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ILLINOIS STATE BAR ASSOCIATION

TRIAL BRIEFS

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

Sanctions and spoliation

By Hon. Barbara Crowder

All truths are easy to understand once they are discovered; the point is to discover them.

—(Galileo Galilei, Italian astronomer, 1564-1642).

Of course, the way to get to the truth in a lawsuit is through discovery. Problems arise when discovery is thwarted by the loss or destruction of evidence. Counsel has more than one option when evidence is missing. Illinois law allows counsel to seek sanctions as a discovery violation. (An alternative is to file a tort claim regarding spoliation of evidence.)

This analysis makes no recommendations but simply addresses the possibility of sanctions for spoliation.

I. Why sanctions?

The first question to address is why a sanction would be available if the victim of spoliation has a cause of action under negligence law. Look no further than the Supreme Court Rules that allow for the discovery of documents, objects, or tangible things and require

> . . . full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party, including the existence, description, nature, custody, condition, and location of any documents or tangible things. . . . The word 'documents,' as used in these rules, includes, but is not limited to, papers, photographs, films, recordings, memoranda, books, records, accounts, communication and all retrievable information in computer storage.
>
> Supreme Court Rule 201(b)(1).

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Taking exhibits to the jury room: Why decision makers need them

By Patrick M. Kinnally, Aurora, Illinois

Over the years it has always struck me as odd that a trial court would not publish to the jury, other than depositions, all of the exhibits that are admitted into evidence during a trial. It has happened to me, for reasons never understood.

Since jurors are required to take jury instructions into the jury room, it would seem a concomitant exercise to have available the evidence upon which the application of the law to those facts interact. (735 ILCS 5/2-1107(b)). In a bench trial, all of the exhibits which are admitted at trial (other than an offer of proof) are entertained by a trial judge sitting as factfinder. But merely because an exhibit is admitted in evidence during a jury trial does not mean the jury is going to see that evidence when they deliberate. *Van Winkle v. Owens Corning Fiberglass Corporation*, 291 Ill. App.3d 165. (1997). A trial judge, in his/her discretion, has the ability to exclude those exhibits

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***(Notice to librarians:** The following issues were published in Volume 56 of this newsletter during the fiscal year ending June 30, 2011: July, No. 1; September, No. 2; October, No. 3; November, No. 4; December, No. 5; January, No. 6; March, No. 7; April, No. 8; May, No. 9; June, No. 10).*

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Sanctions and spoliation

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In addition, Supreme Court Rule 214 requires parties to produce documents, objects, and information requested to be tested, photocopied or sampled. Independent actions (usually subpoenas and depositions) can also be taken to ask one who is not a party for production of documents or objects.

Some records are supposed to be kept pursuant to law and may also be a basis for spoliation claims when a practitioner asks for the records and is advised they no longer exist. X-rays have to be kept for five years under the X-Ray Retention Act; the Hospital Licensing Act mandates ten years for medical records and allows for written notice to extend that; a dentist must keep patient records of dental work performed for ten years under the Illinois Dental Practice Act; and attorneys have obligations to keep some records under Supreme Court Rules. Companies may also have record retention policies that may make a failure to have records open for sanctions when a party has failed to keep them.

There are circumstances when destroying potential evidence before a request for its production was ever made can lead to sanctions even if there is no specific statute that required the records be kept. The Illinois Supreme Court noted that failure to produce relevant evidence because it was destroyed prior to filing a lawsuit can be sanctioned because of the duty a potential litigant owes to preserve relevant and material evidence. *Shimanovsky v. General Motors Corporation, 181 Ill.2d 112, 692 N.E.2d 286, 229 (1998)*. The court reversed a dismissal of the case as a sanction for pre-suit destructive testing by the plaintiff, but agreed that a sanction was warranted as the sanction must consider the level of prejudice to the opposing party.

Failure to preserve evidence prevents the liberal discovery that is allowed. Where someone has made it impossible for the evidence to be reviewed by allowing its loss or destruction, the spoliation of the evidence can lead to sanctions both to punish the person who engaged in the spoliation and to provide fairness in the case.

