

Presenting and Defending a Spoliation of Evidence Case

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Spoliation of evidence seems to be on the rise. But the emergence of case law on the subject has made it easier to identify and address the problem.

Spoliation is the act of destroying or other wise suppressing evidence. It can arise in virtually any kind of case, from antitrust to products liability, and plaintiffs are as likely to do it as defendants. Because spoliation is generally “invisible,” it is difficult to determine how pervasive the practice is. But efforts at statistical analysis have yielded disturbing results. See Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 *Cardozo L. Rev.* 793 (1991). Since 1995, no fewer than 19 law review and bar journal articles have been a significant increase in the number of reported appellate cases addressing the issue.

In this article, we will examine the various approaches that courts take to addressing spoliation problems, and the steps you can take to ferret it out when you suspect that it might have happened in a case. This article addresses situations in which the intent or knowledge of the spoliator is irrelevant and focuses solely on the harm suffered by the non-spoliator.

Judicial Approaches to Spoliation of Evidence

The courts have taken several approaches to spoliation of evidence:

- The most prevalent judicial response to spoliation is to treat it as a form of discovery abuse, sanctionable pursuant to Fed. R. Civ. P. 37 or its state law analogues;
- Some courts have approached it as a matter within their inherent powers. See *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 126-27 (S.D. Fla. 1987);
- Other courts have avoided characterizing the destruction of evidence as spoliation but have nonetheless addressed the issue under equitable principles by attempting to remedy the prejudice suffered by the complaining party; and
- Finally, a minority of states have established spoliation of evidence as an independent tort.

Making a Spoliation Case

Making a spoliation case is seldom easy, particularly when documents may have been spoliated. This is because you must discover and evaluate what has not been produced and may not exist.

Structuring Discovery

Although spoliation cases may be hard to make out, creative use of discovery can uncover spoliation and make out the basis of a spoliation claim.

Uncovering Spoliation

An interrogatory directed at discovering spoliation might read as follows.

“Identify each and every document or other piece of tangible evidence relevant to [plaintiff’s/defendant’s claims/defenses] which has been lost, destroyed or cannot be found. For each document identified state:

Whether any other copy of the accounted for”). *But see Jones v. Goodyear Tire & Rubber Co.*, 137 F.R.D. 657 (C.D. Il. 1991) (holding that gross negligence resulting in loss of product during shipping was sufficient to support directed verdict against defendant on liability), *aff’d sub nom. Marrocco v. General Motors Corp.*, 966 F.2d 220, 225 (7th Cir. 1992) (“the Supreme Court has expressly stated that sanctions may be appropriate in any one of three instances—where the non-complying party acted either with willfulness, bad faith or fault.”)

Indeed, a sufficient degree of culpability may make analysis of the other elements unnecessary. *See Telectron*, supra, 116 F.R.D. at 110. (“In reviewing the range of potential sanction available to this Court, we have concluded that no sanction less than the entry of default judgment as to Defendants’ liability can fairly and adequately redress this willful obstruction of the discovery process....[L]esser sanctions...would neither ensure this Plaintiff’s basic right to fair trial nor provide a truly meaningful deterrent to future acts of willful disregard for our rules of discovery.”) The *Telectron* court relied on very bad faith, relevancy, and presumption that the document would have been harmful in supporting the imposition of a default judgment.

Marshaling the Evidence on the Intent

Affirmative answers to the following questions militate in favor of a finding that the evidence was intentionally or negligently destroyed:

- Was the evidence destroyed with actual knowledge of its relevance or an asserted or potential claim?
- Was there a court order or agreement regarding preservation of evidence?
- Would a reasonable party in the same or similar circumstances have destroyed the evidence?
- Did the spoiling party analyze the evidence before it was destroyed? (A likely in such situations is exclusion of the spoliator’s evidence based in whole or in part on the analysis.)

