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

Spoliation is the “destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” Silvestri v. GMC, 271 F3d 583, 590 (4th Cir 2001) (citing West v. Goodyear Tire & Rubber Co., 167 F3d 776, 779 (2d Cir 1999) (citing Black’s Law Dictionary 1401 (6th ed 1990)); see Pikey v. Bryant, 203 SW3d 817, 821 (Mo Ct App 2006) (spoliation is “the destruction, mutilation, alteration, or concealment of evidence” (citing Black’s Law Dictionary 1437 (8th ed 2004))); State v. Carpenter, 171 P3d 41, 64 (Alaska 2007) (spoliation is the “destruction or alteration of evidence or its intentional concealment . . . until it is destroyed by natural causes”) (citations omitted).

The elements of spoliation are: (1) The party in control of the evidence had an obligation to preserve it at the time it was destroyed; (2) The evidence was destroyed with a culpable state of mind; and (3) The destroyed evidence was relevant to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

In Oregon, spoliation includes not only intentional or fraudulent conduct, but also includes negligence under ordinary negligence principles when a statute creates a duty to disclose evidence.

In general, a party possessing physical or documentary evidence, or electronic records of communications or other data, may be under a duty to preserve the evidence so it will be available for discovery and eventual use at trial. The party destroying, altering or merely failing to preserve important objects or materials may be subjected to sanctions ranging from an adverse evidentiary inference to exclusion of evidence or entry of a default judgment or summary judgment. See Booher v. Brown, 173 Or 464, 474, 146 P2d 71 (1944), overruled on other grounds, 243 Or 431 (1966); Tinglebeck v. Russell, 187 Or 554, 577-578, 213 P2d 156 (1949); Simpkins v Connor, 210 Or App 224, 150 P3d 417 (2006)(held that a plaintiff’s claim for negligent failure to produce medical records was actionable under ordinary negligence principles, when a statute created the duty to disclose medical records). Weidler v. Spring Swings, Inc., 2003 US App LEXIS 349 at *3, 2003 WL 68091, 55 Fed Appx 419 (9th Cir 2003) (unpublished opinion) (trial court could properly exclude evidence and award summary judgment when party’s testing destroyed product); Unigard Sec. Ins. v. Lakewood Engineering & Mfg., 982 P2d 363, 368 (9th Cir 1992).
II. Distinction between first party and third party spoliation.

No Oregon appellate court has addressed this issue.

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

To date, Oregon appellate courts have not expressly recognized a common-law independent tort of "spoliation." Oregon appellate courts also have not addressed the scope of a court’s authority to levy evidentiary or procedural sanctions specifically for spoliation. The issue may eventually become ripe in Oregon, as it has in other jurisdictions.

The appellate courts have acknowledged that parties have pled the tort, and that other jurisdictions recognize it. Fox v County Mut. Ins. Co., 169 Or App 54, 76 n 10, 7 P3d 677 (2000)(the court addressed the tort of intentional interference with a prospective economic advantage and recognized that the substantive tort exists in other jurisdictions); Simpkins v Connor, 210 Or App 224, 150 P3d 417 (2006)(held that a plaintiff’s claim for negligent failure to produce medical records was actionable under ordinary negligence principles, when a statute created the duty to disclose medical records).

Courts may be less likely to address the question of spoliation as an independent tort unless the claim is adequately pleaded and preserved. In Marcum v. Adventist Health System/West, the court declined to address "the precise contours of a cognizable claim for 'negligent spoliation' under Oregon law." 215 Or App 166, 191, 168 P3d 1214 (2007), rev’d on other grounds, 345 Or 237 (2008). The court declined to do so because “plaintiff here failed to make a prima facie showing that defendants’ alleged failure to maintain or produce the allegedly 'missing' records materially impaired her prosecution of her medical negligence and informed consent claims.” Id. at 191. The court characterized the plaintiff’s "'negligent spoliation'” claim as “akin to a legal malpractice claim in that ‘damages arise from the loss’—or diminution of value—‘of an underlying claim.’” Id. at 191 (quoting Simpkins v. Connor, 210 Or App 224, 150 P3d 417 (2006)).

In analyzing Oregon's spoliation jurisprudence, the US District Court of Connecticut recognized that “The Oregon Supreme Court has not yet considered whether intentional or negligent spoliation claims present cognizable causes of action.” In re Helicopter Crash Near Wendle Creek, British Columbia, On August 8, 2002, 2009 WL 1391422 (D Conn May 18, 2009). However, the District Court exercised its “best judgment” and based on Oregon’s jurisprudence decided that “absent a more recent or more authoritative ruling to the contrary . . . the Supreme Court of Oregon would recognize intentional and negligent spoliation of evidence as causes of action.” Id. Thus, the District Court granted the plaintiff’s motion for leave to amend their complaint and include an intentional and negligent spoliation of evidence claim. Id.

