Preservation of Electronic Evidence and Spoliation Issues

HCC Public Risk Attorney Claims Seminar

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Illinois Break-Out Session

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BASICS OF ELECTRONIC DISCOVERY:

Electronic Discovery is the process of identifying, preserving, collecting, preparing, reviewing and producing electronically stored information ("ESI") in the context of the legal process. ESI is "information that is stored electronically, regardless of the media or whether it is in the original format in which it was created, as opposed to stored in a hard copy (i.e. on paper)." *The Sedona Conference Glossary: E-Discovery & Digital Information Management*, p. 20 (3d Ed. 2010).

Federal Rules

- In 2006, Federal Rule of Civil Procedure 26 was amended to require disclosure of all ESI, subject to limitation that party need not provide ESI that is very costly or burdensome to disclose. Rule 34 was amended to allow inspection or copying of ESI. According to the Committee Notes, ESI is "intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments."
- Rule 34 permits a party to specify the form or forms in which ESI is to be produced.
- If the responding objects to the requested form, or if no form is specified, the responding party must state the form or forms it intends to use.
- ESI must be produced in the form or forms in which it is ordinarily maintained or are reasonably usable.
- Parties must first attempt to resolve disputing over ESI through a meet and confer.

7th Circuit Electronic Discovery Pilot Program
(http://www.ca7.uscourts.gov/7thCircuit_ElectronicDiscovery.pdf):

- Principles Relating to the Discovery of Electronically Stored Information
    - Conduct ESI discovery in a cooperative manner
    - Meet and confer early to identify scope and production of relevant ESI
    - Designating E-discovery liaison (attorney, third party consultant, etc.)
    - Preservation letters – reasonable in scope and not vague and overly broad – responses to preservation letters should contain useful information about preservation efforts
    - Scope of preservation – reasonable and proportionate
    - Rule 26(f) conference – identifying ESI and production format
    - Education on Federal Rules and Advisory Comments
    - Consult *Sedona Conference* on E-discovery

Illinois Rules

- Illinois Supreme Court Rule 201(b)(1) includes in its definition of "documents" that can be discovered "all retrievable information in computer storage."

- Illinois Supreme Court Rule 214 permits a written request for production of "documents, objects or tangible things." A party served with the written request shall (1) produce the requested documents as they are kept in the usual course of business or organized and labeled to correspond with the categories in the request, *and all retrievable information in computer storage in printed form"*
    - 1995 Committee Comments to Rule 201(b)(1) –obligates party *to produce on paper* those relevant materials which have been stored electronically.
    - 1995 Committee Comments to Rule 214 – intent is to prevent parties from producing ESI on storage disks or in any other manner which tends to frustrate the party requesting discovery from being able to access the information produced.
- Illinois Supreme Court Rule 201(k) requires parties to make reasonable attempts to resolve differences over discovery before bringing a motion to compel.

Illinois rules "draw no distinction between evidence in hard copy or electronic form." Bellas and Keithley, *The Illinois Duty to Preserve ESI: A Bridge Over Troubled Waters*, Illinois Bar Journal, Vol. 58, No. 9 (March 2013)

A. PRESERVING ELECTRONIC DISCOVERY:

- "The 4 W's" of E-discovery preservation:
    - Who?
    - When?
    - Where?
    - What?
        - *E-discovery Essentials: The 4 W's of Preservation*, ABA E-News for Members, July 2012.

1. Who?
    a. The ABA recommends that all employees who were involved in issues relating to the litigation "and especially the key players" should be informed of the duty to preserve evidence.
    b. Courts have followed a similar line of thinking:
        i. Counsel should discuss possible evidence and the preservation of that evidence with both IT personnel and "the key players in the litigation." *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004).
        ii. All employees who have had dealings with the subject matter of the litigation should be instructed to preserve documents, and the failure to do so can lead to sanctions. *Jones v. Bremen High School Dist. 228*, Case No. 08 C 3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010) ("[D]efendant inexplicably did not request *all* employees who had dealings with plaintiff to preserve emails so that they could be

searched further for possible relevance to plaintiff's case by counsel.").

