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# Spoliation in Child Welfare: Perspectives and Solutions

Dale Margolin Cecka

University of Richmond, [dcecka@richmond.edu](mailto:dcecka@richmond.edu)

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# SPOLIATION IN CHILD WELFARE: PERSPECTIVES AND SOLUTIONS

*Dale Margolin\**

## I. INTRODUCTION

Child welfare attorneys are challenged every day in family court by agencies' failure to produce records.<sup>1</sup> For those who practice child welfare tort litigation, incomplete discovery is also common, even though case records can be critical in determining negligence or malfeasance.<sup>2</sup> In other forms of civil litigation, judges hold parties accountable for the act of losing or destroying records,<sup>3</sup> known as spoliation.<sup>4</sup> Juries are allowed to draw negative inferences about the missing evidence.<sup>5</sup> In contrast, an investigation of child welfare torts reveals that when a defending agency fails to produce credible records, the issue is simply not litigated or does not affect

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\* Associate Professor of Law and Director of the Family Law Clinic at the University of Richmond's T.C. Williams School of Law. The author would like to thank Erika Encinas and Rebecca Johnson for their invaluable research assistance.

<sup>1</sup> Dale Margolin & Daniel Pollack, *Where Are the Records? Handling Lost/Destroyed Records in Child Welfare Tort Litigation*, 30 ABA CHILD L. PRAC. 81, 81 (2011).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Charles R. Neeson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 793 (1991).

<sup>5</sup> Margolin & Pollack, *supra* note 1, at 81.

the procedure or outcome of the case.<sup>6</sup>

This article examines the potential effects of failing to preserve or produce evidence in the child welfare tort context. Section Two provides an overview of the record-keeping policies and practices in child protective systems throughout the country. It also describes the toll that civil litigation has taken on these systems because of negligent care of children. Section Three explains spoliation and its civil and criminal ramifications in other contexts. Section Four analyzes the effects that missing records have on child welfare torts. Section Five discusses best practices for attorneys and courts in addressing spoliation in child welfare tort litigation. Section Five concludes with systemic solutions for preventing the mishandling of child protective case records in the first place.

## II. CHILD WELFARE AGENCIES AND RECORD KEEPING

The duty to preserve child welfare case records is grounded in standards of care and professional ethics and formalized in statutes and regulations.<sup>7</sup> Laws and policies also regulate purging of documents.<sup>8</sup> Many states lack explicit parameters for retaining child wel-

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

fare records, as opposed to other social-service documents.<sup>9</sup> Given the life and potential long-term complications of any single case, state statutes should specify lengthy retention times for child welfare documents.<sup>10</sup> In some states, former foster children also have a right to obtain their records after discharge<sup>11</sup> and may need them for health and other reasons.

Some states are very clear on the maintenance and purging of abuse and neglect reports, but do not set clear timelines for retaining foster care records.<sup>12</sup> Virginia is one state with an exemplary child welfare record policy.<sup>13</sup> It requires that case records for children not adopted or reunited with their families be retained permanently, and all others until the child turns twenty-two.<sup>14</sup> Other states (such as Alabama) have time periods such as seventy-five years for all foster care records.<sup>15</sup>

Child welfare agencies risk [may be more likely to lose] losing records because they have files for thousands of children.<sup>16</sup> In addition, the relationship between the agency and the child may span

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *E.g.*, N.Y. COMP. CODES R. & REGS. tit. 18, § 428.8 (2012).

<sup>12</sup> Margolin & Pollack, *supra* note 1, at 81.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

many years, often until the child reaches age twenty-one.<sup>17</sup> Heavy caseloads and high turnover among caseworkers and supervisors also make it challenging to monitor and enforce record-keeping policies.<sup>18</sup> Incomplete case records are common. Some agencies have been forced to close or have lost their contracts because of poor or fraudulent record keeping.<sup>19</sup> Although most agencies are not involved in willful or bad-faith destruction of records, in some cases their conduct rises to the level of negligence or gross negligence.<sup>20</sup>

Tort litigation involving public and private social services agencies should make administrators and attorneys keenly aware of the obligation to preserve evidence.<sup>21</sup> Across the country, torts regarding individual children in the child welfare system are common.<sup>22</sup> Foster care suits represent 15% of the \$51.7 million New Jersey paid out to settle 317 suits in 2010.<sup>23</sup> Between 1998 and 1999, California settled or paid claims of more than \$3.5 million; twenty-six of these

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See, e.g., Leslie Kaufman, *City to Sever Two Contracts for Foster Care*, N. Y. TIMES, Feb. 3, 2005, at B1.

<sup>20</sup> Margolin & Pollack, *supra* note 1, at 81.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Susan Livio, *Foster Care Lawsuits Have Been Expensive*, THE STAR LEDGER, Apr. 25, 2011, available at [www.nj.com/bridgeton/index.ssf?/base/news-19/1303704614317560.xml&coll=10](http://www.nj.com/bridgeton/index.ssf?/base/news-19/1303704614317560.xml&coll=10).

cases were for child abuse or neglect.<sup>24</sup> Children's Rights, Inc., alone has four class-action suits pending in courts right now, involving 33,500 children.<sup>25</sup> A 2005 study found thirty consent decrees resulting from child welfare class-action suits over the past ten years.<sup>26</sup> These consent decrees affected more than 377,000 children. Twenty-one states currently have an operating consent decree or pending litigation that affects the operation of a state or local child welfare system.<sup>27</sup> In 2011 in Pennsylvania, the siblings of a deceased child were awarded nearly \$2 million for negligence by the foster care agency that was supposed to be overseeing the case.<sup>28</sup> Costs of reproducing lost records should also give any agency pause, adding to the estimated \$40,000 per child (\$22 billion total) spent on the United States foster care system each year.<sup>29</sup>

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<sup>24</sup> Mareva Brown, *Foster Care Abuse Costs - \$3.5 Million in 13 Months*, SACRAMENTO BEE, Nov. 14, 1999, available at <http://robtshepherd.tripod.com/lawsuits.html>.

<sup>25</sup> Class Actions, CHILDREN'S RIGHTS (last visited Feb. 12, 2012, 6:03 PM), <http://www.childrensrights.org/reform-campaigns/legal-cases/>.

<sup>26</sup> See CHILD WELFARE LEAGUE OF AMERICA AND THE ABA CENTER ON CHILDREN AND THE LAW, CHILD WELFARE CONSENT DECREES: ANALYSIS OF THIRTY-FIVE COURT ACTIONS FROM 1995 TO 2005 2 (2005) available at <http://www.cwla.org/advocacy/consentdecrees.pdf>.

