

Overseas Developments: U.S. Case Law Developments - Spoliation of Computer Evidence

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Every time you use a computer you are inevitably overwriting something – frequently inadvertently and unknowingly. While most overwriting is the unintentional result of daily computer use, sometimes computer files are intentionally overwritten or “scrubbed” in attempts to remove all traces of the data.

When litigation ensues in the United States, litigators have a duty to preserve evidence that is relevant to the claims and defenses in the matter. This definition of evidence has been held by several U.S. courts to include digitally created and stored information. Evidence spoliation occurs when data, which may be relevant to ongoing or anticipated litigation or investigation, is destroyed. What follows is an overview of several recent U.S. cases relating to the topic of spoliation of computer evidence.

Court Sanctions Defendant for Destruction of Email Evidence

In a recent decision, *Zubulake v. UBS Warburg*, 2004 WL 1620866 (S.D.N.Y. July 20, 2004), the court stated that litigators have an affirmative duty to ensure relevant documents are preserved by placing a “litigation hold” on the documents, communicating the need to preserve them, and arranging for safeguarding of relevant archival media. Failing to comply with this duty – intentionally or unintentionally – could place attorneys and their clients at risk. Both U.S. state and federal case law is full of civil and criminal decisions, in which courts have sanctioned individuals for spoliation issues. Sanctions range from adverse inference jury instructions and preclusion of evidence to monetary fines or even dismissal or default judgment.

Company Severely Penalised for Destroying Relevant Email

Recently, one of the harshest sanctions for intentionally deleting relevant electronic documents was issued in *United States v. Phillip Morris USA Inc.* 2004 WL 1627252 (D.D.C. July 21, 2004). Even after learning of their duty to preserve electronic documents, the defendants continued to destroy electronic documents for several months, including relevant emails from at least 11 company supervisors and officers. Finding it “it is astounding that employees at the highest corporate level in Philip Morris, with significant responsibilities pertaining to issues in this lawsuit, failed to follow [the preservation] Order...which, if followed, would have ensured the preservation of those emails which have been irretrievably lost,” the court ultimately precluded the defendants from calling as fact or expert witnesses five key individuals who failed to follow the retention policy. The court also ordered the defendants to pay \$2,750,000 in sanctions and costs relating to the spoliation.

Document Retention Policy Does Not Protect Plaintiff

Even if an organisation unintentionally spoliates documents, they can be sanctioned if the document destruction constitutes negligence. In *Rambus, Inc. v. Infineon Techs. AG*, the defendant alleged that the plaintiff instituted a document-purging program despite being on notice of impending litigation for the patents at issue. *Rambus, Inc. v. Infineon Techs. AG*, 2004 WL 383590 (E.D.Va. Feb. 26, 2004), amended by, 220 F.R.D. 264 (E.D.Va. 2004). The plaintiff held a “Shred Day,” an event in which the plaintiff’s employees shredded about two million documents as part of its document retention and destruction policy. The court concluded that even if the plaintiff “did not institute its document retention policy in bad faith, if it reasonably anticipated litigation when it did so, it is guilty of spoliation.” The court granted the defendant’s motion and ordered the plaintiff to immediately produce documents containing information about or relating to the creation, preparation, or scope of the plaintiff’s document retention policy. Even though the plaintiff had a document retention policy in place, it did not protect them from the consequences of document purging because the policy should have been changed to accommodate the impending litigation.

Court Imposes Sanctions for Failure to Produce Email and for Spoliation of E-Evidence

If document spoliation occurs as a result of an organisation's reckless behaviour, spoliation sanctions may also be warranted. In another recent case, the plaintiff moved for discovery sanctions, alleging the defendant failed to preserve discoverable email evidence. *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, No. 01-CV-4340 (WJM) (D.N.J. July 7, 2004); *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, No. 01-CV-4340 (WJM) (D.N.J. Sept. 1, 2004). In an attempt to justify its actions, the defendant pointed out that their own discovery request expressly included emails and claimed that the plaintiff did not specifically include email in its definition of "document" during discovery. The court declined to side with the defendant, stating the defendant "knew, or should have known, those e-mails were discoverable, given their heavy reliance on e-mails obtained from plaintiff during discovery, not to mention the obvious realities of modern litigation...the fact that no technical e-mails were preserved...demonstrates, at the least, extremely reckless behaviour." The court sanctioned the defendants \$566,838 and also issued an adverse jury inference instruction for spoliation of email evidence.

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