2. When?
    a. "A party's duty to preserve specific types of documents does not arise unless the party controlling the documents has notice of those documents' relevance." *Larson v. Bank One Corp.*, Case No. 00 C 2100, 2005 WL 4652509, *10 (N.D. Ill. Aug. 18, 2005). "Notice of the specific documents' relevance most often stems from a discovery request or a party's complaint." *Id.*
    b. "Notice may be received before a complaint is filed if a party knows that litigation is likely to begin, or a party may be alerted by the complaint that certain information is likely to be sought in discovery." *Wiginton v. Ellis*, Case No. 02 C 6832, 2003 WL 22439865, *4 (N.D. Ill. Oct. 27, 2003). Similarly, a duty to preserve exists "[w]hen a party first reasonably foresees that litigation is on the horizon." *Buonauro v. City of Berwyn*, Case No. 08 C 6687, 2011 WL 3754820, *4 (N.D. Ill. Aug. 25, 2011).
        i. In *Buonauro*, a FOIA request was sufficient to put the city on notice of its duty to preserve evidence in light of pending litigation.
        ii. In *Jones*, charges filed with the EEOC were sufficient to put the school district on notice of its duty to preserve evidence in light of pending litigation.
        iii. In *Bryden v. Boys and Girls Club of Rockford*, Case No. 09 C 50290, 2011 WL 843907, *3 (N.D. Ill. March 8, 2011), a pre-complaint letter describing potential claims was the triggering act that put the defendant on notice of its duty to preserve.
3. Where?
    a. ESI has a very broad definition – "information that is stored electronically, regardless of the media."
    b. "[P]ractitioners need to think outside the box because the data they might want preserved can be located anywhere ESI is available." Bellas and Keithley, *The Illinois Duty to Preserve ESI: A Bridge Over Troubled Waters*, Illinois Bar Journal, Vol. 58, No. 9, p. 4 (March 2013)
    c. ESI can be virtually anywhere within an organization, including, computers, servers, e-mail accounts (corporate and personal), smartphones, tablets, social media, the cloud, hard drives, USB drives, and back-up tapes.
4. What?
    a. Anything connected to the claims or defenses! A properly cautious attorney should err on the side of caution and preserve more than what may ultimately be necessary. *Wiginton v. Ellis*, Case No. 02 C 6832, 2003 WL 22439865 (N.D. Ill. Oct. 27, 2003)

i. "A party has a duty to preserve evidence over which it has control and reasonably knew or could reasonably foresee was material to potential litigation." *Wiginton*, 2003 WL 22439865, *4. This does not mean that a party must "preserve every single scrap of paper in its business," but it "must preserve evidence that it has notice is reasonably likely to be the subject of a discovery request even before a request is actually received." *Id.*

ii. A party need not "preserve every shred of paper, every e-mail or electronic document" but still "must not destroy unique, relevant evidence that might be useful to an adversary." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) ("*Zubulake IV*").

iii. The Illinois Supreme Court takes a similarly broad stance in terms of document preservation. "[A] defendant owes a duty to preserve evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." *Boyd v. Travelers Ins. Co.*, 166 Ill.2d 188, 195 (1995).

5. How?
   a. "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." *Zubalake IV*, 220 F.R.D. at 218; *see also Green v. Blitz U.S.A., Inc.*, Case No. 2:07-CV-372 (TJW), 2011 WL 806011, *8 (E.D. Texas, March 1, 2011).
   b. Litigation Hold Letters
      i. Federal Courts have held that the failure to design and implement an adequate litigation hold may constitute negligence or allow for imposition of a sanction.
         1. In *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 541 (D. Md. 2010), the defendant was held in contempt of court for its failure to implement an adequate litigation hold, and the court entered a default judgment and required the defendant to pay plaintiff's costs and attorney's fees. *See also Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 716 F. Supp. 2d 236 (S.D.N.Y. 2010) (instructing the jury to draw an adverse inference against plaintiff who failed to properly implement a litigation hold.).
      ii. A litigation hold should inform employees or personnel of an obligation to locate and preserve all information that may be related to a potential litigation.
      iii. "While [a party] need not have an official written policy regarding the preservation of documents related to litigation to avoid sanctions," its

"apparent failure to warn its employees to preserve documents potentially relevant to this litigation evidences fault by acting with negligence or flagrant disregard of the duty to preserve potentially relevant evidence." *Diersen v. Walker*, 2003 WL 21317276 (N.D. Ill. 2003).

iv. "Once a party is on notice that files or documents in their possession are relevant to pending litigation, the failure to prevent the destruction of relevant documents crosses the line between negligence and bad faith, even where the documents are destroyed according to a routine document retention policy. *Krumwiede v. Brighton Assocs., LLC*, 2006 WL 1308629 *8 (N.D. Ill. 2006) c*iting Wiginton v. Ellis*, 2003 WL 22439865 *7 (N.D. Ill. 2003). 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. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 213, 218 (S.D.N.Y. 2003).

v. *Haynes v. Dart*, 2010 WL 140387 *4 (N.D.Ill. 2010). Defendants conceded that they had not issued a litigation hold until at least nine months after the duty to preserve arose. However, they also argued that they took steps to retain and disclose relevant documents throughout the pendency of the case. The court held that "[t]he failure to institute a document retention policy, in the form of a litigation hold, is relevant to the court's consideration, but it is not *per se* evidence of sanctionable conduct." *Id*. The court held, based on a number of factors, that the absence of a litigation hold was not objectively unreasonable. Essentially, the court stated that whether the preservation that took place was reasonable depends upon the actions of the party in proportion to the issues in the case, and the burden on the preserving party. In *Dart*, the court stated that Cook County Sheriff's office already had nearly 800 cases against it, and a litigation hold in each case would cause an undue burden.