<sup>27</sup> *Id.*

<sup>28</sup> Charles Benson, *Siblings Share Nearly \$2 Million of Late Sister's Estate*, LAWYERSANDSETTLEMENTS.COM, Feb. 26, 2010, [http://www.lawyersandsettlements.com/articles/trust\\_estate/wills-trusts-estates-bank-beneficiary-trust-trustees-2-13656.html](http://www.lawyersandsettlements.com/articles/trust_estate/wills-trusts-estates-bank-beneficiary-trust-trustees-2-13656.html).

<sup>29</sup> *Putting Families First*, THE ECONOMIST, Nov. 25, 2005, available at [www.economist.com/node/5220612](http://www.economist.com/node/5220612); U.S. DEP'T OF HEALTH & HUMAN SERVS., ASPE ISSUE

### III. SPOILIATION

Parties owe a duty to the court to preserve and produce evidence.<sup>30</sup> Failing to do so is known as spoliation.<sup>31</sup> Spoliation can refer to both negligent failure to preserve records and intentional destruction of evidence by a party or their agent, including tampering with or otherwise interfering with evidence.<sup>32</sup> In recent years, spoliation has received increased attention.<sup>33</sup> One survey concluded that 50% of all litigators found spoliation to be a frequent or regular problem.<sup>34</sup>

#### A. Timing of Duty to Preserve

Jurisdiction determines when the duty to preserve records begins.<sup>35</sup> In some states, it begins when litigation is threatened or anticipated;<sup>36</sup> in others, the alleged offending agency must actually receive

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BRIEF: FEDERAL FOSTER CARE FINANCING 1 (2005), available at <http://aspe.hhs.gov/hsp/05/fc-financing-ib/ib.pdf>.

<sup>30</sup> Margolin & Pollack, *supra* note 1, at 86.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (citing Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 793 (1991)).

<sup>35</sup> *Id.*

<sup>36</sup> *See Souza v. Fred Carries Contracts, Inc.*, 955 P.2d 3, 6 (Ariz. Ct. App. 1997) (noting that litigants have a duty to preserve evidence that they know or reasonably should know is relevant in an action, or is reasonably likely to be requested during discovery). *See generally* MATTHIESEN WICKERT LEHRER, S.C. SPOILIATION OF EVIDENCE IN ALL 50 STATES 2, 6, 17, 18 (2008), available at [www.mwl-law.com/CM/Resources/Spoliation-in-all-50-states.pdf](http://www.mwl-law.com/CM/Resources/Spoliation-in-all-50-states.pdf) [hereinafter SPOILIATION OF EVIDENCE].

a formal legal complaint before it can be held accountable.<sup>37</sup> The ABA Model Rules, which every state has adopted almost verbatim, prohibit lawyers from destroying evidence in pending litigation or litigation that is reasonably foreseeable.<sup>38</sup> However, state professional codes prohibit destruction for the purpose of obstructing another party's access to evidence, and do not address negligent destruction or destruction that occurs because of an agency's purging policy.<sup>39</sup>

#### B. State of Mind

The state of mind necessary for finding spoliation varies by state and federal jurisdiction.<sup>40</sup> States can be divided into two categories: those that only sanction spoliation if there is willful destruction and those in which negligence or gross negligence is sufficient (see Appendix).<sup>41</sup> A few states do not appear to sanction spoliation in the underlying action, but may recognize an independent tort for spoliation (discussed below).<sup>42</sup> The federal circuits are also split on whether spoliation requires bad faith.<sup>43</sup>

In states requiring willful destruction, courts generally making

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<sup>37</sup> Margolin & Pollack, *supra* note 1, at 86.

<sup>38</sup> MODEL RULES OF PROF'L CONDUCT R. 3.4(a).

<sup>39</sup> Margolin & Pollack, *supra* note 1, at 86.

<sup>40</sup> *Id.*

<sup>41</sup> See *infra* Appendix I.

<sup>42</sup> John K. Stipancich, Comment, *The Negligent Spoliation of Evidence: An Independent Tort Action May Be the Only Acceptable Alternative*, 53 OHIO ST. L.J. 1135, 1139–40 (1992).

<sup>43</sup> See generally SPOILIATION OF EVIDENCE, *supra* note 36.



a spoliation finding when:<sup>44</sup> (1) evidence has been destroyed; (2) the evidence is relevant; (3) legal proceedings were pending or reasonably foreseeable (in states that recognize foreseeability, as discussed above); and, (4) the destruction was an intentional act of the party or the party's agent indicative of fraud or intent to suppress truth.<sup>45</sup>

In states where gross negligence is sufficient, courts generally consider the following factors when making a spoliation finding<sup>46</sup>: 1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for litigation; and, (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in causing the destruction of the evidence.<sup>47</sup>

### C. Sanctions

Sanctions for spoliation fall into three categories: criminal,

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<sup>44</sup> Margolin & Pollack, *supra* note 1, at 86.

<sup>45</sup> MODEL RULES OF PROF'L CONDUCT, R. 3.4(a).

<sup>46</sup> SPOILIATION OF EVIDENCE, *supra* note 36.

<sup>47</sup> *Id.*

civil, and monetary.<sup>48</sup> Absent an existing court order, the basis for imposing sanctions is the inherent power of the court as well as procedural rules such as Federal Rule of Civil Procedure 37.<sup>49</sup>

### 1. Criminal Sanctions

Spoliation is a misdemeanor<sup>50</sup> or a felony<sup>51</sup> in a number of states, although prosecutors rarely bring charges and most statutes only apply to spoliation in criminal proceedings.<sup>52</sup> Several federal statutes also permit criminal prosecution,<sup>53</sup> and at least one federal court has held that individuals who intentionally destroy or conceal documents during civil litigation may be prosecuted under federal law for obstruction of justice.<sup>54</sup>

### 2. Civil Sanctions

The most common civil sanctions are evidentiary, namely the negative or adverse inference rule.<sup>55</sup> The moving party bears the burden of proof and may introduce evidence that evidentiary materials

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<sup>48</sup> Margolin & Pollack, *supra* note 1, at 86.

<sup>49</sup> *Id.* See also FED. R. CIV. P. 37.

