Discovery:

Tips, Tricks and Best Practices

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And

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The Presenter: Vicki Voisin, ACP

Vicki Voisin, ACP, "The Paralegal Mentor," is a nationally recognized author and speaker who delivers simple strategies for paralegals and other professionals to create success and satisfaction by setting goals and determining the direction they will take their careers. Vicki spotlights resources, ethics issues, organizational tips, and other areas of continuing education to help paralegals and others reach their full potential.

She publishes ***Paralegal Strategies***, a weekly ezine for paralegals and other professionals who want to create lasting success in their personal and professional lives. Additional information is available at www.paralegalmentor.com. She also co-hosts a monthly podcast produced by Legal Talk Network featuring guest experts who discuss issues of interest to the legal profession. For information or to register, go to www.paralegalmentor.com/mastermind-calls.html.

After spending more than twenty years in the paralegal field, Vicki launched her *Paralegal Mentor Program* so she could share her knowledge and experience with other paralegals.

Vicki speaks on issues of interest to the legal profession and is the creator and presenter of EthicsBasics®, a unique and enormously popular program designed to raise awareness of ethical concerns by legal professionals. She has worked as a paralegal for more than 20 years and is currently employed by Running Wise & Ford, PLC in their Charlevoix, Michigan office.

Utilizing the ***EthicsBasics*** format, Vicki has made numerous presentations throughout the United States, addressing paralegals and other members of the legal staff, in both law firms and corporations. She is also a frequent speaker at meetings of professional associations; these presentations have been approved for Attorney MCLE.

Vicki has authored articles of interest to attorneys and paralegals in publications on the state and national level, including the *Michigan Bar Journal, Michigan Lawyers Weekly, The Michigan Paralegal, Legal Assistant Today,* LAAM's *Newsbrief,* and *The Career Chronicle* and *Facts & Findings* published by NALA. Many of those articles have been re-printed nationwide.

Vicki is an active member of the Legal Assistants Section of the State Bar of Michigan, having served as Chair in 2005-06. In 2000, she received the *Mentor's Award* from the Section and she was named *Legal Assistant of the Year* by LAAM, an award that was named in her honor. In 2003, NALA recognized her leadership in the development of the paralegal profession with the presentation of its President's Award.

She is a past president of the National Association of Legal Assistants (NALA) and until recently served on NALA's Advanced Certification Board. Vicki presents **Basic Ethics I and II, Advanced Ethics**, **Ethics & Technology,** and **Time Organization Techniques** on NALA Campus *LIVE!*

Questions may be directed to Vicki@paralegalmentor.com. Visit her blog at www.paralegalmentor.blogspot.com where she addresses matters of interest to legal professionals. Subscribe to her weekly ezine titled ***Paralegal Strategies*** at www.paralegalmentor.com.

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The Presenter: Christina L. Koch, ACP

Christina L. Koch, ACP is a NALA Advanced Certified Paralegal in Trial Practice with more than twenty years of experience in the legal field. She received her Paralegal degree in 1991 and also holds a Bachelor of Science Degree in Management. She is a National Dean's List Scholar.

In 2002, Christina joined the Omaha NE firm of Inserra & Kelley and is currently a Litigation Paralegal/Trial Practice Specialist. Her work with Inserra & Kelley includes handling all aspects of litigation for the firm. She is adept in performing all aspects of litigation, including legal research, writing, discovery, investigative and analytical skills and preparation. Her experience includes the areas of personal injury, workers' compensation, products liability, FELA and insurance defense.

She is a member of NALA, NePA, and a paralegal affiliate of the American Association of Justice. She currently serves as President-Elect of NePA.

Christina completed the NALA LEAP program in 2009 and was named to the Paralegal Superstar Calendar of the nationwide Paralegal Gateway for March of 2008.

Christina has served on the Nebraska Paralegal Association Board of Directors since 2007 and is currently a member of the AAJ Paralegal Task Force Advisory Committee.

She is a nationally recognized author and speaker on various litigation topics and was a member of the faculty of the Trial Specialist Institute in Las Vegas, NV.

Christina is a freelance legal author, speaker and blogger and the founder of the Nebraska Paralegals list serve.

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Notice:

1. What Is Discovery?

Discovery: the process whereby parties to litigation exchange information; used to elicit the basic facts of a case and to clarify issues for trial; useful for determining the strengths and weaknesses of your case.

You must comply with discovery requests from opposing counsel unless you can demonstrate that the request pertains to protected information.

The role of a paralegal in the discovery process can vary but a paralegal can be involved in most aspects so long as the attorney supervises the paralegal's work and takes responsibility for the final work product.

Ethics rules and opinions apply to discovery. The ABA Model Rules of Professional Conduct (available at www.abanet.org) are referred to in this presentation.

Be sure you know your state's ethics rules and opinions, as well as those of your professional association.

Rule 1.1 Competence A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3 Diligence A lawyer shall act with reasonable diligence and promptness in representing a client. This would include performing the discovery necessary for representation.

Rule 1.6 Confidentiality Of Information A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph other provisions in this rule. We're going to talk about what can be disclosed during discovery…and what should not.

Rule 3.2 Expediting Litigation A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Rule 3.4 Fairness To Opposing Party And Counsel A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act and in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

Rule 4.1 Truthfulness In Statements To Others In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person; or fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6, which, if you remember, refers to confidentiality of information.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants With respect to a nonlawyer employed or retained by or associated with a lawyer, the lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; this would include supervising the work of the nonlawyers and reviewing the work product before it leaves the office.

Rule 8.4 Misconduct It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

Note: The above is a summary of each rule as it applies to discovery. Please go to www.abanet.org to review each rule in its entirety.

Applicable court rules depend on jurisdiction and venue of the case.

Jurisdiction – what court has the authority to rule on your specific case?
Venue = the physical location where the case is filed.

Once jurisdiction and venue are determined, review the applicable court rules.

Federal Court: Federal Rules of Civil Procedure
http://judiciary.house.gove/hearings/printers/111th/civil2009.pdf

U.S. District Court: check the web site of the Court in which you are practicing

State, circuit court or administrative law jurisdictions: usually publish discovery rules on the Internet. Check search engines such as Google or Lycos.

You should also check the applicable Rules of Evidence. For instance, the Federal Rules of Evidence:
http://www.law.cornell.edu/rules/fre

2. Is it Discoverable? Is it Privileged?

The following are discoverable:

- ☑ The identity and location of fact witnesses or any fact relevant to the subject matter of the lawsuit;
- ☑ The identity and opinions of an expert witness who may be used at trial.
- ☑ The identity and location of individuals likely to have discoverable information to disputed facts alleged in the pleadings;
- ☑ The facts that lead to a contention or belief that other persons or things caused or contributed to the incident in question;
- ☑ Any insurance agreements relevant to a pending action (included in the Initial Disclosures);
- ☑ Income tax returns (discoverable but subject to protection);
- ☑ Photographs;
- ☑ Contention interrogatories (i.e., "With regard to your contention that you were bit by Defendant's dog, please state every fact that supports your allegation. . ."");
- ☑ Similar incidents and complaints in products liability cases;
- ☑ Trade secrets
- ☑ Net worth is discoverable as to damages claimed;
- ☑ Post-accident investigations, which are not privileged, if there is a substantial need and the investigation is not available through other avenues;
- ☑ Portions of the Experts File (again, we will discuss the new rule later);
- ☑ Party Opinions;
- ☑ Statements;
- ☑ Medical Records;
- ☑ Documents used to refresh recollection at a deposition;
- ☑ Surveillance Materials; and
- ☑ Attorney billing records (if relevant to a controlling issue).

The following are not discoverable:

- ☑ Witness statements obtained in anticipation of pending litigation without substantial need; *Proper Objection: trial preparation material/work-product;*
- ☑ Investigations in anticipation of litigation if there is a showing of substantial need and inability to gain knowledge through other avenues; *Proper Objection: work-product*;
- ☑ Identity and work product of experts informally consulted*; Proper Objection: work-product*; and
- ☑ Attorney's ordinary work product and opinion work product

Rule 26(b) (5) requires a party claiming a privilege to

> "describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection".
>
> The burden of proof is on the party that claims the privilege.

Work Product Doctrine. Protects the attorney's analysis and case strategy.

To claim a work product privilege, a three-prong analysis must be used:

> Was the document prepared during, or in anticipation of litigation;
>
> If so, is the material opinion or non-opinion work product;
>
> If it is non-opinion work product, has the party seeing production demonstrated a substantial need for the document or will the party endure substantial hardship if it is not produced?

Does not protect:

- the underlying facts in work-product documents,
- the identity of the parties from whom the facts were obtained, or the fact that the work-product document exists.

Opinion work product can only be discovered in extraordinary circumstances.

Work-product documents may be discoverable if the party seeking the discovery demonstrates there is a substantial need for the document and there is no other reasonable way to obtain it.

Documents reflecting mental impressions, conclusions, opinions or legal theories are protected by the work product doctrine and cannot be overcome by a showing of substantial need and inability to obtain the document without undue hardship.

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The attorney-client privilege is a rule of evidence. To claim an attorney/client privilege, the following criteria must be met:

- The party for whom the privilege is invoked either is a client or seeks to become a client;
- The attorney or a representative is engaged in the relationship for the purpose of rendering legal services to the client;
- The information is confidential and not intended to be disclosed to third parties for the purpose of obtaining either an opinion on legal services or assistance in a legal proceeding.
- The privilege has not been waived by the client.

The privilege protects only the confidential information, not the disclosure of underlying facts by those who communicated with the attorney. It is the process rather than the factual content that is protected.

The privilege can be waived if the information is communicated directly to a third party, communicated in the presence of a third party, or otherwise disclosed voluntarily.

Self-Analysis Privilege. A party's right to protect an analysis critical of the party's conduct.

- The information must result from an internal review of the party's procedures or products conducted for the purpose of evaluation or improvement;
- Persons contributing to the evaluation intended their input to be kept confidential and not subject to public dissemination; and
- The information contained in the evaluation is the type that would be curtailed if subject to discovery.

3. Scheduling Orders

Scheduling Orders: Set the major deadlines in the case and set the extent of discovery permitted, deadlines for expert witness disclosures, motions, and additional parties or pleadings.

Federal Court:

- ❖ Discovery normally closes no later than thirty-five days prior to the scheduled trial date.
- ❖ Parties work together on a Joint Proposed Scheduling Conference Order; includes
  - a statement of the case,
  - jurisdiction,
  - timing of disclosures,
  - any limits on discovery,
  - and any other items the parties feel are appropriate to be addressed by the Court.

State court scheduling orders may vary from state to state; parties can stipulate to extend the deadlines; if no stipulation, file an Amended Scheduling Order

☑ Pay close attention to the expert deadlines and what is required under those deadlines.

The proposed Scheduling Order is very important in planning your case, not just in terms of strategy, but also in terms of knowing when you have to have certain information and for prioritizing tasks.

☑ Calendaring the dates in the Scheduling Order requires a high degree of competency and accuracy.

4. Discovery Tools and the Discovery Plan

Four basic discovery tools customarily used in litigation:

- ❖ Interrogatories
- ❖ Requests for Production
- ❖ Requests for Admission
- ❖ Depositions.

The discovery plan determines which process or processes will be used. Begin the discovery plan as soon as the complaint is filed. Be sure to review:

- Complaint
- Answer and the Reply, if your jurisdiction allows a Reply
- Potential jury instructions

Questions for preparation of discovery plan:

- What are the issues in the case?
- What do you need to prove?
- What do the facts you have already uncovered determine? Regarding the facts you still need to uncover, what is the best way to find those facts?
- What is unusual about this case?
- Do you need a protection letter to avoid the other side from disposing of evidence?
- Do you need specific subpoenas?
- Did you explore the possibility of social networking discovery?
- Do you need a site inspection or specialty medical examination?
- Have you preserved physical evidence?
- Who will be called as a witness and why?
- Do you need specialized discovery (discovery that is beyond your standard form requests)
- Are electronic documents an issue?
- What about cell phones, pagers, or the little black box in planes or trucks?

Do you need to create a privilege log?

Privilege log: shows all evidence not produced under a claim of privilege. The privilege log is produced to the other attorney to show what evidence has been withheld.

5. Federal Court Scheduling Orders

Federal Court Scheduling Orders differ from State Court Scheduling Orders.

- Federal Court requires the parties "meet and confer" about discovery and case progression as soon as feasible, but not later than 21 days prior to the Scheduling Conference or the date a Scheduling Order is due under Rule 16(b).
- Parties joined or served after the Rule 26(f) Conference must file Initial Disclosures within 30 days of being served or joined, unless given a different timeline by the Court.
- It is a good practice to schedule your Rule 26(f) Conference as soon as possible, closely followed by your Initial Disclosures, which are due within 14 days of the Rule 26(f) Conference.
- No other discovery is allowed until after the parties confer, develop and submit a proposed discovery plan to the court in advance of the scheduling conference
- Parties review the **Rule 26(f) form** to choose deadlines; issues such as e-discovery, discovery deadlines and limits in discovery, and preservation of evidence should be discussed.
- **Report of Rule 26(f) Planning Conference** must be filed with the Court within 14 days of the conference.

Initial Disclosures must include certain information as required under Rule 26(A) (1) (a):

- name, address and phone number of any person likely to have discoverable information and the subject of that information used to support its case (unless used solely for impeachment);
- copies of all documents (including e-discovery) disclosing party has in its possession to support its case (unless used solely for impeachment);
- computation of damages claimed by disclosing party, including supporting documentation on the nature and extent of injuries; and
- copy of any insurance agreements which a party may be able to use to satisfy any judgment or which could be used to indemnify or reimburse for payments made to satisfy any judgment.

The Court issues a Scheduling Order after receiving the parties' **Report of Parties' Rule 26(f) Scheduling Conference** or after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference (usually held by phone).

- Generally completed within 120 days after the defendant has been served or within 90 days after a defendant has filed his appearance or "Answer".
- May mimic the deadlines set forth in the Report of Rule 26(f) Scheduling Conference, or it may alter deadlines.
- Very important that all deadlines be met

Once Initial Disclosures are filed, additional discovery may be commenced, customarily beginning with written discovery.

6. Written Discovery

Main types of written discovery:

- ❖ Interrogatories
- ❖ Requests for Production
- ❖ Requests for Admission
- ❖ Subpoenas Duces Tecum

Interrogatories: written questions to the opposing party, designed to elicit the basic facts of the case.

- Federal Court: interrogatories limited to 25 questions; refer to Rule 33
- Additional Interrogatories may be authorized by leave of Court under Rule 26(b) (2); requires filing of a Motion to Expand Discovery.
- Interrogatories must be answered in writing under oath within thirty (30) days. May request additional time from the serving party; verify extensions in writing, either with a confirmation letter or an e-mail.
- Interrogatories may be objected to; all objections are waived if not asserted within thirty (30) days. Generally, stipulations for extensions will not extend the time in which to object to discovery.
- Check your rules to verify who signs the answers and the objections. An example of a standard set of Interrogatories is included in your handout. It is best to start with a basic form and then customize it to fit your case.

Tips for formulating case-specific discovery requests:

- compare initial pleadings to determine what facts are stipulated and what facts will be disputed;
- review probably jury instructions
- Caution: should be facts be elicited through deposition instead of interrogatories?

Common objections to Interrogatories:

- vague and overly burdensome;
- probe into work product doctrine or information covered by the attorney/client privilege.
- Note: if documents are withheld due to privilege, include the document and the reason for withholding it on the Privilege Log.

Requests for Production of Documents: written requests that the opposing party produce copies of documents.

- Covered by Rule 34
- No limit
- Should be specific to avoid the "vague and overly burdensome" objections.
- Forget the 'fishing expedition'

Requests for Admissions: generally used to stipulate to the genuineness of a document or to set forth facts not in dispute.

- Governed by Rule 36.
- Failure to respond or object to a request within 30 days after it's served results in the matter being deemed admitted
- Each request should be separate; responses generally short and simple: admit, deny, or state in detail why you can't truthfully admit or deny.
- Objection to a Request for Admission must state reasonable grounds for objecting
- An admission under this rule is only good for the case in which it is issued.

Motion to Compel Discovery (Rule 37(a) used

  - when discovery has been served and opposing party fails to respond within the 30-day response period
  - for failure to comply with a court order
  - failure to supplement responses, agree to an inspection, or participate in discovery plan.
  - A hearing is generally required.
  - Expenses may also be awarded

Inspections. Covered by Rule 34 and refers to either inspections of land or products, or inspection of a person's mental or physical conditions. Be sure to consider:

- Will the experts be present?
- Will the inspection include measurements, surveying, testing, sampling or photography?
- If it is a products case and you need an inspection, will the inspection destroy evidence?
- Nonparties may be compelled to submit to an inspection through the use of a subpoena as provided in Federal Rule of Civil Procedure 45 [Rule 34(c)]
- Must state a reasonable time, place and manner for inspection
- The responding party must either respond or object to a Request for Inspection, in writing, within thirty days of service of the request.
- Rule 35 allows for the physical and mental examination of a party.
    - Is the physical or mental state of a party is at issue in the lawsuit?
    - Is there good cause for the request?
    - If medical causation or damages are issues, that will be enough to support an independent medical examination (IME) or defense medical examination (DME).
    - The person subjected to the mental or physical examination is entitled to a copy of the report, upon request.

Subpoenas. Often issued to non-parties; covered by Rule 45.

- Subpoena Duces Tecum is generally used to gather documentation and can be used in conjunction with a deposition or by itself;
    - Should be directed to a specific person, designating what is requested of that person, including the production of any documents.

- Note: some jurisdictions issue subpoenas through Court Reporters and others are issued by the Court. Be sure to check your local rules so you know
    - who issues the subpoenas,
    - What the witness fee is, if any,
    - Specific time periods that must be complied with.
    - Is a Notice of Intent to Serve Subpoena necessary prior to Subpoena?
    - Is there a waiting period before service of the Subpoena?

Subpoena for appearance to appear to give testimony at deposition, hearing or trial.

- Does it need to be served in person or can you serve it by certified mail?

- Is there a witness fee?
- Is there a limit to the subpoena power of the court? Example: mileage restriction
- Is mileage included in your local rules?
- If documents are requested, how does your jurisdiction handle copying expenses?

Is the subpoena is for documents only?

- Indicate that production of the documents will alleviate the necessity of an appearance.

Objections to subpoenas must be served

- before the earlier of the time specified for compliance or 14 days after the subpoena is served
- serving party may move the issuing court for an order compelling production or inspection.

Motion to Quash or Modify Subpoena.

- Filed if a party objects to a Subpoena
- Proper if the subpoena fails to allow a reasonable time to comply, or
    - requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person (with the exception that a person can be commanded to attend a trial by traveling from any such place within the state where the trial is held);
    - requires disclosure of privileged or other protected matter, if no exception or waiver applies;
    - or subjects a person to undue burden.
- Additional reasons to file a Motion to Quash:
    - attempts to obtain a trade secret or other confidential information;
    - attempts to obtain an unretained expert's opinion; or
    - attempts to require a witness to incur substantial expense to travel more than 100 miles to attend trial.

Responding to a subpoena to produce:

- must be produced as they are kept in the ordinary course of business or
- must be organized and labeled to correspond to the categories in the demand.
- persons withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must make the claim of privilege and describe the nature of the documents.
- if information produced in response to a subpoena is subject to a claim of privilege or protection as trial-preparation material, the person making the claim may notify the party that received the information of the claim and the basis for it.

- After notification, a party must promptly return, sequester, or destroy the specified information and any copies and cannot use or disclose the information until the claim is resolved.

Failure to respond to a subpoena can subject a person to a Contempt of Court charge.

7. Depositions

Depositions: to elicit basic facts for discovery purposes and to preserve testimony for trial. Most common are:

- fact witness depositions,
- expert depositions,
- corporate depositions, and
- depositions on written questions.

Rule 27 allows a deposition to be taken to perpetuate testimony. This can only be done by permission of the court; used when a witness may be able to give material testimony but may be unable to attend a trial or hearing. The petition must show five things.

1. Petitioner must expect to be a party in a case but not presently be able to bring the suit.
2. Must show the subject matter of the expected action and what interest the petitioner has in the action.
3. The facts the petitioner believes will be established in the deposition and the reason it is important to perpetuate it.
4. The names or a description of the persons expected to be adverse in the filed case, and
5. Name, address and expected substance of the testimony of the deponent.

Oral Depositions: Rule 30 covers oral depositions, with or without leave of court. There are restrictions in federal court:

- No more than ten depositions are allowed by each side and each deposition is limited to one day of seven hours.
- Check local rules to determine if any additional restrictions are in place. If you are in state or circuit court, check jurisdictional rules regarding the taking of depositions.
- Give appropriate notice of the deposition; some jurisdictions require three days notice, while others require fourteen days notice.

The Paralegal's role in deposition:

- Will probably schedule the deposition; requires a number of phone calls, coordination of multiple schedules and planning.
    - Allow time for attorney to prepare for the deposition; amount may differ for the client as opposed to the witness;
    - Set a reminder to pull the file and organize it for the attorney a few days prior to the deposition.
    - Send a confirmation letter to the client, and/or a Notice of Deposition.
        - Should state the name of the deponent, the time and place of the deposition, method of recording the deposition (i.e., transcription or videotaping), and any documents to be brought to the deposition.
        - Send a copy of the Notice of Deposition to all adverse counsel, the witness, and the court reporter.
        - Note: expert depositions are similar but may require additional preparation, depending on how much of the expert's file is discoverable under the local rules.

CAUTION: Significant changes to the federal rule regarding experts take effect in December 2010:

- 3 significant changes to Rule 26;

1. Draft expert reports and communications between attorneys and their experts will be deemed work product.

2. Still exempts a party intending to offer testimony from a non-testifying expert from producing a report but that party must submit a disclosure with the subject matter on which the witness is expected to present evidence and a summary of the facts and opinions to which the witness is expected to testify.

3. Will require the expert report to identify facts that the expert considered in forming the opinions. The expert's qualifications must include a list of all publications going back ten years, the compensation being paid and a list of all cases where the expert testified at trial or deposition going back four years.

Corporate depositions: more complicated; covered by Rule 30(b) (6).

- Notice of Deposition should name the corporation or other entity you wish to gain information of, but must state with "reasonable particularity" the matters for which the deponent will be requested to provide information.
- Notice of Deposition must advise the corporation of their responsibility to make a designation for the deposition.
- Docket for sufficient time to check back with the corporation or its attorney to find out who they wish to designate. The persons designated must testify about information known or reasonably available to the organization.

Deposition by Written Questions. Covered by Rule 31; allows you to serve written questions on a non-party in lieu of an actual deposition. A Notice of Deposition Upon Written Questions

- must be served on every other party with notice of the questions to be asked of the non-party, as well as the name and address of the non-party to be deposed;
- within 30 days of the notice and written questions are served, other parties may serve cross-questions on all other parties;
- within 10 days after being served with the cross-questions, a party may serve redirect questions upon all other parties;
- within 10 days of those questions, a party may serve re-cross questions on other parties.
- time periods can be increased by Court order;
- after all questions have been submitted, the party requesting the Deposition by Written Questions should serve the Deposition by Written Questions on the party to be questioned. A Court Reporter can be used to present the questions to the deponent on the date of the deposition and attest that the answers are properly sworn.
    - the parties do not need to be present at this type of Deposition.
    - useful to establish authenticity of medical, employment or business records; be sure to depose the custodian of records.

Limitations on where depositions can be taken, and how far a witness can be compelled to travel.

Spoliation of Evidence.

- Parties have a duty to preserve evidence and if they fail to do so, sanctions can be assessed.
- Send a protection letter as soon as you get the case; especially important in products liability cases.
- Try to preserve the evidence yourself by gaining access to the product through an inspection with your expert and opposing counsel's expert.

- Different courts handle spoliation issues in a variety of ways. The most common is to treat it as an abuse of the discovery process and issue sanctions pursuant to Rule 37

Freedom of Information Act Request (FOIA). The Freedom of Information Act (FOIA) is a federal act that allows the public access to all records of federal agencies under the control of the executive branch, unless the records fall under an exemption to the Act.

- There are 9 exemptions; if the requested information falls within one of those exemptions, the agency will weigh the risk of "foreseeable harm" against the disclosure and determine whether or not to claim the exemption.
- Additional information: http://www.rcfp.org/fogg/.

8. Experts

Experts – how to deal with them

- Be sure you have all the experts you need and
- You've docketed your expert deadlines.
- Send the expert a retention letter; include
    - what you are hiring the expert to do,
    - what the expert's fees are and
    - a detailed listing of the materials you are asking the expert to review.
- Order the Curriculum Vitae or resume' of your expert to be the expert will meet any Daubert challenges.
- Two types of experts
    - consulting experts are retained to give an opinion in anticipation of litigation, but are not expected to testify.
    - testifying experts must be experts must be disclosed.
        - In federal court, disclose not only the identity of the expert and the report, but also the expert's qualifications, experience testifying, list of publications, fees and opinions, any materials the expert has reviewed or relied upon in forming his or her opinions.

9. Electronic Discovery

Electronic Discovery refers to any process in which electronic data is sought, located, secured, and searched with the intent of using it as evidence in a civil or criminal legal case.

- Electronically stored information commonly referred to as ESI.
- Early case assessment is more important than ever
    - Data collection
    - Key custodians
    - Contact Information
    - Procedural Guidelines
    - Chain of Custody expectations
    - Data stored by third parties.

    .
- Data of all types can serve as evidence…including email (and its attachments), text, images, calendar files, databases, spreadsheets, audio files, animation, web sites and computer programs.
- Federal Rules that in e-discovery:
    - **Rule 26**. At Rule 26(b)(2) Specific Limitations on Electronically Stored Information says that a party doesn't have to provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost.
    - **Rule 34(b)(2)** covers the production of electronically stored information in that a party must produce documents as they are kept in the usual course of business or organize and label them to correspond to the categories in the request. See *Easley, McCaleb & Assocs., Inc. v Perry*, No. E-2663 (Ga. Super. Ct. July 13, 1994); *Santiago v Mils*, 121 F.R.D., 636, 640 (W.D.N.Y. 1988); *Gates Rubber Co., v Bando Chemical Indus., Ltd., 1*67 F.R.D. 90, 112 (D. Colo. 1996); *Northwest Airlines, Inc. v Teamsters Local 2000 et al*, 163 L.R.R.M. (BNA) 2460, (USDC Minn. 1999).
- ESI requires that lawyers and paralegals have more technical expertise than in the past…and they have to develop an adequate understanding of the client's data system. See *Qualcomm v Broadcom*, 2008 U.S. Dist. LEXIS 911 (S.D. Cal. Jan. 7 2008
- Native File Formats which are identified by the three character extension (i.e. .doc, .docx, .pst); examples of vendors = fiosinc.com, and lexbe.com.
- If claiming the privilege, you are required to disclose that the information exists but is not being turned over due to some privilege; prepare a privilege log
- Sample statement that some attorneys use in their discovery responses:

    "To the extent [client], pursuant to any request by [opposing party], produces a document which any party may later claim is privileged or which any party characterizes as privileged, it is understood that such production does not constitute a waiver of the attorney-client privilege or the attorney work product doctrine. If any discovery material turned over contains privileged information or attorney work-product,

demand is hereby made that it shall be immediately returned if the document appears on its face to have been inadvertently produced."

- Email must be produced with attachments; attachments must be in a reasonably usable form, meaning searchable data can't be produced in an unsearchable format.
- Courts have held that documents must be produced with metadata intact.
- Spoliation of evidence: consider sending a notice not to destroy, conceal or alter any paper or electronic files.

10. Abstracting and Indexing Documents

Begin abstracting and indexing documents as early as possible.

- Know the Supreme Court Rule in your jurisdiction regarding the numbering of exhibits and begin this process with the first deposition.
- When dealing with voluminous documents:
    - Separate the materials into stacks
    - Consolidate similar areas, such as "Research" and "Attorney Notes"; make one file and include both on the label.
    - Put all the pleadings and court papers together and in chronological order.
    - All deposition transcripts should be stored in the same place
    - If you are utilizing your computer system, rearrange subfiles so they are grouped under general headings matching the physical file.
    - In extremely large files, you may also need to index materials within the individual subfiles.

Using Technology in Discovery and Document Control

- Use what is already available to you: telephone, fax, computers, copiers, file servers, scanners, laptops and PDAs.
- Use of technology in document control is crucial in maintaining deadlines and statutes of limitations.
- The Internet is also a good resource; there are numerous websites you can use to find the information you will use every day as a Paralegal.
- Utilize list serves (those your firm subscribes to or those offered by local and national professional associations
- Whether or not you index all depositions and discovery will depend on the case, the status of the litigation, and the complexity of the case.
- Remember: summarizing means the end work product must be summarized; do not reiterate everything in the document being summarized.

The Conclusion

The Discovery Toolbox

DISCOVERY TOOLBOX INDEX

DISCOVERY DEADLINE CHEAT SHEET

DISCOVERY DEADLINE CHEAT SHEET

Discovery	Federal Deadline
Meet and Confer Conference - Rule 26(f) Meeting	Date for Scheduling Order PLUS 21 days
Report of Rule 26(f) Planning Conference - Joint Report	Meet and Confer Conference PLUS 14 days
Initial Disclosures - Each party files separately - File a Notice of Filing with the Court	Report of Rule 26(f) Planning PLUS 14 days
Scheduling Order - Rule 16(b) - Issued by Court after Rule 26(f) Scheduling Conference filed or by deadlines → - May use same deadlines or Court may amend Deadlines from Rule 26(f) Report	Typically 120 days after the defendant is served OR 90 days after defense files an Appearance

Initial Written Discovery

- Rule 33 Interrogatories
  - Limit 25 unless you file a Motion to Expand Discovery under Rule 26(b)(2) or a Stipulation to Expand Discovery under Rule 29
  - Must be answered in 30 days
- Rule 34 Requests for Production
  - No Limit
  - Must be answered in 30 days
- Rule 36 Requests for Admissions
  - No Limit
  - Deemed admitted if not answered in 30 days
- Rule 45 Subpoena Duces Tecum
  - Check local rules re: the following
    - Service methods
    - Witness fees
    - Waiting periods
    - Time period to respond or object
    - Travel restrictions
    - Expenses
      - Mileage
      - Copies
      - Travel expenses
      - Wage reimbursement allowed?

        - Foreign Service
            - 28 U.S.C.A. § 1783
            - Object within 14 days after Subpoena served or time period specified for compliance

Depositions

- Rule 30
    - Limits – 10 per party under Rule 30(a)(2)(A)
    - Limits – 7 hours per deposition under Rule 30(d)(2)

Notice depends on jurisdiction – some 3 days and others are 14 days notice

- Rule 30(b)(6)
    - Corporate Deposition
        - Opposing party designates deponent
        - Remember to give list of questions and List of documents and items to be reviewed
- Rule 31
    - Depositions by Written Questions
        - 30 days for written cross-questions; then
        - 10 days for re-cross questions
        - Answered in front of a notary/court reporter

DISCOVERY MOTIONS HANDOUT

DISCOVERY MOTIONS

Motions	Applicable Federal Rule
Motion to Compel Discovery	Rule 37(a)
- Expenses	Rule 37(a)(5)
o Attorney Fees	
o Sanctions	
Motion for Protective Order	Rule 26(c)
- Expenses	
- Attorney Fees	
Motion to Compel Inspection	Rule 34
- Objections	Rule 34(b)
o Response in Writing	
o Within 30 days	
Motion for Physical/Mental Examinations	Rule 35
- Physical/Mental State at issue	
- Good Cause	
o Medical Causation Issue	
o Damages Issue	
- Copy of Report to person under Examination authorized	Rule 35(b)(1)
Motion to Quash/Modify Subpoena	Rule 45(c)(3)
- Travel limited to w/in 100 miles of Deponent's residence, employment or where deponent regularly transacts business	
- Appropriate if subpoena attempts to obtain Confidential Information or a trade secret	
Motion for Relief Due to Spoliation	Rule 37
- Issue Protection Letters EARLY IN LITIGATION	
Motion for Appointment of Interpreter	Federal Rule of Evidence 604
- Use only Certified Interpreters	IF DEPONENT DOES NOT SPEAK ENGLISH

SAMPLE INITIAL DISCOVERY PLAN

INITIAL DISCOVERY PLAN CHECKLIST

Initial Discovery Plan Meeting Date: _____

Follow Up Meeting Scheduled? _____

DISCOVERY:
__ Discovery plan developed
__ Interrogatories sent ___ Answered by Opposition
__ Form Interrogatories sent ___ Answered by Opp.
__ Request for production of documents __ Answered by Opp.
__ Request for examination of plaintiff __ Answered by Opp.
__ Request to examine land or items __ Answered by Opp.
__ Requests for Admissions __ Answered by Opp.

__ Objections?

__ Depositions set:
__ Plaintiff
__ Defendant
__ Other_____
_____
_____
__ Other discovery _____
__ Motions to compel deadline checked _____
__ Motion filed
__ Motion served

RESPONSE TO OPPOSITION DISCOVERY

__ Interrogatories Answered and Verified
__ Form Interrogatories Answered and Verified
__ Request for Production of Documents Answered and Verified
__ Request for Admissions Answered and Verified
__ Deposition dates calendared:
__ Plaintiff
__ Defendant
__ Other
__ Other discovery answered

SAMPLE INITIAL DISCLOSURES

Example of Initial Disclosures

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JEFFREY L. WILHITE,	)	CIVIL NO. 8:10-CV-306
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
UNION PACIFIC RAILROAD COMPANY, A Corporation,	)	**JEFFREY L. WILHITE'S INITIAL DISCLOSURES**
	)	
Defendant.	)	

COMES NOW Plaintiff, Jeffrey L. Wilhite, and pursuant to Fed. R. Civ. P. 26(a)(1) provides the following initial disclosures:

A. The name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information.

Plaintiff and Spouse:

Jeffrey L. Wilhite
124 DeLonge Avenue
Council Bluffs, IA 51503

Lauri Wilhite
124 DeLonge Avenue
Council Bluffs, IA 51503

Plaintiff's Attorneys:

Inserra & Kelley
6790 Grover Street, Suite 200
Omaha, NE 68106

Representatives of Defendant:

Jim Greelis
Union Pacific Railroad
1400 Douglas Street
Omaha, NE 68179

Shawn Ossenfort
Union Pacific Railroad
1400 Douglas Street
Omaha, NE 68179

There may be other representatives of Union Pacific Railroad that will be called if discovered during the pendency of the lawsuit.