IV. Remedies when spoliation occurs:

Oregon appellate courts have not yet specifically addressed the source or scope of authority to impose sanctions for spoliation. However, courts usually find authority to impose sanctions for spoliation in their rules of procedure for a violation of a court order or under the court’s inherent authority. See Leon v. IDX Sys. Corp., 464 F3d 951, 958 (9th Cir 2006) (federal courts).
In cases when spoliation has occurred, courts must first identify their authority to impose evidentiary or procedural sanctions. The usual bases for that authority is a court’s inherent power to control litigation or in its procedural rules. See West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir 1999) (“Even without a discovery order, a district court may impose sanctions for spoliation, exercising its inherent power to control litigation.”); United States v. $40,955.00 in United States Currency, 554 F.3d 752, 758 (9th Cir 2009) (“Under its inherent power to control litigation, a district court may levy sanctions, including dismissal of the action, for spoliation of evidence.”) (citations omitted); Flury v. Daimler Chrysler Corp., 427 F.3d 939, 944 (11th Cir 2005) (district court’s power to impose sanctions for discovery abuses “derives from the court’s inherent power to manage its own affairs and to achieve the orderly and expeditious disposition of cases”).

(A) Negative inference instruction

“The most commonly discussed remedy for spoliation is a jury instruction permitting an inference against the despoiler.” Sheldon M. Finkelstein, Evelyn R. Storch & James Simpson, Spoliation, or Please Don’t Leave the Cake Out in the Rain, 32 ABA Litigation 28, 29 (Summer 2006). “The best known civil remedy that has been developed is the so-called spoliation inference that comes into play where a litigant is made aware of the destruction or concealment of evidence during the underlying litigation.” Rosenblit v. Zimmerman, 766 A.2d 749, 754-755 (NJ 2001). See Gribben v. Wal-Mart Stores, Inc., 824 N.E.2d 349, 351 (Ind 2005) (“it is well-established in Indiana law that intentional first-party spoliation of evidence may be used to establish an inference that the spoliated evidence was unfavorable to the party responsible.”); Wood v. Pittsford Cent. Sch. Dist., 2008 US App LEXIS 24733 at *7 (2d Cir Dec 8, 2008) (“A spoliation inference is available if: (1) relevant evidence is destroyed; (2) with culpability; (3) when the defendant was under a duty to preserve the evidence”).

(B) Dismissal

Under a court’s inherent powers, a court may dismiss an action or defense for spoliation of evidence. United States v. $40,955.00 in United States Currency, 554 F.3d 752, 758-759 (9th Cir 2009); Utica Mut. Ins. Co. v. Berkoski Oil Co., 872 N.Y.S.2d 166 (NY App Div 2009) (reversing trial court’s dismissal of complaint as sanction because there was no evidence of intentional spoliation or bad faith or that loss of evidence left party without means to defend the action); Nieves v. Ortiz, 2008 US Dist LEXIS 105637 (D NJ Dec 31, 2008) (dismissing defense as sanction and awarding reasonable attorney fees).

Before imposing the harsh sanction of dismissal, courts have been required to make findings, at the very least, of “willfulness, fault, or bad faith.” Leon v. IDX Sys. Corp., 464 F.3d 951, 958 (9th Cir 2006). The Ninth Circuit has identified five factors district courts should consider: “(1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.” Id. at 958.
If the standard of proof to establish dismissal as a sanction for spoliation is at issue, it may be clear and convincing evidence. Micron Tech., Inc. v. Rambus Inc., 255 FRD 135, 149 (D Del 2009).

(C) Criminal Sanctions

Tampering with evidence is a Class A misdemeanor in Oregon. ORS 162.295.

(D) Other Sanctions

In Oregon, “[w]ilful suppression of evidence raises an unfavorable presumption against the party who suppressed it. OEC 311(1)(c); Booher v. Brown, 173 Ore. 464, 474, 146 P2d 71 (1944).” Stephens v. Bohlman, 138 Or App 381, 386, 909 P3d 208 (1996). If evidence is “within the power of a party to produce” and that party does not produce it, “the evidence which he has produced should be viewed with mistrust” and the evidence the party “fail[ed] to produce should be presumed to be adverse to him.” Whitney v. Canadian Bank of Commerce, 232 Or 1, 374 P2d 441 (1962).

In Ferguson v. Nelson, the plaintiffs had requested a special nonuniform jury instruction about “the presumptions that arise when a party willfully suppresses evidence.” 216 Or App 541, 545 n 2 & 552, 174 P3d 620 (2007). The trial court did not give the jury instruction. Id. The court of appeals affirmed, because the plaintiffs did not designate the relevant parts of the record on appeal and the designated record did not contain any evidence to support a finding that the defendant willfully suppressed evidence. Id. (“It was plaintiffs’ burden to demonstrate that the trial court erred by declining to give the requested instructions.”)

In Tigglebeck v. Russell, the court held that there was sufficient facts when the defendant destroyed her will to “free her from suspicion of intentional fraud, neglect, or default, and to overcome the unfavorable presumption which the willful destruction of documentary evidence would otherwise have raised against her.” 187 Or 554, 578, 213 P2d 156, 167 (1949) (citing Booher v. Brown, 173 Or 464, 474, 146 P2d 71 (1944)).

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

Oregon case law has not addressed the issue of spoliation of electronic evidence and duty to preserve electronic information. However, the same principles applied to other forms of evidence would most likely apply. The destruction of evidence constituting “spoliation” may include a party’s failure to preserve evidence in pending or reasonably foreseeable litigation. Zubulake v. UBS Warburg LLC, 220 FRD 212, 216 (SDNY 2003). “As soon as a potential claim is thus identified, a party is under a duty to preserve evidence which it knows, or reasonably should know, is relevant to the future litigation.” Micron Tech., Inc. v. Rambus Inc., 255 FRD 135 (D Del 2009).

VI. Retention of surveillance video.

Oregon case law has not addressed the retention of surveillance video. However, the same principles applied to other forms of evidence would most likely apply.