

Helping businesses avoid spoliation claims

By Richard L. Miller II and Kristen Werries Collier

Everyone loses and damages things from time to time. And businesses – made up, after all, of people – often misplace and inadvertently dispose of e-mails, electronic files and even hard copies of documents. Unfortunately, if that information later becomes relevant to a lawsuit, its loss or damage can be devastating.

“Spoliation” is the term of art for the loss, alteration, damage or destruction of evidence important to civil litigation. There are repercussions for the spoliation of evidence, for obvious reasons: it can give one litigant an unfair advantage over another. The judicial system would break down if every litigant could simply destroy bad evidence and use only the good.

You might wonder what you can do to help your business clients minimize the likelihood of losing or inadvertently destroying evidence in the digital age. Although nothing can guarantee success at avoiding spoliation, advising your clients to take the following steps can dramatically reduce the risk.

Learn your business client’s electronic systems. Electronic discovery is often a spoliation minefield because of the sheer volume of information. Familiarizing yourself with how your client’s data is stored and deleted will help you help it avoid a misstep.

Document information sources. When litigation is imminent, a business should thoroughly document sources of relevant information, key players, and potential custodians of records. That can help you determine the source, content and quantity of potentially discoverable material. Also, it will give you a practical understanding of the business’ document retention policy.

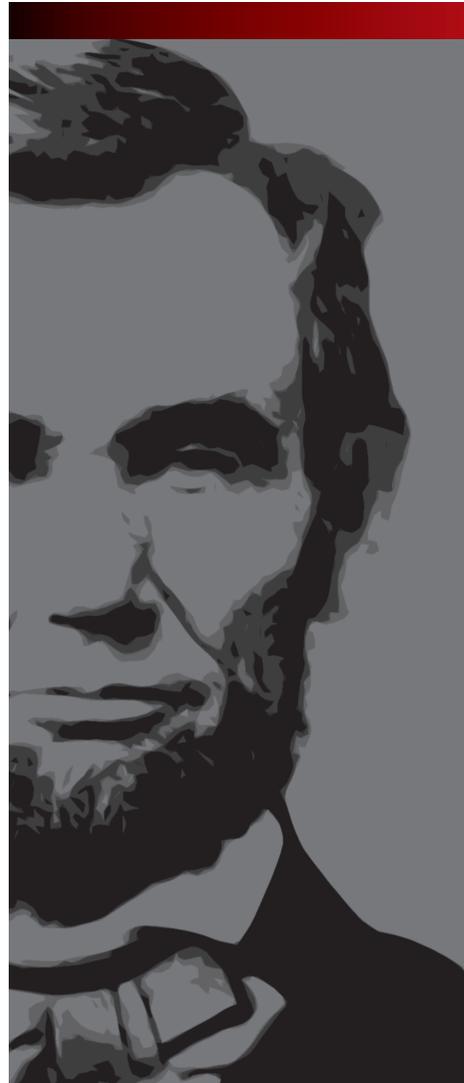
Preserve evidence immediately. If a business foresees a future claim arising out of a dispute, accident, event or injury, it should quickly quarantine and preserve potentially relevant documents, whether in hard copy or electronic form, and do the same with any physical evidence. Doing nothing for weeks, even days, could allow evidence to be destroyed through otherwise harmless, routine practices.

Suspend auto-delete for key players. Businesses should suspend all electronic auto-delete policies and programs for individuals with information relevant to the litigation (or potential litigation). Someone in authority should advise these individuals that their material is being preserved and direct them to save all materials, electronic or not, to which they have access. Err on the side of preserving too much.

Send a “litigation hold letter.” Someone in authority, whose directives will be followed, should work with you to distribute a “litigation hold letter” advising employees who might have relevant evidence to preserve it. This contact person should help identify and collect the potentially responsive documents. He or she may need to testify if a spoliation claim is made.

Get it in writing. You should consider advising your client to require individuals with access to potentially relevant evidence to verify in writing that they understand their preservation responsibilities. These individuals are a great source of information, so ask them to identify – also in writing – the location of all potentially relevant hard-copy materials, electronic documents and physical evidence.

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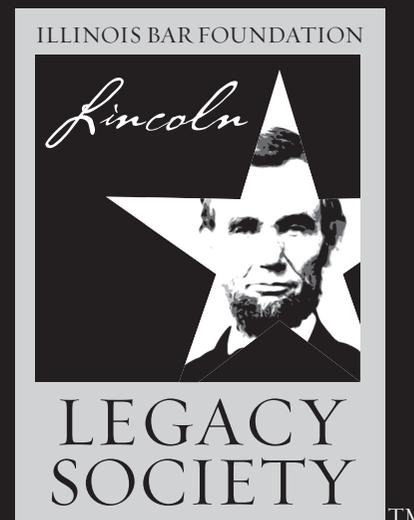
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