Defendant's Attorneys:

David J. Schmitt
Lamson, Dugan & Murray
10306 Regency Parkway Drive
Omaha, NE 68114

Potential Witnesses:

Anne Brummett
Union Pacific Railroad
1400 Douglas Street
Omaha, NE 68179

Shirley Sinnott
Union Pacific Railroad
1400 Douglas Street
Omaha, NE 68179

Jeanette McKowski
Union Pacific Railroad
1400 Douglas Street
Omaha, NE 68179

Vicki Dotson
Union Pacific Railroad
1400 Douglas Street
Omaha, NE 68179

Keith Waeda
Union Pacific Railroad
1400 Douglas Street
Omaha, NE 68179

"Brett" (Manager
Union Pacific Railroad
1400 Douglas Street
Omaha, NE 68179

John Kerns (phonetic)
Union Pacific Railroad
1400 Douglas Street
Omaha, NE 68179

"Steve"
Union Pacific Railroad
1400 Douglas Street
Omaha, NE 68179

Medical Providers:

Christopher Anderson, M.D.
Alegent Health Rehab Center
17021 Lakeside Hills Plaza, Ste. 200
Omaha, NE 68130

Jason Arthur, M.D.
White River Imaging, LLC

Robert Baron
CPAP Supplies

d/b/a Omaha Imaging
501 North 87th Street, Suite 100
Omaha, NE 68114

10481 164th Place
Orland Park, IL 60467

Richard Belatti, M.D.
Pain Management Specialist
Medical Pain Center
7837 Chicago Plaza
Omaha, NE 68114

Stephanie Cuttle, P.A.
UPREHS Clinic Omaha
1416 Dodge Street, Suite 100
Omaha, NE 68179

Rodney Czaplewski, M.D.
Total Healthcare Associates
14610 West Center Road
Omaha, NE 68144

Deborah Doud, M.D.
Physicians Clinic
Cogley-Main Clinic
One Edmundson Place
Council Bluffs, IA 51503

Don Evans, M.D.
Institute of Diagnostic Imaging
11819 Miracle Hills Drive, Suite 101
Omaha, NE 68154

Barry Fanders, M.D.
Alegent Health – Bergan Mercy
Medical Center
7500 Mercy Road
Omaha, NE 68124

Robert Faulk, M.D.
Medical Imaging Consultants, P.C.
7950 Harrison Street
Omaha, NE 68128

Robert Forbes, M.D.
Diagnostic Radiology
501 North 87th Street, Suite 100
Omaha, NE 68114

Kurt Gold, M.D.
Pain Management
Physical Medicine & Rehabilitation
7919 Wakeley Plaza
Omaha, NE 68114

Leslie Hellbusch, M.D.
Midwest NeuroSurgery &
Spine Specialists
8005 Farnam Drive, Suite 305
Omaha, NE 68114

Andrea Herman, M.D.
Alegent Health L Street Clinic
5014 “L” Street
Omaha, NE 68117-1329

Gregory Jackson, M.D.
Alegent Health Bergan Mercy
Medical Center
7500 Mercy Road
Omaha, NE 68124

Ric Jensen, M.D.
Neurological Surgery, Inc.
4242 Farnam Street, Suite 363
Omaha, NE 68131

David Kirschner, P.A.

Steven Koukol, M.D.

Total Healthcare Associates
14610 West Center Road
Omaha, NE 68144

Alan Kricsfeld, M.D.
Jennie Edmundson Hospital
933 East Pierce
Council Bluffs, IA 51503

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Omaha, NE 68114

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Nebraska Spine Center, LLP
13616 California Street, Suite 100
Omaha, NE 68154

Burt J. McKeag, M.D.
UNMC
989100 Nebraska Medical Center
Omaha, NE 68198-9100

Linda Naylor, RN, CCM
IntraCorp
17518 Pine Street
Omaha, NE 68130
(Nurse Case Manager hired by UP)

Dr. Samuel Phillips
Gross, Iwersen, Kratochvil
& Klein
7710 Mercy Road, Suite 224
Omaha, NE 68124

Dr. Angie Rakes
UNMC
989100 Nebraska Medical Center
Omaha, NE 68198-9101

Charles Rush, M.D.
Total Healthcare Associates

The Urology Center
111 South 90th Street
Omaha, NE 68114

S. Prizada Sattar, M.D.
Jennie Edmundson Hospital
933 East Pierce
Council Bluffs, IA 51503

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The Urology Center
112 South 90th Street
Omaha, NE 68115

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13616 California Street, Suite 100
Omaha, NE 68154

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Neurology
One Edmundson Place
Council Bluffs, IA 51503

Shannon Nealon, PT
Excel Physical Therapy
9449 “J” Street
Omaha, NE 68127

Dr. Evelyn Else Reher
Jennie Edmundson Hospital
201 Ridge, Suite 302
Council Bluffs, IA 51503

Charlotte Ricke
UPREHS Clinic Omaha
1416 Dodge Street, Suite 100
Omaha, NE 68179

Michael Salerno, PT
Flex Physical Therapy, LLC

2429 “M” Street
Omaha, NE 68107-2715

928 Valley View Drive, Suite 7
Council Bluffs, IA 51503

Christian Schlaepfer, M.D.
Midwest NeuroImaging
8005 Farnam Drive, Suite 202
Omaha, NE 68114

Michael Schuster, M.D.
Radiology Consultants, P.C.
P.O. Box 4460
Omaha, NE 68104

Rex Schmidt, Psy.D.
501 North 87th Street
Omaha, NE 68114-2881

Lynn Meece, R.N.
Nebraska Medical Center
Pain Management Clinic
989100 Nebraska Medical Center
Omaha, NE 68198

Adrienne Connor, PT
Nebraska Medical Center
Pain Management Clinic
989100 Nebraska Medical Center
Omaha, NE 68198

Methodist Health System
Behavioral Health Clinic
10060 Regency Circle
Omaha, NE 68114

Kimberly Spangler, M.D.
8141 West Center Road
Omaha, NE 68124

Jane Theobald, Ph.D.
Behavioral Health
8303 Dodge Street
Omaha, NE 68114

Scott Wilt, MD
Northwest Anesthesia, P.C.
P.O. Box 31668
Omaha, NE 68131

Alegent Health -
Bergan Mercy Medical Center
7100 Mercy Road
Omaha, NE 68124

Alegent Health –
Immanuel Medical Center
6901 North 72nd Street
Omaha, NE 68122

Hangar P & O East, Inc.
4239 Farnam Street, Suite 839
Omaha, NE 68102

Mercy Hospital
800 Mercy Drive
Council Bluffs, IA 51503

Midwest Pathology Specialists
800 Mercy Drive
Council Bluffs, IA 51503

Progressive Rehabilitation, Inc.
7919 Wakeley Plaza
Omaha, NE 68114

Quality Inn Therapies, Inc.
1941 South 42nd Street
Suite 400
Omaha, NE 68105

Walgreens

White River Imaging, LLC

535 East Broadway
Council Bluffs, IA 5103

d/b/a Omaha Imaging
501 North 87th Street, Suite 100
Omaha, NE 68114

Family Counseling:

Carl Spence
Spence Counseling Center
12035 Q Street
Omaha, NE 68137

Economic Report:

Jerome F. Sherman, Ph.D.
9947 Essex Drive
Omaha, NE 68114

Life Care Plan:

Shelly Kinney
Kinney Consulting, Inc.
6315 South 79th Circle
Ralston, NE 68127

Retirement Benefits:

Railroad Retirement Board
111 South 18th Plaza, Suite C125
P.O. Box 815
Omaha, NE 68101-0815

B. A copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that the disclosing party may use to support its claims or defenses, unless solely for impeachment.

> A complete copy of all medical records and bills, including the detailed demand package has been provided to the defendant via CD-Rom, along with a copy of the detailed narrative demand package. **Discovery is ongoing.**

C. A computation of any category of damages claimed by the disclosing party, making

available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered.

Plaintiff requests special damages and general damages as listed in their demand made upon defendant on or about July 28, 2010 and provided to the defendant via CD-Rom.

D. For inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

None as to Plaintiff.

JEFFREY L. WILHITE, Plaintiff,

s/John P. Inserra
Nebraska Bar #15084
INSERRA & KELLEY
6790 Grover Street, Suite 200
Omaha, Nebraska 68106-3612
Telephone: (402) 391-4000
Facsimile: (402) 391-4039
Attorneys for Plaintiff
jpinserra@inserra.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 21, 2010, the undersigned electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system, which sent notification of such filing upon all parties who filed an appearance or motion by electronic filing in this case.

David J. Schmitt, #19123
Lamson, Dugan & Murray, LLP
10306 Regency Parkway Drive
Omaha, NE 68114
dschmitt@ldmlaw.com
Attorneys for Defendant

s/John P. Inserra
Nebraska Bar #15084
INSERRA & KELLEY
6790 Grover Street, Suite 200
Omaha, Nebraska 68106-3612
Telephone: (402) 391-4000
Facsimile: (402) 391-4039
Attorneys for Plaintiff
jpinserra@inserra.com

SAMPLE INITIAL WRITTEN DISCOVERY REQUESTS (WC)

IN THE NEBRASKA WORKERS' COMPENSATION COURT

,	)	DOC. PAGE
SS #	)	
	)	
Plaintiff,	)	**PLAINTIFF'S REQUESTS FOR ADMISSIONS, INTERROGATORIES, AND FOR PRODUCTION OF DOCUMENTS**
	)	
vs.	)	
	)	
(employer)	)	
address	)	
City,State, ZIP	)	
and	)	
(W-Comp Carrier)	)	
address	)	
City, State, ZIP	)	
Defendants.	)	

TO: **DEFENDANTS** by and through their attorney of record, _____

Plaintiff hereby requests, pursuant to Nebraska Discovery Rules 33, 34, and 36, that the Defendants answer, under oath, the following requests for admissions, interrogatories, and motions for production within thirty (30) days of service of this request as required by law.

It is understood that the answers will contain the composite knowledge of the Defendants and any of the Defendants' representatives or agents. These interrogatories shall be deemed continuing, and if additional information should be discovered after originally answering them with respect to any of the matters inquired about, then it is expected that such information will be promptly revealed to the Plaintiff or Plaintiff's attorneys as required by law.

DEFINITIONS

1. The term "person" as used in these Interrogatories means all individuals and entities, including any individual, firm, corporation, partnership, association, company, receiver, joint venture, estate, trust, or other form of entity, including the parties to this litigation and their officers, agents, employees and representatives.

2. The term "document" as used in these interrogatories means any written, printed, typed, recorded, or graphic matter of every type and description, however and by whomever

prepared, produced, reproduced, disseminated, or made, in your actual or constructive possession, custody, or control, including, but not limited to, all writings, letters, minutes, bulletins, correspondence, telegrams, memoranda, notes, instructions, literature, work assignments, notebooks, records, sales forms, agreements, contracts, notations of telephone or personal conversations or conferences, interoffice communications, microfilm, circulars, pamphlets, advertisements, catalogs, studies, notices, summaries, reports, books, invoices, graphs, photographs, drafts, data sheets, data compilations, computer data sheets, computer data compilations, work sheets, statistics, speeches and other writings, tape recordings, transcripts of tape recordings, phonograph records, data compilations from information which can be obtained or can be translated through detection into reasonably usable form, charts, minutes, checks, check stubs, delivery tickets, bills of lading, invoices, flow sheets, price lists, quotations, bulletins, permits, forms, data processing cards, data sheets, surveys, indexes, tapes, videotapes, film, periodicals, circulars, manuals, or any other tangible thing.

Additionally, the term “document” includes any and all information retained through computer references, and any and all other sources, including, but not limited to any database maintained by defendant or any of its subsidiaries. This includes all documents and data existing in electronic form (in the broadest sense consistent with Fed. R. Civ. P. 34(a) or its state law equivalent, Nebraska Rules of Discovery 33 and 34), including e-mail, electronic peer-to-peer messages, word processing documents, spreadsheets, electronic slide presentations, databases, and other electronic data items, now existing or hereafter created, containing information that can reasonably be anticipated to be relevant to facts at issue in the litigation (“discoverable electronic information”).

3. The term "identify" as used in these Interrogatories means to set forth:

(a) When used with referenced to a person, firm, or corporation;

(i) the full name;
(ii) the present or last known business address and if an individual;
(iii) the present or last known home address; and
(iv) the position and title, if any, and a description of his or her duties and responsibilities in connection with that position.

(b) When used with reference to a document:

(i) the date on the document and the date the document was prepared;
(ii) the identity of person preparing the document and that person's name and address;
(iii) the identity of the person for whom the document was prepared;
(iv) the name and address of each person to whom it addressed;
(v) a description of the document;
(vi) the present location of the document; and
(vii) the contents and subject matter of the document.

4. As used in these requests, the terms "you", or "your", and "yours" refer to the individual defendant answering these Interrogatories and its officers, employees, agents, representatives, divisions, subdivisions, affiliated companies, parent companies, and any and all other persons acting or purporting to act on its behalf.

REQUEST FOR ADMISSIONS

1. REQUEST FOR ADMISSION Please admit the plaintiff had an accident arising out of and in the course of employment with the defendant on or about the date alleged in plaintiff's petition.

RESPONSE:

2. REQUEST FOR ADMISSION Please admit that the plaintiff gave notice to the defendant of the accident and injury alleged in plaintiff's petition.

RESPONSE:

3. REQUEST FOR ADMISSION Please admit that the accident on the date alleged in plaintiff's petition caused plaintiff to suffer the injury or injuries alleged in the petition.

RESPONSE:

4. REQUEST FOR ADMISSION Please admit that plaintiff's disability claimed in plaintiff's Petition is not the result of an intervening accident which occurred outside the scope and course of plaintiff's employment with the defendant.

RESPONSE:

5. **REQUEST FOR ADMISSION** Please admit that the plaintiff has not lost or relinquished the right to make the initial selection of physician.

RESPONSE:

6. **REQUEST FOR ADMISSION** Please admit that the plaintiff's claim is not barred by the Statute of Limitations.

RESPONSE:

INTERROGATORIES

1. **INTERROGATORY** Please specify the following information even if Request for Admission No. 2 is admitted:

a. Name and phone number of all eyewitnesses to the accident and injury alleged in plaintiff's petition;

b. Name and phone number of all co-workers at plaintiff's work site on or about the date of the accident and injury alleged in plaintiff's petition;

c. Name and phone number of plaintiff's immediate superior or supervisor on or about the date alleged in plaintiff's petition.

ANSWER:

2. **INTERROGATORY** Please provide the names and addresses of all witnesses the defendant expects to call at trial of this matter.

ANSWER:

3. **INTERROGATORY** Has the Defendant or its Nebraska workers' compensation insurer requested that the Plaintiff consult with or be examined by any physician?

ANSWER:

4. **INTERROGATORY** If the answer to the preceding Interrogatory is affirmative,

please state:

(a) The date of such examination or treatment;

(b) The nature of such examination or treatment;

(c) The name and address of the person or persons providing the treatment or conducting the examination.

ANSWER:

5. **INTERROGATORY** In the event you have denied any Request For Admission, please set forth the name and phone number of all persons who have knowledge or provided information relied upon for said denial and your basis for each denial.

ANSWER:

6. **INTERROGATORY** Please set forth the provider and the amount of each hospital, medical, and drug bill which you have received concerning the Plaintiff's accident since the date of the accident.

ANSWER:

7. **INTERROGATORY** Please itemize those expenses which have been paid and the date of payment.

ANSWER:

8. **INTERROGATORY** If the defendant is denying payment of certain medical bills in connection with the injuries claimed in the plaintiff's Petition, please list which bills defendant refuses to pay.

ANSWER:

9. **INTERROGATORY** Please state the hours the plaintiff has worked for the employer each week since the date of the accident or injury alleged in plaintiff's petition until the date of maximum medical improvement, if such medical status has been reached, and wage rate of each of those hours of employment. (If MMI has not been reached at this time, please provide said wage and hour information through and including date of these Requests for Discovery).

ANSWER:

10. **INTERROGATORY** Please set forth a true and correct listing of all amounts paid by any Defendant to the Plaintiff in temporary total, temporary partial, and permanent partial disability benefits and the dates or periods for which such payments were made.

ANSWER:

11. **INTERROGATORY** Please provide a list of exhibits the defendant intends to offer at trial of this matter.

ANSWER:

12. **INTERROGATORY** Do you maintain any electronic documents in any way referencing the accident or injury which is the subject of this litigation?

ANSWER:

REQUEST FOR PRODUCTION

1. **REQUEST FOR PRODUCTION** Please produce to the plaintiff for inspection all medical bills which the defendant refuses to pay.

RESPONSE:

2. **REQUEST FOR PRODUCTION** Please review the attached exhibit list for the Plaintiff and produce any documents relating to the following that is in your possession and **not** already on our list:

a. All medical information including records, reports, correspondence, and bills;

b. Application for employment and pre-employment tests and results;

c. All First Reports of Injury;

d. Choice of physician forms or records;

e. All nurse case manager or similar records, including correspondence between the nurse and employer or claims adjuster;

f. 26-week earnings record preceding the accident date in question;

g. Wage and hour information from date of accident to the present date;

h. Summary of benefits paid, both medical and indemnity;

i. Job Descriptions of all positions worked by the plaintiff for the defendant;

j. Transcribed recorded statement of my client;

k. Employee personnel file.

RESPONSE:

3. **REQUEST FOR PRODUCTION** Please produce any videotapes or other surveillance taken of plaintiff in the above-referenced matter.

RESPONSE:

4. **REQUEST FOR PRODUCTION** Any and all memoranda, notes, reports, or other documents concerning the investigation of plaintiff's injury, which was written or compiled by someone not then acting on your behalf.

RESPONSE:

5. **REQUEST FOR PRODUCTION** Any and all electronic mail ("e-mail")

containing discoverable electronic information.

RESPONSE:

6. **REQUEST FOR PRODUCTION** Any and all word processing files, computer presentations (e.g., PowerPoint slides), stand alone databases (e.g., Acess), spreadsheets (e.g., Excel) containing discoverable electronic information.

RESPONSE:

7. **REQUEST FOR PRODUCTION** Any and all electronically stored research and/or reference literature and materials containing discoverable electronic information.

RESPONSE:

8. **REQUEST FOR PRODUCTION** Any and all copies of defendant's electronic document and data retention policy designed to ensure the retention of defendant's discoverable electronic information.

RESPONSE:

DATED this _____ day of _____ 2005.

_____, Plaintiff

By: _____

Jeffrey F. Putnam, # 21527
INSERRA & KELLEY
6790 Grover St. -- Suite 200
Omaha, NE 68106-3612
(402) 391-4000/391-4039 - Fax

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document was sent by United States mail, postage prepaid, to the following on the ___ day of _____ 2005 to defendants, by and through their attorney of record, _____

_____

E-DISCOVERY STATE BY STATE LISTING

Electronic Discovery Law

Posted at 8:37 AM on October 10, 2008 by K&L Gates

Current Listing of States That Have Enacted E-Discovery Rules

More and more states are adopting statutes and court rules addressing the discovery of electronically stored information. Here is a current list with links to the relevant provisions.

Alabama
Amendments to Rules of Civil Procedure 16, 26, 33(c), 34, 37, 45 and Form 51A
Effective Feb. 1, 2010

Alaska
Amendments to the Rules of Civil Procedure 16, 26, 33, 34, 37, and 45
Effective April 15, 2009

Arizona
Amendments to Rules of Civil Procedure 16, 16.3, 26, 26.1, 26.2, 33, 34, 37 and 45
Effective January 1, 2008

Amendments to Arizona Rules of Family Law Procedure

Ariz. R. Family Law P. 49	Disclosure
Ariz. R. Family Law P. 51	Discovery
Ariz. R. Family Law P. 52	Subpoena
Ariz. R. Family Law P. 62	Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes
Ariz. R. Family Law P. 65	Failure to Make Disclosure or Discovery; Sanctions

Effective January 1, 2009

Ariz. R. Evid. 502
Effective January 1, 2010

Arkansas
Rules 26 General Provisions Governing Discovery (See section 26(b)(5))
Effective January 10, 2008

Arkansas Rule of Evidence 502. Lawyer Client Privilege
Effective January 10, 2008

Ark. R. Civ. P. 26.1 Electronic Discovery
Effective Oct. 1, 2009

California

California Code of Civil Procedure
Title 4. Civil Discovery Act
Chapter 1. General Provisions

Chapter 14. Inspection and Production of Documents, Tangible Things, Land, and Other Property
Article 1. Inspection Demand
Article 2. Response to Inspection Demand

Chapter 12. Discovery in Action Pending Outside California
Article 1. Interstate and International Depositions and Discovery Act

Title 3. Of the Production of Evidence
Chapter 1. Means of Production

Rule 3.724 Duty to meet and confer
As Amended, Effective Aug. 14, 2009

Connecticut
Connecticut Practice Book, Superior Court – Procedures in Civil Matters
Sec. 13-9. Requests for Production, Inspection and Examination; In General (*see* subsection (d), at p. 192 of 259-page .pdf document)
Effective January 1, 2006

Florida
1.201 Complex Litigation

Idaho
Idaho R. Civ. P. 33
Idaho R. Civ. P. 34
Effective July 1, 2006

Idaho R. Civ. P. 45
Effective July 1, 2009

Illinois
Illinois Supreme Court Rules 201(b)(1) and 214
Effective January 1, 1996

Indiana
Indiana Rules of Trial Procedure
Rule 26. General provisions governing discovery
Rule 34. Production of documents, electronically stored information, etc.
Rule 37. Failure to make or cooperate in discovery; Sanctions

Iowa
Amendments to Rules of Civil Procedure 1.503, 1.504, 1.507, 1.509, 1.512, 1.517, 1.602
Effective May 1, 2008

Iowa District Court Trial Scheduling Order
Rule 23.5 – Form 2: Trial Scheduling Order
Effective September 1, 2008

Iowa Rule of Evidence 5.502
Effective June 1, 2009

Amendments to Rules of Civil Procedure:
Iowa R. Civ. P. 1.1701 Subpoena
Form 13 Subpoena Form to Testify at Deposition or Produce Documents
Form 14 Subpoena Form to Testify at Hearing or Trial
Form 15 Subpoena From to Produce Documents or Permit Inspection
Effective Oct. 9, 2009

Kansas
Amendments to the Rules of Civil Procedure:
§ 60-216 Pretrial conferences; case management conference
§ 60-226 General Provisions Governing Discovery
§ 60-233 Interrogatories to Parties
§ 60-234 Production of Documents, Electronically Stored Information and Things and Entry Upon Land for Inspection and Other Purposes
§ 60-237 Failure to Allow Discovery; Sanctions
§ 60-245 Subpoenas
Effective July 1, 2008

Louisiana
CCP 1424 - Scope of discovery; trial preparation; materials
CCP 1460 - Option to produce business records
CCP 1461 - Production of documents and things; entry upon land; scope
CCP 1462 - Production of documents and things; entry upon land; procedure
Approved June 25, 2007

CCP 1354 - Subpoena deuces tecum
CCP 1471 - Failure to comply with order compelling discovery; sanctions
CCP 1551 - Pretrial and scheduling conference; order
Effective January 1, 2009

Maine
Amendments to Rules of Civil Procedure 16, 26, 33, 34, 37
Corrections to amendments to rules 34 and 37
Effective August 1, 2008

Maryland
Amendments to Rules 2-402, 2-421, 2-422, 2-424, 2-433, 2-504, 2-504.1, and 2-510
Effective January 1, 2008

Michigan
2.302 General Rules Governing Discovery
2.310 Requests for Production of Documents and Other Things; Entry on Land for Inspection and Other Purposes
2.313 Failure to Provide or Permit Discovery; Sanctions
2.401 Pretrial Procedures; Conferences Scheduling Orders
2.506 Subpoena; Order to Attend
Effective January 1, 2009

Minnesota

Minnesota Rules of Civil Procedure
Rule 16. Pretrial Conference; Scheduling; Management
Rule 26. General Provisions Governing Discovery
Rule 33. Interrogatories to Parties
Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes
Rule 37. Failure to Make Discovery or Cooperate in Discovery: Sanctions
Rule 45. Subpoena

Mississippi
Miss. R. Civ. P. 26(b)(5)
Effective May 29, 2003

Missouri
Rules of the Court of the Twenty-fifth Judicial Circuit (Maries, Phelps, Pulaski and Texas Counties)
Rule 32.3 Electronic Discovery

Montana
Mont. R. Civ. P. 16(b). Scheduling and planning
Mont. R. Civ. P. 26(b). Discovery scope and limits
Mont. R. Civ. P. 26(f). Discovery conference
Mont. R. Civ. P. 33(c). Option to produce business records
Mont. R. Civ. P. 34(a). Scope
Mont. R. Civ. P. 34(b). Procedure
Mont. R. Civ. P. 37(e). Electronically stored information
Mont. R. Civ. P. 45(a). Form – issuance
Mont. R. Civ. P. 45(c). Protection of persons subject to or affected by subpoenas
Mont. R. Civ. P. 45(d). Duties in responding to subpoena
Effective February 28, 2007

Nebraska
Neb. Ct. R. of Discovery § 6-333 Interrogatories to parties
Neb. Ct. R. of Discovery § 6-334 Production of documents, electronically stored information, and things and entry upon land for inspection and other purposes
Neb. Ct. R. of Discovery § 6-334A Discovery from a non-party without a deposition
Effective July 18, 2008

New Hampshire
Superior Court Rule 62. (I) Initial Structuring Conference (*see* subsection (C)(4))
Effective March 1, 2007

New Jersey
Part IV – Rules Governing Civil Practice in the Superior Court, Tax Court and Surrogate's Courts
Rule 1:9. Subpoenas
Rule 4:5B. Case Management; Conferences
Rule 4:10. Pretrial Discovery
Rule 4:17. Interrogatories to Parties
Rule 4:18. Discovery and Inspection of Documents and Property; Copies of Documents
Rule 4:23. Failure to Make Discovery; Sanctions
Effective September 1, 2006

Part VII – Rules Governing Practice in Municipal Courts
Rule 7:7 Pretrial Procedures

New Mexico
Rule 1-016 Pretrial conferences; scheduling; management.
Rule 1-026 General provisions governing discovery.
Rule 1-033 Interrogatories to parties.
Rule 1-034 Production of documents and things and entry upon land for inspection and other purposes.
Effective May 15, 2009

Rule 1.045 Subpoena.
Rule 1.045.1 Interstate subpoenas.
Effective August 7, 2009

New York
Uniform Civil Rules of the Supreme and County Courts, § 202.70 Commercial Division of the Supreme Court
See Rule 1. Appearance by Counsel with Knowledge and Authority.
Effective July 27, 2010
See Rule 8. Consultation prior to Preliminary and Compliance Conferences.
Effective January 17, 2006

Uniform Civil Rules for the Supreme Court and the County Court
Amendment to Section 202.12 Preliminary conference (subsection (c))

Nassau County Supreme Court, Commercial Division Rules
- Guidelines for Discovery of Electronically Stored Information ("ESI")
- Form: Preliminary Conference Stipulation and Order

Onondaga County Supreme Court, Commercial Division Rules
- Form 2: Preliminary Conference Stipulation and Order, Hon. Deborah Karalunas

Queens County Supreme Court, Commercial Division Rules
- See Conferences Rule 5. Consultation among counsel prior conferences

Suffolk County Supreme Court, Commercial Division Rules
- Form: Preliminary Conference Stipulation and Order, Hon. Elizabeth H. Emerson

Westchester County Supreme Court, Commercial Division Rules
- Form 1: Preliminary Conference Order – Commercial Case, Hon. Alan Scheinkman

North Carolina
Local Rules of North Carolina Business Court
See Rule 17.1 – Case Management Meeting
See Rule 18.6 – Conference of Attorneys with Respect to Motions and Objections Relating to Discovery
Effective July 31, 2006

Rules for Superior Court Judicial District 15B
- Rule 6. Discovery

Effective July 1, 2008

North Dakota
North Dakota Supreme Court Rules N.D.R. Civ. P. 16, 26, 33, 34, 37, 45 and Form 20
Effective March 1, 2008

Oklahoma
Rule 5. Pretrial Proceedings
Effective February 9, 2010

Chapter 39. Oklahoma Pleading Code
Section 2004.1 – Subpoena

Chapter 41. Discovery Code.
Section 3226 – General Provisions Governing Discovery
Section 3233 – Interrogatories to Parties
Section 3234 – Production of Documents and Things and Entry upon Land for Inspection and Other Purposes
Section 3237 – Failure to Make or Cooperation in Discovery – Sanctions
Effective November 1, 2010

Ohio
Amendments to Rules of Civil Procedure 16, 26, 33, 34, 37, and 45
Effective July 1, 2008

Tennessee
Rule 16 Scheduling and Planning, Pretrial, and Final Pretrial Conferences and Orders
Rule 26 General Provisions Governing Discovery
Rule 33 Interrogatories to Parties
Rule 34 Production of Documents and Things and Entry Upon Land for Inspection and Other Rule Purposes
Rule 37 Failure to Make or Cooperate in Discovery: Sanctions
Rule 45 Subpoena
Effective July 1, 2009

Rule 502 Limitations on Waiver of Privileged Information or Work Product
Effective July 1, 2010

Texas
Tex. R. Civ. P. 196.4 Electronic or Magnetic Data
Effective January 1, 1999

Utah
Utah R. Civ. P. 33. Interrogatories to parties
Utah R. Civ. P. 34. Production of documents and things and entry upon land for inspection and other purposes
Utah R. Civ. P. 37. Failure to make or cooperate in discovery; sanctions
Effective November 1, 2007

Utah R. Civ. P. 26 General Provisions Governing Discovery
Effective November 2008

Utah R. Civ. P. 45 Subpoena
Effective April 1, 2009

Vermont
Amendments to Rules of Civil Procedure:
Vt. R. Civ. P. 16.2 Scheduling Orders
Vt. R. Civ. P. 26 General Provisions Governing Discovery
Vt. R. Civ. P. 33 Interrogatories to Parties

Vt. R. Civ. P. 34 Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes
Vt. R. Civ. P. 37 Failure to Make Discovery: Sanctions
Vt. R. Civ. P. 45 Subpoena
Effective July 6, 2009

Virginia
Amendments to the Rules of Civil Procedure 4:4, 4:8, 4:9, 4:9A, and 4:13
Effective January 1, 2009

Rule 4:1 General Provisions Governing Discovery
Effective May 3, 2010

Washington
ER 502 Attorney-Client Privilege and Work Product; Limitations on Waiver
Effective September 1, 2010

Wyoming
Wyo. R. Civ. P. 16 Pretrial Conferences; Scheduling; Management
Wyo. R. Civ. P. 26 General Rules Governing Discovery, Duty of Disclosure
Effective July 1, 2010

Wyo. R. Civ. P. 45 Subpoena
Effective Oct. 1, 2009

Wyo. R. Civ. P. 33 Interrogatories to Parties
Wyo. R. Civ. P. 34 Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes
Wyo. R. Civ. P. 37 Failure to Make Disclosures or Cooperate in Discovery; Sanctions
Effective July 1, 2008

We will post additional state e-discovery rules as they are enacted.

Trackbacks (6)

Electronic Discovery Law - *June 19, 2008 2:10 PM*
Nebraska On June 4, 2008, the Nebraska Supreme Court adopted amendments to Neb. Ct. R. of Discovery, 33, 34, and 34A that address the discovery of electronically stored information. The amended rules are available here, and went into effect June...

Electronic Discovery Law - *October 10, 2008 9:00 AM*
The Supreme Court of Ohio has adopted several amendments to the Ohio Rules of Civil Procedure, including several related to electronic discovery. The amendments, which took effect on July 1, 2008, include changes to Rules 16, 26, 33, 34, 37,...

Electronic Discovery Law - *November 24, 2008 1:59 PM*
According to a Revisor's note: The former Nebraska Discovery Rules for All Civil Cases have been renumbered in the revised Nebraska Court Rules as Chapter 6, Article 3, Nebraska Court Rules of Discovery

in Civil Cases. Thus, former rule 26...

Electronic Discovery Law - *December 31, 2008 8:10 AM*
Effective August 1, 2008, Maine has adopted amendments to its Rules of Civil Procedure to "address the need for specific treatment of the discovery of electronically stored information." As stated in the Advisory Committee Note to Rule 16, ...

Electronic Discovery Law - *January 9, 2009 1:08 PM*
Arizona's Supreme Court has approved amendments to Arizona's Rules of Family Law Procedure that will address several major e-discovery issues. The amended rules are based on Arizona's Rules of Civil Procedure and will become effective...

Computer Forensics and E-Discovery Blog - *March 26, 2009 9:58 AM*
I came across several interesting items this week so this post is going to be about a variety of things. The Round Table Group, an expert services firm, approached me about writing an article for their newsletter. They wanted...

Comments (1)

Kae Warnock - *July 8, 2008 11:58 AM*

This is an excellent list of state laws and court rules.

NCSL is presenting a session on e-discovery for legislative attorneys at our Legislative Summit this month. May I have permission to reprint the printable version of this list (with attribution, of course)

Ediscovery Law Firm, Document Analysis Technology Group and Records Management Practice of K&L Gates, offering services related to ediscovery, review of electronic documents, electronic discovery and electronic evidence discovery.

K&L Gates LLP
925 Fourth Avenue, Suite 2900, Seattle, Washington 98104-1158
p. 206.623.7580, f. 206.623.7022

SAMPLE – E-DISCOVERY REQUESTS

TO:

Plaintiff hereby requests, pursuant to Nebraska Discovery Rule 36, the defendant answer, under oath, the following requests for admissions of the truth of any matters within the scope of Rule 26(b) set forth in the request, including the genuineness of any documents described herein, within thirty (30) days of service of this request as required by law.

It is understood that the answers will contain the composite knowledge of the Defendants and any of the Defendants' representatives or agents. These Requests shall be deemed continuing, and if additional information should be discovered after originally answering them with respect to any of the matters inquired about, then it is expected that such information will be promptly revealed to the Plaintiff or Plaintiff's attorney as required by law.

DEFINITIONS

1. **"Computer"** shall include computers, software, hardware, mobile phone, pda, palm pilot, blackberry or other electronic equipment, including but not limited to any audit trails relating to each device.
2. **"Document"** shall include any written, recorded or graphic mailer, however produced or reproduced and whether or not now in existence, including, but not limited to, correspondence, telegrams, photographs, notes or sound or visual recordings of any type of personal or telephone conversations, or of meetings or conferences, minutes of directors or committee meetings, memoranda, interoffice communications, studies, analyses, reports, results of investigations, reviews, contracts, agreements, working papers, statistical records, ledgers, books of account, financial statements and journals, vouchers, bank checks, invoices, receipts, computer data, stenographers' notebooks, desk calendars, appointment books, and diaries or papers similar to any of the foregoing, however denominated. It includes all mailer that relates to or refers in whole or in part to

the subjects referred to in a Request. If a **Document** has been prepared in several copies, or additional copies have been made, and the copies are not identical (or which, by reason of subsequent modification, are no longer identical), each nonidentical copy is a separate "Document." *The term "document" expressly includes "electronic files," including all files and data compilations of any kind, in any electronic medium, including computer files, data files, databases, electronic files, or documents contained on computer disks, tapes, diskettes, hard drives, or any other form of computer or data backup,* ***AND SHALL SPECIFICALLY INCLUDE ANY INFORMATION CONTAINED WITHIN THE "ARCHABUS" SYSTEMS***.

3. **"Maintenance Data"** shall include any data sent to or from any member of maintenance regarding any issue. All below requests shall be limited in time as to the period of time from when the door that is the subject of this lawsuit was installed to the present.

INTERROGATORIES

INTERROGATORY NO. 18: Do you have a written policy for the retention and/or destruction of documents?

ANSWER:

INTERROGATORY NO. 19: Has destruction or overwriting of documents ever been suspended and if so, please specify the dates.

ANSWER:

INTERROGATORY NO. 20: Please state the name, address and phone number of the person with the most knowledge of the retention and destruction at your place of business.

ANSWER:

INTERROGATORY NO. 21: During the period from when the door that is the subject of this lawsuit was installed to the present, have any documents at your place of business

been destroyed? If so, please state which electronic files have been deleted from the magnetic or optical storage media or overwritten from that date to the present, and dates of destruction or overwriting.

ANSWER:

INTERROGATORY NO. 22: List all operating systems installed on all computers, mobile phones, pdas, palm pilots, blackberries or other electronic equipment on which data is stored used by your business, the specific equipment on which the operating system was installed, and the period during which it was installed on the specific equipment.

