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E-Discovery and Spoliation Issues: Litigation Pitfalls, Duty to Preserve, and Clawback Agreements

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A person in a dark suit and tie is sitting at a dark table, carefully stacking light-colored wooden blocks. The background is a blurred office setting. The text is overlaid on the image in a white, sans-serif font.

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Spoliation and E-Discovery

Avoiding Pitfalls in E-Discovery

Chuck Hoey and Robert Quinn

Outline

- 1) When does the duty to preserve arise for plaintiffs and defendants?
- 2) Was there spoliation?
- 3) Electronic preservation of evidence and enormous increases in amounts of information.
- 4) Steps to prove opposing party spoliated evidence.
- 5) Was the spoliation prejudicial?
- 6) What sanctions, if any, are appropriate?

1. Spoliation

- What is Spoliation?
- The intentional destruction of evidence or FAILURE TO PRESERVE EVIDENCE.
- The inadvertent destruction of evidence can lead to spoliation sanctions.
- The inadvertent destruction of evidence can lead to spoliation sanctions.
- Spoliation is not just the intentional destruction of evidence.
- Ignorance is not an excuse, and it will cost you money.
- Many states have tech CLE requirements

Federal Rule 37 (e)

- **(e) Failure to Preserve Electronically Stored Information.** If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
 - **(1)** upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
 - **(2)** only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
 - **(A)** presume that the lost information was unfavorable to the party;
 - **(B)** instruct the jury that it may or must presume the information was unfavorable to the party; or
 - **(C)** dismiss the action or enter a default judgment.

Importance of Spoliation

- Imagine you are sitting in court. The judge is telling the jury that your client/your employer intentionally or negligently destroyed evidence, and you “may/shall infer that the evidence was destroyed because it is bad for their case.”
- Plaintiffs can also be guilty of spoliation and have their case significantly damaged.
- Spoliation can ruin your case or make your case.

***Phillips v Harmon*, 297 Ga. 386, 774 S.E.2d 596 (2015)**

- Created constructive notice in Georgia
- Duty to preserve when litigation becomes reasonably foreseeable and not just when litigation pending
- Allegations of negligence during childbirth with severe injuries – quadriplegia, blindness, inability to speak
- Records saved electronically
- EKG strips with handwritten nurse's notes were not saved
- Plaintiff sought spoliation instruction; trial court denied because no written notice

Phillips v Harmon, 297 Ga. 386, 774 S.E.2d 596 (2015)

- Georgia Supreme Court held spoliation instruction should have been given
- Factors to consider:
 - Internal investigation
 - Contacted insurer and legal counsel
 - Extent of injury, whether fault is clear, potential financial exposure, course of conduct between parties, experience with similar situations
 - Not only what the Plaintiff did – also ask what the Defendant did. This focus is new.

Examples for when duty arises

- Customer slips and falls in the store. Denies injury, says wasn't watching where he was going, says there was no unsafe condition. Manager completes accident report as required by company policy. Customer continues shopping without complaint.
- Is there a duty to preserve?
- What if same facts but floor was wet, and the employees of the store knew the floor was wet?
- Was anything done beyond a standard incident report?

Examples when duty arises

- Customer Hank Hothead sees customer Biff Belligerent. Biff is living with Hank's sister who recently called 911 claiming that Biff was threatening to injure her. Hank and Biff start arguing about Biff's treatment of Hank's sister and get into a fist fight. Both men are injured. The police have to be called. Biff is taken to the ER by ambulance. Does the store have a duty to preserve evidence?
- What if store manager called Hank to say "Biff is here?"
- What if suit was threatened by Biff or Hank?

More examples of duty arising

- Motor vehicle accident with damage to one vehicle. Neither party claims any injury at the scene. Is there a duty to preserve?
- It's no secret that property damage will result in a claim or that MVAs can lead to litigation. Be certain that photos taken at the scene are preserved.

