# MEMORANDUM TO:
# THE EVIDENCE & CIVIL PRO. COMMITTEE RE SPOLIATION

TO: TOM SHRINER

FROM: BILL GLEISNER

DATE: OCTOBER 4, 2013

RE: SPOLIATION

## INTRODUCTION

This is intended as an overview of the evolution of the spoliation doctrine since the advent of digital discovery and litigation, including some observations about possible additions to the recently adopted e-discovery rules that our Evid. & Civ. Pro. Committee may wish to suggest to the Council.

First, the doctrine of spoliation is not new nor is it novel. Historically, there were three possible remedial responses to garden-variety spoliation. In recent years, Wisconsin courts adopted two of those responses. *See In re Estate of Jane Neumann,* 2001 WI App. 61, 242 Wis. 2d 205, 626 N.W.2d 821, where the Court stated: "Courts have fashioned a number of remedies for evidence spoliation. The primary remedies used to combat spoliation are pretrial discovery sanctions, the spoliation inference, and recognition of independent tort actions for the intentional and negligent spoliation of evidence. … Wisconsin has recognized the first two remedies." 2001 WI App. 61 at ¶80; 242 Wis. 2d at 245. *See Sentry Ins. v. Royal Ins. Co., 196 Wis. 2d 907, 918-19, 539 N.W.2d 911 (Ct. App. 1995)* (upholding trial court's exclusion of evidence related to refrigerator where party's expert intentionally removed components, thereby precluding testing by opposing party); and *Jagmin v. Simonds Abrasive Co., 61 Wis. 2d 60, 80-81, 211N.W.2d 810 (1973)* (holding that spoliation inference [against party causing spoliation] is inappropriate where evidence was negligently destroyed, but may be appropriate where destruction is intentional). The most recent authoritative pronouncement on spoliation was the decision of Justice Gableman in American Family Mutual Ins. v. Golke, 2009 WI 81, 319 Wis. 2d 397, 768 N.W.2d 729 where an insurer allegedly failed to preserve roof and chimney evidence from a fire. According to Justice Gableman: [D]ismissal as a sanction for spoliation is appropriate only when the party in control of the evidence acted egregiously in destroying that evidence… Egregious behavior is 'a conscious attempt to affect the outcome of the litigation or

a flagrant, knowing disregard of the judicial process.' Lesser spoliation sanctions, such as pre-trial discovery sanctions and negative inference instructions, however, may be appropriate for spoliation where a party violated its duty to preserve relevant evidence, but where the destruction of such evidence did not constitute egregious conduct." *Id.* ¶42.

## I. THE DEVELOPMENT OF A FEDERAL RESPONSE

Just as e-discovery rules had their primary genesis on the federal level, so did rules governing spoliation of digital evidence. Early on, spoliation was seen as a consequence of a failure of a duty to properly preserve evidence. Courts held that a party had the duty to protect and preserve evidence once it is on notice that it must do so.[1] Courts held that a party may be under a duty to prevent spoliation even if litigation is only reasonably anticipated.[2] The negligent destruction of relevant documents[3] can have consequences almost as serious as when a party intentionally destroys documents.[4]

For a long time there had been case law which held that counsel must take all reasonable steps to prevent spoliation from happening and to set up procedures designed to police the preservation of digital evidence.[5] But courts began to add teeth to the duty to preserve[6] and counsel began to realize that the act of spoliation is actually easier to establish in the case of digital evidence than it is in the case of paper evidence.[7]

Gradually, federal courts began to focus on a duty to preserve "computerized data" during the pendency of a lawsuit.[8] Spoliation in the context of digital litigation began to develop as a tripartite exercise: 1) the violation of a duty to preserve digital assets; 2) which led to a finding of spoliation; and 3) depending on the extent of the violation, the imposition of a sanction. But quickly this exercise took on characteristics that were heavily influenced by the nature of digital assets ("ESI") and their management. For example, in *Metropolitan Opera Ass'n v. Local*