vi. *Jones v. Bremen High School Dist., 228,* 2010 WL 2106640 *7 (N.D. Ill. 2010). An employer can reasonably anticipate litigation when it receives notice that it is a party to a legal or administrative proceeding. *Id*. at 6. The defendant had this knowledge when it received the EEOC charge. An employee sued the school district for race discrimination and the school district failed to issue a litigation hold letter. The court there found that failing to issue a litigation hold letter was unreasonable because the issuance of a litigation hold letter would have placed no burden on the defendant, and the defendant's

instructions to employees, to search their email and remove relevant documents, was unreasonable because each employee could simply permanently delete emails from the defendant's system. A breach is essentially the failure to act reasonably under the circumstances posed within the case.

c. Can a litigation hold letter be discoverable?
    i. District Courts throughout the United States are nearly in agreement that litigation hold letters can and should be produced during discovery if there has been a preliminary showing of spoliation. *See Major Tours, Inc v. Colorel*, 2009 WL 2413631 *5 (D.N.J. 2009). Courts will allow a letter to a client from an attorney, but usually limit the production order to "only those portions of the letter that refer to a litigation hold or preservation issue." *Id*.
d. Once the hold is activated, counsel must locate relevant information and must continuously work to ensure that ESI is preserved. Counsel should issue a litigation hold; should communicate directly with "key players" in the litigation; and should instruct all employees to produce electronic copies of their relevant active files. *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 432, 434 (S.D.N.Y 2004). Counsel and/or staff should also work closely with IT personnel to ensure that all electronic data is properly preserved and ultimately properly disclosed. *See Green v. Blitz U.S.A., Inc.*, Case No. 2:07-CV-372 (TJW), 2011 WL 806011, (E.D. Texas, March 1, 2011) (awarding sanctions where the defendant's employee tasked with preserving and collecting relevant ESI had a "lack of computer prowess" and "did not even attempt to consult with the IT Department about how electronic information could be discovered").
    i. At the outset of litigation, counsel should discuss with opposing counsel the potential ESI in the case and should attempt to agree on how ESI should be retrieved and disclosed.
    ii. "Above all, the [preservation] must be reasonable. A lawyer cannot be obliged to monitor her client like a parent watching a child. At some point, the client must bear responsibility for a failure to preserve. At the same time, counsel is more conscious of the contours of the preservation obligation; a party cannot reasonably be trusted to receive the 'litigation hold' instruction once and to fully comply with it without the active supervision of counsel." *Zubulake*, 229 F.R.D. at 433.
e. When creating either a document retention policy, or preservation policy, keep in mind the Illinois Local Records Act!

i. The Illinois Local Records Act (50 ILCS 205) regulates the preservation or disposal of the public record of all units of Local Government in Illinois. According to the Illinois State Archive Office, "[t]he law's purpose is to maintain a mechanism for the retention of those records that are necessary for the proper functioning of government, the destruction of obsolete and valueless records, and the archival preservation of those records that have long term research values but are not necessary for the routine operations of local government." Gloria Huston, *Illinois Local Records Act*, Illinois State Archives.

ii. Public record under the act includes any book, paper, map, photograph, digitized electronic material, or other official documentary material, regardless of physical form or characteristics, made, produced, executed or received by any agency or officer pursuant to law or in connection with the transaction of public business and preserved or appropriate for preservation by such agency or officer, or any successor thereof, as evidence of the organization, function, policies, decisions, procedures, or other activities thereof, or because of the informational data contained therein.

iii. The Illinois Records Act includes faxes, videos, and emails as records that need to be preserved if they fit the above definition of "public record."

iv. Local Government agencies are allowed to reproduce existing public records in a digitized electronic format if they obtain the permission from a Local Records Commission and the records are reproduced on a "durable medium that accurately and legibility reproduces the original record in all details," and "that does not permit additions, deletions, or changes to the original document images."

v. Each agency must file with the Local Records Commission a Records Disposal Certificate before any record can be disposed of. The certificate allows you to set up a Records Retention Schedule.

    1. You can dispose of records after the minimum retention period listed for each record series is met, provided no litigation is pending or anticipated and providing all audit requirements are met and the agency receives an approved Local Records Disposal Certificate from the appropriate Local Records Commission.

