Spoliation Uncertainty — The Impact of Recent Case Law

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A trend in case law is drawing attention to the lack of uniformity around the country in how federal courts are dealing with the loss of discoverable evidence, also known as spoliation. Sanctions for spoliation mainly relating to electronically stored information (ESI) continue to make news after a number of high-profile decisions in 2013.

Since the end of 2012 there have been a number of decisions in federal courts imposing adverse inference sanctions due to spoliation. In the absence of a “bright line,” parties face uncertainty about what they must do to avoid this potentially case-altering penalty. Arising from this already recognized uncertainty was a proposed amendment to the Federal Rule of Civil Procedure Rule 37(e) that would set uniform standards for spoliation sanctions.

This line of case law rose to prominence 10 years ago when U.S. District Judge Shira Scheindlin laid out a framework in her landmark Zubulake decisions for spoliation sanctions of ESI. The Zubulake decisions addressed triggers, key players and litigation holds, all issues with which parties and courts continue to grapple. Judge Scheindlin revisited these issues in Pension Committee about four years ago and expressed her ongoing frustration with how parties address preservation obligations. Recently in Sekisui v. Hart, Judge Scheindlin reiterated the elements of spoliation when imposing adverse inference sanctions.

CONTROL, CULPABILITY AND PREJUDICE

There are three essential elements to any spoliation argument: culpability, relevance and prejudice. How these elements interact is central to any discussion of spoliation and a finding of the requisite state of mind affects the analysis of relevance and prejudice, including which party bears the burden of proof for establishing relevance and prejudice.

The good news is that there is a generally accepted test used to determine if an adverse inference sanction is warranted. That standard was articulated in, for example, the Second Circuit’s Residential Funding, which Judge Scheindlin quoted in her Sekisui opinion:

“[A] party seeking an adverse inference instruction based on the destruction of evidence must establish (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 reasonable trier of fact could find that it would support that claim or defense.”

The bad news is that decisions vary from one jurisdiction to the next as to which party bears the burden of proof on relevance, prejudice and state of mind. When it comes to the failure to preserve, negligence or gross negligence may be sufficient to establish state of mind. However, in some jurisdictions, willfulness or bad faith may be required.

Two decisions that were issued in August illustrate this debate well. The first opinion in Sekisui began with a magistrate judge’s decision to decline an adverse inference instruction where the plaintiff failed to issue a timely litigation hold and failed to notify a third-party in control of relevant email. The magistrate judge’s ruling relied on the defendants’ failure to demonstrate prejudice.

Judge Scheindlin reversed that decision only two months later because she reached a different conclusion with regard to relevance: “[W]hen evidence is destroyed willfully, the destruction alone ‘is sufficient circumstantial evidence from which a reasonable fact finder could conclude that
the missing evidence was unfavorable to that party." She went on to say that, "when evidence is destroyed willfully or through gross negligence" that "prejudice is presumed."

On the other hand, in Hermann v. Rain Link, the court declined to presume prejudice. U.S. Magistrate Judge K. Gary Sebelius recommended that the defendant had not acted in bad faith, but instead that discoverable information had been lost through the negligent failure to preserve ESI. Judge Sebelius wrote that, for an adverse inference sanction, a moving "party must prove bad faith on the part of the producing party." He also found that "the plaintiff had not shown he was prejudiced" by the spoliation and that the negligent failure and lack of prejudice demonstrated that an adverse inference was not warranted.

For entities doing business across the United States, the unsettled judicial landscape is problematic. Under these circumstances, prudence would appear to dictate that such entities operate according to the strictest standard in order to mitigate the risk of sanctions in the event that ESI is lost.

NEW RULE ON SPOLIATION SANCTIONS

In light of the differences between federal courts of appeals (and even within a judicial district), an amendment has been proposed to Rule 37(e) of the Federal Rules of Civil Procedure. The amendment would limit sanctions for spoliation to a failure to preserve that was "willful or in bad faith" or "irreparably deprived" a party of an opportunity to present a claim or defense.

The comment to the proposed amendment states that it "is designed to provide more significant protection against inappropriate sanctions, and also to reassure those who might in its absence be inclined to over-preserve to guard against the risk that they would confront serious sanctions."

Although the amendment may be long in coming, Judge Scheindlin has already written about it in a footnote of her Sekisui opinion. She stated:

"I do not agree that the burden to prove prejudice from missing evidence lost as a result of willful or intentional misconduct should fall on the innocent party. Furthermore, imposing sanctions only where evidence is destroyed willfully or in bad faith creates perverse incentives and encourages sloppy behavior. Under the proposed rule, parties who destroy evidence cannot be sanctioned . . . even if they were negligent, grossly negligent, or reckless in doing so."

At this juncture in the rulemaking process, the best that can be said is to expect "spirited" comment and debate about the proposed amendment which at the earliest would become effective December 1, 2015.

AVOIDING SPOLIATION ENTANGLEMENTS

Given the uncertainty as to the challenges of managing massive volumes of ESI, what actions can an entity take to avoid spoliation-related issues? Despite the ongoing judicial debate, the courts do appear to recognize when an entity has acted reasonably and has followed sound preservation procedures, harsh sanctions such as an adverse inference instruction appear to be unlikely.

An encouraging example is Research Foundation of SUNY v. Nektar Therapeutics. Despite a failure to preserve, the court denied a motion for an adverse inference, citing the plaintiff’s “comprehensive standard document preservation policy, issued both verbal and written litigation hold notices, preserved backup tapes of emails from before commencement, and confirmed that no custodian had deleted any documents related to this matter.”

While we are in this place of uncertainty waiting for case law or rules amendments to show us a clear path, best practices dictate the following:

1. Establish a defensible preservation process that includes timely written legal holds, custodian acknowledgment and routine follow-up.
2. Be aware of routine document retention and destruction policies, and immediately suspend processes that automatically delete potentially relevant data.
3. Build a culture of compliance within the organization by training employees to take legal holds seriously, know what procedures to follow and be responsible for the outcome.
4. In the event of spoliation, be transparent, readily investigate the situation and offer alternatives for remediation.

Adverse inferences make news, regardless of how many are issued. Recent decisions reflect the uncertainty concerning burdens of proof and state of mind. Yet in due course, parties that demonstrate sound procedures, a bias toward action and transparency have avoided serious spoliation sanctions and been afforded the opportunity to focus on the underlying claims and defenses at hand.

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