<sup>50</sup> See Scott S. Katz & Anne Marie Muscaro, *Spoliation of Evidence – Crimes, Sanctions, Inferences, and Torts*, 29 TORT & INS. L.J. 51, 53 (1993).

<sup>51</sup> *Id.* at 54.

<sup>52</sup> Margolin & Pollack, *supra* note 1, at 86.

<sup>53</sup> Charles Doyle, CONG. RESEARCH SERV., RS 22783, OBSTRUCTION OF JUSTICE: AN ABRIDGED OVERVIEW OF RELATED FEDERAL CRIMINAL LAWS (2007), [www.fas.org/sgp/crs/misc/RS22783.pdf](http://www.fas.org/sgp/crs/misc/RS22783.pdf).

<sup>54</sup> *United States v. Lundwall*, 1 F. Supp. 2d 249, 256 (S.D.N.Y. 1998).

<sup>55</sup> SPOILIATION OF EVIDENCE, *supra* note 36.

were destroyed.<sup>56</sup> The opposing party may rebut this evidence, either in a preliminary hearing or directly to the jury.<sup>57</sup> The jury may infer that the missing evidence would be unfavorable to the alleged offending party.<sup>58</sup> In some jurisdictions, egregious behavior can give rise to a mandatory negative inference.<sup>59</sup>

Other evidentiary sanctions include: excluding evidence, including test results and expert testimony, after an evidentiary hearing;<sup>60</sup> dismissing or granting full or partial summary judgment in favor of the non-offending party;<sup>61</sup> and, imposing a default under Federal Rule 37, or a directed verdict, if a court has already issued a discovery order.<sup>62</sup>

### 3. Professional Discipline

Lawyers can also be professionally disciplined for their role in losing or destroying records.<sup>63</sup> This is rare but has occurred in

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See SPOILIATION OF EVIDENCE, *supra* note 36, at 2, 4, 9, 16 (noting that Arkansas, Delaware, Maryland, and Oregon mandate a negative inference for intentional spoliation); see also Margolin & Pollack, *supra* note 1, at 87.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* See also FED. R. CIV. P. 37.

<sup>63</sup> See SPOILIATION OF EVIDENCE, *supra* note 36, at 7 (noting that Indiana allows discipline for attorneys who are responsible for the spoliation of evidence); see also Margolin & Pollack, *supra* note 1, at 87.

Washington, D.C.<sup>64</sup> In extreme cases, a lawyer can be disbarred.<sup>65</sup>

An attorney may also face malpractice liability if their misconduct has legal or monetary consequences for their client.

#### 4. Monetary Penalties

Under Federal Rule 37 and state procedural laws, courts may order that monetary penalties be paid to the court, the parties, or both, to recover the cost of attempting to discover the missing evidence and for filing the spoliation motion.<sup>66</sup> Some courts go further and award punitive damages, which have gone as high as \$1,000,000.<sup>67</sup>

#### D. Electronic Records: Specific Concerns

Electronically stored information ("ESI") raises new concerns about the ability of litigants to meet their discovery duties.<sup>68</sup> ESI is often more voluminous and easier to duplicate, harder to delete, constantly changes formats, contains hidden metadata, can be dependent on a particular computer system, and may be dispersed across differ-

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<sup>64</sup> *In re Zeiger*, 692 A.2d 1351, 1353 (D.C. 1997).

<sup>65</sup> *Cedars-Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511, 518 (Cal. 1998).

<sup>66</sup> SPOILIATION OF EVIDENCE, *supra* note 36. See also FED. R. CIV. P. 37.

<sup>67</sup> *In re Prudential Co. of Am. Sales Litig.*, 169 F.R.D. 598, 617 (1997), *overruled in part by In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 2000 U.S. Dist. LEXIS 22396 (D.N.J. 2000); *Harkabi v. Sandisk Corp.*, 2010 WL 3377338 (S.D.N.Y. 2010) (imposing sanctions of \$150,000).

<sup>68</sup> Margolin & Pollack, *supra* note 1, at 88.

ent file formats and storage devices.<sup>69</sup>

The federal government and most states have adopted the Uniform Photographic Copies of Business and Public Records as Evidence Act ("UPA"), which permits the use of scanned electronic copies in all judicial proceedings and allows the destruction of original documents unless preservation is required by law.<sup>70</sup> Many state laws and Federal Rule 37(e) also bar courts from sanctioning a party who took reasonable steps to retain information but failed to produce it "as a result of the routine, good-faith operation of an electronic information system."<sup>71</sup>

However, courts will still impose sanctions for negligent destruction of ESI. This includes giving jury instructions regarding a defendant's failure to preserve evidence, actually excluding evidence, and awarding payment to a plaintiff for reasonable costs and fees.<sup>72</sup>

#### E. Independent Tort for Lost or Destroyed Records

Some jurisdictions have started recognizing independent torts for intentional and negligent spoliation, against both first and third

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<sup>69</sup> *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, THE SEDONA CONFERENCE (Jan. 2004), <http://www.thosedonaconference.org/dltForm?did=SedonaPrinciples200401.pdf>.

<sup>70</sup> 28 U.S.C. § 1732 (2006).

<sup>71</sup> FED. R. CIV. P. 37(e); WIS. STAT. § 804.12(4)(m).

<sup>72</sup> *Northington v. H&M Int'l*, 2011 WL 662727, at \*1 (N.D. Ill. Feb. 14, 2011).

parties to litigation.<sup>73</sup> One reason is the sanctions discussed above can only be applied when a first party has spoiled evidence, not when anyone else has negligently or intentionally destroyed evidence.<sup>74</sup>

A California court opened the door to the tort, although it has since been overturned there in all contexts.<sup>75</sup> Kansas courts hold that a tort might apply in limited contexts, but none of these cases have gone forward there.<sup>76</sup> No independent claim for spoliation exists under federal law.<sup>77</sup>

#### 1. Intentional Spoliation, First and Third Parties

The following states recognize a tort for intentional spoliation against both first and third parties: Alaska, Louisiana, Montana, New Mexico, Ohio, and West Virginia.<sup>78</sup> Those courts look at the follow-

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<sup>73</sup> See, e.g., *Smith v. Superior Court of Los Angeles*, 151 Cal. App. 3d 491, 496 (1984), *overruled by Cedars-Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511, 521 (Cal. 1998) (holding a party to the suit not liable in tort for the destruction of evidence when the spoliation could have been discovered before the end of the lawsuit); see, e.g., *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 463 (Alaska 1986); see also *Stipancich*, *supra* note 42, at 1139.