B. RELEVANT PRESERVATION CASES – WHAT NOT TO DO:

a. *Plunk v. Vill. of Elwood, Ill.*, Case No. 07 C 88, 2009 WL 1444436 (N.D. Ill. 2009).

i. The plaintiffs filed suit against the Village and several of its employees, including its President, Administrator and Chief of Police, alleging that the defendants conspired to harm the plaintiffs' businesses and falsely arrested and maliciously prosecuted the plaintiffs.

ii. Defendants failed to preserve an audio recording of a closed session village board meeting where the plaintiffs were discussed.

iii. Despite the defendants argument that the missing audio recording was an accident, the court found that the defendants had an affirmative duty to preserve the audio recording and that they acted unreasonably in failing to preserve it. *Id.* at *10-12.

iv. Plaintiffs made discovery requests for ESI, and an agreement was made whereby the hard drives of all 19 village computers would be mirrored and word searches would be performed on the hard drives to determine if relevant documents existed. Defendants failed to mirror the hard drives or properly preserve the evidence on the hard drives. Defendants also failed to preserve ESI on police department computers and failed to back-up any relevant ESI.

v. The defendants argued that any lost ESI from the hard drives resulted from routine wiping of the hard drives and not any affirmative act to destroy evidence. *Id.* at *14. The court rejected this argument, finding that the defendants were "reckless" with the preservation of the ESI because they failed to place any litigation hold on the ESI and did not have any document retention policies. *Id.* The defendants were ultimately sanctioned for their failure to preserve the ESI.

b. *Green v. Blitz U.S.A., Inc.*, Case No. 2:07-CV-372 (TJW), 2011 WL 806011 (E.D. Texas, March 1, 2011)

i. The plaintiff filed a products liability suit alleging that a defective gas can caused the death of the plaintiff's decedent. The plaintiff brought her motion for discovery sanctions when she learned of emails that were not produced in the litigation, and the motion was filed more than a year after she lost at trial. The primary documents not produced related to the defendants potentially using a "flame arrester" in its gas cans.

ii. The defendant had one employee in charge of obtaining relevant documents for discovery. That employee would meet with counsel before going to other employees and asking them to locate relevant documents. No litigation hold was instituted, no electronic word searches were performed, and the IT department was not consulted in any search for ESI. Additionally, during the course of the litigation, the IT department sent at least ten emails to all employees asking them to delete all of their old emails.

iii. The court found that "any competent electronic discovery effort" would have located relevant emails that were not properly disclosed. Because of the defendant's actions, it was forced to pay a $250,000 sanction and was forced to provide a copy of the court's scathing opinion to every plaintiff in every lawsuit it was currently defending, as well as to every party in every new lawsuit it was to participate in for the next five years.

C. PRESERVATION OF SOCIAL MEDIA

a. *Gatto v. United Air Lines, Inc.*, Case No. 10 CV 1090 ES SCM, 2013 WL 1285285 (D.N.J. March 25, 2013)

i. The plaintiff brought a personal injury action alleging he was injured by a United plane during his employment at JFK Airport. During discovery, the defendants sought information from the plaintiff's Facebook page to show that the plaintiff was neither injured nor prevented from obtaining employment.

ii. Pursuant to an agreement between the parties, the plaintiff changed his Facebook password and provided it to the defendants. The plaintiff said the defendants agreed to not access the account, but the defendants disputed that. Nevertheless, United's attorneys accessed the account and printed part of the page. The plaintiff received an email that his account had been accessed by an unknown IP address. His counsel then questioned United about the account, and United admitted that it did access the account. The next day after United's email, the plaintiff deactivated his account which caused the account to be permanently deleted after 14 days. The plaintiff claimed he deleted the account because of the unknown IP address accessing the account, despite United admitting it accessed the account.

iii. The court found that the plaintiff's Facebook account "was relevant to the litigation" and that the plaintiff had a duty to preserve it. Because the plaintiff failed to preserve his account, the defendants were prejudiced, and the plaintiff was sanctioned by a jury instruction to be given at trial allowing the jury to draw an adverse inference against the Plaintiff for failing to preserve his account and for intentionally destroying evidence.

D. SPOLIATION

a. Definition

i. In Illinois, courts define spoliation of evidence as the "destruction, mutilation, alteration, or concealment of evidence." *Midwest Trust Servs., Inc. v. Catholic Health Partners Servs.*, 910 N.E. 2d 638 (2009).

ii. "Spoliation, in case you haven't heard, is the newest battleground of contemporary litigation, now a continuing sideshow, if not the main event,

in courtrooms across the country." Robert E. Shapiro, *Advance Sheet: Conclusion Assumed, LITIG.*, Spring 2010, at 59.

iii. Potential avenues for spoliation include a legal claim against a party for negligent spoliation of evidence, or discovery sanctions under Supreme Court rule 219.

b. Intentional Spoliation of Evidence in Illinois

i. Most jurisdictions divide spoliation causes of action into either claims of negligent spoliation or intentional spoliation, both with their own defined elements.

ii. Unlike most other states, the state of Illinois has not recognized the independent tort of intentional spoliation. In *Borsellino v. Goldman Sachs Group, Inc.,* 477 F.3d 502 (7th Cir. 2007), the Seventh Circuit applied Illinois law and construed a claim for intentional spoliation as a claim for negligent spoliation reasoning that Illinois law does not recognize a claim for intentional spoliation of evidence.

