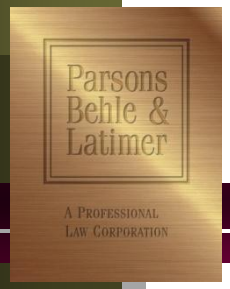

Spoliation of Evidence In The Electronic World

Erik A. Christiansen

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Real World Experiences

- **How many have been involved with spoliation motions?**
- **Pre-retention: a client allegedly wiped a hard drive clean before returned to employer**
- **Defendants who left a company to form a competing company deleted all e-mails on their way out the door**

Huge Volume of E-Mails

- There is a growing mountain of electronic data. The average American businessperson receives between 50 and 150 e-mails daily.
- The average American creates between 5 and 8 gigs of data per year.

A Box of Shredded Documents – The First Wave – The Sarbanes-Oxley Act

- **Remember the box of shredded Enron documents, which William Lerach paraded on TV (before he went to jail)? That was the beginning of where we are today.**
- **The Sarbanes-Oxley Act was passed by Congress on July 30, 2002.**
- **The Act has significant records management implications for public companies and accounting firms that audit public companies:**
- **<u>For Public Companies</u>:**
  - Audit Committees must establish procedures for the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal controls, and auditing issues;
  - Management is responsible for establishing and maintaining an adequate internal control structure and procedures for financing reporting, and assess the effectiveness of internal controls in the annual report.
- **<u>For Accounting Firms</u>:**
  - Accounting firms must preserve audit workpapers and audit information for at least 7 years.

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The Second Wave -- The Federal Rules of Civil Procedure

- Recognizing that electronic information can be critical to the outcome of litigation, the Civil Rules Advisory Committee proposed, and the United States Supreme Court adopted, several changes to the Federal Rules of Civil Procedure.
- These changes went into effect December 1, 2006.
- Under the new rules, a discussion of preservation, disclosure and discovery of electronically stored information now must be part of the Rule 26(f) conference, including requiring counsel “to discuss any issues relating to preserving discoverable information.”

The Second Wave -- The Federal Rules of Civil Procedure

- **Additionally, "electronically stored information" that a party may rely on to support its claims or defenses must be disclosed during Rule 26(a)(1)(B) initial disclosures.**
- **Pursuant to Rule 16(b)(5), the scheduling order may include provisions for disclosure or discovery of electronically stored information.**
- **Rule 33 and Rule 34 also apply to "electronically stored information".**

What About The Cost & Burden?

- **The Civil Rules Advisory Committee also recognized that storing and maintaining electronically stored information can be extremely costly.**
- **Amended Rule 37(f) now provides a safe harbor provision for businesses that are not on notice of pending or imminent litigation that destroy documents pursuant to a routine recycling of information. Fed. R. Civil Pro. 37(f).**

What About The Cost & Burden?

- **Authority is split over whether production of information in a hard-copy format precludes a party from receiving the same information in electronic format. Compare Anti-Monopoly, Inc. v. Hasbro, Inc., No. 94-2120, 1995 WL 649934, *1-2 (S.D.N.Y. Nov. 3, 1995) (holding that a party could not avoid producing electronic data by producing paper copies of the same information), with Williams v. Owens-Illinois, Inc., 665 F.2d 918, 932-33 (9th Cir. 1982) (holding district court did not abuse its discretion in denying request for computer tapes where the requesting party had all of the information in paper format).**

What About The Cost & Burden?

- **Based on more recent cases, it appears courts are more cognizant of the additional information that can be garnered from electronic copies, and are more willing to grant discovery requests for electronic information if the moving party can demonstrate why paper copies may be insufficient. See Medtronic v. Michelson, 229 F.R.D. 550 (W.D. Tenn. 2003) (finding that electronic data files could reasonably lead to the discovery of admissible evidence that is not available in hard-copy format).**

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What About The Scope?

- The scope of electronic discovery is extremely broad.
- Types of electronic documents that may be relevant and later discoverable include, but are not limited to: e-mail and deleted email, metadata, back-up files, internet files, voice mail, and archival tapes. Kleiner v. Burns, No. 00-2160-JWL, 2000 WL 1909470, at *4 (D. Kan. Dec. 22, 2000).
- What about Facebook, My Space, and Twitter pages?
- Moreover, relevant electronic documents may be located on a main frame server, an individual employee's work or home computer, or PDA's or other hand-held electronic organizers. See Mathias v. Jacobs, 197 F.R.D. 29, 35-36 (S.D.N.Y. 2000) (ordering the production of a Palm Pilot that contained information relevant to the claim brought), vacated on other grounds, 167 F. Supp. 2d 606 (2001).
- A party may be sanctioned for destroying any of these document types or storage locations. Kleiner, 2000 WL 1909470, at *4.

