Child Law Practice
Helping Lawyers Help Kids
Vol. 30 No. 6 August 2011

IN PRACTICE

Where are the Records? Handling Lost/Destroyed Records in Child Welfare Tort Litigation

by Dale Margolin and Daniel Pollack

As child welfare professionals, we have all encountered the "missing" record, most often during day-to-day advocacy. For those who practice child welfare tort litigation, incomplete discovery is also common, even though case records can be critical in determining negligence or malfeasance.

In other forms of civil litigation, judges are asked to hold parties accountable for losing or destroying records, and juries are allowed to draw negative inferences about the missing evidence. In contrast, an investigation of child welfare torts reveals that when a defending agency fails to produce credible records, the issue is simply not litigated or does not affect the procedure or outcome of the case.

This article examines the potential effects of failing to preserve or produce evidence in the child welfare context. Best practices are offered from three perspectives—the plaintiff, the defending agency, and the court.

Child Welfare Agencies and Record Keeping

The duty to preserve child welfare case records is grounded in standards of care and professional ethics, and formalized in statutes and regulations. Laws and policies also regulate purging of documents.

Many states lack explicit parameters for retaining child welfare records, as opposed to other social service documents. Given the life and potential long-term complications of any single case, state statutes should specify lengthy retention times for child welfare documents. In some states, former foster children also have a right to obtain their records after discharge[1] and may need them for health and other reasons.

Some states are very clear on the maintenance and purging of abuse and neglect reports, but do not set clear timelines for retaining foster care records. Virginia is one state with an exemplary child welfare record policy. It requires that case records for children not adopted or reunited with their families be retained permanently, and all others until the child turns 22. Other states (such as Alabama) have time periods such as 75 years for all foster care records.

Child welfare agencies risk losing records because they serve thousands of children. In addition, the relationship between the agency and the child may span many years, often until the child reaches age 21. Heavy caseloads and high turnover among caseworkers and supervisors also make it challenging to monitor and enforce record-keeping policies.

Incomplete case records are common. Some agencies have been forced to close or have lost their contracts because of poor or fraudulent record keeping.[2] Although most agencies are not involved in willful or bad faith destruction of records, their conduct may rise to the level of negligence or gross negligence in some cases.

Litigation involving public and private social services agencies should make administrators and attorneys keenly aware of the obligation to preserve evidence. Across the country, torts regarding individual children in the child welfare system are common.

(Continued on page 86)

What's Inside:

State of Mind Requirements

States requiring **willful destruction** are: Alabama, Arkansas, California*, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana*, Iowa, Kentucky, Louisiana, Maine,* Maryland, Massachusetts*, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, Tennessee, Vermont, Wisconsin, and Wyoming.

The states that find spoliation in cases of **negligence and gross negligence** are: Arizona, Illinois, Kansas, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Virginia, Washington, and West Virginia.

*Where a state sanctions spoliation but is unclear about the state of mind, the willful standard is presumed.

Source: *Spoliation of Evidence in All 50 States.* April 4, 2008. <www.mwl-law.com/CM/Resources/Spoliation-in-all-50-states.pdf>

(Continued from p. 81)

- In 2010, New Jersey paid $51.7 million dollars in 317 foster care tort suits.[3]
- In a single year in California, 26 claims were filed, resulting in $3.5 million paid to plaintiffs.[4]
- Children's Rights, Inc. alone has four class actions pending in courts right now, involving 33,500 children.[5]
- A 2005 study found 30 consent decrees resulting from class actions over the past 10 years.[6] These consent decrees affected more than 377,000 children.

Costs of reproducing lost records should also give any agency pause, adding to the estimated $40,000 per child, $22 billion total, spent on the United States foster care system each year.[7]

Spoilage

Parties owe a duty to the court to preserve and produce evidence. Failing to do so is known as spoilage. Spoilage can refer to both negligent failure to preserve records and intentional destruction of evidence by a party or their agent, including tampering with or otherwise interfering with evidence. In recent years, spoilage has received increased attention. One survey concluded that 50% of all litigators found spoilage to be a frequent or regular problem.[8]

Timing of Duty to Preserve

Jurisdictions vary in when the duty to preserve records starts. In some states it begins when litigation is threatened or anticipated;[9] in others, the alleged offending agency must actually receive a formal legal complaint before they can be held accountable.