Culpability, Reasonableness, and Document Retention Policies

Was the evidence destroyed consistent with a standard policy of evidence retention? If not, that is evidence of culpability. If so, it is evidence of lack of culpability. However, even a written document destruction/retention policy may be subject to intense scrutiny. For example, in *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988), the Eighth Circuit considered the reasonableness of a document retention policy, concluding that a “corporation cannot blindly

destroy documents and expect to be shielded by a seemingly innocuous document retention policy.” The factors that went in to the assessment of reasonableness included:

- The facts and circumstances surrounding the relevant documents. As an example, the court opined that a “three-year retention policy may be sufficient for documents such as appointment books or telephone messages, but inadequate for documents such as customer complaints”;
- Whether lawsuits have been filed to which the documents are relevant or connected (the documents at issue in the Lewy case were customer complaints. The court also identified the frequency of such complaints, and the magnitude of the complaints as factors in assessing reasonableness;
- Whether the document retention policy was instituted in bad faith; and
- Whether, even if the policy is reasonable given the nature of the documents subject to the policy, the subject documents should have been retained notwithstanding the policy considering the particular facts and circumstances. (The example the court gave as “if the corporation knew or should have known that the documents would become material at some point in the future.”)

Culpability and Size of Organization

How large an organization is an issue in assessing culpability. Standing alone, a large entity’s destruction of evidence may be less indicative of culpability depending upon the actual knowledge or imputability of knowledge of the actor actually responsible for the destruction. Generally, courts have had little difficulty imputing responsibility from hired experts to the party to the lawsuit. *See Barker v. Bledsow*, 85 F.R.D. 545, 547-48 (W.D. Okla. 1979).

In contrast, it is more difficult for a small entity to argue that the destruction of evidence was innocent as knowledge is more easily imputed throughout the entity. Is it the party that is responsible for the spoliation or is it his or her counsel’s conduct that led to the spoliation? Again, it depends on the circumstances. *See, e.g., Barker*, supra, 85 F.R.D. at 549 (“[D]ismissal is too harsh a penalty for plaintiff, whose participation in the complained of actions went to further than his choice of an attorney.”)

Culpability and Knowledge of Relevance

Have there been similar lawsuits involving the same evidence? Was future litigation foreseeable at the time of destruction? If so, then it is more likely that the spoliator knew of or was chargeable with knowledge of the relevance of the evidence to litigation. *See, e.g., Shelbyville Mutual Ins. Co. v. Sunbeam Leisure Products*, 643 N.E.2d 1319 (Ill. Ct. App.), *appeal denied*, 642 N.E.2d 1304 (Ill. 1994).

Culpability and Protective Orders

Was there a protective order in place regarding preservation of evidence? If so, it will be easier for a court to find that there was a duty to preserve the evidence. Also, sanctions may be more readily available if the spoliation was in violation of a court order. *See Jones*, supra 137 F.R.D.

at 663. (“The stipulation and protective order created duty of care to ‘preserve, keep safe and maintain the[product] in an unaltered state and do no destructive testing.’”) In *Jones* the subject product was lost when shipped through UPS. There was evidence before the court that the product was improperly packed and that the shipment was not monitored properly. The court entered a directed verdict against the spoliator, because to otherwise would permit it “to profit from its gross negligence in mishandling this evidence despite the clear language in the protective order.: *Id.* At 664

Miscellaneous Culpability Consideration

Has the spoliator been found guilty of spoliation of evidence or other discovery abuse in other proceedings? If so, that is some evidence of knowing and willful conduct. Was the actual destruction of the evidence conducted by the party to the suit or a third party? If by a third party, what is the relationship between them?

Prejudice to the Innocent Party

How important is the spoliated evidence to the spoliator’s of the innocent party’s case? In the products liability context, the subject product may be irreplaceable and case-dispositive. But note that this is not an absolute rule in products liability. For example, the rule may not apply when the claim is for a design defect rather than a manufacturing defect. *See O’Donnell v. Big Yank, Inc.*, 696 A.2d 846 (Pa. Super. Ct. 1997). Thus, spoliation of the product often leads to dismissal of a plaintiff’s claims if the plaintiff is responsible or a default in favor of the plaintiff if the defendant is responsible for the spoliation. *See e.g., Segmiller v. H.P.E., Inc.*, N.E.2d 1156 (Ill. App. Ct. 1980). In other context, evaluating the spoliated evidence can be more problematic.

