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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

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Spoliation of Evidence: Attorneys Beware

RECENTLY, THE concept of spoliation of evidence, once a rarity, has received considerable attention from the courts and civil litigators alike. In the past several years, the U.S. Court of Appeals for the Second Circuit and U.S. District Court for the Southern District of New York have decided numerous spoliation cases, resulting in an increased awareness of the doctrine as well as a fuller definition of its scope and limitations.¹

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.”² The developing law on spoliation makes clear that in some cases the duty to preserve evidence may arise well before a lawsuit has been filed, and sanctions for spoliation may be imposed even where destruction of relevant evidence is unintentional and is merely the product of negligence. However, the cases are equally clear that not every failure to produce evidence constitutes spoliation, and that even where spoliation has occurred, the appropriate remedy must be narrowly



tailored to fit the circumstances of each case.

When Does the Duty to Preserve Arise?

The threshold question in determining whether spoliation has occurred is whether the party who altered or destroyed the evidence in question had a duty to preserve it at the time it was compromised. The duty to preserve arises well before a document is requested in discovery, and in almost any case is triggered no later than when a lawsuit is filed. But the duty to preserve evidence precedes the filing of a complaint “where a party is on notice that litigation is likely to be commenced.”³ In some instances the duty to preserve arises immediately following an injury, where it is reasonably foreseeable from the circumstances that litigation may ensue. The court in *Houlihan v. Marriott International, Inc.*,⁴ thus found that a hotel had a duty to preserve a soap dish on which the plaintiff had cut himself, observing that “[w]here a hotel guest is

injured in a hotel room, there is a strong likelihood that such injury will be the subject of future litigation.” In other instances, the duty to preserve is triggered by a party’s own pre-litigation actions which indicate that it anticipates being sued, such as where an employer seeks an independent medical examination of an injured employee or conducts pre-litigation video surveillance,⁵ or where it begins labeling documents pertaining to the plaintiff as attorney-client privileged and behaving in other ways that evince a fear of impending litigation.⁶

A finding of spoliation requires that the spoliator acted with a “culpable state of mind.” But an intent to thwart the litigation is not required.

In its most recent pronouncement on the question, the Second Circuit, in *Residential Funding Corp. v. DeGeorge Financial Corp.*,⁷ stressed that neither bad faith nor even gross negligence is needed to establish the requisite culpable state of mind. Citing its decision the previous year in *Byrnie v. Town of Cromwell*,⁸ the court of appeals noted that a party may destroy evidence with a culpable state of mind if it does so knowingly, even without the intent to breach its duty to preserve the evidence. Adopting the reasoning in *Turner v. Hudson Transit Lines, Inc.*,⁹ the court noted that sanctions for spoliation should, in some instances, be available even for the negligent destruction of

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documents because

[i]t makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently. The adverse inference provides the necessary mechanism for restoring the evidentiary balance. The inference is adverse to the destroyer not because of any finding of moral culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss.

This standard places a heavy burden on potential litigants to identify and preserve potentially relevant documents at the earliest sign that litigation is likely. Companies that have document retention/destruction policies must ensure that documents which would be destroyed in the ordinary course of business are retained, and careful attention must be paid to preserving electronic evidence, including e-mails and other information stored on back-up tapes.

It is not sufficient for an attorney merely to inform his or her client of the duty to preserve evidence. Several cases decided during the past year have imposed sanctions for spoliation, where such instructions were not properly explained or executed. In *Pastorello v. City of New York*,¹⁰ Southern District Senior Judge Charles S. Haight Jr. found that corporation counsel had failed to advise its clients of their obligation to preserve relevant evidence pertaining to plaintiff's claim. Specifically, the defendants denied having documents responsive to plaintiff's discovery request for security officers' memo books, when in fact those books did exist at that time, but were subsequently destroyed in accordance with a three-year retention policy. The risk management official sought to justify her failure to produce this material on the basis that she had

no knowledge of the record-keeping procedures of the hospital police.

