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an interview with Nicholas Elliott and Ben DiPietro
Editors of Risk & Compliance Journal.

See page 14

21
Why boards of directors have compliance committees
Paula Saddler and Margaret Steenrod

33
Employee Internet access in the workplace: Unleashing the power of the employee to protect the organization
David Melnick

39
China clamps down on bribery and corruption: Why third-party due diligence is a necessity
Dennis Haist and Caroline Lee

47
Not calling the hotline: A business threat
Lester Levine

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Litigation holds: Avoiding spoliation of evidence and obstruction of justice

Spoliation of evidence is the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or future litigation.

Spoliation of evidence, even if merely negligent, can lead to significant civil liability.

Spoliation of evidence, which is synonymous with obstruction of justice in the criminal context, can lead to prison time and fines for company employees.

The duty to preserve evidence, absent special circumstances, arises when the litigant is aware that there is a reasonable likelihood of civil litigation or a law enforcement action.

Having a protocol in place to suspend document retention/destruction programs when appropriate is vital to avoiding liability for spoliation of evidence.

With the advances in technology and seemingly endless amounts of electronic communications created and transmitted each day, the issue of spoliation of evidence has become a hot topic in both civil and criminal courts. In civil courts, failing to adequately safeguard against spoliation of evidence could be the effective death knell for a case. In the criminal context, spoliation of evidence could result in fines or jail time for obstruction of justice.

Spoliation of evidence is the “destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or future litigation.” In civil litigation, many states do not recognize an independent cause of action for spoliation of evidence. But that does not mean that there are not significant ramifications for companies that are found to have spoliated evidence. The most significant penalty against a spoliating litigant is that the court can instruct the trier of fact that it must infer that the missing evidence was detrimental to the spoliating party. Civil litigants can also be exposed to discovery sanctions for spoliation of evidence. The discovery sanctions available to a party prejudiced by the spoliation of evidence include monetary sanctions, contempt sanctions, issue sanctions ordering that designated facts be taken as established or precluding the offending party from supporting or opposing designated claims or defenses, evidence sanctions prohibiting the offending party from introducing designated matters into evidence, and terminating sanctions that include striking part or all of the pleadings, dismissing part or all of the action, or granting a default judgment against the offending party. The severity of potential sanctions depends on the egregiousness of the spoliator’s conduct.
In criminal investigations, a person or agent of a company that is found to have altered or destroyed evidence can be guilty of obstruction of justice. A person found guilty of obstruction of justice can face a prison sentence of up to 20 years, in addition to monetary fines. Obstruction of justice crimes range from interfering with governmental investigations, including official proceedings and federal audits, to the actual destruction, alteration, or falsification of evidence.

In light of these risks, companies should take proactive measures to put themselves in the best position possible to avoid the legal troubles that could result from spoliation. A threshold issue in determining whether a company has spoliated evidence depends on whether there was a duty to preserve the evidence in the first place.

The duty to preserve evidence
Whether a company will suffer potential liability for spoliation of evidence turns on whether the company had a duty to preserve the evidence. If the company did have such a duty, it can suffer significant ramifications resulting in considerable liability.

The general rule is that the obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when the party should have known that the evidence may be relevant to future litigation. In the absence of there being a reasonable likelihood of litigation, there is no duty to preserve evidence unless the duty is voluntarily assumed or imposed by statute, regulation, contract, or other special circumstance, such as promissory estoppel. Whether a party “should have known” that the evidence may be relevant to future litigation is an inquiry that must be applied on a case-by-case basis. For example, once a lawsuit has been filed, and the company is aware of the lawsuit, the duty to preserve the evidence obviously attaches. The duty can also arise, however, if a company receives a demand letter from a former employee or if events and circumstances reasonably put the company on notice that litigation is likely forthcoming. Similarly, if a company is contemplating filing a lawsuit, the duty to preserve relevant evidence could attach well before a complaint is even drafted or an attorney is consulted.

In short, when a party is deemed to be on notice “is a function of the variable chronologies along with the issues that develop in the lawsuit.”

Once a duty to preserve evidence has been triggered, the next endeavor is to determine the scope of the evidence that must be preserved. Even if a company has a duty to preserve relevant evidence, such a duty does not extend to every shred of paper, every email, or every electronic document. But, once the duty to preserve attaches, the party must not destroy unique, relevant evidence that might be helpful to an adversary. Such evidence includes anything that the party knows or ‘reasonably should know’ is relevant to the action, is reasonably calculated to lead to the discovery of admissible evidence, is
reasonably likely to be requested during discovery, or is the subject of a pending discovery request. To guard against potential spoliation of evidence, companies should suspend their routine document retention/destruction policies and put in place a “litigation hold” to avoid the possibility that relevant evidence becomes altered or is destroyed.

