

## Electronic Discovery &amp; Records Management

## TIP OF THE MONTH



November 30, 2009

Defending Spoliation Claims

**Scenario**

A large company finds itself defending against a contentious employment discrimination lawsuit. During discovery, the company's document production includes electronically stored information (ESI). Plaintiff alleges a gap in the ESI produced by the company and asserts that it resulted from the company's failure to implement an adequate litigation hold. Accordingly, plaintiff makes a motion seeking spoliation sanctions.

**Defending Against Spoliation**

The duty to adopt appropriate measures to preserve relevant evidence arises when a party receives notice of or reasonably anticipates litigation. Significantly, the preservation obligation can occur well before a lawsuit is actually filed. Even after a "triggering event" has happened, a company still is not required to preserve "everything" — for example, every email sent or received, all of its hard copy or electronic documents, or every backup tape then in existence. Rather, the law attempts to strike an appropriate balance; one that allows companies the flexibility they need to continue day-to-day operations while also ensuring that the parties are able to conduct full and fair discovery.

**Spoliation Factors**

While there is no single test or set of factors to determine if spoliation sanctions are warranted, generally speaking, a party engages in spoliation when:

- It destroys or significantly alters evidence that is relevant to pending, imminent or reasonably foreseeable litigation, or
- It fails to preserve relevant property for another's use in litigation.

While a culpable state of mind is often considered a condition precedent to the imposition of sanctions, some courts have indicated that spoliation can result from mere negligence, particularly in cases where the relevance of the destroyed evidence is readily established or the degree of prejudice to the requesting party is significant. The specific elements of spoliation claims and the consequences of these vary widely among jurisdictions, so it is necessary to determine the applicable law in the relevant jurisdiction in order to properly defend against these claims.

**Importance of the Litigation Hold**

A comprehensive document retention policy that provides for the application of litigation holds can be critical in defending against spoliation claims. A litigation hold suspends routine destruction of

discoverable ESI. While many courts treat the existence of a litigation hold as a necessary condition for avoiding spoliation penalties, implementation of the hold is equally important. Failure to timely implement a reasonable litigation hold can result in sanctions if that failure results in loss of relevant ESI.

Determining the proper scope of the litigation hold is also an important step to avoiding sanctions. As a general matter, the preservation duty attaches only to the ESI in a party's possession, custody or control that can be reasonably foreseen to be relevant and discoverable in the litigation. In assessing the proper scope of preservation, consideration should be given to, among other things, ESI in the control of a vendor or contractor providing outsourced services. A party also should consider whether non-traditional forms of ESI, such as audio recordings or voicemail records, fall within the scope of its preservation obligations.

The preservation and restoration of backup media is a frequently litigated issue. At least one court has found that inaccessible backup tapes are generally not subject to a litigation hold. Nonetheless, a litigant should consider whether it should preserve backup tapes that contain ESI for key custodians. A key factor to consider in making this determination is the extent to which the data on the backup media is duplicative of other, more accessible, sources of relevant data.

### **Potential Spoliation Sanctions**

The severity of a spoliation sanction can vary substantially depending on whether the court determines that the loss happened intentionally, negligently or despite a party's reasonable preservation efforts. If a party is found to have engaged in spoliation, it may face a number of damaging consequences, including sanctions and the undermining of its credibility before the court. 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.

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 costs. Other potential sanctions for spoliation can be more severe, including the striking of pleadings, the exclusion of evidence, the loss of attorney-client privilege or work-product protection, the issuance of an adverse inference instruction or even the dismissal of the suit or entry of a default judgment. Depending on the context, the loss of evidence can even lead to criminal penalties.

### **Best Practices**

Having a comprehensive and defensible electronic discovery process is one of the best defenses to spoliation claims. Not only will such a program decrease the likelihood of losing relevant evidence, but it also can mitigate the severity of any adverse consequences should relevant evidence be lost. Thus, proper documentation of preservation and discovery efforts is important because it can help demonstrate that a party has taken reasonable steps to comply with its discovery obligations. To successfully defend against spoliation claims, the following types of evidence can demonstrate good processes and show compliance with discovery obligations:

- The timing and scope of the litigation hold;

- The follow-up efforts to monitor compliance;
- The scope of successful evidence collection by source;
- The reasonable measures put in place to monitor compliance with the legal hold and to identify and collect relevant, discoverable evidence;
- The proportionality of preservation and collection measures to the case; and
- The search terms and/or other methodologies used to identify relevant ESI, why those terms or methods were selected, and how effective they were in identifying relevant ESI.

Parties are expected to meet a standard of reasonableness, not perfection, in their preservation efforts. A party's ability to show that it had a reasonable process, that it followed that process in a reasonable manner and that it acted in good faith should go a long way toward helping that party avoid a spoliation sanction where relevant evidence is lost despite those efforts.

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