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Best Practices For Avoiding Spoliation

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Law360, New York (June 22, 2015, 4:13 PM ET) -- Commercial litigation often involves the production of massive amounts of paper and electronic documents, and modern business practices are likely to guarantee that electronically stored information will remain the subject of evolving discovery rules and court decisions for the foreseeable future.[1] Litigants, however, should not discount the importance of ensuring that physical evidence is properly preserved and maintained in accordance with the rules as well. This article addresses the appropriate steps that a litigant should take to preserve evidence and to ensure that the opposing party does the same.

Consider the following: Your company acts as a components supplier to a manufacturer turning out thousands of products per week. After some of the finished products fail in the field, the manufacturer ceases production and issues a recall, resulting in the return and quarantine of tens of thousands of finished products. Shortly thereafter, the manufacturer sues your company for supplying defective components. The steps that your company and the manufacturer take in order to preserve the components and finished products (and related records) will determine whether spoliation is at issue. Implementing a plan ensuring preservation and diligently monitoring the preservation efforts of both your company and the manufacturer will help you to later successfully raise, or defend against, a motion for sanctions based on spoliation of evidence. A meritorious spoliation motion can significantly impact litigation and may even result in a judgment prior to the submission of dispositive motions or trial. With spoliation motions on the rise (over 150 have been filed in the Third Circuit since 2008), preserving and carefully maintaining physical evidence should be an immediate and paramount concern in any case involving products or other physical evidence.

What is Spoliation?

Spoliation occurs when a party destroys or significantly alters evidence or fails to preserve evidence relevant to pending or reasonably foreseeable litigation.[2] Because the destruction or loss of evidence may prevent a party from proving or defending against a claim, courts have inherent authority to sanction a party for spoliation.

In the Third Circuit, before considering sanctions, courts consider the following factors to determine if a party has spoliated evidence:

1. whether the evidence was in the party's control;
2. whether the evidence is relevant to the claims or defenses;
3. whether there has been actual destruction or withholding of evidence; and,
4. whether the duty to preserve was reasonably foreseeable.[3]

Importantly, before imposing sanctions, the court must find that the party who destroyed or withheld the evidence acted in bad faith.[4]

Spoliation Sanctions

After finding that a party has engaged in spoliation, courts in the Third Circuit conduct a fact-intensive inquiry to determine the appropriate sanction, generally choosing between the following three types:

1. an adverse inference jury instruction;
2. the exclusion of evidence or testimony; or
3. in severe cases, the outright dismissal of a claim or defense.[5]

Fines and attorneys' fees may also be imposed.[6]

In selecting the appropriate sanction, courts consider several factors, including: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, whether a lesser sanction will still serve to deter such conduct by others in the future.[7]

Avoiding Spoliation

1. When to Take Action to Preserve Physical Evidence

A party's duty to preserve physical evidence will be triggered as soon as litigation is "reasonably foreseeable."[8] Once the duty attaches, you should take a number of steps, outlined below, to ensure that evidence potentially relevant to litigation is preserved. Because the "reasonably foreseeable" standard is assessed on a case-by-case basis, there is no automatic time at which the preservation duty arises. To be prudent, you should take steps to preserve and maintain evidence as soon as litigation appears likely. Case law suggests that the following events may trigger the preservation duty:

- Receipt of a demand letter or communication in which litigation is threatened
- Service of presuit discovery
- Request to engage in alternative dispute resolution prior to the initiation of litigation
- Receipt of a preservation letter from opponent
- Retention of consultants or experts in anticipation of defending against a lawsuit
- Testimony elicited or evidence introduced in other litigation

2. Meet with Corporate and/or Outside Counsel

Once your company's duty to preserve evidence may have been triggered, corporate and/or outside counsel should be promptly contacted to determine the scope of evidence that may be potentially relevant to the litigation. Company employees may underestimate the extent to which evidence should be preserved, and the failure to expansively define, at an early stage, the scope of evidence to be preserved – and those who should preserve it – may result in too little evidence being preserved, thereby providing a basis to argue that crucial evidence was lost or destroyed.

3. Issue a Litigation Hold and Suspend All Routine Destruction Policies

Next, your company should immediately suspend all routine destruction policies until further notice. For example, you may have a routine policy of discarding certain inventory and records at regular intervals. The time of production, the materials used, and the conditions of production may be lost forever. Employees should be instructed that the failure to suspend any routine practice resulting in the destruction of components, finished products, or other potential physical evidence could expose the company to legal sanctions, as a court could find that the failure to suspend the practice was an intentional "bad faith" act of destruction of evidence.

Next, a litigation hold should be issued — even if your opponent has yet to file or serve a complaint. A litigation hold should direct all appropriate employees and, if applicable, outside consultants or third parties, to locate and preserve evidence potentially relevant to the litigation. An effective litigation hold will be relatively detailed and convey essential information about the litigation or prospective litigation, such as: the names of the parties and potential witnesses; the factual circumstances leading to the dispute; the type of legal claims that may be at issue; the individual employees who may possess potentially relevant evidence; and a list of the products or other physical evidence that may be at issue. Since the litigation hold may later be produced to your opponent during discovery and submitted to the court for review, it should be carefully drafted to avoid the inclusion of subjective impressions or privileged information concerning the litigation.

