EFFECTIVELY PRESERVING EVIDENCE

Ronald I. Raether Jr.

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A. Spoliation of Evidence

1. Avoiding Spoliation of Evidence

Attorneys must caution their clients to beware of the consequences of a failure to adequately preserve electronic data that is in their possession.[85] Unlike paper documents that require overt acts like shredding to be destroyed, electronic data can be destroyed through routine use of computers.[86] Merely turning on a computer can eliminate "slack" and "temporary" files, cause data to be overwritten, or change metadata.[87] By clicking on a file, its "last-accessed" date may change, which invites a suggestion that the file has been altered. Attorneys can avoid spoliation of evidence by making sure that their clients understand their preservation responsibilities, informing clients of actions necessary to preserve evidence, and sending opponents preservation letters and/or seeking a preservation order. These issues will be discussed infra with greater detail.

2. Sanctions for Spoliation

As the reliance on electronic storage of documents and methods of communication grows, communications or drafts that individuals or companies typically did not preserve or save in the past are now preserved in e-mails and documents saved on computer hard drives, networks or other media. This large increase in potentially discoverable information, along with the numerous locations where electronic data may be stored, results in not only more potential evidence to maintain and review but also greater risk that some evidence may be lost, altered through the general course of business, destroyed as part of an adopted retention policy or destroyed intentionally. These greater risks equate to a higher risk of sanctions for discovery violations, including spoliation.

One recent example illustrating the consequences of a failure to produce electronic evidence was the ruling in a fraud case brought by New York financier Ronald Perelman against investment banking firm Morgan Stanley. Morgan Stanley repeatedly failed to turn over e-mails that were connected to a merger in 1998 between Coleman, Inc. a company owned by Perelman, and Morgan Stanley's client, Sunbeam Corporation.[89] The court ruled that Morgan Stanley had been "grossly negligent" in handling its e-mails.[90] The judge wrote, "The prejudice to [Perelman] from these failings cannot be cured."[91] As a result, the court told jurors that they could infer that Perelman was a victim of fraud.[92] In making this ruling, the judge suggested that Morgan Stanley may have withheld information because it wanted to hide the Securities and Exchange Commission's probe into its e-mail retention policies.[93] Just a week before this ruling, Morgan Stanley disclosed that the SEC was considering enforcement action against it for not properly retaining e-mails.[94]

Another recent example of the possible consequences of a failure to produce electronic evidence is the jury verdict reached in Zubulake. On April 6, 2005, the jury ordered UBS to pay $29.2 million to former saleswoman, Laura Zubulake, who had sued UBS for gender discrimination.[95] The judge had instructed the jury that it could conclude that e-mails that were destroyed contained information adverse to UBS.[96]

3. Requirements for an Adverse Inference

Spoliation is "[t]he intentional destruction, mutilation, alteration, or concealment of evidence."[97] As the definition suggests, courts typically require the deletion, alteration or concealment of evidence to be intentional or done in bad faith in order to merit the imposition of sanctions:

- Beck v. Haik, 377 F.3d 624 (6th Cir. 2004V The court defined spoliation to be the intentional destruction of evidence.
- Mathias v. Jacobs, 197 F.R.D. 29, 37 (S.D.N.Y. 2000) vacated on other grounds, 167 F. Supp. 2d 606 (S.D.N.Y. 2001). The court

held that the destruction of evidence must be "willfull" to impose an adverse inference.

- Banco Latino, S.A.C.A. v. Gustavo A. Gomez Lopez, 53 F. Supp. 2d 1273, 1277 (S.D. Fla. 1999). The court expressly refused to extend spoliation sanctions to destruction resulting from negligent or reckless acts. The court reasoned that "mere negligence in … destroying the records is not enough for an adverse inference, as it does not sustain an inference of consciousness of a weak case."

- Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997). The court held that "[t]he adverse inference must be predicated on the bad faith of the party destroying the records."

- Lewv v. Remington Arms Co., 836 F.2d 1104, 1112 (8th Cir. 1988) (citation omitted). The court stated that "a presumption or inference arises . .. only when the spoliation or destruction [of evidence] was intentional, and indicates fraud and a desire to suppress the truth, and it does not arise where the destruction was a matter of routine with no fraudulent intent."

