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E-DISCOVERY

Unanswered E-Discovery Questions in the 3rd Circuit

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Special to the Legal

Before a court may give an adverse inference instruction to punish a party's spoliation of evidence in violation of Rule 26 and Rule 37's preservation duties, the court must find that: the evidence was within the party's control; there was an "actual suppression or withholding of evidence;" the evidence destroyed or withheld was relevant to the claims or defenses; and it was reasonably foreseeable that the evidence would be discoverable. This is according to the 3rd U.S. Circuit Court of Appeals' 1995 decision in *Brewer v. Quaker State Oil*.

With respect to a spoliator's requisite "actual suppression" of evidence for imposition of e-discovery adverse inference sanctions, there is an intra-jurisdictional rift in the 3rd Circuit.

In its 2008 opinion in *Arteria Property PTY Ltd. v. Universal Funding V.T.O. Inc.*, the U.S. District Court for the District of New Jersey observed, "District courts within the 3rd Circuit are split regarding the showing necessary to satisfy the 'actual suppression' requirement. Some have found that an adverse inference arises when spoliation 'was intentional, and indicates fraud and a desire to suppress the truth, and not where the destruction was a matter of routine with no fraudulent intent.'

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Other authority requires spoliation to be the result of intentional conduct. Still, some courts have held that the adverse inference is justified where evidence has been negligently destroyed. There is, thus, an inter-district split as to the requisite culpability of a purported spoliator needed to trigger an adverse inference."

Earlier this year, the District of New Jersey, in *Medeva Pharma Suisse A.G. v. Roxane Laboratories Inc.*, called the latest shot on the intentional versus negligent "actual suppression" issue in New Jersey federal courts — albeit a fact-specific one that cannot (at least not yet) be called a bright-line rule. Consistent with earlier decisions in this district, the *Medeva* court determined that "negligent destruction of relevant evidence can be sufficient to give rise to the spoliation inference."

"A party need not show that its adversary 'intentionally or knowingly destroyed or withheld' evidence," the court said. "This is true because 'if a party has notice that evidence is relevant to an action, and either proceeds to destroy that evidence or allows it to be destroyed by failing to take reasonable precautions, common sense dictates that the party is more likely to have been threatened by the evidence' and, regardless of the 'offending party's culpability ... it cannot be denied that the opposing party has been prejudiced.'"

However, the *Medeva* court specifically left open the possibility that "where one of the more drastic sanctions such as dismissal or suppression of evidence is sought, a greater showing of culpability may be required."

Although this January 2011 ruling is an unreported decision, it at least provides counsel facing harsh spoliation sanctions, such as the striking of trial witnesses or the granting of judgment in the discovering party's favor, a basis to argue that the absence of spoliation intent warrants leniency from the court in exercising its discretion in levying sanctions. This approach would be consistent with earlier rulings, such as *Atlantic Health Systems Inc. v. Cummins Inc.*

In New Jersey federal court, then, negligent "actual suppression" of documents may suffice — at least for "lesser" sanctions. But *Arteria* was spot-on in pointing out the intra-district rift on this issue. (See the Middle District of Pennsylvania's *Paluch v. Dawson*, requiring intentional conduct for spoliation

sanctions; the Eastern District's *Chirdo v. Minerals Tech Inc*., requiring evidence of willful or fraudulent destruction of evidence; and the District of New Jersey's *Paris Bus. Products v. Genisis Tech*., which held negligent destruction of evidence suffices for adverse inference.)

So, at least for now, it seems that whether your client may be sanctioned with an adverse inference for "innocent" oversights — such as forgetting to turn off automatic-deletion functions of electronic document retention policies or not issuing a litigation hold when litigation becomes reasonably foreseeable after the organization terminates a litigious employee — turns on the district within the 3rd Circuit where your client is sued.

MUST YOUR CLIENT PUT ITS LITIGATION HOLD IN WRITING?

In her 2010 opinion in *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities LLC*, Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York held that a party's failure to issue a written litigation hold constitutes gross negligence per se because that failure is likely to result in the destruction of relevant information.

However, given that courts differ in the fault they assign when a party fails to implement a litigation hold, not all courts — even those within the 2nd Circuit — agree with *Pension Committee* that a litigation hold must be written to satisfy the preservation duty of the Federal Rules, including *Steuben Foods Inc. v. Country Gourmet LLC,* a 2011 Western District of New York opinion; and the 2011 Southern District of New York ruling in *Centrifugal Force Inc. v. Softnet Communication Inc*.

The 3rd Circuit, the District of New Jersey and the Eastern and Middle districts of Pennsylvania have yet to weigh in on *Pension Committee*'s written legal hold mandate. Even if these jurisdictions were to side with those in which there is no express requirement that a litigation hold be in writing, clients and their counsel would be well-advised to put carefully prepared litigation holds in writing for a variety of reasons, not the least of which is evidence to meet future challenges from opposing parties that the organization flouted its data preservation duties.

Putting the organization's litigation hold in writing, along with documenting the steps used to implement the hold (e.g., the timing of hold notices; the identity of the notices' recipients, including management, employees in control of key data and third-party vendors with relevant documents; records of recipients' written acknowledgment of the hold memo; and follow-up steps by counsel and client to ensure compliance) prepares and empowers the company to withstand scrutiny later on, such as rebuttal of allegations of document loss or destruction. Obviously, this involves far more than simply an e-mail blast to all company employees from a manager, with instructions not to delete documents on a certain topic.

A written hold might also make F.R.C.P. 37's "safe harbor" more accessible to an unintentional spoliator. Under Rule 37(f), a court, absent exceptional circumstances, may not impose sanctions for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system. The rule applies only to information lost because of the routine operation of an information system — only if the operation was in good faith. A written litigation hold memo distributed throughout the organization to all persons with potentially relevant records could help establish the requisite "good faith" necessary for Rule 37's safe harbor.

These unanswered e-discovery questions within the 3rd Circuit mean that unintentional destruction of documents in one district might be sanctioned with an adverse inference, whereas the very same conduct in another district might escape that fate. Until courts in this jurisdiction take a position on *Pension Committee*, it is advisable to put litigation hold memos in writing — for reasons that go beyond sanction considerations. •