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An Ounce Of Prevention For Problems With No Cure

Law360, New York (March 29, 2011) -- As a federal district court judge in Texas recently observed, "Spoliation of evidence — particularly of electronically stored information — has assumed a level of importance in litigation that raises grave concern." Rimkus Consulting Group Inc. v. Cammarata, 688 F. Supp. 2d 598, 607 (S.D. Tex. 2010).

Spoliation is the destruction, mutilation or alteration, whether deliberate or inadvertent, of evidence that may be necessary for the prosecution or defense of a lawsuit. Although recent cases have focused on the deletion of emails and other electronic information, spoliation principles apply with equal force to all other types of evidence, including hard copies of documents, photographs and any physical evidence that may be relevant to anticipated litigation.

For example, a car owner planning to sue the manufacturer on a design defect claim has a duty to preserve the damaged vehicle in its post-accident condition so that it is available for inspection by the company's experts. If the owner fails to do so, a spoliation motion is sure to follow, and the case against the manufacturer may well be headed to the dump together with the defective vehicle.

From the perspective of a busy trial judge, spoliation disputes are a "grave concern" because they take up a great deal of the court's time — time that otherwise could be devoted to resolving the substantive merits of the claims that brought the parties into conflict in the first place.

The judge must determine whether evidence in fact was destroyed or altered, what the evidence was, who destroyed it, why it was destroyed, whether the same or similar evidence can be obtained from another source, and whether any of the lost evidence is relevant to the underlying claims and defenses.

Spoliation fights also are a grave concern for the litigants. The party making the spoliation allegations may fear, justifiably, that its adversary has discarded critical evidence that will be costly or impossible to obtain from other sources. The party accused of spoliation, on the other hand, may face particularly grave consequences, including the ultimate sanction of having a default judgment entered against it.

Courts will generally find that spoliation has occurred if three conditions are satisfied: 1) The person with custody of the evidence had a duty to preserve it at the time it was discarded or altered; 2) the person who destroyed the evidence acted with a culpable state of mind; and 3) the evidence was

relevant to claims or defenses in the litigation, such that it is reasonable to infer that the evidence would have undermined the position of the party who destroyed it.

The duty to preserve arises when a party begins to contemplate filing a lawsuit, or has reason to believe that a suit will be filed against it. The safest course is to preserve all evidence that is likely to be relevant to the anticipated lawsuit. Bad faith is required to establish a culpable mental state in a majority of jurisdictions, but as discussed more fully below, carelessness will suffice in others.

Courts have broad discretion to impose a variety of sanctions for spoliation, including default judgments, attorneys' fees, injunctions requiring the restoration of deleted emails and adverse inference instructions allowing — or requiring — the jury to find that the party destroyed evidence to bolster its claims or defenses. Although the applicable rules and remedies vary across jurisdictions and the underlying facts vary from one case to the next, several principles have emerged that warrant consideration when litigation is on the horizon.

Human Error May Not Be an Excuse

Cases involving intentional spoliation generally get the most media coverage because the recitation of the facts reads like a legal thriller and the court not infrequently imposes a substantial sanction on the responsible party. In a Florida case from the late 1980s, for example, a manufacturer was sued by one of its distributors for alleged violations of the antitrust laws. Upon receiving the complaint and the plaintiff’s request for documents, the company’s general counsel ordered the immediate destruction of all price lists, invoices and sales correspondence more than two years old.

Eight years later, after extensive discovery and an evidentiary hearing concerning the document destruction, the court entered a default judgment against the company together with an award of attorneys' fees. The same sanctions were imposed in a recent New York case where a defendant deleted relevant files from a laptop computer and then reinstalled the operating system in an effort to conceal his actions. A forensic examination of the laptop revealed the misconduct, and the court had no reservations about entering a default judgment against him.

More commonly, evidence is discarded or misplaced due to inadvertence and inattention. Courts have often remarked that spoliation sanctions, particularly the more severe ones, should be reserved for litigants who act in bad faith. But in a number of jurisdictions, most notably the Second Circuit, mere negligence can lead to sanctions when evidence is destroyed and the opposing party is prejudiced as a result.

For example, in a pending New York case, a group of investors brought suit to recover losses they incurred in two hedge funds. While working on the complaint in 2003, the investors’ lawyers asked them for copies of certain documents, but did not instruct them to preserve all documents that might be requested in discovery.

A litigation hold was not put in place until 2007, by which point numerous documents had been discarded. The court held that the belated implementation of a litigation hold was “at a minimum,

grossly negligent," particularly in light of the court's 2004 ruling in an unrelated case emphasizing the importance of doing so. See Pension Comm. v. Banc of Am. Sec. LLC, 685 F. Supp. 2d 456, 477 (S.D.N.Y. 2010).

The court went on to find that many of the investors had been "grossly negligent" in other aspects of their discovery compliance, and it announced that it would read the jury an instruction permitting it to presume, if it chose to, that the missing and destroyed documents "would have been both relevant and prejudicial" to the investors' case. Id. at 480.

Other investors were found to have been merely negligent, on balance, and the court declined to give a spoliation instruction as to them. Monetary sanctions, however, were imposed against both the grossly negligent and the merely negligent investors.