<sup>74</sup> *Stipancich*, *supra* note 42, at 1140.

<sup>75</sup> *Smith v. Superior Ct. of Los Angeles*, 151 Cal. App. 3d 491, 496 (1984), *overruled by Cedars-Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511, 521 (1998) (holding a party to the suit not liable in tort for the destruction of evidence when the spoliation could have been discovered before the end of the lawsuit); see also *Temple Cmty. Hosp. v. Superior Court*, 976 P.2d 223, 233 (Cal. 1999) (holding a third party who intentionally destroys or suppresses evidence is not liable in tort, an issue that remained unresolved after the *Cedars-Sinai* holding).

<sup>76</sup> *Foster v. Lawrence Mem'l Hosp.*, 809 F. Supp. 831, 838 (Kan. 1992).

<sup>77</sup> Laura Kindel & Kai Richter, *Spoliation of Evidence: Will the New Millennium See A Further Expansion of Sanctions for the Improper Destruction of Evidence?*, 27 WM. MITCHELL L. REV. 687, 696 (2000).

<sup>78</sup> *Hazen v. Anchorage*, 71 P.2d 456, 463 (Alaska 1986) (permitting a tort for intentional spoliation against first and third parties); *Guillory v. Dillard's Dep't Store, Inc.*, 777 So.2d 1,

ing factors: (1) pending or probable civil litigation; (2) knowledge by the spoliator that litigation is pending or probable; (3) willful destruction of evidence; (4) intent to interfere with the victim's prospective civil suit; (5) a causal relationship between the evidence destruction and inability to prove the lawsuit; and, (6) damages.<sup>79</sup>

## 2. Negligent Spoliation, Third Parties

A tort for negligent spoliation is actionable against third parties in Alabama, Florida, Indiana, Louisiana, and West Virginia.<sup>80</sup> Montana recognizes the tort against both first and third parties.<sup>81</sup> The elements are: (1) pending or probable civil litigation (2) a legal or contractual duty to preserve evidence relevant to the potential action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the de-

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3–4 (La. Ct. App. 2000) (permitting a tort for intentional spoliation against first and third parties); *Oliver v. Stimson Lumber Co.*, 993 P.2d 11, 18–23 (Mont. 1999) (permitting a tort for intentional spoliation for first or third parties), *overruled on other grounds by* *Delgado v. Phelps Dodge Chino, Inc.*, 34 P.3d 1148 (N.M. 2001); *Smith v. Howard Johnson, Co.*, 615 N.E.2d 1037, 1038 (Ohio 1993) (permitting a tort for intentional spoliation for first and third parties); *Hannah v. Heeter*, 584 S.E. 2d 560, 563–64 (W. Va. 2003) (permitting a tort for intentional spoliation for first and third parties); *see also* Margolin & Pollack, *supra* note 1, at 87.

<sup>79</sup> Margolin & Pollack, *supra* note 1, at 87.

<sup>80</sup> *Smith v. Atkinson*, 771 So.2d 429, 438 (Ala. 2000) (permitting a tort for negligent spoliation against third parties); *Townsend v. Conshor, Inc.*, 832 So.2d 166, 167 (Fla. Dist. Ct. App. 2002) (permitting a tort for negligent spoliation against third parties); *Glotzbach, CPA v. Froman*, 827 N.E.2d 105, 108 (Ind. Ct. App. 2005) (permitting a tort for intentional or negligent spoliation against third parties); *Guillory v. Dillard's Dep't Store, Inc.*, 777 So.2d 1, 3–4 (La. Ct. App. 2000) (permitting a tort for intentional or negligent spoliation against first and third parties); *Hannah v. Heeter*, 584 S.E.2d 560, 563–64 (W. Va. 2003) (permitting a tort for negligent spoliation against third parties).

<sup>81</sup> *Oliver v. Stimson Lumber Co.*, 993 P.2d 11, 19, 22 (Mont. 1999).

struction and inability to prove the lawsuit; and, (6) damages.<sup>82</sup> In any of these torts, it can be difficult to determine damages, but courts usually allow the plaintiff to bring evidence of potential recovery from the underlying action.<sup>83</sup> Courts are apt to award higher damages if the offending party is a first party; otherwise, they will make a finding that is “just and reasonable.”<sup>84</sup> Some states also allow punitive damages.<sup>85</sup>

#### IV. SPOILIATION IN CHILD WELFARE

Lost or destroyed records affect the hundreds of thousands of children involved in child welfare tort actions.<sup>86</sup> However, spoliation is hardly ever addressed in this context or pursued as a separate tort.<sup>87</sup> Perhaps this is not surprising, given that child welfare litigation and family and juvenile courts so often deviate from standard practice.<sup>88</sup> But because the venue for child welfare torts is general jurisdiction state and federal courts, spoliation can and should be addressed when

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<sup>82</sup> Margolin & Pollack, *supra* note 1, at 87.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* (quoting *Smith v. Superior Court*, 151 Cal. App. 3d 491, 500 (1984)).

<sup>85</sup> *See, e.g., Moskowitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, 344 (Ohio Ct. App. 1994) (allowing spoliation of evidence to be the basis for punitive damages in Ohio); *see, e.g., Hannah v. Heeter*, 584 S.E.2d 560, 563–64 (W.Va. 2003) (allowing spoliation of evidence to be the basis for punitive damages in West Virginia).

<sup>86</sup> Margolin & Pollack, *supra* note 1, at 87.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*



appropriate.<sup>89</sup>

#### A. Recent Precedent

Lost records have garnered attention in a few recent child welfare matters and related tort and criminal actions.<sup>90</sup> Courts are starting to hold agencies and individual caseworkers accountable for negligence in record keeping, as its own offense.<sup>91</sup>

##### 1. Civil Cases

Spoliation emerged in at least one class action in New Jersey in 2001, filed against the entire state system for abuse suffered by children with a goal of adoption.<sup>92</sup> Plaintiffs asked for an injunction to stop the state from performing an internal audit, which plaintiffs claimed started after the class action was filed and required workers to post-date and alter records to make it appear the agency was doing its job.<sup>93</sup> Although the plaintiffs did not meet their burden of proving intent or actual fraud, the court recognized that sanctions would have been appropriate if they had.<sup>94</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 86–88.

<sup>91</sup> *Id.* at 81.