1. However, there has been a strong push both within the Northern District of Illinois and within academic literature to create an intentional spoliation claim in Illinois like the majority of other jurisdictions. *In Williams v. General Motors Corp.,* 1996 WL 420273 (N.D. Ill. 1996), the court reasoned that it is likely that the Illinois Supreme Court would eventually recognize intentional spoliation because it would "make no sense, after all, for the court to hold a defendant liable for its merely negligent conduct but not for the intentional conduct that resulted in the same harm." *Id.* at *3.

2. The elements of an intentional spoliation claim are: (1) the existence of a potential civil action; (2) defendant's knowledge of the action; (3) destruction of relevant evidence; (4) intent; (5) a causal connection between destruction and the plaintiff's inability to prove the claim; and (6) damages.

c. Negligent Spoliation of Evidence Claims in State Court

i. Creation of a Negligent Spoliation claim

1. As of now, only negligent spoliation of evidence exists under Illinois law. The case of *Boyd v. Travelers Ins. Co.,* 166 Ill. 2d 188, 193 (1995) is known as the "watershed pronouncement" of Illinois law regarding negligent spoliation of evidence. In *Boyd*, the plaintiff was using a propane heater to keep his employer's van warm. The heater exploded leaving the plaintiff with severe injuries. Two days after the incident two claims adjusters from the insurance company representing the manufacturer of the heater

took possession of the heater for investigation and inspection. Prior to inspection being performed, they lost the heater. The Supreme Court held that Boyd could state a claim for spoliation only under existing negligence law and set forth the elements.

ii. Elements of a claim

1. The Supreme Court of Illinois recently addressed the parameters of a negligent spoliation cause of action in *Martin, et al. v. Kelley & Sons, Inc*., 2012 WL 4950881 (Ill. 2012). To make out a claim for negligent spoliation under Illinois Law, a plaintiff must prove that:
    a. The defendant owed the plaintiff a duty to preserve the evidence;
    b. The defendant breached its duty;
    c. The loss of the evidence was the proximate cause of the plaintiff's inability to prove claims in an underlying lawsuit; and,
    d. As a result, the plaintiff suffered actual damages.

iii. Duty Element

1. In *Martin*, three employees of the defendant Keeley & Sons, Inc. were injured in a construction accident when an I-Beam fell on to a bridge. On the same day of the accident, the Illinois Department of Transportation and Occupational Health and Safety Department investigated the incident. On the next day, the defendant destroyed the I-beam by breaking it apart with a hydraulic hammer. The plaintiffs argued that the defendants owed them a duty to preserve the I-Beam as evidence in potential litigation and that by failing to do so they were unable to prove their negligence claims against the manufacturer of the I-beam. The court disagreed and created a very difficult standard for plaintiffs in negligent spoliation claims.
2. As is set forth in *Martin*, the general rule in Illinois is that there is no duty to preserve evidence. In order to establish a preservation claim, the Supreme Court noted that a Plaintiff must establish an exception to the rule. To establish an exception, a plaintiff must meet a two-part test:
    a. The first part is the "relationship" element. This means establishing an agreement, contract, statute, special circumstance or voluntary undertaking that imposed a duty on the defendant to preserve the evidence.
    b. The second part is the "foreseeability" element. Plaintiff must show that the duty extends to the particular piece of evidence by showing that a "reasonable person in the

defendant's position should have foreseen that the evidence was material to the potential civil action."

3. *In Martin*, as in almost every negligent spoliation claim, the plaintiff must attempt to show a relationship through either a special circumstance or that the defendants voluntarily undertook to preserve the evidence. Establishing a relationship through agreement, contract or statute is far easier if applicable.
    a. The court held that under the special circumstance umbrella, possession and control of the evidence, standing alone, are not sufficient to establish a duty to preserve evidence. Moreover, the court held that something more, such as a request by Plaintiff to preserve the evidence or the Defendant segregating the evidence for its own investigation, would likely help establish a duty to preserve.
    b. In summary, the court essentially held that lower courts should define the scope of duty owed in negligent spoliation claims narrowly and look for affirmative conduct on the part of the plaintiff to excise control of evidence for its own independent investigation, i.e. a litigation hold letter, *See Dardeen v Kuehling*, 213 Ill. 2d 329 (2004), plus an affirmative action on the part of the Defendant to set aside such evidence. If both exist, a plaintiff will have met the duty element.
        i. *See Combs v. Schmidt*, 976 N.E.2d 659 (1st Dist. 2012) (hinting that a duty is more likely to arise when the party 1) had possession of, or at least control over the evidence; 2) had notice that the requesting party was a potential litigant; and 3) segregating at least some of the evidence, especially if done for benefit of requesting party.
        ii. However, the duty is less likely to arise if the requesting party had a reasonable opportunity to inspect the evidence and failed to do so. *See Dardeen*, 213 Ill. 2d at 329.
    c. *Martin* was easily distinguishable for the court from *Jackson v. Michael Reese Hosp. and Med Ctr.*, 294 Ill. App. 3d 1 (1st Dist. 1997). In *Jackson*, a hospital segregated a patient's medical records into a special litigation file but lost the records. The court found that

there was a relationship between the parties and an obvious understanding of potential future litigation.

