

WELCOME!



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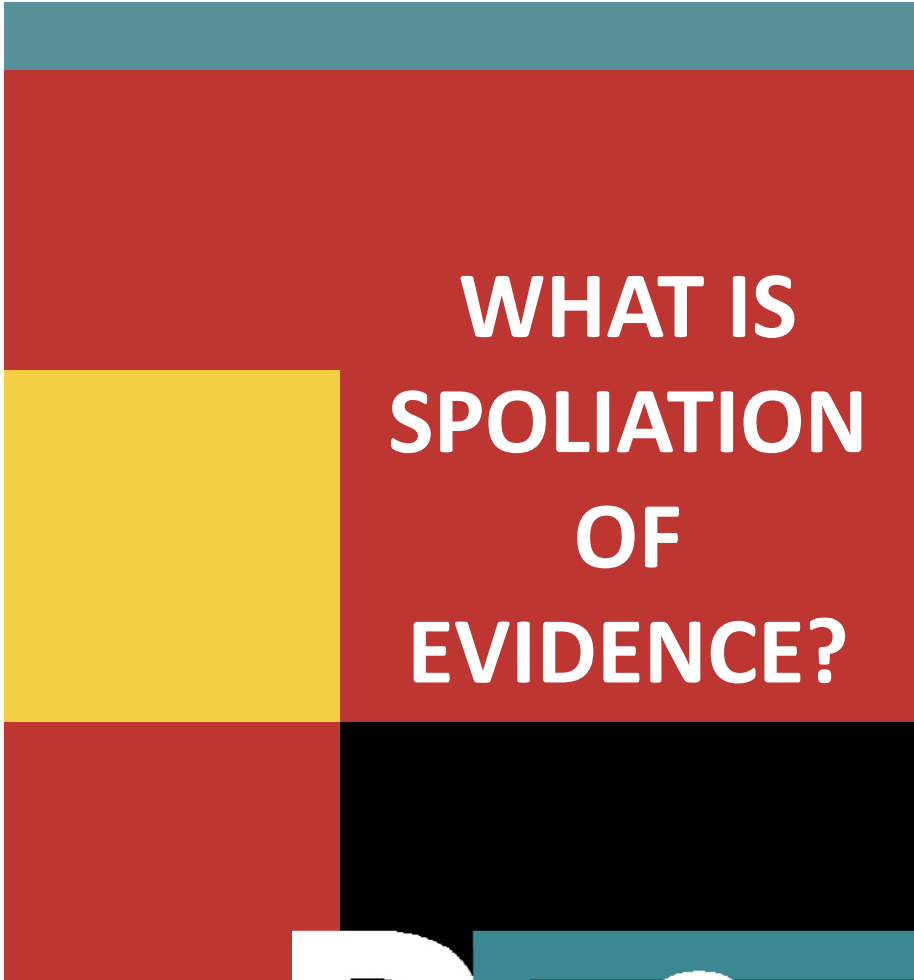
Spoliation of Evidence and Electronic Discovery

Presented by:

Max E. Fiester & Joseph H. Langerak IV

Rudolph, Fine, Porter & Johnson, LLP

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**WHAT IS
SPOILIATION
OF
EVIDENCE?**



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What is Spoliation of Evidence?

- The 7th Circuit Court of Appeals cited the Indiana Supreme Court, which quoted Black's Law Dictionary:

- “The intentional destruction, mutilation, alteration, or concealment of evidence, usually a document. If proved, spoliation may be used to establish that the evidence was unfavorable to the party responsible.”

- Allen v. LTV Steel Co.*, 68 Fed. Appx. 718 (7th Cir. 2003)


What is Spoliation of Evidence?

- The Southern District of New York relied on a 2nd Circuit Court of Appeals definition:
 - “The destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.”
 - Adorno v. Port Authority of New York and New Jersey*, 258 F.R.D. 217 (S.D.N.Y. 2009)

What is Spoliation of Evidence?



- In layman's terms:
 - Destroying (including deletion), altering, or hiding of evidence that may be used in litigation.



**DESTRUCTION
VS.
SPOILIATION**



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Destruction vs. Spoliation

- Not every destruction will amount to spoliation:
 - “The crucial element in a spoliation claim is not the fact that the documents were destroyed but that they were destroyed for the purpose of hiding adverse information.”
 - *Norman-Nunnery v. Madison Area Tech. College*, 625 F.3d 422 (7th Cir. 2010)
 - The court in that case found that because the documents were destroyed prior to a claim being made, the destroying party did not know, nor should it have known, that litigation was imminent.