ANSWER:

INTERROGATORY NO. 23: As to the storage of data generated by the users of your computers, mobile phones, pdas, palm pilots, blackberries or other electronic equipment (such as word-processor files, work orders, data files, and email):

If the data is backed up on tape or other media, please state:

a. The number of media currently existing with backup data;
b. The maximum storage size for each such media;
c. The brand name for each such media;
d. The last time each such media was backed up;
e. The computer or other hardware for each such backup.

ANSWER:

INTERROGATORY NO. 24: State the physical location and current user of each computer, mobile phone, pda, palm pilot, blackberry or other electronic equipment (such as word-processor files, work orders, data files, and email) or other hardware listed in the previous Interrogatories.

ANSWER:

INTERROGATORY NO. 25: Provide a list of all personnel responsible for maintaining computer hardware, data or information systems on computers for your place of

business, including name, position, title, contact information, and official job description and list of duties.

ANSWER:

INTERROGATORY NO. 26: Does your place of business maintain a policy regarding use of removable media in its workstations, computers, mobile phones, pdas, blackberries, or networks?

ANSWER:

INTERROGATORY NO. 27: List all hardware components installed internally or externally to the computers, workstations, mobile phones, pdas, blackberries or networks of your maintenance department during the period from when the door that is the subject of this lawsuit was installed to the present.

ANSWER:

INTERROGATORY NO. 28: List all log files, including audit trails, found on computers, workstations, mobile phones, pdas, blackberries or your business's network, and the equipment and logical path where the log files or audit trails can be found.

ANSWER:

INTERROGATORY NO. 29: Do any employees of your business use portable devices in the course of their employment that are not connected to your business's network, and that are not backed up or archived? If so, list all users and the devices they use.

ANSWER:

INTERROGATORY NO. 30: Any graphic representation of the components of your computer network, and the relationship of those components to each other, including but not limited to flow charts, videos or photos, and drawings.

ANSWER:

INTERROGATORY NO. 31: List all telephone equipment provided by your place of business or used by its maintenance employees to perform work.

ANSWER:

INTERROGATORY NO. 32: List any and all user identification numbers and passwords necessary to access computers or programs addressed in these interrogatories and requests.

ANSWER:

INTERROGATORY NO. 33: Please provide copies of your computer security policies and procedures and the name and contact information for the person responsible for security.

ANSWER:

REQUESTS FOR PRODUCTION

REQUEST NO. 6: Produce any and all company organizational and policy information in its entirety, including but not limited to organizational charts, corporate policy and procedure manuals, policy memoranda, system schematic, audit trail procedure, network topology, system restart procedure, email retention policies, and other related information.

RESPONSE:

REQUEST NO. 7: Produce any and all documents and things related to networks or groups of connected computers that allow people to share information and equipment.

RESPONSE:

REQUEST NO. 8: Produce any and all information related to email, including but not limited to current, backed-up and archived programs, accounts, unified messaging, server-based email, Web-based e-mail, dial-up email, user names and addresses, domain names and addresses, email messages, attachments, manual and automated mailing lists and mailing list addresses as it pertains to maintenance or the vendors used by maintenance.

RESPONSE:

REQUEST NO. 9: Please produce copies of any and all written policies for the retention of documents.

RESPONSE:

REQUEST NO. 10: Please produce copies of any and all written policies for the destruction of documents.

RESPONSE:

REQUEST NO. 11: Please produce all backup and/or archive maintenance media, during the period from when the door that is the subject of this lawsuit was installed to the present.

RESPONSE:

REQUEST NO. 12: Produce any backup or archived maintenance data during the period from when the door that is the subject of this lawsuit was installed to the present.

RESPONSE:

REQUEST NO. 13: Provide the names of all of your business's information systems or information technology personnel during the period from when the door that is the subject of this lawsuit was installed to the present.

RESPONSE:

REQUEST NO. 14: Produce any and all devices used to place information on loose or removable storage media, including but not limited to hard drives, floppy drives, CD-Rom drives, tape drives, recordable DVD-ROM drives and removable drives.

RESPONSE:

REQUEST NO. 15: Please produce the blackberries, including their magnetic or optical storage media, for inspection and copying, used by maintenance during the period from when the door that is the subject of this lawsuit was installed to the present.

RESPONSE:

REQUEST NO. 16: Provide any and all documentation of software and hardware modifications to the computers used by maintenance during the period from when the door that is the subject of this lawsuit was installed to the present, including, but not limited to modification dates, software/hardware titles and version numbers, names of persons performing modifications, location of any backup of the data on the computer performed prior to modification, and disposition of replaced software and hardware.

RESPONSE:

REQUEST NO. 17: Produce any and all software installed or used on the computers used by maintenance during the period from when the door that is the subject of this lawsuit was installed to the present.

RESPONSE:

REQUEST NO. 18: Produce any and all voice messaging records including but not limited to caller message recordings, digital voice recordings, interactive voice response unit (IVR/VRV) recordings, unified messaging files, and computer-based voice mail files to or from maintenance during the period from when the door that is the subject of this lawsuit was installed to the present.

RESPONSE:

REQUEST NO. 19: Produce all phone use records for maintenance including but not limited to logs of incoming and outgoing calls, invoices and contact management records, manually or automatically created or generated during the period from when the door that is the subject of this lawsuit was installed to the present.

RESPONSE:

REQUEST NO. 20: Produce any and all manual and automatic records of equipment use, including but not limited to fax, access, audit, security, email, printing, error and transmission records regarding maintenance during the period from when the door that is the subject of this lawsuit was installed to the present.

RESPONSE:

REQUEST NO. 21: Produce any and all portable devices used by maintenance and not backed up or archived, including but not limited to handheld devices, set-top boxes, notebook devices, CE devices, digital recorders, digital camera and external storage devices during the period from when the door that is the subject of this lawsuit was installed to the present.

RESPONSE:

REQUEST NO. 22: Produce copies of all maintenance manuals, policies and other guidelines for employee access and use of Internet resources for maintenance issues during the period from when the door that is the subject of this lawsuit was installed to the present.

RESPONSE:

DATED on this _____ day of May, 2009.

DONALD R. LITKE, Plaintiff

By:_____

John P. Inserra, #15084
INSERRA & KELLEY
6790 Grover Street, Suite 200
Omaha, Nebraska 68106-3612
(402) 391-4000
(402) 391-4039 (Fax)
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the above and foregoing document by regular, first class United States mail, postage prepaid this ____ day of May, 2009 on the following:

David L. Welch
PANSING, HOGAN, ERNST & BACHMAN, LLP
10250 Regency Circle, #300
Omaha, NE 68114

Mr. John W. Iliff
Gross & Welch
1500 Omaha Tower
2120 S. 72nd Street
Omaha, NE 68124-2342

SAMPLE OF DISCOVERY RESPONSES SUMMATION

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

KEVIN WERTS and PEGGY WERTS, as Natural Parents, Guardians, and Next Best Friends of BLAKE WERTS, a minor child,	)	**CASE NO: CI 06-2866**
Plaintiffs,	)	**SAMPLE OF INITIAL DISCOVERY SUMMARY – ANSWERS OF DR. TAYLOR**
v.	)	
DR. BRUCE E. TAYLOR, and SAINT ELIZABETH'S REGIONAL MEDICAL CENTER, d/b/a SAINT ELIZABETH'S COMMUNITY HEALTH CENTER,	)	
Defendants.	)	

Interrogatories:

Key:
OB – Overly Broad
I – Irrellevant
NCLDE – Not calculated to lead to discovery of admissible evidence
P – Privileged

1	Persons Answering	Bruce E. Taylor, MD
2	Subject of Investigation	Objection – OB/I/NCLDE/P
3	Liability Insurance	Yes
4	Liability Insurance	COPIC Ins Co – Limits $200K/$600K; qualified by Hosp. Med. Liab. Act0
5	Consults with other med providers RE: Plfs	None outside of practice

Requests for Production

1	CV	Attached
2	Records Relating to I#2	Objection – OB/I/NCLDE/P

SAMPLE OF DISCOVERY COMPLIANCE LETTER PRIOR TO MOTION TO COMPEL

Sample Compliance with Meet and Confer Requirement

Month/Day/Year
Name
Address

RE: _____

Dear _____:

The purpose of this letter is to request that you tender a further response to [here set forth interrogatory number, set number, etc.].

As you know, interrogatory number [here set forth interrogatory number, set number, etc.] inquired whether: [here specify text in interrogatory].
Your response to said interrogatory states that: [here specify the text of response].

[Plaintiff or defendant] considers this response to be insufficient because [here set forth why the answer is incomplete or evasive, the objection is legally invalid or the claim of privilege is not meritorious].

As you know, under [here specify statute or rule of court] the parties are required to meet and confer in an effort to achieve an informal resolution of discovery disputes prior to requiring judicial intervention through a motion to compel further response. Please let me know if you disagree with the position set forth in this letter and/or whether we will be able to achieve an informal resolution of this matter. I estimate the probable cost of a motion to compel to be $_____, including hours to prepare the motion and hours to attend the hearing on the motion.

Very truly yours,

Attorney name

CHECKLIST FOR PREPARING A NOTICE OF DEPOSITION

DEPOSITION INFORMATION

_____ John P. Inserra #15084 Initial Request _____ Reschedule _____
_____ Craig L. Kelley #18341

Docket _____ by _____

_____ Prepare NOD _____ Video _____ Teleconference _____ Prepare ***AMENDED*** NOD

_____ Send Letter Client Regarding NOD _____ Send "Pointers on How to Act"

Contact: _____Phone:_____

Case Name: _____

DOA: _____ or Docket:_____ Page:_____ Case #: _____

Deposition of: _____who is a

____ Physician _____ Expert ____ Fact Witness ____ Plaintiff/Client ____ Defendant

Deposition Location:_____

Time:_____ Prep Time:_____ Date:_____ /_____
(Client Only) (mm-dd-yy) (day of week)

Deposition Requested by: _____ I&K _____ Opposing Counsel _____
_____
_____
_____

Send Notice to:

_____ Thibault Suhr & Thibault (Phone: 331-2500 Fax: 331-1198)
6818 Grover, Suite 107 - Omaha, NE 68106 email: tst@courtreporteromaha.com

_____ Think Video - Mr. John F. MacKnight (Phone: 597-6300 Fax: 592-0349)
7914 W Dodge Rd, Suite 436 - Omaha, NE 68114 email: thinkvideo@aol.com

_____ JS Wurm & Associates – Sue – (Phone: 800-551-8382 Fax: 402-475-9876)
233 So. 13th Street, #801 - Lincoln, NE 68508 email: sue@jswurm.com

_____ Latimer Reporting (Toll Free: 877-567-5669 Phone: 402-476-1153 Fax: 402-476-3853)
528 South 13th Street, Suite 1 - Lincoln, NE 68508 email: latimerrep@aol.com

_____ Other: _____

If questions, contact: _____ Attorney _____ RSM _____ CK _____ Other

SAMPLE – MOTION FOR APPOINTMENT OF INTERPRETTER

IN THE DISTRICT COURT OF DOUGLAS COUNTY

[Plaintiff]	)	DOC. ____ NO. _____
	)	
Plaintiff,	)	
v.	)	**MOTION FOR APPOINTMENT**
	)	**OF INTERPRETER AND**
[Defendant]	)	**PAYMENT OF INTERPRETER'S**
	)	**EXPENSE OUT OF THE SUPREME**
Defendant.	)	**COURT GENERAL FUND**

COMES NOW, the Defendant/Plaintiff [_____], and respectfully moves this Court for an Order, pursuant to Neb. Rev. Stat. §§ 25-2403 and 25-2406, and in accordance with the Nebraska Supreme Court Rules Relating to Court Interpreters, appointing a Spanish-speaking interpreter to assist in preparation for trial and at trial in the captioned matter, and further moves the Court for payment of the associated interpreter fees in accordance with the Nebraska Supreme Court fee schedule out of the General Fund as established by the Nebraska Supreme Court for such purposes.

In support of this Motion, Defendant/Plaintiff [_____], states that he/she is unable to effectively communicate the English language for preparation and trial of her case, and that such appointment and payment of translation fees would be in the interest of justice. Defendant/Plaintiff has already contacted [_____] an interpreter fluent in both the English and Spanish language, and requested that [_____] provide interpreting services in this case, and [_____] has agreed to this request.

WHEREFORE, Defendant/Plaintiff, [_____] prays for an Order appointing a Spanish-speaking interpreter to assist in preparation for trial and at trial in the captioned matter, and for payment of translation fees out of the General Fund as established by the Nebraska Supreme Court for such purpose, and for such other and further relief the Court deems appropriate.

DATED this _____ day of _____, 200____.

_____, [Defendant/Plaintiff]

By: _____
_____, # _____
INSERRA & KELLEY
6790 Grover Street – Suite 200
Omaha, NE 68106-3612
(402) 391-4000
(402) 391-4039 – Fax

Attorneys for [Plaintiff/Defendant]

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the above matter will come for hearing on the ____ day of _____ 200_____, before the Honorable _____, Douglas County Courthouse, Courtroom No. _____. Omaha, NE at the hour of _____a./p.m., or as soon thereafter as the same may be heard.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon the following by mailing said copy by regular U.S. Mail, portage prepaid on this the ____ day of _____ 200____ to the following counsel of record:

_____

SAMPLE – CORPORATE NOTICE OF DEPOSITION – RULE 30(b)(6)

IN THE DISTRICT COURT OF PLATTE COUNTY, NEBRASKA

ANNA S. ZIMMERER, and BECTON DICKINSON, a New Jersey corporation, as subrogee, and Kemper Employer's Insurance Company, as subrogee,	)	**CASE NO. CI 02-539**
Plaintiffs,	)	
vs.	)	**PLAINTIFF'S NOTICE OF CORPORATE DEPOSITION OF DEFENDANT METRO MACHINE & ENGINEERING CORPORATION PURSUANT TO NEBRASKA RULES OF DISCOVERY 30(b)(5), 30(b)(6) and 34**
METRO MACHINE & ENGINEERING CORPORATION, a Minnesota corporation,	)	
Defendant,	)	

TO: METRO MACHINE & ENGINEERING CORPORATION, a Minnesota Corporation, and Brian Nolan, Its Attorneys

PLEASE TAKE NOTICE, that pursuant to Nebraska Rules of Discovery 30(b)(5) and 30(b)(6), the stenographic deposition of **METRO MACHINE & ENGINEERING CORPORATION,** will be taken before a qualified Court Reporter at 8001 Wallace Road, Eden Prairie, MN 55344 on the _____ day of _____, 2005 at _____:____ __.m., and thereafter by adjournment until the same shall be completed.

Pursuant to Nebraska Rule of Discovery 30(b)(6), **METRO MACHINE & ENGINEERING CORPORATION**, is required to designate and fully prepare one or more officers, directors, managing agents, or other persons with the most knowledge concerning the following designated matters; or other persons who consent to testify on its behalf, and whom Defendant will fully prepare to testify regarding the following designated matters and as to such information that is known or reasonably available to the organization:

1. The existence of the documents requested below pursuant to Nebraska Rule of Discovery 34;
2. The electronic creation, duplication and/or storage of the documents requested below pursuant to Nebraska Rule of Discovery 34;

3. Any and all document retention/destruction policies that would relate to any of the documents requested below pursuant to Nebraska Rule of Discovery 34;

4. The location of the documents requested below pursuant to Nebraska Rule of Discovery 34;

5. The organization, indexing and/or filing of the documents requested below pursuant to Nebraska Rule of Discovery 34;

6. The method of search for the documents requested below pursuant to Nebraska Rule of Discovery 34;

7. The completeness of the documents produced pursuant to Nebraska Rule of Discovery 34;

8. The authenticity of the documents produced pursuant to Nebraska Rule of Discovery 34;

9. The person with the most knowledge or information regarding the details of the Purchase Order and accompanying Equipment & Tool Specifications Agreement;

10. The person with the most knowledge or information as to the "debugging" process as set forth in Defendant's Answer to Interrogatory No. 7;

11. The person with the most knowledge or information of the "joint agreement" regarding the guarding of the machine as set forth in Defendant's Answer to Interrogatory No. 9;

12. The person with the most knowledge or information regarding claims against Defendant for injuries related to the Solo Shot machine or any other similar machine as set forth in Defendant's Answer to Interrogatory No. 19;

13. The person with the most knowledge or information as to the condition of the Solo Shot machine when it was placed in use at Becton Dickinson;

14. The person with the most knowledge or information as to other equipment purchased by Becton Dickinson from Defendant;

15. The person with the most knowledge or information as to the installation and training of the use of the Solo Shot machine at the time it was installed at Becton Dickinson;

16. The person with the most knowledge or information as to the inspections made of the Solo Shot both prior and subsequent to installation and "debugging"; and

17. The person with the most knowledge or information as to direct parties or any third parties who may have knowledge or information about the Solo Shot machine's engineering, production, manufacture, installation, maintenance, or use issues.

Pursuant to Nebraska Rules of Discovery 30(b)(5) and 34, plaintiff requests that **METRO MACHINE & ENGINEERING CORPORATION** produce the following documents and tangible things, as well as permit Plaintiff's counsel to inspect and copy each of the following documents and tangible items in the possession, custody, or control of **METRO MACHINE & ENGINEERING CORPORATION**, its attorneys or other representatives or agents:

SCHEDULE OF DOCUMENTS:

1. Any documents relating to the "debugging" process as set forth in Defendant's Answer to Interrogatory No. 7.
2. Any documents relating to the "joint agreement" regarding the guarding of the machine as set forth in Defendant's Answer to Interrogatory No. 9.
3. Andy documents relating to any claims against Metro Machine for injuries related to the Solo Shot machine or any other similar machine as set forth in Defendant's Answer to Interrogatory No. 19.

Dated: October 30, 2010.

ANNA S. ZIMMERER, Plaintiff,

_____

Jeffrey F. Putnam, #21527
INSERRA & KELLEY
6790 Grover Street, Suite 200
Omaha, Nebraska 68106-3612
(402) 391-4000
(402) 391-4039 (Fax)
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document was mailed by United States mail, postage prepaid, to the following on the _____ day of February, 2005.

Brian D. Nolan
NOLAN, OLSON, HANSEN, FIEBER
& LAUGHTENBAUGH, L.L.P.
300 South 19th Street, Suite 302
Omaha, NE 68102

Chad P. Richter
Paul E. Larson
BERENS & TATE, P.C.
10050 Regency Circle, #400
Omaha, NE 68114-3721

_____

SAMPLE FED.R.CIV.P. 30(b)(6) DEPOSITION NOTICE

UNITED STATES DISTRICT COURT
DISTRICT OF [Jurisdiction]

_____, Plaintiff,	Court File No.:
v.	NOTICE OF TAKING DEPOSITION PURSUANT TO FED.R CIV P. 30(b)(6)
_____, Defendant.	

PLEASE TAKE NOTICE that [Plaintiff/Defendant/Corporation] take(s) the deposition, before a qualified notary public by oral examination, of [Plaintiff/Defendant/Corporation] on [date/time], commencing at [location]. The deposition will continue until adjournment.

Pursuant to Federal Rule of Civil Procedure 30(b)(6), [Plaintiff/Defendant] corporate designee(s) shall be prepared to testify regarding the following subjects, all with respect to [Plaintiff's/Defendant's] information technology systems:

1) Number, types, and locations of computers currently in use and no longer in use;
2) Past and present operating system and application software, including dates of use;
3) Name and version of network operating system currently in use and no longer in use but relevant to the subject matter of the action;
4) File-naming and location-saving conventions;
5) Disk or tape labeling conventions;
6) Backup and archival disk or tape inventories or schedules;
7) Most likely locations of electronic records relevant to the subject matter of the action;
8) Backup rotation schedules and archiving procedures, including any backup programs in use at any relevant time;
9) Electronic records management policies and procedures;
10) Corporate policies regarding employee use of company computers and data;

11) Identities of all current and former personnel who have or had access to network administration, backup, archiving, or other system operations during any relevant time period.

[Date]

BY:

[Counsel/law firm name and address]
Attorneys for [Plaintiff/Defendant]

SAMPLE – Fact Witness Notice of Deposition

IN THE NEBRASKA WORKERS' COMPENSATION COURT

REBECCA A. HENKE	)	**DOC. 203 PAGE 1387**
SSN: 391-72-9362	)	
	)	
Plaintiff,	)	**PLAINTIFF'S NOTICE**
	)	**TO TAKE DEPOSITION**
v.	)	**OF JOHN PAYNE**
PENSKE TRUCK LEASING CO., L.P.,	)	
c/o CSC-Lawyers Incorporating Service	)	
Company, Registered Agent	)	
	)	
Defendant.	)	

Take notice that the said plaintiff will take the deposition upon oral examination of **JOHN PAYNE,** at the offices of Penske Truck Leasing Co., LP, G5 Corporate Woods Plaza, Bridgeton, Missouri, on Tuesday, **March 30, 2004** at **11:00 o'clock a.m**., and thereafter from day to day as the taking of said deposition may be adjourned. Deponent is directed to bring all documents and correspondence relating to the above Plaintiff to the deposition. Said deposition is to be used in the above-entitled action. You are hereby notified to appear and take part in said deposition. Said deposition to be recorded and transcribed by a certified court reporter, which will be provided by the plaintiff.

DATED on this _____ day of March 2004.

REBECCA A. HENKE, Plaintiff

By: _____

Jeffrey F. Putnam, #21527
INSERRA & KELLEY
6790 Grover Street, Suite 200
Omaha, NE 68106-3612
(402) 391-4000/ 391-4039 - Fax
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

As one of the attorneys for the Plaintiff herein, I do hereby certify that I caused the above **Notice to Take Deposition** to be served upon the Defendant herein by mailing same as First Class United States Mail, with postage prepaid, to its attorney of record, John W. Iliff, Gross & Welch, P.C., 1500 Omaha Tower, 2120 S. 72nd Street, Omaha, NE. 68124-2342, on this the _____ day of March 2004.

_____

SAMPLE – Video Notice of Deposition

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

RODNEY D. KREGER	)	CASE NO. C103-2204
	)	
Plaintiff,	)	
	)	NOTICE TO TAKE
vs.	)	VIDEO DEPOSITION OF
	)	R. MICHAEL GROSS, M.D.
MANUEL C. VALVERDE,	)	
	)	
	)	
DEFENDANT	)	

Take notice that the said plaintiff will take the video deposition upon oral examination, of **DR. MICHAEL GROSS,** at **7710 Mercy Road – Suite 224, Omaha, Nebraska** on Nebraska Spine Center, 11819 Miracle Hills Drive, Suite 102, Omaha, Nebraska, on Wednesday, **May 5, 2004 at 9:00 o'clock a.m.**, and thereafter from day to day as the taking of said deposition may be adjourned. Deponent is directed to bring all medical records, documents and correspondence relating to the above Plaintiff to the deposition. Said deposition is to be used in the above-entitled action. You are hereby notified to appear and take part in said deposition. Said deposition to be recorded and transcribed by Thibault Suhr & Thibault Court Reporters.

DATED on this _____ day of February 2004.

RODNEY KREGER, Plaintiff

By: _____

John P. Inserra, #15084
INSERRA & KELLEY
6790 Grover Street, Suite 200
Omaha, Nebraska 68106-3612
(402) 391-4000/391-4039 - Fax
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

As one of the attorneys for the Plaintiff herein, I do hereby certify that I caused the above **Notice to Take Deposition** to be served upon the Defendant herein by mailing same as First Class United States Mail, with postage prepaid, to its attorney of record, Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., Wells Fargo Center, 1248 "O" Street, Suite 600, Lincoln, NE 68508, on the _____day of February 2004.

_____

SAMPLE – Deposition by Written Questions

IN THE DISTRICT COURT OF SARPY COUNTY, NEBRASKA

KATHERINE RIEPLE,	)	**DOC. CI06 NO. 622**
	)	
Plaintiff,	)	
	)	**NOTICE OF INTENTION TO TAKE**
v.	)	**DEPOSITION BY WRITTEN QUESTIONS**
	)	**OF DR. BERNARD KRATOCHVIL**
	)	
DEBORAH WANGBERG,	)	
	)	
Defendant.	)	

TO: Defendant DEBORAH WANGBERG and Douglas L. Phillips, KLASS LAW FIRM, LLP, Mayfair Center, Upper Level, 4280 Sergeant Road, Suite 290, Sioux City, IA 51106, attorney of record

Please take notice a deposition of written questions will be taken of Dr. Bernard Kratochvil, M.D., Drs. Gross, Iwersen, Kratochvil & Klein, P.C., Orthopaedic Surgery, 7710 Mercy Road, #224, Omaha, NE 68124 on the _____ day of _____ at __:___ __.m. and continuing thereafter until complete. Said deposition upon written questions will proceed before a Certified Court Reporter at the offices of Dr. Bernard Kratochvil, M.D., Drs. Gross, Iwersen, Kratochvil & Klein, P.C., Orthopaedic Surgery, 7710 Mercy Road, #224, Omaha, NE 68124, pursuant to Rule 31 of the Nebraska Civil Discovery Rules.

Dated: March _____, 2007.

KATHERINE RIEPLE, Plaintiff,

By: _____

John P. Inserra, #15084
INSERRA & KELLEY
6790 Grover Street, Suite 200
Omaha, NE 68106-3612
(402) 391-4000
(402) 391-4039 (Fax)
jpinserra@inserra.com

Certificate of Service

The undersigned hereby certifies that he served a true and correct copy of the above and foregoing document by regular, first class United States mail, postage prepaid this ____ day of March 2007 on the following:

Douglas L. Phillips
KLASS LAW FIRM, LLP
Mayfair Center, Upper Level
4280 Sergeant Road, Suite 290
Sioux City, IA 51106

_____

IN THE DISTRICT COURT OF SARPY COUNTY, NEBRASKA

KATHERINE RIEPLE,	)	**DOC. CI06 NO. 622**
	)	
Plaintiff,	)	
	)	
v.	)	**DEPOSITION BY WRITTEN QUESTIONS**
	)	**OF DR. BERNARD KRATOCHVIL**
	)	
DEBORAH WANGBERG,	)	
	)	
Defendant.	)	

TO: **BERNARD L. KRATOCHVIL, M.D.,** Drs. Gross, Iwersen, Kratochvil & Klein, P.C., Orthopaedic Surgery, 7710 Mercy Road, #224, Omaha, NE 68124

QUESTIONS PERTAINING TO:
KATHERINE RIEPLE; IME OF JANUARY 23, 2007

DIRECT QUESTIONS TO BE PROPOUNDED TO THE WITNESS

QUESTION NO. 1: Identify yourself fully, including your full name, business address, and occupation including job title and the business with which you are employed.

ANSWER:

QUESTION NO. 2: With regard to the pending lawsuit, please state who hired you to perform medical services, what you have been hired to do, and what your compensation is to be.

ANSWER:

QUESTION NO. 3: Please state what percentage of your medical practice is performed as a medical-legal expert performing Independent Medical Exams and/or providing opinions to requesting lawyers, claims representatives, or other legal representatives.

ANSWER:

QUESTION NO. 4: Please state what percentage of your answer to Question #3 above is performed for all defendants as opposed to what percentage is performed for all plaintiffs.

ANSWER:

QUESTION NO. 5: Please state what percentage of your income is earned from expert medical work.

ANSWER:

QUESTION NO. 6: Please state the average number of Independent Medical Examinations that you perform in one year.

ANSWER:

QUESTION NO. 7: Please state specifically each case in which you have actually testified, whether by deposition or at trial within the past three years.

ANSWER:

QUESTION NO. 8: Please state whether the report dated November 13, 2006 attached as Exhibit "A" to these questions is a true and accurate copy of your assessment of the plaintiff as a result of an Independent Medical Examination you conducted on or about November 13, 2006?

ANSWER:

QUESTION NO. 9: Please state the number of times you have been employed by the law firm of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, PC during the past three (3) years in an expert capacity.

ANSWER:

_____
BERNARD L. KRATOCHVIL, M.D.

Before me, the undersigned authority, on this day personally appeared BERNARD L. KRATOCHVIL, M.D., known to me to be the person whose name is subscribed to the foregoing instrument in the capacity therein stated, who being first duly sworn, stated upon his oath that the answers to the foregoing questions are true and correct.

_____
NOTARY PUBLIC

My Commission Expires:_____

SAMPLE – Deposition Summation

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

KEVIN WERTS and PEGGY WERTS, as Natural Parents, Guardians, and Next Best Friends of BLAKE WERTS, a minor child,	)	**CASE NO: CI 06-2866**
Plaintiffs,	)	**DEPOSITION SUMMARY OF DR. BRUCE E. TAYLOR, M.D.**
v.	)	
DR. BRUCE E. TAYLOR, and SAINT ELIZABETH'S REGIONAL MEDICAL CENTER, d/b/a SAINT ELIZABETH'S COMMUNITY HEALTH CENTER,	)	
Defendants.	)	

Education and Qualifications:

4:12-6:25 Dr. Taylor's education, qualifications, and experience up to the time of delivery of Blake Werts.

8:17-9:1 Board Certified in OB/GYN in 1981 – lifetime certification.

Standard Practice of Covering Other Drs. Patients:

7:1-17 Dr. Lucas (partner of Dr. Taylor) saw Blake Werts 1x; general practice was to deliver own patients but had patients meet at least one other person in case of emergency (doctor out of town, etc.)

7:18-25 Shared responsibilities for covering hospital/deliveries and assisted each other in surgeries.

8:1-13 Covered Joe Rogers and Dr. Lucas also covered Taylor's patience if he was out of town

8:14-16 Doesn't know how many active patients he had in 1996

Hospital Staff and Privileges:

9:2-15 1996 – on staff at Bryan and St. E's; courtesy staff at LGH; allows him to admit patients and perform surgeries

9:16-10:2 Privileges at St. E's in 1996 – attending OB/GYN – surgeries, c-sections, deliveries, high-risk ob

10:3-7 1996 - 50% deliveries @ St. E's; 50% at Bryan

10:8 -13 Deliveries – average 12-14 patients per month, do not know how many in 1996

Protocol of OB through Delivery:

10:14-11:8 Usual protocol of OB through delivery – see PA for 30 minutes for history and lab; next 2-3 weeks to a month he sees them for physical exam and info, blood work, develop pregnancy plan; back monthly until 32 weeks; then see every 2 weeks until 36 weeks; then weekly until delivery

34:20-35:12 1996 – normal ultrasound number same as today – 1 to 2; based on patient's problems, or if twins or if patient diabetic; normal OB patients get ultrasound at 22-24 weeks; Now due an early ultrasound to document dates, especially for people who may have repeat C-Section. Not normal to do ultrasounds towards end of pregnancy except if question of fetal size.

Peggy – History and Treatment

11:9-12:1 Peggy Werts was a patient; reviewed her office and hospital records prior to depo in his office; records given by counsel

12:1-19 First saw Peggy on 3/6/06, but she was prior patient; saw for OB history a couple visits before they moved to CA; seen after moved back for routine exam.

12:20-23 Never reviewed records from first delivery in California

12:24-13:3 PA took history initially

13:4-24 Peggy's History: prior C-section for fetal distress; infant hospitalized for heart problems; per Peggy no reason not to have VBAC, low cervical transverse uterine incision.

13:25-14:19 No verification of incision. Cannot be done by exam or ultrasound.

21:3-21:11 Only way to determine the incision type is by operating record; patient asked to bring in and didn't.

29:17-25 Peggy had prior C-Section and no vaginal deliveries; no significance to him in decision for VBAC.

30:1-21 Fact that original C-section was done because of fetal distress put Peggy at higher ability to have VBAC because C-section was not done because of disproportion. If breach, higher risk for cord prolapsed and head entrapment if delivered

vaginally. Blake was not breach.

35:13-36:5 Reviewed ultrasound reports. Significance is 5/16/96 – ultrasound at 22 weeks – showed infant growing symmetrically with due date of 9/18/96; ultrasound of 9/5/96 – showed still symmetrical growth, fluid level normal, placenta normal; due date unchanged – meaning infant not growing macrosomic – a little over 7 lbs.

36:6-37:1 Peggy admitted to St. E's on 9/16/96; not in labor; plan to induce before infant grew larger; decision to induce made around 9/11; notation within hospital chart to go ahead and start a Pitocin induction that was dated that date; Pitocin used to cause contractions.

37:2-7 Felt needed to induce labor as she was closer to her due date and if you start in the morning can get done before 2AM

37:22-38:14 Pitocin not started on September 11th. Note dated 9/11/96 state admit on 9/16 for VBAC induction. Start Pitocin on admission.

38:24-39:7 Prior to 9/16/96, Peggy had not gone into labor or they would not have waited to induce. Induction had nothing to do with size of baby.

39:21-41:19 Peggy checked into hospital at 7:05 a.m. and was administered Pitocin. He took a look at her at noon according to the hospital record. At noon Pitocin was started and she was having very mild contractions. Indication in nurse's notes he was there at 10AM and elected fetal monitoring strip and spoke with the patient.

42:11-18 Spoke with patient. Nothing really happening at that point.

45:2-25 At 10:00 AM, Peggy basically having no contractions. At 12:00 PM, condition not much different. Cervix not dilated and head was presenting still a little higher, which is normal sometimes. Nurses notes indicate an SVE – sterile vaginal exam. Done with a glove on hand and you put it in the vagina and check for cervical dilatation.

46:1-47:1 Told them to go ahead and increase the Pitocin and wrote a note in the progress sheet "9/16, noon, 30-year-old MWF, which stands for married white female, gravid 2, para 1, with an EDC of 9/23/96, admitted for a trial of induction. History of previous C-section. Chest clear, heart regular rate and rhythm without murmurs. Cervix fingertip 20 percent effaced, fetal heart tones okay. Impression: Term pregnancy, two, VBAC, pan trial of pit, type and screen. With VBACs always get blood available just in case you need one, routine protocol for Taylor in case of C-section or bleeding episode.

47:2-48:23;

49:21-50:13 Back to hospital when he called in and she was having fetal distress shortly before she delivered. Called in at 8:04 according to hospital record. Believes the hospital was trying to call him at the same time – assumes that's what they would be doing with the problems she started to have. Fortuitous that he happened to call first. Doesn't know for sure. Has not asked whether anyone attempted to call him. At 8:04, he was at 11th & South St, Zesto's. After call, proceeded expeditiously to St. E's. Told at time of call that the fetal heart tones were down and she was complaining of abdominal pain and uterus was firm – indicating infant was having some distress, the uterus being firm could also go along with an abruption where the placenta can sometimes separate from the uterus. Ordered some Tributalene to stop contractions and asked if there were any other physicians within the hospital to go ahead and start things sooner. There was another C-section going on at the time from his records and no one else available who could respond any faster. Indicated hospital should prepare Peggy for a C-Section. He called labor and delivery and doesn't recall which nurse she talked to.

48:24-49:3 When arrived at hospital, went up to the labor and delivery and reviewed the fetal monitor and proceeded with C-section.

49:8-20 Took a look at fetal monitoring strips. According to his note fetal tones down to around 70 with no increase indicating infant not tolerating current condition.

50:14-51:4 From hospital chart, it appears Peggy Cline was the nurse who made notations on the chart. Other nurses taking care of Peggy were J. Ewoldson and Sandy Bleich. Brenda Goodbar was circulating nurse. Worked with these nurses on a regular basis.

51:17-52:16 Between noon and time he called hospital, Peggy feeling very mild contractions, not changing anything cervix wise. Needs contractions to change cervix. Hadn't progressed much at that point. At 4:30, according to nurse notes, called in and increased Pitocin as still having mild contractions.

52:20-53:15 Pitocin increase every 15-30 minutes – had been going on all day. Hard to say what shows in flow record on whether it helped because no notation between 16:30 and 19:15, but on OB flow record – Peggy still having mild contractions until about 7 o'clock. Hard to read copy. In nurse's notes, says at 7:00, appears to say moderate – assumes inferring to contractions.

