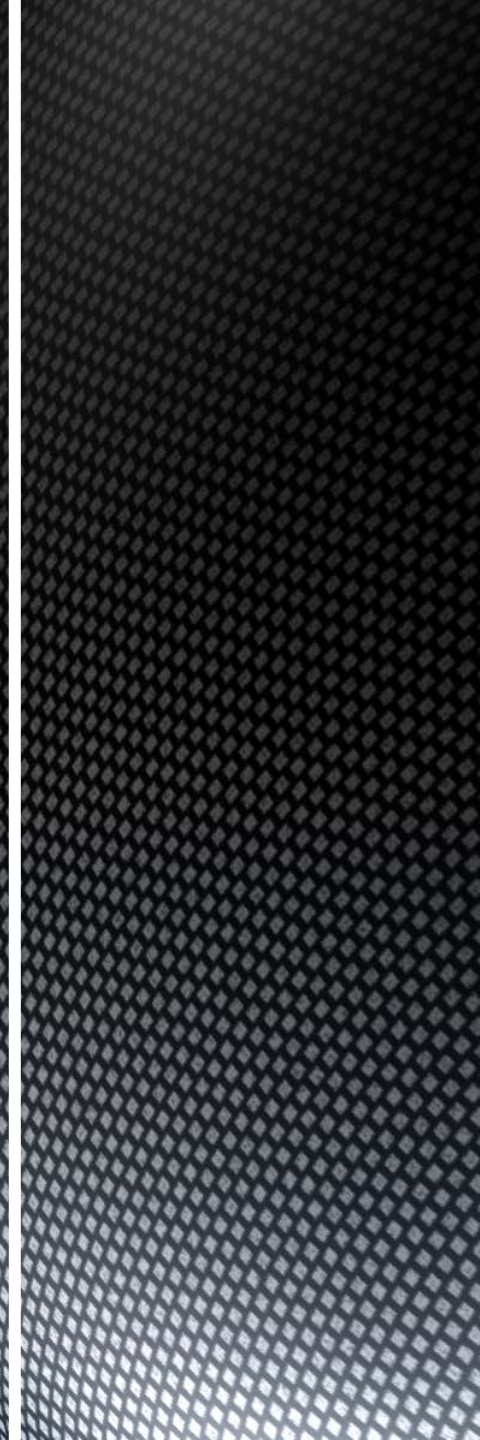




SPOILIATION OF EVIDENCE

What is it?



- The **SPOLIATION OF EVIDENCE** is the intentional, reckless, or negligent withholding, hiding, altering, fabricating, or destroying of evidence relevant to a legal proceeding.
- When Spoliation has occurred there are two possible consequences:
 1. In New Jersey, proceedings possibly altered by spoliation may be interpreted under a *spoliation inference*, which essentially allows a jury to presume that the evidence the spoliator destroyed or otherwise concealed would have been unfavorable to him or her.
 2. New Jersey does not recognize a separate tort action for intentional spoliation of evidence as spoliation is remediable under the existing tort action for fraudulent concealment.



1.) Spoliation Inference

- The spoliation inference is a negative evidentiary inference that a finder of fact can draw from a party's destruction of a document or thing that is relevant to an ongoing or reasonably foreseeable civil proceeding: the finder of fact can review all evidence destroyed in as strong a light as possible against the spoliator and in favor of the opposing party.
- The theory of the spoliation inference is that when a party destroys evidence, it may be reasonable to infer that the party had "consciousness of guilt" or other motivation to avoid the evidence. Therefore, the fact finder may conclude that the evidence would have been unfavorable to the spoliator.

- Because Spoliation does not require bad faith or intent to destroy harmful evidence, it is best to take a Conservative Approach when deciding what evidence to preserve.
- Negligent document retention procedures or negligent execution of good document retention procedures can lead to spoliation.
- Additionally, destruction of good evidence may not subject you to spoliation sanctions, but it can make your case weaker.



2.) Elements of Fraudulent Concealment of Evidence



1. The Defendant had a legal obligation to disclose evidence in connection with an existing or pending litigation;
 2. That the evidence was material to the litigation;
 3. That the Plaintiff could not have obtained access to the evidence from another source;
 4. That the Defendant unintentionally withheld, altered or destroyed the evidence with purpose to disrupt the litigation; and
 5. That the Plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence that the Defendant concealed.
- If successful, compensatory damages and punitive damages can be awarded.

The Duty to Preserve Evidence Should be Triggered by:

1. Receipt of a Demand Letter
2. Service of Tort Notice
3. Preservation letter
4. Service of a Complaint
5. An Accident or Incident



What Evidence will need to be Gathered?

1. **Who** - will be the relevant individuals to this case
2. **What** – evidence they may have or be in control of (emails, texts, social media posts, physical documents, etc.)
3. **Where** – is the evidence physically stored in a closet or file cabinet or is it electronically stored (computer, cell phone, cloud storage, flash drive, hard drive, website, etc.)
4. **When** – the duty to preserve evidence is triggered upon an accident or occurrence or when litigation is reasonably foreseeable



“Potentially Relevant Evidence”:

If it appears that it may have the tendency to help prove or disprove one of the legal elements of the case, i.e. it could potentially make one of the elements of the case likelier or not to be true, it is potentially relevant.