The ABA Model Rules, which are adopted in every state almost verbatim, prohibit lawyers from destroying evidence in pending litigation or litigation that is reasonably foreseen.[10] However, state professional codes prohibit destruction for the purpose of obstructing another party's access to evidence, and do not address negligent destruction or destruction that occurs because of an agency's purging policy.

State of Mind

The state of mind necessary for finding spoilage varies by state and federal jurisdiction. States can be divided into two categories, those that only sanction spoilage if there is willful destruction and those in which negligence or gross negligence is sufficient (see box). A few states do not appear to sanction spoilage in the underlying action, but may recognize an independent tort for spoilage (discussed below). The federal circuits are also split on whether spoilage requires bad faith.

In states requiring willful destruction, courts generally making a spoilage finding when: (1) evidence has been destroyed; (2) the evidence is relevant; (3) legal proceedings were pending or reasonably foreseeable (in states that recognize foreseeability, as discussed above); (4) the destruction was an intentional act of the party or the party's agent indicative of fraud or intent to suppress truth.[11]

In states where gross negligence is sufficient, courts generally consider the following factors when making a spoilage finding: 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; (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.

Sanctions

Sanctions for spoilage fall into three categories: criminal, civil, and monetary. Absent an existing court order, the basis for imposing sanctions is the inherent power of the court as well as procedural rules, such as Federal Rule of Civil Procedure 37.

Criminal sanctions. Spoilage is a misdemeanor[12] or a felony[13] in a number of states, although prosecutors rarely bring charges and most statutes only apply to spoilage in criminal proceedings. Several federal statutes also permit criminal

prosecution,[14] and at least one federal court has held that individuals who intentionally destroy or conceal documents during civil litigation may be prosecuted under federal law for obstruction of justice.[15]

Civil sanctions. The most common civil sanctions are evidentiary, namely the negative or adverse inference rule. The moving party bears the burden of proof and may introduce evidence that the materials were destroyed. The opposing party then rebuts this evidence, either in a preliminary hearing or directly to the jury. The jury may infer that the missing evidence would be unfavorable to the alleged offending party.[16] In some jurisdictions, egregious behavior can give rise to a mandatory negative inference.[17]

Other evidentiary sanctions include:

- excluding evidence, including test results and expert testimony, after an evidentiary hearing.[18]
- dismissing or granting full or partial summary judgment in favor of the nonoffending party.[19]
- imposing a default under Federal Rule 37, or a directed verdict, if a court has already issued a discovery order.[20]

Professional discipline. Lawyers can also be professionally disciplined for their role in losing/destroying lost records.[21] This is rare but has occurred in Washington, D.C.[22] In extreme cases, a lawyer can be disbarred.[23] An attorney may also face malpractice liability if their misconduct has legal or monetary consequences for their client.

Monetary penalties. Under Federal Rule 37 and state procedural laws, courts may order that monetary penalties be paid to the court and/or parties to recover the cost of attempting to discover the missing evidence and filing the spoilage motion.[24] Some courts go further and award punitive damages, which have gone as high as one million dollars.[25]

Independent Tort for Lost/Destroyed Records. Some jurisdictions have started recognizing independent torts for intentional and negligent spoilage, against both first and third parties to litigation. One reason is the sanctions discussed above can only be applied when a first party has spoiled evidence, not when any one else has negligently or intentionally destroyed evidence.[26]

A California court opened the door to the tort although it has since been overturned there in all contexts.[27] Kansas holds that a tort may apply in some limited contexts, but no cases have gone forward there.[28] No independent claim for spoilage exists under federal law.[29]

Intentional spoliation, first and third parties. The following states recognize a tort for intentional spoliation against both first and third parties: Alaska, Louisiana, Montana, New Mexico, Ohio, and West Virginia. Those courts look at the following factors: (1) pending or probable civil litigation; (2) knowledge by the spoliator that litigation is pending or probable; (3) willful destruction of evidence; (4) intent to interfere with the victim's prospective civil suit; (5) a causal relationship between the evidence of destruction and inability to prove the lawsuit; and (6) damages.