53:16-24 How long proceed with Pitocin – **LAMSON OBJECTION – VAGUE AND INDEFINITE** -Generally proceed with Pitocin by inducing during the day and into evening, stop, rest them, start again the next day – depends on need for delivery. Guess is if she had not had episode at 8 o'clock, probably would have rested overnight and started again the next morning unless she was tired of it.

54:4-12 Risks of continuing Pitocin was water intoxication, which is why Taylor ordered a double strength Pitocin; same amount of Pitocin or a little more and a lesser amount of fluid so she's not getting as much fluid value.

54:13-56:3 Notation in OB flow record at 19:15 says variable deceleration decreased 90 to 120 times 20-40 seconds – meaning heart rate when down to 90-120 for a short period of time. Variable deceleration is one that changes with contractions, usually associated with the contraction. Can be cord changes or cord pressure. Can be caused by position of infant at that moment. If variable, it's something they note to see if you can change it by position changes, oxygen if necessary. Sometimes they will stop. – **LAMSON OBJECTION TO WHETHER THERE IS SOMETHING SIGNIFICANT ABOUT MAKING THE NOTE – AS TO FORM AND FOUNDATION** – Taylor did not make the note. Thinks just documenting what the fetal heart tones are doing. Can't read next line.

56:4-24 Next Notation is 19:35; significance is they moved her from bed to chair, so assumes fetal heart tones resolved as to variabilities or probably would have been a notation. Normally do not move someone who is having heart tone changes to a chair if they are still occurring. Doesn't have the strip and we don't either. Other reasons for the move – to try a different position, tired of lying in bed. Certainly don't normally do that for fetal distress.

56:25-57:16 Mentioned change in position with variable deceleration – not same change – normally would change mother's position from right side to left side to back to try to find a position more normal for infant. If variable deceleration for short duration, probably not necessary to call dr. to discuss if it resolved on it's one. If continuous, anticipate a phone call.

57:17-58:15 OB Flow record – page 15 – time 19:40, says focus, has FHTs – fetal heart tones; note indicates patient calls out with pain. Taylor assumes it says patient calls out with complaint of pain, decreased Pitocin and individual's name. – **LAMSON OBJECTION TO ASKING IF INDICATES PROBLEM WITH FETAL MONITOR READINGS – AS TO FORM AND LACK OF FOUNDATION** – Taylor doesn't know if they are reading off the fetal monitor because it is not noted at that point until 19:54 when it's difficult to assess and had to get her back to bed at 19:54; assume they were trying to assess fetal heart tones at that point.

58:16-60:1 Number of notes from 19:54 – 8:04, 20:04; all have deceleration – **CHRISTENSEN OBJECTION AS TO ASKING WHAT THAT MEANS AS FORM OF QUESTION – SAYS NOT SURE THAT PROPERLY STATES THE RECORD** – Taylor says found fetal heart tones to be in 70 area and increased the IV and gave mother oxygen and tried changing sides; also did scalp stimulation with little response; put her in Trendelenburg positioning – all changes to the patient's positioning to try to alleviate the fetal heart tone change; appears from notes there is some fetal distress – not sure how to quantify how

much. Concern of her pain complaint would be whether she may have had a placental separation or as what turned out a dehiscence of previous incision. Blood in the abdomen can cause pain too.

60:2 -61:2 When did C-section – according to OP note, opened the abdomen – small amount of blood – hole within the uterus where infant's head was starting to come out; infant delivered, headed off to pediatrician who he did a very good resuscitation and then repaired defect within the uterus. Defect appeared to be at area of the scar from prior C-section. Blake was not breathing. He was immediately intubated and when you're intubated you don't breathe, so can't answer how long he wasn't breathing.

60:3-13 **LAMSON AND CHRISTENSEN OBJECTIONS TO FORM OF QUESTION; VAGUE AND INDEFINITE** – (John asked if there was anything prior to the C-Section that would tell how long not breathing prior to C-Section) – Infants don't normally breathe on the inside so no breathing going on until exposed to oxygen and air.

61:14-25 **LAMSON AND CHRISTENSEN OBJECTIONS – FOUNDATION** (John asked opinion re: what happened in utero to Blake re: rupture); Taylor not sure what happened to Blake in utero at time of rupture except he was under some stress.

62:1-12 Delivery at 8:25. Never examined baby – not a pediatrician; probably went in to see him but doesn't recall. It is usual for him to do when infant is in ICU.

62:13-63:10 Followed-up with Peggy; last note in office chart – baby seems to be doing better – is rolling over and acting more normally, although gets mad and pulls thumbs into the inside. Not a neurologist – doesn't know significance. Sounded like baby was doing good for rolling over at 6 weeks. Did not see Peggy or Blake again, but they sent him a note that says "Thank you Dr. Taylor" picture of Blake and brother Bryce.

Guidelines: VBAC and ACOG, as well as Hospital

15:1-22 Guidelines for VBAC: 60-80% success rate in 1996; less side effects from vaginal birth; complications present on both; in 1996 – concern about C-section rates – encouraged to do VBACs, Peggy wanted. National concern – ACOG and news media.

16:2-11 Guidelines for VBACs in 1996 – revised since then from ACOG; he is a member

16:13-17:24 ACOG – group of certified and affiliated physicians and personnel; guidelines published in practice management – mailed out by ACOG; references made in a

journal; has access to 1996 guidelines; His atty has them. Also have old ones in his files.

18:1-19:15 Guidelines are made through practice committee made up of experts in the field; no knowledge of who formulated as committee changes; Has met some committee members. Appointed by ACOG to panels. Trusts ACOG. No knowledge of whether the guidelines are peer reviewed. Guidelines appear in Williams Textbook of Obstetrics, GOBY obstetrical Textbook; Fetal and Maternal medicine textbooks.

19:16-24 Functioned under ACOG guidelines or hospital guidelines. Still uses ACOG guidelines.

19:25-20:14 Doesn't recall guidelines by St. E's other than the OB/GYN rather than family physician or midwife; does not have bylaws from 1996; hospitals did not encourage VBAC. Physician-patient relationship makes the decision.

22:20-23:1 30 minute limitation for emergency C-Section was from ACOG. Doesn't know if it was shorter prior to 1996.

VBAC Determining Factors:

20:15-21:2;
21:12-22:19;
23:5-13 Determining factors are patient's desire, whether C-section was classic C-section or low cervical transverse; whether she was told she could not have a VBAC; classical C-section goes up and down and prohibit a VBAC; fetal weight; number of C-sections; any previous vaginal deliveries; having a nonrepeatable C-section, i.e. breach or fetal distress have a higher chance of normal vaginal delivery; if cephalopelvic disproportion – less of a chance; size of woman and pelvis; and ability of hospital to do C-Section within 30 minutes of decision; hospital staffed with anesthesia and surgery personnel and ability to monitor infant with appropriate nursing personnel.

Conversations with Peggy RE: VBAC and Risks

23:14-24:9 Spoke with Peggy about VBAC; Only one notation where it says C-section-VBAC, which indicates patient would like to try vaginal; On 8/28 in treatment plan noted labor p.c. which is precautions – discussed what to do if she went into labor.

24:10-25:12 No particular form for VBAC until 2000; No recollection of specific conversation with Peggy re VBAC; routinely discusses risk complications of any surgery or VBAC with patients. Standard for him; patient requested VBAC. No other

notations re: conversation.

31:25-33:25 Risks discussed with Peggy – hard to remember, but sure that he did; considered the risks to be less than 1% of uterine rupture; no notes that risk was higher than normal; normal is less than 1%; **LAMSON OBJECTS TO FORM OF QUESTION AS VAGUE AND INDEFINITE**; Taylor believes risk is normal for a VBAC – higher than a non-VBAC.

34:1 -18 Peggy was adamant about vaginal delivery – she wanted a trial of labor to deliver normally; believes this because "Most women do." Can't say specifically. No special planning done for Peggy re: delivery.

37:8-21 Discussion with Peggy about doing induction of labor. Notes would be under labor precautions; Recollection of game plan of what is usual and customary to discuss with patients as a routine.

38:17-23 Decided on 9/11 to proceed with induction and made arrangements with hospital.

VBAC Risks

25:13-26:18 Risks – less than 1% of uterine rupture; not progressing in labor; 2nd C-section with a first time VBAC – for Peggy is about the same as someone who is having a first-time delivery; risk of bleeding because of weak spot in uterus; most significant risk is uterine rupture or placental abruption due to old scar – can open and create placental abnormalities and oxygenation to the infant – depending on where rupture is and tolerability of infant to the assault; variable – no way to say if it will or will not happen. Risk of death to infant or mother; same as any pregnancy.

28:4-14 Risks of VBAC with macrosomic infant – may not fit out; cephalopelvic disproportion; some still successful at vaginal deliveries; guidelines did not say it should not be done, depending on size of infant.

Mom/Fetal Weight

26:19-28:3 Ultrasound 2 weeks prior to due date showed a little over 7 lbs. – not a macrosomic infant 2 weeks prior to delivery; Notes in ultrasound – LGA – large for gestational age; that was reason for the ultrasound to determine if infant too large; coded for insurance; macrosomic means infants greater than 4500 grams ; 4000 grams is 8 lbs 8 oz.

28:15 -25 Blake was 8 lbs 4 oz at delivery. 4,000 grams is considered to be in area of macrosomia, but 72% who are 4,000 – 4,500 grams still deliver vaginally.

29:1-16 Weight of Mother not an issue in ACOG guidelines in 1996, but some suggestions

now that an elevated BMI make it less desirable because of fat dystocia – more difficult for mom to get legs apart sufficiently or labia apart sufficiently.

Time Factors RE: C-Section; Hospital Liability Factors

30:22-31:21 ACOG guideline in 1996 was from decision to incision – 30 minutes. No recommendations about physicians being present during labor; no physician present with Peggy during labor; hospital had anesthesia and staff available for emergency C-Section; hospital sufficient to monitor the infant.

63:11-18 Dr. Lucas not on call for deliveries on 9/16/96 – nobody else otherwise on call, but that's why he called in and asked if anyone in-house; no one available. Made that notation in hospital records. Significant from standpoint that no other easier option to get things done faster than what he did. If infant has fetal distress, try to do delivery, if necessary.

ON CROSS EXAM BY CHRISTENSEN

65:1- Based on review of records, believe nurses followed his orders re: administration of Pitocin.

Pitocin

39:8-20 Pitocin causes uterine contractions, works in the pituitary. One other choice besides Pitocin – Cytotec which is shown today to not be a good choice.

42:19-43:12 Normal course of Pitocin varies with receptibility of patient. No timing standard – depends on the patient and how they respond to the medication. Usually start out with a low dose and gradually increase until contractions become rhythmic.

43:13-44:1; 54:4-12 Dangers of Pitocin are hyperstimulation/prolonged contraction. Can also cause ADH effect, antidiuretic effect – patient retains water – so often decrease amount of fluids given to patient depending on how much is going on so she doesn't become water intoxicated.

44:2-45:1 Prolonged contraction – lasting more than a minute and a half to two minutes. Sometimes last 3-4 minutes. Average contractions are usually 60 seconds, maybe 90. Danger of a prolonged contraction: if contraction strong enough, will cut off the cord supply blood wise to the infant and can cause fetal distress where you have a decreased fetal heart rate. That why use fetal monitor when using Pitocin.

52:20-22 Pitocin done systematically. Start at low dose and increase every 15-30 minutes depending on results.

53:16-24 How long proceed with Pitocin – **LAMSON OBJECTION – VAGUE AND INDEFINITE** -Generally proceed with Pitocin by inducing during the day and into evening, stop, rest them, start again the next day – depends on need for delivery.

Fetal Monitoring Strips

41:20-42:10 Fetal monitor assesses fetal heart rate of infant and contractions of patient. Kept by hospital in the records. St. E's does not have them in the record. No idea what happened to them.

Nurse Responsibilities

51:5-16 Responsibilities of nurses – **LAMSON OBJECTS TO FORM AND LACK OF FOUNDATION** – to assist patient with their needs, start IV, place the monitor, check blood pressure, pulse, monitor the fetal monitor, report any changes.

SAMPLE – Scheduling Conference Packet

United States District Court

District of Nebraska

Example of Scheduling Conference Packet from Federal Court

LYLE E. STROM
United States District Judge

Roman L. Hruska U.S. Courthouse TEL: (402) 661-7320
Suite 3190
111 South 18th Plaza FAX: (402) 661-7318
Omaha, Nebraska 68102-1322

September 3, 2010

RE: 8:10cv306,
Jeffrey L. Wilhite v. Union Pacific Railroad Company

Dear Counsel and Persons Appearing Without Counsel:

This case has been assigned to magistrate judge Thomas D. Thalken and the undersigned District Judge. The undersigned judge will handle all preliminary pretrial matters, dispositive motions, i.e., motions to dismiss and motions for summary judgment. If the parties consent to trial before a magistrate judge, all motions will be handled by the magistrate judge.

The Federal Practice Committee in the Spring of 2000 held a conference open to all members of the Nebraska Federal Bar Association. The purpose of the conference was to obtain suggestions to aid the court in expediting the progression of civil cases. Counsel recommended early, active judicial involvement. With the advent of amendments to the Federal Rules of Civil Procedure which took effect December 1, 2000, the court has implemented a number of these suggestions.

Meet and Confer Obligations

The Federal Rules of Civil Procedure require the parties to meet and confer and provide to the court a report of their conference. Plaintiff should initiate the scheduling of this conference. If the parties are agreeable, the conference can occur by telephone.

The court expects the parties to electronically file a detailed report which includes , among other matters, the following subjects: (1) a statement of the elements of each claim and defense raised; (2) statement of how each party's disclosure will relate to the claim/defense raised by that party; (3) whether summary judgment motions may be appropriate, and, if so, what discovery must first take place; (4) whether the parties consent to disposition by a magistrate judge.

Initial Progression Order and Status Conference

Relying upon the report provided by counsel, the judge will enter an **initial** progression order which will set deadlines for initial disclosures and authorize the commencement of discovery. Approximately ninety days into the case, a status conference will be held. Counsel will be required to participate, in person or by telephone. The initial progression order will contain a setting of this status conference. The status conference will be held by the judge.

At the status conference, the court will ensure that the initial disclosure requirements have been met. The parties will be expected to have named all known lay witnesses and identified expert witnesses, even though disclosure of full reports may not yet have occurred. The court will rule on any outstanding discovery disputes. The parties will be expected to discuss and schedule the disclosure of expert witness reports and summary judgment motions. The court will explore the possibilities for mediation. The parties will be expected to have discussed settlement with their clients and obtained authority in advance of the status conference. A final progression order will be established. Finally, the case will be scheduled for trial for a week certain before the assigned district judge or magistrate judge. Based upon the trial schedule, a final pretrial conference date will be set, as well as a date for the formal close of all discovery.

Consent Trials

Special trial settings before this Court are available.

A consent form is enclosed for your review. A consent to trial by a magistrate judge cannot be initiated by motion. Rather, all parties must sign the consent form and submit it to the chambers of the assigned district court judge. Upon the filing of the consent form, counsel will be contacted by the chambers of the magistrate judge regarding scheduling and establishing a special setting for trial. It is the court's experience that cases are most expeditiously handled when the issue of consent is considered early on in the scheduling of the case in order to provide the parties with a greater option of trial scheduling dates.

Deadline for Report to the Court

Please review the enclosed form. It provides an agenda for the parties' initial conference. **I expect the completed form to be electronically filed on or before October 12, 2010**.

Thank you for your prompt attention to this matter.

Sincerely,

s/ Lyle E. Strom

LYLE E. STROM
United States District Judge

Enclosures

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Plaintiff(s),	)	**8:10CV**
v.	)	
	)	**REPORT OF PARTIES' PLANNING CONFERENCE**
Defendant(s).	)	

Counsel for the parties met on _____in person/by telephone. Representing plaintiff(s) was/were _____; representing defendant(s) was/were _____. The parties discussed the case and jointly (except as noted below) make the following report:

1. The elements of the plaintiff's claims and the elements disputed by defendant are as follows:

a. Jurisdiction

b. Venue

NOTE: If either jurisdiction or venue is being challenged, state whether counsel wish to delay proceeding with the initial phases of discovery until those issues have been decided, and if so, (i) how soon a motion to dismiss or transfer will be filed, and (ii) what, if any, initial discovery, limited to that issue, will be necessary to resolve the motion. _____

_____

_____

c. CLAIM I: _____

Elements of Claim I: (list and number all substantive elements):

_____

_____

_____

_____

_____

Of those elements, defendant disputes the following elements: _____

_____.

d. CLAIM II: _____

Elements of Claim II: (list all substantive elements):

_____

_____

_____

_____

_____

Of these elements, defendant disputes the following elements: _____

_____.

2. The elements of the defenses raised by the pleadings are:

a. FIRST DEFENSE: _____

Elements (again, by number):

_____

_____

_____

_____

Of these elements, plaintiff disputes the following elements: _____

_____.

b. SECOND DEFENSE: _____

Elements:

_____

_____

Of these elements, plaintiff disputes the following elements: _____

_____.

3. Of the *disputed* elements identified above by all parties, discovery will be necessary to resolve the following elements: _____.

4. The plaintiff ___ does ___ does not anticipate a need to amend pleadings or add parties; if necessary, plaintiff can file the necessary motions to add parties or amend pleadings by: _____. If more than ninety days, the reasons that much time is necessary are: _____.

5. The defendant ___ does ___ does not anticipate a need to amend pleadings or add parties; if necessary, defendant can file the necessary motions to add parties or amend pleadings by: _____. If more than ninety days, the reasons that much time is necessary are: _____.

6. The parties submit that the following elements of the pending claims or defenses may be appropriate for disposition by summary judgment or partial summary judgment: _____; and state that the discovery necessary to determine whether to file summary judgment motions on such element(s) can be completed by _____.

7. The parties submit the following plan for their completion of discovery:

a. Disclosures required by Rule 26(a)(1), including a statement of how each matter disclosed relates to the elements of the *disclosing party's* claims or defenses, ___ have been completed; ___ will be completed by _____.

b. _____ Is the maximum number of interrogatories, including subparts, that may be served by any party on any other party.

c. _____ Is the maximum number of depositions that may be taken by plaintiffs as a group and defendants as a group.

d. Depositions shall be limited by Rule 30(d)(2) *except* the depositions of _____ _____, which by agreement are limited as follows: _____.

e. All parties will *identify* experts (i.e., ***with* full** reports required by Rule 26(a)(2), by _____.

8. ____ a. The parties request that this case be referred immediately for mediation in accordance with the court's Mediation Plan as amended October 1, 2000, to the following mediator from the court's list of approved mediators: _____.

___ b. The parties state that they intend to hire their own mediator or neutral person for mediation or negotiation, and request that the court stay further progression of this case for _____ days to accommodate their efforts to settle now.

___ c. The parties state that this case will not be settled, and the court should not plan or schedule settlement conferences, mediation or other alternative dispute resolution techniques.

___ d. The parties submit that the minimum discovery necessary for counsel to negotiate toward settlement is: _____ _____ _____, and state that it will be completed by _____. The parties anticipate the court will contact them at that time to further explore settlement.

9. The parties ___ do ___ do not consent to trial by a magistrate judge. If the parties consent to trial by a magistrate judge, enclose the executed consent.

10. The parties now anticipate that the case can be ready for trial in _____, 200_. If more than eight months are required, state the special problems or circumstances that necessitate that much time for trial preparation are: _____
_____
_____
_____.

11. It now appears to counsel that the trial of this case, if necessary, will require ___ trial days.

12. Other matters to which the parties stipulate and/or which the court should know/consider:

_____
_____
_____
_____

_____ _____
Counsel for Plaintiff Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

_____, Plaintiff	)	Case Number: __:___CV_____
v.	)	**CONSENT TO EXERCISE OF JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE AND ORDER OF REFERENCE**
_____, Defendant	)	

CONSENT TO EXERCISE OF JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE

In accordance with the provisions of 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73, the parties in this case hereby voluntarily consent to have a United States magistrate judge conduct any and all further proceedings in the case, including the trial, and order the entry of a final judgment. Any appeal shall be taken to the United States court of appeals for this circuit.

Signature of Attorney or Party	**Name of Party**	**Date**
_____	For_____	_____
_____	For_____	_____
_____	For_____	_____
_____	For_____	_____
_____	For_____	_____

ORDER OF REFERENCE

IT IS HEREBY ORDERED that this case be referred to the Honorable _____, United States Magistrate Judge, for all further proceedings and the entry of judgment in accordance with 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and the foregoing consent of the parties.

_____ _____
Date United States District Judge

NOTE: RETURN THIS FORM TO THE CLERK OF THE COURT **ONLY IF** ALL PARTIES HAVE CONSENTED **ON THIS FORM** TO THE EXERCISE OF JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE.

SAMPLE – Report of Parties' Rule 26(f) Planning Conference

Example of Report of Parties' Rule 26(f) Planning Conference

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JEFFREY L. WILHITE, Plaintiff, vs. UNION PACIFIC RAILROAD COMPANY, Defendant.	)))))))))	CASE NO. 8:10-CV-306 REPORT OF PARTIES' RULE 26(f) PLANNING CONFERENCE

Counsel for the parties met on September 10, 2010 by telephone. Representing the plaintiff was John Inserra; representing defendant was David J. Schmitt. The parties discussed the case and jointly (except as noted below) make the following report:

1. The elements of the plaintiff's claims and the elements disputed by defendant are as follows:

a. Jurisdiction. The defendant does not contest jurisdiction.

b. Venue. The defendant does not contest venue.

c. CLAIM I: Negligence under FELA.

Elements of Claim I: Plaintiff alleges that on January 24, 2008 he was working as a Clerk when the file drawer broke, causing him injury. Plaintiff alleges defendant was negligent under FELA in failing to provide a reasonably safe place to work, reasonably safe and proper equipment, reasonably safe customs and practices, and sufficient personnel and aid to do the work.

Of these elements, defendant disputes the following numbered elements:

Defendant disputes all of the foregoing.

2. The elements of the defenses raised by the pleadings are:

a. FIRST DEFENSE: Plaintiff's negligence was the sole cause or contributing cause of his alleged injuries and damages.

Elements: Plaintiff's own carelessness caused the accident and it was not due to any careless action or inaction of defendant as plaintiff may have failed to properly use tools and equipment, follow safe and proper methods and procedures, and follow proper training and instruction.

Of these elements, plaintiff disputes the following elements: Plaintiff disputes all of the foregoing.

b. SECOND DEFENSE: Plaintiff failed to mitigate his alleged damages.

Elements: Plaintiff failed to take action to resume gainful employment as soon as he reasonably could given his medical condition in order to reduce his lost wage claim, and may have failed to comply with recommendations of health care providers delaying his recovery.

Of these elements, plaintiff disputes the following elements: Plaintiff disputes all of the foregoing.

c. THIRD DEFENSE: Plaintiff's alleged injuries were pre-existing or caused by other conditions.

Elements: Pre-existing conditions or other medical conditions or events affected plaintiff's condition and defendant is not responsible for the same.

Of these elements, plaintiff disputes the following elements: Plaintiff disputes all of the foregoing.

d. FOURTH DEFENSE: Defendant is entitled to a setoff for certain benefits.

Elements: Plaintiff has received certain RRB or other benefits which may act to reduce any award as certain benefits are a setoff to any award under FELA.

Of these elements, plaintiff disputes the following elements: Plaintiff disputes all of the foregoing.

3. Of the *disputed* elements identified above by all parties, discovery will be necessary to resolve the following elements: All.

4. The plaintiff does not anticipate a need to amend pleadings or add parties; if necessary, plaintiff can file the necessary motions to add parties or amend pleadings by: December 31, 2010.

5. The defendant does not anticipate a need to amend pleadings or add parties; if necessary, defendant can file the necessary motions to add parties or amend pleadings by: December 31, 2010.

6. The parties submit that the following elements of the pending claims or defenses may be appropriate for disposition by summary judgment or partial summary judgment: The parties currently do not anticipate claims and/or defenses will be appropriate for disposition by summary judgment or partial summary judgment.

7. The parties submit the following plan for their completion of discovery:

a. Disclosures required by Rule 26(a)(1), including a statement of how each matter disclosed relates to the elements of the *disclosing party's* claims or defenses, will be completed by October 31, 2010.

b. 50 is the maximum number of interrogatories, including subparts that may be served by any party on any other party.

c. 10 is the maximum number of depositions that may be taken by plaintiff as a group and defendants as a group.

d. Depositions shall be limited by Rule 30(d)(2).

e. All parties will *identify* experts (i.e., **with full** reports required by Rule 26(a)(2) by May 31, 2011.

8. d. The parties submit that the minimum discovery necessary for counsel to negotiate toward settlement is deposition of plaintiff Jeffrey Wilhite and Mrs. Wilhite; depositions of witnesses to the incident and possible depositions of plaintiff's immediate managers or supervisors; obtaining all of the plaintiff's medical records; deposing one or more treating health care providers depending on the nature and extent of their opinions in their medical records, and state that it will be completed by February 28, 2011.

9. The parties do not consent to trial by a magistrate judge.

10. The parties now anticipate that the case can be ready for trial in September 30, 2011. If more than eight months are required, state the special problems or circumstances that necessitate that much time for trial preparation are: plaintiff claims significant medical injuries to numerous parts of his body, including his low back which required surgery, neck, shoulders, legs, depression, bowel dysfunction, sexual dysfunction, and incontinence. The plaintiff was awarded a total disability by the Railroad Retirement Board and is claiming significant damages in this litigation. Multiple medical, liability, economic and damages expert witnesses will be necessary in the litigation and it will require sufficient time to complete all of the necessary depositions and be prepared for trial.

11. It now appears to counsel that the trial of this case, if necessary, will require 5 trial days.

12. Other matters to which the parties stipulate and/or which the court should know/consider.

/s/ John Inserra
John Inserra #15084
Inserra & Kelley
6790 Grover Street, Suite 200
Omaha, NE 68106-3612
402-391-4000 = telephone
402-391-4039 = facsimile

/s/ David J. Schmitt
David J. Schmitt #19123
Lamson, Dugan and Murray, LLP
10306 Regency Parkway Drive
Omaha, NE 68114
402-397-7300 = telephone
402-397-7824 = facsimile

SAMPLE – Order for Scheduling Conference

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEBRASKA

Example of Order for Scheduling Conference issued by the Federal Court

JEFFREY L. WILHITE	)	8:10CV306
	)	
Plaintiff,	)	
	)	ORDER
vs.	)	
	)	
UNION PACIFIC RAILROAD COMPANY, A Corporation,	)	
	)	
Defendant.	)	

This matter is before the Court after receipt of the report of parties' planning conference (Filing No. 9).

IT IS ORDERED that a scheduling conference with the undersigned will be held on:

Wednesday, October 13, 2010, at 8:15 a.m.

in Suite 3190, Roman L. Hruska U.S. Courthouse, 111 South 18th Plaza, **OMAHA**, Nebraska, to establish a final progression order for this case. The parties may participate by telephone by notifying Judge Strom's office prior to said date.

DATED this 14th day of September, 2010.

BY THE COURT:

/S/ Lyle E. Strom

LYLE E. STROM, Senior Judge
United States District Court

SAMPLE – Medical Records Subpoena

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

DONALD R. DAVIS, **Plaintiff,** **vs.** **UNION PACIFIC RAILROAD COMPANY, A Corporation,** **Defendant.**	)	**DOC. 1092 NO. 291** **RULE 6-334(A) RECORDS SUBPOENA**

TO: Dr. Devin Fox and any other providers of medical treatment, Union Pacific Railway Hospital Association, 1416 Dodge Street, Omaha, NE 68179

Pursuant to the authority granted in § 25-1273 R.R.S. Nebraska and Neb. Ct. R. Disc. § 334(A), YOU ARE HEREBY COMMANDED to appear before a representative of Inserra & Kelley, 6790 Grover Street, Suite 200, Omaha, NE 68106-3612, a law firm within the State of Nebraska, on or before **January 27, 2010, at 9:00 a.m.**, in the above-entitled action.

YOU ARE FURTHER COMMANDED to have and bring with you, or mail, the following records in your possession including, but not limited to:

All records in your possession relating to the care and treatment of **DONALD R. DAVIS; SSN: 508-64-6870; DOB: 07/11/1949 ,** comprising true, correct, and complete copies of any and all medical records of any kind including, but not limited to, medical reports, consultation reports, doctors' notes, history and physical, operative reports, nurses' notes, correspondence, x-ray and other diagnostic reports or films, itemized statements or other billing records, and any and all documentary material of any kind.

IN LIEU OF A PERSONAL APPEARANCE, YOU MAY DELIVER/MAIL A CLEAR AND FULLY LEGIBLE COPY OF THESE RECORDS, PRIOR TO **JANUARY 25, 2010** TO:

Christina L. Koch, ACP, Paralegal
Inserra & Kelley
6790 Grover Street, Suite 200
Omaha, NE 68106-3612

A copy of Neb. Ct. R. Disc. § 6-334(A) is attached to this subpoena in compliance with Neb. Ct. R. Disc. § 6-334(A)(3). Pursuant to Neb. Ct. R. Disc. § 6-334(A), a notice of the serving of this subpoena was either sent to the following or notice was waived by:

· Attorney for Defendant: Anne Marie O'Brien, LAMSON, DUGAN & MURRAY, LLP, 10306 Regency Parkway Drive, Omaha, NE 68114

I HAVE HEREBY ISSUED THIS SUBPOENA PURSUANT TO THE AUTHORITY GRANTED IN § 25-1273 R.R.S. NEBRASKA ON THIS _____ DAY OF JANUARY, 2010. HEREOF FAIL NOT UNDER PENALTY OF THE LAW.

DATED on this _____ day of January, 2010.

By:_____

John P. Inserra, #15084
INSERRA & KELLEY
6790 Grover Street, Suite 200
Omaha, Nebraska 68106-3612
(402) 391-4000
(402) 391-4039 (Fax)
Attorneys for Plaintiff
jpinserra@inserra.com

***Refer any inquiries to Christina L. Koch, ACP, Advanced Certified Paralegal, Inserra & Kelley, 6790 Grover Street, Suite 200, Omaha, NE 68106-3612; Phone (402) 391-4000; Fax (402) 391-4039

§ 6-334(A). Discovery from a nonparty without a deposition.

(a) Procedure.

(1) Scope. Any party may, by subpoena without a deposition:

(A) require the production for inspection, copying, testing, or sampling of designated books, papers, documents, tangible things, or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, and other data compilations from which information can be obtained) translated if necessary by the owner or custodian into reasonably usable form, that are in the possession, custody, or control of a person who is not a party and within the scope of Rule 26(b); or

(B) obtain entry upon designated land or other property within the scope of Rule 26(b) that is in the possession or control of a person who is not a party for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon.

(2) Notice. A party intending to serve a subpoena pursuant to this rule shall give notice in writing to every other party to the action at least 10 days before the subpoena will be issued. The notice shall state the name and address of the person who will be subpoenaed, the time and place for production or entry, and that the subpoena will be issued on or after a stated date. A designation of the materials sought to be produced shall be attached to or included in the notice.

Such notice may be given by a party other than a plaintiff at any time. Such notice may not be given by a plaintiff until the time at which Rule 30(a) would permit a plaintiff to take a deposition.

(3) Issuance. A subpoena may be issued pursuant to this rule, either by a request to the clerk of the court or by an attorney authorized to do so by statute, at any time after all parties have been given the notice required by subsection (2). The subpoena shall identify all parties who were given notice that it would be issued and the date upon which each of them was given notice. A subpoena pursuant to this rule shall include or be accompanied by a copy of this rule.

(4) Time, manner, and return of service. A subpoena pursuant to this rule shall be served either personally by any person not interested in the action or by registered or certified mail not less than 10 days before the time specified for compliance. The person making personal service shall make a return showing the manner of service to the party for whom the subpoena was issued.

(b) Protection of Other Parties.

(1) Objection Before Issued. Before the subpoena is requested or issued any party may serve a written objection on the party who gave notice that it would be issued. The objection shall specifically identify any intended production or entry that is protected by an applicable privilege, that is not within the scope ofdiscovery, or that would be unreasonably intrusive or oppressive to the party. No subpoena shall demand production of any material or entry upon any premises identified in the objection. If the objection specifically objects that the person served with the subpoena should not have the option to deliver or mail copies of documents or things directly to a party, the subpoena shall not be issued unless all parties to the lawsuit mutually agree on the method for delivery of the copies.

(2) Order. The party who gave notice that a subpoena would be issued may apply to the court in which the action is pending for an order with respect to any discovery for which another party has served a written objection. Upon hearing after notice to all parties the court may order that the subpoena be issued or not issued or that discovery proceed in a different manner, may enter any protective order authorized by Rule 26(c), and may award expenses as authorized by Rule 37(a)(4).

(3) Protective Order. After a subpoena has been issued any party may move for a protective order under Rule 26(c).

(c) Protection of the Person Served with a Subpoena.

(1) Avoiding Burden and Expense. A party or an attorney who obtains discovery pursuant to this rule shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court by which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings of the person subject to the subpoena and reasonable attorney fees.

(2) Responding to the Subpoena.

(A) A person served with a subpoena pursuant to this rule shall permit inspection, copying, testing, or sampling either where the documents or tangible things are regularly kept or at some other reasonable place designated by that

person. If the subpoena states that the person served has an option to deliver or mail legible copies of documents or things instead of inspection, that person may condition the preparation of the copies on the advance payment of the reasonable cost of copying.

(B) A person served with a subpoena pursuant to this rule may, within 10 days after service of the subpoena, serve upon the party for whom the subpoena was issued a written objection to production of any or all of the designated materials or entry upon the premises. If objection is made, the party for whom the subpoena was issued shall not be entitled to production of the materials or entry upon premises except pursuant to an order of the court. If an objection has been made, the party for whom the subpoena was issued may, upon notice to all other parties and the person served with the subpoena, move at any time in the district court in the county in which the subpoena is served for an order to compel compliance with the subpoena. Such an order to compel production or to permit entry shall protect any person who is not a party or an officer of a party from significant expense resulting from complying with the command.

(3) Protections. On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

(A) fails to allow reasonable time for compliance,

(B) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(C) subjects a person to undue burden.

(d) Duties in Responding to Subpoena.

(1) Production. A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) Objection. When information subject to a subpoena is withheld on an objection that it is privileged, not within the scope of discovery, or otherwise protected from discovery, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is

sufficient to enable the party who requested the subpoena to contest the objection.

(e) Coordination.

(1) Copies. If the party for whom the subpoena was issued creates or obtains copies of documents or things, that party shall make available a duplicate of such copies at the request of any other party upon advance payment of the reasonable cost of making the copies.

(2) Inspection. If a notice of intent to serve a subpoena designates that the subpoena will require entry upon land or other property for the purposes permitted by subsection (a)(1)(B), any other party shall, upon request to the party who gave the notice, be named in the subpoena as also attending at the same time and place.

COMMENT TO RULE 34A

Authority to issue a subpoena pursuant to this rule is governed by Neb. Rev. Stat. § 25-1273. The procedure is similar to the practice for nonparty nondeposition discovery under Fed. R. Civ. P. 45, with certain topics such as the time of prior notice and coordination of the disclosure more specifically defined. This procedure is optional, so a party may elect to use a deposition or any other available discovery procedure instead.

Rule 34A and Comment adopted December 12, 2001; Rule 34A(c)(2)(B) amended May 19, 2004; Rule 34A(a)(1)(A), 34A(a)(2), 34A(b)(1), 34A(c)(2)(A-B) amended June 4, 2008, effective June 18, 2008. Renumbered and codified as § 6-334(A), effective July 18, 2008.

