



Making It Personal: Personal Liability of In House Lawyers for Spoliation of Evidence

Presentation By:

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Spoliation: Making It Personal

Ethical Rule Implicated:

RULE 3.4

Fairness to Opposing Party and Counsel

A lawyer shall not:

- (1) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.

Spoliation: Making It Personal

Spoliation is the destruction of evidence. It can happen intentionally; it can happen inadvertently; liability may attach to either scenario.

Brief review of rules:

Zubalake (many reported decisions)

Pension Committee of the Univ. of Montreal Pension Plan v. Bank of America Securities, LLC, as amended 2010 WL 184312 (S.D.N.Y.)

- *You must act when you have a reason to believe there is a “claim”*
- *You must not be careless*
- *You must follow up*
- *You must follow up again*
- *You must follow up again (CYA)*

Spoliation: Making It Personal

Spoliation is a tort. As a corporate officer or employee, you are always liable for your torts, even if you commit the tort on behalf of your corporate employer or client.

Currently 12 states, including New Jersey and Connecticut, recognize spoliation as a tort, for which damages may be awarded.

Spoliation: Making It Personal

What are elements of the tort?

- *Existence of civil action*
- *Legal or contractual duty to preserve evidence*
- *Destruction of evidence*
- *Significant impairment in ability to prove lawsuit*
- *Causal relationship*
- *Damages*

Spoliation: Making It Personal

- Officer is fired and informs company that he plans to sue it for severance
- Before resolving severance claim (or perhaps to leverage it), company sues officer for misappropriating trade secrets; officer is not required to counterclaim for severance
- Trade secrets lawsuit spans four years; officer wins; tells company he plans to sue for indemnity and severance
- Company pays his legal fees, thus resolving indemnity claim; he then sues for severance

Spoliation: Making It Personal

What does officer learn in discovery?

- Company's in house counsel, who was responsible for records retention procedures, failed to place litigation hold when it fired him.
- As a result of her failure to act, the company's auto-delete function wasn't shut off, and all digital evidence existing at the time of his termination was destroyed.
- In house counsel did place hold for indemnity case many years later.

Spoliation: Making It Personal

- In house counsel failed to take steps to preserve records when the officer threatened to bring employment claims after he won the trade secrets case in 2007 because, as she testified during her deposition, she “didn’t take his threats to sue seriously”.
- She stated in an email, after the indemnity case was resolved, that the litigation hold relating to the officer could now be lifted, because “all open matters with officer have been resolved.”

Spoliation: Making It Personal

- In house counsel was named personally in the lawsuit for spoliation on the basis that she negligently and intentionally destroyed evidence.
- Case settles very favorably for officer. Insurance company participates.
- In house counsel is no longer employed at the company.

Spoliation: Making It Personal

Swofford v. Eslinger, 2009 WL 3818593 (M.D. Fla. 2009)

- A shooting occurs and homeowner sues sheriff's department and deputies for civil rights claims.
- Counsel for plaintiff-homeowner sends letter requesting that all evidence be preserved; sends second letter and specifies what should be preserved.
- No litigation hold memo is sent; sole action is that paralegal sends letter to the deputies involved.
- In house counsel testifies that forwarding the two "lawyer letters" was sufficient.

Spoliation: Making It Personal

- Plaintiff files motion for monetary sanctions. Still, in house counsel does nothing to ensure preservation efforts are undertaken.
- Evidence shows emails and evidence were destroyed.
- Plaintiff expends over \$300,000 to recover evidence.
- Court finds bad faith; because in house counsel and sole responsibility for preservation of evidence, court imposes sanctions on him personally.

Spoliation: Are you at Risk?

Harkabi v. Sandisk Corporation, 2010 WL 3377338 (S.D.N.Y.).

- “Electronic discovery requires litigants to scour disparate data storage mediums and formats for potentially relevant documents. That undertaking involves dueling considerations: thoroughness and cost. This motion illustrates the perils of failing to strike the proper balance.”
- In this case, argument was that email and laptop data were lost despite reasonable steps to preserve it.
- Plaintiff sent document preservation letter. In house counsel circulates FOUR do not destroy memos and instructs global director of operations to preserve laptops. Laptops are placed in secure area.

Spoliation: Are you at Risk?

- Company institutes new archive systems. Employee asks if laptops can be reissued to others. Employee testifies that in house counsel agrees. Nothing is documented.
- Company informs plaintiff that it cannot locate missing data on its servers.
- In house counsel may have issued litigation hold memo, but in house counsel did not supervise or approve the copying and wiping of the laptop hard drives. In house counsel was not involved with transfer of email archives.
- Court finds that at a minimum, company was negligent. – a “cascade of errors”.
- Court imposes monetary sanction of \$150,000. Did not impose sanction on in house counsel but in house counsel’s failures were critical to award of sanctions.

Spoliation: Are you at Risk?

- Indemnity may not be available if corporate officer did not act in good faith on behalf of corporation; collateral estoppel issues if there is a finding of “bad faith”.
- Insurance (general liability, EPLI, malpractice) may not cover deliberate and intentional actions.

Spoliation: Avoiding Personal Risk

- Even when in doubt as to a potential claim, take steps to preserve evidence.
- The failure to issue a written litigation hold is “gross negligence”.
- Make sure you are familiar with the manner and method in which digital data is treated. Failing to halt auto-delete may be gross negligence and may even constitute the willful destruction of evidence depending on the facts.

Spoliation: Avoiding Personal Risk

- Keep written records of the hold and the efforts undertaken to ensure compliance with the hold. Follow up is critical.
- Keep a litigation holds “calendar,” updating as to status and actions taken.
- Documentation of follow-up is critical.
- Identify key players and make certain to preserve and collect their documents. Keep written records of the hold and records of all follow up communications concerning the hold. You do not want to be accused of engaging in “careless” or “indifferent” efforts.

Spoilation: Most Important Principle

- CYA