In criminal cases, spoliation of evidence can implicate obstruction of justice statutes. Generally, to be guilty of obstruction, a person must have “corruptly intended to impede the administration of that judicial proceeding.” Courts have described this as a nexus requirement—that the defendant’s act have a relationship in time, causation, or logic with the judicial proceedings. So, for example, in the context of a grand jury subpoena, criminal liability can attach where the person has notice that his wrongful conduct will affect the administration of justice because false information will be provided to a grand jury or otherwise pertinent information known to be called for by a grand jury may be placed beyond its reach. This does not mean that the person must have actually seen the subpoena, or even know of its precise contents, to be guilty of obstruction. One can be found guilty of obstruction of justice if he/she simply knew that the subpoena called for a category of documents and subsequently takes steps to place the documents beyond the reach of the grand jury.

Penalties for spoliation of evidence
As discussed above, there are a number of adverse actions that courts can utilize if a party has spoliated evidence. In civil cases, chief among these is an adverse evidentiary inference against the spoliating party. If the court determines that such a remedy is appropriate, the trier of fact will be instructed to infer that the missing evidence would have been detrimental to the party responsible for its destruction. In some cases, this could essentially serve as a directed verdict against the spoliator. A party seeking an adverse evidentiary inference must establish the following three elements: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party’s claim or defense such that a trier of fact could find that it would support that claim or defense. Once the duty to preserve attaches (as previously discussed), the next determination is whether the spoliator acted with a culpable state of mind. When evaluating the second prong, courts have found that mere negligence is sufficient. In essence, once the duty to preserve attaches, absent circumstances that are completely out of the party’s control (i.e., destruction of documents caused by an accidental fire), the fact that evidence is destroyed or altered will satisfy the state of mind prong.

Finally, and perhaps the most difficult element to prove, is that the missing evidence
would have been favorable to the party seeking the adverse inference. If the party seeking the adverse inference can prove under the second prong that the spoliation was intentional or willful, then the spoliator’s mental culpability itself can be evidence of the relevance of the destroyed documents. But, if the spoliation is merely negligent, or even if it is reckless, the party seeking the remedy must prove that the missing evidence was relevant to their claim or defense. Although difficult to prove, if established, the result can be devastating for the spoliating party. This predicament was illustrated in *Karlsson v. Ford Motor Co.* *Karlsson* was a product liability case in California regarding the absence of a three-point harness in the center backseat of a car. The trial court imposed discovery sanctions against the defendant, including an adverse evidentiary sanction that precluded the introduction of evidence that the defendant warned the passenger that a lap belt was a dangerous condition or that the manufacturer was unaware of its failure to warn, because the defendant’s pattern of discovery abuse had led to the loss of evidence related to the alleged warnings. The jury ultimately awarded the plaintiff over $30 million in compensatory and punitive damages. The Court of Appeals affirmed, finding that the sanctions were not excessive considering that they related directly to the evidence that was unavailable.

Discovery sanctions are also available to a civil litigant that has been prejudiced by the spoliation of evidence. At their core, discovery sanctions are intended to remedy discovery abuse, not to punish the offending party. Accordingly, discovery sanctions should: (1) be tailored to serve that remedial purpose; (2) should not put the moving party in a better position than he would otherwise have been had he obtained the requested discovery; and (3) should be proportionate to the offending party’s misconduct.

The most potent of the discovery sanctions to be imposed on a spoliator is terminating sanctions. Although terminating sanctions are typically reserved for particularly egregious examples of discovery games that amount to fraud, companies must be aware that spoliation of evidence could lead to the dismissal of its complaint or having default judgment entered against it. For example, terminating sanctions have been issued against a plaintiff that repeatedly violated stipulations and court orders, forged documents offered as true, and deliberately destroyed evidence pertinent to exposing the forgery. Courts have also imposed terminating sanctions when the conduct was not as egregious. For example, a California court ordered terminating sanctions against a litigant that was arguably negligent (or reckless) in allowing the documentary evidence supporting (or possibly rebutting) his case to be destroyed after failing to pay the storage fees for safeguarding the documents, even though he did not violate any prior court orders. That being said, terminating sanctions are less likely if there is no prior violation of a court order. Courts may also...
take a passive approach and allow the jury to determine the appropriate inference that should be drawn from the missing evidence where the evidence was innocently destroyed after the duty to preserve was triggered. Therefore, the more egregious the conduct by the spoliator, the more substantial the remedy will be in favor of the party prejudiced by the spoliation. Having a protocol in place when there is a reasonable prospect of litigation is the best way to safeguard against inadvertent spoliation of evidence.

