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RECENT COURT DECISIONS ON SPOILIATION OF EVIDENCE

E-discovery has emerged as one of the most challenging areas of records and information management, thanks to the Zubulake decision and developments that occurred afterward such as the Sedona Principles and changes to the Federal Rules of Civil Procedure. Application of these new rules and practices has been difficult and in some cases has resulted in sanctions due to spoliation of evidence. “Failure to preserve” evidence when litigation was evident is a particular cause of recent cases. This article explores some of the challenges associated with recent court rulings on spoliation.

For those who may be unfamiliar with the term, spoliation is an intentional act of destroying, hiding or otherwise denying evidence in a legal proceeding. The results of a finding of spoliation can include fines or incarceration as a part of criminal penalties. It can also have far-reaching effects due to “negative inference” which is an assumption that the evidence destroyed would have unfavorable to party that destroyed the evidence. This can cause an “adverse inference instruction” from the judge to the jury. In some locations, spoliation can justify a separate legal action against the parties who destroyed the evidence.

TIMELY LEGAL HOLDS

Pension Committee vs. Banc of America Securities - 2010

This case involved Judge Shira Scheindlin who also heard the Zubulake case in 2004. The most significant finding was that a party could still be sanctioned, even when no ‘egregious examples’ of destruction of evi-



dence occurred. In her opinion, Judge Scheindlin observed a “failure to timely institute written legal holds” which contributed to “careless and indifferent collection efforts after the duty to preserve arose”. She added that “Courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party.”

Scheindlin recommended a four-step process before imposing a remedy for a failure to preserve:

- Assess the culpability of the party to determine whether there is negligence, gross negligence or misconduct
- Assess whether a sanction is justified due to the failure to preserve
- Assess which party should bear the burden of proof regarding loss of evidence and consequences resulting from the loss
- Provide an appropriate remedy

Micron Tech v. Rambus and Hynix v. Rambus - 2011
The US Federal Circuit reached a similar decision in Rambus. In both cases, Rambus was cited for instituting a new document retention policy that caused employees to destroy discoverable documents and promoted the erasing of computer backup tapes after 3 months. In the Rambus decision the appellate court found that a duty to preserve attaches when "litigation is "pending or reasonably foreseeable" under an objective standard, which does not carry a gloss requiring that litigation be imminent, probable, or without significant contingencies".

Regarding the Micron case, the website JD Supra (www.jusupra.com) provides the following synopsis of the decision. "The Court determined that the retention policy was 'discussed and adopted within the context of [the patent holder's] litigation strategy,' and that the patent holder 'knew, or should have known, that a general implementation of the policy was inappropriate because the documents destroyed would become material at some point in the future.' The Court found that the showing of bad faith was so clear and convincing, that the only appropriate sanction was to declare the patents unenforceable against Micron."

WITHOLDING ESI CAN ALSO LEAD TO SANCTIONS

Colman (Parent) Holdings, Inc. v. Morgan Stanley – 2005

This case is interesting in that Morgan Stanley preserved all paper documents related to the case; however, they continued to overwrite (destroy) e-mails for a year, in violation of an SEC regulation that the e-mails be preserved for two years. The court ordered that backup tapes be searched and that a certificate of compliance be filed. After the certificate, additional backup tapes were discovered after the filing but the court was not informed. The court found that Morgan Stanley spoiled evidence based on its failure to preserve e-mails in an accessible form as SEC regulations required. As a result, the court granted the plaintiff's motion for an "adverse inference instruction".

WILLFUL MISCONDUCT CONTRIBUTING TO SPOILIATION

Rimkus v. Cammarata SDTX – 2010

Some legal commentators consider this case to be equally as important as Judge Scheindlin's Pension case, but for different reasons. The Pension case applied a legal hold features to a finding of spoliation. In Rimkus, Judge Lee Rosenthal uses "willful conduct" and "bad faith" to explore the opposite end of the spectrum of sanctionable acts. The suit involves

employees leaving to form their own company and suing their former employer to invalidate "non compete" provisions in their employee agreements. The following paragraphs are taken from Judge Rosenthal's opinion.

"Despite the fact that the founders of U.S. Forensic had sought and obtained legal advice on many aspects of their departure from Rimkus and their formation and operation of the competing business, they made no effort to preserve relevant documents, even after the Louisiana and Texas suits had been filed. To the contrary, the evidence shows affirmative steps to delete potentially relevant documents. Even assuming that there was an email destruction policy as DeHarde testified, it was selectively implemented. The deleted documents included emails and attachments relevant to the disputes with Rimkus--the emails and attachments showing what information U.S. Forensic's founders took from Rimkus to use in the competing business, including to solicit business from Rimkus clients, and how they solicited those clients."

While she references the Pension case frequently, she draws an important distinction involving misconduct, rather than a trigger event. "The spoliation allegations in the present case are different. They are allegations of willful misconduct: the intentional destruction of emails and other electronic information at a time when they were known to be relevant to anticipated or pending litigation. The alleged spoliators are the plaintiffs in an earlier-filed, related case and the defendants in this case. The allegations include that these parties--referred to in this opinion as the defendants--concealed and delayed providing information in discovery that would have revealed their spoliation. The case law recognizes that such conduct is harmful in ways that extend beyond the parties' interests and can justify severe sanctions."