Negligent spoilage, third parties. A tort for negligent spoliation is actionable against third parties in Alabama, Florida, Indiana, Louisiana, and West Virginia. Montana recognizes the tort against both first and third parties. The elements are: (1) pending or probable civil litigation (2) a legal or contractual duty to preserve evidence relevant to the potential action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the destruction and inability to prove the lawsuit; (6) damages.

In any of these torts, it can be difficult to determine damages, but courts usually allow the plaintiff to bring evidence of potential recovery from the underlying action. Courts are apt to award higher damages if the offending party is a first party who intentionally destroys evidence; otherwise, they will make a finding that is "just and reasonable."[30] Some states also allow punitive damages.[31]

Lost/Destroyed Records in Child Welfare

Lost or destroyed records affect the hundreds of thousands of children involved in child welfare tort actions. However, it is hardly ever addressed in this context or pursued as a separate tort. Perhaps this is not surprising, given that child welfare litigation and family/juvenile court so often deviate from standard practice. But because the venue for child welfare torts is general jurisdiction state and federal courts, spoilage can and should be addressed when appropriate.

Altered records. Spoilage emerged in at least one class action in New Jersey in 2001, filed against the entire state system for abuse suffered by children with a goal of adoption.[32] Plaintiffs asked for an injunction to stop the state from performing an internal audit, which plaintiffs claimed started after the class action was filed and required workers to post-date and alter records to make it appear the agency was doing its job. Although the plaintiffs did not meet their burden of proving intent or actual fraud, the court recognized that sanctions would have been appropriate if they had.

Record-keeping practices. Other cases focus on child welfare record

Electronic Records

Electronically stored information (ESI) raises new concerns about the ability of litigants to meet their discovery duties. ESI is more voluminous and easier to duplicate; harder to delete; constantly changes formats; contains hidden metadata; can be dependent on a particular computer system, and is dispersed across different file formats and storage devices.[1]

The federal government and most states have adopted the Uniform Photographic Copies of Business and Public Records as Evidence Act (UPA), which permits the use of scanned electronic copies in all judicial proceedings and allows the destruction of original documents unless preservation is required by law.[2]

Many state laws and Federal Rule 37(e) now also bar courts from sanctioning a party who took reasonable steps to retain information but failed to produce it "as a result of the routine, good-faith operation of an electronic information system."[3]

However, courts will still impose sanctions for negligent destruction of ESI. This includes giving jury instructions regarding a defendant's failure to preserve, excluding evidence, and awarding payment to a plaintiff for reasonable costs and fees.[4]

[1] "The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production." SK071 ALI-ABA 363, 2004. <www.thesedonaconference.org/dltForm?did=SedonaPrinciples200401.pdf>

[2] 28 U.S.C. § 1732.

[3] Rule 37e; *E.g.,* in Wisconsin: 804.12(4)(m). <https://docs.legis.wisconsin.gov/statutes/statutes/804/12/4m>

[4] Northington v. H&M Int., 2011 WL 662727 (N.D. Ill., 2011).

keeping. In Washington, plaintiffs who were suing the state because of abuse by their foster parents filed a separate claim under the Public Records Act when the agency failed to produce documents in the original case.[33] They were awarded $525,000. In New York in 2011, for the first time in a fatality case anywhere in the United States, child protection workers were indicted for negligent homicide for failing to monitor a case, including losing and fabricating records.[34]

Judges are now penalizing prosecutors for losing law enforcement notes, which has ramifications for child welfare. In a recent criminal case, The Supreme Court of New Jersey held that police reports of an alleged child sexual assault, in which the department of social services was involved, were in the control of the prosecutor.[35] Therefore, when they disappeared, an adverse inference could be taken against the prosecution. Without a criminal finding, a state's civil case is harder to prove and could affect a child's safety and/or foster care placement.