SAMPLE – FOIA Principle Contacts Listing

SEARCH
FOIA All DOJ
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READING ROOMS
REFERENCE GUIDE
DEPARTMENT COMPONENTS
DOJ COMPONENTS' FOIA SERVICE CENTERS/LIAISONS
PRINCIPAL FOIA CONTACTS AT FEDERAL AGENCIES
FOIA PUBLIC LIAISONS AT FEDERAL AGENCIES
OTHER FEDERAL AGENCIES' FOIA WEB SITES
ANNUAL FOIA REPORTS
CHIEF FOIA OFFICER REPORTS
FOIA POST
FOIA REFERENCE MATERIALS
AGENCY CHIEF FOIA OFFICERS
OIP HOME
DOJ HOME

E-mail updates

Principal FOIA Contacts at Federal Agencies

The Department of Justice's Office of Information Policy (OIP) is the principal contact point within the executive branch for advice and policy guidance on matters pertaining to the administration of the Freedom of Information Act. Through OIP's FOIA Counselor service, experienced FOIA advisers are available to respond to FOIA-related inquiries at (202) 514-3642 (514-FOIA). For inter-agency contact purposes, the following list contains the principal FOIA contacts at all federal agencies dealing regularly with FOIA matters. In some instances (e.g., the Department of Defense), all major agency components are listed individually under the agencies. In other instances (e.g., the Food and Drug Administration), major agency components are listed separately. In still other instances (e.g., the Department of Labor), no components are listed, as it is the agency's preference that all FOIA contacts be made through its main FOIA office. Fax numbers and e-mail addresses are provided as a matter of agency preference as well. All telephone and fax numbers are listed by local area code, which can be dialed in the federal long distance system. OIP should be notified whenever there is a change in a principal agency FOIA contact or any change in title, telephone or fax number, or address.

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SAMPLE – FOIA Request Tips & Tricks

Making the FOIA Work for You

1) Do your **RESEARCH** before you file a FOIA request.

- A FOIA request should be a research tool of last resort; it can take a long time to obtain records and can be costly.
- Ascertain whether the documents you are seeking already are publicly available. Review agency websites, including their online FOIA reading rooms. For documents dated prior to the mid-1970's, contact the National Archives and keep in mind that Congress is a natural source for material on public policy. If you are associated with a research organization such as a university, that subscribes to electronic research databases, search for journals that reference pertinent documents, or databases that store declassified documents such as http://nsarchive.chadwyck.com/. Finally, contact public interest groups or other organizations that have interest in your topic. There are a number of sources for already declassified federal government records.
- Doing your research first will inform you as to the key events and key decision-makers on your topic, help you pinpoint documents and agencies in your requests, and keep you from requesting material extraneous to your interest.

2) **WRITE** your request clearly; and be specific.

- Overly broad requests are wasteful in time (yours, and the government's) and resources (yours, and the government's). Please keep in mind that agencies only are required to search for documents under the FOIA, not create them. You cannot ask an agency to do your research for you. Only if you are fairly certain that a government agency will have documents should you send a FOIA request.
- Be specific: assume the FOIA officer is not familiar with your topic. As many agencies perform computerized searches for documents, use key words and phrases. For example, an agency may not be able to search "escalation of tension," but be able to search "military assistance." Also, provide accurate titles and dates, full names, and pertinent news stories discussing the subject of your request. In other words, assist the person in doing the search by providing key items of information.
- Keep your request brief, avoiding narratives, as they likely will confuse the FOIA Officer. Don't write two-page supporting essays for your request, as they will only create confusion for the FOIA Officer.
- To see sample FOIA requests click here.

3) **TARGET** your request.

- In addition to researching your topic, research the government to find out where to send the request.
- Send your request to the agency most likely to hold the records. While the Department of State and the CIA have one centralized FOIA office, the military branches have individual FOIA offices in each component. The FBI, among others, maintains records at headquarters and in field offices. Contacting the main agency FOIA office to determine the location of records can save delays in your responses; at a minimum, they may agree to forward your request to the correct location. Also review the agency's FOIA reference guide and handbook on its website for information on how to target your request.
- It is worth your time to find out exactly which components of agencies maintain the documents you are requesting. It will save time (weeks, months or even years) in referrals.

4) Establish and maintain **CONTACT** with the agency.

- Agency response letters often identify a point-of-contact or case officer for your FOIA request. If not, after a reasonable period of time, call and check on the status of your request and identify the case officer. Your effort will indicate to the FOIA officer your continued interest in the request. The FOIA officer can then advise you of estimated fees; can seek clarification of your request; can advise you of delays; and can advise you if extraneous material is located.
- Don't harass your FOIA officer with too many calls or letters. Yours is not the only case the agency has received. Also, consider that at some agencies program (or policy) officers may also handle FOIA requests, and your request is just one of many tasks they must undertake.
- Note all substantive telephone contacts in addition to the agency correspondence you receive.

5) Stay **ADMINISTRATIVELY** accurate. Understand the FOIA Statutes.

- Carefully follow the agency's own FOIA regulations and instructions in correspondence. For example, while only some agencies may require you to submit their denial letters with your appeal, it is helpful to include them anyway. Lack of correspondence may at best delay their response, and at worst allow them to not consider an appeal. Also, as requests can become complex and documentation voluminous, it is helpful to create a filing or tracking system for your own use.
- Timeframes. You cannot appeal an agency's lack of initial response until the agency has had 20 business days to respond. Also, agencies may, at their discretion, accept your appeal for a denial of documents beyond their appeal period. Finally, the agency has 20 business days to decide your appeal before you may file a complaint in federal court.

6) **DELAYS** in processing requests, while frustrating, can be expected.

- Delays in processing FOIA requests occur at many agencies, and are endemic at a handful of agencies. Most agency delays are short, perhaps only a week or two. However, agencies that handle national security information have delays ranging from a few months to several years. These agencies maintain heavy backlogs due primarily to the time-and-resource consuming review of classified material. Additionally, the number of classified documents increased dramatically in the 1980's. Also, in some instances, various agencies can have input into a single classified document. Delays are exacerbated by the fact that, for most agencies, FOIA is not an agency priority -- budget or otherwise -- meaning delays will continue to plague the system.

7) Be **REASONABLE**.

- Consider the FOIA officer receiving your request. A well-written request, helpful contact, and a non-confrontational manner on your end will only aid the processing of your request. The FOIA officer is often faced with bureaucratic or ideological intransigence within his or her own agency. Pestering your FOIA contact at an agency may mean jeopardizing a helpful source of information.
- Don't send frivolous letters or file pointless appeals; they will delay processing of yours - and others' - requests. Contact with the FOIA officer will help you ascertain what is a useful exercise.

SAMPLE – FOIA Request

Agency Head [or Freedom of Information Act Officer]
Name of Agency
Address of Agency
City, State, Zip Code

Re: Freedom of Information Act Request

Dear _____:

This is a request under the Freedom of Information Act.

I request that a copy of the following documents [or documents containing the following information] be provided to me:
[identify the documents or information as specifically as possible.]

In order to help to determine my status to assess fees, you should know that I am **[insert a suitable description of the requester and the purpose of the request.]**

[Sample requester descriptions:

a representative of the news media affiliated with the _____ newspaper (magazine, television station, etc.), and this request is made as part of a news gathering and not for commercial use.

affiliated with an educational or noncommercial scientific institution, and this request is made for a scholarly or scientific purpose and not for commercial use.

an individual seeking information for personal use and not for commercial use.

affiliated with a private corporation and am seeking information for use in the company's business.]

[Optional] I am willing to pay fees for this request up to a maximum of $____. If you estimate that the fees will exceed this limit, please inform me first.

[Optional] I request a waiver of all fees for this request. Disclosure of the requested information to me is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in my commercial interest. **[Include a specific explanation.]**

Thank you for your consideration of my request.

Sincerely,

Name Address City, State, Zip Code Telephone Number **[Optional]**

SAMPLE – FOIA Appeal Letter

Agency Head or Appeal Officer
Name of Agency
Address of Agency
City, State, Zip Code

Re: Freedom of Information Act Appeal

Dear _____:

This is an appeal under the Freedom of Information Act.

On **[date]**, I requested documents under the Freedom of Information Act. My request was assigned the following identification number:_____. On **[date]**, I received a response to my request in a letter signed by**[name of official]**. I appeal the denial of my request.

[Optional] The documents that were withheld must be disclosed under the FOIA because....

[Optional] I appeal the decision to deny my request for a waiver of fees. I believe that I am entitled to a waiver of fees. Disclosure of the documents I requested is in the public interest because the information is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in my commercial interest. **[Provide details]**

[Optional] I appeal the decision to require me to pay review costs for this request. I am not seeking the documents for commercial use. **[Provide details]**

[Optional] I appeal the decision to require me to pay search charges for this request. I am a reporter seeking information as part of a news gathering and not for commercial use.

Thank you for your consideration of this appeal.

Sincerely,

Name
Address
City, State, Zip Code
Telephone Number [Optional]

SAMPLE – Spoliation Rules Listing

SPOLIATION OF EVIDENCE IN ALL 50 STATES

LAST UPDATED 4/2/2008

In 1984, California was the first state to recognize the tort of spoliation. See *Smith v. Superior Ct.*, 151 Cal.App.3d 491, 198, Cal.Rptr. 829, 831 (Cal. 1984). However, the majority of jurisdictions that have subsequently examined the issue have declined to create or recognize such a tort. Only Alabama, Alaska, Florida, Indiana, Kansas, Louisiana, Montana, New Mexico, Ohio, and West Virginia have explicitly recognized some form of an independent tort action for spoliation. California overruled its precedent, and declined to recognize first-party or third-party claims for spoliation. See *Temple Cmty. Hosp. v. Superior Ct.*, 20 Cal.4th 464, 84 Cal.Rptr.2d 852, 976 P.2d 223, 233 (Cal. 1999); *Cedars-Sinai Med. Center v. Superior Ct.*, 18 Cal.4th 1, 74 Cal.Rptr.2d 248, 954 P.2d 511, 521 (Cal. 1998).

Generally those states that have recognized or created the tort of spoliation in some form, limit such an action to third-party spoliation of evidence related to pending or actual litigation. First-party spoliation claims are those claims for destruction or alteration of evidence brought against parties to underlying litigation. Conversely, third-party spoliation claims are those destruction or alteration of evidence claims against non-parties to underlying litigation. Moreover, most of these states generally hold that third-party spoliator must have had a duty to preserve the evidence before liability can attach. The majority of states that have examined this issue have preferred to remedy spoliation of evidence and the resulting damage to a party's case or defense, through sanctions or by giving adverse inference instructions to juries.

Sanctions can include the dismissal of claims or defenses, preclusion of evidence, and the granting of summary judgment for the innocent party. The following is a compendium of decisions for the states that have examined the issue of spoliation.

ALABAMA

DEFINITION:

Alabama defines spoliation as: "an attempt by a party to suppress or destroy material evidence favorable to the party's adversary." *May v. Moore*, 424 So.2d 596, 603 (Ala. 1982); *Wal-Mart Stores, Inc. v. Goodman*, 789 So.2d 166, 176 (Ala. 2000).

THIRD-PARTY TORT:

Smith v. Atkinson, 771 So.2d 429, 438 (Ala. 2000), holds that spoliation may be a basis for a cause of action where a third-party has negligently destroyed material evidence, but states that adverse inference instruction and discovery sanctions are the remedy when spoliation is charged against an opposing party. *Smith* established a test to determine when a party could be liable for negligent spoliation of evidence. *Smith*, at 771 So.2d at 432, analyzes the concepts of duty, breach, and proximate cause. With respect to proximate cause, it held: "in order for a plaintiff to show proximate cause, the trier of fact must determine that the lost or destroyed evidence was so important to the plaintiff's claim in the underlying action that without that evidence the claim did not survive or would not have survived a motion for summary judgment under Rule 56, Ala. R. Civ. P." 771 So.2d at 434.

In order for a defendant to show proximate cause, the trier of fact must determine that the lost or destroyed evidence was so important to the defense in the underlying action that without that evidence the defendant had no defense to liability. *Id.*

ADVERSE INFERENCE:

If the trier of fact finds a party guilty of spoliation, it is authorized to presume or infer that the missing evidence reflected unfavorably on the spoliator's interest. *McCleery v. McCleery*, 200 Ala. 4, 75 So. 316 (Ala. 1917). Spoliation "is sufficient foundation for an inference of [the spoliator's] guilt or negligence." *May v. Moore*, 424 So.2d 596, 603 (Ala. 1982); see also *Wal-Mart Stores*, supra, 789 So.2d at 176; *Christian v. Kenneth Chandler Constr. Co*., 658 So.2d 408, 412 (Ala. 1995).

SANCTIONS:

Spoliation can have special consequences, *i.e*., sanction under Rule 37, Ala. R. Civ. P., when a party frustrates a discovery request by willfully discarding critical evidence subject to a production request. *Iverson v. Xpert Tune, Inc.*, 553 So.2d 82 (Ala. 1989). In such a situation, where the plaintiff is guilty of spoliation, the sanction of dismissal of the claim may be warranted. *Iverson*, supra. Dismissal for failure to comply with a request for production may be warranted even when there was no discovery pending or even litigation underway at the time the evidence in question was discarded or destroyed. *Vesta Fire Ins. Corp. v. Milam & Co. Const., Inc.*, 901 So.2d 84, 93 -94 (Ala. 2004).

ALASKA

FIRST-PARTY INTENTIONAL TORT:

In *Hazen v. Anchorage*, 71 P.2d 456 (Alaska 1986), the plaintiff was permitted to allege spoliation against a municipal prosecutor, who was not a party to the underlying civil suit, but was an agent of the municipality (Anchorage). Furthermore, in *Nichols v. State Farm & Cas. Co.*, 6 P.3d 300 (Alaska 2000), the Court implied that spoliation of evidence by a party's agent creates a claim for first-party spoliation. Additionally, the *Hazen* court permitted the plaintiff to bring a claim against the individual police officers involved in her arrest (third-party spoliation).

THIRD-PARTY INTENTIONAL TORT:

In, *Nichols* the Alaska Supreme Court explicitly recognized intentional third-party spoliation of evidence as a tort. These previous holdings were relied on by the Alaska Supreme Court in *Hibbits v. Sides*, 34 P.3d 327 (Alaska 2001). In *Hibbits*, the Court held that when alleging third-party spoliation, a plaintiff must plead and prove that the defendant intended to interfere in his civil suit.

ARIZONA

INDEPENDENT TORT ACTION:

Arizona does not recognize an independent claim for either negligent or intentional spoliation of evidence. *Tobel v. Travelers Ins. Co.*, 988 P.2d 148, 156 (Ariz. App. 1999).

SANCTIONS/ADVERSE INFERENCE:

Generally speaking, innocent failure to preserve evidence does not warrant sanction or dismissal. *Souza v. Fred Carriers Contracts, Inc.*, 955 P.2d 3, 6 (Ariz. App. 1997). However, litigants have a duty to preserve evidence which they know or reasonably should know is relevant or reasonably calculated to lead to the discovery of admissible evidence and is reasonably likely to be requested during discovery or is the subject of a pending discovery request. *Id.*

Issues concerning destruction of evidence and appropriate sanctions therefore should be decided on a case by case basis, considering all relevant factors. *Id.* In doing so, the court noted the destruction of potentially relevant evidence occurs along a continuum of fault and the resulting penalties should vary correspondingly. *Id.* quoting *Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir. 1988).

ARKANSAS

DEFINITION:

In Arkansas, spoliation is defined as "the intentional destruction of evidence and when it is established, [the] fact-finder may draw [an] inference that [the] evidence destroyed was unfavorable to [the] party responsible for its action." *Union Pacific R.R. Co. v. Barber*, 356 Ark. 268, 298, 149 S.W.3d 325, 345 (Ark. 2004).

ADVERSE INFERENCE INSTRUCTION:

Spoliation is the intentional destruction of evidence; when it is established, the fact-finder may draw an inference that the evidence destroyed was unfavorable to the party responsible for its spoliation. *Tomlin v. Wal-Mart Stores, Inc.*, 81 Ark. App. 198, 100 S.W.3d 57 (Ark. 2003). An aggrieved party can request that a jury be instructed to draw a negative inference against the spoliator. *Id.; Superior Federal Bank v. Mackey*, 84 Ark. App. 1, 25-26, 129 S.W.3d 324, 340 (Ark. 2003).

SANCTIONS:

Arkansas rules of civil procedure, professional conduct and criminal code are also available as sanctions both against attorneys and others who engage in spoliation of evidence. *Goff v. Harold Ives Trucking Co., Inc.*, 27 S.W.3d 387, 391 (Ark. 2000).

CALIFORNIA

FIRST-PARTY TORT FOR INTENTIONAL SPOLIATION:

The California Supreme Court has held that there is no tort for "the intentional spoliation of evidence by a party to the cause of action to which the spoliated evidence is relevant [*i.e.*, first-party spoliation], in cases in which ... the spoliation victim knows or should have known of the alleged spoliation before the trial or other decision on the merits of the underlying action." *Cedars-Sinai Med. Ctr. v. Superior Ct.*, 18 Cal.4th 1, 74 Cal.Rptr.2d 248, 258, 954 P.2d 511 (Cal. 1998).

THIRD-PARTY TORT FOR INTENTIONAL SPOLIATION:

The California Supreme Court has also held that there was no cause of action for intentional spoliation of evidence by a third-party. *Temple Cmty. Hosp. v. Sup. Ct.*, 20 Cal.4th 464, 84 Cal.Rptr.2d 852, 862, 976 P.2d 223 (Cal. 1999).

NO TORT OF NEGLIGENT SPOLIATION:

The California Court of Appeal extended these decisions to preclude causes of action for negligent spoliation by first or third parties. See *Forbes v. County of San Bernardino*, 101 Cal.App.4th 48, 123 Cal.Rptr.2d 721, 726-27 (Cal. 2002).

SANCTIONS:

California recognizes the availability of standard non-tort remedies to punish and deter for the destruction of evidence. *Cedars-Sinai Medical Center v. Superior Court*, 954 P.2d 511, 517 (Cal. 1998). The available remedies may include: (1) The evidentiary inference that the evidence which one party has destroyed or rendered unavailable was unfavorable to that party. See California Evidence Code § 413 (evidence which one party has destroyed or rendered unavailable was unfavorable to that party.); (2) Discovery sanctions under California Code of Civil Procedure § 2023; (3) Disciplinary action against the attorneys. See Cal. Rules Prof. Conduct, Rule 5-220 and Cal. Bus. & Prof. Code §§ 6077 and 6106; (4) Criminal penalties for destruction of evidence under California Penal Code § 135 (criminalizes the spoliation of evidence, which creates an effective deterrent against this wrongful conduct).

POST JUDGMENT TORT OF SPOLIATION:

California courts have not addressed the issue whether a tort for intentional spoliation of evidence exists "in cases of first-party spoliation in which the spoliation victim neither knows nor should have known of the spoliation until after a decision on the merits of the underlying action." *Cedars-Sinai Med. Ctr.*, 74 Cal.Rptr.2d at 258 n. 4, 954 P.2d 511 (Cal. 1998). As a consequence, this court must decide this issue as it believes the California Supreme Court would do. *HS Servs., Inc. v. Nationwide Mut. Ins. Co.*, 109 F.3d 642, 644 (9th Cir. 1997).

The Federal District Court in Central California concluded that the California Supreme Court would not recognize an intentional spoliation of evidence tort where the spoliation victim did not know nor should

have known of the spoliation until after a decision on the merits of the underlying action. See *Roach v. Lee*, 369 F.Supp.2d 1194, 1203 (C.D. Cal. 2005).

COLORADO

ADVERSE INFERENCE:

Colorado recognizes adverse inference as a sanction for intentional destruction of evidence. The state of mind of the party that destroys the evidence is an important consideration in determining whether adverse inference is the appropriate sanction. In addition, in order to remedy the evidentiary imbalance created by the loss or destruction of the evidence, an adverse inference may be appropriate even in the absence of a showing of bad faith. *Id*. Special caution must be exercised to ensure that the inference is commensurate with the information that was reasonably likely to have been contained in the destroyed evidence. *Pfantz v. K-Mart Corp.*, 85 P.3d 564 (Colo. App. 2003).

CONNECTICUT

ADVERSE INFERENCE:

Although Connecticut has recognized that an adverse inference may be drawn when relevant evidence is intentionally destroyed, the courts have also recognized as a general rule that the inference is a permissive one. *Leonard v. Commissioner of Revenue Services*, 264 Conn. 286, 306, 823 A.2d 1184, 1197 (Conn. 2003). An adverse inference may be drawn against a party who has destroyed evidence only if the trier of fact is satisfied that the party who seeks the adverse inference has proven three things: (1) the spoliation must have been intentional; (2) the destroyed evidence must be relevant to the issue or matter for which the party seeks the inference; and (3) the party who seeks the inference must have acted with due diligence with respect to the spoliated evidence. *Beers v. Bayliner Marine Corp.*, 236 Conn. 769, 777-78, 675 A.2d 829 (Conn. 1996).

DELAWARE

TORT OF SPOLIATION:

Delaware declines to recognize a separate cause of action for negligent or intentional spoliation. See *Lucas v. Christiana Skating Center, Ltd.*, 722 A.2d 1247, 1250 (Del. 1998).

SANCTIONS:

Criminal penalty: 11 Del. C. § 1269(2), Tampering with physical evidence, states that “a person is guilty of tampering with physical evidence when ... believing that certain physical evidence is about to be produced or used in an official proceeding or a prospective official proceeding, and intending to prevent its production or use the person suppresses it by any act of concealment, alteration or destruction, or by employing force, intimidation or deception against any person.”

ADVERSE INFERENCE:

Where a litigant intentionally suppresses or destroys pertinent evidence, an inference arises that evidence would be unfavorable to his case. *Lucas v. Christiana Skating Center, Ltd.*, 722 A.2d 1247, 1250 (Del. 1998).

FLORIDA

NO INDEPENDENT CAUSE OF ACTION FOR FIRST-PARTY SPOLIAITON

The Florida Supreme Court determined in *Martino v. Wal-Mart Stores, Inc.*, 908 So.2d 342 (Fla. 2005), that the remedy against a first-party defendant for spoliation of evidence is not an independent cause of

action for spoliation of evidence. This holding clarified a split regarding the tort of spoliation between the Third and Forth District Courts of Appeals.

THIRD-PARTY TORT OF SPOLIATION:

The holding in *Marino* is limited to first-party spoliation. Florida Appellate Courts have recognized an independent claim for spoliation against third-parties. *Townsend v. Conshor, Inc.*, 832 So.2d 166, 167 (Fla. Dist. Ct. App. 2002); *Jost v. Lakeland Reg'l Med. Ctr., Inc.*, 844 So.2d 656 (Fla. 2d DCA 2003). Third-party spoliation claims, however, do not arise until the underlying action is completed. *Lincoln Ins. Co. v. Home Emergency Servs., Inc.*, 812 So.2d 433, 434-435 (Fla. Dist. Ct. App. 2001). In order to establish a cause of action for spoliation, a party must show: (1) the existence of a potential civil action, (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action, (3) destruction of that evidence, (4) significant impairment in the ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages. *Jost v. Lakeland*, 844 So. 2d 656, 657-685 (Fla. 2d DCA 2003).

SANCTIONS:

In *Public Health Trust v. Valcin*, 507 So.2d 596, 599 (Fla. 1987), the court held that when evidence was intentionally lost, misplaced, or destroyed by one party, trial courts were to rely on sanctions found in Fla. R. Civ. P. 1.380(b)(2), and that a jury could well infer from such a finding that the records would have contained indications of negligence. If the negligent loss of the evidence hinders the other party's ability to establish a *prima facie* case, then a rebuttable presumption of negligence for the underlying tort will be applied. This presumption and sanction were upheld in *Martino v. Wal-Mart Stores, Inc.*, 908 So.2d 342, 346-47 (Fla. 2005).

GEORGIA

THIRD-PARTY TORT OF SPOLIATION:

The Georgia Court of Appeals declined to recognize an independent third-party tort for spoliation of evidence. *Owens v. Am. Refuse. Sys., Inc.*, 244 Ga.App. 780, 536 S.E.2d 782 (Ga. 2000).

FIRST-PARTY TORT OF SPOLIATION

In *Gardner v. Blackston*, 185 Ga.App. 754, 365 S.E.2d 545 (Ga. 1988), the court stated in *dicta* that Georgia law does not recognize spoliation of evidence as a separate tort. In *Sharpnack v. Hoffinger*, 231 Ga.App. 829, 499 S.E.2d 363 (Ga. 1998), the court again reviewed the issue, but since the court had already determined that the plaintiff in the case had assumed the risk of his injury, he could not establish a meaningful link between his underlying claims and the alleged spoliation. Therefore, the appellate court affirmed the grant of summary judgment.

SANCTIONS:

Georgia courts do have the authority to impose sanctions to remedy the prejudice from the spoliation of evidence. *R.A. Siegel Co. v. Bowen*, 539 S.E.2d 873, 877 (Ga. Ct. App. 2000). Sanctions range from adverse inference, dismissal and exclusion of evidence. *Chapman v. Auto Owners Ins. Co.*, 469 S.E.2d 783, 784 (Ga. Ct. App. 1996); see also*, Cavin v. Brown*, 538 S.E.2d 802, 804 (Ga. Ct. App. 2000).

Courts will look to a variety of factors in determining which sanctions to impose, including: (1) whether the party seeking sanctions was prejudiced as a result of the destruction of the evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the party that destroyed the evidence acted in good or bad faith; and (5) the potential for abuse of expert testimony about the evidence was not excluded. *Bridgestone/Firestone North Am. Tire, L.L.C. v. Campbell*, 574 S.E.2d 923, 926 (Ga. Ct. App. 2002); *Chapman*, 469 S.E.2d at 785.

HAWAII

TORT OF SPOLIATION:

Hawaii courts have not resolved whether Hawaii law would recognize a tort of spoliation of evidence. See *Matsuura v. E.I. du Pont de Nemours and Co.*, 102 Haw. 149, 168, 73 P.3d 687, 706 (Haw. 2003).

IDAHO

TORT OF SPOLIATION:

Idaho Courts have discussed this tort, but have not formally recognized it. In *Yoakum v. Hartford Fire Ins. Co*., 129 Idaho 171, 177-178, 923 P.2d 416, 422-423 (Idaho 1996), the court found that assuming Idaho law would recognize the tort of spoliation, it would require the willful destruction or concealment of evidence. In this particular case, the court found that the plaintiffs had not demonstrated that the defendants destroyed any evidence which would justify holding them liable for this tort.

EVIDENTIARY RULES/SANCTIONS:

Idaho courts have recognized the spoliation doctrine as a form of admission by conduct. "By resorting to wrongful devices, the party is said to provide a basis for believing that he or she thinks the case is weak and not to be won by fair means…Accordingly, the following are considered under this general category of admissions by conduct:…destruction or concealment of relevant documents or objects." *Courtney v. Big O Tires, Inc.*, 139 Idaho 821, 824, 87 P.3d 930, 933 (Idaho 2003), citing *McCormick On Evidence*, 4th Ed. § 265, pp. 189-94 (1992) As an admission, the spoliation doctrine only applies to the party connected to the loss or destruction of the evidence. Acts of a third person must be connected to the party, or in the case of a corporation to one of its superior officers, by showing that an officer did the act or authorized it by words or other conduct. Furthermore, the merely negligent loss or destruction of evidence is not sufficient to invoke the spoliation doctrine. Moreover, the circumstances of the act must manifest bad faith. Mere negligence is not enough, for it does not sustain the inference of consciousness of a weak case." *Id*.

There may certainly be circumstances where a party's willful, intentional, and unjustifiable destruction of evidence that the party knows is material to pending or reasonably foreseeable litigation may so prejudice an opposing party that sanctions such as those listed in Rule 37(b) of the Idaho Rules of Civil Procedure are appropriate. *Id.*

ILLINOIS

TORT OF SPOLIATION:

The Supreme Court of Illinois has held that a party confronted with the loss or destruction of relevant, material evidence at the hands of an opponent may either: (1) seek dismissal of his opponent's complaint under Rule 219(c); or (2) bring a claim for negligent spoliation of evidence. The mode of relief most appropriate will depend upon the opponent's culpability in the destruction of the evidence.

TORT OF NEGLIGENT SPOLIATION:

The Supreme Court of Illinois has declined to recognize spoliation of evidence as an independent tort and instead held that a spoliation claim can be stated under existing negligence principles. *Dardeen v. Kuehling*, 213 Ill.2d 329, 335, 821 N.E.2d 227, 231, 290 Ill. Dec. 176, 180 (Ill. 2004). In order to state a negligence claim, a plaintiff must allege that the defendant owed him a duty, that the defendant breached that duty, and that the defendant's breach proximately caused the plaintiff damages. The Court tailored the duty element to spoliation claims: "The general rule is that there is no duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, a contract, a statute or another special circumstance. Moreover, a defendant may voluntarily assume a duty by affirmative conduct. In any of the foregoing instances, a defendant owes a duty of due care to preserve

evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." *Id.* This claim requires conduct that is "deliberate [or] contumacious or [evidences an] unwarranted disregard of the court's authority" and should be employed only "as a last resort and after all the court's other enforcement powers have failed to advance the litigation." *Adams v. Bath and Body Works, Inc.*, 358 Ill.App.3d 387, 392, 830 N.E.2d 645, 651-655, 294 Ill. Dec. 233, 239 - 243 (Ill. App. 1 Dist. 2005).

SANCTIONS:

Sanctions for spoliation require mere negligence, the failure to foresee "that the [destroyed] evidence was material to a potential civil action". *Dardeen*, 213 Ill.2d at 336, 290 Ill. Dec. 176, 821 N.E.2d 227. Rule 219(c) permits sanctions only where a party unreasonably fails to comply with a discovery order" and that a "party who had nothing to do with the destruction of evidence cannot be said to have unreasonably failed to comply with a discovery order" because "[b]efore noncompliance can be unreasonable, a party must have been in a position to comply".

INDIANA

TORT OF SPOLIATION:

First-party If an alleged tortfeasor negligently or intentionally destroys or discards evidence that is relevant to a tort action, the plaintiff in the tort action does not have an additional independent cognizable claim against the tortfeasor for spoliation of evidence. *Gribben v. Wal-Mart Stores, Inc.*, 824 N.E.2d 349, 355 (Ind. 2005).

THIRD-PARTY TORT OF SPOLIATION:

Negligent or intentional spoliation of evidence is actionable as a tort only if the party alleged to have lost or destroyed the evidence owed a duty to the person bringing the spoliation claim to have preserved it. *Glotzbach, CPA v. Froman*, 827 N.E.2d 105, 108 (Ind. App. 2005). To determine the existence of a duty Indiana courts balance three factors: (1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and (3) public policy concerns. *Id.* This balancing test is to be used only in those instances where the element of duty has not already been declared or otherwise articulated. *Id.* Indiana Code § 35-44-3-4 provides that "a person who…alters, damages, or removes any record, document, or thing, with intent to prevent it from being produced or used as evidence in any official proceeding or investigation…commits obstruction of justice." This is a class D felony.

SANCTIONS:

Indiana Courts may also sanction parties, but not third parties, for the spoliation of evidence through: (1) evidentiary inferences that the spoliated evidence was unfavorable to the responsible party; (2) sanctions for discovery violation under Indiana Trial Rule 37(B), which authorizes courts to respond with sanctions which include among others, ordering that designated facts be taken as established, prohibiting the introduction of evidence, dismissal of all or part of an action, rendering judgment by default against a disobedient party, and payment of reasonable expenses including attorneys' fees; and (3) discipline for spoliating attorneys under Indiana Rules of Professional Conduct.

IOWA

SANCTIONS:

Evidence of spoliation may allow an inference that "a party who destroys a document with knowledge that it is relevant to litigation is likely to have been threatened by the document." *Lynch v. Saddler,* 656 N.W.2d 104, 111 (Iowa 2003). Such inference may only be drawn when the destruction of relevant evidence was intentional, as opposed to merely negligent or the evidence was destroyed as the result of routine procedure. *Id.* However, such inference does not amount to substantive proof and cannot

take the place of proof of a fact necessary to the other party's cause. *Smith v. Shagnasty's, Inc*., 2004 WL 434160 (Iowa App. 2004). Interestingly, the evidentiary inference is imposed both for evidentiary and punitive reasons. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 721 (Iowa 2001). Adverse inference instructions should be utilized prudently and sparingly. *Lynch v. Saddler*, supra.

KANSAS

TORT OF SPOLIAITION:

In *Koplin v. Rosel Well Perforators, Inc.*, 241 Kan. 206, 734 P.2d 1177 (Kan. 1987), the Kansas Supreme Court considered the certified question of whether Kansas would recognize a common law tort action for intentional interference with a civil action by spoliation of evidence under the facts presented. The Supreme Court of Kansas concluded that absent some independent tort, contract, agreement, voluntary assumption of duty, or some special relationship of the parties, the new tort of spoliation of evidence should not be recognized in Kansas under the facts presented. *Id* at 215, 734 P.2d at 1177. Consequently, the U.S. District Court for Kansas held that the Supreme Court of Kansas would recognize the tort of spoliation under some limited circumstances. *Foster v. Lawrence Memorial Hosp.*, 809 F. Supp. 831, 838 (Kan. 1992).

ADVERSE INFERENCE INSTRUCTION:

Kansas law generally provides that "failure to throw light upon an issue peculiar with any parties' own knowledge or reach raises a presumption open to explanation, of course, that the concealed information was unfavorable to him." Kansas utilizes a pattern jury instruction, K.P.J.I. § 102.73, borrowed from the Illinois Jury Instruction for "Inferences Arising from Failure to Produce Evidence." The applicable jury instruction, K.P.J.I. § 102.73, provides: If a party to [the] case has failed to offer evidence within his power to produce, you may infer that the evidence would have been adverse to that party, if you believe each of the following elements: (1) The evidence was under the control of the party and could have been produced by the exercise of reasonable diligence. (2) The evidence was not equally available to an adverse party. (3) A reasonably prudent person under the same or similar circumstances would have offered if (he) (she) believed it to be favorable to him. (4) No reasonable excuse for the failure has been shown.

KENTUCKY

TORT OF SPOLIATION:

Kentucky does not recognize separate torts for either first-party or third-party spoliation of evidence. *Monsanto Co. v. Reed*, 950 S.W.2d 811, 815 (Ky. 1997).

SANCTIONS/ADVERSE INFERENCE:

Rather, the court counteracts a party's deliberate destruction of evidence through evidentiary rules, civil sanction, and missing evidence instructions. *Id.*

LOUISIANA

TORT OF SPOLIATION:

Louisiana courts have recognized the right of an individual to institute a tort action against someone who has impaired the party's ability to institute or prove a civil claim due to negligent or intentional spoliation of evidence. See *Guillory v. Dillard's Dept. Store, Inc.*, 777 So.2d 1, 3 (La. App. 3rd Cir. 2000); *McCool v. Beauregard Memorial Hosp*., 814 So.2d 116, 118 (La. App. 3rd Cir. 2002). A plaintiff asserting a state law tort claim for spoliation of evidence must allege that the defendant intentionally destroyed evidence. *Desselle v. Jefferson Hosp. Dist. No. 2*, 887 So.2d 524, 534 (La. App. 2004).