<sup>92</sup> *Charlie H. v. Whitman*, No. 99-3678 (GEB), at 1(D.N.J. Jan. 27, 2000) (unpublished memorandum opinion on plaintiff's motion for injunction in) (on file with author).

<sup>93</sup> *Id.* at 2.

<sup>94</sup> *Id.* at 10–11.

In the infamous Philadelphia case of Danieal Kelly, a 14-year-old girl with cerebral palsy who was supposed to be receiving intensive services from the city and its contracted agency starved to death in her mother's apartment.<sup>95</sup> Danieal's siblings were awarded nearly two million dollars for the agency's negligence,<sup>96</sup> which included fraudulent record keeping.<sup>97</sup> Because of this case, the Philadelphia Department of Human Services was forced to implement some thirty-seven reforms, overseen by the Child Welfare Review Panel.<sup>98</sup> The new regulations include strict record-keeping policies and consequences for failure to follow them.<sup>99</sup>

In Washington, plaintiffs who were suing the state because of abuse by their foster parents filed a separate claim under the Public

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<sup>95</sup> Joseph A. Slobodzian, *Danieal Kelly's Death Was 'A Matter of Time'*, THE INQUIRER (July 12, 2011) available at [http://articles.philly.com/2011-07-12/news/29764962\\_1\\_dhs-visits-worker](http://articles.philly.com/2011-07-12/news/29764962_1_dhs-visits-worker).

<sup>96</sup> Charles Benson, *Siblings Share Nearly \$2 Million of Late Sister's Estate*, LAWYERSANDSETTLEMENT.COM (Feb. 26, 2010), [http://www.lawyersandsettlements.com/articles/trust\\_estate/wills-trusts-estates-bank-beneficiary-trust-trustees-2-13656.html](http://www.lawyersandsettlements.com/articles/trust_estate/wills-trusts-estates-bank-beneficiary-trust-trustees-2-13656.html).

<sup>97</sup> United States v. Kamuvaka, Crim No. 09-, at 8–10 (E.D. Pa. Apr. 30, 2009) (indictment), available at <http://www.justice.gov/usao/pae/News/2009/may/multiethnicind.pdf>.

<sup>98</sup> CITY OF PHILADELPHIA COMMUNITY OVERSIGHT BOARD FOR THE DEP'T OF HUMAN SERVS., REPORT ON PROGRESS, at 1 (2010), available at <http://www.phila.gov/dhs/pdfs/COBFebMayorsProgRp03102010.pdf>.

<sup>99</sup> *Id.* at 2–5.

Records Act when the agency failed to produce documents in the original case.<sup>100</sup> They were awarded \$525,000.<sup>101</sup>

## 2. Criminal Cases

There is precedent for indicting and convicting caseworkers for altered records.<sup>102</sup> In the Danieal Kelly case, caseworkers and supervisors were convicted of fraud for “knowingly filing false reports claiming to provide social services to at-risk children and their families, when few or no services were ever provided, and then billing the City for those services.”<sup>103</sup> They were also convicted of conspiracy for obstructing a federal investigation by altering, destroying, concealing, and falsifying records.<sup>104</sup>

In 2011, a child protection worker and his supervisor were charged with criminal homicide for the death of a girl on their caseload, an unprecedented occurrence in New York City.<sup>105</sup> Charges in-

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<sup>100</sup> Susannah Frame, *Former Foster Children Awarded Record Payout in Public Records Lawsuit*, KING 5 NEWS (Nov. 5 2009), [www.King5.com/news/local/Former-foster-children-awarded-record-payout-in-public-records-lawsuit-629261292.html](http://www.King5.com/news/local/Former-foster-children-awarded-record-payout-in-public-records-lawsuit-629261292.html).

<sup>101</sup> *See id.*

<sup>102</sup> Press Release 2010, *Social Services Agency Co-Founders Sentenced for Deadly Fraud Scheme*, THE FEDERAL BUREAU OF INVESTIGATION (June 10, 2010), <http://www.fbi.gov/philadelphia/press-releases/2010/ph061010a.htm>.

<sup>103</sup> *Id.*

<sup>104</sup> *9 Workers Indicted After Danieal Kelly's Death*, ABC LOCAL (May, 7 2009), <http://abelocal.go.com/wpvi/story?section=news/local&id=6790693>.

<sup>105</sup> Mosi Secret, *Child Welfare Workers Charged in Brooklyn 4-Year-Old's Death*, N.Y. TIMES (Mar. 24, 2011), available at <http://query.nytimes.com/fullpage.html?res=9407EED61231F937A15750C0A9679D8B63&pagewanted=all>. *See generally* Jennifer Gonnerman, *The Knock at the Door*, N.Y.

cluded falsifying business records in the first degree and tampering with public records in the first degree.<sup>106</sup> Both defendants pleaded not guilty to all of the charges and are currently awaiting trial.<sup>107</sup>

### 3. Penalties for Lost Police Records

Judges are now penalizing prosecutors for losing law enforcement notes, which has ramifications for child welfare.<sup>108</sup> In a recent criminal case, The Supreme Court of New Jersey held that police reports of an alleged child sexual assault, in which the department of social services was involved, were in the control of the prosecutor.<sup>109</sup> Therefore, when the reports disappeared, an adverse inference could be taken against the prosecution.<sup>110</sup> Excluding police records has a domino effect on a child welfare case, because without a criminal finding, a state's civil case is harder to prove and could affect a child's safety and foster care placement.<sup>111</sup>

### B. Independent Torts for Spoliation in Child Welfare

Besides holding child protective agencies accountable for

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MAGAZINE (Sept. 11, 2011), available at <http://nymag.com/news/features/acschareece-bell-2011-9/index6.html>.

<sup>106</sup> Secret, *supra* note 105.

<sup>107</sup> See *Profiling A Supervisor Accused In Young Girl's Death*, NAT'L PUB. RADIO (Sept. 16, 2011), <http://www.npr.org/2011/09/16/140543474/profiling-a-supervisor-accused-in-a-young-girls-death>.

<sup>108</sup> Margolin & Pollack, *supra* note 1, at 88.

<sup>109</sup> *New Jersey v. W.B.*, 17 A.3d 187, 198 (N.J. 2011).

<sup>110</sup> *Id.* at 192.