Assessing Potential Child Welfare Torts. Individual plaintiff attorneys also frequently contact expert witnesses about the viability of claims when records are missing. For example, when a child has died at the hands of a foster parent, and the original foster parent screening application is no where to be found, can a case be brought against the agency for placing the child there? Did the agency ever have the application? If not, is the agency culpable for not opening the home properly? Can we infer that an application would or should have alerted the agency to potential problems?

Independent torts against first parties. Children in foster care have the right to be free from harm.[36] Moreover, an agency has statutory and professional responsibilities to a child.[37] A cause of action may lie if there are damages resulting from mishandled records. Aside from the tort of spoilage, a contractual claim could potentially be brought based on professional and legal duties.

Independent torts against third parties. An independent tort for third party spoilage could also be filed where a school, hospital, or other agency involved with the case that is not being directly sued has lost crucial documents about the child. It is well documented that foster children's school records are frequently lost, and they may contain crucial information about the child's academic and physical well-being.

Practice Points

Plaintiffs' Attorneys

Access case records. The case record and the expert case record review in class actions are some of the most important evidence a plaintiff's attorney can use. Discovery of case records is also crucial for plaintiffs' attorneys because confidentiality laws can be a barrier to document retrieval before a child welfare tort action begins. Furthermore, family court, where the original case was litigated, is so informal that the agency's record may tell the only complete story of a child's case. Some states do not even record family court hearings and the family court files contain scant documentary evidence.

When considering a case, the plaintiff's attorney should not rule anything out because of missing records. There may be pieces to the

puzzle that can be uncovered through discovery, with enough to form a basis for inferences or other sanctions. The attorney should ask about the agency's internal written procedure for updating case files; if the agency refuses to provide it and it is not publicly available (for example, on a Web site), the attorney can make a FOIA request. State FOIA laws should not be a bar to accessing such policies.

Notify the agency of a potential claim. As soon as possible before litigation, the plaintiff's attorney must notify the defending agency, in writing, that h/she may file a claim related to the evidence; this will counter the argument that preservation was unforeseeable. The attorney should also request, in writing, that the agency retain all records related to the child and permit the attorney to inspect them. If the agency does not agree in writing to preserve the evidence, the attorney should move for a court order requiring it to do so.

Identify holes. After records are received, whether voluntarily or through subpoena, they must be scrutinized for holes and inaccuracies, including supervisor's signatures (e.g., not being signed, or signed after the required time). The plaintiff's attorney may want to take depositions of caseworkers, supervisors, or system managers to find out if anyone has deviated from standard practice or destroyed or altered records. Interrogatories can also reveal what efforts were made to preserve documents.

Consider sanctions. A plaintiff's strongest argument in arguing a motion or submitting evidence for spoilage is that the basis of their case is what the agency did or did not do, which is supposed to be documented in the records. Prejudice is clear because no other entity (besides subcontractors, who are liable as first party agents if they are not named themselves) is involved with the child or even allowed to access these records.

Furthermore, negligent behavior with case files should be sanctioned because it affects the life of the child, who is in the custody of the agency and is owed legal and professional duties. The plaintiff's attorney should consider all sanctions, including asking for an injunction to prevent an agency from fabricating records after threat or commencement of a lawsuit.

> When considering a case, the plaintiff's attorney should not rule anything out because of missing records.

Suggested jury instructions for the adverse inference can be found in numerous state codes, such as those in Kansas[38] and Michigan.[39]

Agency Attorneys

Advise clients to retain records. Agency attorneys must advise their clients to comply with state laws on retaining records. Where statutes are not clear, the agency should establish a policy that is followed consistently and that adheres to professional standards. All employees must be trained regularly on how to document and store case activity. The agency is better off erring on the conservative side, with liberal retention times for electronic and physical records. Even though the UPA allows destruction of original documents if not prohibited by law, when in doubt, existing hard copies should be retained.

Ensure agency subcontractors retain records. The attorney should also advise the agency's subcontractors and consultants to retain copies of all relevant documents. This is especially important in jurisdictions where a party may be found liable for spoilage by an agent, whether or not bad faith exists on the part of the party.[40]

Ensure a process is in place to identify foreseeable litigation. The agency attorney should permit only knowledgeable personnel to decide what constitutes foreseeable litigation. Once such a determination is made, the attorney should order an internal "hold" on the purging of records and make sure all employees with the ability to alter or delete files are notified. Because many agencies now use electronic case updating, the agency attorney must be sure to notify the IT department immediately.