Allegations of negligent conduct are insufficient. *Quinn v. RISO Investments, Inc.*, 869 So.2d 922 (La. App. 2004). Where suit has not been filed and there is no evidence that a party knew suit would be filed when the evidence was discarded, the theory of spoliation of evidence does not apply. *Desselle v. Jefferson Hosp. Dist. No. 2*, 887 So.2d at 534.

ADVERSE INFERENCE:

The tort of spoliation of evidence has its roots in the evidentiary doctrine of "adverse presumption," which allows a jury instruction for the presumption that the destroyed evidence contained information detrimental to the party who destroyed the evidence unless such destruction is adequately explained. *Guillory v. Dillard's Dept. Store, Inc.*, 777 So.2d 1, 3 (La. App. 3rd Cir. 2000).

MAINE

TORT OF SPOLIATION:

The Maine Law Court has apparently never recognized such a cause of action, for spoliation of evidence. *Gagne v. D.E. Jonsen, Inc.*, 298 F.Supp.2d 145, 147 (D. Me. 2003); citing *Butler v. Mooers*, 2001 WL 1708836 (Me. Super., June 13, 2001), at 1. In addition, federal courts sitting in Maine have identified spoliation as a doctrine intended "to rectify any prejudice the non-offending party may have suffered as a result of the loss of evidence and to deter any future conduct, particularly deliberate conduct, leading to such loss of evidence." *Driggin v. American Sec. Alarm Co.*, 141 F.Supp.2d 113, 120 (D. Me. 2000).

SANCTIONS:

The remedy for spoliation of evidence is sanctions, including "dismissal of the case, the exclusion of evidence, or a jury instruction on the spoliation inference." *Id.* This view of the doctrine is not consistent with the existence of an independent cause of action arising out of such deliberate conduct. Rather, the injured party may seek sanctions that will affect its claims or defenses. See*, e.g., Pelletier v. Magnusson*, 195 F.Supp.2d 214, 233-37 (D. Me. 2002); *Elwell v. Conair, Inc.*, 145 F.Supp.2d 79, 87-88 (D. Me. 2001).

MARYLAND

ADVERSE INFERENCE/PRESUMPTION:

In *Miller v. Montgomery County*, 64 Md.App. 202, 214-15, 494 A.2d 761, cert. denied, 304 Md. 299, 498 A.2d 1185 (Md. 1985), Judge Bloom, writing for the Supreme Court of Maryland, explained the effect spoilation of evidence might have on the spoliator's case as follows: The destruction or alteration of evidence by a party gives rise to inferences or presumptions unfavorable to the spoliator, the nature of the inference being dependent upon the intent or motivation of the party. Unexplained and intentional destruction of evidence by a litigant gives rise to an inference that the evidence would have been unfavorable to his cause, but would not in itself amount to substantive proof of a fact essential to his opponent's cause. Under *Miller*, an adverse presumption may arise against the spoliator even if there is no evidence of fraudulent intent. *Anderson v. Litzenberg*, 115 Md.App. 549, 559, 694 A.2d 150, 155 (Md. App. 1997). The presumption that arises from a party's spoilation of evidence cannot be used as a surrogate for presenting evidence of negligence in a *prima facie* case.

SANCTIONS:

Maryland courts have condoned discovery sanctions as remedies for spoliation of evidence. See *Klupt v. Krongard*, 728 A.2d 727, 738 (Md. Ct. Spec. App. 1999). The ultimate sanction of dismissal or default when spoliation may be imposed when the spoliation involves: (1) a deliberate act of destruction; (2) discoverability of the evidence; (3) an intent to destroy the evidence; (4) occurrence of the act at a time after suit has been filed, or, if before, at a time when filing is fairly perceived as imminent. *White v.*

Office of the Public Defender, 170 F.R.D. 138, 147 (D. Md. 1997). One court noted that the greatest of sanctions is appropriate when the conduct demonstrates willful or contemptuous behavior, or a deliberate attempt to hinder or prevent effective presentation of defenses or counterclaims. *Manzano v. Southern Md. Hosp., Inc.*, 698 A.2d 531, 537 (Md. 1997).

MASSACHUSETTES

TORT OF SPOLIATION:

In *Fletcher v. Dorchester Mut. Ins. Co.*, 437 Mass. 544, 773 N.E.2d 420 (2002), the Massachusetts Supreme Court declined to recognize an action in tort for spoliation of evidence.

SANCTIONS:

The Massachusetts Supreme Court has recognized that Massachusetts courts have remedies for spoliation of evidence, *i.e.*, exclusion of testimony in the underlying action, dismissal, or judgment by default. See *Gath v. M/A-Com, Inc.*, 440 Mass. 482, 499, 802 N.E.2d 521, 535 (Mass. 2003). Sanctions should be carefully tailored to remedy the precise unfairness occasioned by the spoliation. *Id.* at 426; see also, *Keene v. Brigham & Women's Hosp., Inc.*, 786 N.E.2d 824, 833-34 (Mass. 2003). Sanctions may be imposed even if the spoliation of evidence occurred before the legal action was commenced, if a litigant knows or reasonably should know that the evidence might be relevant to a possible action. *Stull v. Corrigan Racquetball Club, Inc.*, 2004 WL 505141 (Mass. Super. 2004).

MICHIGAN

TORT OF SPOLIATION:

Michigan does not recognize spoliation of evidence as a separate tort. *Panich v. Iron Wood Prods. Corp.*, 445 N.W.2d 795 (Mich. Ct. App. 1989). However, Michigan has never explicitly refused to consider spoliation of evidence as an actionable tort claim if the right facts were present. *Wilson v. Sinai Grace Hosp*., 2004 WL 915044 (Mich. App. 2004).

ADVERSE INFERENCE/PRESUMPTION:

Spoliation of evidence is controlled by a jury instruction, M. Civ. J.I.2d 6.01(d), which provides that a trier of fact may infer the evidence not offered in a case would be adverse to the offending party if: (1) the evidence was under the offending party's control; (2) could have been produced by the offending party; (3) that no reasonable excuse is shown for the failure to produce the evidence. When these three elements are shown, a permissible inference is allowed that the evidence would have been adverse to the offending party. However, the trier of fact remains free to determine this issue for itself. *Lagalo v. Allied Corp.*, 592 N.W.2d 786, 789 (Mich. Ct. App. 1999).

When there is evidence of willful destruction, a presumption arises that the non-produced evidence would have been adverse to the offending party, and when left unrebutted, this presumption requires a conclusion that the unproduced evidence would have been adverse to the offending party. *Trupiano v. Cully*, 84 N.W.2d 747, 748 (Mich. 1957). Generally, where a party deliberately destroys evidence, or fails to produce it, courts presume that the evidence would operate against the party who destroyed it or failed to produce it. *Johnson v. Secretary of State*, 406 Mich. 420, 440, 280 N.W.2d 9 (Mich. 1979); *Berryman v. K Mart Corp.*, 193 Mich.App. 88, 101, 483 N.W.2d 642 (Mich. 1992); *Ritter v. Meijer, Inc.*, 128 Mich.App. 783, 786, 341 N.W.2d 220 (Mich. 1983). It is well-settled that only when the complaining party can establish "intentional conduct indicating fraud and a desire to destroy [evidence] and thereby suppress the truth." can such a presumption arise. *Trupiano v. Cully*, 349 Mich. 568, 570, 84 N.W.2d 747 (Mich. 1957), quoting 20 Am. Jur., Evidence, § 185, p. 191; see also *Lagalo v. Allied Corp.*, 233 Mich.App. 514, 520, 592 N.W.2d 786 (Mich. 1999).

MINNESOTA

TORT OF SPOLIATION:

Minnesota does not recognize an independent spoliation tort. *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 437 (Minn.1990).

SANCTIONS:

Spoliation sanctions are typically imposed where one party gains an evidentiary advantage over the opposing party by failing to preserve evidence. See *Himes v. Woodings-Verona Tool Works, Inc.*, 565 N.W.2d 469, 471 (Minn. App. 1997), review denied (Minn. 1997). This is true where the spoliator knew or should have known that the evidence should be preserved for pending or future litigation; the intent of the spoliator is irrelevant. *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995). When the evidence is under the exclusive control of the party who fails to produce it, Minnesota permits the jury to infer that "the evidence, if produced, would have been unfavorable to that party." *Federated Mut.,* 456 N.W.2d at 437. Furthermore, the propriety of a sanction for the spoliation of evidence is determined by the prejudice resulting to the opposing party. Prejudice is determined by considering the nature of the item lost in the context of the claims asserted and the potential for correcting the prejudice. *Patton*, 538 N.W.2d at 119. Adverse Inference Instruction Michigan, Civ. J.I.G. § 12.35, reads that, "If either party does not produce evidence that the party could reasonably be expected to produce and intentionally destroys evidence which that party has been ordered to produce and fails to give a reasonable explanation, you may decide that the…evidence would have been unfavorable to that party."

MISSISSIPPI

TORT OF SPOLIATION:

In *Dowdle*, the Mississippi Supreme Court refused to "recognize a separate tort for intentional spoliation of evidence against both first and third-party spoliators." *Dowdle Butane Gas Co. v. Moore*, 831 So.2d 1124, 1135 (Miss. 2002). In *Richardson* the Court likewise refused to recognize a separate tort for negligent spoliation of evidence. *Richardson v. Sara Lee Corp.,* 847 So.2d 821, 824 (Miss. 2003).

ADVERSE INFERENCE/PRESUMPTION:

In *Stahl v. Wal-Mart Stores, Inc.*, 47 F.Supp.2d 783, 787 n. 3 (S.D. Miss. 1998), the court held that "in the absence of bad faith – *i.e*., evidence of culpability on the part of the spoliator – then there can be no adverse influence or presumption…even when there is prejudice to the innocent party." The court further held "it is a general rule that the intentional spoliation or destruction of evidence relevant to a case raises a presumption, or, more properly, an inference, that this evidence would have been unfavorable to the case of the spoliator." *Tolbert v. State*, 511 So.2d 1368, 1372-73 (Miss. 1987), quoting *Washington v. State*, 478 So.2d 1028, 1032-33 (Miss. 1985). "Such a presumption or inference arises, however, only when the spoliation or destruction was intentional and indicates fraud and a desire to suppress the truth and it does not rise where the destruction was a matter of routine with no fraudulent intent." *Id.*

SANCTIONS:

Spoliation remedies include discovery sanctions, criminal penalties or disciplinary actions against attorneys who participate in spoliation. *Dowdle*, supra. Mississippi recognizes a refutable "negative" or adverse inference against a spoliator. *Thomas v. Isle of Capri Casino*, 781 So.2d 125 (Miss. 2001).

MISSOURI

ADVERSE INFERENCE:

A party who intentionally destroys or significantly alters evidence is subject to an adverse evidentiary inference under the spoliation of evidence doctrine. *Baldridge v. Director of Revenue*, 82 S.W.3d 212,

222 (Mo. App. 2002). ”[T]he destruction of written evidence without satisfactory explanation gives rise to an inference unfavorable to the spoliator.” G*arrett v. Terminal R. Ass’n of St. Louis*, 259 S.W.2d 807, 812 (Mo. 1953). “Similarly, where one party has obtained possession of physical evidence which [the party] fails to produce or account for at the trial, an inference is warranted against that party.” *State ex rel. St. Louis County Transit Co. v. Walsh*, 327 S.W.2d 713, 717 (Mo. App. 1959). “[W]here one conceals or suppresses evidence such action warrants an unfavorable inference.” *Id.* at 717-18.

When an adverse inference is urged, it is necessary that there be evidence showing intentional destruction of the item, and also such destruction must occur under circumstances which give rise to an inference of fraud and a desire to suppress the truth. In such cases, it may be shown by the proponent that the alleged spoliator had a duty, or should have recognized a *duty*, to preserve the evidence. *Morris v. J.C. Penney Life Ins. Co.*, 895 S.W.2d 73, 77-78 (Mo. App. 1995). “Since the doctrine of spoliation is a harsh rule of evidence, prior to applying it in any given case, it should be the burden of the party seeking its benefit to make a *prima facie* showing the opponent destroyed the missing [evidence] under circumstances manifesting fraud, deceit or bad faith.” *Baldridge,* supra.. Simple negligence is not sufficient to apply the adverse inference rule. *Brissette v. Milner Chevrolet Co.*, 479 S.W.2d 176, 182 (Mo. App. 1972).

MONTANA

TORT OF SPOLIATION:

Montana courts have adopted the torts of both intentional and negligent spoliation against third parties. Negligent spoliation of evidence consists of the following elements: (1) existence of a potential civil action; (2) legal or contractual duty to preserve evidence relevant to that action; (3) destruction of that evidence; (4) significant impairment of the ability to prove the potential civil action; (5) causal connection between the destruction of the evidence and the inability to prove the lawsuit; (6) significant possibility of success of the potential civil action if the evidence were available; and (7) damages. See *Gentry v. Douglas Hereford Ranch, Inc.*, 1998 Mont. 182, 290 Mont. 126, 962 P.2d 1205 (Mont. 1998); *Oliver v. Stimson Lumber Co.,* 297 Mont. 336, 345-354, 993 P.2d 11, 18-23 (Mont. 1999). Intentional spoliation consists of the following elements: (1) the existence of a potential lawsuit; (2) the defendant’s knowledge of the potential lawsuit; (3) the intentional destruction of evidence designed to disrupt or defeat the potential lawsuit; (4) disruption of the potential lawsuit; (5) a causal relationship between the act of spoliation and the inability to prove the lawsuit; and (6) damages. *Id.*

Under Montana law, the tort of spoliation of evidence (whether intentional or negligent) requires “the existence of a potential lawsuit.” *Oliver v. Stimson Lumber Co.*, 297 Mont. 336, 993 P.2d 11, 21 (Mont. 1999). Spoliation of evidence can only occur in connection with some other lawsuit; it is intrinsically bound up in the same transaction as the underlying lawsuit. *Smith v. Salish Kootenai College*, 378 F.3d 1048, 1058 (9th Cir. Mont. 2004).

NEBRASKA

ADVERSE INFERENCE:

When intentional destruction of evidence is established, the fact finder may draw the inference that the evidence destroyed was unfavorable to the party responsible for its destruction. See *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (Neb. 2002); *Trieweiler v. Sears*, 268 Neb. 952, 992, 689 N.W.2d 807, 843 (Neb. 2004).

NEVADA

TORT OF SPOLIATION:

Nevada does not recognize a separate tort for first-party or third-party spoliation of evidence. *Timber Tech Engineered Bldg. Products v. The Home Ins. Co.*, 55 P.3d 952, 953-54 (Nev. 2002).

ADVERSE INFERENCE:

"It is well-established that a party is entitled to jury instructions on every theory of her case that is supported by the evidence." *Bass-Davis v. Davis*, 117 P.3d 207, 209 (Nev. 2005). In *Reingold v. Wet 'N Wild Nevada, Inc.*, 113 Nev. 967, 970, 944 P.2d 800, 802 (Nev. 1997), the Nevada Supreme Court recognized that under N.R.S. § 47.250(3), when evidence is willfully destroyed, the trier of fact is entitled to presume that the evidence was adverse to the destroying party. It further held that evidence is "willfully" destroyed even if the evidence is destroyed pursuant to an established company policy. *Bass-Davis v. Davis*, 117 P.3d at 210.

NEW HAMPSHIRE

ADVERSE INFERENCE:

An adverse inference – that the missing evidence would have been unfavorable – can be drawn only when the evidence was destroyed deliberately with a fraudulent intent. See *Rodriguez v. Webb*, 141 N.H. 177, 180, 680 A.2d 604 (N.H. 1996). The timing of the document destruction is not dispositive on the issue of intent, however, and an adverse inference can be drawn even when the evidence is destroyed prior to a claim being made. See *Id.* at 178, 180, 680 A.2d 604; *Murray v. Developmental Services of Sullivan County, Inc.,* 149 N.H. 264, 271, 818 A.2d 302, 309 (N.H. 2003).

NEW JERSEY

ADVERSE INFERENCE AND SANCTIONS:

Spoliation of evidence in a prospective civil action occurs when evidence relevant to the action is destroyed, causing interference with the action's proper administration and disposition. *Manorcare Health v. Osmose Wood*, 336 N.J. Super. 218, 226, 764 A.2d 475, 479 (N.J. App. Div. 2001). In civil litigation, depending on the circumstances, spoliation of evidence can result in a separate tort action for fraudulent concealment, discovery sanctions, or an adverse trial inference against the party that caused the loss of evidence. See *Rosenblit v. Zimmerman*, 166 N.J. 391, 400-06, 766 A.2d 749 (N.J. 2001). But, the Supreme Court of New Jersey held that it did not recognize a separate tort action for intentional spoliation. *Id.* at 404-05. An adverse inference instruction may be given during the underlying litigation whereby it is presumed the destroyed evidence would have been unfavorable to the destroyer. See *Swick v. N.Y. Times*, 815 A.2d 508, 511 (N.J. 2003).

Discovery sanctions may include a designation that certain facts are taken as established, a refusal to permit the disobedient party to support or oppose claims or defenses, prohibiting the introduction of designated matters into evidence, dismissal of an action, or entry of judgment by default. *Id*. An appropriate remedy may include an award of counsel fees in exceptional cases, particularly where there is a finding of intentional spoliation and the non-spoliating party's ability to defend itself was compromised. *Grubbs v. Knoll*, 376 N.J. Super. 420, 435-436, 870 A.2d 713 (N.J. Super. A.D. 2005).

NEW MEXICO

TORT OF INTENTIONAL SPOLIATION:

The New Mexico Supreme Court has recognized the tort of intentional spoliation of evidence. *Coleman v. Eddy Potash, Inc.*, 120 N.M. 645, 649, 905 P.2d 185, 189 (N.M. 1995) overruled on other grounds, *Delgado v. Phelps Dodge Chino, Inc.*, 34 P.3d 1148 (N.M. 2001). Coleman established the following elements for the tort of intentional spoliation of evidence: (1) the existence of a potential lawsuit; (2) the defendant's knowledge of the potential lawsuit; (3) the destruction, mutilation, or significant alteration of potential evidence; (4) intent on the part of the defendant to disrupt or defeat the lawsuit; (5) a causal relationship between the act of spoliation and the inability to prove the lawsuit; and (6) damages.

TORT OF NEGLIGENT SPOLIATION:

The Court in *Coleman* rejected a separate cause of action for negligent spoliation of evidence. *Coleman*, 120 N.M. at 650, 905 P.2d at 190 (stating that "adequate remedies exist" under "traditional negligence principles" and relying on "the general expectation that an owner has a free hand in the manner in which he or she disposes of his or her property")

ADVERSE INFERENCE:

Where the actions of the spoliator fail to rise to the level of malicious conduct or otherwise meet the elements of the tort of intentional spoliation of evidence, New Mexico believes a more appropriate remedy would be a permissible adverse evidentiary inference by the jury in the underlying claim. This evidentiary inference could be accomplished through an instruction to the jury that it is permissible to infer that evidence intentionally destroyed, concealed, mutilated, or altered by a party without reasonable explanation would have been unfavorable to that party. Trial courts, in determining whether to give this instruction, should consider whether the spoliation was intentional, whether the spoliator knew of the reasonable possibility of a lawsuit involving the spoliated object, whether the party requesting the instruction "acted with due diligence with respect to the spoliated evidence," and whether the evidence would have been relevant to a material issue in the case. *Torres v. El Paso Elec. Co.*, 987 P.2d 386, 401-407 (N.M. 1999).

SANCTIONS:

New Mexico recognizes that spoliation of evidence may result in sanctions. These sanctions include dismissal or adverse inference. *Segura v. K-Mart Corp.*, 62 P.3d 283, 286-87 (N.M. 2002).

NEW YORK

THIRD-PARTY NEGLIGENT SPOLIATION:

The Court of Appeals of New York declined to recognize such a cause of action under the facts of *Met-Life Auto & Home v. Joe Basil Chevrolet, Inc.*, 1 N.Y.3d 478, 807 N.E.2d 865, 775 N.Y.S.2d 754 (N.Y. 2004). The court in this case focused its decision on the non-existence of a duty giving rise to preservation of evidence and the lack of notice to preserve the evidence militated against establishing such a cause of action.

SPOLAITION BY AN EMPLOYER:

Spoliation by an employer may support a common law cause of action when such spoliation impairs an employee's right to sue a third-party tortfeasor. See *DiDomenico v. C & S Aeromatik Supplies*, 252 A.D.2d 41, 682 N.Y.S.2d 452 (N.Y. 2d Dept. 1998). But in other instances, New York Courts have specifically rejected a cause of action for spoliation of evidence when the employer was not on notice that evidence would be needed. *Monteiro v. R.D. Werner Co.*, 301 A.D.2d 636, 754 N.Y.S.2d 328 (N.Y. 2d Dept. 2003) (employer had no duty to preserve scaffold which allegedly caused plaintiff's injuries and employer was not on notice that an action was contemplated against a third-party).

SANCTIONS:

C.P.L.R. § 3126 permits sanctions, including dismissal for a party's failure to disclose relevant evidence. *Met-Life*, 1 N.Y.3d at 482-83. New York courts will impose "carefully chosen and specifically tailored sanctions within the context of the underlying action" to remedy spoliation of evidence. For instance, a defendant may be granted summary judgment when the plaintiff negligently fails to preserve crucial evidence. *Amaris v. Sharp Elecs.*, 758 N.Y.S.2d 637 (N.Y. App. Div. 2003). However, awarding summary judgment to the plaintiff for the defendant's intentional destruction of evidence may be too drastic a remedy. *Mylonas v. Town of Brookhaven*, 759 N.Y.S.2d 752, 753-754 (N.Y. App. Div. 2003). But see *Herrera v. Matlin*, 758 N.Y.S.2d 7, 7 (N.Y. App. Div. 2003), aff'd 771 N.Y.S.2d 347 (N.Y. A.D. 2004) (physician's loss of records amounting to professional misconduct warranted striking of answer).

NORTH CAROLINA

ADVERSE PRESUMPTION/INFERENCE:

The North Carolina Supreme Court recognizes a permissive, rather than mandatory adverse inference may be drawn against a spoliator of evidence. *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 182-192, 527 S.E.2d 712, 715 - 721 (N.C. App. 2000). "[T]o qualify for the adverse inference, the party requesting it must ordinarily show that the spoliator was on notice of the claim or potential claim at the time of the destruction." *McLain*, 137 N.C. App. at 187, 527 S.E.2d at 718 (quotation omitted). The obligation to preserve evidence may arise prior to the filing of a complaint where the opposing party is on notice that litigation is likely to be commenced. *Id.* The evidence lost must be "pertinent" and "potentially supportive of plaintiff's allegations." *Id.* at 188, 527 S.E.2d at 718.

Finally, "[t]he proponent of a missing document inference need not offer direct evidence of a cover-up to set the stage for the adverse inference. Circumstantial evidence will suffice." *Id.* at 186, 527 S.E.2d at 718; *Arndt v. First Union Nat. Bank*, 613 S.E.2d 274, 281-283 (N.C. App. 2005).

NORTH DAKOTA

ADVERSE INFERENCE/SANCTIONS:

Trial courts in North Dakota have the authority to sanction a party when key evidence is missing, "even where the party has not violated a court order and even when there has been a no finding of bad faith." *Bachmeier v. Wallwork Truck Ctrs.*, 544 N.W.2d 122, 124 (N.D. 1996). In sanctioning a party, the district court should at least consider "the culpability, or state of mind, of the party against whom sanctions are being imposed; a finding of prejudice against the moving party, and the degree of this prejudice, including the impact it has on presenting or defending the case; and, the availability of less severe alternative sanctions." *Id.* at 124-25. Trial courts have the "duty to impose the least restrictive sanction available under the circumstances in the exercise of its inherit power." *Id.* at 125. Sanctions can include dismissal, preclusion of evidence, or adverse inference. *Id.* at 126.

OHIO

TORT OF SPOLIATION:

The Supreme Court of Ohio held that a cause of action exists in tort for intentional spoliation against parties to the primary action as well as third parties. *Smith v. Howard Johnson Co., Inc.*, 67 Ohio St.3d 28, 29, 615 N.E2d 1037 (Ohio 1993). The elements required are: (1) pending or probable litigation involving the plaintiff; (2) knowledge on the part of the defendant that litigation exists or is probable; (3) willful destruction of evidence by defendant designed to disrupt plaintiff's case; (4) disruption of plaintiff's case; and (5) damages proximately caused by defendant's acts.

PUNITIVE DAMAGES:

The Ohio Supreme Court has determined that spoliation of evidence may be the basis of an award of punitive damages in an underlying medical malpractice action. *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331 (Ohio App. 1994).

SANCTIONS/ADVERSE INFERENCE:

Courts also recognize discovery sanctions for an adverse party's failure to provide evidence if the same was willful and prejudice is established. *Barker v. Wal-Mart Stores, Inc.*, 2001 WL 1661961, 7 (Ohio Ct. App. Dec. 31, 2001). Ohio uses Jury Instruction § 305.1. *Tate v. Adena Regional Med. Ctr.*, 801 N.E.2d 930 (Ohio App. 2003).

OKLAHOMA

TORT OF SPOLIAITON:

In *Patel v. OMH Medical Center, Inc.*, 987 P.2d 1185 (Okla. 1999), the Oklahoma Supreme Court stated "[n]either spoliation of evidence nor *prima facie* tort (for acts constituting spoliation of evidence) has ever been recognized by this court as actionable."

ADVERSE INFERENCE:

"Spoliation occurs when evidence relevant to prospective civil litigation is destroyed, adversely affecting the ability of a litigant to prove his or her claim." *Patel v. OMH Medical Center, Inc.*, 987 P.2d at 1202. If applicable, destruction of evidence without a satisfactory explanation gives rise to an inference unfavorable to the spoliator. *Manpower, Inc. v. Brawdy*, 62 P.3d 391, 392 (Okla. Ct. App. 2002).

OREGON

ADVERSE PRESUMPTION:

Oregon has a statutory provision allowing that willful suppression of evidence raises an unfavorable presumption against the party who suppressed it. O.R.S. § 40.135, Rule 311(1)(c). see also *Stephens v. Bohlman*, 909 P.2d 208, 211 (Or. Ct. App. 1996).

PENNSYLVANIA

TORT OF SPOLIATION:

Spoliation of evidence is not recognized as a separate cause of action under Pennsylvania law. *Elias v. Lancaster Gen. Hosp.*, 710 A.2d 65, 68 (Pa. Super. Ct. 1998).

SANCTIONS:

Parties can be sanctioned for spoliation of evidence. *Id.* In Pennsylvania, spoliation provides that a party cannot benefit from its own withholding or destruction of evidence by creating an adverse inference that the evidence is unfavorable to that party. *Manson v. Southeastern Transp. Auth.*, 767 A.2d 1, 5 (Pa. 2001). Whether and how to sanction a party is within the discretion of the court. *Eichman v. McKeon*, 824 A.2d 305, 312-314 (Pa. Super. Ct. 2003). A determination of the appropriate sanction requires the court to determine three factors: (1) the degree of fault of the parties who alter or destroy the evidence; (2) the degree of prejudice suffered by the opposing parties; (3) the availability of a lesser sanction that will protect the opposing parties' rights and deter future similar conduct. *Id*. (citing *Schroeder v. Commonwealth Dep't of Transp.*, 710 A.2d 23 (Pa. 1998) (adopting the test from *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3rd Cir. 1994)).

RHODE ISLAND

TORT OF SPOLIATION:

Neither the Rhode Island legislature or the courts have yet established or recognized the existence of an independent tort for spoliation of evidence. See *Malinowski v. Documented Vehicle/Drivers Systems, Inc.*, 66 Fed. Appx. 216, 222 (R.I. 2003).

ADVERSE INFERENCE:

Rhode Island does recognize that an adverse inference may be given as a spoliation of evidence instruction. *Mead v. Papa Razzi Restaurant*, 840 A.2d 1103, 1108 (R.I. 2004). The party seeking the spoliation of evidence has the burden of proof to establish that the destruction of evidence was deliberate or negligent. See *Malinowski v. United Parcel Serv.*, 792 A.2d 50, 54-55 (R.I. 2002). Furthermore, it is not necessary to show bad faith by the spoliator to draw the adverse inference,

however bad faith may strengthen the spoliation inference. *Kurczy v. St. Joseph's Veterans Ass'n, Inc.*, 820 A.2d 929, 946 (R.I. 2003).

SOUTH CAROLINA

TORT OF SPOLIATION:

There is no case law in South Carolina discussing spoliation of evidence, specifically. However, South Carolina apparently recognizes a type of adverse inference rule as it relates to loss or destruction of evidence. *Wisconsin Motor Corp. v. Green*, 79 S.E.2d 718, 720-21 (S.C. 1954). It appears as though such inference may be given when a party does not provide an explanation for its failure to produce appropriate documents. *Id.*

SOUTH DAKOTA

ADVERSE INFERENCE:

Under South Dakota law, if a party fails to present evidence or witnesses, such non-production justifies an inference that the evidence would be unfavorable. *Cody v. Leapley*, 476 N.W.2d 257, 264 (S.D. 1991). "The non-production or suppression by a party of evidence which is within his power to produce and which is material to an issue in the case justifies the inference that it would be unfavorable to him if produced." *Id.; Leisinger v. Jacobson*, 651 N.W.2d 693, 699 (S.D. 2002). The burden of proof with respect to the adverse inference rule is on the spoliator to show that it acted in a non-negligent, good faith manner in destroying the document sought. *Wuest v. McKennan Hosp.*, 619 N.W.2d 682, 686 (S.D. 2000). The spoliator must show he acted in good faith without negligence or malice in destroying the evidence. *Id.* A jury is required to determine if the explanation given is reasonable and if so, may not infer that the missing information contained unfavorable evidence to the opposing party. *Id.*

TENNESSEE

ADVERSE INFERENCE:

The doctrine of spoliation of evidence permits a court to draw a negative inference against a party that has intentionally, and for an improper purpose, destroyed, mutilated, lost, altered, or concealed evidence. See *Foley v. St. Thomas Hosp.*, 906 S.W.2d 448, 453-54 (Tenn. Ct. App. 1995); *Bronson v. Umphries*, 138 S.W.3d 844, 854 -855 (Tenn. Ct. App. 2003).

TEXAS

TORT OF SPOLIATION:

Texas does not recognize an independent cause of action for intentional or negligent spoliation of evidence by parties to litigation. *Trevino v. Ortega*, 969 S.W.2d 950, 951 (Tex. 1998).

ADVERSE INFERENCE INSTRUCTION:

A spoliation instruction is an instruction given to the jury outlining permissible inferences they may make against a party who has lost, altered, or destroyed evidence. *Brewer v. Dowling*, 862 S.W.2d 156, 159 (Tex. App. - Fort Worth 1993), writ denied. A party who has deliberately destroyed evidence is presumed to have done so because the evidence was unfavorable to its case. A trial judge has broad discretion in determining whether to provide a jury with a spoliation presumption instruction. See *Trevino v. Ortega*, 969 S.W.2d 950, 953 (Tex. 1998); *Texas Elec. Co-op. v. Dillard*, 171 S.W.3d 201, 208-209 (Tex. App. – Tyler 2005). The intentional spoliation of evidence relevant to a cause raises a presumption the evidence would have been unfavorable to the spoliators. *Id.* This presumption can be rebutted by evidence that the spoliation was not a result of fraudulent intent and does not apply when documents are merely lost. *Cresthaven Nursing Residence v. Freeman*, 2003 WL 253283, 8, 10 (Tex. Ct. App., Feb. 5, 2003).

The presumption does not arise unless the party responsible for destruction of evidence had a duty to preserve it. *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 722 (Tex. 2003). However, such a duty arises "only when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim." *Id.* A party need not take extraordinary measures to preserve evidence, but must exercise reasonable care in preserving evidence. *Trevino*, 969 S.W.2d at 951. A court may determine there is no breach of the duty to preserve evidence if the alleged spoliator offers an "innocent explanation" such as that the evidence was destroyed in an ordinary course of business. *Id.* Finally, the party alleging spoliation is not entitled to remedy unless it establishes prejudice. *Id.*

UTAH

There is no authority demonstrating that Utah has adopted the spoliation doctrine. See *Burns v. Cannondale Bicycle Co.*, 876 P.2d 415, 419 (Utah App. 1994).

VERMONT

The only Vermont case discussing destruction of evidence requires that a party must have reason or obligation to preserve evidence before a "presumption of falsity" will arise. *Lavalette v. Noyes*, 205 A.2d 413, 415 (Vt. 1964).

VIRGINIA

ADVERSE INFERENCE:

Virginia law recognizes spoliation or missing evidence inference, which provides that "[w]here one party has within his control material evidence and does not offer it, there is [an inference] that the evidence, if it had been offered, would have been unfavorable to that party." Charles E. Friend, *The Law of Evidence in Virginia §* 10-17, at 338 (5th ed.1999); *see Jacobs v. Jacobs*, 218 Va. 264, 269, 237 S.E.2d 124, 127 (Va. 1977) (holding principle is an inference rather than a presumption). Further, Virginia acknowledges that spoliation issues also arise when evidence is lost, altered, or cannot be produced. *Wolfe v. Virginia Birth-Related Neurological Injury Comp. Program*, 40 Va. App. 565, 580-583, 580 S.E.2d 467, 475-476 (Va. App. 2003). A spoliation inference may be applied in an existing action if, at the time the evidence was lost or destroyed, "a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action.

In a third-party spoliation context, an employer has no duty to preserve evidence on behalf of an employee who seeks to bring a third-party claim. *Austin v. Consolidation Coal Co.*, 501 S.E.2d 161, 163 (Va. 1998). Under the Virginia Workers Compensation Act there is no duty imposed on an employer to preserve evidence. *Id.* at 163-64. However, this case applies only to an employer's duty to preserve evidence.

ADMISSION (PARTY OR AGAINST INTEREST):

In general, a party's conduct, so far as it indicates his own belief in the weakness of his cause, may be used against him as an admission, subject of course to any explanations he may be able to make removing that significance from his conduct… "conduct showing the concealment or destruction of evidential material is…admissible; in particular the destruction (spoliation) of documents as evidence of an admission that their contents are as alleged by the opponents." 1 Greenleaf Ev. (16 Ed.), § 195, at 325. *Neece v. Neece*, 104 Va. 343, 348, 51 S.E. 739, 740-41 (Va. 1905); *Wolfe v. Virginia Birth-Related Neurological Injury Comp. Program*, 40 Va. App. 565, 580-583, 580 S.E.2d 467, 475-476 (Va. App. 2003).