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[1] *Cf. Yu Jung Park v. City of Chicago*, 297 F.3d 606, 616 (7th Cir. 2002).
[2] *Rubber Co. v. Bando Chemical Industries*, 167 FRD 90 (D. Colo. 1996).
[3] As to the consequences for negligently destroying documents, *see US v. Koch*, 197 FRD 463 (ND Okla. 1998).
[4] As to cases where a party is sanctioned for "explicitly" violating a court order against destroying documents, *see In re Prudential Insurance Co.*, 169 FRD 598, 615 (DC NJ 1997).
[5] *National Association of Radiation Survivors v. Turnage*, 115 FRD 543, 557 (ND Cal. 1987); *Prudential Ins. Co. of America Sales Practices Litigation*, 169 FRD 598 (NJD 1997); *US v. Koch Industries*, 197 FRD 463 (ND Okla. 1998). *See* duties of corporation and counsel discussed in *William Thomson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1455 (CD Cal. 1984).
[6] *3M v. Pribyl*, 259 F.3d 587 (7th Cir. 2001) (the Court allowed a negative inference to be drawn from the apparent intentional deletion of information from a computer hard drive. *Id.* at 606, n. 5); *Rodgers v. CWR Construction*, 33 S.W.3d 506, 510 (Ark. 2000); *Patton v. Newmar Corp.*, 538 N.W.2d 116, 120 (Minn. 1995). *Mudge v. Penguin Air Conditioning*, 633 NYS2d 493 (1995). *See also Mathias v. Jacobs*, 197 FRD 29 (SD NY 2000).
[7] It is amazing what forensic computer experts can tell about what efforts have been made to delete or hide digital evidence. *See, e.g., Trigon Ins. Co. v. US*, 204 FRD 277 (ED Va. 2001).
[8] *See, e.g., In re Cell Pathways Securities Litigation*, 203 F.R.D. 189 (ED Pa. 2001); *In re Bridgestone*, 129 F. Supp. 2d 1207 (SD Ind. 2001).

*100, Hotel Employees*, 212 FRD 178 (SDNY 2003), the Court sanctioned defense counsel because: "(1) [Counsel] never gave adequate instructions to their clients about the clients' overall discovery obligations, … [and] (3) delegated document production to a layperson who … did not even understand himself (and was not instructed by counsel) that a document included a draft or other non-identical copy, a computer file and an e-mail; …" *Id.* at 222. In the case of *In re Old Banc One Shareholders Securities Litigation*, 2005 U.S. Dist. Lexis 32154 (N.D. Ill. December 8, 2005) which addresses a party's obligation to prepare and disseminate a retention policy for digital records. In *Banc One*, the Court observed: "In order to meet its obligations, Bank One needed to create a comprehensive document retention policy to ensure that relevant documents were retained and needed to disseminate that policy to its employees…." *Id.* at *11-12.

What has really driven spoliation in a different direction in terms of digital litigation is the growing awareness that digital evidence often had characteristics which are completely different from those of other types of evidence. Most particularly, the entire issue of spoliation and preservation are now colored by the revolutionary concept of "metadata." This is actually not a difficult concept and can be understood in a very general sense to mean an electronic component of a computer record that is ordinarily not visible to a user or a discovering party. It might include systemic information (routing information of emails) or it might be records in a database or a formula in a spreadsheet. The new federal e-discovery rules and the Sedona Conference both have addressed this phenomenon. According to Favro, A New Frontier in Electronic Discovery: Preserving and Obtaining Metadata, 13 B.U.J. Sci. & Tech. L. 1 (2007):

> [T]he amendments to Rule 34 may have a significant effect on metadata production. Like the other amended discovery rules, amended Rule 34 was expressly drafted to recognize that electronic data is subject to discovery and should be treated differently from paper documents. Electronic materials are now distinctly characterized as 'electronically stored information' instead of being classified as a mere subset of 'documents.' This distinction creates a set of discovery rights and obligations for electronic data different than those for paper documents. For instance, amended Rule 34(b) allows the requesting party to specify a particular form for production of electronic documents. Such a right may enable a party to obtain metadata either by requesting that productions be made in native format or in TIFF with corresponding databases containing extracted metadata. And while the responding party may object to the form of production and elect not to produce the metadata, nothing in the amendments forecloses the requesting party

> from seeking its production through a motion to compel. If, on the other hand, the requesting party does not specify a form for production, the responding party may not produce electronic materials in a form that makes the documents more difficult to review.

*Id.* at 14.

