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5 Tips To Avoid Spoliation Sanctions

Law360, New York (December 3, 2015, 5:55 PM ET) --

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All parties have a duty to preserve potentially relevant evidence in response to a reasonably foreseeable litigation. The failure to comply with this duty can have devastating consequences. Courts may impose severe sanctions when a party destroys evidence that it had a duty to preserve. The severity of the sanctions imposed frequently depends upon the court's view of the spoliator's degree of culpability and the prejudice suffered by the party seeking the sanctions. Generally, spoliation sanctions include monetary sanctions, an adverse inference jury instruction, and/or a default judgment.

Since 2005, sanctions for spoliation of evidence have increased 271 percent.[1] A recent study shows that spoliation sanctions were granted in nearly one-third (28 percent) of the sampled cases in which at least one party moved for sanctions and the court ruled on that motion.[2] The same study found that the most common type of sanction granted was an adverse inference jury instruction, which was granted in 44 percent of all cases in which a sanction was imposed.[3] Given judges' increasing willingness to grant spoliation sanctions and the potential effect that such sanctions can have on the disposition of the case, it is important to take all reasonable steps to preserve potentially relevant evidence. Below, we provide five tips to avoid spoliation sanctions.

These recommended best practices are important even with the recent amendments to the Federal Rules of Civil Procedure.[4]

1. Understand When the Duty to Preserve Arises

The duty to preserve begins when litigation is reasonably foreseeable. As soon as a potential claim is identified, a litigant is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action. Because a potential claim may be identified in prelitigation correspondence, the

duty to preserve may start months or even years before a complaint is filed.

In Zest v. Implant Direct, the district court found that presuit correspondence exchanged 16 months prior to the filing of the complaint triggered defendants' duty to preserve.[5] In this correspondence, plaintiffs warned defendants that if defendants proceeded with plans to commercialize a product under development plaintiffs would sue for patent infringement. In its analysis, the court noted that the correspondence supported a finding that defendants were on notice of the potential litigation.[6]

2. Issue and Implement an Effective Litigation Hold

Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and implement a "litigation hold" to ensure the preservation of relevant documents.[7] A litigation hold is an instruction directing custodians of certain documents and electronically stored information to preserve relevant evidence in response to a pending or reasonably foreseeable litigation. The hold should be in writing and distributed to those individuals who are most likely to have relevant information. In the hold, practical guidance should be provided as to the types of documents that are relevant and any applicable date ranges.

The failure to institute a litigation hold may result in monetary sanctions. In Keithley v. The Home Store.com Inc., the patent holder moved for spoliation sanctions against the accused infringers for, inter alia, the accused infringers' failure to have a litigation hold in place.[8] The district court found no error in the magistrate judge's order of monetary sanctions against the accused infringers because the district court found that no written litigation hold policy specific to the case was in effect for four and half years after the duty to preserve arose and because during this time period defendants recklessly allowed the destruction of relevant source code.[9]

It is important to note that a party's obligations do not end with the issuance of a litigation hold. Once a "litigation hold" is in place, a party and its counsel must make certain that all sources of potentially relevant information are identified and placed "on hold." For counsel, this will involve gaining an understanding of the client's document retention policies as well as the different ways that the client stores information.

3. Make Sure All Sources of Data Are Preserved

Traditionally, document preservation meant identifying and placing on hold emails, electronic documents and paper documents. The technological advances in the last 10 years, however, have dramatically increased the ways in which we communicate and transact business. This expansion poses special challenges to the duty to preserve potentially relevant evidence as additional media may now have to be searched. To comply with the duty to preserve, counsel should consider all sources of ESI used by the client. These sources may include text messages, voicemail messages, videos recorded on smartphones, etc.