WASHINGTON

ADVERSE INFERENCE/REBUTTABLE PRESUMPTION:

In *Pier 67, Inc. v. King County*, 89 Wash.2d 379, 573 P.2d 2 (Wash. 1977), the court held: "where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him. 89 Wash.2d at 385-86, 573 P.2d 2. To remedy spoliation the court may apply a rebuttable presumption, which shifts the burden of proof to a party who destroys or alters important evidence. In deciding whether to apply a rebuttable presumption in spoliation cases, two factors control: "(1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party." *Marshall v. Bally's Pacwest, Inc.*. 94 Wash. App. 372, 381-383, 972 P.2d 475, 480 (Wash. App. Div. 2, 1999). In weighing the importance of the evidence, the court considers whether the adverse party was afforded an adequate opportunity to examine it. Culpability turns on whether the party acted in bad faith or whether there is an innocent explanation for the destruction. *Id.*

WEST VIRGINIA

TORT OF SPOLIATION - INTENTIONAL SPOLIATION:

West Virginia does recognize a tort of intentional spoliation of evidence as an independent tort when committed by either a party to an action or a third-party. See *Hannah v. Heeter*, 584 S.E.2d 560, 563-64 (W. Va. 2003). The elements of the tort of intentional spoliation consists of: (1) a pending or potential civil action; (2) knowledge of the spoliator of the pending or potential civil action; (3) willful destruction of the evidence (4) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; (5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action; (6) the party's inability to prevail in the civil action; and (7) damages. Once the first six elements are established, there arises a rebuttable presumption that but for the fact of the spoliation the party injured by the spoliation would have prevailed in the pending or potential litigation. *Id.*

NEGLIGENT SPOLIATION:

West Virginia does not recognize spoliation of evidence as an independent tort when the spoliation is the caused by the negligence of a party to a civil action. *Id.*

NEGLIGENT THIRD-PARTY SPOLIATION:

West Virginia does recognize spoliation of evidence as an independent tort when the spoliation is the result of negligence of a third-party and that third-party had a special duty to preserve the evidence. *Id.* The element of the tort of negligent spoliation of evidence by a third-party consists of: (1) the existence of a pending or potential civil action; (2) the alleged spoliator had actual knowledge of the pending or potential civil action; (3) a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption, or special circumstances; (4) spoliation of the evidence; (5) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; and (6) damages. (There arises a rebuttable presumption that but for the fact of the spoliation of evidence the party injured by the spoliation would have prevailed in the pending or potential civil litigation if the first five element are met). *Id.*

PUNITIVE DAMAGES:

In actions of tort where willful conduct affecting the rights of others appears a jury may assess exemplary, punitive, or vindictive damages. *Id.*

ADVERSE INFERENCE:

A trial court may give an adverse inference jury instruction or impose other sanctions against a party for spoliation of evidence after considering: (1) the party's degree of control, ownership, possession or

authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for litigation; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in causing the destruction of the evidence. *Id.* The party requesting the instruction bears the burden of proof.

SANCTIONS:

Rule 37, of the West Virginia Rules of Civil Procedure, is designed to permit the use of sanctions against a party who refuses to comply with the discovery rules. *Id.*

WISCONSIN

TORT OF SPOLIATION:

Wisconsin has not recognized independent tort actions for the intentional and negligent spoliation of evidence. *Estate of Neumann ex rel. Rodli v. Neumann*, 242 Wis.2d 205, 244-249, 626 N.W.2d 821, 840 - 843 (Wis. App. 2001).

ADVERSE INFERENCE:

The trier of fact can draw an adverse inference from intentional spoliation of evidence. *Id.; Jagmin v. Simonds Abrasive Co.*, 61 Wis.2d 60, 80-81, 211 N.W.2d 810 (Wis. 1973). The Supreme Court affirmed the trial court's refusal to give an adverse inference instruction in the absence of clear, satisfactory and convincing evidence that the defendant had intentionally destroyed or fabricated evidence. *Jagmin*, 61 Wis.2d at 80-81, 211 N.W.2d 810.

SANCTIONS:

Wisconsin trial courts have discretion in imposing sanctions for spoliation of evidence. See *State v. McGrew*, 646 N.W.2d 856 (Wis. Ct. App. 2002). However, sanctions cannot "be considered unless there is clear and convincing proof that evidence was deliberately destroyed or withheld." *Hoskins v. Dodge County*, 642 N.W.2d 213, 228 (Wis. Ct. App. 2002). When deciding whether and how to sanction a party who has destroyed evidence, Wisconsin courts consider the circumstances, including whether the destruction was intentional or negligent, whether comparable evidence is available, and whether at the time of destruction the responsible party knew or should have known that a lawsuit was a possibility. *Farr v. Evenflo Co., Inc.,* 287 Wis.2d 827, 705 N.W.2d 905 (Wis. 2005); *Id.* In *Garfoot v. Fireman's Fund Ins. Co*., 228 Wis.2d 707, 724, 599 N.W.2d 411 (Wis. Ct. App. 1999), the court held that dismissal as a sanction for destruction of evidence requires a finding of egregious conduct, "which, in this context, consists of a conscious attempt to affect the outcome of litigation or a flagrant knowing disregard of the judicial process." The spoliation rule does not apply in administrative proceedings. *Yao v. Bd. of Regents of Univ. of Wis. Sys.*, 649 N.W.2d 356, 362 (Wis. Ct. App. 2002).

WYOMING

TORT OF SPOLIATION:

Rather than recognize an independent tort claim for fraudulent creation of evidence (or spoliation of evidence), Wyoming law allows courts to draw an adverse inference against a party responsible for losing or destroying evidence. See *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 775-776 (10th Cir. 1999) (applying Wyoming law).

ADVERSE INFERENCE:

It is well-settled that a party's bad-faith with holding, destruction, or alteration of a document or other physical evidence relevant to proof of an issue at trial gives rise to a presumption or inference that the evidence would have been unfavorable to the party responsible for its non-production, destruction, or

alteration. The Wyoming Supreme Court stated that, “for example, in a negligence action, where a party demonstrates that evidence was concealed or destroyed in bad faith (either deliberately or with reckless disregard for its relevance), that fact should be admitted, counsel should be permitted to argue the inference to the jury, the court should instruct the jury as to the inference, and the jury may infer that the fact would have helped prove negligence; a court’s refusal may be an abuse of discretion. Indeed, some courts have held that such destruction creates a presumption that shifts the burden of production, or even persuasion, to the party responsible for the destruction.” *Abraham v. Great Western Energy, LLC*, 101 P.3d 446, 455-456 (Wyo. 2004).

SANCTIONS:

”Where the evidence, rather than being destroyed, has been tampered with in bad faith, a court has the option of excluding it, thus denying its use by the tampering party. Where the alteration is not in bad faith and is not so egregious, however, the evidence itself should be admitted, together with information relating to how it was altered, and counsel may argue the issue to the jury. *Id.* Where the loss or destruction of evidence is not intentional or reckless, by contrast, some courts give the trial court discretion to admit or exclude testimony relating to the missing evidence, and discretion to give or withhold a “missing evidence” instruction and a court should refuse to give such instruction if the non-produced evidence is cumulative or of marginal relevance. *Id.*

In a case that warrants imposition of a sanction against the spoliating party, the court may choose to instruct the jury on the “spoliation inference,” *i.e*., inform the jury that the lost evidence is to be presumed unfavorable to that party; preclude the spoliating party from introducing expert testimony concerning testing on the missing product or other evidence concerning the product; or dismiss the plaintiff’s claim or the defendant’s defense or grant summary judgment to the innocent party. *Abraham v. Great Western Energy, LLC*,101 P.3d at 455-456, citing Richard E. Kaye, Annotation, *Effect of Spoliation of Evidence in Products Liability Action*, 102 A.L.R. 5th 99-100 (2002).

SAMPLE – Spoliation Protection Letters

Form spoliation letter to opposing counsel

[date]

[address]

re: [matter (, case number)]

Dear: _____,

By this letter, you and your client{s} are hereby given notice not to destroy, conceal or alter any paper or electronic files and other data generated by and/or stored on your client's {clients'} computers and storage media (e.g., hard disks, floppy disks, backup tapes), or any other electronic data, such as voice mail. As you know, your client's {clients'} failure to comply with this notice can result in severe sanctions being imposed by the Court {and liability in tort} for spoliation of evidence or potential evidence.

Through discovery we expect to obtain from you a number of documents and things, including files stored on your client's {clients'} computers and your client's {clients'} computer storage media. {As part of our initial discovery efforts, you [are hereby served with/will soon receive] [initial/supplemental] interrogatories and requests for documents and things.}

In order to avoid spoliation, you will need to provide the data requested on the original media. Do not reuse any media to provide this data.

{Although [we may bring/have brought] a motion for an order preserving documents and things from destruction or alteration, your client's {clients'} obligation to preserve documents and things for discovery in this case arises in law and equity independently from any order on such motion.}

Electronic documents and the storage media on which they reside contain relevant, discoverable information beyond that which may be found in printed documents. Therefore, even where a paper copy exists, we [seek/will seek] all documents in their electronic form along with information about those documents contained on the media. We also [seek/will seek] paper printouts of only those documents that contain unique information after they were printed out (such as paper documents containing handwriting, signatures, marginalia, drawings, annotations, highlighting and redactions) along with any paper documents for which no corresponding electronic files exist. Our discovery requests [ask/will ask] for certain data on the hard disks, floppy disks and backup media used in your client's {clients'} computers, some of which data are not readily available to an ordinary computer user, such as "deleted" files and "file fragments." As you may know, although a user may "erase" or "delete" a file, all that is really erased is a reference to that file in a table on the hard disk; unless overwritten with new data, a "deleted" file can be as intact on the disk as any "active" file you would see in a directory listing.

{Courts have made it clear that all information available on electronic storage media is discoverable, whether readily readable ("active") or "deleted" but recoverable. See, e.g., Easley, McCaleb & Assocs., Inc. v. Perry, No. E-2663 (Ga. Super. Ct. July 13, 1994; "deleted" files on a party's computer hard drive held to be discoverable, and plaintiff's expert was allowed to retrieve all recoverable files); Santiago v. Miles, 121 F.R.D. 636, 640 (W.D.N.Y. 1988; a request for "raw information in computer banks" was proper and obtainable under the discovery rules); Gates Rubber Co. v. Bando Chemical Indus., Ltd., 167 F.R.D. 90, 112 (D. Colo. 1996; mirror-image copy of everything on a hard drive "the method which would yield the most complete and accurate results," chastising a party's expert for failing to do so); and Northwest Airlines, Inc. v. Teamsters Local 2000, et al., 163 L.R.R.M. (BNA) 2460, (USDC Minn. 1999); court ordered image-copying by Northwest's expert of home computer hard drives of employees suspected of orchestrating an illegal "sick-out" on the Internet).}

Accordingly, electronic data and storage media that may be subject to our discovery requests and that your client{s} are obligated to maintain and not alter or destroy, include but are not limited to the following:

Introduction: description of files and file types sought

All digital or analog electronic files, including “deleted” files and file fragments, stored in machine-readable format on magnetic, optical or other storage media, including the hard drives or floppy disks used by your client’s {clients’} computers and their backup media (e.g., other hard drives, backup tapes, floppies, Jaz cartridges, CD-ROMs) or otherwise, whether such files have been reduced to paper printouts or not. More specifically, your client{s} is {are} to preserve all of your e-mails, both sent and received, whether internally or externally; all word-processed files, including drafts and revisions; all spreadsheets, including drafts and revisions; all databases; all CAD (computer-aided design) files, including drafts and revisions; all presentation data or slide shows produced by presentation software (such as Microsoft PowerPoint); all graphs, charts and other data produced by project management software (such as Microsoft Project); all data generated by calendaring, task management and personal information management (PIM) software (such as Microsoft Outlook or Lotus Notes); all data created with the use of personal data assistants (PDAs), such as PalmPilot, HP Jornada, Cassiopeia or other Windows CE-based or Pocket PC devices; all data created with the use of document management software; all data created with the use of paper and electronic mail logging and routing software; all Internet and Web-browser-generated history files, caches and “cookies” files generated at the workstation of each employee and/or agent in your client’s {clients’} employ and on any and all backup storage media; and any and all other files generated by users through the use of computers and/or telecommunications, including but not limited to voice mail. Further, you are to preserve any log or logs of network use by employees or otherwise, whether kept in paper or electronic form, and to preserve all copies of your backup tapes and the software necessary to reconstruct the data on those tapes, so that there can be made a complete, bit-by-bit “mirror” evidentiary image copy of the storage media of each and every personal computer (and/or workstation) and network server in your control and custody, as well as image copies of all hard drives retained by you and no longer in service, but in use at any time from _____ to the present.

Your client{s} is {are} also not to pack, compress, purge or otherwise dispose of files and parts of files unless a true and correct copy of such files is made.

Your client{s} is {are} also to preserve and not destroy all passwords, decryption procedures (including, if necessary, the software to decrypt the files); network access codes, ID names, manuals, tutorials, written instructions, decompression or reconstruction software, and any and all other information and things necessary to access, view and (if necessary) reconstruct the electronic data we [are requesting/will request] through discovery.

1. **Business Records:** [All documents and information about documents containing backup and/or archive policy and/or procedure, document retention policy, names of backup and/or archive software, names and addresses of any offsite storage provider.]

a. All e-mail and information about e-mail (including message contents, header information and logs of e-mail system usage) {sent or received} by the following persons:

   [list names, job titles]

b. All other e-mail and information about e-mail (including message contents, header information and logs of e-mail system usage) containing information about or related to:

   [insert detail]

c. All databases (including all records and fields and structural information in such databases), containing any reference to and/or information about or related to:

   [insert detail]

d. All logs of activity (both in paper and electronic formats) on computer systems and networks that have or may have been used to process or store electronic data containing information about or related to:

   [insert detail]

e. All word processing files, including prior drafts, “deleted” files and file fragments, containing information about or related to:

   [insert detail]

f. With regard to electronic data created by application programs which process financial, accounting and billing information, all electronic data files, including prior drafts, “deleted” files and file fragments, containing information about or related to:

   [insert detail]

g. All files, including prior drafts, “deleted” files and file fragments, containing information from electronic calendars and scheduling programs regarding or related to:

   [insert detail]

h. All electronic data files, including prior drafts, “deleted” files and file fragments about or related to:

   [insert detail]

2. **Online Data Storage on Mainframes and Minicomputers:** With regard to online storage and/or direct access storage devices attached to your client’s {clients’} mainframe computers and/or minicomputers: they are not to modify or delete any electronic data files, “deleted” files and file fragments existing at the time of this letter’s delivery, which meet the definitions set forth in this letter, unless a true and correct copy of each such electronic data file has been made and steps have been taken to assure that such a copy will be preserved and accessible for purposes of this litigation.

3. **Offline Data Storage, Backups and Archives, Floppy Diskettes, Tapes and Other Removable Electronic Media:** With regard to all electronic media used for offline storage, including magnetic tapes and cartridges and other media that, at the time of this letter’s delivery, contained any electronic data meeting the criteria listed in paragraph 1 above: Your client {clients} is {are} to stop any activity that may result in the loss of such electronic data, including rotation, destruction, overwriting and/or erasure of such media in whole or in part. This request is intended to cover all removable electronic media used for data storage in connection with their computer systems, including magnetic tapes and cartridges, magneto-optical disks, floppy diskettes and all other media, whether used with personal computers, minicomputers or mainframes or other computers, and whether containing backup and/or archive data sets and other electronic data, for all of their computer systems.

4. **Replacement of Data Storage Devices:** Your client {clients} is {are} not to dispose of any electronic data storage devices and/or media that may be replaced due to failure and/or upgrade and/or other reasons that may contain electronic data meeting the criteria listed in paragraph 1 above.

5. **Fixed Drives on Stand-Alone Personal Computers and Network Workstations:** With regard to electronic data meeting the criteria listed in paragraph 1 above, which existed on fixed drives attached to stand-alone microcomputers and/or network workstations at the time of this letter's delivery: Your client {clients} is {are} not to alter or erase such electronic data, and not to perform other procedures (such as data compression and disk de-fragmentation or optimization routines) that may impact such data, unless a true and correct copy has been made of such active files and of completely restored versions of such deleted electronic files and file fragments, copies have been made of all directory listings (including hidden files) for all directories and subdirectories containing such files, and arrangements have been made to preserve copies during the pendency of this litigation.

6. **Programs and Utilities:** Your client {clients} is {are} to preserve copies of all application programs and utilities, which may be used to process electronic data covered by this letter.

7. **Log of System Modifications:** Your client {clients} is {are} to maintain an activity log to document modifications made to any electronic data processing system that may affect the system's capability to process any electronic data meeting the criteria listed in paragraph 1 above, regardless of whether such modifications were made by employees, contractors, vendors and/or any other third parties.

8. **Personal Computers Used by Your Employees and/or Their Secretaries and Assistants:** The following steps should immediately be taken in regard to all personal computers used by your client's {clients'} employees and/or their secretaries and assistants.

a. As to fixed drives attached to such computers: (i) a true and correct copy is to be made of all electronic data on such fixed drives relating to this matter, including all active files and completely restored versions of all deleted electronic files and file fragments; (ii) full directory listings (including hidden files) for all directories and subdirectories (including hidden directories) on such fixed drives should be written; and (iii) such copies and listings are to be preserved until this matter reaches its final resolution.

b. All floppy diskettes, magnetic tapes and cartridges, and other media used in connection with such computers prior to the date of delivery of this letter containing any electronic data relating to this matter are to be collected and put into storage for the duration of this lawsuit.

9. **Evidence Created Subsequent to This Letter:** With regard to electronic data created subsequent to the date of delivery of this letter, relevant evidence is not be destroyed and your client {clients} is {are} to take whatever steps are appropriate to avoid destruction of evidence.

In order to assure that your and your client's {clients'} obligation to preserve documents and things will be met, please forward a copy of this letter to all persons and entities with custodial responsibility for the items referred to in this letter.

Sincerely, etc.

March 17, 2010

Ms. Teresa Dubose
Claims Management, Inc.
P.O. Box 1288
Bentonville, AR 72712

RE: Our Client:
Claim:
Accident Location: Walmart Supercenter Store #776
3010 East 23rd Avenue North
Fremont, NE 68025
Date of Accident:

Dear Ms. Dubose:

By this letter, Wal-Mart is hereby given notice not to destroy, conceal or alter any paper or electronic files and other data generated by and/or stored on your client's computers and storage media (e.g., hard disks, floppy disks, backup tapes), or any other electronic data, such as voice mail, video surveillance tapes, and photographs, including digital and hard copies. As you know, Wal-Mart's failure to comply with this notice can result in severe sanctions being imposed by the Court and liability in tort for spoliation of evidence or potential evidence.

Through discovery we expect to obtain from Wal-Mart a number of documents and things, including files stored on its computers and computer storage media, the surveillance tapes from the date of the accident, any accident reports or incident reports, maintenance logs, photos, and any and all other relevant documents. Enclosed is a draft of the Complaint we intend to file early next week. As part of our initial discovery efforts, you will receive initial interrogatories and requests for documents and items.

In order to avoid spoliation, you will need to provide the data requested on the original media. Do not reuse any media to provide this data. Electronic documents and the storage media on which they reside contain relevant, discoverable information beyond that which may be found in printed documents. Therefore, even where a paper copy exists, we will seek all documents in their electronic form along with information about

those documents contained on the media. We also will seek paper printouts of only those documents that contain unique information after they were printed out (such as paper documents containing handwriting, signatures, marginalia, drawings, annotations, highlighting and redactions) along with any paper documents for which no corresponding electronic files exist. Courts have made it clear that all information available on electronic storage media is discoverable, whether readily readable ("active") or "deleted" but recoverable.

Evidence Created Subsequent to This Letter: With regard to electronic data created subsequent to the date of delivery of this letter, relevant evidence is not to be destroyed and Wal-Mart is to take whatever steps are appropriate to avoid destruction of evidence.

In order to assure that Wal-Mart's obligation to preserve documents and things will be met, please forward a copy of this letter to all persons and entities with custodial responsibility for the items referred to in this letter. If you wish to discuss this claim, please give me a call.

Sincerely,

Honest Hank
Attorney at Law

XXX:xx
Enclosure

As you may be aware, my law firm represents XXXXXXXX as a result of personal injuries resulting from an accident which occurred on XXX in XXXX. We specifically request that the following evidence be maintained and preserved and not be destroyed, modified, altered, repaired, or changed in any matter:

1. The tractor and trailer involved in this accident.

2. Bills of lading for any shipments transported.

3. Any oversized permits or other applicable permits or licenses covering the vehicle or load on the day of the accident.

4. The daily logs for the day of the accident and the eight day period preceding the accident.

5. The daily inspection reports for the day of the accident and the eight day period preceding the accident.

6. Daily inspection reports for the tractor and trailer involved in this accident for the day of the accident and the eight day period preceding this accident.

7. Maintenance, inspection, and repair records or work orders on the tractor and the trailer for the day of the accident and for the six month period preceding the accident.

8. Annual inspection report for the tractor and trailer covering the date of the accident.

9. The complete driver's qualification file, including but not limited to:

   a. application for employment
   b. CDL license
   c. driver's certification of prior traffic violations
   d. driver's certification of prior accidents
   e. driver's employment history
   f. inquiry into driver's employment history
   g. pre-employment MVR
   h. annual MVR
   i. annual review of driver history

j. certification of road test
k. medical examiner's certificate
l. drug testing records
m. HAZMAT or other training documents

10. Photographs of the vehicles involved in this accident or the accident scene.

11. Any post-accident alcohol and drug testing results

12. Any lease contracts or agreements covering the tractor or trailer involved in this accident.

13. Any interchange agreements regarding the tractor or trailer involved in this accident.

14. Any data or printout from on-board recording devices, including but not limited to ECM (electronic control module), any on-board computer, tachograph, trip monitor, trip recorder, trip master, or other recording device for the day of the accident and the six month period preceding the accident.

15. Any post-accident maintenance, inspection, or repair records or invoices in regard to the tractor and trailer.

16. Any weight tickets, fuel receipts, hotel bills, or other records of expenses regarding the driver or the tractor or trailer involved in the collision for the day of the accident and the eight day period preceding the accident.

17. Any trip reports or dispatch records regarding the driver or the tractor or trailer involved in this collision for the day of the accident and the eight day period preceding this accident.

18. Any e-mails, electronic messages, letters, memos, or other documents concerning this accident.

19. The accident register maintained by the motor carrier as required by federal law for the one year period preceding this accident.

20. Any drivers manuals, guidelines, rules or regulations given to drivers.

21. Any reports, memos, notes, logs or other documents evidencing complaints about the driver.

22. Any DOT or PSC reports, memos, notes or correspondence concerning Chip P. Bledsoe or the tractor or trailer involved in this accident.

In regard to the tractor and trailer involved in this incident, we would like to set up a mutually convenient time for our expert to inspect, examine, and conduct tests on the unit. We specifically request that you make no repairs or adjustments to the tractor or trailer until this inspection is completed. I must have a response within the next ten (10) days.

SAMPLE – Spoliation Brief and Memo in Support

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Attorneys for The SCO Group, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC. Plaintiff/Counterclaim-Defendant, v. INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant/Counterclaim-Plaintiff.	**SCO'S MOTION FOR RELIEF FOR IBM'S SPOLIATION OF EVIDENCE** Case No. 2:03CV0294DAK Honorable Dale A. Kimball Magistrate Judge Brooke C. Wells

Plaintiff/Counterclaim-Defendant, The SCO Group, Inc. ("SCO"), for the reasons set forth in the Memorandum in Support of Its Motion For Relief for IBM's Spoliation of Evidence moves this Court to (1) enter an order precluding IBM from contesting that it relied on AIX and Dynix/ptx source code in making contributions to Linux development, and (2) impose an

adverse-inference instruction against IBM, consistent with the common-sense and well-established principle that a party who has notice that evidence is relevant to litigation and who proceeds to destroy it is more likely to have been threatened by that evidence than a party in the same position who does not destroy the evidence.

DATED this 25th day of September, 2006.

HATCH, JAMES & DODGE, P.C.
Brent O. Hatch
Mark F. James

BOIES, SCHILLER & FLEXNER LLP
Robert Silver
Stuart H. Singer
Stephen N. Zack
Edward Normand

By: /s/Brent O. Hatch

Counsel for The SCO Group, Inc.

CERTIFICATE OF SERVICE

Plaintiff/Counterclaim-Defendant, The SCO Group, Inc., hereby certifies that a true and correct copy of the foregoing SCO's Motion For Relief for IBM's Spoliation of Evidence was served on Defendant/Counterclaim-Plaintiff International Business Machines Corporation on the 25th day of September, 2006 by the Court's CM/ECF system or by U.S. Mail to:

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_____/s/ Brent O. Hatch_____

To be Argued by:
MARK R. BOWER
(Time Requested: 15 Minutes)

New York Supreme Court
Appellate Division—Second Department

CARMELINA BAGLIO, as mother and natural guardian of DOMINICK BAGLIO, and CARMELINA BAGLIO, individually,

Plaintiffs-Appellants,

– against –

ST. JOHN'S QUEENS HOSPITAL,

Defendant-Respondent,

– and –

ELISE LAMBERT, M.D., JUAN SANDOVAL, M.D., VALERIE CUCCO, M.D., and JOHN DOE a/k/a FRANCISCO CELUYE, M.D.,

Defendants

Docket No.: 2002-01209

BRIEF FOR PLAINTIFFS-APPELLANTS

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Queens County Clerk's Index No. 017761/97

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TABLE OF AUTHORITIES

CASES:

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STATEMENT OF FACTS

A. MEDICAL HISTORY:

Overview: Brain-damaged infant DOMINICK BAGLIO was born at ST. JOHNS QUEENS HOSPITAL on July 13, 1994, and, according to the newborn hospital chart, was discharged from the hospital as a normal term baby boy after only two days (R. 85).

The principal issue in this case is whether DOMINICK suffered fetal distress during his mother's labor, that required a cesarian section or other intervention that was not offered or performed. The available hospital records provide no direct evidence of fetal distress. There are some indirect indicia that there might have been fetal distress, but the incomplete documentation is inadequate proof to allow plaintiff's experts to form opinions with the requisite medical certainty to make out a *prima facie* case. There is no evidence showing when the possible distress began, the character or degree of the distress, or the duration of the distress. These details are essential to prove that the distress was sufficiently severe and prolonged to cause injury. Without complete records, is impossible to prove (or disprove) malpractice, but the burden of proof is on the plaintiffs, so that the plaintiffs lose when the lack of records makes proof impossible.. The singular reason for this lack of proof, is that the defendant hospital either lost or destroyed the fetal monitor strips that document the baby's well-being during labor. The missing fetal monitor strips are "the key to the case."

The fetal monitoring: From her time of arrival at the hospital until the delivery, the mother, CARMELINA BAGLIO, was routinely put on a fetal heart monitor - a machine that detects and records the fetal heart rate relative to the mother's uterine contractions, to assess how the baby is

faring under the stresses of labor. There are characteristic patterns to the baby's heartbeat that are printed out by the fetal monitor machine, which indicate if the baby is doing well or poorly. If the fetal monitor shows alarming heartbeat patterns, medical intervention, such as oxygenating the mother or delivering the baby by cesarian section, may be necessary to prevent brain damage to the baby (R. 12-13, 356-357). The fetal monitor generates a paper strip, or tape, that looks somewhat like an EKG strip, as a permanent objective record of the readings (R. 12-13, 356-357).

According to the mother's hospital record (R.49-84), the fetal monitoring ran for about ten hours, from admission to the hospital (3 a.m.) until delivery (1:17 p.m.). The fetal monitor machine generates its paper strip record at the standard rate of three centimeters per minute (slightly more than five feet per hour), so there should be a paper tape approximately fifty feet long documenting DOMINICK BAGLIO's heartbeat during the last ten hours before his birth. By law, the fetal monitor tracings must be retained and preserved at least until the infant reaches his nineteenth birthday.

The delivery: DOMINICK was delivered using obstetrical forceps to pull the baby's head out of the birth canal (R. 74). Forceps are not used casually; they are used only if there is fetal distress (R. 13, 357). Nothing in the hospital record explains why forceps were needed in this case (R. 13, 357). However, the doctor's note for the delivery describes the "[umbilical] cord around neck x 4 tight" - meaning that the baby's umbilical cord looped around his neck four times (R. 13, 357), possibly kinking up, and/or strangling the baby like a hangman's noose. If the umbilical cord was kinked, or strangled this baby in the womb, it would create characteristic patterns of fetal asphyxia which would be reflected on the fetal monitoring (R. 13, 357). Therefore, the delivery note creates an expectation that the fetal monitor strips would document fetal distress, that was not recognized at the time.

However, without the fetal monitor strips, it is impossible for plaintiff to make a *prima facie* case, as it is impossible to prove the degree, character, or duration, of the distress., or exactly when or how it should have been treated. This underscores the critical nature of the fetal monitor strips - the only *objective* record of the baby's condition during labor..

Conflicting evidence: Blatant disparities exist between what is found in the limited available medical records surrounding the birth, and the reality of the child. DOMINICK's mother, CARMELINA BAGLIO, testified that her baby didn't cry when he was born (R. 181), and that he was pale and still in the newborn nursery (R. 290-201). The mother's sworn testimony is both credible and consistent with the subsequent developments, but is irreconcilably inconsistent with the Apgar scores and observations recorded in the newborn's chart. Of a possible maximum Apgar score of 10 points, consisting of the sum of up to two points for each of five different criteria, DOMINICK's birth records show high-normal Apgar scores of 8 at one minute and 9 at five minutes after birth (R. 91). The Apgar scores recorded by the defendants are *impossible*, if the mother's testimony that the newborn didn't cry after delivery, is believed. The baby was given one Apgar point (out of a possible maximum of two) for his cry, representing a weak cry (R. 105). If the baby had no cry at all, as the mother swore (R. 181), that part of the Apgar score should have been assigned a zero. Likewise, at 5 minutes after the birth, the baby was given perfect scores of two points each for muscle tone and color (R. 105), which is incompatible with the mother's testimony that the baby was pale and still in the nursery (R. 290-291).

Of course, the Apgar score is entirely *subjective*, dependent on the accuracy of the examiner's assessments, just as the mother's observations are. All of the handwritten narrative descriptions of

the labor (R. 71-72) and the appearance of the baby (R. 89-94), are likewise *subjective*, as they are filtered through the eyes and the perspectives of the observers.

For this reason, and the many additional reasons that will immediately follow, that *objective* proof, namely, the fetal monitor strips, is essential to break the impasse of contradicting factual assertions, and to prove that the baby experienced fetal distress prior to his birth.

Subsequent developments: From the time he came home from the hospital, the baby was shaking (R. 212). At age one week, he was taken back to the hospital screaming (R. 212). These episodes were seizures, and little DOMINICK was eventually diagnosed with cerebral palsy. DOMINICK has a seizure disorder (R. 243-244) requiring anti-convulsant medications (R.245, 249). His neuro-muscular problems were apparent at age 3, in his impaired gait. When he walked, he could not swing his arms back and forth like a normal child, holding them still by his sides (R. 235) He needed orthotics on his legs (R. 241), and was found to have hearing problems (R. 256). At age 3, he still did not speak (R. 234). His coordination, speech, hearing, and cognitive delays posed challenges beyond the abilities of the Special Education program in the public schools (R. 237-239), so that he now goes to a United Cerebral Palsy School (R. 237) instead. He needs speech therapy three times a week, and both occupational and physical therapy twice a week each (R. 253). Certainly, the prognosis for his ability to function as a normal, independent adult, is bleak.

The cause of these terrible problems is very much in dispute. The mother's labor and delivery record is inadequate and incomplete, but what is there shows nothing alarming *per se*. These records, at face value, will not support a *prima facie* case.

The irreconcilable inconsistencies between the delivery and newborn records on the one hand, and the mother's testimony and the subsequent course of the child's development on the other, make objective records of the baby's condition in the hours leading up to the birth, (i.e., the fetal monitor strips) of crucial and dispositive importance

B. PROCEDURAL HISTORY:

On March 10, 1997, as part of the pre-suit investigation, plaintiff's attorney requested that the hospital supply the infant's complete medical records, including the fetal monitor strips (R. 309). At first, the hospital produced some normal fetal monitor strips, which displayed reassuring heart patterns (R. 310-353). CARMELINA BAGLIO's name was hand-written on the strips, giving the illusion that these were the plaintiffs'; however, simple analysis proved that the strips that the hospital produced were not CARMELINA BAGLIO's, notwithstanding the labeling to the contrary.[1]

On June 17, 1997, the plaintiffs' attorney wrote to the hospital's Medical Records Department, protesting that the strips that had been supplied were not of this labor and delivery (R. 354).

The lawsuit was started on July 25, 1997 (Summons, R. 20-21).

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[1] Throughout this litigation, the hospital never claimed that the strips it originally produced are the *bona fide* tracings from Mrs. BAGLIO's labor.

There are multiple tip-offs that prove that these tapes (R. 310-353) are not of the plaintiff.

For instance, a machine-generated date and time stamp appears in fine print on almost every page. The date is 12/01/04. (The correct date would be 7/13/94-7/14/94.) Similarly, the time of day recorded on the strips is wildly off. The tape supplied is interrupted after several hours while the mother had a sonogram (R. 321). (There was no mid-labor sonogram in Mrs. BAGLIO's labor.) The tape also has notes showing where the mother was given oxygen (R. 321); Mrs. BAGLIO was never given oxygen during her labor. There are other major discrepancies, too.

It appears that someone else's normal tracings were supplied, with the plaintiff's name inscribed, in order to mislead us.

The Summons & Complaint crossed with a letter dated July 30, 1997, wherein the hospital's Director of Medical Information Services confirmed although fetal monitoring had indeed been performed, the hospital was unable to find the strips, concluding that "should we locate them, I will contact you immediately." (R. 355).

Five years later, the missing fetal monitor strips still have not been turned over.

Plaintiff moved to strike the defendants' Answer for spoliating this crucial evidence, but withdrew that initial motion when the hospital promised to produce the fetal monitor tracings if they were found, and agreed to produce a person knowledgeable about their procedures for storing such records, and the search to find the missing strips, for deposition (R. 16).

On May 31, 2001, the hospital's chosen witness, Ms. Maritza Payamps of the Medical Records Department, was deposed to explain the loss of the fetal monitor strips. Ms. Payamps testified that the fetal monitor strips are supposed to be stored with the mother's chart (R. 373); that in sixteen years in the Medical Records Department; that she had never encountered the loss of fetal monitor strips in any other case (R. 382); and she had no explanation for their loss (R. 16).

Ms. Payamps' deposition revealed glaring inadequacies in the hospital's efforts made to find these missing tracings. No inquiry as to what happened to the fetal monitor strips was ever made of the doctors or nurses actually involved in this labor or delivery (R. 405). No inquiry of the medical records personnel who handled DOMINICK BAGLIO's records at the time of preparation was made (R. 405), nor of the hospital's Risk Management Department, either (R. 405).

Thereafter, plaintiff demanded further discovery in an effort to locate the missing fetal monitor tracings, get secondary evidence or their contents, or explain their loss (R. 412-415, 462):

1. Any records of the fetal monitoring that were stored in an electronic or computerized medium;
2. A copy of the relevant Joint Commission Accreditation of Hospitals' standards for the completion of incomplete hospital records;
3. A copy of the hospital's computer program for record keeping, so as to see if the missing fetal monitor tracings had been computerized;
4. Inspection of the "unfiled" fetal monitor strips which Ms. Payamps testified were stored in a small box, in order to see if DOMINICK BAGLIO's lost tracings were in that box;
5. The depositions of Records Room employee Irene Ngai (who assembled the baby's chart) and Risk Management's Azarean Cameron (who did the original "search" for the missing records);
6. A copy of any "deficiency report" that details what portions of a medical record are missing; and
7. The identity of the unidentified Obstetrics Department representative, who represented to the Medical Records Department that the Obstetrics Department did not have the missing records.

Except for identifying one name, the hospital never moved for a protective order against this discovery, but simply stated "boiler plate objections" and refused compliance (R. 433-434).

A Compliance Conference was held on February 27, 2001. At the Compliance Conference, the court "so ordered" a stipulation that directed the depositions of a Risk Manager by April 31, 2001, and defendant DR. CUOCCO by June 29, 2001, and the plaintiff was required to put the case on the calendar by August 31, 2001 (R. 421).

The court's tight deadline to put the case on the calendar by August 31, 2001, forced plaintiffs' attorney to do so without obtaining six of the seven items of discovery listed above.

C. THE MOTION LEADING TO THIS APPEAL:

On July 3, 2001, after the defendants failed to supply six of the seven aforesaid items of documentary discovery (R. 412-415, 462), but prior to putting the case on the calendar, plaintiffs moved to strike the hospital's Answer for these failures of discovery, and particularly, for the spoliation of the crucial fetal monitor tracings.