Sanctions for discovery violations are imposed pursuant to Supreme Court Rule 219. There is no specific sanction that is mandated as sanctions are in the court's discretion and the court must consider several factors, according to *Shimanovsky:*

> (1) the surprise to the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party's objection to the testimony or evidence; and (6) the good faith of the party offering the testimony or evidence. *Shimanovsky at 124.*

II. What are the possible sanctions?

Possible sanctions can be found in Supreme Court Rule 219. Rule 219(c) provides that remedies may be those that are just and include "among others": (i) staying the proceedings until the order is complied with; (ii) barring the party from filing any other pleading relating to any issue to which the refusal relates; (iii) barring the offending party from maintaining a particular claim, counterclaim, third-party complaint, or defense relating to that issue; (iv) barring witnesses from testifying concerning that issue; (v) entering a default judgment or a dismissal against the offending party as to claims or defenses about which the issue is material; (vi) striking any pleading relating to that issue; (vii) where a money judgment is entered for fees or expenses, order interest to be paid for the period of pre-trial delay caused by the behavior.

> The provision goes on to allow for "an appropriate sanction" that may include reasonable expenses incurred as a result of the misconduct such as attorney's fees and allows where the misconduct is willful, permits a monetary penalty to be assessed and collected. The court must state the reasons and basis of any sanction imposed under 219(c).

III. What sanctions are usually applied for spoliation?

A. Barring the offending party from maintaining a particular claim, counterclaim, third-party complaint, or defense relating to that issue has been adopted as a sanction. Courts have adopted adverse inferences as sanctions. The court may decide all reasonable presumptions against the party who has destroyed evidence as was addressed in these cases.

Smith v. Tri-R Vending, 249 Ill.App.3d 654, 619 N.E.2d 172 (2d Dist. 1993);

Whittaker v. Stables, 339 Ill.App.3d 943, 791 N.E.2d 588 (2d Dist. 2001).

B. Precluding the presentation of evidence or barring testimony has been adopted by the court as a sanction for spoliation of evidence in the following:

Kambylis v. Ford Motor Co., 338 Ill. App.3d 788, 788 N.E.2d 1 (1st Dist. 2003);

Boyd v. Travelers Insurance Co. 166 Ill.2d 188, 652 N.E. 2d 267 (1995).

Graves v. Daley, 172 Ill.App.3d 35, 526 N.E.2d 679 (3d Dist. 1988).

C. The courts have also used entering a default judgment or a dismissal against the offending party. A cautionary note, though, as there are a number of cases where a court has been reversed for dismissal. Spoliation sanctions are no different from other Rule 219(c) sanctions in that the court should not deal more harshly than is warranted with the offender.

Peal v. Lee, 403 Ill.App.3d 197, 933 N.E.2d 450 (1st Dist. 2010);

Adams v. Bath & Body Works, Inc., 358 Ill.App.3d 387, 830 N.E.2d 645 (1st Dist. 2005), appeal denied 216 Ill.2d 679 (2005); and

Stringer v. Packaging Corporation of America, 351 Ill.App.3d 1135, 815 N.E.2d 476 (4th Dist. 2004).

IV. Instructing the Jury

Most lawyers think the "Failure to Produce Evidence or a Witness" instruction of the Illinois Pattern Jury Instructions for civil cases applies only to missing witnesses. Not so.

If the court determines that a party has failed to produce evidence and has no reasonable excuse for failing to do so, the court may determine it was not produced because the evidence would be unfavorable to that

party's position. In the court's discretion, the failure of a party to produce evidence may lead to the giving of a jury instruction about the presumption.

This is one difference between choosing to seek sanctions for spoliation as opposed to pursuing a claim for spoliation. According to the Comments, "[t]his instruction is not intended to be an issue or burden of proof instruction dealing with spoliation." *Dardeen v. Kuehling et. al., 213 Ill.2d 329, 821 N.E. 2d 227 (2004)*.

The instruction has been used and approved in an action where defendant took photos of the plaintiff and did not produce them or the jail's log book to defend plaintiff's claim of police brutality. *Debow v. City of E.St.Louis, 510 N.E.2d 895 (5th Dist. 1987)*. In *Roeseke v. Pryor, 152 Ill.App.3d 771, 504 N.E.2d 927 (1st Dist. 1987),* a hotel was being sued over plaintiff's rape. It failed to produce a report made by its own night manager who had summarized what happened the night of the rape even though the hotel normally prepared and kept reports. IPI 5.01 was given.