The Pitfalls of E-Mail and Deleted E-Mail

- **E-mail messages have become one of the most sought-after pieces of electronic evidence because of misconceptions that employees generally have about e-mail communication.**
- **First, e-mail communication is commonly informal and the information shared is more analogous to that shared during a telephone conversation as compared with a written letter. Michael R. Arkfeld, Electronic Discovery and Evidence § 1.02 (2004). Second, employees often mistakenly believe that deleting an email will cause the email to disappear permanently. Id. § 3.08.**
- **Lastly, many employees believe that e-mail communication is private, and are surprised to learn that they are discoverable and admissible at trial. Id.**

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Destroy e-mail at your peril

- **Negligent or intentional destruction of relevant e-mail communication has resulted in severe sanctions being imposed against the offending party. See, e.g., United States v. Philip Morris USA, Inc., 327 F. Supp. 2d 21, 26 (D.D.C. 2004) (imposing monetary sanction of $2,750,000 for reckless destruction of relevant e-mail communication).**

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Metadata, Hidden or Embedded Information

- **The federal rules advisory committee has defined "metadata" as "[i]nformation describing the history, tracking, or management of an electronic file."**
- **Metadata indicates when a document was made, who made it, who edited it, and when it was last viewed. Metadata is embedded information that is stored in electronically generated materials, but is not visible when a document or material is printed. See Arkfeld, supra, § 3.07.**
- **Electronic documents must be produced with Metadata intact and preserved.**

Destroy Metadata at Your Peril

- **Courts have held that metadata may contain relevant, discoverable material, and parties have been sanctioned for not preserving or producing relevant metadata. See In re Telxon Corp. Securities Litig., No. 5:98CV2876, 2004 WL 3192729, at *35-36 (N.D. Ohio July 16, 2004) (imposing sanctions for destruction of documents, including metadata that described changes made to relevant documents).**

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Back-up Files

- A back-up is a duplicate storage copy of a program, data or document.
- Computer back-up copies are a great source of electronic discovery, however, back-up systems may not preserve all electronic information and may only be used by a company to restore damaged or destroyed hardware.
- Commonly, back-up tapes or systems are overridden after an established time period and replaced with new back-up information.

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Back-up Files

- **A notable case, discussing preservation requirements, drew a distinction between a back-up tape or system that is *accessible*, or actively used for information retrieval, and *inaccessible*, or those typically maintained solely for the purpose of disaster recovery. Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).**
- **Specifically, the court held that routine suspension of a document destruction policy in anticipation of litigation generally only applies to *accessible* back-up tapes and not to back-up tapes designed exclusively as disaster recovery systems. Id.**

Back-up Files

- **An exception has been carved out of this general distinction, however; a company must preserve *all* back-up tapes containing documents of "key players" to the potential or imminent litigation, if the information contained on the tapes is not otherwise available. Zubulake, 220 F.R.D. at 218.**
- **Zubulake is recognized by many courts as the leading case on spoliation of electronic documents, and it is likely many other courts will eventually draw this distinction and only require preservation of accessible back-up tapes, unless the specific exception applies.**

Destroy Backup Tapes At Your Peril

- **When a party is on notice of pending or imminent litigation, back-up tapes are an excellent source of "deleted" documents, and parties have been sanctioned for negligently, recklessly, or intentionally destroying back-up tapes that contain potentially relevant information. See Zubulake v. UBS Warburg, LLC, (Zubulake V), No.. 02-1243, 2004 U.S. Dist. LEXIS 13574, at *51-63 (S.D.N.Y. July 20, 2004) (imposing several discovery sanctions for failing to preserve e-mail communications by key players and failing to preserve back-up tapes that contained documents created or modified by these key players).**

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Other Types of Electronic Documents

- **There are several other types of electronic documents that may contain relevant, discoverable material. In Kleiner, the court stated that discoverable electronic documents include, but are not limited to,**

  voice mail messages and files, back-up voice mail files, e-mail messages and files, back-up e-mail files, deleted e-mail, data files, program files, back-up and archival tapes, temporary files, system history files, Web site information stored in textual, graphic or audio format, Web site log files, cache files, cookies, and other electronically-recorded information.

