I. Elements/definition of spoliation: Is it an “intentional or fraudulent” threshold or can it be negligent destruction of evidence?

Nebraska has stated that a negative inference may be drawn from spoliation of evidence only where substantial evidence exists to support findings that the evidence: (1) had been in existence, (2) was in the possession or under the control of the party against whom the inference may be drawn, (3) that the evidence would have been admissible at trial, and (4) that the party responsible for the destruction of evidence did so intentionally and in bad faith. State v. Davlin, 263 Neb. 283, 302, 639 N.W. 2d 631, 648 (2002).

Additionally, the Nebraska Supreme Court has made clear that the threshold for a negative spoliation inference arises “only where the spoliation or destruction was intentional and indicates fraud and a desire to suppress the truth, and it does not arise where the destruction was a matter of routine with no fraudulent intent.” Id.; see also Richter v. City of Omaha, 273 Neb. 281, 286, 729 N.W.2d 67, 71 (2007) (citing Davlin and stating that a negative inference may be drawn only when the destruction of evidence was intentional).

II. Distinction between first party and third party spoliation.

Nebraska has not specifically addressed the distinction between first party and third party spoliation. However, the seminal case of State v. Davlin suggests that Nebraska would only apply a negative inference instruction for first party spoliation. Davlin, in listing the elements for a valid spoliation claim, states that the evidence must have been “in the possession or under the control of the party against whom the inference may be drawn.” State v. Davlin, 263 Neb. 283, 302, 639 N.W.2d 631, 649 (2002). Therefore, it appears that Nebraska courts would not apply a negative inference where evidence was destroyed by a third party unless there was a significant nexus between the party to the litigation and the third party spoliator such that the spoliation was effectively “under the control” of the party to the litigation.

III. Whether there is a separate cause of action for a spoliation claim.

Nebraska has not addressed the issue of whether to adopt an independent tort for the spoliation of evidence. See Dowdle Butane Gas Co. v. Moore, 831 So. 2d 1124, 1128 (Miss. 2002) (discussing states that recognize the independent tort of spoliation of evidence and stating that the tort has not been widely adopted in other jurisdictions).
IV. Remedies when spoliation occurs:

(A) - Negative inference instruction

In Nebraska, the proper remedy for spoliation of evidence is an adverse inference instruction. McNeel v. Union Pac. R.R. Co., 276 Neb. 143, 156, 753 N.W.2d 321, 332 (2008). It is a general rule that the intentional spoliation or destruction of evidence relevant to a case raises an inference that this evidence would have been unfavorable to the case of the spoliator. Id. The rationale of the rule is that intentional destruction amounts to an admission by conduct of the weakness of one’s own case. Id. Thus, when spoliation is established in Nebraska, the factfinder may draw the inference that the evidence destroyed was unfavorable to the party responsible for its destruction. State v. Davlin, 263 Neb. 283, 301, 639 N.W.2d 631, 648 (2002).

(B) - Dismissal

Nebraska courts have not held that dismissal is an appropriate remedy for a spoliation claim. Instead, courts have relied on a negative inference instruction. See IV(A) above.

(C) - Criminal sanctions

Neb. Rev. Stat. § 28-922 makes destroying or tampering with physical evidence after learning of the pendency of an official proceeding a Class IV felony. Neb. Rev. Stat. § 28-922 (2009). A Class IV felony is punishable by a maximum of five years imprisonment, ten thousand dollars fine, or both. Neb. Rev. Stat. § 28-105. However, the threat of criminal prosecution for evidence destruction in civil litigation appears to be more theoretical than real. Research revealed no criminal convictions in Nebraska for destroying evidence in civil litigation. Instead, courts have relied on a negative inference instruction for spoliation claims. See IV(A) above.

(D) - Other sanctions

While not dealing specifically with spoliation, the Nebraska Supreme Court has stated that courts have inherent powers to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial. Schindler v. Walker, 256 Neb. 767, 779, 592 N.W.2d 912, 920 (1999). Without such inherent power, a court would be powerless to deal with discovery violations that do not specifically involve a court order. Id. This inherent power fills the gap when rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process. Id. For example, in Schindler a trial court’s exclusion of evidence was affirmed as an exercise of inherent power. Id. Therefore, while a negative inference has been stated as the preferred remedy, courts in Nebraska have broad discretion to apply other sanctions for the spoliation of evidence if the interests of justice demand it.

V. Spoliation of electronic evidence and duty to preserve electronic information.

The Federal District Court for the District of Nebraska has stated that “[w]hen the prospect of litigation is present, parties are required to preserve documents that may be relevant to the issues to be raised, and a failure to do so may result in a finding of spoliation of evidence.” Board
of Regents of the Univ. of Neb. v. BASF Corp., No. 4:04CV3356, 2007 WL 3342423, at *4 (D. Neb. Nov. 5, 2007). Additionally, this obligation to preserve evidence begins “when a party knows or should have known that the evidence is relevant to future or current litigation.” Id. “At a minimum, that means counsel must direct the client to ensure that documents are preserved, not deleted from an electronically stored information system or otherwise destroyed or made unavailable.” Id. Failure to adhere to these guidelines could result in discovery sanctions for failing to preserve relevant evidence, and, if the destruction was intentional with the desire of suppressing the truth, a successful claim for spoliation of evidence.

VI. Retention of surveillance video.

Nebraska has not specifically dealt with the issue of spoliation from the failure to retain a surveillance video. However, there is no indication that the duty to preserve surveillance video would differ substantially from the duty to preserve or retain evidence generally.