(N.D. Ill. May
		of a litigation hold,					support or defend	25, 2010).
		is relevant to the	Bad faith				the claim	
		court's	BP Amoco				OR delays	
		consideration, but	Chemical Co. v.				production of	
		it is not <i>per se</i>	Flint Hills				evidence	
		evidence of	Resources,				Jones v. Bremen	
		sanctionable	LLC, No. 05 C				High Sch. Dist. 228,	
		conduct."	5, 2010 WL				No. 08-C-3548,	
			,				2010 WL 2106640.	
		<i>Haynes v. Dart,</i> No. 08 C 4834,	1131660, at *24 (N.D. Ill. Mar.				at *8-9 (N.D. Ill.	
Seventh		-	· ·				``	
/en		2010 WL 140387,	25, 2010).				May 25, 2010).	
Ser		at *4 (N.D. Ill. Jan.						
•1		11, 2010).						

	Duty to	Courts in the	Bad faith	Bad faith	Bad faith	This issue has not	Destruction of	"destruction
	Duty to		Wright v. City	Johnson v. Avco		been addressed, but it	evidence that "may	
	preserve	Eighth Circuit have	· ·		Greyhound Lines,	,		was not
	potentially	not found conduct	of Salisbury,	<i>Corp.</i> , No. 4:07CV	Inc. v. Wade, 485	has been stated that	have [been] helpful"	'willful' or
	relevant	culpable without	No.	1695 CDP, 2010	F.3d 1032, 1035	there is no	Dillon v. Nissan	malicious," but
	documents in	analyzing the facts,	2:07CV0056	WL 1329361, at	(8th Cir. 2007);	presumption of	<i>Motor Co.</i> , 986 F.2d	plaintiffs'
	party's	although	AGF, 2010 WL	*13 (E.D. Mo.	Menz v. New	irrelevance of	263, 268 (8th Cir.	counsel should
	possession	reasonableness is	126011, at *2	2010); Menz v.	Holland N. Am.,	intentionally	1993).	have known to
	Dillon v. Nissan	not discussed.	(E.D. Mo. Apr.	New Holland N.	Inc., 440 F.3d	destroyed documents.		preserve the
	Motor Co., 986		6, 2010).	Am., Inc., 440 F.3d	1002, 1006 (8th	Alexander v. Nat'l	"irreparable injury	evidence; jury
	F.2d 263, 267			1002, 1006 (8th	Cir. 2006);	Farmers Org., 687	to plaintiffs' claims"	was instructed
	(8th Cir. 1993).			Cir. 2006).	Stevenson v. Union	F.2d 1173, 1205 (8th	Monsanto Co. v.	that "an adverse
					Pac. RR, 354 F.3d	Cir. 1982).	Woods, 250 F.R.D.	inference may
					739, 747 (8th Cir.		411, 414 (E.D. Mo.	be drawn from
					2004) (bad faith		2008).	plaintiffs'
					required if			failure to
					spoliation happens			preserve the
					pre-litigation)			vehicle" Bass
					1 0 /			v. Gen. Motors
					Bad faith is not			Corp., 929 F.
					required to			Supp. 1287,
					sanction for "the			1290 (W.D.
					ongoing			Mo. 1996),
					destruction of			aff'd on this
					records during			ground, 150
					litigation and			F.3d 842, 851
					discovery."			(8th Cir. 1998).
					Stevenson, 354			(0
					F.3d at 750;			
					MeccaTech, Inc. v.			
					Kiser, 2008 WL			
					6010937, at *8 (D.			
					Neb. 2008) (same),			
					adopted in part,			
					No. 8:05CV570,			
ťh					2009 WL 1152267			
Eighth					(D. Neb. Apr. 23,			
Ei					(D. Neb. Apr. 23, 2009).			
