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Understanding, Spotting, and Preventing Spoliation

Written by Lindy K. Keown, Esq.

Spoliation is a unique, legal concept occurring when relevant evidence is intentionally or negligently lost, altered, or destroyed. The severity of spoliation in litigation runs the gamut—from the unintentional loss of superfluous records to the intentional destruction of case critical emails. All types of evidence can be subject to spoliation, and spoliation can occur in various ways. Below are a few examples:

- Deleting electronic documents;
- Losing documents due to a scheduled purge of older documents;
- Throwing out tangible items; or
- Performing repairs or alterations on tangible items.

This article explores the possible ramifications of spoliation and how you can be on guard to both prevent and spot spoliation in your cases.

HOW COURTS HANDLE SPOLIATION

Spoliation is not handled consistently across the country. Some states allow parties to pursue independent tort actions against a spoliator. Other states have such stringent spoliation sanctions available to parties that spoliated evidence could be better than the real thing. For instance, courts in Maryland, New Mexico, and Florida can dismiss a lawsuit if spoliation of evidence is particularly prejudicial or egregious. Other states, such as Ohio, may even allow punitive damages in certain spoliation cases.

Sanctions. Before a court sanctions a party, the court will consider the circumstances under which the evidence was lost, altered, or destroyed. Typically, before a court will impose any type of sanction for spoliation, the spoliator must have had some type of duty to preserve. It is important to understand at what point the obligation to preserve evidence begins, which many courts refer to as a "triggering event." This triggering event generally happens when a lawsuit becomes possible or probable, such as when a pre-suit demand is made or received, or a Complaint is served. Courts also consider the importance of the evidence to the non-spoliating party, providing more relief where a case is heavily impacted by the spoliation. In fact, severe sanctions can be ordered in cases of even inadvertent spoliation if the non-spoliating party can demonstrate that it is so prejudiced by the destruction or loss of evidence that it cannot proceed.

If spoliation remedies are warranted, courts across the country have approved a variety of remedies to cure the prejudice created by the spoliation. These remedies include providing adverse inference jury instructions, creating rebuttable presumptions for the jury, limiting evidence, striking pleadings, striking testimony, or even dismissing a case.

Independent Tort Actions. Even with the availability of the above sanctions, some courts have recognized that these remedies are inadequate to compensate an injured party or deter a spoliator. Courts in certain states, such as Alabama, Indiana, and Montana, recognize an independent tort for certain types of spoliation.

Generally, independent tort actions are pursued against a third-party who either negligently or intentionally destroyed material evidence in an underlying lawsuit. In states that recognize this cause of action, a party hampered by a third-parties' spoliation may be able to pursue a separate spoliation cause of action against that third-party.

An interesting hiccup that makes the independent tort not feasible for many is that the underlying lawsuit must generally be resolved before an independent tort for spoliation can be pursued. This makes sense because an independent tort for spoliation would likely be premature until the party suffers a cognizable injury due to the alleged spoliation. »

PREVENTING AND SPOTTING SPOLIATION

Regardless of what side of the 'v' you are working on, a litigation paralegal can be critical in either preventing or spotting spoliation.

Preventing spoliation centers around preservation, communication, and understanding how your client operates. To avoid spoliation, paralegals and attorneys alike must familiarize themselves with their clients' electronic systems and processes. When litigation becomes probable or likely, such as when a client receives a demand letter or is served with a Complaint, the client should take immediate preservation actions. Sophisticated clients may have this down to a science, with litigation hold policies set in stone. However, not all clients are aware of their obligations to preserve relevant evidence. A paralegal can assist by ensuring a client knows about the breadth of this obligation, from physical documents (records, photos) to electronic documents (text messages, emails), to multimedia (surveillance videos). Equally as important, legal counsel and paralegals must ensure that a litigation hold is disseminated to all employees with control over any piece of relevant evidence. A hold could cover multiple departments and custodians in a business (i.e. IT department, HR department, etc.). Although it may be difficult to determine what evidence is relevant at the outset of a lawsuit, communication with your client can go a long way. A carefully tailored litigation hold could serve as a helpful reminder about a party's obligations to preserve in a lawsuit—and prevent costly ramifications.

Spotting spoliation can be trickier. At the outset of a lawsuit, a form preservation letter sent to opposing counsel with follow up discovery about any lost, destroyed, or altered documents/tangible objects, can certainly get the ball rolling.

SPOLIATION REQUIRES CONSTANT VIGILANCE

Simply put, the key to avoiding spoliation is preservation. When and how this preservation is accomplished is where a strong paralegal and attorney can assist a client. As we become a more cloud based, paperless society, recognizing and being vigilant about spoliation issues is even more important in the legal profession and something every litigation paralegal should always have in their mind as they work on a case.

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