<sup>111</sup> Margolin & Pollack, *supra* note 1, at 88.

spoliation, there are two independent tort claims that could be filed on behalf of children whose records have been lost.<sup>112</sup>

### 1. Possible Independent Torts against First Parties

Children in foster care have the right to be free from harm.<sup>113</sup>

Moreover, an agency has statutory and professional responsibilities to a child.<sup>114</sup> A cause of action may lie if there are damages resulting from mishandled records.<sup>115</sup> Aside from the tort of spoliation, a contractual claim could potentially be brought based on professional and legal duties.<sup>116</sup>

### 2. Possible Independent Torts against Third Parties

An independent tort for third party spoliation could also be filed where an entity not being directly sued, such as a school, hospital, or other agency involved with the case, has lost crucial documents about the child.<sup>117</sup> It is well documented that foster children's school records, which may contain crucial information about the child's aca-

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<sup>112</sup> *Id.*

<sup>113</sup> *See, e.g.,* Nicini v. Morra, 212 F.3d 798, 808 (3d. Cir. 2001); Meador v. Cabinet for Human Res., 902 F.2d 474, 476 (6th Cir. 1990); Bramm v. Washington, 81 P.3d 851, 857 (Wash. 2003); Doe v. New York City Dep't of Soc. Servs., 649 F.2d 134, 141 (2d Cir. 1987); Yvonne L. v. New Mexico Dep't of Human Servs., 959 F.2d 883, 892-93 (10th Cir. 1992); Deshaney v. Winnebago Dep't of Soc. Servs., 489 U.S. 189, 201 n.9 (1989).

<sup>114</sup> *See, e.g.,* CNTY. OF SAN MATEO HUMAN RES. AGENCY, FOSTER PARENT HANDBOOK, §11(A), §12 (A), available at <http://www.co.sanmateo.ca.us/portal/site/humanservices/menuitem.ef2c94fdbdc30bc965d293e5d17332a0/?vgnextoid=262f7cb1dada1210VgnVCM1000001d37230aRCRD>.

<sup>115</sup> Margolin & Pollack, *supra* note 1, at 88.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

demic and physical well-being,<sup>118</sup> are frequently lost.<sup>119</sup>

## V. BEST PRACTICES REGARDING SPOILIATION IN CHILD WELFARE

### A. Plaintiffs' Attorneys

#### 1. Do Not Rule Out Potential Child Welfare Torts

Individual plaintiffs' attorneys frequently contact expert witnesses about the viability of claims when records are missing.<sup>120</sup> For example, when a child has died at the hands of a foster parent and the original foster parent screening application is nowhere to be found, can a case be brought against the agency for placing the child there? Did the agency ever have the application? If not, is the agency culpable for not opening the home properly? Could a court infer that an application would or should have alerted the agency to potential problems?<sup>121</sup>

When considering a case, the plaintiff's attorney should not rule anything out because of missing records.<sup>122</sup> There may be enough pieces to the puzzle recoverable through discovery to form a basis for inferences or other sanctions.<sup>123</sup> The attorney should ask

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 88–89.

about the agency's internal written procedure for updating case files; if the agency refuses to provide it and it is not publicly available (for example, on a website), the attorney can make a FOIA request.<sup>124</sup> State FOIA laws should not bar to accessing such policies.<sup>125</sup>

## 2. Access Case Records

The case record and the expert case record review in class actions are some of the most important evidence a plaintiff's attorney can use.<sup>126</sup> Discovery of case records is also crucial for plaintiffs' attorneys because confidentiality laws can be a barrier to document retrieval before a child welfare tort action begins.<sup>127</sup> Furthermore, family court, where the original case was litigated, is so informal that the agency's record may tell the only complete story of a child's case.<sup>128</sup> Some states do not even record family court hearings and the family court files contain scant documentary evidence.<sup>129</sup>

## 3. Notify the Agency of a Potential Claim

As soon as possible before litigation, the plaintiff's attorney must notify the defending agency, in writing, that he or she may file a

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<sup>124</sup> *Id.* at 89.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 88.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

claim related to the evidence; this will counter the argument that preservation was unforeseeable.<sup>130</sup> The attorney should also request, in writing, that the agency retain all records related to the child and permit the attorney to inspect them.<sup>131</sup> If the agency does not agree in writing to preserve the evidence, the attorney should move for a court order requiring it to do so.<sup>132</sup>

#### 4. Identify Holes

After records are received, whether voluntarily or through subpoena, they must be scrutinized for holes and inaccuracies, including invalid supervisor's signatures (e.g., not being signed, or signed after the required time).<sup>133</sup> The plaintiff's attorney may want to take depositions of caseworkers, supervisors, or system managers to find out if anyone has deviated from standard practice or destroyed or altered records.<sup>134</sup> Interrogatories can also reveal what efforts were made to preserve documents.<sup>135</sup>

#### 5. Consider Sanctions

A plaintiff's strongest argument in a motion for spoliation

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<sup>130</sup> *Id.* at 89.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*



sanctions is that the basis of the plaintiff's case is what the agency did or did not do, which is supposed to be documented in the records.<sup>136</sup> Prejudice is clear because no other entity (besides subcontractors, who are liable as first party agents if they are not named themselves) is involved with the child or even allowed to access these records.<sup>137</sup>

Furthermore, negligent behavior with case files should be sanctioned because it affects the life of the child, who is in the custody of the agency and is owed legal and professional duties.<sup>138</sup> The plaintiff's attorney should consider all sanctions, including asking for an injunction to prevent an agency from fabricating records after threat or commencement of a lawsuit.<sup>139</sup>

Suggested jury instructions for the adverse inference can be found in numerous state codes, such as that of Kansas<sup>140</sup> and Michigan.<sup>141</sup>

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> PIK 4th Civil § 102.73.

<sup>141</sup> M. Civ. J.I. 2d 6.01(d).