Destruction vs. Spoliation

- Remedies for spoliation may only be applicable where someone “**knew** the evidence was relevant to some issue at trial and that his **willful** conduct resulted in its loss or destruction.” *In re Complaint of Vulcan Materials Co. v. Massiah*, WL 1718896 (4th Cir. 2010).
- Compare to 7th Circuit’s use of “intentional”



**WHEN DOES
A DUTY
ARISE?**



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When Does a Duty Arise?

- Be careful not to draw a bright line at the date a claim is made or formal litigation is started:
 - “An obligation to preserve may arise ‘when a party should have known that the evidence may be relevant to future litigation.’”
 - *Beaven v. U.S. Dept. of Justice*, 622 F.3d 540 (6th Cir. 2010), quoting *Kronisch v. U.S.*, 150 F.3d 112, 126 (2nd Cir. 1998).

When Does a Duty Arise?

- The crucial date is when a party *should have known* that the evidence *may* be relevant:
 - An internal memo addressing a terminated employee’s potential claim of harassment?
 - An email from a customer or another business stating he “may” be seeking the advise of an attorney?
 - A telephone call in which the other party states, “You’ll never get away with this!”?



**WHAT IS
THE DUTY?**



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What is the Duty?

- Judge Shira Scheindlin, who is a leader in the electronic discovery issue, acknowledged in an interview that the federal rules addressing electronic discovery exacerbates the problem of having an enormous volume of material, but said sanctions are appropriate where a business knows or should know that certain records are relevant, but nonetheless fail to preserve them.

What is the Duty?

- She then cited with approval an 8th Circuit Court of Appeals decision, which held spoliation requires:
 - “Some indication of an intent to destroy the evidence for the purpose of obstructing or suppressing truth”
 - Demonstrating intent can be accomplished with circumstantial evidence (inferences)



**WHY IS
SPOILIATION
IMPORTANT?**



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Why is Spoliation Important?

- Perhaps you are thinking that destroying “the smoking gun” is always the best way to proceed. Think again.
- The remedies where another party has spoliated evidence vary, but each remedy acts in some way to benefit the party making the claim.



**REMEDIES
FOR
SPOILIATION**



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Remedies for Spoliation

- An adverse instruction to the jury.
 - The most common remedy
 - If the jury finds that a party intentionally destroyed relevant evidence in bad faith, it may infer that such evidence was unfavorable to that party.
 - Example: If a party destroyed/erased a computer's hard drive, the jury could infer that it contained the evidence the other claimed was on it.

Remedies for Spoliation

- Excluding evidence favorable to the party committing the spoliation
 - A party could be precluded from introducing evidence that would be contradicted by evidence which has been destroyed.
- Dismissing a case
 - Where a Plaintiff has committed spoliation.
 - This is a severe remedy and must be used sparingly by the court, only where lesser sanctions would not suffice.

Remedies for Spoliation

- In Indiana, spoliation is not an independent tort against a first party, meaning that a plaintiff cannot sue someone he has already sued with an additional count for spoliation.
- However, a claim against a third party, i.e. someone who is not directly involved and sued by the plaintiff, may have some exposure.

Remedies for Spoliation

- “Indiana common law does not recognize an independent cause of action for either intentional or negligent ‘first party’ spoliation of evidence....”
 - *Meridian Sec. Ins. Co. v. Hoffman Adjustment Co.*, 933 N.E.2d 7, 14 (Ind. Ct. App. 2010), quoting *Glotzbach v. Froman*, 854 N.E.2d 337, 338 (Ind. 2006).
- That does not mean the law will not change in the future as a result of legislative action.

Remedies for Spoliation

- The *Hoffman Adjustment Co.* case also addressed a third-party claim, meaning someone other than the defendant destroyed evidence.
 - The court noted a prior case finding that a separate action may be necessary where the remedies for spoliation are not applicable, e.g. where an employer destroyed evidence, but is not a party to the suit and thus cannot have an adverse inference against it.

Remedies for Spoliation

- However, the court in *Hoffman* noted there can be no third-party spoliation claim against an employer because there is no duty in the employer-employee context to preserve evidence. It found that certain other remedies, such as contempt sanctions, are still available against a third party.