iv. Breach of Duty
    1. If the duty to preserve evidence is established, typically it is easy to establish a breach of duty by establishing the evidence at issue is in fact lost, destroyed, significantly damaged or altered. *See Fuller Family Holdings, LLC v. Ne. Trust Co.*, 371 Ill. App. 3d 605, 624 (1st Dist. 2007).

v. Injury to Plaintiff
    1. "A Plaintiff must demonstrate….that but for the defendant's loss or destruction of the evidence, the plaintiff had a reasonable probability of succeeding in the underlying suit." *Boyd,* 166 Ill. 2d at 196.

vi. Damages
    1. According to *Jones v. O'Brien Tire and Battery Serv. Ctr., Inc.*, 374 Ill. App. 3d 918, 936 (5th Dist. 2007), "the most accurate measure of damages [in a spoliation claim] would be the difference between the amount for which the case settled without the evidence and the amount upon which the jury finds it likely that the parties would have settled had the evidence existed allowing the defendant to present a stronger case." The case law shows courts trending toward fully compensating the party for the entire amount of the potential trial recovery with the evidence.

d. *Boyd* and *Martin* applied to ESI – a tricky proposition.
    i. "As we have seen from *Martin*, the dearth of Illinois case law specifically applying the duty to preserve evidence articulated in *Boyd* to the emerging field of ESI's application of evidence in Illinois is confusing." Bellas and Keithley, *The Illinois Duty to Preserve ESI: A Bridge Over Troubled Waters*, Illinois Bar Journal, Vol. 58, No. 9, p. 3 (March 2013).
        1. ESI is easy to unintentionally destroy. *Id.*
        2. Proper investigation techniques through use of metadata can make or break your case; proper care to preserve ESI must be taken. *Id.*
        3. "[T]here is a growing trend toward judicial intolerance for the attorney who has not done his homework. Ignorance of technology is no longer a defense to a cause of action for spoliation." *Id.*

e. Discovery Sanctions Under Illinois Supreme Court Rule 219(c)
    i. Illinois Supreme Court Rule 219(c) authorizes a trial court to impose sanctions, including the dismissal of a cause of action, where a party unreasonably fails to comply with a discovery rule or any order entered by

the court. Normally, this rule is reserved for defendants who maintain that a plaintiff has altered, destroyed or manipulated evidence.

ii. *Shimanovsky v. General Motors Corp.,* 181 Ill. 2d 112 (1998)

1. The plaintiff retained an expert to complete an investigation into a vehicles power steering mechanism to determine if the vehicle had a defect which caused a crash. The plaintiff's expert removed the power steering components from the car and disassembled it. The expert then sectioned some of the components to determine if there was a defect. The expert found that the power steering components had no defect. Defendant eventually moved to compel plaintiff to produce the components. Defendants argued that the sectioning of the power-steering components deprived GM of the opportunity to show the jury evidence of proper manufacturing and no evidence of defect. The trial court dismissed the plaintiff's action as a sanction under Rule 219(c). The Illinois Supreme Court held that plaintiff's destructive testing interfered with GM's right to discovery. However, the Supreme Court remanded the case for a sanction other than dismissal.
2. In order for a dismissal to be upheld, the conduct of the non-moving party must be "deliberate, contumacious, or an unwarranted disregard of the courts authority" and should be employed "only as a last resort and after all the court's other enforcement powers have failed to advance the litigation." *Id.* at 123.
    a. The court did state that this rule may extend to conduct that occurred before any litigation commences.
3. Potential Sanctions under Rule 219
    a. Staying the proceedings until an order is complied with;
    b. Barring the party from filing any other pleading relating to any issue which the refusal relates;
    c. Barring the offending party from maintain a particular claim, counterclaim, third-party complaint, or defense relating to the issue;
    d. Barring witnesses from testifying regarding that issue;
    e. Entering a default judgment or dismissal against the offending party as to claims or defenses about which the issue is material;
    f. Striking any pleading relating to that issue; and/or,
    g. Reasonable expenses such as attorney's fees, costs, and interest.

