SPOLIATION: Analysis

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Digital spoliation, like spoliation in the ink-on-paper context, carries with it a well-known series of risks for the responding party and its attorneys. However, in the digital context, a lack of expertise in the medium and the brute proliferation of digital information have made the possibility of spoliation - inadvertent or willful - ever more present.

Defense and corporate counsel are most likely at risk if there is a showing of willful destruction. However, even if spoliation is negligent, it is not beyond reason to envision a personal sanction by the trial judge. As for a company, sanctions range from monetary fines to default judgment. Generally, the harshest sanctions (default judgment, criminal punishment) are reserved for those instances in which the defendant has acted in bad faith. Keep in mind that bad faith can be inferred from particularly negligent conduct. Absent such a showing, potential sanctions include attorneys' fees, monetary fines or, perhaps most daunting, an adverse instruction to the jury.

The most severe sanctions, such as entry of default judgment or criminal punishment, are generally reserved for the willful destruction of digital evidence. Nevertheless, numerous courts have shown a willingness to issue harsh sanctions for the negligent destruction of data. Counsel for the responding party should thus advise their client not only to avoid willful destruction of data, but also to preserve data that has been or is likely to be requested. In the case of purely negligent destruction, potential sanctions include monetary fines, attorneys' fees, and perhaps most damaging, an adverse inference instruction to the jury. A few states also recognize tort remedies for spoliation.

For example, in *In re Prudential Insurance Co. Sales Practices Litigation*, the court found that the respondent did not act willfully in the destruction of data that should have been preserved but nevertheless imposed a sanction of $1,000,000 plus requestor's attorneys' fees. In re Prudential Is. Co. Sales Practices Litigation, 169 F.R.D. 598 (D.N.J. 1997). In *U.S. v. Koch Industries, Inc.*, another negligent destruction case, the court allowed the plaintiffs to inform the jury of which backup tapes were destroyed and to explain the impact of the destruction on their case. U.S. v. Koch Industries Inc., 1998 WL 1744497 (N.D.Okla., 1998).

On the other hand, some courts have refused to impose sanctions absent willful conduct. In *Carlucci v. Piper Aircraft Corp.*, the court stated that data destroyed pursuant to a "bona fide, consistent and reasonable document retention policy" might provide a justification for failing to produce requested documents. Carlucci v. Piper Aircraft Corp., 102 F.R.D. 472, 483 (D.C.Fla. 1984). Obviously, the surest route to sanctions is to convince the court that the spoliation was willful.

One factor courts weigh heavily is exactly *when* the spoliation occurred. Ziegler, Richard F. and Seth A. Stuhl. "Spoliation issues arise in digital era." *National Law Journal* 20 (16 February 1998), B09. While not dispositive, respondents are more likely to face tough sanctions if data was lost *after* the issuance of a protective order. In *Procter & Gamble Co. v. Haugen*, the court, while imposing monetary sanctions for spoliation of electronic evidence, refused to find bad faith on the respondent's part. It explained that, while the duty to preserve evidence exists independently of a court order, the presence of an order would have provided the basis necessary to judge respondent's conduct from a bad faith perspective. Procter & Gamble Co. v. Haugen, 179 F.R.D. 622 (D.Utah, 1998). One author commenting on *Procter & Gamble* suggests that the lack of a discovery request at the time of respondent's misconduct was a key reason that the court did not entitle the opposing party to "certain evidentiary presumptions." Ballon, Ian C. "Spoliation of e-mail evidence: Proposed intranet policies and a framework for analysis." *Cyberspace Lawyer* 4 (March 1999), 2.

If requestors are able to show spoliation, they will likely need to further demonstrate through "concrete evidence" that actual harm resulted from the respondent's misconduct. *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, 167 F.R.D. 90 (D.Colo. 1996). The trial judge will seek to impose a punishment proportional to the harm suffered, so it is in the requestor's interest to demonstrate the prejudicial effect of unproduced evidence.

Moreover, courts are less and less willing to let corporations hide behind their retention policy. Admonishing the defendant for negligently failing to preserve the evidence requested, the Eighth Circuit in *Lewy v. Remington Arms Co.* concluded that "a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy." Lewy v. Remington Arms Co., 836 F.2d 1104 (8th Cir. 1988). The *Lewy* court suggested that a court should consider whether the record retention policy is "reasonable considering the facts and circumstances surrounding the relevant documents." *Id.*

Companies looking to destroy historical data, therefore, need to consider seriously whether a judge and jury will consider it "reasonable" for them to destroy old backup tapes. Corporations on notice of any *potential* litigation that may involve a request for their data are likely under a duty to preserve the tapes.

For example, in an indictment against Texaco executives for willful destruction of data, the government found fault with destruction of documents "likely to be requested" by plaintiffs in the future. Indictment, U.S. v. Lundwall, S-1 97 Cr. 211 (S.D.N.Y. 1997). While a criminal prosecution for such destruction is rare, the indictment in *Lundwall* emphasizes the fact that courts will look beyond current litigation in evaluating whether corporate defendants' violated any duty to preserve historic data.

The *Lewy* court's discussion of a company's document destruction decisions is instructive to our analysis. There, the court outlined three factors for courts to consider:

1. Whether defendant's record retention policy is reasonable in light of the facts and circumstances surrounding the relevant documents;
2. The extent to which the destroyed data was relevant to pending or likely lawsuits;
3. Whether the corporation instituted the data retention policy in bad faith. Lewy at 1112.

It is quite clear that, based on these factors, if a corporation destroys historic data plausibly within the scope of any potential litigation, it is opening itself up to the possibility of sanctions for spoliation of evidence.

A more particularized factor for companies to consider is whether there exist any statutory requirements as to record retention. Government record retention requirements vary. *See, e.g.*, the Code of Federal Regulations; see also discussion in Grady, Patrick R. "Discovery of computer stored documents and computer based litigation support systems: Why give up more than necessary?" *John Marshall Journal of Computer and Information Law* 14 (Spring 1996), 523.

If a company does go forward with destruction of old data, it should be careful to memorialize exactly what it has destroyed and which methodology it employed. Such a recording will help rebut charges of impropriety if its decision to destroy old data is challenged in future litigation.

A few courts have stated that spoliation cannot occur "prior to the institution of suit." *See, e.g.*, Turner v. Hudson Transit Lines Inc., 142 F.R.D. 68 (S.D.N.Y. 1991). However, a corporation is taking a serious gamble if it counts on only confronting judges who share that viewpoint. Destruction of historic data must be carefully documented and must take into account whether any litigation that may require production of that data is reasonably likely to arise.