## B. Agency Attorneys

### 1. Advise Clients to Retain Records

Agency attorneys must advise their clients to comply with state laws on retaining records.<sup>142</sup> Where statutes are not clear, the agency should establish a policy that is followed consistently and that adheres to professional standards.<sup>143</sup> All employees must be trained regularly on how to document and store case activity.<sup>144</sup> The agency is better off erring on the conservative side, with liberal retention times for electronic and physical records.<sup>145</sup> Even though the UPA allows destruction of original documents if not prohibited by law, when in doubt, existing hard copies should be retained.<sup>146</sup>

### 2. Ensure Agency Subcontractors Retain Records

The attorney should also advise the agency's subcontractors and consultants to retain copies of all relevant documents.<sup>147</sup> This is especially important in jurisdictions where a party may be found liable for spoliation by an agent, whether or not bad faith exists on the

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<sup>142</sup> Margolin & Pollack, *supra* note 1, at 89.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* (citing *Rosenthal Collins Group, LLC v. Trading Techs. Int'l*, 2011 WL 7224467 \*8-\*14 (N.D. Ill. 2011)).

part of the party.<sup>148</sup>

### 3. Ensure a Process is in Place to Identify Foreseeable Litigation

The agency attorney should permit only knowledgeable personnel to decide what constitutes foreseeable litigation.<sup>149</sup> Once such a determination is made, the attorney should order an internal “hold” on the purging of records and make sure all employees with the ability to alter or delete files are notified.<sup>150</sup> Because many agencies now use electronic case updating, the agency attorney must be sure to notify the IT department immediately.<sup>151</sup> In fact, many federal courts now find that because litigation “holds” are the norm, failure by a party’s counsel to issue a “hold” is gross negligence by the party, allowing for an adverse inference.<sup>152</sup> The agency attorney should document all efforts to preserve documents.<sup>153</sup>

### 4. Restrict Document Access

Access to the “held” documents should be restricted to necessary employees.<sup>154</sup> They should be explicitly instructed not to change records in any way, including altering or adding dates or signatures

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* (citing Pension Committee of the Univ. of Montreal Pension Plan et. al. v. Banc of America Securities, LLC, et.al., 685 F. Supp. 2d 456, 466–67 (S.D.N.Y. 2010)).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Margolin & Pollack, *supra* note 1, at 89.

<sup>154</sup> *Id.*

where they might be missing.<sup>155</sup> If a case note is problematic, it is easier to make a good faith negligence claim than defend against an allegation of bad faith tampering.<sup>156</sup>

#### 5. Know Your Defenses

The agency's strongest defense to any missing record is that the loss was unintentional.<sup>157</sup> Testimony about the working conditions of the agency—the thousands of documents, the heavy caseloads because of lack of funding for additional caseworkers, and the high staff turnover rates to name a few—can show that a mistake was innocent.<sup>158</sup> Furthermore, if the litigation occurs long after the child has left foster care, there were no apparent problems in foster care, and all state and internal purging policies were followed, the agency may successfully argue that it complied with the standards of the profession.<sup>159</sup>

Another defense is that the missing documents do not prejudice the case, although this is a more difficult argument because records are usually the most important piece of evidence regarding

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 88–89.

<sup>159</sup> *Id.* at 90.

the actions of the agency.<sup>160</sup> However, the attorney can make the case that certain records are not relevant, such as a missing report card in a case focusing on the visits a caseworker made to a foster home.<sup>161</sup>

A final defense is laches—that the opposing party had the opportunity to obtain the records but did not act in time.<sup>162</sup> Although this is an unlikely argument in child welfare torts because records are confidential, it could succeed if the plaintiff's attorney is working with a foster care attorney or guardian ad litem who has ongoing access to records.<sup>163</sup> The court may be reluctant to penalize an already overburdened agency and prolong the litigation when the plaintiff could have collaborated with non-adverse parties to obtain documents.<sup>164</sup>

### C. Court's Perspective

#### 1. Balance Interests When Evaluating Claims

Courts are challenged to balance all of these interests.<sup>165</sup> On one hand, bad behavior, including negligence, should be punished, especially because record keeping affects thousands of children.<sup>166</sup>

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

On the other, courts cannot be too speculative about missing documents.<sup>167</sup> Punitive measures could also set agencies back in their efforts to improve their practices.<sup>168</sup> Indeed, the judge in the New Jersey class action discussed above hesitated to “impose additional burdens” without solid proof that the agency was engaging in abnormal practices or a cover-up because this was “genuinely antithetical to the goals of the . . . litigation.”<sup>169</sup>

## 2. Weigh Prejudice to Innocent Party when Considering Sanctions

One suggested approach,<sup>170</sup> which may apply in child welfare cases, is to require the alleged offender to prove their behavior was completely excusable; any degree of fault—from negligence to fraud—will trigger sanctions.<sup>171</sup> However, the most important factor in determining sanctions is not the degree of fault, but prejudice to the innocent party.<sup>172</sup> Prejudice is presumed, but the alleged offender can rebut this presumption.<sup>173</sup> Monetary penalties could be included to compensate the moving party for the costs of bringing the motion

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Charlie H. v. Whitman*, No. 99-3678 (GEB), at 1 (D.N.J. Jan. 27, 2000) (unpublished memorandum opinion on plaintiff’s motion for injunction in) (on file with author).

<sup>170</sup> Benjamin A. Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 *FORDHAM L. REV.* 2005, 2029 (2011).

<sup>171</sup> *Id.*

<sup>172</sup> Margolin & Pollack, *supra* note 1, at 90.

<sup>173</sup> *Id.*

or searching for the evidence, but the substantive sanctions would always be linked to how the lost information could have affected the other party's case.<sup>174</sup> So, in the wrongful death example, in which the foster parent's screening application is missing, an adverse inference about what that application might have said would be appropriate.<sup>175</sup> In addition, the agency could be precluded from introducing other materials to show it screened the foster parent or has valid intake procedures.<sup>176</sup>

### 3. Choose Sanctions That Restore Parties and Deter Spoliation

This suggested approach allows the court wide discretion in choosing sanctions, but is grounded in the idea that the primary purpose of the punishment is to return the parties to the position they would have been in had the evidence not been lost.<sup>177</sup> At the same time, the sanctions are a deterrent to bad behavior, and should lead to better record keeping, regardless of whether litigation is pending.<sup>178</sup> All sides can agree that any improvement in case management would be a positive outcome for child welfare.<sup>179</sup>

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

## VI. PREVENTING SPOILIATION: HOW TO IMPROVE RECORD KEEPING

Records should not be lost, recreated, or falsified in the first place. Accurate records are integral to better case management—we need to know what services are being provided to a family and how the case is progressing.<sup>180</sup> But many argue that caseworkers have already become too bogged down with paperwork, devoting their time to filling out forms and entering data instead of helping families.<sup>181</sup> Furthermore, records are sloppy and continue to get lost even though various record keeping systems have been implemented by states and local agencies.<sup>182</sup>

One solution is to create a new staff of clerks whose sole function is to input data.<sup>183</sup> This service could also be contracted out to a data entry organization, perhaps a non-profit entity that employs low-skilled workers as part of a training program.<sup>184</sup> This might even provide opportunities to employ youth who have aged out of care. Regardless, strict confidentiality measures would have to be in place.