- There is no duty to preserve everything. HOWEVER, it is better to preserve than destroy. Review with counsel.
- There is no duty to create evidence.



Types of Evidence:

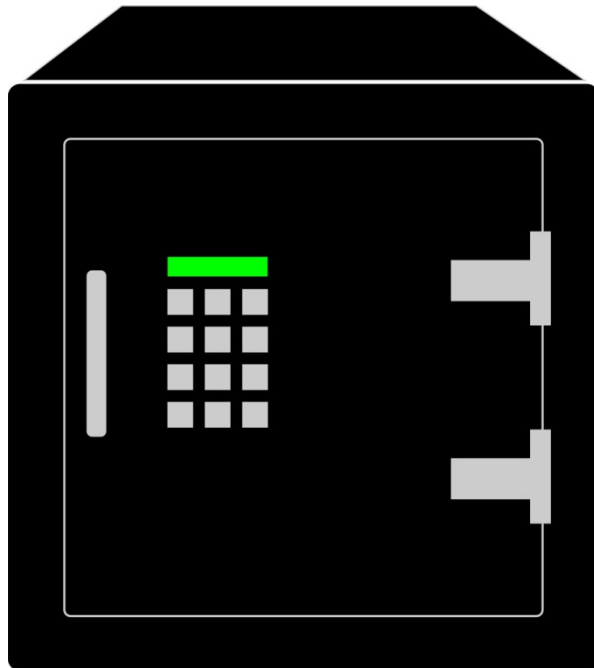


1. Testimony: e.g., oral or written statements, such as video and/or audio recordings or an affidavit; and
2. Exhibits: e.g., physical objects, documents (correspondence) and electronic documents (emails, texts, social media posts); and
3. Documentary material, or demonstrative evidence, which are admissible (i.e., allowed to be considered by the trier of fact, such as jury) in a judicial or administrative proceeding.



- Preservation of Surveillance Video evidence is crucial to avoid spoliation.
- It should be determined what photographic and/or audio/video evidence exists and it should be secured as soon as possible.





How should the
evidence be stored
and secured?

Electronically Stored Information (ESI)



Beyond Emails & Excel Files: computers, mobile phones, server/cloud storage, flash drives, networks, external hard drives, company website and archived back up discs

Metadata is a term for hidden text, formatting codes, formulae and other hidden information associated with an electronic file.

- Metadata must be preserved to provide the following:



- Confirmation of Authenticity; and
- Context and Identity to files; and
- Additional information that may be relative evidence.

Inaccessible Files

You must preserve:

- Backup tapes
- Archival data
- Legacy data
- Deleted information



Tip #1.

Preserve evidence in its entirety; not just what may appear relevant.



Tip #2.

Attempt to get the potential evidence into your possession or obtain an agreement that the evidence will be preserved and that no destructive testing will occur without notice.

- Destructive Testing and Notice: Once the duty to preserve evidence is triggered, notice must be given prior to destruction or destructive testing. Other interested parties must be given the opportunity to inspect the evidence prior to destruction.

Tip #3.

Have a secured evidence locker or evidence room. If there is a piece of evidence that is too large, be sure to document its location and the condition.

Tip #4.

Work with defense counsel. A protective order can be obtained before suit is filed. A litigation hold letter to other parties or those who may possess evidence.



Tip #5.

Experts should also be notified that destructive testing should not be performed without prior approval and notice.

Tip #6.

Ignorance surrounding duties, policies and procedures is insufficient justification for spoliation.

Parties have a duty to ensure those in charge of the evidence are provided with instructions and tools and that the evidence is secure.

Tip #7.

It is not just the insured's job: individual managers, employees, IT staff, and others also have a duty to preserve evidence.



Tip #8.

You must excuse your counsel for “nagging” you about preserving evidence. Attorneys face their own legal liability and potential sanctions for failing to advise clients to preserve evidence.



Voluntary Undertaking

Records that have been created and kept in the course of business, or for your own benefit must be preserved (assuming litigation is foreseeable or initiated).



Contract, Agreement or Statute

The Insured may contract with a Third Party company to maintain files that will be potentially relevant evidence.



Potential Sanctions for Spoliation of Evidence



Sanctions

The sanction for Spoliation of Evidence serves three goals:

1. To make whole, as nearly as possible, the litigant whose cause of action has been impaired by the absence of crucial evidence.
 2. To punish the wrongdoer; and
 3. To deter others from such conducts.
- The focus in selecting the proper sanction is evening the playing field or rectifying the prejudice caused by the spoliation so as to place the parties in equipoise.
 - The sanction of dismissal will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party.

IMPLICATIONS



1. Dismissal – though RARE!

2. Barring of Evidence

- Key evidence can be barred, which is sometimes paramount to the dismissal of the claim.



3. Evidentiary Presumptions

- The jury may make “adverse inferences”





4. Monetary Penalties

- The party and/or their attorney can have monetary sanctions imposed by the court.
- No showing of bad faith is required for sanctions.

5. Independent Legal Liability

- A separate claim for Fraudulent Concealment of Evidence may be filed seeking compensator and/or punitive damages.

QUESTIONS