- Vick v. Texas Employment Comm'n. 514 F.2d 734, 737 (5th Cir. 1975). The court determined that if the party simply destroys documents or records negligently, then the rationale for sanctioning spoliation does not hold.

In contrast, other courts have granted an adverse inference even if the evidence was not destroyed in bad faith:

- Rambus, Inc. v. Infineon Techs. AG, No. 3:00cv524, 2004 WL 383590, 2004 U.S. Dist. LEXIS 2988 (E.D. Va. Feb. 26, 2004), amended by, 220 F.R.D. 264. The plaintiffs employees shredded approximately two million documents as part of its document retention policy put in place after receiving notice of impending litigation. The court concluded that even if the plaintiff "did not institute its document retention policy in bad faith, if it reasonably anticipated litigation when it did so, it is guilty of spoliation" and that "even valid purging programs need to be put on hold when litigation is 'reasonably foreseeable.'"

- Martino v. Wal-Mart Stores, Inc., 835 S. 2d 1251 (Fla. Dist. Ct. App. 2003). The court stated that an adverse inference regarding

the destruction of documents arises when a party has possession of self-damaging evidence and either loses or destroys the evidence.

- Wuest v. McKennan Hosp., 619 N.W. 2d 682, 687 (S.D. 2000) (citation omitted). The court stated that if a document "is unavailable because of negligence, or for some reason evidencing a lack of good faith, the jury should be given an adverse inference instruction."

  Am. States Ins. Co. v. Tokai-Seiki (H.K.), Ltd., 704 N.E. 2d 1280 (Miami County 1997). The court stated that "negligent or inadvertent destruction of evidence is sufficient to trigger sanctions where the opposing party is disadvantaged by the loss."

The Zubulake court (discussed earlier) established a three part test to determine when an adverse inference for spoliation is appropriate:

- the party with control over the evidence had a duty to preserve it at the time of destruction;
- the records were destroyed with a "culpable state of mind"; and
- the destroyed evidence was "relevant" to the party's claim or defense and a reasonable trier of fact might find that it would support that claim or defense.

Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 220 (S.D.N.Y. 2002). Whether negligent or reckless actions would fulfill the "culpable state of mind" element depends upon the jurisdiction. Zubulake argues, however, that intentional destruction ger se establishes the relevance required in the third element. Id.

4. Other Sanctions For Spoliation

Although the adverse inference instruction is the most common sanction for failing to preserve evidence, courts may award financial sanctions or even dismiss the case:

- Covucci v. Keane Consulting Group, Inc., 2006 Mass. Super LEXIS 313 (Mass. Sup. Ct. May 31, 2006) Court dismissed plaintiffs complaint after finding that plaintiffs deletion of e-mail and scrubbing of files from computer was evidence of persistent bad-faith repudiation of discovery obligations, intentional spoliation, and fraud on the court.

- Phoenix Four, Inc. v. Strategic Res. Corp., 2006 U.S. Dist. LEXIS 32211 (S.D.N.Y. May 23, 2006). Court ordered monetary sanctions to be paid by defendant following late production of several hundred boxes of printed electronic documents. Court, however, refused to order an adverse inference instruction or bar filing of summary judgment motion.

- DaimlerChrysler Motors v. Bill Davis Racing, Inc., 2005 U.S. Dist. LEXIS 38162 (E.D. Mich. Dec. 22. 2005) Monetary sanctions and adverse inference order by court after defendant failed to suspend normal document destruction procedures after filing of lawsuit.

- United States v. Phillip Morris USA Inc. f/k/a Phillip Morris Inc., 327 F. Supp. 2d 21 (D.D.C. July 21, 2004). The defendant continued to delete e-mails under its retention policy for two years after a court order to preserve all evidence and for several months even after learning that its retention policy was inadequate in light of the litigation. The court precluded the defendants from calling a key employee at trial who failed to preserve documents and ordered the defendants to pay costs, as well as $2,750,000 in sanctions.

- OZO, Inc. v. Mover, 594 S.E.2d 541 (S.C. Ct. App. 2004). The court granted default judgment against the defendant, after he delayed in providing his computer to the plaintiff and reformatted the hard drive erasing relevant information.