4. Although not stated in the rule, courts in Illinois have also adopted adverse inferences against a party. The court may further decide that a jury may take all reasonable presumptions against the party who destroyed or altered evidence. *See Whittaker v. Stables*, 339 Ill. App. 3d 943 (2d. Dist. 2001).
5. If a court issues a dismissal for spoliation, most cases have been reversed on appeal.

f. Federal Remedies for Spoliation of Evidence
    i. Federal Courts have two independent sources of authority for spoliation. No independent cause of action exists for spoliation under federal law. *See Trentadue v. U.S.*, 386 F.3d 1322, 1342-43 (10th Cir. 2004).
        1. Federal Rule of Civil Procedure 37
            a. Under section (b) of Rule 37, a district court may sanction a party for failure to comply with a discovery order. Sanctions may include:
                i. Directing designated facts to be taken as established for purposes of the action;
                ii. Prohibiting a party from supporting or opposing designated claims or defenses, or introducing designated matters in evidence;
                iii. Striking pleadings in whole or part;
                iv. Staying proceedings;
                v. Dismissing the action;
                vi. Entering a default judgment;
                vii. Holding a party in contempt of court; and,
                viii. Requiring a party to pay reasonable expenses, including attorney fees, caused by its failure to obey the order.
            b. Several courts have held that Rule 37 may extend to conduct that occurred before discovery began. "Even though a party may have destroyed evidence prior to issuance of the discovery order and thus be unable to obey, sanctions are still appropriate under Rule 37(b) because this inability was self-inflicted." *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991).
        2. Inherent power of the court
            a. In *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), the United States Supreme Court held that the inherent power of federal courts to remedy litigation abuse extends to a full range of litigation abuses including spoliation.

ii. Remedies/Sanctions

1. Federal courts tend to evaluate sanctions based on three dimensions: "the culpability of the spoliating party, the degree of prejudice to the aggrieved party, the availability of appropriate lesser sanctions." *See Am. Family Mut. Ins. Co. v. Roth*, No. 05 CV 3829, 2009 WL 982788, at *4 (N.D. Ill. 2009) ("Spoliation sometimes permits, but rarely ever requires, the ultimate sanction of dismissal of the case against the Plaintiff or entry of default judgment against the defendant.) (*Citing Mathis v. John Morden Buick, Inc*., 136 F.3d 1153 (7th Cir. 1998).
2. What is Prejudice to a party?
    a. When a claim for spoliation substantially denies a party the ability to support or defend the claim or delays the production of evidence. *Krumwiede v. Brighton Assocs., LLC*, No. 05 C 3003, 2006 WL 1308629, *10 (N.D. L. 2006).
3. Because dismissal or default is "draconian," courts are required to find either willfulness, bad faith or fault. *See Rodgers v. Lowe's Home Ctrs*., Inc., No. 05 CV 0502, 2007 WL 257714 (N.D.Ill. 2007).
    a. In *REP MCR Realty, LLC v. Lynch*, 363 F.Supp. 2d 984, 988 (N.D. Ill. 2005), the court sanctioned a party's fabrication of evidence, creating two letters and a contract, by dismissing the action.
    b. The Seventh Circuit has found that the sanctions of dismissal or adverse inference findings should be supported by evidence of intentional destruction in bad faith. *See Bryden v. Boys and Girls Club of Rockford*, No. 09 C 50290, 2011 WL 843907 (N.D. Ill. 2011); *citing Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008).
    c. Fault is more than a "slight error in judgment," and is instead based on the reasonableness of the party's conduct. *See In Re Kmart Corp.*, 371 B.R. 823, 840 (Bankr. N.D. Ill. 2007).
    d. Instead, courts should look to "clear and convincing evidence of an intentional act by the party in possession of the allegedly lost or destroyed evidence" for the purpose of hiding adverse information. *Fass*, 532 F.3d at 644.

g. Can Lawyers be Held Accountable? YES!!!
    i. Although the majority of economic sanctions are rendered against the party, it is a building trend to sanction attorneys who are heavily involved in the spoliation of evidence.
    ii. In *Lester v. Allied Concrete Co.*, 80 Va. Cir. 454, 2010 WL 7371245 (Va. Cir. Ct., May 27, 2010), a Virginia state court Judge issued an attorney a $522,000 sanction for instructing his client to remove photos from Facebook. The attorney blatantly directed spoliation by telling his client to remove the photos of himself acting inappropriately. The lawyer was afraid the pictures would prejudice the wrongful death claim of his wife involved in an automobile accident.
    iii. In Illinois State and Federal courts, once more F.R.C.P. 37 and Supreme Court Rule 219 allow for the imposition of economic sanctions against an attorney in circumstances involving bad faith, willfulness and fault.
    iv. In addition, in Illinois the ARDC has suspended an attorney's license for the unlawful destruction and concealment of evidence. *See In Re Holman*, 96 CH 679 (M.R. 10776). Under the Illinois Rules of Professional Conduct, an attorney can be suspended or face other reprimands for the unlawful destruction and concealment of evidence.
    v. Finally, spoliation of evidence can lead to extensive discovery and a lengthy evidentiary hearing, which could lead counsel for the innocent party to expend considerable amount of time pursuing evidence that does not exist or a request for sanctions. *See United Cent. Bank v. Kanan Fashions, Inc.*, No. 10 CV 331, 2012 WL 1409245 (N.D. Ill. 2012).