				1	2009).	l	l	

	Duty to	In Hous. Rights	Bad faith not	Willfulness, bad	Bad faith or gross	This issue has not	When spoliation	The Court's
	preserve	Ctr. v. Sterling,	required	faith, or fault	negligence	been addressed.	substantially denies	research has not
	potentially	2005 WL 3320739,	Dae Kon Kwon	Dae Kon Kwon v.	Karnazes v. County	ocon addressed.	a party the ability to	located case in
	relevant	at *3 (C.D. Cal.	v. Costco	Costco Wholesale	of San Mateo, No.		support or defend	which the court
	evidence in	Mar. 2, 2005), the	Wholesale	<i>Corp.</i> , No. CIV.	09-0767 MMC		the claim	granted an
	party's	court quoted	<i>Corp.</i> , No. CIV.	08-360 JMSBMK,	(MEJ), 2010 WL		Henry v. Gill Indus.,	adverse
	possession	Zubulake IV, 220	08-360	2010 WL 571941,	2672003, at *2		983 F.2d 943, 948	inference
	Leon v. IDX	F.R.D. at 220	JMSBMK,	at *2 (D. Hawai'i	(N.D. Cal. July 2,		(9th Cir. 1993).	instruction and
	Systems Corp.,	("Once the duty to	2010 WL	2010) (requiring	2010).		()	stated what the
	2004 WL	preserve attaches,	571941, at *2	that party "engaged).			instruction
	5571412, at *3	any destruction of	(D. Hawai'i	deliberately in	Bad faith not			would be.
	(W.D. Wash.	documents is, at a	2010); Carl	deceptive	required			
	2004), aff'd,	minimum,	Zeiss Vision	practices")	Otsuka v. Polo			
	464 F.3d 951	negligent."), and	Intern. GmbH v.	I	Ralph Lauren			
	(9th Cir. 2006).	found that	Signet	"[D]isobedient	<i>Corp.</i> , No. C 07-			
		defendants'	Armorlite, Inc.,	conduct not shown	02780 SI, 2010			
	Duty extends to	"[d]estruction of	No. 07CV0894	to be outside the	WL 366653, at *3			
	key players.	documents during	DMS(POR),	control of the	(N.D. Cal. Jan. 25,			
	Hous. Rights	ongoing litigation	2010 WL	litigant' is all that	2010).			
	Ctr. v. Sterling,	was, at a minimum,	743792, at *15	is required to	,			
	2005 WL	negligent."	(S.D. Cal. Mar.	demonstrate				
	3320739, at *3		1, 2010),	willfulness, bad				
	(C.D. Cal. Mar.		amended on	faith, or fault."				
	2, 2005).		other grounds,	Henry v. Gill				
			2010 WL	Indus., 983 F.2d				
Ч			1626071 (S.D.	943, 948 (9th Cir.				
Ninth			Cal. Apr 21,	1993).				
Z			2010).					

	D	N	D 1011		D 1611			D 1611
	Duty extends to	No.	Bad faith not	"willfulness, bad	Bad faith	Although this	Spoliation that	Bad faith;
	key players	Procter & Gamble	required	faith, or [some]	Turner v. Pub.	specific issue has not	impairs a party's	adverse
	Pinstripe, Inc.	Co. v. Haugen, 427	Hatfield v. Wal-	fault"	Serv. Co. of Colo.,	been addressed, the	ability to support a	inference
	v. Manpower,	F.3d 727, 739 n.8	Mart Stores,	Procter & Gamble	563 F.3d 1136,	court declined to	claim or defense.	instruction
	Inc., No. 07-	(10th Cir. 2005)	Inc., 335 Fed.	Co. v. Haugen, 427	1149 (10th Cir.	"create a presumption	Pinstripe, Inc. v.	Smith v. Slifer
	CV-620-GKF-	(stating that district	App'x 796, 804	F.3d 727, 738 (10th	2009).	in favor of spoliation	Manpower, Inc., No.	Smith &
	PJC, 2009 WL	court must consider	(10th Cir.	Cir. 2005) (using		whenever a moving	07-CV-620-GKF-	Frampton/Vail
	2252131, at *1	Rule	2009).	language originally	Neither bad faith	party can prove that	PJC, 2009 WL	Assocs. Real
	(N.D. Okla.	26(b)(2)[(C)](iii),		in Societe	nor intentionality	records that might	2252131, at *2	Estate, LLC,
	July 29, 2009).	which requires the	Negligence	Internationale v.	required	have contained	(N.D. Okla. July 29,	No. CIVA
	•	court to limit	Pipes v. UPS,	Rogers, 357 U.S.	Hatfield v. Wal-	relevant evidence	2009).	06CV02206-
	A party with	discovery if "the	Inc., No.	197, 212 (1958),	Mart Stores, Inc.,	have been destroyed"	,	JLK, 2009 WL
	possession of	burden or expense	CIV.A.07-1762,	which	335 Fed. App'x	in Crandall v. City &		482603, at *13
	potentially	of the proposed	2009 WL	distinguished	796, 804 (10th Cir.	County of Denver,		(D. Colo. Feb.