After implementation, compliance with the litigation hold should be regularly monitored, which may require the appointment of a specific individual to supervise preservation efforts. The hold should remain in place and updated as necessary until the case is resolved. The proper documentation of a litigation hold is also critical because it may be necessary to show a court that your company acted diligently and in good faith to preserve evidence.

4. Send a Preservation Letter

After ensuring that your company's own preservation efforts are in effect, a letter should be sent to the opposing party, stressing its duty to preserve evidence. A well-drafted letter should be focused and plainly set forth the obligation to discontinue routine destruction or modification of potentially relevant evidence, without being hyperbolic. Should a spoliation issue later arise, a preservation letter may be submitted to the court to demonstrate that you provided early notice of the other side's preservation obligations. Consideration should be given as to whether the letter should be supplemented, with more specific information, after the completion of some fact discovery. Remember, however, that warning your opponent as to the consequences of failing to preserve evidence, without first putting in place measures to preserve your company's own evidence, could be compelling, and even embarrassing, evidence in your opponent's favor.

5. Locate and Preserve All Potentially Relevant Evidence

Next, your company should take steps to locate all evidence potentially relevant to the litigation. Depending on the amount of physical evidence at issue, this step may require interviewing employees or third parties. If your company is in receipt of products returned by customers or distributors, such products should be promptly inventoried, isolated and safely preserved. Records evidencing the dates of manufacture, shipment and return, as well as any identifying numbers, should be recorded and maintained. Because many months, if not a year or more, may lapse between the implementation of a litigation hold and formal discovery, the location of all relevant evidence should be documented and regularly monitored. Chain of custody should be documented at all times. The destruction of evidence during this period, even if accidental, could provide your opponent with grounds for a successful spoliation argument.

6. Working with Consultants or Other Third Parties

At the outset of the litigation or during the discovery stage, you may find it necessary to supply a consultant, testing agency, or expert with physical samples for testing or examination purposes. Your duty to preserve such samples, however, does not expire upon the transfer of the samples to another person or entity. In other words, for purposes of a spoliation analysis, your company retains control over its physical evidence even when in the possession of a third party. Thus, in most cases, you will be held responsible for a third party's destruction or alteration of evidence. To avoid this result, you should confirm whether the third party has a routine destruction policy and, if so, you should formally request that the policy be suspended and that the samples be maintained upon completion of any examination or analysis. If you do not and the third party destroys the evidence, problems may later arise in the litigation, even if the third party is not ultimately retained as an expert or called to testify. For example, a formally retained expert may want to rely on some portion of the third party's analysis for his or her opinion. Under such circumstances, the court may preclude the testimony on the basis that you deprived the other side of an opportunity to view and evaluate the evidence forming the basis for your expert's opinion.

Always proceed cautiously before transferring physical samples to a third party and ensure that those samples are preserved. Failing to do so could result in unanticipated and detrimental consequences.

7. Properly Limiting the Retention of Physical Evidence

The preservation of physical evidence necessarily requires sufficient physical space in which to store the evidence. Thus, a logistical issue that may arise is the burden imposed on your company to maintain all evidence that is potentially relevant to the litigation. Before destroying any evidence, even if you believe it to be identical to other preserved evidence, you should alert the opposing party of the issue and, if possible, reach an agreement as to the amount and types of evidence to be retained as well as to cost sharing. If an agreement cannot be reached, you may need to file a motion to limit the retention of the evidence, which the court may resolve by explicitly permitting the destruction of certain amounts of evidence or requiring your opponent to share storage costs.

Conclusion

It is increasingly burdensome to ensure compliance with destruction policies and litigation holds. Nevertheless, motions for sanctions based on spoliation of evidence have become increasingly common, and a company that is not prepared to defend against a claim of spoliation may find itself forced to choose between an unfavorable settlement offer or the imposition of sanctions that could prevent it from prevailing on its claims or defenses. Being mindful of these concerns, your company should be aware of the duty to preserve evidence and act promptly once that duty is triggered. Engaging experienced outside counsel who can assist with preservation obligations at the onset of litigation will help to ensure that all relevant evidence is preserved and that you are well-positioned to defeat any claim of spoliation.

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[1] In fact, Rule 37 of the Federal Rules of Civil Procedure is due to be amended on December 1, 2015 to make Rule 37(e) applicable where a party fails to preserve electronically stored information that should have maintained in the anticipation or course of litigation. See Discovery Subcommittee Report, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf at 369-401.

[2] See, e.g., Bull v. United Parcel Serv., Inc., 665 F.3d 68, 72-73 (3d Cir. 2012).

[3] Id. at 73.

[4] Id.

[5] Mosaid Techs. Inc. v. Samsung Elecs. Co., 348 F. Supp. 2d 332, 335 (D.N.J. 2004).

[6] Id.

[7] Bull, 665 F.3d at 72-73; Schmid v. Milwaukee Elec. Tools Corp., 13 F.3d 76, 79 (3d Cir. 1994).

[8] See, e.g., AMG Nat'l Trust Bank v. Ries, No. 06-cv-4337, 2011 WL 3099629, at *4 (E.D. Pa. July 22, 2011).