Conclusion

Searching for the truth may actually be reaching for the stars. Attorneys and judges fervently hope that parties have kept the necessary items and documents so that a fair decision can be made on the merits of the case. Unfortunately, that wish is not always granted. Hopefully knowing the potential and most frequently used sanctions will assist counsel in evaluating what steps to take when faced with the loss or destruction of evidence. ■

Taking exhibits to the jury room: Why decision makers need them

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from the jury's consideration.

This is because the Code of Civil Procedure states: "(d) Papers read or received in evidence, other than depositions, may be taken by the jury to the jury room for use during the jury's deliberation." (735 ILCS 5/2-1107(d).

A recent opinion, *Estate of Oglesby v. Berg*, Ill. App.3d , 2011 WL 1205151, Ill.App. 1st Dist. 2011) ("*Oglesby*"), explains, perhaps inextricably, the operation of this rule. *Oglesby* was a tort case involving an automobile crash. Liability was admitted. The issue was the nature and amount of damages. During the trial, the plaintiff produced an exhibit (#10), which was a billing statement from Mrs. Oglesby's treating physician, Dr. Silverman. Basically, the exhibit listed a series of visits by the plaintiff with Dr. Silverman over a one-month period in the autumn of 1998, immediately post-accident. The total charges were about $1,400.

Dr. Silverman continued to see Mrs. Oglesby, apparently, periodically through October 1999, but no entries appeared in the exhibit after the first month of treatment. During closing argument, plaintiff's counsel argued that Mrs. Oglesby was treated for a year after the accident while the defense argued the relevant related treatment did not exceed one month as portrayed in plaintiff's Exhibit 10. The exhibit was admitted into evidence during the trial. The defense attorney asked that it be sent to the jury room with the jurors. The trial court declined to do so. The trial judge refused to send the exhibit back to the jury room because it was plaintiff's exhibit and not the defendant's.

The *Oglebsy* court found this ruling by the trial court to be erroneous. It agreed the decision to send an exhibit admitted into evidence to the jury room rests within the discretion of the trial court. *Gallina v. Watson*, 354 Ill.App.3d 515, 821 N.E.2d 326 (4th Dist. 2004). It concluded that the trial judge's refusal to permit the jury to take the exhibit to the jury room, when it was not offered by its original proponent, was not an exercise of discretion at all, and therefore was error. It then went on to explain that, even though an error had occurred, the error was not reversible. It concluded in its analysis of the damages that both parties had ample opportunity to present their positions and that the verdict was a reasonable resolution. Also, it noted that the jurors never asked for the exhibit although there was nothing in the record that indicated the jurors had been told they could ask for it, either.

In *Gallina*, a medical negligence case, the plaintiff requested that Exhibit 9, a physician's written opinion disclosure, be sent to the jury room. This exhibit, like all others,

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OFFICE
Illinois Bar Center
424 S. Second Street
Springfield, IL 62701
Phones: 217-525-1760 OR 800-252-8908
www.isba.org

CO-EDITORS
Robert T. Park
Angela Imbierowicz
Stephen C. Buser
Patrick M. Kinnally

MANAGING EDITOR/ PRODUCTION
Katie Underwood
kunderwood@isba.org

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was admitted in evidence during the trial. All the other exhibits were published to the jury except No. 9. The defendant hospital objected because it said its mere presence in the jury room would provide more emphasis on its content as opposed to other exhibits. A rather weak argument since all other exhibits admitted at trial were sent to the jury room. The court's decision to exclude from the jury's deliberations was reversed on appeal since the court said it clearly would have been of assistance to the jury in assessing the physician's testimony. *Gallina* was a defense verdict on liability and, therefore, reversible error requiring a new trial. To the contrary, the *Oglesby* court rejected its applicability since defendants were unable to show they were prejudiced by the fact the jurors did not have Exhibit 10 in the jury room.

