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IN THIS ISSUE

Spoliation sanctions are intended to "even the playing field" by ensuring that a spoliating party may not profit from its misconduct and restoring the non-spoliating party to the position it would have otherwise occupied had the information at issue not been destroyed. This article summarizes counsel's duties, and collects cases describing the contours of sanctions when applied by courts.

Spoliation and Sanctions in Employment Litigation: An Update

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Given the now ubiquitous presence of e-discovery and the importance of electronically stored information in employment litigation, defense counsel must be aware of the dangers of spoliating electronic evidence. In 2015, the Federal Rules of Civil Procedure were amended to provide sanctions that the court may impose upon a finding that a party has failed to preserve electronically stored information.[1] Specifically, where a party has acted with intent to deprive another party of the use of ESI in litigation, the court may presume the information was unfavorable to the spoliating party, instruct the jury that it may or must presume that the information was unfavorable to the spoliating party, or even enter case-terminating sanctions by dismissing the action or entering a default judgment. Likewise, various state court rules also contemplate the imposition of litigation sanctions where spoliation has occurred. It is generally within the discretion of the court to fashion remedies intended to "level the playing field" to ensure that the spoliating party does not retain an unfair advantage as a result of litigation misconduct.

Litigants' Preservation Obligations and Failure to Preserve

The risks attendant to a finding of spoliation warrant careful consideration of parties' obligations to preserve information. A party's preservation obligations attach when the party reasonably anticipates that litigation will occur. For example, in the employment context, where an employer intends to take some employment action against an employee, such as a termination or, in an academic setting, the non-renewal of an employment contract, the employer should be on notice that the impacted employee may seek to bring claims arising out of the employment action. Although the employment action alone may be insufficient to make litigation reasonably foreseeable, out of an abundance of caution, employers should err on the side of preserving information sooner rather than later. To determine whether a party has a duty to preserve, courts will consider the relevance of the material at issue and the likelihood of prejudice to the opposing party in the event that the material is not preserved.[2]

Once a duty to preserve arises, a party's failure to take reasonable steps to preserve the information will give rise to potential sanctions for spoliation. As discussed in greater detail below, under the Federal Rules, the imposition of sanctions requires that the spoliating party act "with an intent to deprive another party of the information's use in litigation." A growing body of case law recognizes that selective preservation of text messages, deletion of files or other materials at a time significant to the subject matter of the litigation, and, notably, the failure of counsel to adequately advise clients of their

[1] Fed. R. Civ. P. 37(e).
[2] *See, e.g., Hirsch v. General Motors Corp.*, 266 N.J. Super. 222, 250 (App. Div. 1993)

preservation obligations may warranted a finding of spoliation.[3]

In a variety of contexts, courts have found that a party failed to preserve electronic information when a duty to preserve such information had already attached. *See e.g., Ronnie Van Zant v. Pyle*, 270 F. Supp. 3d 656 (S.D.N.Y 2017) (defendant spoliated evidence where text messages germane to the issues in litigation were not preserved while other information on the same device was preserved); *Leon v. IDX Sys. Corp.*, 464 F.3d 951 (9th Cir. 2006) (plaintiff in whistleblower action spoliated evidence where thousands of relevant files were deleted from his laptop); *Calderon v. Corporacion Puertorriquena De La Salud*, 992 F. Supp. 2d 46 (D.P.R. 2014) (selective production of some text messages, but not others, warranted a finding of spoliation); *Moore v. CITGO Refining & Chems. Co., L.P.*, 735 F.3d 309 (5th Cir. 2013) (three plaintiffs spoliated evidence where email communications were deleted after discovery orders relating to same were issued and a fourth plaintiff made no effort to preserve the contents of email inbox).

The Responsibilities of Counsel and Avoiding Spoliation

The case law underscores the significance of ESI in the current litigation landscape and the potential for destruction of such evidence to dramatically impact the outcome of a case. While spoliation claims often involve questions whether the parties themselves have adhered to their obligations to preserve relevant ESI[4], courts have emphasized the importance of counsel's role in ensuring compliance.

As articulated by the U.S. District Court for the Southern District of New York, "[t]he preservation obligation runs first to counsel, who has a duty to advise his client of the type of information potentially relevant to the lawsuit and the necessity of preventing its destruction."[5] Counsel's failure to instruct his or her client on their preservation obligations[6], or their failure to adequately

[3] Some courts have cautioned that the sophistication of the parties should be considered when evaluating that party's preservation efforts, reasoning that sophisticated parties are expected to have a higher degree of awareness of their obligations. *Friedman v. Philadelphia Parking Auth.*, No. cv 14-6071, 2016 U.S. Dist. LEXIS 108902 (E.D. Pa. Mar. 10, 2016).