Tips

- When a client or potential client calls a lawyer, to discuss a possible claim, that individual (or company) is probably contemplating litigation. That's why the call is made!
- Address spoliation immediately – better safe than sorry.
- Ask if suit has been threatened, if correspondence has been received, etc.
- Also ask about what actions this individual or company have taken to investigate.
- Preserve or replace evidence which may have been destroyed already.

What to save

- E-Preservation = Saving my butt
- Photos
- Reports
- Texts
- Emails
- Phone logs
- Security footage in store AND parking lot
- Damaged equipment
- Allegedly defective items
- Literally anything you can think of

What to save – mobile phones

- Becoming more important – texts, photos, videos, call history, messaging apps
- Collect phones vs have users back up phones
- Train employees how to back up their phones
- Privacy issues – Apple Pay, passwords, iTunes, Touch ID settings NOT backed up

Mobile Phones (cont'd)

- Health and fitness apps, and geolocation data NOT automatically backed up. This information is sometimes relevant.
- Instruct clients to have mobile phone data backed up, and how to do it.
- Privacy issues – taking phones vs what data is being taken.
- Do some employees need work phones?

Plaintiff's duty to Preserve

- *Cooper Tire & Rubber Company v. Koch* 303 Ga. 336 (2018)
- Single vehicle crash allegedly due to defective tire
- Driver survived in ICU for several weeks. He and his wife discussed saving the allegedly defective tire.
- Vehicle and other tires destroyed to save cost of storage
- Had not hired or spoken to attorney or expert
- Early in the case – could still learn more in discovery
- No spoliation because plaintiff was not contemplating litigation. Destruction of evidence could hurt plaintiff.

Plaintiff's Duty To Preserve

- When would a reasonable person, in plaintiff's shoes, have foreseen litigation?
- If plaintiff is a PI lawyer, that plaintiff will be held to much tougher standard than a plaintiff who has never been to court or worked in the legal field.
- Look at plaintiff's actions, life experience, history of litigation (if any)
- Course of conduct between the parties
- Threats to sue
- Veiled threat to sue

Plaintiff's Duty To Preserve

- Speaking to lawyer all but guarantees duty to preserve exists
- What if lawyer contacted the plaintiff and was turned down?
- What if plaintiff has a close friend or family member who is a lawyer?
- Hiring an expert all but guarantees duty to preserve exists

Plaintiff's Duty To Preserve

- Plaintiff contacting potential witnesses could be sign that plaintiff is considering litigation
- Plaintiff can be anticipating litigation months before defendant's duty to preserve arise
- In that situation, make sure all the evidence plaintiff had was preserved
- Check their social media once litigation starts

Plaintiff's Duty To Preserve

- Same standard – when a reasonable person would anticipate that litigation is pending now
- Same standard but different results
- Large companies which routinely have litigation will be held to much higher standard than many plaintiffs
- Different people will be held to different standards

When Spoliation Goes Wrong

- In 1999, the United States Department of Justice (DOJ) sued several major tobacco companies for fraudulent and unlawful conduct and reimbursement of tobacco-related medical expenses.
- As part of the litigation, the court entered a case management order that required all parties to preserve “all documents and other records containing information which could be potentially relevant to the subject matter of this litigation.”
- However, due to a company policy regarding deleting old e-mails, Phillip Morris had continued to delete all emails more than 60 days old.

