The Lane Law Letter

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Spoliation - Is It Really That Big a Deal?

You bet it is! So important, that we are dedicating this entire newsletter to the topic!

Spoliation of evidence is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably anticipated litigation. The topic is important to you because the improper destruction of relevant evidence can result in court sanctions you will not like. The court can suppress evidence favorable to you, fine you, order you to pay the other party's attorneys' fees, or issue a spoliation instruction to the jury that they may, or must, infer that the lost or destroyed evidence would have been adverse to you. Worse, the court can strike your pleading and grant judgment against you. In short, the failure to preserve relevant evidence in a claim or dispute can cost you the case. You should not take that chance. Read on to see how to avoid these problems.

Your lawyer has to deal with the intricate issues of whether the facts of your case support a claim for spoliation sanctions, and what facts may help to defend against a spoliation claim: When does the duty to preserve evidence arise? What is relevant evidence that must be preserved? Was relevant evidence destroyed after the duty to preserve arose? Was the evidence destroyed with a "culpable state of mind," and what constitutes a culpable state of mind? Will sanctions be imposed against you, and how will that affect your case? The *Judge* has to determine what spoliation sanction to impose, if any. *You* have only to take the proper steps to avoid the spoliation problem in the first place.

We are a litigation firm with a practice emphasizing transportation, insurance and construction law in New York and New Jersey.

We hope that you find The Lane Law Letter both enjoyable and useful in keeping you updated on legal developments important to you.

As always, we welcome questions and comments regarding our articles. Contact us by phone at 973-512-3244, or by email at law@jclane.com.

Inside this issue:

You Be the Judge - Lost Emails

A lawyer-turned-businessman breaches a contract by using copyrighted materials in his own customer digital newsletters. The copyright owner sues him for infringement. He cancels his outside back-up vendor account. All his emails are lost. He reinstates the vendor account and posts a few innocent emails to cover his tracks. Spoliation or not?

Federal District Judge Forrest in New York says it was intentional, *malicious* spoliation. The Judge acted on her own to grant judgment to the plaintiff, the most powerful spoliation sanction, in *Regulator Fundamentals*, decided August 5, 2014. See the full story on our website, www.thelanelawfirm.com.

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to keep up with the latest legal and technical news and for up-to-the-minute analysis of issues that affect us all!

When Does the Duty to Preserve Evidence Arise?

The duty arises when you first have reason to know that the evidence may be relevant to pending or anticipated future litigation. This can be before any claim has been made or any lawsuit has been filed. If you contemplate making a claim or suing a party, the duty has already arisen. If another party has threatened a suit or claim against you, the duty has arisen. You must then preserve all relevant evidence and ensure that it is not altered. And if the claim involves an accident, assault, or other specific event, the duty to preserve evidence may attach as soon as the event occurs – not two years later when you are sued. The courts call that a "triggering event." You call it a slip and fall, an assault, a fire loss, an industrial accident, or a truck crash. When you know of the event that involves your company or one of its employees, the steps to preserve all relevant evidence must go into motion.

Some illustrations help make the point. After a customer's fall in a Target store, Target should have immediately preserved the video footage of the store rather than allow the timed re-use of the tape. (*Slovin v. Target Corp.*, U.S. Dist. Ct., Southern Dist. of New York, 2013) ("Target's obligation to preserve the video is beyond peradventure."). When a prisoner complained of an assault in a jail, the same federal court ruled that the City's jailer should have promptly preserved video surveillance of the jail. (*Taylor v. City of New York*, 2013). One day after a fire in offices it rented, the New York City Housing Authority reviewed and edited a surveillance video in a cafeteria where the fire was believed to have started. In a lawsuit against the building's security agency, The Appellate Division of the New York Supreme Court held that the Housing Authority's primary obligation was to preserve the video, not alter it. The redacted video could not be offered in evidence by the Authority. (*New York City Housing Authority v. ProQuest Security, Inc.*, 2013).

In business disputes, at least one party knows of a contemplated claim long before the claim is made. In the case of *Zubulake v. UBS Warbug, LLC*, (Southern Dist. of New York), a female equities trader filed an EEOC gender discrimination claim against her employer. The duty to preserve e-mails relevant to her claim arose four months earlier, when key executives became aware of the impending claim. The e-mails had already been deleted and attempts to retrieve them from backup tapes were not fully successful. UBS continued to delete e-mails long after a preservation hold was issued by the company. That was gross negligence, according to District Judge Schira Scheindlin, and resulted in serious sanctions, including a "spoliation charge" to the jury that they may infer that the spoliated e-mails would have been adverse to the employer's defense. That is a serious sanction. It could spoil your whole day.

Zubulake is the case of a decade ago which for the first time applied spoliation law to electronically-stored information ("ESI"). It was followed throughout the country, and District Judge Shira Scheindlin became famous. Judge Scheindlin recently imposed harsh sanctions against a plaintiff company which contemplated a lawsuit for breach of contract, but began and continued the intentional deletion of thousands of relevant e-mails months and years after the obligation to preserve relevant evidence arose. Ask us about *Sekisui America Corp. v. Hart*, decided in August 2013.