[4] *See also Ottoson v. SMBC Leasing and Finance, Inc.*, 268 F. Supp.3d 570 (former employee, in action for disability discrimination and retaliation, spoliated evidence where she did not produce, and admitted to deleting, emails central to her claims); *McQueen v. Aramark Corp.*, No. 2:15-cv-492, 2016 U.S. Dist. LEXIS 164678 (D. Utah Nov. 29, 2016) (in employment dispute, defendant acknowledged that ESI and physical documents were destroyed, including electrical work orders relevant to plaintiff's claims); *Coyne v. Los Alamos Nat'l Sec., LLC*, No. CIV 15-0054 2017 U.S. Dist. LEXIS 67021 (D.N.M Mar. 21, 2017) (in responding to a request for text messages relating to plaintiff's wrongful termination action, it was determined that plaintiff's cellular phone was erased and reset one day before it was to be provided to defendant's counsel)

[5] *Orbit One Comms. v. Numerex Corp.*, 271 F.R.D. 429, 437 (S.D.N.Y. 2010); *see also EPAC Techs, Inc. v. Harper Collins Christian Publg' Inc.*, 2018 U.S. Dist. LEXIS 53360 (M.D. Tenn. Mar. 29, 2018) ("Counsel must take an active and primary role" in the process of ensuring satisfaction of preservation obligations).

[6] *Lokai Holdings LLC v. Twin Tiger USA LLC*, No. 15-cv-9363, 2018 U.S. Dist. LEXIS 46578 (S.D.N.Y. March 12, 2018) (ordering sanctions against counsel where they failed to properly instruct defendants on their obligations to preserve).

oversee preservation efforts can give rise to sanctions.[7] In *Zubulake v. UBS Warburg, LLC*, the court offered guidance to employment defense counsel as to steps they can take to ensure compliance with their obligations, acknowledging that the active supervision of counsel is of particular importance when dealing with electronically stored information.[8]

When litigation has commenced, or when litigation is reasonably foreseeable, counsel should ensure that a "litigation hold" notice be issued to employees. A litigation hold notice should apprise employees of the individuals and subject matter of the litigation or anticipated litigation and should set forth in detail the categories of documents or information that may be relevant to the matter. The notice should clearly and unequivocally state that all of the material identified therein must not be deleted, modified, overwritten, or otherwise disposed of until a notice is issued terminating the litigation hold.

Significantly, many email platforms or document management systems may implement automatic deletion protocols or other similar measures and many organizational clients will have an established policy or set of policies governing records retention. In many instances, material or information relevant to the litigation or anticipated litigation is likely to be governed by these polices. Therefore, to ensure that relevant material is preserved, a litigation hold notice should clearly instruct recipients of the notice to suspend any applicable retention or destruction practices.

Good practice with regard to the issuance of litigation hold notices is for counsel to communicate directly with individuals most likely to be considered "key players"[9] in the litigation to ensure that they both acknowledge and fully understand their preservation obligations. In the context of employment-based claims, these individuals should include, without limitation, the impacted employee's supervisors, subordinates, and co-equals within his or her unit(s), and the individual(s) responsible for any complained of employment action. Likewise, counsel should periodically require that individuals subject to litigation holds reaffirm their acknowledgement and understanding of their preservation obligations and actively participate in the process of compliance, particularly where discovery is likely to implicate substantial ESI collection and review.[10]

Imposing Spoliation Sanctions

Courts have long observed that spoliation sanctions are intended to "even the playing field" by ensuring that a spoliating party may not profit from its misconduct and restoring the non-spoliating party to the position it

[7] *Merck Eprova AG v. Gnosis S.P.A.*, No. 07-cv-5898, 2010 U.S. Dist. LEXIS 38867 (S.D.N.Y. Apr. 20, 2010) (court sanctions counsel for falling short in their responsibilities to oversee preservation and ensure preservation obligations are met).

[8] 229 F.R.D. 422, 433-434 (S.D.N.Y. 2003).

[9] *Id.*

[10] The *Zubulake* court explained that counsel has both an affirmative and continuing duty "to monitor compliance so that all sources of discoverable information are identified and searched." *Id.* at 432.

would have otherwise occupied had the information at issue not been destroyed.[11]

The courts have broad discretion to fashion remedies for spoliation, up to and including, in extraordinary circumstances, case terminating sanctions.[12] More often, however, courts imposing spoliation sanctions will award the non-spoliating party an adverse inference jury instruction. The adverse inference either permits the jury to find that the spoliated evidence was harmful to the spoliating party's case – a permissive inference – or, instructs the jury that it must so find – a mandatory inference.[13] In addition, the non-spoliating party may assert a tort claim for fraudulent concealment.[14] Under either approach, to warrant imposing sanctions, the missing evidence must be material to the litigation and its absence must be prejudicial to the non-spoliating party.