- RKL Inc. v. Grimes, 177 F. Supp. 2d 859 (N.D. 111. 2001). The court found that the defendant defragmented his home computer to prevent plaintiff from discovering the deletion of confidential information and software. The court ordered the defendant to pay $100,000 in compensatory damages, $150,000 in punitive damages, attorneys' fees and court costs.

- Long Island Diagnostic Imaging v. Stony Brook Diagnostic Assocs., 286 A.D.2d 320 (N.Y. App. Div. 2001). The court

dismissed the defendants' counterclaims and third party complaint due to their spoliation of evidence.

5. Independent Causes of Action for Spoliation

In addition to potential spoliation sanctions in the pending matter, some jurisdictions, including Ohio, also recognize an independent cause of action for the destruction of documents. In these states, a party may bring a separate case claiming damage resulting from the destruction in the previous action. To prove the tort of intentional spoliation in Ohio, a party must prove five elements:

1. "[P] ending or probable litigation involving the plaintiff,
2. knowledge on the part of defendant that litigation exists or is probable,
3. willful destruction of evidence by defendant designed to disrupt the plaintiffs case,
4. disruption of the plaintiffs case, and
5. damages proximately caused by the defendant's acts."

Smith v. Howard Johnson Co., 615 N.E.2d 1037, 1038 (Ohio 1993).

Although not recognized in Ohio,[98] some jurisdictions, including California and the District of Columbia, recognize an independent action for the tort of negligent spoliation. Typically the following elements must be shown:

- "the existence of a potential civil action;
- a legal or contractual duty to preserve evidence relevant to the action;
- negligent destruction of evidence;
- significant impairment of the ability to prove the underlying lawsuit;

- a causal relationship between the destruction of evidence and the inability to prove the underlying lawsuit; and damages."[99]

B. Your Client's Preservation Responsibilities

All parties "are obligated to take appropriate measures to preserve documents and information ... reasonably calculated to lead to the discovery of admissible evidence and likely to be requested during discovery."[100] The duty attaches when the party has knowledge or notice of the relevance of evidence to the dispute. A party may receive notice of the duty to preserve or the evidence's relevance through:

- Prior Litigation
- Pre-litigation Communications or Other Information
- Filing of a Complaint
- Discovery Requests
- Federal Rules of Civil Procedure
- Court Orders
- Statutes

1. Scope of Evidence that Must Be Preserved

Although a party has a duty to preserve all documents or other evidence that may lead to relevant information, courts acknowledge that not every e-mail or other electronic evidence can realistically be preserved once a party has notice of the duty to preserve. For example, in Concord Boat Corp. v. Brunswick Corp., No. LR-CO-95-781, 1997 33352759, 1997 U.S. Dist. LEXIS 24068, at *16-17 (E.D. Ark. Aug. 29, 1997), the court determined that the duty to preserve arose only with the filing of the complaint and not during previous antitrust litigation because "to hold that a corporation is under a duty to preserve all e-mail potentially relevant to any future litigation would be tantamount to holding that the corporation must preserve all e-mail."

Furthermore, the court in Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 217 (S.D.N.Y. 2003), a decision in a leading case relating to electronic discovery, noted that "[a]s a general rule,. . . a party need not preserve all backup tapes even when it reasonably anticipates litigation." The court went on to note however, that any "unique, relevant evidence that might be useful to an adversary" must be preserved. Id. at 218. The Zubulake court also clarified that the duty extends only to the employees likely to have relevant information and that the duty generally does not extend to inaccessible backup tapes. Id. The court added, however, if a party can determine which backup tapes contain specific employees' electronic data, then those tapes must be preserved. Id.

The Zubulake court also provided a preferred data preservation procedure once the duty to preserve attaches:

- Preserve backup tapes for key employees or others with relevant information
- Retain both current and archived backup tapes identified as potentially relevant
- Catalog documents created after the duty attaches in a separate file for easy collection and review
- Take mirror images of computer hard drives.

Id.

2. Retention Policies

Courts commonly find that the duty to preserve relevant information overrides any company retention policies covering the document or data:

- Bradley v. Sunbeam Corp., No. 5: 99 CV144, 2003 WL 21982038, 2003 U.S. Dist. LEXIS 14451, at *38-40 (N.D. W.Va. Aug 4, 2003). The court ruled that the duty to preserve exceeds a company's duty "to do nothing more than follow its own internal policy."