	relevant	discovery	2214990, at *1	"fault" from a	2009);	Colo., No. 05-CV-		25, 2009).
	evidence has a	outweighs its likely	(W.D. La. July	party's inability to	Schrieber v. Fed.	00242-MSK-MEH,		-,,
	duty to preserve	benefit").	22, 2009).	act otherwise).	Ex. Corp., No. 09-	2006 WL 2683754, at		
	it; even if the		,,		CV-128-JHP-PJC,	*2 (D. Colo. Sept. 19,		
	party				2010 WL 1078463	2006).		
	relinquishes				(N.D. Okla. March	2000).		
	ownership or				18, 2010).			
	custody, it must				10, 2010).			
	contact the new							
	custodian to							
	preserve the							
	evidence.							
	Jordan F.							
	Miller Corp. v.							
	Mider Corp. v. Mid-Continent							
	Aircraft Serv.,							
	139 F.3d 912,							
	1998 WL							
-	68879, at *5-6							
Tenth	(10th Cir.							
Te	(1001 CIr. 1998).							
	1 7 7 0].							

	Duty to	Courts in the	Bad faith	Bad faith	Bad faith	This issue has not	Spoliation of	Negligence;
	preserve	Eleventh Circuit	Managed Care	Managed Care	Penalty Kick	been addressed.	evidence that was	jury to be
	potentially	have not found	Solutions, Inc.	Solutions, Inc. v.	Mgmt. Ltd. v. Coca		not just relevant but	instructed that
	relevant	conduct culpable	v. Essent	Essent Healthcare,	Cola Co., 318 F.3d		"crucial" to a claim	the destruction
	evidence that	without analyzing	Healthcare,	Inc., No. 09-60351-	1284, 1294 (11th		or defense	raises a
	party has	the facts, although	Inc., No. 09-	CIV, 2010 WL	Cir. 2003);		Managed Care	rebuttable
	"access to and	reasonableness is	60351-CIV,	3368654, at *12	Managed Care		Solutions, Inc. v.	inference that
	control over"	not discussed.	2010 WL	(S.D. Fla. Aug. 23,	Solutions, Inc. v.		Essent Healthcare,	the evidence
	Nat'l Grange		3368654, at *4	2010).	Essent Healthcare,		Inc., No. 09-60351-	supported
	Mut. Ins. Co. v.		(S.D. Fla. Aug.		Inc., No. 09-60351-		CIV, 2010 WL	plaintiff's claim
	Hearth &		23, 2010).		CIV, 2010 WL		3368654, at *8 (S.D.	Brown v.
	Home, Inc., No.				3368654, at *13		Fla. Aug. 23, 2010).	Chertoff, 563 F.
	CIV.A.		Degree of		(S.D. Fla. Aug. 23,			Supp. 2d 1372,
	2:06CV54WCO		culpability is		2010).			1381 (S.D. Ga.