Can the Evidence Be Reconstructed?

Is there any way of “reconstructing” or otherwise determining the contents of the spoliated evidence? Can a claim or defense be fairly presented in the absence of the spoliated evidence? Both the spoliator and innocent party can take advantage of this argument. The spoliator argues that because the content of the evidence is unknown, there can be no effective evaluation of the prejudice suffered by the innocent party. This argument is much less effective for the spoliator in the products liability context if the subject product is lost or materially altered. The innocent party argues that since the spoliated evidence cannot be evaluated, the only effective remedy is default in its favor. Otherwise, the spoliator would profit from its wrongful conduct.

How Do You Prove a Negative?

What if the nature and contents of the spoliated evidence cannot be determined? How can prejudice be shown in the absence of such proof? For example, in an antitrust case, if the only description of the spoliated evidence is “memoranda regarding widget pricing,” how can the degree of prejudice be determined? Certainly some evidence could be obtained through depositions of those that might have prepared or reviewed the spoliated evidence, assuming

their identities can be determined. If the nature of the evidence cannot be determined, the spoliator argues that it cannot be punished because prejudice, and therefore proportionality, cannot be determined.

Proportionality is a principle encompassed within due process. Discovery sanctions, particularly severe ones, raise due process considerations. “[T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.” *Societe Internationale v. Rogers*, 357 U.S.197,209 (1958), citing *Hammond Packing Co. v. State of Arkansas*, 212 U.S. 322, 350-51 (1909); *Hovey v. Elliott*, 167 U.S. 409 (1897); accord, *Insurance Corp. of Ireland Ltd. V. Campagnie Des Bauxites de Guinee*, 456 U.S. 694, 705-06 (1982). Discovery sanctions cannot be used to adjudicate the merits of a party’s claims or defenses unless a party’s hindrance of the discovery process justifies a presumption that its claims or defenses lack merit. *Insurance Corp. of Ireland*, 456 U.S. 694, 705-06; *Rogers*, 357 U.S. at 209-10; *Hammond Packing*, 212 U.S. 350-51.

In response, the innocent party argues that the conduct was intentional or at least negligent and that the spoliator should not be allowed to profit from its own misfeasance.

Reconstruction of the Spoliated Evidence and Irreparable Loss

This issue is related to the prejudice element. Obviously, if the spoliated evidence can be reconstructed or recreated somehow, there is little or no prejudice suffered by the innocent party. The more complex the product or evidence in question is, the more difficult reconstruction may be. For example, if the allegation is that the steering system of a car was a defective product, reconstruction may be effectively impossible. There are too many elements of the steering system, potentially manufactured by different entities, to readily allow for sufficient reconstruction in the absence of the allegedly defective original.

Outside the products liability context, the reconstruction issue plays out differently. In the case of documents, even if other copies of the spoliated document are available, a showing of prejudice can be made if the original is the one destroyed or if it can be shown that there was something unique about the destroyed document. For example, if it can be shown that a key individual made notes on his or her copy, and that copy was subsequently spoliated, then a prejudice argument can be made. The spoliator would respond that the written notes can be reconstructed through questioning of the note’s maker.

The Need for Deterrence

In broad terms, a review of the case law indicates that many courts are punishing spoliation of evidence more severely than they once did. This is evidenced by the increase in the number of reported cases involving spoliation of evidence and sever sanctions. There is also authority for

the proposition that spoliation of evidence is a growing problem. *See* Charles R. Nesson, *supra*.

Both views support the aggressive imposition of sanctions for spoliation of evidence. An argument can be made that spoliation is being punished more severely because lesser sanctions and measures have been ineffective deterrents.

The existence of an independent tort for spoliation of evidence in the subject jurisdiction is a two edged sword. On the one hand, it is indicative of judicial/legislative recognition of the problem of spoliation of evidence. On the other, the spoliator can argue that the tort is the exclusive remedy for spoliation and that it should not be addressed as a matter appropriate for discovery sanctions.