Culpable State of Mind Exhibited

Judge Haight concluded that the defendants had exhibited the requisite culpable state of mind for imposition of spoliation sanctions through their gross negligence in failing to preserve this evidence. He noted that the "obligation to preserve evidence runs 'first to counsel, who [has] a duty to advise [her] client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction.'" He further observed that "[d]efendants' ignorance of their own reporting and record-keeping procedures is not only insufficient to disavow culpability, it is in and of itself culpable."

In *Golia v. Leslie Fay Co., Inc.*,¹¹ the defendant also failed to ensure that relevant documents were retained and that document requests were responded to properly. The employment discrimination plaintiffs in that case sought copies of performance notes and records reflecting the need for corrective action to refute the defendant's claim that they had performed their work as patternmakers in an unsatisfactory manner. Those documents were ultimately thrown out by the plaintiffs' supervisor when she herself was fired, more than a year after the discovery request seeking these documents was served. Southern District Judge Gerald E. Lynch found the testimony of the defendant's employee charged with collecting discovery responses confusing and contradictory. He concluded that the fact that the supervisor had the opportunity to destroy documents when she was fired was a direct result of the defendant's gross negligence in failing to undertake a proper search for the documents when

they were requested, concluding that the defendant was highly culpable in that destruction.

Spoliation: Not Each Failure

Despite increased judicial willingness to impose sanctions for spoliation arising out of negligent conduct, the circumstances giving rise to a successful claim of spoliation are narrowly tailored and do not encompass the vast majority of discovery disagreements. Parties have been unsuccessful in seeking spoliation sanctions based on delayed production of discovery material.¹² Similarly, failure to create (as distinguished from failure to maintain) documentation, even documentation that may be required under a policy or regulation, does not constitute spoliation. Thus, in *Pastorello*, after accepting plaintiff's claim of spoliation relating to the security officers' memo books which had been destroyed, Judge Haight rejected the plaintiff's subsequent effort to expand the spoliation sanction to encompass entries for dates for which the memo books were turned over, but in which procedurally required notations appeared never to have been made. He noted that her argument "misconceives the purpose of a sanction based. ... upon the spoliation of evidence. ... [which] has no office to perform with respect to evidence that should have existed but never did."¹³

In addition, when a party fails to act with reasonable diligence to obtain evidence in a timely fashion, it may undermine its chances of obtaining spoliation sanctions if that evidence is eventually destroyed. In *Townes v. Cove Haven, Inc.*,¹⁴ the court rejected the plaintiff's contention that the defendant had engaged in spoliation when it made substantial modifications to the swimming pool in which plaintiff's husband died. The modifications to the pool

were made more than two years after the accident and more than one year after plaintiff commenced her lawsuit, a period the court found afforded plaintiff a reasonable opportunity to have arranged for inspection of the pool. Quoting *Sterbenz v. Attina*,¹⁵ the court noted that sanctions for spoliation are not appropriate when the detriment suffered by a party is the product of its own counsel's dilatory handling of the case.

Remedies

A court may impose sanctions for spoliation of evidence under Rule 37(c) or under its inherent supervisory powers. Such sanctions run the gamut from entry of judgment against the offending party in particularly egregious circumstances, to an appropriate adverse inference, to imposition of costs. Although determination of which sanction is appropriate rests with the sound discretion of the trial judge, that discretion should be guided by the goals of deterring such conduct; placing the risk of an erroneous judgment on the offending party; and restoring the prejudiced party to the same position it would have been in absent the spoliation.¹⁶

The party seeking an adverse inference instruction must come forward with some evidence "from which a reasonable trier of fact could infer that the destroyed or unavailable evidence would have been of the nature alleged by the party affected by its destruction."¹⁷ Relevance may be presumed where the offending party is found to have destroyed evidence in bad faith, but in cases where spoliation is based on negligence, the party seeking the adverse inference has the additional burden of making some showing regarding the likely contents of the destroyed evidence. Thus, in *Zubulake v. UBS Warburg LLC*,¹⁸ the court declined to impose sanctions for spoliation,

notwithstanding its finding that the defendant's employees had negligently destroyed evidence that defendant was under a duty to preserve.