It seems evident that providing juries with more information upon which to make a decision is more important than the opposite of that proposition. At a minimum, jurors should be instructed that they have the ability to ask for exhibits that have been admitted into evidence. With the advent of the possibility of jurors being able to ask questions of witnesses in state court trials (See, *Chicago Daily Law Bulletin*, May 20, 2011, "Committee Hears Pros and Cons of Jurors Asking Questions"), maybe the rule of permitting jurors to review all exhibits admitted into evidence should be an imperative. The more a jury knows as to evidence that has been made admissible by the parties and the court's rulings can hardly be argued to be unfair, prejudicial or an abuse of discretion. A jury's verdict should always be based on all the evidence, not the absence of a part of it. ■

E-discovery: Not as easy as it may sound

By Hon. Daniel T. Gillespie

DuPage County has conducted e-filing programs for many years. Federal courts in Illinois have been doing it for some time. Cook County has conducted a pilot program of e-filing in the Law Division. Now that e-filing is being introduced to more civil calls in Cook County, it can be expected to be coming to other counties in Illinois as well.

Discussions of e-filing inevitably lead to discussions of electronic discovery. What exactly is electronic discovery? Can this help attorneys and their clients? What if the attorney or party makes a mistake and sends out confidential information inadvertently? Can that be retrieved?

Many of those questions were addressed in a fascinating discussion on e-discovery in an ISBA presentation by attorneys George Bellas and Todd Flaming on electronic evidence at the ISBA Civil Practice & Procedure Section Council" Allerton Conference at Starved Rock in April 2011. The illuminating panel discussion was moderated by attorney Matt Pfeiffer. Much of the information in this article is drawn from that presentation.

Electronically Stored Information is known as ESI and may include discoverable information. ESI is subject to production under F.Civ.R. 34(a). Under Civ.R. 34(b), the form of production of ESI can be specified by the requesting party in a request or thereafter by a responding party in a response. But if the requesting party doesn't specify, it must be produced in the form in which is ordinarily maintained (i.e., as ESI).

An excellent discussion of ESI can be found in the case of *Lorraine v. Markel American Insurance Company*, 241 F.R.D. 534 (D.MD. 2007). This is a landmark decision about the admissibility and authentication of digital evidence by Magistrate Judge Paul W. Grimm, which established a detailed baseline for the use of ESI before his court. Given the guidelines and references provided by the judge, it has now become difficult for counsel to argue against the admissibility of electronic evidence.

Civ.R. 16 imposes a requirement that opposing counsel meet and confer to resolve e-discovery issues. Civ.R. 16(b). Scheduling orders permit the courts to include provisions for disclosure or discovery of ESI. Parties are required to discuss preservation and disclosure of ESI at Civ.R. 26 planning conferences in a "Meet and Confer" meeting. Parties are required to include ESI in their initial disclosures under Civ.R. 26(a).

Chief Judge James Holderman of the Northern District of Illinois chairs the 7th Circuit's E-Discovery Pilot Program. His committee includes lawyers, in-house counsel, and consultants. The primary goal of this initiative is to change the pretrial dynamic to lessen the cost of e-discovery. This is important because it can become very expensive for a corporate party to a suit to have to pay a third-party vendor to cull, filter, and process the electronically stored information requested by opposing counsel in discovery. The 7th Circuit Pilot Program has devised a list of principles to deal with ESI discovery issues as they arise. These principles serve as rules or guidelines as they proceed through this new dimension of electronic discovery. Principle 1.01 is described as Purpose. This rule declares that the animating idea for this initiative is to "incentivize early and informal information exchange on commonly encountered issues relating to evidence preservation and discovery, paper and electronic, as required by Rule 26(f)(2)."

This approach is designed to help courts secure the "just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information without court intervention." Cornerstones of the principles are cooperation and proportionality. The animating idea is that there should be a sea change in the way discovery is conducted by attorneys. Rather than the traditional "hide the ball" approach favored by many attorneys and many firms, which often results in protracted and hostile hearings before judges, opposing attorneys should work with each other to anticipate and resolve discovery difficulties inherent in ESI discovery. Principle 1.02 of the 7th Circuit's Pilot Program on E-Discovery addresses cooperation and declares that an attorney's zealous representation is not compromised by cooperating in discovery. Failure of counsel or a party to cooperate in "facilitating and reasonably limiting discovery requests and responses" could contribute to a "risk of sanctions." For a better understanding of this principle, one

may wish to review Fed. R. Civ. P. 26(g) and the case of *Mancia v. Mayflower Textile Servs. Co.,* 253 F.R.D. 354 (D. Md. 2008).

