

# UNDERSTANDING EVIDENCE SPOILIATION AND TIPS TO AVOID IT

Kevin L. Fritz and Shannon C. King Lashly & Baer, P.C.

## SPOILIATION EXPLAINED

Spoilation is the act of destroying or otherwise suppressing evidence. It can arise in virtually any type of case, from wrongful death to antitrust litigation. Both plaintiffs and defendants can be liable for spoliation. Spoliation of evidence occurs when someone with an obligation to preserve evidence related to a legal claim either neglects to do so or intentionally fails to do so.<sup>1</sup> A failure to preserve evidence can take place by intentional or inadvertent destruction of evidence, damage to the evidence or loss of evidence.<sup>2</sup> When spoliation occurs, the party responsible may be held liable in court through a variety of different sanctions, adverse inferences or even judgments. This will vary greatly from state to state.

## TRIGGERING THE DUTY TO PRESERVE

The duty to preserve evidence, including documents, electronically stored information (ESI) or other tangible evidence that generally arises when a party is aware of pending litigation, litigation is threatened, or when litigation is reasonably foreseeable under the facts and circumstances of the incident in question. Being served with a complaint or petition can trigger the duty to preserve. However, the complaint must allege facts describing the conduct that affords notice to the party in possession of the evidence.<sup>3</sup>

The duty to preserve potentially relevant evidence may arise before the commencement of a lawsuit if it is reasonably foreseeable that a lawsuit will be filed.<sup>4</sup> “It matters not whether an organization is the initiator or the target of litigation,” the duty to preserve evidence arises at “the moment that litigation is reasonably anticipated.”<sup>5</sup> This can arise when a potential defendant receives a letter of representation from counsel of a potential litigant, a demand letter, a preservation of evidence letter or if an event or other circumstance would reasonably put an organization on notice that a lawsuit is likely to be filed. Further, pre-litigation discussions, requests to inspect evidence, or a history of previous litigation arising out of similar events or circumstances can trigger a duty to preserve relevant evidence.<sup>6</sup>

The duty to preserve can also arise from other sources, including a contract, a voluntarily assumed duty (such as a company’s document retention policy), a statute or regulation, an ethical code, or another special circumstance.

Absent notice of pending or probable litigation, reasonably foreseeable litigation or a duty to preserve triggered by another source, a company or individual has the right to dispose of its own documents or property without liability.

## DETERMINING WHAT NEEDS TO BE PRESERVED

A party need not preserve all documents, ESI, or tangible evidence. The general rule is that a “potential spoliator” need only do what is reasonable under the circumstances and does not need to take extraordinary measures.<sup>7</sup> A party needs to preserve relevant records which include:

Any documents or tangible things... made by individuals “likely to have discoverable information that the disclosing party may use to support its claims or defenses.” The duty also includes documents prepared for those individuals, to the extent those documents can readily be identified... The duty also extends to information that is relevant to the claims or defenses of any party, or which is “relevant to the subject matter involved in the action.” Thus, the duty to preserve extends to those employees likely to have relevant information—the “key players” in the case.<sup>8</sup>

Generally, this means preserving documents, ESI, and tangible evidence that is reasonably related to the subject claim. It is also recommended to preserve up to six

months of related records if possible. This includes items like call logs, time sheets, project correspondence, surveillance videos - anything that is recorded in the day-to-day function or operation of the business. This time frame of preservation is likely beyond what will ultimately be discoverable during litigation; however, six months of pertinent records allows your attorney to effectively evaluate your claim or defense and as ensure you have preserved a reasonable amount of information.

Relevant ESI must be actively preserved. Many computer systems have automatic deletion features that periodically purge and delete documents. Once the duty to preserve is triggered, a party must take affirmative steps to stop any automatic deletion process.<sup>9</sup>

### CONSEQUENCES OF SPOLIATION

The consequences of spoliation vary from state to state. There are a handful of states that recognize an independent tort claim for spoliation of evidence, which allows a plaintiff to recover money damages if they can prove the requisite elements of the claim. In most states, the consequences are civil or evidentiary sanctions. The sanctions can take the form of specific jury instructions (adverse inference), exclusion of additional relevant evidence, dismissal, or even an adverse judgment.

### TIPS TO AVOID SPOLIATION

- Err on the side of caution when deciding to preserve evidence. Analyze a situation early to determine if litigation is reasonably foreseeable or if the duty is triggered by other sources. Preserve beyond what you think is relevant. As a rule of thumb, preserve six months worth of records.
- Provide litigants or potential litigants with a reasonable opportunity to inspect and test evidence before it is destroyed if evidence cannot reasonably be retained.
- Keep a written record of all preservation requests or offers to inspect evidence.
- Take photographs or videos of the evidence, if possible.
- Review all company document retention policies to determine that you are acting within those guidelines.
- Take an active role in document preservation efforts, including placing a legal or litigation hold on relevant items.
- Designate a person such as a client records manager or information technology manager to be responsible for locating and preserving hard copies and electronically stored information.
- Contact your attorney in the relevant jurisdiction for assistance.



*Kevin L. Fritz is a partner at Lashly & Baer, P.C. in Missouri. He engages in all aspects of civil litigation, in both state and federal courts, with an emphasis on transportation litigation involving motor carriers, insurance defense, premises liability, product liability, commercial and business litigation, including pre-trial and discovery matters, trials before judges and juries and upon appeal.*



*Shannon C. King is an associate at Lashly & Baer, P.C. in Missouri. She is a litigator who focuses her practice on civil litigation, with an emphasis on transportation and commercial litigation. She has experience in all phases of the litigation process from intake, evaluation, investigation and discovery, motion practice and trial preparation.*

*All footnotes referenced in this article are available at [lashlybaer.com/footnotes](http://lashlybaer.com/footnotes).*