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Electronic Discovery & Records Management

TIP OF THE MONTH

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Prosecuting Spoliation Claims

Scenario:

A large company is defending itself in a breach of contract lawsuit. In order to prepare its defense, the company requests documents from the plaintiff that include electronically stored information (ESI). The company believes that plaintiff possesses certain emails and drafts of the contract that may refute plaintiff's interpretation of the contract. However, plaintiff has not produced the requested documents. The defendant company suspects plaintiff has failed to preserve the ESI on backup tapes, perhaps even intentionally.

Prosecuting Spoliation

A party engages in spoliation when it destroys or significantly alters evidence that is relevant to pending, imminent, or reasonably foreseeable litigation, or if it fails to preserve property (such as a company laptop) for another's use in litigation. The specific elements of spoliation claims and their consequences vary widely among jurisdictions, and thus applicable law should be consulted. Most large organizations tend to think of spoliation as a defensive issue. However, an organization that takes appropriate steps to preserve relevant information may be in a strong position not only to defend itself from accusations of spoliation, but to affirmatively pursue spoliation claims against a litigation opponent that fails to meet its own preservation obligations.

If a party is found to have engaged in spoliation, it may face a number of consequences, including sanctions and the undermining of its credibility before the court. Accordingly, a litigant that has met its preservation obligations, and that determines that its opponent has not, can consider whether it is advantageous to pursue spoliation sanctions.

In determining whether to award sanctions, and which sanctions to apply, courts will typically consider the spoliator's degree of fault, the prejudice suffered by the opposing party, and the nature of the sanction being sought by the moving party. Potential sanctions for spoliation include:

- Monetary penalties;
- Stricken pleadings;
- Exclusion of evidence;
- Loss of attorney-client privilege or work-product protection;
- Adverse inference instructions; and
- Dismissal, default judgment and possible criminal penalties, in particularly egregious circumstances.

The most common spoliation sanction is a monetary penalty, which can take the form of a fine, an award of attorneys' fees or a shifting of legal costs. In one case, the District Court for the District of Columbia imposed a fine of several million dollars against a party in connection with its periodic system-wide destruction of email over a two-year period. The large sanction appears to have been issued, at least in part, as a result of the court's belief that the defendants continued to permit monthly destruction of email for several months after learning of the problem and waited more than four months to notify the court and opposing counsel.

A spoliator may also face more severe sanctions, such as an adverse inference instruction, which permits the jury to infer that the missing evidence would have harmed the spoliator's case, or a default judgment. In one 2005 case, a defendant financial institution was found to have engaged in a practice of overwriting email every 12 months, despite an SEC regulation that required the company to retain email for a two-year period. The trial court ordered the defendant to produce backup tapes, review emails, conduct searches, produce responsive emails and a privilege log, and certify compliance with the order. After the defendant certified compliance with this order, the trial court found that the defendant possessed more than 1,400 backup tapes that had not yet been processed or produced, and that the defendant continued to overwrite emails and fail to produce emails and attachments. The court ultimately granted plaintiff's motion for a default judgment in part and deemed certain facts admitted for purposes of trial. The court also revoked the *pro hac vice* admission of the defendant's counsel. At the conclusion of the trial, the jury awarded a judgment well in excess of one billion dollars against the defendant, more than half of which was punitive damages.

Best Practices

In order to lay the foundation to pursue a potential spoliation claim, a party to a lawsuit should consider whether taking the following affirmative steps is appropriate in their matter:

- Ensure that your organization has met its own preservation obligations.
- Send a preservation letter (also known as a "first-day letter") to the opposing party that identifies the types of ESI and hardware (e.g., personal laptops or computers) that would likely be subject to discovery. A first-day letter puts the opposing party on notice that you consider data from those sources of ESI to be relevant, and can then be used later as evidence if the ESI is subsequently destroyed.
- Seek a court order concerning the parties' obligations to preserve and produce relevant ESI. Like a preservation letter, such an order can help lay the groundwork for a subsequent spoliation motion.
- Use a Federal Rules of Civil Procedure 30(b)(6) deposition to obtain information regarding the steps that were taken to preserve and produce documents. You might also ask such questions during depositions of fact witnesses. Such questioning may expose holes in the opposing party's production.
- Seek out third parties who may possess relevant ESI. If that third party produces responsive ESI containing communications with the opposing party, but the opposing party never produces such ESI, this may point to possible spoliation.
- Employ a forensic computer expert to discover and prove a spoliation claim by having the expert examine the opposing party's computer systems to determine whether ESI was modified or destroyed.

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