According to U.S. District Judge Lee H. Rosenthal, Chair of the Judicial Conference's Advisory Committee on Civil Rules, has written: "The amendment to Rule 34(a) ends the debate over whether various parts of electronic files, including metadata, are subject to discovery because they are, or are not, part of a 'document.' Metadata is 'electronically stored information,' discoverable if relevant, not privileged, and within the limits that govern discovery. This semantic change tracks the evolution of cases and secondary literature treating metadata. Rather than viewing it only as a conceptually separate element of an electronic 'document,' metadata is also increasingly recognized as including the software that assembles in formation from different databases and brings it together for the reader." Rosenthal, A Few Thoughts on Electronic Discovery after December 1, 2006: Metadata and Issues Relating to the Form of Production, 116 Yale L. J. Pocket Part 167, at 186 (2006).

The metadata debate is largely responsible for transforming the issue of spoliation and the closely related issue of preservation into something we have never before seen in the law. We started seeing cases like *Columbia Pictures, Inc. v. Bunnell*, 85U.S.P.Q.2d 1448, 2007 WL 4877701 (C.D. Cal. 2007), where the focus wasn't on metadata per se, although I believe that was really the gravamen of the case. In *Columbia Pictures* the Court imposed the drastic remedy of default judgment against the defendant web site operators because of spoliation and other misconduct. In Columbia Pictures, the Plaintiffs' main contention was that the defendant's Web site "entices, promotes, and contributes to copyright infringement by its users. Thus, the alteration or deletion of forum posts specifically referencing copyrighted works, or providing guides on how to download… has prejudiced Plaintiffs' ability to demonstrate Defendants' alleged inducement or encouragement of infringement, necessary to prove contributory infringement. This altered or deleted evidence also would have been relevant to proving Defendants' failure to exercise its right to stop or limit infringement, necessary to prove vicarious infringement… In a case such as this, where a substantial number of items of evidence have been destroyed, a plaintiff's burden would be particularly onerous if he were required to prove the relevance of all the destroyed items." *Id.* at *6-7. And now we see cases like *United Factory Furniture Corp. v. Alterwitz,* 2012 WL 1155741 (D. Nev. 2012) (''Litigants

owe an '**uncompromising duty to preserve**' what they know or reasonably should know will be relevant evidence in a pending lawsuit **even though no formal discovery requests have been made and no order to preserve evidence has been entered**… A defendant's duty to preserve exists when a defendant is on notice that documents and information in its possession are relevant to litigation, or potential litigation [Emphasis supplied].'' Id. *3).

The law is moving in such a direction that a producing party that neglects its duty to preserve does so at its considerable peril. According to *In re Napster, Inc. Copyright Litigation*, 462 F. Supp. 2d 1060 (N.D. Cal. 2006). '' 'Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents.'… 'The obligation to retain discoverable materials is an affirmative one; it requires that the agency or corporate officers having notice of discovery obligations communicate those obligations to employees in possession of discoverable materials.' Therefore, even if Hummer's 'long standing policies' included deleting emails, Hummer was required to cease deleting emails once the duty to preserve attached." *Id.* at 1070. As the Court made clear in *J & M Associates v. National Union Fire Ins. Co*., 2008 WL 5102246 (S.D. Cal. 2008) the duty to preserve arises irrespective of whether a subpoena or request to produce has been filed: "Contrary to J & M's argument that there is no obligation to preserve documents until a document request seeking such documents is served, the Court believes that it is clear that a party has a duty to preserve all potentially relevant documents, including e-mails, once a lawsuit is reasonably probable or filed." *Id.* at *4. In fact, the duty to preserve exists regardless of whether a putative defendant has received a suit threat letter or other written notice of probable litigation. It is enough that a party knew or should have known that litigation was probable. *Adams v. Dell, Inc*., 621 F. Supp. 2d 1173, 1190 (D. Utah 2009).[9]

In fact, where there is a failure to preserve courts will seriously entertain the charge that there is spoliation and at a minimum this will open the door to direct access to a producing party's computer system so that a forensic search can be done at the expense of the producing party. Judge Facciola discussed this in *Peskoff v. Faber*, 251 FRD 59 (D. DC 2008). "[T]he need here for a forensic examination is directly attributable to what was and was not done by Mr. Faber to preserve electronically stored information. [Faber's] acts and omissions shatter any argument that the burden or expense of that forensic examination, if

[9] there is such a close relationship between the duty to preserve and spoliation that some courts have held that where there is no duty to preserve, there can be no spoliation. According to the Court in Prestige Global Co., Ltd. v. L.A. Printex Industries, Inc., 2012 WL 1569792 (S.D. N.Y. 2012), ''In order to have engaged in spoliation, then, a party must have violated a preservation requirement.'' Id. at *3.