In fact, many federal courts now find that because litigation "holds" are the norm, failure by a party's counsel to issue a "hold" is gross negligence by the party, allowing for an adverse inference.[41] The agency attorney should document all efforts to preserve documents.

Restrict document access. Access to the "held" documents should be restricted to necessary employees. They should be explicitly instructed not to change records in any way, including altering or adding dates or signatures where they might be missing. If a case note is problematic, it is easier to make a good faith negligence claim than defend against an allegation of bad faith tampering.

Know your defenses. The agency's strongest defense to any missing record is that the *loss was unintentional.* Testimony about the working conditions of the agency—the thousands of documents, the heavy caseloads because of lack of funding for additional caseworkers, and the high staff turnover rates to name a few—can show that a

mistake was innocent.

Furthermore, if the litigation occurs long after the child has left foster care, there were no apparent problems in foster care, and all state and internal purging policies were followed, the agency may successfully argue that it complied with the standards of the profession.

Another defense is that the *missing documents do not prejudice the case,* although this is a more difficult argument because records are usually the most important piece of evidence regarding the actions of the agency. However, the attorney can make the case that certain records are not relevant, such as a missing report card in a case focusing on the visits a caseworker made to a foster home.

A final defense is *laches*—that the opposing party had the opportunity to obtain the records but did not act in time. Although this is an unlikely argument in child welfare torts because records are confidential, it could succeed if the plaintiff's attorney is working with the foster care attorney/guardian ad litem, who has ongoing access to records. The court may be reluctant to penalize an already overburdened agency and prolong the litigation when the plaintiff could have collaborated with nonadverse parties to obtain documents.

Court's Perspective

Balance interests when evaluating claims. Courts are challenged to balance all of these interests. On the one hand, bad behavior, including negligence, should be punished, especially since record keeping affects thousands of children. On the other, courts cannot be too speculative about missing documents. Punitive measures could also set agencies back from improving their practices. Indeed, the judge in the New Jersey class action discussed above hesitated to "impose additional burdens" without solid proof that the agency was engaging in abnormal practices or a cover-up because this was "genuinely antithetical to the goals of the… litigation."

Weigh prejudice to the innocent party when considering sanctions. One suggested approach,[42] which may apply well in child welfare cases, is that unless the alleged offender can prove that their behavior was completely excusable, any degree of fault – from negligence to fraud—will trigger sanctions. However, the most important factor in determining sanctions is not the degree of fault but prejudice to the innocent party. Prejudice is presumed, but the alleged offender can rebut this presumption. Monetary penalties could be included to compensate the moving party for costs of bringing the motion or searching for the evidence, but the substantive sanctions would always be linked to how the lost information could have affected the other party's case.

So, in the wrongful death example, where the foster parent's screening application is missing, an adverse inference about what that application might have said would be appropriate. Or the agency could be precluded from introducing other materials to show it screened the foster parent or has valid intake procedures.

Choose sanctions that restore parties and deter spoilage. This approach still gives the court wide discretion in choosing sanctions, but is grounded in the idea that the primary purpose of the punishment is to return the parties to the position they would have been in had the evidence not been lost. At the same time, the sanctions are a deterrent to bad behavior, and will hopefully lead to better record keeping, regardless of whether litigation is pending. We can all agree that any improvement in case management would be a positive outcome for child welfare.

Conclusion

Lost records are common in child welfare torts. Although the issue has long been overlooked by litigators and courts, it is starting to receive attention. Attorneys and judges must be mindful of incomplete, altered, and destroyed case records. This includes taking preventative steps, while also being prepared to ask for evidentiary and other sanctions or pursuing separate tort actions when lost or destroyed records are harming a party.

Dale Margolin is Associate Professor of Law and Director of the Family Law Clinic at the University of Richmond School of Law.

Daniel Pollack, MSSA (MSW), JD is Professor at Yeshiva University, School of Social Work, and a frequent expert witness in child welfare cases.