- **Kleiner v. Burns, No. 00-2160, 2000 WL 1909470, at *4 (D. Kan. Dec. 15, 2000) (granting motion to compel discovery of electronic documents of the types described after party requested disclosure of "computerized data and other electronically stored information.").**

A Trap For the Modern World -- Spoliation of Evidence:

- **Spoliation refers generally to the destruction, alteration, or non-disclosure of relevant evidence. Thompson v. H.U.D., 219 F.R.D. 93, 100 (D. Md. 2003).**
- **In general, information is discoverable if it is "relevant to the claim or defense of any party" or if it "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).**
- **With greater amounts of information being retained only in electronic form, judges have become increasingly intolerant of spoliation of electronic documents, even if the destruction was in accordance with an existing document retention policy.**

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A Trap For the Modern World -- Spoliation of Evidence:

- **There are several factors a court will consider before imposing spoliation sanctions. The four most common factors examined are: (1) if a duty existed to preserve the electronic evidence in question; (2) the prejudice to the requesting party; (3) the intent of the offending party; and (4) the efficacy of less severe spoliation sanctions. See Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 220 (S.D.N.Y. 2003).**
- **Once a court has determined that spoliation sanctions are appropriate, it has a variety of sanctions that it may impose, ranging from entering a default judgment against the offender to monetary sanctions against counsel and/or the company. Capellupo v. FMC Corp., 126 F.R.D. 545, 551-53 (D. Minn. 1989). See generally, Amy Longo, Dale Cendali & Christine Cwiertny, Current Trends in Electronic Discovery, SK0171 Am. L. Inst. – Am. B. Ass'n 303, 346 (2005).**

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Factors a Court Will Consider Before Imposing Spoliation Sanctions

A. Duty to Preserve

- **The threshold question a court will consider before spoliation sanctions are imposed is whether the party who destroyed electronic evidence had any obligation or duty to preserve it.**
- **The determination generally turns on when the party had notice of the relevance of the information to imminent or current litigation. Wm. T. Thompson Co. v. General Nutrition Corp., Inc., 593 F. Supp. 1443, 1450 (C.D. Cal. 1984).**
- **Courts have found four possible scenarios to constitute sufficient notice for a duty to arise: statutory notice, prior litigation, anticipated litigation, and the filing of a complaint. Id.**

Factors a Court Will Consider Before Imposing Spoliation Sanctions

i. **Statute**

- **A duty to preserve evidence may be mandated by federal or state statute. See 15 U.S.C.A. § 78q (1997) (imposing a duty to retain financial records for securities brokers or traders); 15 U.S.C.A. § 78u-4(b)(3)(c)(i) (1997) (imposing a duty to retain all records, including electronic records, to all parties with actual notice of a private securities litigation); 29 U.S.C.A. 657(c) (1997) (imposing a duty to preserve workplace documents for the Secretary of Health and Human Services as required by OHSA).**
- **Compliance with a statute may not be sufficient to avoid spoliation sanctions if certain documents should be retained for longer periods of time in anticipation of litigation. See Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72 (S.D.N.Y. 1991) (holding that retention period mandated by statute was insufficient for discovery purposes because party was on notice of imminent litigation).**

ii. Prior Litigation

- Prior litigation may also create a duty to preserve certain types of electronic documents. This duty can arise in two ways.
- First, if allegations are made in a lawsuit that are potential causes of action for future litigation, a duty to preserve relevant documents arises in anticipation of subsequent litigation. See U.S. v. Koch Indus., Inc., 197 F.R.D. 463, 482 (N.D. Okla. 1998).
- Second, a duty to preserve documents may arise if a party knew that certain types of electronic documents were relevant to a claim because they had been involved in similar litigation in the past and were likely to be involved in that type of litigation again. See Stevenson v. Union Pacific, 354 F.3d 739, 747-48 (8th Cir. 2004).

Factors a Court Will Consider Before Imposing Spoliation Sanctions

iii. Anticipated Litigation

- **A duty to preserve electronic evidence arises at the time a lawsuit is anticipated.**
- **A leading case on the destruction of electronic evidence and the sanctions that follow is Zabulake v. UBS Warburg, LLC, 220 F.R.D. 212 (S.D.N.Y. 2003). In that case, UBS Warburg was sanctioned for the destruction of e-mail communications and e-mail back-up tapes after the company learned that a former employee "might" sue for gender discrimination. Zubulake, 220 F.R.D. at 217 ("The duty to preserve attached at the time that litigation was reasonably anticipated.").**

Factors a Court Will Consider Before Imposing Spoliation Sanctions

iv. After complaint is filed

- At the very latest, a party is on notice to preserve relevant electronic evidence after a complaint has been filed. See Zubalake, 220 F.R.D. at 216 (finding that a duty to preserve electronic evidence arose at the very latest, when the plaintiff filed a gender discrimination claim).