incurred by Mr. Faber, would be 'undue.' … His failure to act has had tangible consequences, particularly the recycling of timely back-up tapes and the auto-deletion of relevant e-mails. That this deleted information can only be recovered by a forensic examination, if it can be recovered at all, is directly attributable to Mr. Faber's inaction." *Id*. at 62. A failure to preserve electronic evidence may by itself open a producing party up to charges of spoliation. In *Goodman v. Praxair Services, Inc*., 2009 WL 1955805 (D. Md. 2009) the Court stated '''The failure to preserve electronic or other records, once the duty to do so has been triggered, raises the issue of spoliation of evidence and its consequences.' Spoliation is 'the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably fore- seeable litigation." *Id*. at *9.

In *Micron Technology, Inc. v. Rambus Inc*., 645 F.3d 1311 (Fed. Cir. 2011) the court dismissed the plaintiff's complaint because it committed spoliation. Id. at 1695. The Court of Appeals for the Federal District first noted that a determination of bad faith is a prerequisite to the imposition of dispositive sanctions pursuant to the District Court's inherent power, and must be made with caution. Id. at 1704. The Court further noted that to make a determination of bad faith a court had to find that the spoliating party 'intended to impair the ability of a potential defendant to defend itself.' Id. Id. at 1705. The Court stated that the question of whether prejudice to the defendant had been satisfactorily determined by the district court.

## II. SPOLIATION SANCTIONS ARE NOW A BLOOD SPORT

According to the head of King & Spaulding's Discovery Center, writing at 60 Duke L.J. 789 (2010): "For the most serious violations, courts have imposed the most draconian of sanctions: dismissal of all claims or defenses. … In cases of lesser violations, courts have used a continuum of penalties… Such penalties have included evidence preclusion, witness preclusion, disallowance of certain defenses, reduced burden of proof, removal of jury challenges, limiting closing statements, supplemental discovery, and additional access to computer systems. In some instances, more creative courts have imposed nontraditional sanctions, such as payments to bar associations [for] educational programs…" *Id*. at 803-804.

Monetary sanctions are still a favored tool, but the awards are going up. Compare *U.S. v. Phillip Morris*, 327 F. Supp. 2d 21 (D.C. July 21, 2004) (where a monetary sanction of $2,750,000 had to be paid into the Court Registry) with *Magana v. Hyundai Motor Am.*, 220 P.3d 191 (Wash. S. Ct. 2009), where Hyundai was sanctioned eight million dollars. The reasons why Hyundai was sanctioned provides insight into what courts think is sanctionable conduct in the case of the

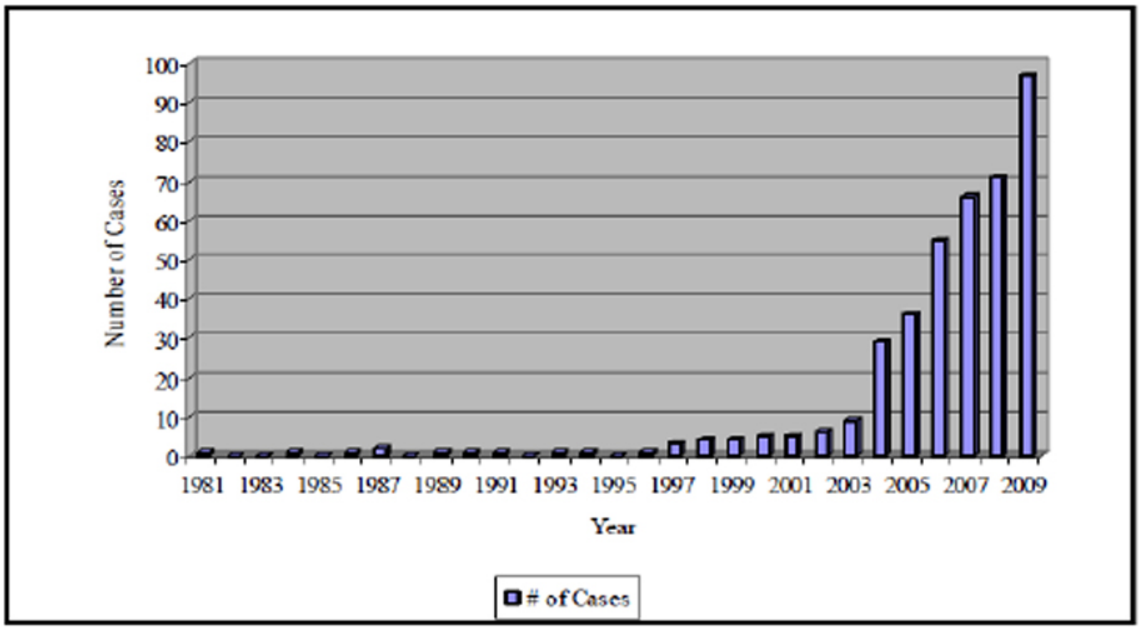
discovery of digital evidence. The Hyundai Court found: "A corporation must search all of its departments, not just its legal department, when a party requests information about other claims during discovery… Hyundai had the obligation to diligently respond to Magaña's discovery requests about other similar incidents. It failed to do so by using its legal department as a shield. Hyundai had the obligation to diligently and in good faith respond to discovery efforts, [and] maintain a document retrieval system that would enable the corporation to respond to plaintiff's requests." *Id.* 585-586.[10]