BUT SOMETIMES DELETION IS JUST DELETION

Just because there have been numerous cases that find spoliation is evident and order sanctions, doesn't mean all cases do. Here are several examples where courts did not order sanctions even though spoliation was evident.

Pipes v. UPS – 2009

In this case a driver had an accident and blamed a faulty tire on his truck. He was fired by the company. He instituted grievance proceedings through the union but the firing was upheld at all levels. Following completion of the proceedings the records were destroyed and the tire was released to a vendor. The driver then

sued both his union and UPS. UPS claimed that they thought the matter was concluded and destroyed the records accordingly. The court declined a sanctions claim for spoliation.

Gallagher v. Magner – 2010

In this case rental property owners sued the city of St. Paul regarding enforcement of the housing code. The city did not implement a litigation hold. A motion for sanctions due to spoliation of evidence was filed (based on a failure to preserve). The motion was denied based on an absence of a “bad faith finding”. On appeal, the court upheld the magistrate court decision. “Also critical to our decision is the magistrate judge's conclusion that the City did not intentionally destroy or withhold evidence in an attempt to suppress the truth. See *Greyhound Lines*, 485 F.3d at 1035 (“The ultimate focus for imposing sanctions for spoliation of evidence is the intentional destruction of evidence indicating a desire to suppress the truth[.]”). To be sure, a district court does not abuse its discretion by imposing sanctions, even absent an explicit bad faith finding, where a party destroys specifically requested evidence after litigation has commenced. *Stevenson*, 354 F.3d at 749-50. However, where a court expressly finds, as here, that there is no evidence of intentional destruction of evidence to suppress the truth, then the district court also acts within its discretionary limits by denying sanctions for spoliation of evidence.”

Conclusion

FRCP changes have brought with them numerous problems that have yet to be completely sorted. The adversarial nature of opposing counsel in litigation will make most discovery requests into contests. The result of this is more focus on spoliation claims. The most effective remedy to avoid spoliation claims is having an effective records management program, complete with policies, procedures and applying that program across the enterprise. One key aspect of this program is proper application of legal hold procedures. Judge Schiendlin summarizes this obligation and related risks very well in the Pension case. “By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records—paper or electronic—and to search in the right places for those records, will inevitably result in the spoliation of evidence.”

ARMA International Educational Foundation (AIEF) 2011 Graduate Level Scholarship

The ARMA International Educational Foundation (AIEF) has established three scholarship programs to encourage development of the international records and information management community with an appropriately educated records and information management workforce.

GRADUATE LEVEL SCHOLARSHIPS ARMA INTERNATIONAL EDUCATIONAL FOUNDATION SCHOLARSHIP

Six scholarships of \$3000 are awarded annually, in the summer, to a full-time students entering the second year of a graduate records and information management program or equivalent library science or archival studies program which contains a significant number of records management and information courses at a recognized university or a college leading to a Masters or Doctorate degree or equivalent.

MAVIS EPPES, FAI, EXCELLENCE IN RECORDS MANAGEMENT SCHOLARSHIP

One scholarship of \$3,000 is awarded annually, in the summer, to a full-time student entering the second year of a graduate records and information management program or equivalent library science or archival studies program which contains a significant number of records management and information courses at a recognized university or a college leading to a Masters or Doctorate degree or equivalent. Funding for this award is provided in recognition of Mavis Eppes, FAI, a distinguished legal records administrator and founding AIEF trustee. Preference is given to a candidate intending on a career in legal records management.

LEADERSHIP SCHOLARSHIP

One scholarship of \$3,000 is awarded in the summer of 2011 to a full-time student entering the second year of a graduate records and information management program or equivalent library science or archival studies program which contains a significant number of records management and information courses at a recognized university or a college leading to a Masters or Doctorate degree or equivalent. Funding for this award is provided by leaders of ARMA International.

Eligibility and Application Process

Application Requirements:

1. Completed application form.
2. Provide evidence of the intention to continue with the second year of such a program
3. Submit an outline of the courses and related papers completed in the first year
4. Submit evidence of being a member in good standing of ARMA International or another nationally or internationally recognized information management association
5. Provide evidence of having attained a grade average of 80% or a B average or higher in the first year of their graduate degree program as indicated by the submission of an official transcript
6. Prepare a 1000 or more word research essay which thoroughly explores an aspect of records and information management studies. If deemed appropriate by the AIEF, further agrees to allow the AIEF to publish the essay
7. Agree to the terms and conditions of the Scholarship
8. Submit one hard copy of a letter of application, the documentation indicated above and three letters of reference from individuals able to comment on the applicant's academic performance, involvement or interest in the records and information management community and leadership abilities
9. Applications are due by June 30, 2011 and are to be submitted to:

Preston W. Shimer, FAI
Foundation Administrator
ARMA International Educational Foundation
1609 Terrie Drive
Pittsburgh PA 15241 USA

For further information, visit the Foundation Website
<http://www.armaedfoundation.org/>



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