Southern District Judge Shira A. Scheindlin began by noting that "[a]s documents are increasingly maintained electronically, it has become easier to delete or tamper with evidence (both intentionally and inadvertently) and more difficult for litigants to craft policies that ensure all relevant documents are preserved." In that case, despite instructions from its counsel to retain all relevant documents and to stop recycling back-up tapes that might contain pertinent e-mails, the defendant's employees did not comply with these directives. As a result, certain tapes were improperly destroyed and certain isolated e-mails were deleted from the system. The court found however, that the plaintiff had not established that the missing e-mails were likely to support her claims of discrimination. Judge Scheindlin emphasized that although the e-mails contained on the defendant's back-up tapes were relevant in the sense that they bore on the issues in the litigation, plaintiff had produced no evidence that the specific missing tapes would be more probative than those that had been produced, particularly in light of the fact that most of the missing e-mails predated important events in the plaintiff's dispute with her employer.

Accordingly, Judge Scheindlin declined to grant the adverse inference sought by the plaintiff. She did, however, require the defendant to bear the costs of the plaintiff's additional discovery concerning the destroyed e-mails.¹⁹

Fertile Ground for Litigation

As these and other recent cases demonstrate, claims of spoliation provide fertile ground for litigation,

often with extreme consequences. Counsel should pay careful attention in counseling their clients, even before a lawsuit is filed, to be sensitive to document preservation and retention issues so as to avoid such costly, generally avoidable, ancillary litigation.



(1) The Second Circuit cases include: *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F3d 99 (2d Cir. 2002); *Reilly v. Natwest Markets Group Inc.*, 181 F3d 253 (2d Cir. 1999); *Byrnie v. Town of Cromwell*, 243 F3d 93 (2d Cir. 2001); *West v. Goodyear Tire & Rubber Co.*, 167 F3d 776 (2d Cir. 1999); and *Kronisch v. United States*, 150 F3d 112 (2d Cir. 1998).

(2) *West*, 167 F3d at 779.

(3) *Rutgerswerke AG v. Abex Corp.*, 2002 WL 1203836 (SDNY June 4, 2002), quoting *Indemnity Insur. Co. of North America v. Liebert Corp.*, 1998 WL 363834 (SDNY June 29, 1998). See also *Kronisch*, 150 F3d 112.

(4) 2003 WL 22271206 (SDNY Sept. 30, 2003).

(5) See, e.g., *Pace v. National Railroad Passenger Corp.*, 2003 WL 22860317 (D. Conn. Dec. 1, 2003).

(6) See, e.g., *Zubulake v. UBS Warburg LLC*, 2003 WL 22410619 (SDNY Oct. 22, 2003).

(7) 306 F3d at 108.

(8) 243 F3d at 109.

(9) 142 FRD 68 (SDNY 1991).

(10) 2003 WL 1740606 (S.D.N.Y. Apr. 1, 2003).

(11) 2003 WL 21878788 (S.D.N.Y. Aug. 7, 2003).

(12) See, e.g., *Tingling v. The Great Atlantic & Pacific Tea Co.*, 2003 WL 22973452 (S.D.N.Y. Dec. 17, 2003).

(13) *Pastorello v. City of New York*, 2003 WL 22118972 (S.D.N.Y. Sept. 11, 2003). See also *Riddle v. Liz Claiborne, Inc.* 2003 WL 21976403 (S.D.N.Y. Aug. 19, 2003) (defendant's "shortcoming" in failing to maintain documents in accordance with either its own policies or with applicable federal law "is simply not the destruction or alteration of evidence which is central to the doctrine of spoliation").

(14) 2003 WL 22861921 (S.D.N.Y. Dec. 2, 2003).

(15) 205 FSupp2d 65 (EDNY 2002).

(16) See *Kronisch*, 150 F3d at 126.

(17) *Residential Funding*, 306 F3d at 109, citing *Kronisch*, 150 F3d at 127, and *Byrnie*, 243 F3d at 110.

(18) 2003 WL 22410619 (S.D.N.Y. Oct. 22, 2003).

(19) See also *Houlihan v. Marriott*, 2003 WL 22271206 (sanction limited to costs of identifying additional sources of information and litigating the destruction of the evidence, due to innocent nature of spoliation and minimal prejudice to plaintiff from destruction of soap dish on which he was injured).

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