In some cases, spoliation sanctions appear to have almost taken the form of damage relief. In the case of *SK Hynix v. Rambus*, 2013 WL 1915865 (N.D. Cal. 2013) a Court imposed a sanction of $250 Million dollars against a party which had otherwise substantially prevailed in patent infringement litigation. In that case SK Hynix (then Hyundai Electronics Industries Co., Ltd.) commenced an against Rambus for a declaratory judgment of noninfringement, invalidity, and unenforceability with respect to several of Rambus's patents and Rambus countersued for patent infringement. Id. at *1. A jury returned a verdict in favor of Rambus on most of its claims. Id. However, the Court had found that Rambus had spoliated evidence. According to the Court: Imposition of a monetary sanction is an imprecise, imperfect process. After considering all of the evidence and argument submitted by the parties, and the relevant authorities, the court concludes that a monetary sanction of $250,000,000 to be applied as a credit against Rambus's judgment against SK Hynix recognizes that Rambus's conduct was inexcusable but not so egregious as to justify dismissal of its infringement case… The amount of the sanction is severe and would be excessive if such amount were not necessary to mitigate the presumed prejudice resulting to SK Hynix from Rambus's spoliation. It also strikes the appropriate balance between acknowledging that the majority of Rambus's patents have been determined to be valid and recognizing that Rambus's spoliation of evidence must be redressed in a meaningful way. The sanction will unquestionably deter Rambus and others from engaging in similar conduct in the future. Finally, from the public's standpoint, imposition of this sanction lays to rest years of complicated and expensive litigation." Id. at *22.

[10] The duty to preserve is becoming as onerous as spoliation. According to the Court in *Danis v. USN Communications, Inc.*, 2000 WL 1694325 (N.D. Ill. 2000): "The Court's authority to sanction a party for the failure to preserve and/or produce documents is both inherent and statutory. … ***The duty to preserve documents in the face of pending litigation is not a passive obligation. Rather, it must be discharged actively***:… The obligation to preserve documents that are potentially discoverable materials is an affirmative one that rests squarely on the shoulders of senior corporate officers. …. The scope of the duty to preserve is a broad one, commensurate with the breadth of discovery permissible under Fed.R.Civ.P. 26. … '[A] litigant 'is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, … Moreover, the case law establishes that a discovery request is not necessary to trigger this duty [Emphasis supplied]."

However, the courts have been devising more and more innovative (and I would argue questionable) sanctions. In *Green v. Blitz U.S.A, Inc.* (E.D. Tex. Mar. 1, 2011), the U.S. District Court for the Eastern District of Texas found the defendant's abuse of the discovery process to be so egregious that it ordered the offending party to provide a copy of the court's highly detailed opinion to every plaintiff in every lawsuit it has had litigation with during the two previous years. Moreover, the court ordered that a copy of its opinion must be filed with the abusing party's *first pleading with the presiding court in every new lawsuit in which it is a party*, whether as a plaintiff, defendant, or any other capacity, *for five years*. And in fact, overall the imposition of sanctions is increasing at an alarming rate. Take a look at the following chart from a recent study:

*Figure 1. Annual Number of E-Discovery Sanction Cases*




Sanction litigation is rapidly taking on a life of its own. In *Pillay v. Millard Refrigerated Services, Inc*., 2013 WL 2251727 (N.D. Ill. 2013) the Court granted an adverse inference instruction after it found that the defendant was on notice to preserve relevant ESI. "Here, Pillay notified Millard of his intention to file the present lawsuit well before the LMS data were automatically overwritten in August 2009. In September 2008 shortly after his termination, Pillay sent a [demand] letter placing Millard on notice of an impending lawsuit. Pillay and Ramirez also filed charges with the EEOC giving Millard another reason to believe that litigation was imminent. Indeed, Pillay and Ramirez sent Millard preservation notices in December 2008 approximately eight months before the deletion of the LMS data. Although Millard deleted the LMS numbers before Pillay and Ramirez filed this

lawsuit, Pillay and Ramirez's pre-filing correspondence with Millard in addition to their filing EEOC charges gave the requisite notice of a possibility of litigation invoking Millard's preservation duty." Id. at *2. The Court did this despite the fact that the failure to preserve may have been the result of negligence. "Even if merely negligent, however, sanctions can still be appropriate when a party's culpability is based on fault. *See Marrocco,* 966 F.2d at 224 ('[S]anctions may be appropriate in any one of three instances—where the noncomplying party acted either with wilfulness, bad faith, *or* fault.'); Gutierrez v. P.A.L., Ltd., 2011 WL 6019393, at *3 (N.D. Ill. Nov. 23, 2011) ('An adverse inference sanction may be imposed where such a sanction is proportionate with the circumstances involved, the misconduct was prejudicial to the other party, and the misconduct evinces willfulness, bad faith, or fault.'). Fault entails actions deemed 'objectively unreasonable.' *Oce N. Am., Inc. v. Brazeau,* 2010 WL 5033310, at *6 (N.D. Ill. Mar.18, 2010). Even if Millard's failure to preserve the underlying LMS data did not rise to the level of bad faith, it falls squarely within the realm of conduct deemed to constitute fault. That Millard knew about the pending lawsuit and that the underlying LMS data would be deleted but failed to preserve the information was objectively unreasonable. Accordingly, even without a finding of bad faith, the court may craft a proper sanction based on Millard's failure to preserve the underlying LMS data. Id. at *4. See also *Cottle-Banks v. Cox Communications,* 2013 WL 2244333 (S.D. Cal. 2013) where the Court observed: The 'culpable state of mind' includes negligence. Lewis v. Ryan, 261 F.R.D. 513, 521 (S.D.Cal.2009)… A finding of 'bad faith' is not a prerequisite. *Glover v. BIC Corp.,* 6 F.3d 1318, 1329 (9th Cir.1992). 'A party's destruction of evidence qualifies as willful spoliation if the party has 'some notice that the documents were potentially relevant to the litigation before they were destroyed.' *Leon v. IDX Sys. Corp.,* 464 F.3d 951, 959 (9th Cir.2006) (Plaintiff admitted deleting entire directories of personal files and that he wrote a program to 'wipe' any deleted files from the unallocated space in the hard drive after having received a letter from defense counsel cautioning Plaintiff to preserve all data). Where the 'culpable state of mind' is bad faith, that fact alone is sufficient to demonstrate relevance. *Zubulake,* 220 F.R.D. at 220. By contrast, when the destruction is negligent, relevance must be proven by the party seeking the sanctions." Id. at *14.

Some Courts do not require a showing of bad faith before imposing sanctions. Sometimes carelessness is enough. In *EEOC v. Ventura Corp.,* 2013 WL 550550 (D. PR 2013) the Court found as follows: "A court may impose sanctions, including exclusion of evidence, even '[i]f such evidence is mishandled through carelessness....' Trull, 187 F.3d at 95 (citing *Sacramona v. Bridgestone/Firestone,* Inc., 106 F.3d 444, 447, 446 (1st Cir.1997)). Therefore, as a result of Ventura's spoliation of relevant job application materials, Ventura will be precluded from