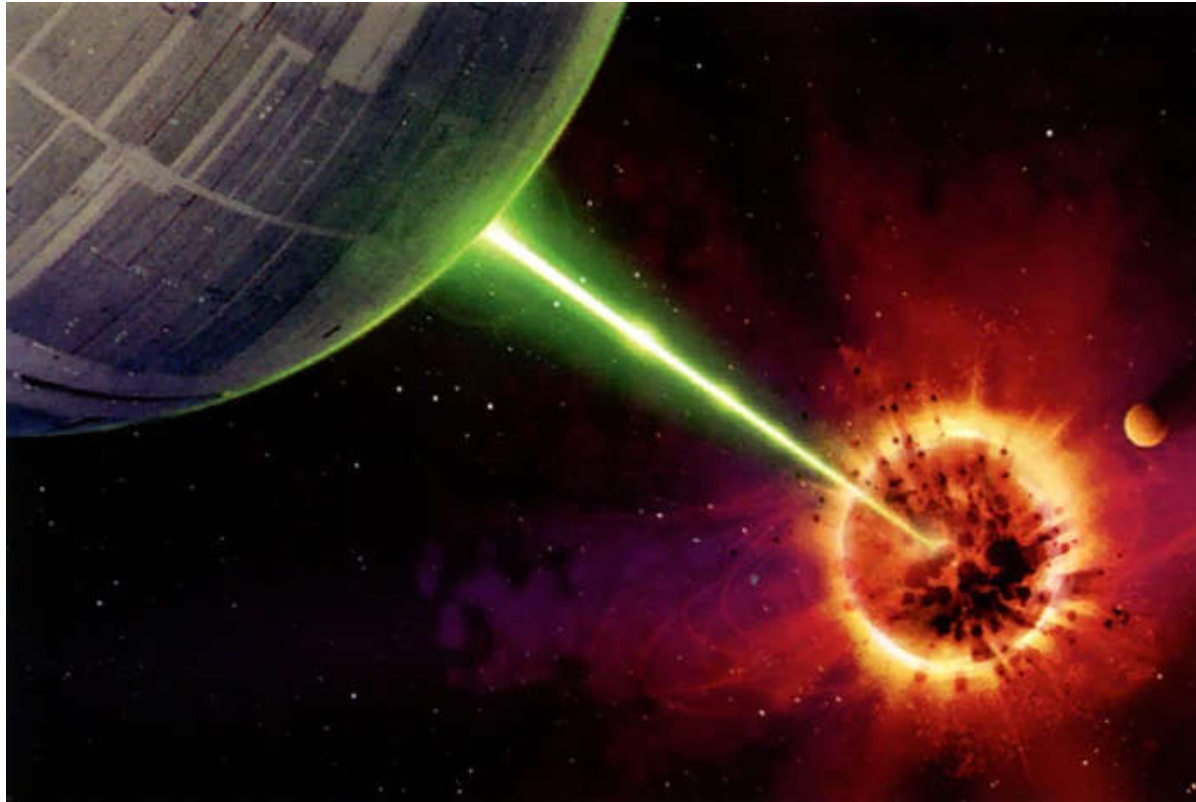
When Spoliation Goes Wrong

- The Plaintiff moved for sanctions after Philip Morris failed to comply with the “print and retain” policy.
- Philip Morris was precluded from calling as witnesses at trial any employee that failed to comply with the retention order. This included many of its executives, such as its Senior Vice President of Corporate Affairs.
- Philip Morris was also ordered to pay \$2.75 million in fines.

Auto deletions, looping over the video



**“We automatically delete
{information}”**



When Spoliation Goes Wrong

- *O'Berry et. al. v. Turner, et. al.*, (M.D. Ga.). Trucking case.
- During discovery, Plaintiffs sought Truck Driver's driving log as well as ECM data regarding the truck.
- The accident occurred in June 2013. In August 2013, Plaintiffs' counsel sent a litigation hold letter to Defendants requesting preservation of driver logs, along with the ECM data from the truck.
- Eventually, Defendants admitted that the information had been inadvertently destroyed. Plaintiffs filed a Motion for Sanctions.

When Spoliation Goes Wrong

- Defendants argued that they made a good faith effort to preserve the data.
- Defendants printed out the driving log as well as the data from the truck and placed it in storage.
- The hard file mysteriously went missing.
- After discovering that the file was missing, Defendants contacted the site responsible for storing the truck's data electronically.
- However, the information had been deleted pursuant to PeopleNet's data retention policy.

When Spoliation Goes Wrong

- The Court looked at the recently amended FRCP 37(e) regarding preserving electronic information and determined that Defendants had a duty to preserve the electronic data.
- However, because Defendants made the “minimal” effort to preserve the evidence by printing it off, the Court found that the Defendants’ did not act with the intent to deprive Plaintiff’s of the information.
- The Court refused to strike Defendants’ Answer and enter a judgment against them.
- However, the Court did order that an adverse inference instruction be read to the jury that the missing data should be presumed to have been unfavorable to Defendants.