These are the reasons why we want you to pay careful attention to the duty to preserve relevant evidence and to know when that duty arises. If you are even thinking about the issue, chances are you already have the duty.

What Evidence Must Be Preserved?

The short answer is this: **any evidence that you reasonably should know is relevant to a dispute**. Start with e-mails. Surveillance video should be downloaded before the system recycles and erases scenes of a fall, assault or industrial accident. Gather relevant contracts, deeds, real estate leases, and equipment leases, installation and owner's manuals. Incorporation documents, by-laws, personnel records and commercial documents should be preserved when you face a business or employment claim.

In **trucking and intermodal accidents**, drivers' paper and electronic logs should be set aside. To be redundant, keep the logs in the event of a serious accident. The DOT six-month hold rule may not be long enough to preserve a good defense of proper driving that may be shown in a log page. A spoliation adverse inference charge would permit a jury to infer that the missing logs harbored evidence of driver neglect, such as Hours of Service violations, unsafe speed, or other unsafe driving. Similarly, drivers' Vehicle Inspection Reports should be retained to guard against an inference that a driver reported a mechanical defect, especially if proper braking is an issue in a case. Driver's qualification files are relevant, as are manifests, bills of lading, delivery receipts, and trip sheets for the relevant time period. In a serious accident, ECM data should be downloaded before the tractor is driven further and data is electronically replaced. The tractor should be kept available, not driven, until the claimant's attorney can have it inspected. The failure to do so will most assuredly bring a spoliation claim and potential adverse sanctions.

A **manufacturer** anticipating a **personal injury** or **property damage product liability claim**, or a **contract claim**, already knows what is relevant, for most of it was created in the design and manufacturing phases by the manufacturer itself. Research and development documents, design drawings, details of testing of materials from which the product is made, claim statistics for previous claims and lawsuits, are among them. Recall or modification information, including governmental inspections and orders, should be preserved. Manuals for installers and owners of the product are certainly relevant. Information on component parts and their suppliers may be relevant, as well as contracts with suppliers and internal evaluations of the competency of those suppliers.

Construction claims involve their own documents which should be preserved. These include all e-mail and communications between and among the owner, its architects and engineers, and the contractors hired for the job. A litigant in such a dispute should gather and retain all design drawings and specifications, contracts and subcontracts, tests performed, such as on soils or strength of materials, and all shop drawings and catalog cuts submitted by subcontractors and materialmen, and the reviews and review logs by the design professionals.

You Be the Judge - Necessary Repairs?

Plaintiff brought suit against a construction company and its president and a glass installer, alleging defects in a window system. Within a year of the installation plaintiff advised the glass installer of the defects, and the installer attempted repair. The leaks worsened, causing water damage, and plaintiff hired someone else to make repairs. Suit was then filed, but at a point too late for defense experts to perform pre-remediation inspections. Spoliation or not?

The NJ trial court opined that plaintiff's remediation resulted in prejudice to defendants, and precluded plaintiff's experts from testifying. The Appellate Division reversed and remanded, noting that the installer had opportunities to inspect the windows and had significant knowledge of the condition, but limited plaintiff's expert proofs to those based only on evidence obtained prior to removal of the windows. The NJ Supreme Court affirmed as to the glass installer, and reversed as to the construction company and its president, writing, "With no independent source of evidence with which to mount a defense, the claims against those defendants cannot proceed. The only fair remedy is dismissal." *Robertet Flavors, Inc. v. Tri-Form Const. Inc.,* 2010.

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What Should *You* Do to Avoid a Spoliation Claim?

When you know or should know of a potential dispute, your company should issue a "**litigation hold**," also known as a "**spoliation hold**," to all personnel who have access to or who create documents or things which may be relevant to the dispute, instructing that all such evidence be preserved until further notice. Electronically stored documents should perhaps be collected and downloaded to an external hard drive. All of this information is likely to be discoverable in a lawsuit. Perhaps you have a document retention program, which is good. But when a duty to preserve evidence arises, be sure not to destroy relevant information, even if the retention policy would otherwise allow the destruction. As always, when in doubt, call us!

You Be the Judge - Deleted Facebook Account

Frank Gatto was an airport worker injured while unloading baggage. He sued United Airlines and Allied Aviation Services for injuries he sustained when, he says, a United aircraft caused a movable stair owned by Allied to crash into him. United's attorneys sought information from Mr. Gatto's Facebook account, but the account was deleted at Mr. Gatto's request for reasons *unrelated* to his lawsuit, but *after his accident*. Spoliation or not?

For this negligence, the federal court in New Jersey ordered an adverse inference charge be given to the jury allowing them to infer that the Facebook postings would be adverse to Mr. Gatto's claims. (*Gatto v. United Air Lines*, 2013).