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PROTECT AND DEFEND: MANAGING ISSUES OF SPOLIATION IN AN ELECTRONIC AGE

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Spoliation is a complex issue that merits attention from those beginning their career in the insurance market. This article will attempt to shed light on the basics of spoliation and its impact on litigation, as well as explore spoliation in the context of e-discovery.

What is Spoliation?

Spoliation is the "destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." The types of relevant evidence that may need to be preserved include, but are not limited to: products involved in an accident, physical evidence, video, security logs, communications in paper or electronic form, medical records required to be kept by statute or regulation, or repair logs.

When does the duty to preserve evidence arise and to whom does it extend?

The duty to preserve evidence arises when a reasonable person knows or should know, that litigation is possible and that the evidence in question might be important. What is not under control is whether or not such evidence has been requested by an opposing party or ordered to be produced by a court. Even with such requests absent, parties must preserve relevant evidence.

The scope of this duty extends out towards many more parties than one would expect. Parties to litigation, their experts, attorneys, insurers, and even third party affiliates must all be vigilant in the preservation of relevant evidence.

Possible Consequences of Spoliation

If this duty to preserve is not met and spoliation of evidence occurs, the courts have discretion to issue sanctions to the offending party. The severity of the sanctions imposed is directly related to "remedying the prejudice caused to the other party." Courts weigh a number of factors including whether the spoliation was negligent or intentional, if evidence was requested by an opposing party or the court, and the nature and extent of the prejudice caused by the spoliation.

Sanctions that arise as a result of spoliation can range from an adverse jury instruction to awarding costs of defense and legal fees. Possible default judgment against the spoliating party as well as the possibility of excluding the spoliated evidence from trial, highlight the fact that this issue is of paramount importance, as it may lead to the practical inability to defend a case.

Spoliation & E-Discovery

Spoliation is further complicated within the context of "E-Discovery". Once considered a "cutting edge" issue, electronic spoliation and "E-Discovery" are now central concepts, often crucial to pre-trial discovery.

"E-Discovery" involves the pre-trial discovery process of gathering, producing, and managing "Electronically Stored Information" or ESI. Examples of ESI are e-mail messages, electronic files on a server, website content, and backup media files such as flash drives or disks.

ESI also includes information called "metadata". Metadata is electronic information about other data. For example, if a user changes a number in a Microsoft Excel spreadsheet, "metadata" would be associated to that Excel spreadsheet reflecting the change. Other examples involve the timestamp on an e-mail or phrase changes in a Microsoft Word document.

As one can imagine, this type of information may become crucial to litigation, and courts have started to fully appreciate the potential prejudice involved in the mismanagement of electronic data. Because of the critical importance of ESI, the costs associated with gathering such data can be onerous, and the dynamic nature of electronic data can become difficult to manage.

The Cost of E-Discovery

Below is the definition of "document" included in a recent subpoena for records that our office propounded to opposing counsel:

> *The term "document" shall also include, without limitation, agreements, appointment books, calendars, charts, computer printouts, conferences, contracts, data compilations from which information can be obtained, diagrams, diaries, drafts, envelopes, financial statements, graphs, instructions, inter or intra-office communications, ledgers, letters, memoranda, microfiche, microfilm, minutes and notes of meetings, notebooks, notes, photocopies, photographs, plans, publications, published or unpublished speeches or articles, purchase orders, recordings, records, reports, scrapbooks, specifications, tape or disk recordings, telegrams, telephone or other conversations or communications, telexes, transcripts, e-mail and electronic data.*

Now imagine locating this type of information requested in a business context. Relevant information could be located on a central server, a local hard drive, a cloud-based software application such as "SaaS" online, an employee's Blackberry or smartphone, a home computer, or a laptop. To gather, organize, manage and preserve this information is extremely expensive and time consuming.

ESI & the Dynamic User

Not only is ESI costly and time consuming to locate and manage, but also the data itself is in constant flux. A major shift has occurred where technology users are contributing as opposed to consuming. Whether it be YouTube, social media platforms, or e-mail or text messaging, users are creating the content as opposed to simply viewing it. This creates potential problems for businesses and corporations involved in litigation, as the relevant data set is constantly changing. As a result of these new trends, individuals have the ability to communicate written content on a widespread, instantaneous basis.

Possible Consequences and Necessary Action

Although managing ESI is burdensome, the alternative, failing to preserve or identify such evidence, can result in heavy costs, sanctions, and even an adverse judgment. Certain practical steps should be followed to avoid electronic spoliation:

The "Litigation Hold" Letter

Anticipated or pending litigation requires prompt notification to your client to retain evidence in its original condition as of the time of occurrence. This communication should be in the form of a "litigation hold" letter, which identifies what may be relevant, the manner in which such evidence should be preserved, and the consequences associated with spoliation. Regular communication after sending a "litigation hold" letter is necessary to ensure that your clients, employees and business associates fully understand the types of data they need to preserve.

Create a Written Data Retention Policy

Long before any pending litigation, a business should establish a formal, written, "Data Retention Policy". At least in the United States Federal Courts, certain "safe harbor" provisions exist. Part of the December 1, 2006 amendments to the Federal Rules of Civil Procedure include Rule 37(e), which provides the following:

"Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."

Although this amendment hardly provides complete protection from sanctions resulting from electronic data spoliation, it provides businesses who have established reasonable data management policies some breathing room. It is important to note that such retention policies need to be executed "routinely" and in "good faith." For this destruction of data or documents on the eve of litigation is not afforded any protection by this rule.

An overbroad retention policy or the impulse to "save everything" may prove to be a costly strategy. Indeed, a court may demand that a business produce data in its possession, even if it is not reasonably accessible because of undue burden and cost.

Consider the potential costs associated with Rule 26(b)(2)(B) of the Federal Rules of Civil Procedure:

"The party from whom discovery is sought must show that the evidence is not reasonably accessible because of undue burden. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause."

The court, *even if it finds producing certain data to be unduly burdensome*, can nonetheless order a party to produce certain evidence. Therefore, it is crucial to create a measured, written document retention policy so as to avoid both costs associated with producing documents during litigation and costs associated with managing the finite resources of your client's data.

It is crucial that spoliation and the duty to preserve evidence be taken seriously by all parties, as anything less may result in sanctions and the practical inability to defend certain matters. Aggressive and up-front management of these issues will save your client time and money in the long run.

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