E. TOP TEN TIPS TO AVOIDING SPOLIATION AND SANCTIONS

1. **LOOK OUT!** Remember to watch for, or teach others to watch for events that trigger an organizations duty to preserve documents, i.e. EEOC charge, lawsuit, letter of preservation, or a letter to the organization from a disgruntled employee.
2. **SEND A LITIGATION HOLD LETTER!** Send a letter to all employees to inform them of the situation and the immediate, necessary need to preserve evidence related to the claims.
3. **DOCUMENT EVERYTHING!** Make sure to document the key pieces of evidence, the custodian of the records, their location, and who has access to them.
4. **FAMILIARIZE YOURSELF!** An attorney should immediately sit down with the custodian of the records and understand the electronic system in order to better understand employee questions and plan for E-discovery.
5. **SUSPEND AUTOMATIC RETENTION/DELETION POLICY!** Immediately suspend any policy that deletes emails, videos, or calls in order to preserve evidence.
6. **ASSEMBLE A TEAM!** Immediately upon the release of a litigation hold letter, assemble a team of both attorneys and custodians of the records who can oversee the litigation hold, answer questions from employees, and help legal counsel and the business/municipality stay connected.
7. **VERIFY!** The litigation hold team should have individual meetings with individuals with access to the relevant information to verify that they understand their role and responsibilities regarding preservation.
8. **COMMUNICATE WITH OPPOSING COUNSEL!** Litigation counsel should immediately be in contact with opposing counsel to draft and formulate the proper boundaries of electronic and other discovery to make sure that the documents are preserved, and to avoid future spoliation or sanctions.
9. **DO NOT PROCRASTINATE!** The level of sanction or remedy can as much as quadruple if the business and/or counsel procrastinates regarding a litigation hold letter or preservation policy.
10. **MONITOR AND ENFORCE COMPLIANCE!** Make sure that employees who have been alleged to have committed misconduct are not able to immediately delete evidence of any potential misconduct.

SAMPLE LITIGATION HOLD LETTER FOR DEFENSE COUNSEL

Office of the Corporation Counsel

NOTICE TO PRESERVE DOCUMENTS AND ELECTRONIC INFORMATION

August 30, 2013

PRIVILEGED/CONFIDENTIAL
ATTORNEY WORK PRODUCT

To: City Manager
Director of Public Works
All Public Works Employees
Director of Human Resources
Director of Information Technology

Re: *Johnson v. City of Anywhere*
Case No. 13-CV-1234
Records Retention Directive

Dear Employees:

This is a matter of the utmost importance. The City Corporation Counsel's Office requires your assistance with regard to preserving information relating to the above-referenced matter.

The City has been served with an EEOC charge of discrimination filed by former Public Works employee, James Johnson, alleging claims of hostile work environment, racial discrimination, wrongful termination and retaliation. Effective immediately, you are hereby required to retain and preserve any and all documents and data of any kind that relate in any way to Mr. Johnson and his employment with and separation from the City.

Please be advised that the requirements of this letter supersede any City document retention and destruction policy that conflicts with the terms of this notice. You must immediately suspend your normal document retention/destruction policies and preserve all evidence related to this claim including, but not limited to:

* Written documents (including memoranda, letters, transcripts, reports, evaluations, plans, permits, citations, databases, calendars, telephone logs, manager information, internet usage files, etc.);
* Photographs, videotape, audiotape, digital recordings;
* Electronic documents (e-mail, word docs, spreadsheets, etc.); and

* All other electronic information maintained, created, or received by City computer systems, including desktop and laptop computers, cell phones, Blackberry devices, PDAs, flash or thumb drives, and work telephones.

The duty to preserve evidence extends to all evidence within your possession, custody and control. That means all documents in your open files, closed files, warehoused files, and documents saved to compact disk or microfiche. This duty also extends to documents held by third parties over which you have control. This includes any consultants performing work for the City. If you believe that these third parties may have documents or other evidence in their possession that is relevant to the charge filed by Mr. Johnson, you must forward a copy of this letter to them and make certain that these instructions are followed.

In order to comply with its legal obligations, the City must immediately preserve all existing documents and data relevant to the EEOC Charge described above and suspend deletion, overwriting, or any other possible destruction of relevant documents. Electronically stored data, i.e. emails, are an important and irreplaceable source of discovery and/or evidence in this matter. You must take every reasonable step to preserve this information until further notice from the City Corporation Counsel.

Failure to adhere to these evidence preservation instructions could result in serious legal consequences for the City and/or its officials and employees. Therefore, you should assign this task high priority and make sure that the work is properly supervised. Responsibility for preserving relevant evidence attaches to the department that creates or maintains this evidence. For guidance and assistance in preserving electronically stored information, please contact the Director of Information Technology at extension 1234.

You will be contacted by the City Corporation Counsel in the near future for an update on your preservation efforts and to answer any questions you may have. In the meantime, if this correspondence is in any respect unclear, please contact the Corporation Counsel.

Very truly yours,

John Q, Jones
General Counsel

cc: City Mayor and Counsel