In addressing the failure to preserve ESI, the 2015 amendments to the Federal Rules of Civil Procedure permit sanctions where ESI that should have been preserved is lost through the failure of a party to take reasonable measures to preserve it, and it could not be replaced through further discovery.[15] In such event, where prejudice to the non-spoliating party is found, the court "may order measures no greater than necessary to cure the prejudice."[16] The Rule leaves the nature of any curative measures to the discretion of the court, which is tasked with imposing measures proportionate to the prejudice suffered by the non-spoliating party.

To reach more severe sanctions, however, the court must find that "the party acted with the intent to deprive another party of the information use in the litigation."[17] The amendments to the Rule were intended to resolve issues where severe sanctions like an adverse inference instruction, will not issue upon a finding of mere negligence.[18] Rather, in order to support a finding of an "intent to deprive" under Rule 37(e)(2), courts will

[11] *See e.g., Rosenbilt v. Zimmerman*, 166 N.J. 391 (2001); *Jerista v. Murray* 185 N.J. 175 (2005)

[12] *See e.g., Leon v. IDX Sys. Corp.*, 464 F.3d 951 (9th Cir. 2006); *Moore v. CITGO Refining & Chems. Co.*, 735 F.3d 309 (5th Cir. 2013)

[13] As examples, adverse inference instructions were awarded in *Ronnie Van Zant v. Pyle*, 270 F. Supp. 3d 656 (S.D.N.Y 2017); *Calderon v. Corporaction Puertorriquena De La Salud*, 992 F. Supp. 2d 46 (D.P.R. Jan. 16, 2014); *McQueen v. Aramark Corp.*, No. 2:15-cv-492, 2016 U.S. Dist. LEXIS 164678 (D. Utah Nov. 29, 2006); *Beaven v. US DOJ*, 622 F.3d 540 (6th Cir. 2010).

[14] *Rosenbilt,* 166 N.J. at 406-407 ("We hold that the tort of fraudulent concealment, as adopted, may be invoked as a remedy for spoliation where [the non-spoliating party establishes] . . . (1) that the defendant in the fraudulent concealment action had a legal obligation to disclose evidence in connection with an existing or pending litigation; (2) that the evidence was material to the litigation; (3) that plaintiff could not reasonably have obtained access to the evidence from another source; (4) that defendant intentionally withheld, altered, or destroyed the evidence with the purpose to disrupt the litigation; (5) that plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence defendant concealed").

[15] Fed. R. Civ. P. 37(e).

[16] Fed. R. Civ. P. 37(e)(1).

[17] Fed. R. Civ. P. 37(e)(2).

[18] The Rule partially abrogates the standard articulated by the Second Circuit in *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002), which permitted the issuance of an adverse inference instruction upon a finding of gross negligence by the spoliating party.

examine all of the circumstances surrounding the loss of the evidence, including whether the party took some affirmative measure causing the evidence to be lost, whether any such measure was taken while the party was aware of its preservation obligations, or whether other measures were taken to preserve some sources of evidence, but not others.[19] Courts have cautioned that, even upon a finding of intent, the imposition of dispositive sanctions such as dismissal or a default judgment is a drastic remedy to be deployed only in drastic circumstances.[20]

Conclusion

As electronically stored information continues to emerge as the focal point of fact discovery in modern litigation, both the plaintiff's bar and the defense bar must be mindful of the parties' obligations to preserve relevant material and counsel's oversight role in ensuring compliance. Although litigators in the federal courts face a higher bar to the imposition of the harshest spoliation sanctions, courts are unwilling to permit counsel to take discovery obligations lightly and often stand ready to fashion appropriate remedies where relevant information is lost. For employers, a robust policy and practice of identifying and securing this information, as well as communicating these obligations to their employees as soon as litigation is reasonably anticipated, remains the strongest safeguard against potentially costly spoliation sanctions.

[19] *See e.g., Moody v. CSX Transportation, Inc.*, 271 F. Supp. 3d 410, 431 (W.D.N.Y 2017); *Ronnie Van Zant*, 270 F. Supp. at 668-670.

[20] *Moody*, 274 F. Supp. 3d at 433.

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