2. How to Avoid Spoliation - Have and Follow a Retention Policy

- Most documents should be kept for a specific period of time and then disposed of because retaining all documents for an infinite amount of time can be problematic and expensive. Margaret M. Koesel & Tracey L. Turnbull, American Bar Association *Spoliation of Evidence* ch.2 (2006).

Reducing Claim Costs

- There are four prevailing reasons to implement and follow a document retention program. These include (1) the expense of storing documents, (2) the ability to locate documents efficiently, (3) the desire to avoid sanctions for the improper destruction of documents, and (4) the consequences in litigation of retaining documents that should not have been subject to retention.

Enforcing Document Retention

- Following a document retention policy does not prevent spoliation sanctions if the destruction of evidence occurs after a duty to preserve arises. Stated another way, one may not use a document retention policy to obstruct justice laws.
- However a well-designed document retention policy can help prevent spoliation sanctions. For the retention policy to work smoothly in conjunction with litigation, document destruction must be suspended upon the start of litigation, an official investigation into the company, or when the company should have reason to know that litigation is imminent.

A. What to Consider When Designing a Document Retention Program

- A document retention program should be tailored to fit the needs of the particular company
- Most importantly the document retention program should involve and revolve around a legitimate business purpose. Therefore, when determining whether a document or tangible item should be destroyed or preserved the purpose for discarding the document or item should be a business purpose.
- The program should be suspended or changed when there is potential litigation or at the commencement of litigation in order to avoid accusations of motive behind destruction of documents or tangible items.

- The company should also educate and remind its employees of the document retention policy and its importance.
- Where the employee is uncertain about whether the document should be destroyed or retained they should first consult with a higher authority or counsel.
- Following the retention policy regularly is pertinent. Otherwise, the company is open to charges that it only follows its document retention policy when beneficial to destroy evidence of wrongdoing. If possible, someone should be in charge of monitoring and handling the document retention policy.

B. Document Retention Requirements

- Generally a company may decide what the appropriate time period is for retaining non-permanent records unless there is an applicable state or federal statute or regulation that dictates an appropriate retention period.
- Therefore, the company should familiarize itself with any state or federal record keeping requirements.

C. Suspension of Document Retention Policies

- As stated earlier, it is very important to suspend any document retention policies as soon as the company has notice of a lawsuit or reason to know of a potential lawsuit. The company must take the necessary steps to preserve potential evidence, which includes suspending the document retention policy in regard to documents relevant to that litigation.

D. Factors Courts Consider when Imposing Sanctions

- Courts have significant leeway in deciding what sanction is appropriate to impose on the spoliator.
- Some factors that are often considered by courts include: 1) the culpability of the spoliating party, 2) the prejudice to the non-offending party, 3) the degree of interference with the judicial process, 4) whether lesser sanctions will remedy any harm and deter future acts of spoliation, 5) whether evidence has been irretrievably lost, and 6) whether sanctions will unfairly punish a party for misconduct by the attorney.

Clawback Agreements

- Yes, you need one
- Will require return of privileged documents which are INADVERTENTLY provided by mistake
- MUST show that you took reasonable steps to insure that the documents were checked before going out
- Extensive document review early in the case
- *Irth Solutions, LLC vs. Windstream Communications, LLC* No. 2:16-CV-219 (S.D. Ohio August 2, 2017)
- Documents released which were privileged not subject to clawback agreement – while motion pending, documents released AGAIN.

PreTrial Discovery Conferences – Federal Rule 26 (f)

- One subject for conducting discovery is how E-Discovery will be handled. Examples:
- What is saved and how?
- Format of information
- Metadata
- TAR
- Proportionality
- Expenses
- Clawback agreements

Resources

- Strafford Seminars
- DRI and state defense organizations such as GDLA
- Sedona Conference
- Law and technology CLEs

Thank You

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