Endnotes

[1] *E.g.,* N.Y. Comp. Codes R. & Regs. tit. 18, § 428.8.

[2] *See, e.g.,* Kaufman, Leslie. "City to Sever Two Contracts for Foster Care." *New York Times*, Feb. 3, 2005, B1.

[3] Livio, Susan. "Foster Care Lawsuits Have Been Expensive." *The Star-Ledger,* April 25, 2011. <www.nj.com/bridgeton/index.ssf?/base/news-19/1303704614317560.xml&coll=10>

[4] Brown, Mareva. "Foster Care Abuse Costs - $3.5 Million in 13 Months." *Sacramento Bee,* Nov.14, 1999. <http://robtshepherd.tripod.com/lawsuits.html>

[5] *See* Children's Rights, "Class Actions" at www.childrensrights.org/reform-campaigns/legal-cases/

[6] Kosanovich, Amy and Rachel Molly Joseph, et. al. *Child Welfare Consent Decrees: Analysis of Thirty-Five Court Actions from 1995 to 2005.* Washington, DC: Child Welfare League of America and the ABA Center on Children and the Law, October 2005. <www.cwla.org/advocacy/consentdecrees.pdf>

[7] "Foster Care: Putting Families First." *The Economist*, Nov. 25, 2005. <www.economist.com/node/5220612>

[8] Nesson, Charles R. "Incentives to Spoliate Evidence in Civil Litigation: The Need for

Vigorous Judicial Action." *Cardozo Law Review* 13, 1991, 793.

[9] *E.g.,* Arizona, Idaho, Texas, Virginia. *See Spoliation of Evidence in All 50 States,* April 4, 2008. <www.mwl-law.com/CM/Resources/Spoliation-in-all-50-states.pdf>

[10] *ABA Model Rules of Professional Conduct,* R. 3.4.

[11] Ibid.

[12] *E.g.,* Iowa and Texas. *See* Katz, Scott S. and Anne Marie Muscaro. "Spoilage of Evidence–Crimes, Sanctions, Inferences, and Torts.*"Tort & Insurance Law Journal* 29, 1993, 51.

[13] *E.g.,* Kentucky, Minnesota, Ibid.

[14] Doyle, Charles. *CRS Report Obstruction of Justice: An Abridged Overview of Related Federal Criminal Laws.* Washington, DC: Congressional Research Service, updated Dec 27, 2007. <www.fas.org/sgp/crs/misc/RS22783.pdf>

[15] United States v. Lunwall, 1 F. Supp 249 (S.D.N.Y 1998).

[16] *Spoliation of Evidence in All 50 States,* 2008.

[17] Arkansas, Delaware, Maryland, Oregon, Ibid.

[18] Ibid.

[19] Ibid.

[20] Ibid.

[21] *E.g.,* Indiana, Ibid.

[22] In re Zeiger, 692 A.2d 1351, 1353 (D.C. 1997).

[23] Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511, 518 (Cal. 1998).

[24] *See* Spoliation of Evidence in All 50 States. <www.mwl-law.com/CM/Resources/Spoliation-in-all-50-states.pdf>

[25] In re Prudential Co. of America Sales Litigation, 169 F.R.D. 598, 617 (1997), subsequently overturned in part by In re Prudential Ins. Co. of Am. Sales Practices Litig., 2000 U.S. Dist. LEXIS 22396 (D.N.J. 2000); Harkabi v. Sandisk Corp., 2010 WL 3377338 (S.D.N.Y. 2010), award of $150,000.

[26] Stipancich, John K. "The Negligent Spoliation of Evidence: An Independent Tort Action May Be the Only Acceptable Alternative." *Ohio State Law Journal* 53, 1992, 1135.

[27] Smith v. Superior Ct., 198 Cal. Rptr. 829 (Ct. App. 1984), overturned by Temple Cmty. Hosp. v. Sup. Ct., 976 P.2d 223, 233 (Cal. 1999).

[28] *Spoliation of Evidence in All 50 States,* 2008.