Remedies for Spoliation

- On the other hand, a third party spoliation claim was permitted against a defendant's insurer, finding that insurers are no strangers to litigation, and it "strains credulity to posit ... that a liability carrier could be unaware of the potential importance of physical evidence." *Thompson v. Owensby*, 704 N.E.2d 134 (Ind. Ct. App. 1998).



**PRESERVATION
OF EVIDENCE
LETTERS**



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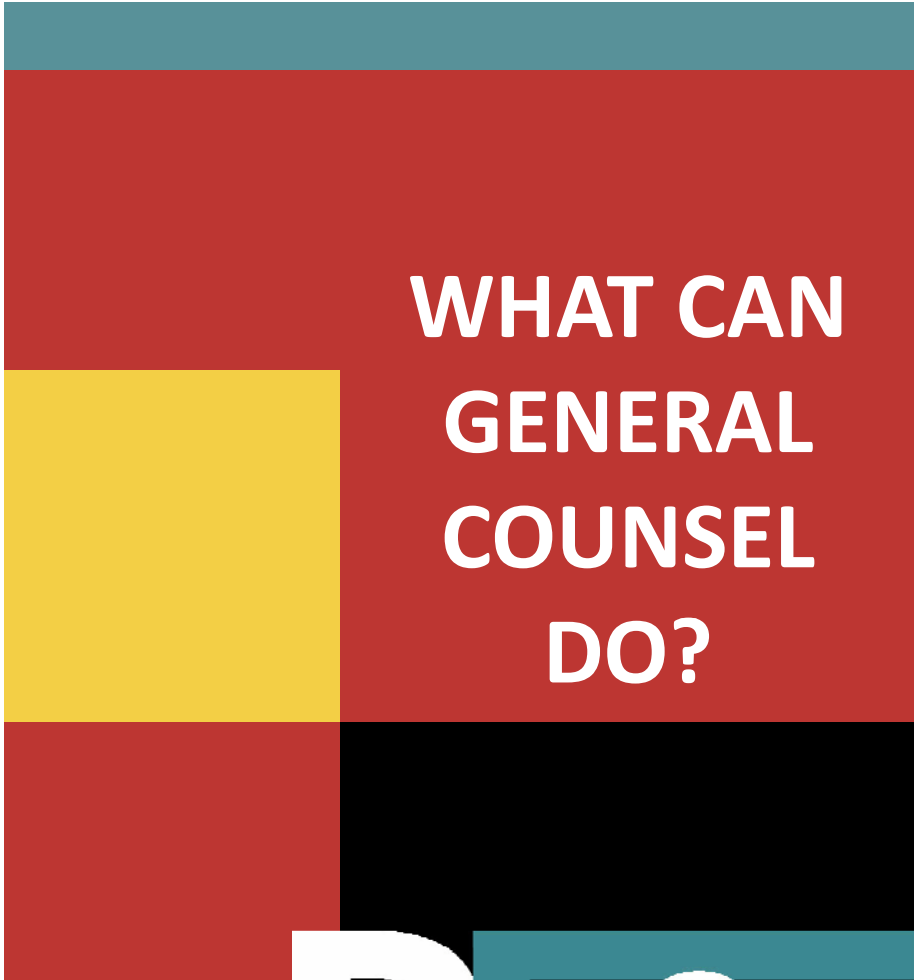
Preservation of Evidence Letters

- Be very cautious if you receive a preservation of evidence letter, which is a letter, typically from an attorney, instructing you to preserve certain evidence because it may be relevant to a pending or future action.
 - These letters often contain requests to preserve voluminous document or cease regular document retention policies.

Preservation of Evidence Letters



- Whether or not you must comply with a preservation of evidence letter, and to what extent, is going to vary from situation to situation, and the best advice is to consult with a litigation specialist to determine how to respond.



**WHAT CAN
GENERAL
COUNSEL
DO?**



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What Can General Counsel Do?



• Judge Scheindlin gave a Top 10 list of things for general counsel to do in order to comply with a business's obligations:

1. Have a good records retention policy.
2. Have a person responsible for records retention who knows the business's obligations. She suggests this should NOT simply be assigned to the head of the IT department.

What Can General Counsel Do?