- Trigon Ins. Co. v. United States, 204 F.R.D. 277, 289 (E.D. Va. 2001). The court stated "document retention policies . . . do not trump the Federal Rules of Civil Procedure or requests by opposing counsel. . . . [Ejxecution of a document retention policy that is at odds with the rules governing the conduct of litigation does not protect [the party] from a finding of intentional destruction."

- Lewy v. Remington Arms Co., 836 F.2d 1104, 1112 (8th Cir. 1988). The court stated that "if the corporation knew or should have known that the documents would become material at some point in the futuref,] then such documents should have been preserved. Thus, a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy."

3. Practical Advice Regarding Preservation of Data

Once a party becomes aware that litigation may be forthcoming, it should take action to preserve all documents, whether electronic or hard copy, related to the potential litigation. The following steps assist in effectively fulfilling a party's duty to preserve electronic data:

- Suspend routine document destruction or alteration required under document retention policy.

- Involve counsel in determining both issues relevant to the case and that may lead to relevant discovery.

- Send a priority memorandum, with periodic reminders thereafter, to the appropriate employees, including those in information technology, instructing them to preserve all documentation relevant to the litigation. The order should include the issues involved in the litigation and remind the employees that the data retention policy no longer applies to these issues.

- Obtain copies of all hard copy documents.

- Develop working knowledge of the technology systems to determine storage media, locations and length of storage. This knowledge should also include whether the system overwrites deleted information. Depending upon the complexity of the

system, this step may also require consulting a computer forensics expert to determine an effective strategy for preserving and maintaining electronic data.

- Designate an employee to be responsible for the collection and protection of relevant documents and information.

C. Preservation of Evidence

1. Preservation of Evidence Letter

The most effective way to provide early notice to a party of its duty to preserve evidence is to send a letter to opposing counsel or the party, if prior to filing a complaint, requesting him or it to preserve all information, including electronic evidence, related to the matter.[101] This letter should contain, at a minimum, the following information:

- A description of the subject matter of the dispute.
- A very broad description of potentially relevant documents mirroring the description provided to your own client.
- A generic listing of locations where electronic data may be stored, including, but not limited to, hard drives, archival or backup tapes, laptop computers, home computers, voice-mail systems, handheld computers, networks, cell phones, proprietary online services, third-party storage repositories, and intranets.
- A request that the opposing party's document retention policy be reviewed and suspended or modified to prevent routine destruction of electronic and printed materials.
- A request that the opposing party's management information systems and information technology personnel be notified of the need to preserve data.

Finally, counsel should include the need to preserve all electronic evidence in the Conference Report required by Fed. R. Civ. P. 16 or Ohio R. Civ. P. 16. By including it in the Rule 16 Conference Report, all parties, including the court, clearly have been notified of the duty and its potential breadth. Furthermore, it is also important to send

reminder notices of the continuing obligation to preserve evidence throughout the litigation.

2. Preservation Order

If there is a strong likelihood that an adversary is likely to alter or destroy relevant electronic evidence before production, it is advisable to seek a preservation order.[102] Such a preservation order should require the opponent to take all necessary steps to preserve electronic evidence or it should allow on-site inspection of the adversary's computers and storage media.[103]

D. Preserving; the Chain of Custody

A chain of custody for electronic evidence must be maintained and documented when collecting the data. Much like evidence in a criminal case, a proponent of the evidence must show that the electronic document or recording presented in court is the same document or recording that existed prior to the commencement of the litigation. In other words, the proponent must show that no alteration or manipulation of the data has occurred. The following information should be documented each time data is collected or shared:

- "Date, time, and place of collection or receipt.
- The name of the individual who collected or received the evidence.
- A description of what was obtained, including media-specific information.
- Media type, standard, and manufacturer.
- All movement of evidence (evidence transfer) and the purpose of the transfer.
- Physical (visual) inspection of evidence.
- Procedures used in collecting and analyzing the data.
- Date and time of check-in and check-out of media from secure storage."[104]

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Rules