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<sup>180</sup> See, e.g., Child Protective Services: A Guide for Caseworkers, Effective Documentation, 101–104, available at <http://www.childwelfare.gov/pubs/usermanuals/cps/cps.pdf> [hereinafter *Child Protective Services*].

<sup>181</sup> See, e.g., The Knock at the Door, *supra* note 105 (explaining why a caseworkers job is really a writing job).

<sup>182</sup> See, e.g., *id.*

<sup>183</sup> See, e.g., *Ohio Non Profit Data Entry*, COLEMAN DATA SOLUTIONS, (Apr. 19, 2011), <http://www.coleman-data.com/ohio-non-profit-data-entry.html>.

<sup>184</sup> *Id.*



But is this a good use of resources? Records should be timely and accurate, but they should also reflect quality interactions.<sup>185</sup>

Merely adding clerks to input data may not be the best use of already-stretched budgets.<sup>186</sup> In fact, research shows traditional investigation methods of suspected child maltreatment do not correlate with reduced maltreatment or placement in foster care.<sup>187</sup> Child protective caseworkers spend the majority of their time investigating and documenting complaints.<sup>188</sup> Referrals to services, when made, are often met with resistance because of the adversarial nature of the caseworker-family relationship; the caseworker is acting simultaneously as fact finder for a case against the parent and as a service provider.<sup>189</sup>

Moreover, most referrals only address immediate threats to safety such as domestic violence and substance abuse.<sup>190</sup> Although these can be effective, the root causes of maltreatment—socioeconomic factors and lack of social support—are often ig-

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<sup>185</sup> See, e.g., *Child Protective Services: A Guide for Caseworkers, Effective Documentation*, 101–104, available at <http://www.childwelfare.gov/pubs/usermanuals/cps/cps.pdf>.

<sup>186</sup> Kristin A. Campbell et. al, *Household, Family, and Child Risk Factors After an Investigation for Suspected Maltreatment*, 164 ARCH PEDIATRICS & MED. 943, 943–44 (2010), available at

<http://archpedi.ama-assn.org/cgi/reprint/164/10/943.pdf>.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 948.

nored.<sup>191</sup> Certain types of targeted interventions, such as parent-child therapy, parent training programs after physical abuse, cognitive behavioral therapy after sexual abuse, therapeutic peer interaction after neglect, trauma based cognitive therapy, and visiting nurse services do have measurable results, but are also less common and more costly.<sup>192</sup>

Considering the multifaceted demands on caseworkers and the inveterate structure of the child welfare system, perhaps a better use of resources than a new data entry staff would be to provide all caseworkers with personal digital assistants, such as iPads, to bring to home visits.<sup>193</sup> In recent years, schools and other non-profits have written grants or taken advantage of generous corporate donations to distribute such technology to their staffs.<sup>194</sup> Why are child protective and foster care agencies lagging behind?

A much broader solution, suggested by one medical journal, would be to remove all prosecuting burdens from the child protection

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<sup>191</sup> Campbell, *supra* note 186, at 948.

<sup>192</sup> *Id.*

<sup>193</sup> See, e.g., Jennie Magiera, *I Don't Have IPADS: Writing PAD/Technology Grants*, TEACHING LIKE IT'S 2999 (May 11, 2011), <http://teachinglikeits2999.blogspot.com/2011/05/idont-have-ipads-writing-ipadtechnology.html>.

<sup>194</sup> *Id.*

agency.<sup>195</sup> Instead, caseworkers on home visits would focus on gathering information about what the family needs and making and following up on the appropriate referrals.<sup>196</sup> Prosecuting child abuse would be left to the criminal system; the money currently used for this would go toward substantive services for families.<sup>197</sup> The proponents of such whole-sale change are well aware of the obstacles.<sup>198</sup> Addressing child neglect has never been a priority in this country, except when a tragedy occurs; notorious cases result in disciplinary action but not fundamental change.<sup>199</sup> We have never been willing to pay for caseworkers with advanced degrees, let alone visiting nurses or other special treatments for children at risk of maltreatment.<sup>200</sup> And the child protection system refuses to take poverty head on, even though it is a root cause of maltreatment.<sup>201</sup> It is hard to imagine any of this starting now.<sup>202</sup>

Regardless of how child protective workers' roles evolve in the future, keeping fastidious notes of interviews, observations, and

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<sup>195</sup> Abraham B. Bergman, *Child Protective Services Has Outlived its Usefulness*, 164 ARCH PEDIATRICS & MED. 978, 978–79.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *See id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

referrals will always be an essential duty.<sup>203</sup> Given the availability of user-friendly, affordable technology, the soundest solution may be to provide caseworkers with PDAs, and at the same time invest in services that raise people out of poverty.<sup>204</sup>

## VII. CONCLUSION

The spoliation of evidence in child welfare has received scant attention by litigators and courts, but it is ripe for consideration.<sup>205</sup> Attorneys and judges should be mindful of incomplete, altered, and destroyed case records, and take appropriate measures to prevent them from having a detrimental impact on the lives of children.<sup>206</sup> Agencies should also implement efficient record keeping practices, while simultaneously increasing services that have long-term benefits for families and that reduce the maltreatment of children.<sup>207</sup>

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<sup>203</sup> *Child Protective Services*, *supra* note 180.

<sup>204</sup> Campbell, *supra* note 186.

<sup>205</sup> Margolin & Pollack, *supra* note 1, at 90.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

## Appendix 1

<b>State of Mind Requirements</b>	
States requiring willful destruction are <sup>208</sup> :	Alabama, Arkansas, California*, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana*, Iowa, Kentucky, Louisiana, Maine,* Maryland, Massachusetts*, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, Tennessee, Vermont, Wisconsin, and Wyoming.
The states that find spoliation in cases of negligence and gross negligence are <sup>209</sup> :	Arizona, Illinois, Kansas, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Virginia, Washington, and West Virginia.

\*Where a state does sanctions spoliation but is unclear about the required state of mind, the willful standard is presumed.

<sup>208</sup> *Spoliation of Evidence in All 50 States*, April 4, 2008, MATTHIESEN WICKERT LEHRER S.C., [www.mwl-law.com/CM/Resources/Spoliation-in-all-50-states.pdf](http://www.mwl-law.com/CM/Resources/Spoliation-in-all-50-states.pdf).

<sup>209</sup> *Id.*