

ISSUE: CAN YOU BE SANCTIONED FOR FAILING TO PRESERVE ESI?

ANSWER: DEPENDS

Excerpt from *Arkfeld's Best Practices Guide for ESI Pretrial Discovery - Strategy and Tactics (2008-2009)*

§ 3.16 - Spoliation and Sanctions

§ 3.16(A) Overview

§ 3.16(B) Requesting Party Strategy

§ 3.16(C) Producing Party Strategy

§ 3.16(D) Checklist

§ 3.16(A) Overview

Parties have an obligation to preserve evidence. The failure of a client to preserve evidence can lead to severe sanctions from the court.

With computer-based discovery, the ESI can be easily and permanently lost or changed unless a party acts immediately. In the business environment this loss can occur by recycling backup tapes, booting up a computer, opening a file or installing new computer applications or data onto a hard drive. Add to this the increased volume, different locations and automatic purging systems for electronic evidence, and it can easily lead to unfortunate consequences and spoliation of evidence.

The spoliation doctrine has been held to be:

- A tort action
- A defense
- A discovery sanction
- A default judgment sanction

Some sanctions imposed by the court if spoliation is found, are:

- Adverse inference jury instruction
- Monetary sanctions
- Attorney sanction
- Defense to recovery
- Dismissal or default judgment
- Evidentiary sanctions

Motions for sanctions for spoliation must be filed in a timely manner. Generally, an evidentiary hearing is required in order to determine if sanctions are to be imposed. The courts, depending on the jurisdiction, differ as to the necessary elements to establish a claim of spoliation. It generally requires:

- An act of destruction;
- Discoverability of the evidence;
- An intent to destroy the evidence;
- Occurrence of the act at a time after suit has been filed, or if before, at a time when the filing is fairly perceived as imminent.
- Prejudice — usually discussed in relation to what sanctions to impose.

See McGuire v. Acufex Microsurgical, Inc., 175 F.R.D. 149, 154 (D. Mass. 1997).

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After electronic documents have been destroyed and sanctions are requested, the court, depending on the jurisdiction, will usually examine the degree of culpability, i.e., whether the destruction or failure to produce was willful or negligent.

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Cross-references

- EDE § 7.9, *Litigation Hold and Sanctions*
- EDE § 7.9(B), *Sanctions — Fed. R. Civ. P. 37*
- EDE § 7.9(C), *Spoliation*

§ 3.16(B) Requesting Party Strategy

- Send a preservation letter to the producing party.
- Determine when the triggering event has occurred that imposes an obligation on the producing party to take reasonable steps to preserve ESI records subject to discovery in the litigation.
- After litigation has started the preservation request should be reiterated during the 26(f) meet and confer session that specifically requires the parties to discuss preservation of ESI. If the

parties cannot reach agreement, the court can try to resolve it during the Rule 16 hearing. It would be advantageous to the requesting party to have the court issue a preservation order.

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§ 3.16(C) Producing Party Strategy

- Ensure your client has a litigation readiness program in place to be implemented when litigation is “reasonably anticipated.”
- Ensure that the document retention program is suspended and litigation hold directives are implemented when litigation is “reasonably anticipated.”

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§ 3.16(D) Checklist

- [] Ensure your client has a litigation readiness program in place.
- [] Review your client’s document retention and management policies.
- [] Ensure compliance with statutory and regulatory retention requirements..
- [] Make sure that your client’s normal document retention policy is suspended to handle any preservation obligations that may arise in the course of litigation.

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