offering any evidence regarding the number of men that applied to the positions of Zone Manager or Support Manager between 2007 and 2009 and regarding the qualifications of applicants during that period of time. See *Colon v. Blades,* 268 F.R.D. 129 (D.P.R.2010) (finding appropriate spoliation sanction against party for inability to produce documents was to preclude it from offering the documents as evidence or any testimony related thereto). The EEOC also requests that this Court allow the trier of fact to infer that the content of emails contained in Mojica and Ruiz's e-mail accounts would have been unfavorable to Ventura… 'A spoliation instruction, allowing an adverse inference, is commonly appropriate ... where there is evidence from which a reasonable jury might conclude that evidence favorable to one side was destroyed by the other.... The burden is upon the party seeking the instruction to establish such evidence." *U.S. v. Laurent,* 607 F.3d 895, 902 (1st Cir.2010). The EEOC has established that an e-mail from decision-makers discussing the termination of Zayas' employment just six months after his appointment in fact existed and were destroyed. The e-mail that Zayas produced aids to prove his allegation that '[a]fter his placement to the position of Zone Manager, Ventura immediately targeted [him] for termination.' … Therefore, it can be inferred that the content of other similar e-mail communications that are now unavailable would have further supported the EEOC's and Zayas' version of events. Thus, in the context of the evidence before the Court now, we find that an adverse-inference instruction makes sense here." Id. at *7.

In *Kirgan v. FCA*, LLC, 2013 WL 1500708 (CD Ill. 2013) the Court reached the following conclusion: "In the case now before this Court, there is no question that Defendant was under a duty to preserve all documents relating to Plaintiff's discharge, at the very least from the date that the EEO charge was filed. At that point, the reasonable possibility of litigation existed. The duty was reinforced by subsequent communications from Plaintiff's attorney, ranging from discovery requests to subpoenas to depositions… Second, there is no question that the duty was breached. Despite repeated requests for Borsdorf's calendars, Defendant failed to take steps to preserve them. Borsdorf acknowledges that he knew—and hence Defendant knew, because his knowledge is attributable to Defendant—Plaintiff wanted the documents. He nonetheless continued to delete his entries on a regular basis for several years, all the while continuing to insist that no calendars existed… I do not believe that the sanction of default is warranted. I do, however, believe that stern measures are called for. The Defendant's direct and vicarious conduct was willful and intentional, and it cannot be condoned. Accordingly, the following sanctions are entered:

1. The jury is to be given a spoliation instruction, which permits the jury to draw a negative inference from its failure to preserve and its destruction of relevant documents.

2. Defendant may not use—at summary judgment or at trial—any evidence or argument that may have been contained in Borsdorf's destroyed calendars, unless that evidence or argument is corroborated by other documentary evidence or by testimony of witnesses independent of the Defendant.
3. Defendant shall pay attorney's fees to the Plaintiff for the fees his counsel incurred in preparing this motion. That amount shall be doubled, in a rough effort to compensate Plaintiff for the efforts that were made in her counsel's attempts to obtain the calendars." Id. at *1-3.[11]

## CONCLUSION

We know that the Judicial Conference is striving to introduce proportionality into the discovery process.[12] I do not believe Wisconsin practitioners can wait. We should study this and propose rules which will introduce proportionality and more fairness into the standards applicable to digital spoliation.

Spoliation is at best a satellite concern and should not become the means by which Justice is achieved or not achieved. When it comes to sanction litigation involving spoliation, it has truly become a case of the tail wagging the dog. Wisconsin should not wait for the U.S. Judicial Conference; we should show the way as we have often done and establish a more reasonable and proportional set of standards when it comes to preservation, spoliation and sanctions.

Bill

[11] Interestingly, the standard for preservation may be higher when lawyers are involved as litigants. *Distefano v. Law Offices of Katsos*, 2013 WL 1339548 (E.D. NY 2013) was a legal malpractice action in which the defendant lawyer was alleged to have spoliated evidence. According to the Court: "Although the failure to institute a 'litigation hold' is not negligence per se, whether the party implemented good document preservation practices is a factor that courts should consider… The Court will also consider Katsos' status as an attorney and the fact that she certainly should have been aware of the preservation requirements of litigation. Courts have held that in an ongoing litigation, '[t]he preservation obligation runs first to counsel, who has a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction.' … '[L]itigants (especially when they are lawyers) who act intentionally or with willful disregard to subvert their opponents' ability to find and offer relevant evidence should face harsh sanctions." Id. at * 8.

[12] http://www.discoveryadvocate.com/2013/06/11/judicial-conference-proposes-proportional-discovery-through-amendments-to-the-frcp/