[29] Kindel, Laura and Kai Richter. "Spoliation of Evidence: Will the New Millennium See A Further Expansion of Sanctions for the Improper Destruction of Evidence?" *William Mitchell Law Review* 27, 2000, 687.

[30] Smith v. Superior Court, 198 Cal. Rptr. 829, 500 (Ct. App. 1984).

[31] *E.g.,*New Jersey, West Virginia. *Spoliation of Evidence in All 50 States,* 2008.

[32] Unpublished memorandum opinion on plaintiff's motion for injunction in Charlie and Nadine H. v. Whitman, 83 F. Supp. 2d 476 (D.N.J. 2000), on file with the author.

[33] Frame, Susannah. "Former Foster Children Awarded Record Payout in Public Records Lawsuit." *King 5 News*, Nov. 5, 2009. <www.king5.com/news/local/Former-foster-children-awarded-record-payout-in-public-records-lawsuit-69261292.html>

[34] Secret, Mosi and Karen Zraick. "Child Welfare Workers Charged in Brooklyn 4-Year-Old's Death." *New York Times,* Mar. 24, 2011, A1.

[35] New Jersey v. W.B., 2011 N.J. LEXIS 567 (2011).

[36] *See, e.g.,* Nicini v. Morra, 212 F.3d 798, 808 (3d. Cir. 2001) (en banc); Meador v. Cabinet for Human Res. 902 F.2d 474 (6th Cir. 1990); Bramm v. Washington, 81 P.3d 851 (Wash. 2003); Doe v. New York City Dep't of Soc. Servs., 649 F.2d 134, 141-2 (2d. Cir. 1987); Yvonne L. v. New Mexico Dep't of Human Servs., 959 F.2d 993 (10th Cir. 1992); Deshaney v. Winnebago Dep't of Soc. Servs., 489 U.S. 1989, 201 n.9 (1989).

[37] *E.g.,* California: *Foster Parent Handbook* available at www.co.sanmateo.ca. us/portal/site/humanservices/menuitem.ef2c94fdbdc30bc965d293e5d17332a0/?vgnextoid=262f7cb1dada1210VgnVCM1000001d37230aRCRD, Ohio: http://codes.ohio.gov/orc/5153.16; for MSWs: Social Workers and Record Retention Requirements, available at www.socialworkers.org/ldf/legal_issue/200510.asp?back=yes&print=1.

[38] K.P.J.I. § 102.73.

[39] M. Civ. J.I.2d 6.01(d).

[40] Rosenthal Collins Group, LLC v. Trading Techs. Int'l, 2011 WL 722467 (N.D. Ill. 2011).

[41] Pension Committee of the Univ. of Montreal Pension Plan et al. v. Banc of America Securities, LLC, et al., 2010 WL 184312 (S.D.N.Y. 2010).

[42] Spencer, A. Benjamin. "The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court." *Fordham Law Review* 79, 2011, 1869.

*(***Ex parte E.R.G.,** *continued from p. 83)*

decide that interfering with the parent's rights is in the child's best interests.

While state legislatures may grant grandparents a limited right to visit their grandchildren, statutes must recognize the fundamental rights of parents to raise their children in order to be constitutional. Alabama's Act did not mention the parents' rights, however. Rather, it instructed trial courts to determine if grandparent visitation "is in the child's best interests." The parent's wishes were only considered as part of "other relevant factors" that the court should consider.

The state supreme court held the Act was unconstitutional in its entirety. It explained that the Act may only infringe on parental rights to protect a compelling state interest and that such an infringement must be narrowly tailored and use the least-restrictive means. Here, the Act focused only on the best interests of the child with little regard for the constitutional rights of the parents.

Although the court recognized the child's best interests were important, it found they did not rise to the level of a compelling state interest on their own. Further, applying the best interests standard substituted the judge for the parent as the decision maker with no regard for the parents' rights, also with no compelling interest.

Since the Act did not require a compelling state interest and there was no showing that applying the Act was the least-restrictive means to achieve a compelling state interest, the court found it violated parents' basic rights. Further, the Act's failure to include a presumption favoring the parents when deciding visitation infringed on the constitutional rights of the parents to raise their children.