	, 2006 WL		weighed against					2008) (but other
	5157694 at * 5		prejudice					courts in
	(N.D. Ga. Dec.		caused by					Eleventh
	19, 2006).		spoliation					Circuit will not
			Flury v.					order any
			Daimler					sanctions
			Chrysler Corp.,					without bad
			427 F.3d 939,					faith)
			945 (11th Cir.					
			2005); Brown v.					
th			Chertoff, 563 F.					
en			Supp. 2d 1372,					
Eleventh			1381 (S.D. Ga.					
E			2008).					

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	Duty to	Courts in the D.C.	Case law	Bad faith	Negligent or	This issue has not	Case law states that	"[A]ny adverse
	preserve	Circuit have not	addresses	Shepherd v. Am.	deliberate	been addressed.	the spoliated	inference
	potentially	found conduct	specific	Broad Cos., 62	Mazloum v. D.C.		evidence must have	instruction
	relevant	culpable without	sanctions, rather	F.3d 1469, 1477	Metro. Police		been relevant, i.e.,	grounded in
	evidence	analyzing the facts,	than sanctions	(D.C. Cir. 1995);	<i>Dep't</i> , 530 F. Supp.		information that	negligence
	"within the	although	generally.	D'Onofrio v. SFX	2d 282, 292		would have	would be
	ability of the	reasonableness is		Sports Group, Inc.,	(D.D.C. 2008);		supported a claim or	considerably
	defendant to	not discussed.		No. 06-687	More v. Snow, 480		defense, but it does	weaker in both
	produce it"			(JDB/JMF), 2010	F. Supp. 2d 257,		not address	language and
	Friends for All			WL 3324964, at *5	274-75 (D.D.C.		prejudice.	probative force
	Children v.			(D.D.C. Aug. 24,	2007); D'Onofrio		1 5	than an
	Lockheed			2010).	v. SFX Sports			instruction
	Aircraft Corp.,			,	Group, Inc., No.			regarding
	587 F. Supp.				06-687 (JDB/JMF),			deliberate
	180, 189				2010 WL 3324964,			destruction."
	(D.D.C.),				at *10 (D.D.C.			Mazloum v.
	(D.D.C.), modified, 593 F.				Aug. 24, 2010) (not			D.C. Metro.
	Supp. 388				for mere			Police Dep't,
	(D.D.C.), <i>aff'd</i> , 746 F.2d 816				negligence unless			530 F. Supp. 2d
					"the interests in			282, 293
	(D.C. Cir.				righting the			(D.D.C. 2008).
	1984).				evidentiary balance			
					and in the deterring			
					of others trumps			
					the lacuna that a			
					logician would			
					detect in the logic			
D.C.					of giving such an			
D					instruction").			
Federal	"In reviewing sanction orders, [the Federal Circuit] applies the law of the regional circuit from which the case arose." <i>Monsanto Co. v. Ralph</i> , 382 F.3d 1374, 1380 (Fed. Cir. 2004). In <i>Consolidated Edison Co. of N.Y., Inc. v. United States</i> , 90 Fed. Cl. 228, 255 n.20 (Fed. Cl. 2009), the United States Court of Federal Claims observed that "the United States Court of Appeals for the Federal Circuit, has not definitively addressed whether a finding of bad faith is required before a court can find spoliation or impose an adverse inference or other sanction. Because many of the spoliation cases decided to date by the Federal Circuit have been patent cases in which the Federal Circuit applies the law of the relevant regional circuit, the Federal Circuit has not had the opportunity to announce a position binding on this court as to a possible 'bad faith' or other standard to trigger a spoliation of evidence sanction. Consequently, judges of the United States Court of Federal Claims have taken differing positions on the "bad faith" requirement. <i>Compare [United Med. Supply Co. v. United States</i> , 77 Fed. Cl. 257, 268 (2007)] ('[A]n injured party need not demonstrate bad faith in order for the court to impose, under its inherent authority, spoliation sanctions.'), <i>with Columbia First Bank, FSB v. United States</i> , 54 Fed. Cl. 693, 703 (2002) (noting findings of bad faith are required before the court can determine that there was spoliation)." (Citation omitted.)							