

LEGAL ALERT

Steps to Avoid Future Litigation Dangers for Municipal Leadership*How to Handle Electronic Discovery from Retention through Litigation*

Litigation and the forever-looming threat of litigation mean municipalities must take care to preserve their records and documents. While the law recognizes that it is impractical for municipalities to keep each and every one of their records forever, judges do not respond favorably to defendants who make excuses for not being able to produce relevant documents in court. Worse than just a judge's disfavor, not being able to produce evidence may open the Village up to a spoliation of evidence claim and the additional heartache of reputational and financial damage. Klein, Thorpe, and Jenkins offers a presentation on just this topic, crafted with a comprehensive approach through the eyes of both their municipal attorneys and team of litigators. In broad strokes, we tell our clients and prospective clients how to:

1. Institute and Follow a Consistent Document Retention Policy

Developing and following a set document retention policy will only help. Case law shows that if a document is destroyed according to the policy, then it likely was not destroyed in bad faith. "[T]he destruction of evidence by means of a party's ordinary document retention policy can be a sign that it did not act in bad faith." *Buonauro v. City of Berwin*, Case No. 08 C 6687, 2011 WL 3754820, *10 (N.D. Ill. Aug. 25, 2011). But, courts assessing breaches of the duty to preserve evidence "do not reach any conclusion based simply on the existence of a retention policy." *Hess v. Biomet, Inc.*, No. 3:16-CV-208-JD-MGG, 2018 WL 3127162, at *2 (N.D. Ind. Feb. 16, 2018). Therefore, a retention policy is not everything, but it is a great first step.

2. Identify Triggering Events That Could Signify Litigation

Once you know that litigation is likely to begin (such as through the filing of a complaint, claim, pre-complaint letter or preservation letter), you are deemed to be on notice to preserve your documents. Moreover, major incidents, such as incidents of force which end in death, traffic accidents based in police pursuit with serious bodily injury or death, the filing of an EEOC or IDHR charge, as well as several other incidents likely give rise to the necessity to preserve documents. Error on the side of caution and speak to counsel immediately.

3. Preserve All Documents Relative to Any Claims or Defenses

Once you are on notice, you have a duty to preserve evidence that is reasonably likely to be the subject of discovery requests. The duty to preserve "is broad and 'encompasses any evidence that the non-preserving party knew or reasonably could foresee would be relevant to the action.'" *Cohn v. Guaranteed Rate, Inc.*, 318 F.R.D. 350, 354 (N.D. Ill. 2016) (quoting *Scruggs v. Miller*, No. 3:16-CV-050 JD, 2016 WL 495603, at *5 (N.D. Ind. Feb. 8, 2016); see also *Boyd v. Travelers Ins. Co.*, 166 Ill.2d 188, 195 (Ill. 1995). Our team can walk you through the various documents and components of your duty to preserve.

For any questions or comments you might have regarding this newsletter, please feel free to contact:

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4. Provide a Preservation Letter, Email or Order to Preserve Relevant Material

There is no real excuse for failing to warn your employees to preserve documents. Once you know litigation is looming, you must suspend your document retention policy and put in place a litigation hold to ensure all the relevant documents are kept. A party's "apparent failure to warn its employees to preserve documents potentially relevant to this litigation evidences fault by acting with negligence or flagrant disregard of the duty to preserve potentially relevant evidence." *Diersen v. Walker*, 2003 WL 21317276 (N.D. Ill. 2003).

Courts are reasonable, but you must be reasonable in return. How much time may pass between defendant's notice of litigation and the litigation hold is a fact-specific inquiry, since "often litigation holds cannot be placed in a matter of minutes," and "[e]very potentially relevant to this litigation evidences fault by acting with negligence or flagrant disregard of the duty to preserve potentially relevant evidence." *Does 1-5 v. City of Chicago*, No. 18-CV-03054, 2019 WL 2994532, at *6 (N.D. Ill. July 9, 2019). Our experience in this area of the law, from police misconduct litigation to general torts, will allow us to help you identify how quickly preservation should go into effect and the timeframe needed to protect your interests.

5. Notify Record-Keepers, Risk Claims Managers, and Insurers

Prompt, written notice to risk claims managers and primary and excess insurance policy carriers for all potential claims covered by any lines of insurance is a requirement of all insurance policies and failure to provide it is grounds for denial of coverage. *W. Am. Ins. Co. v. Yorkville Nat. Bank*, 238 Ill.2d 177, 185 (Ill. 2010). You must also conference with record-keepers designated pursuant to the Illinois Local Records Act, 50 ILCS 205/3a. Contact with the record-keepers will help you to learn how far back the records go (the time frame is individualized and set by the Local Records Commission and Local Records Commission of Cook County).

6. Familiarize Yourself with Evidence and Assemble a Team

Create a team to oversee the document retention process, working closely with IT personnel to ensure electronic copies are retained and easily accessible. Counsel and/or staff should also work closely with IT personnel to ensure that all electronic data is properly preserved and ultimately properly disclosed. See *Green v. Blitz U.S.A., Inc.*, Case No. 2:07-CV-372 (TJW), 2011 WL 806011, (E.D. Texas, March 1, 2011), *vacated*, No. 2:07CV372-TJW, 2014 WL 2591344 (E.D. Tex. June 10, 2014) (awarding sanctions where the defendant's employee tasked with preserving and collecting relevant ESI had a "lack of computer prowess" and "did not even attempt to consult with the IT Department about how electronic information could be discovered").

7. Stay On Top of Your Team and Communicate Regularly

More than just telling your staff to retain documents, ensure they do so through oversight. A team approach is absolutely necessary to this venture. Counsel must act as a guiding light, instructing and helping municipal leadership with the intricacies of document production based on the legal claims at stake. If not yet risen to litigation, communication about those who request information from the Village Attorney or a FOIA Officer/Command Staff can go a long way in showing good faith to preserve all relevant documentation.

8. Act Fast, Avoid Spoliation and WIN

In Illinois, courts define spoliation of evidence as the "destruction, mutilation, alteration, or concealment of evidence." *Midwest Trust Servs., Inc. v. Catholic Health Partners Servs.*, 910 N.E. 2d 638 (1st Dist. 2009). There are major sanctions for such conduct, including dismissal, contempt, entering a default judgment or allowing the court or jury to infer negligent or purposeful destruction of evidence. Receiving, retrieving and preserving the most relevant documents more often than not helps the municipality prove its defenses and WIN the case!

These steps and more are covered within our presentation along with detailed descriptions of the law. Please, contact our office at 312-984-6400 or through any of the attorneys listed to the side for information on this presentation or any other municipal law-related or litigation topics.