In criminal cases, spoliation of evidence is synonymous with obstruction of justice, which could result in a 20-year prison sentence. The case of United States v. Quattrone is instructive. Quattrone, an investment banker, had learned of a grand jury investigation into a finance group he managed. As part of the investigation, a subpoena had been issued to Quattrone’s company. Quattrone never saw the subpoena and did not know the specific categories of documents sought in the subpoena. Two days after learning about the grand jury investigation, Quattrone endorsed a prior email encouraging people to adhere to the company’s email and document retention and destruction policy. After the first trial resulted in a hung jury, Quattrone was convicted of corruptly endeavoring to obstruct a grand jury, corruptly endeavoring to obstruct the an SEC investigation, and knowingly or corruptly persuading or endeavoring to persuade others to withhold or destroy documents with intent to interfere with the proceedings. Although Quattrone’s conviction was overturned for a flawed jury instruction regarding the required mental state, the Quattrone case highlights the importance of ensuring that a litigation hold is put in place once a company has knowledge of a government investigation and that all employees should be informed that document retention/destruction schedules are frozen until further notice.

In December 2013, a former BP engineer was convicted of intentionally destroying evidence requested by federal criminal authorities investigating the April 2010 Deepwater Horizon disaster. After learning that his electronic files were being sought as part of the investigation, and after specifically being told to retain all electronic data relating to the disaster, the engineer deleted more than 300 text messages with his supervisor relating to his concern regarding Top Kill, the BP failed effort to pump heavy mud into the blown-out wellhead to try and stop the oil flow. After being convicted and while awaiting sentencing, he was granted a new trial due to juror misconduct.

Proactive prevention
When a company becomes aware that the preservation of evidence is necessary, the first step is to protect all potentially relevant sources of evidence and immediately freeze the normal operating document destruction

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procedures. As soon as the company can reasonably anticipate litigation or a government investigation, all actions that would result in the destruction of documents or information that may be relevant to the litigation or investigation should be suspended. Even if the company does not know of the specifics of the investigation or dispute, once the duty attaches, there could be a finding of spoliation even if the evidence is innocently destroyed as part of an ordinary course of business document destruction policy.

In determining what evidence must be preserved, companies must realize that all electronic storage devices are sources of evidence. This includes, but is not limited to, cell phones, tablets, computers, electronic calendars, and personal digital assistants. Understanding the company’s technology infrastructure and communicating with the information technology department is imperative because automated janitorial functions must be stopped and relevant back-up tapes preserved. It is common practice to distribute a memorandum describing the litigation hold and the actions that the relevant employees need to take. Once the litigation hold is implemented, the company should identify the custodians that have potentially relevant information, and require that they sign an acknowledgment of their preservation obligations, especially if they conduct company business on personal electronic devices. All preservation efforts should be documented as quickly as possible to prevent any accidental spoliation and opportunity for modification.

Preserving electronically stored data can become very expensive depending on a variety of factors, including the type of business the company engages in and the company’s technology infrastructure system. This cost, however, likely pales in comparison to the legal problems that a finding of spoliation could bring. In an effort to avoid the negative ramifications of spoliation, companies should act immediately when litigation or an investigation appears likely.

**Conclusion**

It is increasingly difficult for companies to monitor all of its employees to ensure that document retention/destruction policies are adhered to. It is even more difficult to ensure that those policies are effectively halted once the company learns that litigation is reasonably likely or if a federal investigation has commenced. Under the Federal Rules of Evidence, if evidence is altered or destroyed during the normal course of business, and prior to knowledge of the potential litigation, then no spoliation of evidence has occurred. But, determining when the duty to preserve evidence attaches is a paramount issue that companies should be mindful of at all times.*

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12. Quattrone, 441 F.3d at 171.
14. Id.
15. Id. at 221.
16. Id.
18. Id. at 1224-1226.
24. Id. at 162-67.
25. Id. at 161.

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