In support of the motion, plaintiff submitted the Expert Affidavit of board-certified obstetrician/gynecologist Max Lilling, M.D. Dr. Lilling attested that in a case alleging mistreated fetal distress:

> "... the fetal monitor strips are needed to assess the presence and duration of the fetal distress. The loss of the fetal monitoring strips deprives one of the opportunity to assess these factors... [and also] takes away the ability to objectively evaluate the true status of the infant where there are alleged defenses."

Dr. Lilling further attested that:

> "This record contains very little information concerning fetal well-being or lack thereof. The record does, however, indicate (1) a forceps-assisted delivery, and (2) that the umbilical cord was tightly around the infant's neck 4 times at the time of delivery. These factors together indicate a *likelihood* of fetal distress. Forceps delivery is only done with a significant indication, generally related to a need to remove the child from the birth canal because of evidence of fetal distress. Moreover, when the umbilical cord is tightly around the infant's neck, the cord, which is the infant's oxygen supply, becomes crimped, and the child would be expected to show indications of fetal distress on the fetal monitoring strips. The progress notes in this case are scant and unhelpful in assessing the infant's condition, and give no indication why a forceps delivery was undertaken, or what impact the cord being tightly around the infant's neck had on fetal well-being,. The fetal monitoring strips would give fairly conclusive evidence as to the presence of fetal distress, or lack thereof. Without the fetal monitoring strips, one could only *speculate* regarding the degree, duration, and impact of fetal distress in this case.
>
> "It is therefore my opinion within a reasonable degree of obstetrical certainty, that **[the loss of the fetal monitor strips] significantly and grossly prejudices [the plaintiffs'] ability to fully evaluate and present this case**." (R. 12-13) [emphasis added.]

In a further Medical Affirmation submitted in a reply, Dr. Lilling added that:

> "In 1994, many hospitals in the New York City region backed up fetal monitoring strips on an electronic medium, i.e., a computer disk." (R. 461)

The defense did not submit any contrary expert's affirmation, did not deny the loss of the fetal monitor strips, did not explain the loss of the fetal monitor strips, did not dispute that they were necessary to evaluate the extent or duration of fetal distress, did not dispute the inference that a backup of the data may exist on a computer disk (but also did not search for the computer disk), and did not deny the fatal effect that the loss of the strips caused.

Despite this uncontradicted demonstration of "significant and gross prejudice" to the plaintiff, and based solely on the motion papers, without conducting a "Vaughn hearing" (named for Vaughn v. City of N.Y., 201 A.D.2d 556, 607 N.Y.S.2d 726) to explore the circumstances or significance of the spoliation, the lower court found, that "while the fetal monitoring strips are clearly significant to the plaintiff's case, there is other evidence that is available [that would compensate for the loss of the strips]. Indeed, the plaintiff's medical records and progress notes are included in the case file. Thus the court cannot conclude that the loss of the strips prejudices the plaintiff as to warrant the drastic sanction of striking St. John's [Hospital's] answer." (R. 5-6). No sanction whatsoever was imposed, and no compensating remedy was provided. The plaintiffs' motion was denied.

Plaintiff appeals from that Order.

RELEVANT STATUTES AND REGULATIONS

New York City Rules and Regulations, Title 10, Sec. 405.10(4):

"Medical records shall be retained in their original or legally reproduced form for a period of at least six years from the date of diskharge, or three years after the patient's age of majority (18 years), whichever is longer..."

Education Law §6530, "Definitions of Profession Misconduct", subdiv. 32"

"Failing to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient. Unless otherwise provided by law, all patient records must be maintained for at least six years. Obstetrical records and records of minor patients must be retained for at least six years, and until one year after the minor patient reaches the age of eighteen years."

POINT I

THE LOSS OR DESTRUCTION OF THE FETAL MONITOR STRIPS WAS WILLFUL

The loss of critical evidence can prevent a litigant from meeting their burden of proof and cost them the relief sought. An act of spoliation gives one party unfair advantage over the other in litigation, impeding the search for truth, and knocking the scales of justice out of balance. That is what happened here.

In the court below, the hospital did not deny the loss or destruction of the fetal monitor strips herein, or the devastating prejudicial effect that resulted. No benign or innocent explanation for the absence was offered, and there was no denial that the loss of this crucial evidence would eviscerate the plaintiff's case. The essential factual premises of the plaintiffs' motion were unchallenged.

Rather, the defense simply argued that the plaintiff could not prove that the loss or destruction of the strips was malicious, willful, or contumacious. Since the mechanism by which the strips disappeared is unknown, the defense could not, and did not, affirmatively contend that it was accidental or innocent, but instead insisted that it was the plaintiff's burden to show intentional evil, if the defense was to be punished (R. 426-429). According to the defense, absent proof of malicious intent to hide or destroy evidence, an admitted spoliator escapes scot-free.

Although the plaintiffs necessarily have no *direct* proof of how the fetal monitor strips were lost or destroyed, malicious or wrongful intent can be inferred from the facts surrounding the spoliation, and may be proved circumstantially, by the nature and timing of the conduct and events. Sage Realty Corp. v. Proskauer Rose LLP, 275 A.D.2d 11; Sonmez v. World on Columbus, *supra*; cf., Christian v City of New York, ___ A.D.2d ___, 703 N.Y.S.2d 5.

Here, there are many circumstances that prove willfulness.

The hospital's initial supply of *someone else's tracings*, that inexplicably had Mrs. BAGLIO's name written onto them, would be suspicious enough, had it occurred in isolation. If the hospital's spoliation was innocent, one would ordinarily expect a simple response candidly conceding that the fetal monitor strips were lost. Instead, someone at the hospital wrote this mother's name on someone else's normal tracings, and tried to pass them off as the plaintiffs'. This was an obvious, affirmative attempt to deceive .The seriousness of the attempted deception can only be realized when the crucial nature of the lost tracings is fully appreciated; i.e., the missing fetal monitor strips are "the key to the case", the only document containing *objective* evidence of the pivotal issue - the baby's condition during labor. Only these strips can show the details of the fetal distress needed to prove the case.

But there is more.

After the attempted deception failed, and the unexplained loss was admitted, the hospital failed to conduct a diligent, meaningful search for the "missing" tapes. The search effort described by the hospital's chosen witness was superficial to the point of being empty "lip service". No inquiry was made of the obvious, key people who were involved in the target events at the time. (A detailed list of those shortcomings appears in the Statement of Facts, at pages 6-7 , *supra*.). The gross inadequacies in the search were compounded even further when the hospital blocked and refused the plaintiff's documentary discovery requests that required actions designed to find the strips (R. 412-415, 462), or back-up copies of the same data on computer disks (R. 461). Every step the hospital took was deliberately designed to frustrate and impede any serious effort to find the missing strips. Giving the defense the benefit of the doubt as to the initial loss of the strips, every action thereafter was undeniably deliberate and intentional.

An unmistakable picture of willfulness emerges.

POINT II

PROOF OF WILLFULNESS IS NOT ESSENTIAL TO STRIKE A SPOLIATOR'S PLEADINGS

Although plaintiffs believe that wilfulness has been fully demonstrated not just by the loss of the fetal monitor strips and the unexplained substitution of someone else's tracings mislabeled to give the false appearance of being the plaintiffs', and further buttressed by the hospital's actions and obstructions subsequent to the loss of these records, proof of willful intent is not a necessary element to strike a spoliator's pleadings. The evolving rule is "Spoliator, beware!" Klein v. Seenauth. 180 Misc. 2d 213, 687 N.Y.S.2d 889.

The unintentional loss of evidence, absent intentional destruction, can be just as fatal to a litigant as if it were deliberate, so as to justify striking a pleading. DiDomenico, *supra*, Squiteri, *supra* at 201-203. The court below explicitly recognized this. (Order Appealed From, R. 6).

Thus, this "drastic sanction" has been applied even if the destruction occurred through negligence rather than willfulness, and even if the evidence was destroyed before the spoliator was a party to litigation, provided it was on notice that the evidence might be needed for future litigation. *See*, e.g., Kirkland v. New York City Housing Authority, 236 A.D.2d 170 (1st Dept. 1997) (dismissal of third- party action appropriate where crucial evidence was negligently destroyed); *accord*, Healey v. Firestone Tire & Rubber Co., 212 A.D.2d 351, *rev'd on other grounds* 87 N.Y.2d 596; *see, also*, Squiteri v. City of New York, 248 A.D.2d 201 (1st Dept. 1998). A pleading may be struck absent willful or contumacious conduct, depending on the extent of prejudice to a party and when necessary as a "matter of elementary fairness" Puccia v Farley, 261 A.D.2d 83, 85; Kirkland, *supra*. Hartford Fire Ins. Co. v. Regenerative Bldg. Const., 271 A.D.2d 862, 863, 706 N.Y.S.2d 236, quoting Puccia,

supra; Lane v. Fisher Park Lane Co., 276 A.D.2d 136. Appropriate remedial actions include striking the pleadings. New York Cent. Mutual Fire Ins. Co. v. Turnerson's Elec., Inc., ___ A.D.2d ___, 721 N.Y.S.2d 92 [holding that where a party destroys key physical evidence "such that its opponents are ' prejudicially bereft of appropriate means to confront a claim with incisive evidence,"' the spoliator may be punished by the striking of its pleading; Squiteri, *supra*, at 202- 203 ["when a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoliation"]; Mudge, Rose, Guthrie, Alexander & Ferdon, *supra* at 493 [dismissing plaintiffs claim due to its "negligent loss of a key piece of evidence which defendants never had an opportunity to examine"]; *see*, also, Liz v. William Zinsser & Co., 253 A.D.2d 413.

Accordingly, proof of willfulness is not essential - nor should it be - as the important element of spoliation is that it results in same prejudice, and requires the same remedial steps to restore balance to the scales of justice, whether the spoliation was intentional or not.

POINT III

ALL OF THE TESTS TO MEASURE THE WHETHER THE DEFENDANT'S SPOLIATION WARRANTS STRIKING THEIR PLEADING, HAVE BEEN MET

The penalties for spoliation are separate and apart from the sanctions authorized by CPLR §3126 for defiance of a court order directing discovery. A spoliator of key physical evidence is properly punished by striking its pleadings. DiDomenico v. C&S Aeromatik, 52 A.D.2d 41 (2nd Dept. 1998); Mudge, Rose, Guthrie, Alexander & Ferdon v. Penguin Air Conditioning Corp., 221 A.D.2d 243 (2nd Dept., ___) [dismissal of complaint warranted where plaintiff negligently lost key piece of evidence before defendants could examine it]; Velasquez vs. Brocorp, 283 A.D.2d 423, 723 N.Y.S.2d 870 (1st Dept. 2001); Goldman v. Gateway Toyota, 283 A.D.2d 457, 724 N.Y.S.2d 630 (2001) [complaint stricken for spoliation]; Cabasso v. Goldberg, 288 A.D.2d 116, 733 N.Y.S.2d 47 (1st Dept, 2001) [defendant's answer stricken for spoliation of evidence]; Stroebe v. Martin, 272 A.D.2d 318, 272 A.D.2d 318, 707 N.Y.S.2d 882 (1st Dept., 2000) [complaint dismissed for spoliation]; Sage Realty Corp. v. Proskauer Rose LLP, 275 A.D.2d 11 [plaintiff's pleading stricken for spoliation] (1st Dept., 2000) ; New York Central Mutual Fire Insurance Company v. Turnerson's Electric Inc., 280 A.D.2d 652, 721 N.Y.S.2d 92 (2nd Dept., 2001) [complaint dismissed for spoliation]; Roman v North Shore Orthopedic Assn., 271 A.D.2d 669 (2nd Dept., 2000) [defendant's third-party complaint dismissed for spoliation]; Romano v Scalia and DeLucia Plumbing, A.D.2d (2nd Dept., 2001) [complaint dismissed for spoliation]; Long Island Diagnostic Imaging v. Stoney Brook Diagnostic Imaging 286 A.D.2d 320, 728 N.Y.S.2d 781 (2nd Dept., 2001) [defendant's counterclaims and third-party claims stricken for spoliating billing records].

Public policy demands, for obvious reasons, that a spoliator never be permitted to benefit from its spoliation of evidence. The spoliator must bear the consequences of its own acts or omissions, whether those were intentional or negligent, and suffer the consequences necessary to restore justice. In some cases, a lesser penalty than striking of pleadings may satisfactorily bring the scales of justice back into balance, but in this case, there is no way to do so except by striking the pleadings.[2] The long list of citations above shows that the striking of pleadings as a penalty for spoliation of evidence is not anathema to either the First or Second Departments, because they recognize that permitting a litigant to obtain any benefit from spoliation serves only to create an incentive that encourages more spoliation in the future.

Conversely, imposing severe, negative consequences for spoliation creates a beneficial and necessary disincentive to prevent spoliation and encourages the proper preservation of evidence that is essential to our system of justice.

Applying the various tests espoused in these cases to the facts of this case, the plaintiffs' two pre-suit letters to the hospital's Medical Records Department (R. 309 and 354) prove that the hospital was on actual notice that this evidence was crucial to the prosecution of this action even before litigation was commenced. Therefore, the criteria for striking a pleading based on pre-litigation notice, per Kirkland, *supra*, has been satisfied. At a minimum, the loss or destruction of that crucial

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[2] In Kirkland, *infra*, this Court suggested that the drastic remedy of striking a party's pleadings might not be appropriate in a product liability action *if* the missing product could be reconstructed from the manufacturer's design plans. However, in the present action, the reconstruction of the fetal monitor tracings or their contents from other sources is totally impossible. Those tracings show continuous, moment-to-moment objective proof of the fetal hearbeat in relationship to the mother's uterine contractions, which is not documented anywhere else in the existing records, and cannot be reconstructed from any other source. This essential element of the plaintiff's case is totally precluded and lost forever, due to the spoliation of the strips by the defendant Hospital.

evidence despite advance knowledge of its importance, was negligent, and the supply of someone else's strips falsely labeled as Mrs. BAGLIO's suggests an intentional and deliberate attempt to mislead, that surely is "willful and contumacious." This justifies striking the spoliator's pleadings.

Applying the test of prejudice to the facts of this case, the statement by the plaintiff's medical expert that "within a reasonable degree of obstetrical certainty, [the loss of the fetal monitor strips] significantly and grossly prejudices [the plaintiffs'] ability to fully evaluate and present this case," is uncontested. Thus, gross and significant prejudice to the plaintiffs is established without dispute.

Applying the test of "elemental fairness" to the facts of this case, **we reach the ultimate question**. **Inevitably, the loss of these records must cause one side or the other to lose the case**. **Who should that be?** The newborn baby, who is *non sui juris* and blameless for his own awful injuries, or the defendant who either negligently or wilfully lost or destroyed the records that would prove (or disprove) the merits of the case, and then impeded all efforts to find them? The just resolution of this question of fairness is easily and instantly resolved by looking to the statutory and regulatory mandates of New York City Rules and Regulations, Title 10, Sec. 405.10(4) and Education Law §6530, "Definitions of Professional Misconduct", subdiv. 32, both of which impose the clear legal duty of preserving these records on the defendants, for the benefit of the plaintiffs' use in litigation (hence the implicit references to the statute of limitations in both), in addition to the duty to avoid destruction of evidence imposed by the common law, obstruction of justice rules, and ordinary ethics. The scales of justice overwhelmingly tilt in the infant's favor, as he is utterly innocent but nonetheless grossly prejudiced under any circumstances. The hospital was charged with the clear statutory, regulatory, common law, and ethical duty of preserving the crucial fetal monitor records,

and is responsible for their loss or destruction in violation of that duty, so that “elemental fairness” mandates that they, rather than the newborn, should suffer the consequences.

POINT IV

THE COURT BELOW ERRED IN FINDING THAT THE SPOLIATION HEREIN WAS NOT SO PREJUDICIAL AS TO WARRANT STRIKING THE DEFENDANT'S ANSWER, AND IN LEAVING THE PLAINTIFFS REMEDILESS

Neonatal brain damage does not occur instantly It develops progressively over time. Proving causal connection between malpractice and the infant's brain injuries depends on demonstrating not only abstract suggestions of fetal distress, but also on a showing the duration and depth of that distress (R. 357). No secondary evidence exists that allows the plaintiffs to prove the duration and depth of fetal distress without the fetal monitor strips. Although plaintiff's expert attested to "a *likelihood* of fetal distress" (R. 13, 357), without the strips he cannot assess either the depth or duration of the presumed distress (R. 13, 357), which is indispensable to proving causation. The spoliation of the fetal monitor strips leaves the plaintiffs with no evidence sufficient to make out a *prima facie* case

The Order Appealed From (R. 5-6) adopted the authorities urged by the plaintiff that support punishing a spoliator by striking its pleadings. DiDomenico, *supra*; Kirkland, *supra*. The lower court also agreed that the unintentional loss of evidence, absent intentional destruction, could be just as fatal to a litigant as if it were deliberate, so as to justify striking a pleading. DiDomenico, *supra*, Squiteri v. City of N.Y., 248 A.D.2d 201 at 201-203, (R. 6). Nonetheless, plaintiffs' motion was denied, based on the lower court's unsupported *sua sponte* finding that "while the [lost] fetal monitoring strips are clearly significant to the plaintiff's case, there is other evidence that it available [that makes up for the loss]. Indeed, plaintiff's medical records and progress notes are included in the

case file. Thus, the court cannot conclude that the loss of the strips prejudices the plaintiff [so] as to warrant the drastic sanction of striking St. John's Answer."

Plaintiffs-Appellants contend that this finding is clear error. There is nothing whatsoever in the Record on Appeal that supports the lower court's conclusion that the available "medical records and progress notes" can *possibly* compensate for the lost fetal monitor strips. On the contrary, the existent "medical records and progress notes" can not support a *prima facie* case. In their opposing papers, the defense never suggested that the prejudice from the absence of the monitor strips could be compensated or overcome through the use of other records. The plaintiffs' expert's medical affirmation showing "significant and gross prejudice" was uncontradicted. If the case were to go to trial, the defense would certainly emphasize the plaintiff's complete inability to prove the depth or duration of the *presumed* fetal distress to maximum advantage. The plaintiffs simply cannot make out a *prima facie* case, far less a persuasive *prima facie* case, without this evidence. Indeed, given the expert's frank concession of "gross prejudice" to his ability to evaluate and present the case, the expert would be devastated on cross-examination, and would have to concede that any opinions on causal connection were speculative. No "adverse inference charge" to the jury can fill the gaps in the the necessary expert testimony that is lacking. The result would have to be a dismissal, or a defendant's verdict

As such, the court's conclusion that the consequent prejudice would not be fatal, is utterly unfounded and unsupported by the Record on Appeal..

"Remedial action is obligatory in instances in which the lost or destroyed evidence is 'crucial to the determination of the key issue.'" Fada Industries, Inc. v. Falchi Building Co., L.P., 189 Misc.2d 1, 730 N.Y.S.2d 827 (N.Y. Sup. 06/22/2001), citing Squitieri v. City of New York, *supra*;

Kirkland v. New York City Housing Authority, *supra;* Mudge, Rose, Guthrie, Alexander & Ferdon v. Penguin Air Conditioning Corp., *supr*a; Liz v. William Zinsser & Co., 253 A.D.2d 413. The court below erred, as it extended no remedy to the prejudiced party, leaving a terrible harm unaddressed and unpunished.

While striking a pleading is unquestionably a "drastic remedy", it is the only remedy that can compensate for the "gross prejudice" created by the loss of the fetal monitor strips. Here, the defense clearly gains an immense, unfair advantage from their spoliation of crucial records, yet the plaintiff was awarded no remedy to compensate for this massive wrong, forcing the plaintiff into the hopeless position of having to try a case to a certain defeat.

While the court's assessment of an appropriate penalty for spoliation is discretionary, that exercise of discretion must have a proper foundation. It cannot be unsupported whimsy or caprice. Here, there is no foundation for either the finding that other records compensated for the loss of the fetal monitor strips, or the lower court's refusal to penalize the spoliator, leaving the plaintiff remediless despite the destruction of evidence that is fatal to the case.

Accordingly, the Order Appealed from is error, and should be reversed.

CONCLUSION

The court below erred in finding that the plaintiff was not irreparably prejudiced by the loss or destruction of the fetal monitor strips. There is powerful inferential proof that the spoliation was willful, but even if it was unintentional, it was so negligent and so prejudicial as to warrant striking the defendant's pleading just the same. The spoliation will inevitably cost one side or the other a certain loss at trial. As between the spoliator and the innocent baby, elemental fairness mandates the loss be borne by the spoliator.

The Order Appealed From should be reversed.

Respectfully submitted,

_____

Mark R. Bower
The Law Offices of Mark R. Bower, P.C.
Appellate Counsel for Plaintiffs-Appellants

SAMPLE – Confidentiality & Nondisclosure Agreement

CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT

THIS AGREEMENT, made this ____ day of _____ (month), _____ (year), between _____, (hereinafter "Disclosing Party"), and _____ (hereinafter "Receiving Party").

BACKGROUND

The Disclosing Party and Receiving Party wish to discuss and exchange certain items and information related to business programs, products, applications, systems, components, technologies and business topics (the "Invention") which the parties hereto consider highly confidential and proprietary.

NOW THEREFORE, the parties hereto, intending to be legally bound in consideration of the mutual covenants and agreements set forth herein, hereby agree as follows:

1. DEFINITIONS

1.1. "**Invention**" shall mean all information relating to business programs, products, applications, systems, components, technologies and business topics.

1.2. "**Confidential Information**" shall mean all information provided by Disclosing Party with respect to the Invention regardless of whether it is written, oral, audio tapes, video tapes, computer discs, machines, prototypes, designs, specifications, articles of manufacture, drawings, human or machine readable documents. Confidential Information shall also include all information related to the Invention

provided by Disclosing Party to Receiving Party prior to the signing of this agreement. Confidential Information shall not include any of the following:

(a) such information in the public domain at the time of the disclosure, or subsequently comes within the public domain without fault of the Receiving Party;

(b) such information which was in the possession of Receiving Party at the time of disclosure that may be demonstrated by business records of Receiving Party and was not acquired, directly or indirectly, from Disclosing Party; or

(c) such information which Receiving Party acquired after the time of disclosure from a third party who did not require Receiving Party to hold the same in confidence and who did not acquire such technical information from Disclosing Party.

1.3. "**Disclosing Party**" shall mean the party disclosing information to the other relating to the Invention.

1.4. "**Receiving Party**" shall mean the party receiving information from the other relating to the Invention.

2. USE OF CONFIDENTIAL INFORMATION

The Receiving Party agrees to:

(a) receive and maintain the Confidential Information in confidence;

(b) examine the Confidential Information at its own expense;

(c) not reproduce the Confidential Information or any part thereof without the express written consent of Disclosing Party;

(d) not, directly or indirectly, make known, divulge, publish or communicate the Confidential Information to any person, firm or corporation without the express written consent of Disclosing Party;

(e) limit the internal dissemination of the Confidential Information and the internal disclosure of the Confidential Information received from the Disclosing Party to those officers and employees, if any, of the Receiving Party who have a need to know and an obligation to protect it;

(f) not use or utilize the Confidential Information without the express written consent of Disclosing Party;

(g) not use the Confidential Information or any part thereof as a basis for the design or creation of any method, system, apparatus or device similar to any method, system, apparatus or device embodied in the Confidential Information unless expressly authorized in writing by Disclosing Party; and

(h) utilize the best efforts possible to protect and safeguard the Confidential Information from loss, theft, destruction, or the like.

3. RETURN OF CONFIDENTIAL INFORMATION

All information provided by the Disclosing Party shall remain the property of the Disclosing Party. Receiving Party agrees to return all Confidential Information to Disclosing Party within 15 days of written demand by Disclosing Party. When the Receiving Party has finished reviewing the information provided by the Disclosing Party and has made a decision as to whether or not to work with the Disclosing Party, Receiving Party shall return all information to the Disclosing Party without retaining any copies.

4. NON-ASSIGNABLE

This agreement shall be non-assignable by the Receiving Party unless prior written consent of the Disclosing Party is received. If this Agreement is assigned or otherwise transferred, it shall be binding on all successors and assigns.

5. GOVERNING LAW

This Agreement and all questions relating to its validity, interpretation, performance and enforcement (including, without limitation, provisions concerning limitations of actions), shall be governed by and construed in accordance with the laws of the State of _____ (State), notwithstanding any conflict-of-laws doctrines of such state or other jurisdiction to the contrary, and without the aid of any canon, custom or rule of law requiring construction against the draftsman.

6. No License

Neither party does, by virtue of disclosure of the Confidential Information, grant, either expressly or by implication, estoppel or otherwise, any right or license to any patent, trade secret, invention, trademark, copyright, or other intellectual property right.

7. Binding Nature of Agreement

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors and assigns.

8. Provisions Separable

The provisions of this Agreement are independent of and separable from each other, and no provision shall be affected or rendered invalid or unenforceable by virtue of the fact that for any reason any other or others of them may be invalid or unenforceable in whole or in part.

9. ENTIRE AGREEMENT

This Agreement sets forth all of the covenants, promises, agreements, conditions and understandings between the parties and there are no covenants, promises, agreements or conditions, either oral or written, between them other than herein set forth. No subsequent alteration, amendment, change or addition to this Agreement shall be binding upon either party unless reduced in writing and signed by them.

10. Arbitration

Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be resolved by arbitration conducted by the Commercial Division of the American Arbitration Association and in accordance with the rules thereof, conducted in Fargo, North Dakota, or in any other convenient forum agreed to in writing by the parties. Any arbitration award shall be final and binding, and judgment upon the award rendered pursuant to such arbitration may be entered in any court of proper jurisdiction. Notwithstanding the foregoing, either party may seek and obtain temporary injunctive relief from any court of competent jurisdiction against any improper disclosure of the Confidential Information.

IN WITNESS OF THEIR AGREEMENT, the parties have set their hands to it below effective the day and year first written above.

Disclosing Party	**Receiving Party**
By: _____	By: _____

SAMPLE – LOGS

SAMPLE – Exhibit List/Logs

Exhibit List – CLIENT NAME

Our #	Depo #	Trial #	When Offered Depo/Trial/Hrg	Offered By:	Received? Yes or No	Description of Exhibit

Our #	Depo #	Trial #	Offered	Received	Description of Exhibit

Additional Notes

Exhibit Log

Case Name: Case ID:

Exhibit	Exhibit #	Source of Exhibit	Offered at (hrg/depo/trial)	Original Maintained By	Objections	Rulings	Notes

SAMPLE – Evidence Logs

Summary of Evidence

Case Name: Case ID:

Evidence	Bates Numbers	Date	Source	Relevance	Foundation	Objection	Supporting Exhibits	Ruling

Exhibit/Witness Cross-Reference Chart

Case Name: Case ID:

Date Collected	Name of Individual Who Collected Evidence	Exhibit Number	Description of Exhibit	Origination (Trial/Depo/Discovery)	Witness(es) Evidence Relates To	Marked As Exhibit?

Production Log

Case Name: Case ID:

Document	Bates Numbers	Date of Document	Author	Date Produced	Produced By	Privileges Asserted	Notes

Privilege Log

Case Name: Case ID:

Start Bates No.	End Bates No.	Doc Date	Author	Recipient	CC	Document	Privilege Description	Privilege Summary	Location of Document

Photograph Log

Case Name: Case ID:

Photograph No.	Description	Date Photographed	Time Photographed	Photographer	Where Photographed	Location of Original Photos/Negatives	Produced?	Offered as Exhibit?	Exhibit #

Prior and/or Unrelated Medical

Case Name: Jerome Phillips v. Christopher Allen Case ID: Doc. 1067 No. 493

Date	Provider	Medical Treatment	Reason for Treatment	Impairment or Permanency	Medical Records?	Date Produced	Privilege Assessed	Notes	Column4

Medications

Case Name: Case ID:

Date	Provider	Medication	Reason for Prescription	Medical Records?	Date Produced	Privilege Assessed	Notes

SAMPLE – Timelines

Medical Timeline

Case Name: DOA: Doc. Page

Date	Provider	Medical Treatment	Charges Incurred	Prescriptions	Physician	Notes


Blake Werts Birth Timeline
7:00 AM
11:00 AM
3:00 PM
7:00 PM
11:00 PM
3:00 AM
Sep 16 1996
Sep 17
Peggy Admitted to Hospital (7:05 AM)
Start Pitocin 10u/500 (7:40 AM)
Increase Pitocin 20u/500 (4:30 PM)
FHT Decelerations Noted in Nurse's Notes (7:15 PM)
Nurse's Notes indicate Pt calls out in pain (7:50 PM)
Nurse's Notes indicate uterus palpated (7:53 PM)
Deceleration; FHT's difficult to assess (7:54 PM)
Mom complains of abdominal pain; abdomen very firm; fetal heart rate dropped into 70's (7:55 PM)
Nurse's Notes indicate moved to left side; FHT's at 70BPM with questionable variability (7:58 PM)
Nurse's Notes indicate No FHT response (8:00 PM)
Nurse's Notes indicate moved to right side: scalp stim done with no response (8:02 PM)
Nurse's Notes indicate Dr. Taylor calls in and given report on deceleration; Ordered terbuline and C/S prep (8:04 PM)
Nurse's notes indicate FHT's remain in 70's with no LTV; scapt unable to be applied. No response (FHT's) despite interventions. C/S explained; permis obtained (8:05 PM)
Nurse's notes indicate FHT's asculated 80 BPM with no variability; proceeded with Cesarean birth. Dr. Taylor here. (8:12 PM)
Delivered by Dr. Taylor (8:25 PM)
Taken to Neonatal ICU (8:34 PM)
Blake's First Gasp of Air Post-Delivery (8:40 PM)
Sep 16 1996
Sep 17
7:00 AM
11:00 AM
3:00 PM
7:00 PM
11:00 PM
3:00 AM
Created with Timeline Maker Professional. Printed on Jun 02 2008.

June 23, 2009

Mr. R. Allan Mebus
RAMCRASH CONSULTING
1026 Denbigh Drive
Iowa City, IA 52246

RE: Kelly Gibbs v. Kelcey J. Brockmeyer, Lance Ostermiller and State Farm, et al.

Dear Mr. Mebus:

It was a pleasure to speak with you in connection with pending and anticipated litigation involving the above-entitled action. Our firm generally intends to seek your analysis and opinion regarding liability issues as to the accident which is addressed in the enclosed documents.

Initially, we request that you review the enclosed information, as detailed below, and give me a call to discuss the human factors, time distance factors, and any other factors you deem necessary in determining liability percentage breakdown attributable to each party (Kelcey Brockmeyer, Lance Ostermiller, and if applicable, Kelly Gibbs) in this accident. Kelly Gibbs is our client and is insured by State Farm Insurance. Lance Ostermiller is also insured by State Farm Insurance. Kelcey Brockmeyer is insured by IMT. The following documents are enclosed via CD-Rom:

1. Recorded statement of Lance Ostermiller to State Farm Insurance;
2. Recorded statement of Kelsey Brockmeyer to State Farm Insurance;
3. Recorded statement of Kelly Gibbs to State Farm Insurance;
4. Recorded Statement of Lance Ostermiller to IMT Insurance;
5. All photographs taken in this case;
6. Official Accident Report from Iowa Department of Transportation;
7. Iowa Police Report Codes;
8. Iowa State Patrol Investigation, inclusive of Witness Statements of:
    a. Lance Ostermiller;
    b. James Weis, Sr.;
    c. Elijah Wood;
    d. Brian Keith;
    e. Francis Nieman;
    f. Kelcey Jean Brockmeyer; and
    g. Lance Ostermiller.
9. Deposition transcript of Lance Ostermiller;

10. Deposition transcript of Kelsey Brockmeyer;
11. Deposition transcript of Kelly Gibbs;
12. Plaintiff's discovery responses to date; and
13. Defendant's discovery responses to date.

If you should need any further information prior to our next conference call, please let me know. Once you have had the opportunity to review the enclosed documents and conduct your investigation, please give me a call to discuss the case prior to authoring your report. My paralegal, Christi Koch, is available to assist you with any additional information needed or to set up a conference call should you wish to speak with me directly. Please let her know if we can provide anything additional to you.

As you are aware, all work under this engagement, including any reports, data, notes, work papers, correspondence or other documents you may generate or receive are to be considered confidential work product. All such documents (any information they contain that is not publicly available data) may be used only for purposes of this engagement and, of course, may not be disclosed to anyone without our written consent. Please notify us promptly if you receive:

a) Any request to reveal information related to the engagement or to examine, inspect or copy any documents you generate or receipt; or

b) Any actual or attempted service of a subpoena, summons or order purporting to require the disclosure of any such information or documents.

Your fees as indicated in your Fee Schedule provided to our office are acceptable and we acknowledge and accept that we will be billed monthly, as indicated in your Fee Schedule. A retainer check in the amount of $1,000.00 is enclosed and will be credited against the final bill for services rendered. It is understood and accepted that this retainer fee is not refundable and not given as a condition or guarantee of a specific opinion in this matter.

We look forward to working with you on this case.

Sincerely,

Craig L. Kelley
clkkelley@inserra.com

CLK/ck
Enclosures

cc: Kelly D. Gibbs

New Discovery Rule 12/1/2010

RE: Experts

Rule 26. Duty to Disclose; General Provisions Governing Discovery[**]

(a) Required Disclosures.

* * * * *

(2) ***Disclosure of Expert Testimony.***

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be

[**]In the Rule, material added after the public comment period is indicated by double underlining, and material deleted after the public comment period is indicated by underlining and overstriking. In the Note, new material is indicated by underlining and deleted material by overstriking.

accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data ~~or other information~~ considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this ~~the~~ ~~Rule 26(a)(2)(A)~~ disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under

Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D~~C~~) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C),

within 30 days after the other party's disclosure.

(ED) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

* * * * *

(b) Discovery Scope and Limits.

* * * * *

(3) ***Trial Preparation: Materials.***

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to

Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the

required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording — or a transcription of it — that recites substantially verbatim the person's oral statement.

(4) ***Trial Preparation: Experts.***

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been

identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which ~~of~~ the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B),

regardless of the form of the communications, except to the extent that the communications:

(i) rRelate to compensation for the expert's study or testimony;

(ii) iIdentify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) iIdentify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

(DB) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held

by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E~~C~~) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D~~B~~); and

(ii) for discovery under (D~~B~~), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

* * * * *

Committee Note

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than "data or other information," as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and — with three specific exceptions — communications between expert witnesses and counsel.

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including — for many experts — an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts — one for purposes of consultation and another

to testify at trial — because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Subdivision (a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all "facts or data considered by the witness in forming" the opinions to be offered, rather than the "data or other information" disclosure prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on "facts or data" is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that "facts or data" be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data "considered" by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Subdivision (a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule

26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

Subdivision (a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

Subdivision (b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also

applies to drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any "preliminary" expert opinions. Protected "communications" include those between the party's attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery.

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they

are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related cases.

The protection for communications between the retained expert and "the party's attorney" should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party's behalf in several of the cases. In such a situation, the protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the "party's attorney" concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert's study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not

limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Second, under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The exception applies only to communications "identifying" the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii) — that the party has a substantial need for the

discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.

In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

Changes Made After Publication and Comment

Small changes to rule language were made to conform to style conventions. In addition, the protection for draft expert disclosures or reports in proposed Rule 26(b)(4)(B) was changed to read "regardless of the form in which the draft is recorded." Small changes were also made to the Committee Note to recognize this change to rule language and to address specific issues raised during the public comment period.