Cases reveal courts taking a harder line against the destruction of electronic evidence, a trend that underscores the importance of keeping records.

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The law has always imposed on plaintiffs and defendants the duty to preserve evidence once litigation is foreseeable. However, case law in the area has grown quickly and become more complex as storage and transmission of information by electronic means becomes more common and courts, through their inherent powers or pursuant to specific rules, can order production of electronic data regardless of the medium on which it is stored.

Any electronic information--whether corporate or "personal"--can be evidence, depending on the circumstances. Such data includes, but it is not limited to, writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations.

Businesses, including but not limited to manufacturers, distributors, wholesalers, retailers, service providers, insurers and self-insurers--there is no definitive list, need to be aware that they may have evidence, that they need to preserve that evidence, and that significant problems can arise if they fail to do so.

Spoliation is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." The courts have authority and discretion to impose a range of sanctions for spoliation of evidence. Indeed, spoliation, in and of itself, can establish a basis for a claim for damages.

Spoliation keeps rearing its head in hundreds of cases. There are more than 300 cases on record in Massachusetts state and federal courts where spoliation was an issue. More than 7,800 cases in state and federal courts throughout the country have also turned up spoliation as an issue. As a guesstimate, at least one third of these cases cover 2000-2008.

Judges are no longer inclined to turn a deaf ear or a blind eye and impose a mere "slap on the wrist" for mishandling, losing or destroying electronic data. Instead, courts are handing out sometimes penalties, sometimes severe penalties, to litigants who fail to provide electronic data requested or ordered to be produced. Defenses to claims of spoliation are narrow and difficult to maintain, necessitating increased expenditure of energy, time and costs.

Because courts are taking a harsher position in situations where evidence has "disappeared" or is otherwise unavailable, it is advisable to pay attention to judicial trends so that common pitfalls can be recognized and avoided. Anything less than an aggressive approach to complying with the duty of preservation and avoiding potential spoliation problems creates a risk of judicial sanctions, as the following examples will illustrate.

Almost any information that is stored electronically may be evidence, depending on the nature of the case.

For instance, in *Zubulake v. UBS Warburg LLC*, the plaintiff alleged workplace gender discrimination and retaliation. Potentially relevant electronic evidence included employee e-mail correspondence. The employer was obligated to preserve any document or tangible thing made by or for individuals likely to have discoverable information that supported the plaintiff's claims. That included e-mails among key employees as well as backup tapes.

In *Century ML-Cable Corp. v. Carillo,* a business tort case, Century, a cable television provider, sought to prevent Carillo from modifying and distributing cable television decoders used to intercept and view Century's premium and pay-per-view programs. Carillo was ordered to preserve and produce evidence, including electronic records and a laptop computer that he used to store information and to clone converter decoder keys. Instead, he destroyed the evidence.
In *Keene v. Brigham and Women's Hospital Inc.*, the plaintiffs brought a medical malpractice suit, alleging that the hospital negligently treated their newborn son, resulting in severe brain damage. The hospital was sanctioned for losing a portion of the baby's medical records.

In *Blinzler v. Marriott International Inc.*, the plaintiff alleged that her husband died because the hotel personnel ignored her request for an ambulance. The hotel was obligated to preserve the record of outgoing telephone calls and the security officer's log; its failure to do so resulted in court-imposed sanctions.

Obviously, as in the *Century* case, a party spoliates evidence when litigation has started and he or she destroys records that he has been requested to produce. However, there is an obligation to preserve potentially relevant evidence once litigation is foreseeable. This means that such a duty kicks in long before a suit is filed and even before the defendant is notified of a potential claim.

In the *Keene* case, plaintiffs requested a copy of the baby's medical records a year or so after his birth and the hospital then filed a notice of potential claim with its insurer. The court found that the hospital knew or should have known at that point, eight years before suit was filed, that a suit was possible, and therefore its duty to preserve evidence was in effect at that time. Although there was no evidence that the records were intentionally destroyed, it is important to note that the hospital was held accountable for the plaintiffs' inability to prove their claim.

In the *Zubulake* case, it was clear from e-mails that key employees anticipated that the plaintiff would sue well before she even filed an administrative complaint. Litigation was reasonably anticipated at that point and as a result, the court found that UBS had a duty to preserve evidence. By failing to preserve e-mails and backup tapes, UBS committed sanctionable spoliation.

The courts take spoliation very seriously, and there are sanctions associated with spoliation of electronic evidence. Sanctions can range from the award of fees and expenses to the adverse party, to exclusion of arguments or evidence, to adverse jury instructions, to outright dismissal of the suit or entry of default judgment against the spoliator.

In *Zubulake*, the court ordered UBS to pay the plaintiff's costs incurred in deposing certain witnesses about the destruction of evidence and certain newly discovered e-mails.
In *Century* and *Keene*, the court took what can only be considered the ultimate step and entered default judgments in favor of the plaintiffs without ever hearing testimony on the merits of the claims. The hospital was liable for malpractice and Carillo was liable for interference with Century's cable transmissions. This result is certainly not surprising in the *Century* case, where Carillo had acted willfully and the plaintiff was seriously prejudiced.

In *Keene*, however, it was unclear who lost the records, and there was no evidence that the hospital intentionally destroyed them. The court defaulted the hospital nonetheless, because it saw no other way to remedy the prejudice to the plaintiffs.

In *Blinzler*, the plaintiff was allowed to tell the jury that the telephone and security records had existed and been lost; the jury could then infer that the hotel had destroyed the records because they were harmful to its defense. The hotel's assertion that it destroyed the records pursuant to its established records retention/destruction policy did not excuse the spoliation.

As the creation, use and storage of electronic data becomes more common so does the possibility of spoliating such evidence, with the serious consequences that can follow. Failure to identify and preserve evidence, intentionally or even carelessly, can result in heavy costs, adverse instructions to the jury and even an adverse verdict and money judgment that had nothing to do with the merits of the case.

The duty to preserve evidence must be taken seriously and measures can and should be put in place to avoid spoliation of evidence and resultant potential sanctions, which may at a minimum, hamper, and at worst completely eliminate, the defense of a lawsuit.

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