District court are becoming increasingly aware of the importance to preserve these nonconventional sources of data and are ordering sanctions for their spoliation. In In re Pradaxa Products Liability Litigation, the district court ordered defendants to pay nearly $1 million, in part, for their "egregious" conduct related to text message preservation.[10] This conduct included defendants' failure to disallow the auto-delete feature of their company-issued cellular phones.[11] In finding this conduct sanctionable, the court emphasized that text messages are ESI and that it does not matter that text messaging is a less prominent form of communication.[12]

4. Limit Use of Personal Email Accounts and Devices

To reduce the risk that potentially relevant information is inadvertently destroyed, parties should instruct their employees to refrain from conducting business using the employees' personal email accounts or devices such as laptops. Here, the concern is that information sent or received via personal email accounts or stored in personal computers is outside the parties' data retention architecture. As such, there is no ordinary way for the parties to search for and place on hold any information on the employees' personal email accounts and devices. This is significant because the failure to preserve potentially relevant information in these personal email accounts and devices is sanctionable spoliation.

In Zest IP Holdings LLC et al. v. Implant Direct Mfg. LLC, the district court found that two of the defendants' employees (the president and the director of design engineering) communicated at times using personal email accounts regarding the products accused of infringement.[13] The court also found that an indeterminate number of those personal emails were destroyed after a duty to preserve arose.[14] After concluding that this was sanctionable spoliation, the court determined that an adverse inference jury instruction was an appropriate sanction.[15]

5. Understand That the Duty to Preserve Is Ongoing

Intellectual property litigation is often protracted and can last several years. Many events can happen during the life of a case that may affect a party's duty to preserve potentially relevant evidence. For example, new patents and infringing products may be added to the case as discovery progresses. When such events take place, it is imperative to revise the litigation hold to ensure that it adequately covers the current scope of the case, including documents that are potentially relevant to any new claims or defenses.

Similarly, the parties may hire new employees during the course of the litigation. To the extent that those employees become the custodians of potentially relevant evidence, it is essential that they receive a copy of the current litigation hold and are aware of their duty to preserve.

Conclusion

Judges and juries are increasingly holding companies and their attorneys liable for lapses in preserving documents — particularly in the face of culpable destruction. Implementing the five key practices outlined above will help litigants significantly mitigate the risk that documents will be lost and will also aid counsel in the defense of a spoliation charge.

—By Manuel J. Velez and Lisa M. Ferri, Mayer Brown LLP

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DISCLOSURE: Mayer Brown LLP represented Zest IP Holdings LLC and Zest Anchors LLC in the matter of Zest IP Holdings LLC v. Implant Direct Mfg. LLC, No. 10-541 (S.D. Cal.).

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[1] Stephanie Fox, Ten Things to Consider When Establishing a Legal Hold Policy, Association of Corporate Counsel (2013) at 1.

[2] Emery G. Lee III, Motions for Sanctions Based Upon Spoliation of Evidence in Civil Cases, Report to the Judicial Conference Advisory Committee on Civil Rules, Federal Judicial Center (2011) at 8.

[3] Id.

[4] On Dec. 1, 2015, the standard for spoliation under Federal Rule of Civil Procedure 37(e) was amended.

[5] Zest IP Holdings, LLC v. Implant Direct Mfg. LLC, No. 10-541, slip op. at 16-17 (S.D. Cal. June 16, 2014).

[6] Id.

[7] Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 431 (S.D.N.Y. 2004).

[8] Keithley v. Homestore.com, Inc., 629 F.Supp.2d 972, 977 (N.D. Cal. 2008).

[9] Id. at 977-78.

[10] In re Pradaxa (Dabigatran Etexilate) Products Liability Litigation, No. 12-2385, slip op. at 50 (S. Ill. Dec, 9, 2013) rev'd on other grounds.

[11] Id. at 44-45.

[12] Id. at 41.

[13] Zest IP Holdings, LLC v. Implant Direct Mfg. LLC, No. 10-541, slip op. at 10-13 (S.D. Cal. June 16, 2014).

[14] Id. at 17-20.

[15] Id. at 26.

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