Spoliation May Bolster an Adversary's Otherwise Weak Case

Spoliation sanctions can eviscerate a strong case, and can bolster what would otherwise be a losing case for the opposing party. Jurors may find it tedious to sit through weeks of testimony about metallurgical analyses and complex accounting rules, and they may not fully understand that testimony even when an expert does her best to break it down for them.

What the jury will have no difficulty understanding is an instruction that one of the parties had a duty to preserve its documents and that, in violation of that duty, documents that would have been helpful to the other party were deliberately or carelessly destroyed.

Moreover, testimony and other evidence about how and why the spoliation occurred may be quite riveting, particularly if the witnesses appear to be evasive or uncomfortable while explaining their actions.

For example, in an ongoing case in Texas where the defendants intentionally destroyed evidence, the court agreed to let the jury "hear the evidence of the defendants' deletion of emails and attachments, and inconsistent [deposition] testimony about the emails, the concealment of email accounts, and the delays in producing records and information sought." Rimkus, 688 F. Supp. 2d at 653.

With a ruling like that in hand, a party with a weak case can redirect the focus of the trial from the underlying substantive claims to the spoliation of evidence. For that very reason, and as a result of the attention that recent spoliation rulings have received, it is safe to say that spoliation sanctions "will be increasingly sought by litigants." Pension Comm., 685 F. Supp. 2d at 471.

Anyone Who is Partially to Blame May Be Sanctioned

Spoliation sanctions serve three basic purposes: They provide some measure of redress to the opposing party; they punish the offending party; and they incentivize other litigants to exercise appropriate care in fulfilling their discovery obligations.

Generally, when evidence is lost or destroyed, the party itself — whether a person or an entity — will bear the brunt of the sanctions. However, to further the goals of punishment and deterrence, courts have not hesitated to impose sanctions on the person or persons most directly responsible for the loss of evidence, including individual employees of a corporate party, in-house counsel and trial counsel.

A recent example is a Florida case involving an accidental police shooting. Just four days after the incident, the plaintiff's lawyer sent a letter to the sheriff's office demanding that all evidence related to the shooting be preserved. Later, the plaintiff's counsel sent a second letter identifying specific categories of evidence to be preserved, including the guns and radios of the two deputies involved, emails and laptop computers. A paralegal in the sheriff's office forwarded the letters to several employees, including the sheriff, who had been named as a defendant.

However, the general counsel did not issue a litigation hold memorandum, nor did he specifically direct the two deputies to preserve relevant evidence. After extensive discovery, the sheriff's department conceded during a hearing that relevant emails had been deleted, one deputy's laptop had been completely erased, and that both deputies' guns had been returned to the manufacturer as part of a firearms exchange program.

In light of the plaintiff's preservation letters and the department's policies requiring the preservation of evidence during the pendency of an investigation, the court concluded that the spoliation was willful.

Accordingly, in addition to granting an adverse inference instruction against the defendants, the court imposed monetary sanctions against the sheriff, the two deputies and the general counsel, jointly and severally. See Swofford v. Eslinger, 671 F. Supp. 2d 1274 (M.D. Fla. 2009).

Defeating a Spoliation Attack May Be a Pyrrhic Victory

Litigating even a moderately complex case is an expensive proposition, taking into account the fees of the lawyers, expert witnesses and electronic discovery vendors. A spoliation dispute can quickly fission into a case unto itself, replete with forensic analyses by electronic data consultants, extensive depositions, briefing and evidentiary hearings. There can be no doubt that defending against spoliation motions not only is "very, very time consuming" and "distracting," but also extremely expensive for the parties. Pension Comm., 685 F. Supp. 2d at 471.

The proceedings in the Pension Committee litigation amply illustrate this point. The parties spent nearly a year taking depositions on the spoliation issue, after which "[c]ounsel spent a huge amount of time preparing declarations, including drafting, questioning plaintiffs' employees and attempting to locate documents that had not yet been produced." Id. at 474.

The parties also prepared for and participated in two evidentiary hearings concerning the spoliation issues. Id. at 478.

Although one can only speculate about the total expense that the plaintiffs incurred in defending against the motion, it is safe to say that they overran whatever litigation budget they established at the outset

of the case. The bottom line is that it is better to avoid a spoliation motion than to defeat one.

There are several advance steps that parties can take to minimize the risk that relevant evidence will be discarded inadvertently when litigation arises. Many companies have a records management program; one goal of such a program is to provide the company with a defensible approach to maintaining and deleting electronic information in the ordinary course of business, and a well-designed program can provide defenses to certain claims of spoliation.

A records management program also advances a company's knowledge of the nature and location of the various types of electronic data that might be sought in discovery, vastly simplifying the process of instituting timely litigation holds.

A number of recent decisions emphasize the importance of implementing a litigation hold when a lawsuit is anticipated, and have held that it is grossly negligent to overlook that step. In addition to distributing the litigation hold memorandum, it is a good practice to speak individually with the employees most likely to have relevant materials, in order to ensure that they understand the range of the materials that should be retained.

Corporate email systems typically permit the system administrator to establish an electronic litigation hold, so that at least one copy of every email remains in existence even if the corporate recipient deletes the copy from his or her mailbox.

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