Remedies for Spoliation of Evidence

As noted above, there are a number of remedies available for spoliation of evidence, from instruction to the jury to an independent tort action. The most common approach is to treat it as discovery abuse.

Advantages of Discovery Abuse

There are a number of advantages to approaching spoliation of evidence as a matter of discovery abuse or under the court's inherent powers as opposed to an independent tort. Courts are familiar and comfortable with meting out sanctions for discovery abuse. When seeking discovery sanctions, you are not asking the court to do anything new or novel. Depending on the jurisdiction, a wide variety of sanctions will be available for discovery abuse ranging from monetary sanctions to default judgments. On appeal, discovery sanctions are usually reviewed under an abuse of discretion standard. You may be able to introduce evidence at a sanctions hearing that you would not be able to at a conventional trial.

Avoids Problems of Independent Tort Approach

The discovery sanctions approach also avoids some of the jurisprudential difficulties presented by the independent tort approach. What is the basis of a duty to third parties not to spoliolate evidence? This question is particularly relevant in pre-suit spoliation cases. Another difficult inquiry is proving causation and damages when the content and nature of the missing evidence is unknown or largely unknown. To some extent, spoliation is similar to legal malpractice from a causation standpoint. Not only must it be proven that the evidence was wrongfully spoliated, it must also be shown that the outcome of the trial would have been different but for the spoliation. However, in contrast with legal malpractice, expert testimony may be of limited relevance in the spoliation context. Thus, it may be a harder case to prove than legal malpractice. An instruction to the jury that the spoliated evidence would have been harmful would seem to be particularly unavailing in this context. If the instruction were sufficient in the independent tort case, why would it have been insufficient in the underlying lawsuit? This issue becomes even more confusing if the spoliation tort and the underlying suit are tried at the same time.

Consider the Appropriate Sanction

When using the discovery abuse approach, think about what kind of sanction to seek. Courts are often reluctant to award default judgments. However, the same result can often be achieved through the exclusion of evidence. If the opposing expert performed destructive testing on the subject product or reviewed materials that are subsequently no available to you , you may be able to exclude the expert testimony. *See Ralston v. Casanova*, 473 N.E.2d 444, 449 (Ill. App. Ct. 1984) (noting that “preservation of the allegedly defective product, if possible, is of the utmost importance in both proving and defending against a strict liability action”).

Why Exclusion Is Appropriate

Exclusion of such evidence is necessary to prevent unfair prejudice, and arguably a due process violation. *See, e.g., American Family Ins. Co. v. Village of Pontiac GMC, Inc.*, 585 N.E.2d 1115 (Ill. App. Ct. 1992) (“Plaintiffs were the only individuals with first-hand knowledge of the physical evidence which is far more probative. . .As a matter of sound public policy, an expert should not be permitted intentionally or negligently to destroy such evidence and then substitute his or her own description of it.”) If the excluded evidence is essential to claim or defense, a default judgment may be appropriate.

Spoilation of Evidence and Legal Malpractice

As shown above, the consequence of spoliation of evidence can be dire. Thus, if an attorney is responsible for or does not prevent the spoliation of evidence, her or she may be liable for legal malpractice. Malpractice could arise from the following situation:

- The attorney loses the evidence’
- The attorney has requested or authorizes destructive testing;
- The attorney does not properly instruct the client or expert about the need to preserve the evidence; or
- The attorney exacerbates the spoliation by not being candid with the opposing party and the court or attempts to conceal the spoliation.

Given the stakes involved, it is important to timely advise clients and experts regarding the need to preserve evidence and the consequences of spoliation.

Conclusion

Spoliation cases seem to be on the rise. Although this is unfortunate, some outlines have begun to emerge in how to address the problem and how courts tend to deal with it. Creative use of discovery is an important factor in uncovering whether spoliation has taken place at all. It is also an important tool for making sure to establish the requisites of a spoliation problem, give careful thought to choosing an appropriate sanction. Fairness calls for nothing less.