3. Have a records retention committee that meets regularly. General counsel should be on the committee, as well as the head of IT and the records retention manager.
4. Disseminate the retention policy to all employees
5. Have a response team to address any litigation-based need to preserve documents
6. Consult with outside counsel to discuss the retention policy, especially those parts that address responding to litigation.

What Can General Counsel Do?



7. If necessary, hire an outside vendor to help with any litigation holds. This would not be required in every case, but if the documents are voluminous, it would be helpful.
8. Have your attorney in the litigation raise the issue of cost with the judge as soon as possible to avoid as much cost as possible. Have detailed information on costs, not merely “it’s expensive.”

What Can General Counsel Do?



9. Educate yourself about your business's records and technology (storing, accessibility, cost)
10. Avoid destruction if there is a question as to a duty to preserve, in order to avoid sanctions.

What Can General Counsel Do?



- If you receive a subpoena, check with outside counsel before responding in any fashion.
 - You may need to comply
 - You may be able to quash the subpoena
 - You may need to comply with certain parts, but not others
 - You should have an understanding on who will bear costs where those costs are significant



**ELECTRONIC
DISCOVERY**

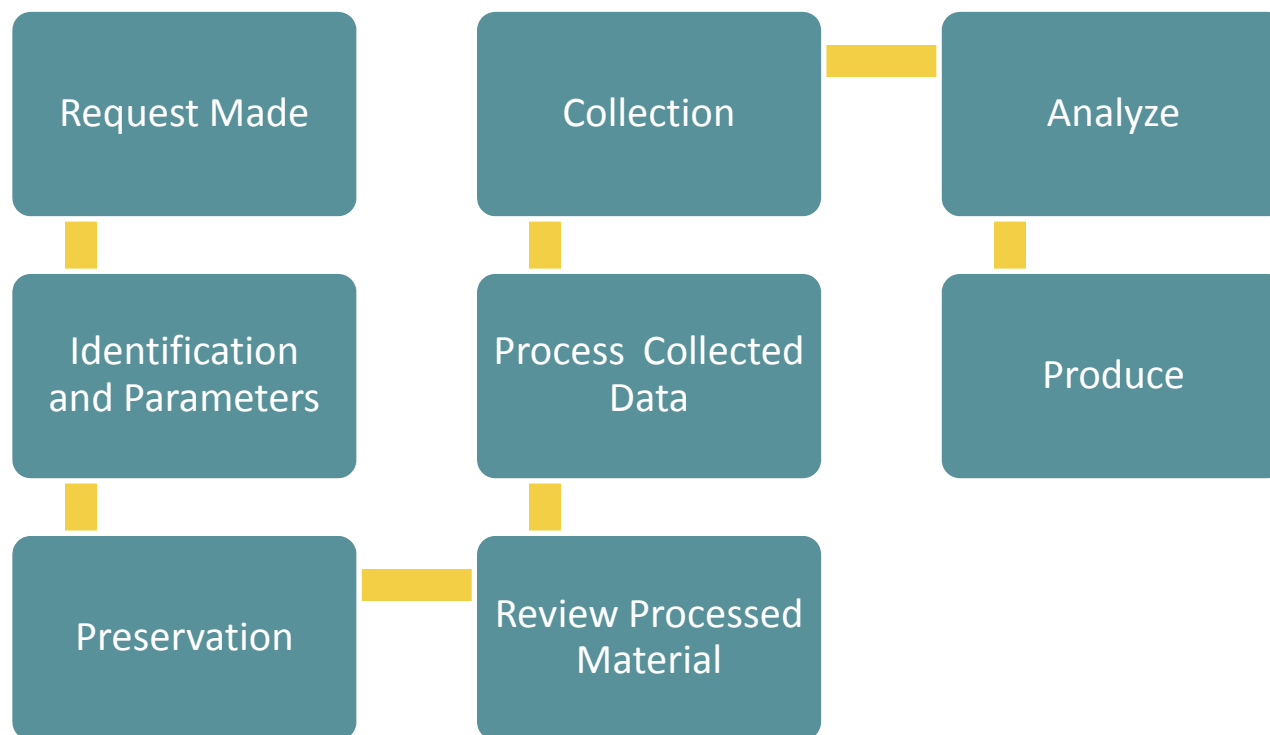


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What is ESI?