The Federal Rules of Civil Procedure allow responding parties to evaluate the relative expense and difficulty of producing information from one system (source) versus another. The burden and costs may make the data "not reasonably accessible." The question of what is—and what is not—reasonably accessible has already proven to be fertile grounds for disputes. The courts' response has been to apply considerations of proportionality. Principle 1.03 deals with proportionality. Accordingly, ESI production requests and responses "should be reasonably targeted, clear, and as specific as possible." For a better understanding of this area, one should remember that the proportionality standard applies to all discovery, even "accessible" ESI.

Principle 2.06 deals with production format costs, addressing what should be a suitable production format for tendering ESI. This requires a good-faith effort to agree on the format of ESI production at the initial 26(f) conference. If the parties are unable to agree, they should raise the issue promptly with the court. As a general rule, ESI stored in a database can be produced by querying the database for information resulting in a report or other reasonably useable and exportable electronic file. Applying this principle, the requesting party is generally responsible for the cost of creating its copy of the requested information. Discussion of cost-sharing is encouraged, particularly when discussing the addition of optical character recognition (OCR) or other upgrades of paper documents, or if non-text-searchable electronic information is contemplated by parties.

Principle 3.01 deals with the education of attorneys on electronic discovery issues. This principle contemplates that in any "litigation matter" counsel will become familiar with the federal rules on e-discovery. The 2006 Advisory Committee report concerning the federal e-discovery amendments emphasizes the importance of attorneys familiarizing themselves with the federal rules on electronic discovery.

Federal judges and practitioners have seized the initiative in setting protocols for electronic discovery. Lessons learned in federal courts should be very helpful in initiating e-discovery programs in state court. This is crucial because in many cases electronic discovery can be quite vast and expensive to acquire, evaluate and disseminate appropriately. ■

Information of note:

FastCase now includes bankruptcy and all federal district cases. FastCase is an online research service which is free to ISBA members. Go to <www.isba.org/fastacase>

The ISBA offers the "Quick Reference Guide" to Illinois Supreme Court Rules 213 (f) and (g). Learn more at <http://www.isba.org/store/books/supremecourtrule213> ■

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Monday, 9/12/11- Chicago, Frankie's Scaloppine—Five Star Service: Ethically Satisfying your Client's Appetite for Great Customer Service. Presented by the Illinois State Bar Association. 5:30-7:30.

Tuesday, 9/13/11- Teleseminar—Joint Venture Agreements in Business, Part 1. Presented by the Illinois State Bar Association. 12-1.

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Friday, 9/16/11- Galena, Eagle Ridge Resort and Spa—Hot Topics in Consumer Collection. Presented by the ISBA Commercial Banking, Collections and Bankruptcy Section; co-sponsored by the ISBA Young Lawyers Division. 8:45-4:30.

Friday, 9/16/11- Carbondale, SIU School of Law—A Roadmap to the New Illinois Religious Freedoms and Civil Union Act. Presented by the Standing Committee on Sexual Orientation and Gender Identity. 2-4.

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October

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Wednesday, 10/12/11- Teleseminar—Drafting LLC Operating Agreements, Part 2. Presented by the Illinois State Bar Association. 12-1.

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Thursday, 10/13/11- Chicago, USB Towers—Collaborative Law: The Nuts and Bolts. Presented by the ISBA General Practice, Solo and Small Firm Section; co-sponsored by the ISBA Alternative Dispute Resolution and the ISBA Young Lawyers Division. 8-12.

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Monday, 10/17/11- Chicago, ISBA Chicago Regional Office—Hot Topics in Consumer Collection. Presented by the ISBA Commercial Banking, Collections and Bankruptcy Section; co-sponsored by the ISBA Young Lawyers Division. 8:45-4:30.

Tuesday, 10/18/11- Teleseminar—2011 Americans With Disabilities Act Update. Presented by the Illinois State Bar Association. 12-1.

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Thursday, 10/20/11- Chicago, ISBA Chicago Regional Office—The IMDMA and the Welfare of Pets. Presented by the ISBA Animal Law Section; co-sponsored by the ISBA Family Law Section and the ISBA Human Rights Section. 1:00-4:30 pm.

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