

Spoliation Instruction – Lost, Destroyed or Unpreserved Evidence

[*Name of party*] failed to preserve evidence regarding [*describe unpreserved evidence*] that [he] [she] [it] was required to preserve. Because [*name of party*] failed to preserve the evidence, you may, but are not required to, assume that the evidence would have been unfavorable to [*name of party*].

SOURCE: *Souza v. Fred Carries Contracts, Inc.*, 191 Ariz. 247, 955 P.2d 3 (App. 1997); *Smyser v. City of Phoenix*, 215 Ariz. 428, 160 P.3d 1186 (App. 2007); *McMurtry v. Weatherford Hotel, Inc.*, 231 Ariz. 244, 293 P.3d 520 (App. 2013).

USE NOTE 1: The law imposes on parties a duty to preserve evidence if they know or reasonably should know that the evidence is relevant to a case or which they reasonably should anticipate will be relevant in a future case. *Souza*, 191 Ariz. at 250, 955 P.2d at 6. If the court determines that a party has failed to preserve evidence, the trial judge has discretion to determine if a party’s conduct warrants sanctions, and if so, what type of sanction would be appropriate under the circumstances. *Souza*, 191 Ariz. at 250, 955 P.2d at 6; *McMurtry*, 231 Ariz. at 260, 293 P.3d at 536. In deciding what sanction is appropriate, the court is to consider all relevant information including the degree of culpability and the prejudice to the opposing party. *Souza*, 191 Ariz. at 250, 955 P.2d at 6; *Smyser*, 215 Ariz. at 440; 160 P.3d at 1198; *McMurtry*, 231 Ariz. at 260, 293 P.3d at 536. The range of permissible sanctions include: (1) monetary sanctions, (2) precluding the offending party from opposing a claim or defense, or (3) allowing the offending party to dispute the claim or defense, but instructing the jury that because the offending party failed to preserve evidence, the jury may draw an adverse inference regarding the unpreserved evidence. *Souza*, 191 Ariz. at 249, 955 P.2d at 5; *McMurtry*, 231 Ariz. at 260, 293 P.3d at 536. This instruction is to be used when the court has determined that the jury should be instructed regarding an adverse inference that may be drawn because of a party’s failure to preserve evidence.

USE NOTE 2: In some cases the court may conclude that a party intentionally destroyed evidence for the purpose of preventing the opposing party to establish a claim or a defense. In such situations the court may conclude that stronger language is needed to accurately describe the court’s findings. In such cases the word “destroyed” (or other similar phrase suggesting intent) may be substituted for the phrase “failed to preserve.”

COMMENT 1: RAJI Criminal Standard Instruction No. 10 includes language giving the jury the power to evaluate whether the offending party’s conduct was sufficient to conclude that spoliation had occurred (“If you find that the State has lost, destroyed, or failed to preserve evidence . . .”). While there is language in *State v. Willits*, 96 Ariz. 184, 33 P.2d 274 (1964), to support this provision in the criminal context, there is no similar law in the civil context. The committee concluded that in the civil context, the court in pretrial proceedings would determine whether the offending party’s conduct was sufficiently egregious to warrant sanctions. If the court has determined that the offending party’s conduct was sanctionable and that the appropriate sanction is an adverse inference instruction to the jury, the committee concluded that it would make no sense to instruct the jury to re-evaluate the judge’s determination that the offending party’s conduct was sufficiently egregious to warrant sanctions.

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COMMENT 2: RAJI Criminal Standard Instruction No. 10 also includes language giving the sanctioned party the opportunity to rebut the adverse inference by presenting evidence that its failure to preserve the evidence was excusable. (“If you find . . . , then you should weigh the explanation given for the loss or unavailability of the evidence.”) The criminal instruction allows the jury to make an adverse inference “unless [the jury] accepts the party’s explanation” regarding the reason why the evidence was not preserved. The committee could not find any legal support for this language in the civil context. As set forth above, the committee concluded that in the civil context the court in pretrial proceedings would determine whether the offending party’s conduct was sufficiently egregious to warrant sanctions, and the court’s evaluation at that hearing would necessarily include the court’s consideration of the alleged offending party’s explanation of why the evidence was not preserved. The committee is not aware of any case law which either permits or prohibits the offending party from offering evidence and argument to the jury to explain its failure to preserve evidence. Accordingly, the committee takes no position on whether the court may allow such evidence and argument to the jury in its consideration of whether to assume the adverse inference allowed by the instruction.

COMMENT 3: This instruction is based on the common law rule regarding spoliation. Ariz. R. Civ. P. 37(g) was substantially amended in 2016 to add new rules regarding the preservation of electronically stored information. The amended rule sets forth requirements that are similar to, but different from, the common law rule applicable to tangible and documentary evidence. Rule 37(g)(1) sets forth the duty to preserve electronic evidence. Rule 37(g)(2) identifies the remedies and sanctions that are available if the court determines that a party has failed to properly preserve electronic evidence. Rule 37(g)(2)(B) provides that a court may instruct the jury regarding an adverse inference only if the court finds that a party intended to deprive another party of the opportunity to use electronic information.