- ESI is Electronically Stored Information:
 - Unfortunately, it's as broad as it sounds:
 - Literally anything that is stored electronically could be encompassed in ESI
 - The breadth was so daunting, the Federal Rules advisory committee's note to the 2006 amendments was "It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing [ESI]"
 - ESI is commonly 95% of a party's information

The Flow of a Request



The Request



- The New Federal Rules Will Trigger Immediately
 1. Rules 16 and 26 now require counsel to confer before discovery can begin to discuss ESI and its disclosure
 2. Most states are already employing similar measures.
 3. Topics discussed at this initial conference(s): form of production, preservation v. continued operations, privilege and avoidance of waiver, anything related to ESI discovery

Identification and Parameters

- You must take immediate affirmative steps to identify all sources of discoverable information.
 - Counsel must identify key issues in the case and the employees involved
- What can those be: anywhere discoverable information could exist:
 - Start with key custodians: the people
 - Then non custodians: databases or back-ups (document management systems, e-mail archives, etc...)

Identification and Parameters

- Sources (to name a few):
 - Individual Computers
 - Servers
 - Removable drives
 - E-Mail
 - Home computers/laptops
 - PDAs
 - Smart Phones
 - Back-ups
 - Digitized Voicemail

Identification and Parameters

- Not reasonably accessible ESI does not need to be produced:
 - No bright line rule – case by case
 - Any readily usable format that does not need to be restored or manipulated
 - *Zubulake I*
 - Examples – back up tapes for disaster recovery – old/obsolete systems no longer used – deleted now fragmented data
 - *Zubulake III*
 - Sampling often permitted to determine accessibility.

Preservation/Collection

- Communicate with each key custodian (you should have already done this)
 - Have them complete a check-list on what they have done
- Have IT immediately secure non-key personnel sources

Identification and Parameters

- Network enabled meta-data sampling preferred over file searching
 - Defining search criteria – get involved with this
 - Report sampling: shows file types on each source and the volume – ***this will gauge your future costs and workforce requirements.***
 - If the report is too small or too large – its a red-flag

Preservation/Collection

- Basics:

- No clicking and dragging: it destroys meta-data
- No copying data to a hard drive: another bad idea
- The data must remain intact through a defensible procedure

- Your IT personnel must fully understand these preservation and collection principles– if they do not, outsource the job

- See *Louis Vuitton Malletier v. Dooney & Burke, Inc.*, 2006 U.S. Dist. LEXIS 87096 (S.D.N.Y. Nov. 30, 2006) (\$15,000 in savings keeping it in-house, but sanctioned with an adverse inference for missing emails)

Process/Review/Analyze Data

- Compile the relevant data to be reviewed
- Review for protected information (you will miss some, but don't worry):
 - Work-product
 - Attorney-client privilege
 - Protective Order Material
 - Personal Identification Information
 - Trade secret/copyright/proprietary
- Review for relevance and to ensure within scope of request or required initial disclosure (this is often cursory)

Production



- Generate Privilege Log for Protected Information (if any)
 - Be Specific
 - When in Doubt, Assert the Privilege
- Create and Indexing System for Identification and Production if Possible

Presentation



- Rule 34 Governs, Unless You Agree Otherwise
- If not other agreement:
 - Produce ESI in a form it is ordinarily maintained or readily usable
 - Motions to compel will often resolve form disputes
- If you agreed to another form:
 - Rule 34 doesn't matter
 - You then must produce as agreed

Presentation



- Parties can request to sample and test the ESI
 - This will audit your own searches
 - Reject efforts to investigate your actual IT system – keep them in the data extracted
 - Protective orders should be instituted if someone wants to sample your ESI:
 - Privacy matters
 - Trade secret
 - Privileges

Presentation



- Protecting Privilege

- You will produce protected information inadvertently
- Claiming privilege after production is acceptable and typical – Rule 26(b)(5)
- Party with the protected information must destroy

What to Know

- Have a document retention policy in place
 - *This can allow for safe-harbor if data is lost*
- Learn your ESI system with IT personnel assistance now, if you haven't already
- Outsource, unless you can really handle it
- You or outside counsel reach an agreement with opposing counsel for:
 - Preservation of privileges after production
 - Plan for inspection, copying testing and sampling ESI
 - Form of Production



QUESTIONS
&
ANSWERS



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**THANK
YOU!**



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