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Factors a Court Will Consider Before Imposing Spoliation Sanctions

B. Prejudice to the Requesting Party

- **After it has been shown that a duty to preserve electronic evidence arose prior to the destruction of evidence, a court will then examine the prejudice to the requesting party from the destruction. Zubulake, 220 F.R.D. at 220.**
- **This occurs simultaneously with an examination of the intent of the offending party; the next factor discussed below.**
- **This examination is a balancing test of sorts.**
- **The District of Colorado has stated, "[t]he factors of mental state and harm slide past each other in the wide variety of circumstances," and that the "two factors are intertwined." Gates Rubber Co. v. Bando Chem. Indus., Ltd., 167 F.R.D. 90, 102 (D. Colo. 1996).**

Factors a Court Will Consider Before Imposing Spoliation Sanctions

- **If the intent of the offending party is willful or intentional, the prejudice to the requesting party may be inferred from this bad faith conduct. Zubulake, 220 F.R.D. at 221. See also Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99, 109 (2d. Cir. 2002) ("When a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party.").**
- **If the intent of the offending party falls below willful destruction, including reckless or negligent spoliation of electronic documents, a party seeking sanctions must demonstrate that a reasonable trier of fact could find the missing electronic information supportive to their claim or defense. Id.**

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Factors a Court Will Consider Before Imposing Spoliation Sanctions

- **This examination, in large part, determines what sanction will be imposed. See Convolve, Inc. v. Compaq Computer Corp., 223 F.R.D. 162 (S.D.N.Y. 2004) (refusing to impose adverse jury instruction for destruction of e-mail communication because moving party could not demonstrate that negligently destroyed e-mails would have been beneficial to its case).**
- **The burden is on the aggrieved party to establish a reasonable possibility based on concrete evidence that access to the destroyed evidence would have been favorable to its case. Gates Rubber Co., 167 F.R.D. at 104.**

Factors a Court Will Consider Before Imposing Spoliation Sanctions

C. Intent of the Offending Party

- Intertwined with the prejudice factor is an examination of the intent of the offending party.
- A party's motive or degree of fault is relevant to what type of sanction will be imposed. Advantacare Health Partners v. Access IV, No. 03-04496, 2004 WL 1837997, at *4 (N.D. Cal. Aug. 17, 2004).
- When spoliation of evidence is caused by malicious intent, and has caused significant prejudice to the aggrieved party, severe sanctions are supportable. Gates Rubber Co., 167 F.R.D. at 102-03.

Factors a Court Will Consider Before Imposing Spoliation Sanctions

- More common are circumstances where a party negligently destroyed electronic documents that caused some prejudice to the aggrieved party. Jones v. Goodyear Tire and Rubber Co., 966 F.2d 220, 224 (7th Cir. 1992) (awarding default judgment for negligent destruction of key physical evidence).
- For dispositive sanctions, courts are in agreement that the offending party must have destroyed the electronic evidence as a result of willfulness or bad faith. Gates Rubber Co., 167 F.R.D. at 103 (citing Gocolay v. New Mexico Fed. Sav. & Loan Ass'n, 968 F.2d 1017, 1020 (10th Cir. 1992)).
- When electronic documents are destroyed in bad faith, a presumption arises that the documents would have been beneficial to the opposition, a conclusion that supports an adverse jury instruction or default judgment. Computer Assoc. Int'l, 133 F.R.D. at 169.

Factors a Court Will Consider Before Imposing Spoliation Sanctions

D. Availability and Efficacy of Less Severe Spoliation Sanctions

- **Before a court will impose spoliation sanctions, it will generally consider whether lesser sanctions will appropriately punish and deter the offending party and compensate the aggrieved party. Advantacare Health Partners, 2004 WL 1837997, at *4.**
- **Rejection of lesser sanctions is appropriate under two circumstances:**
  1) when no lesser sanction could both punish the offending party and deter other similarly tempted parties; or
  2) when the facts show that deceptive conduct has occurred and will likely continue. Computer Assoc. Int'l., 133 F.R.D. at 170. See Proctor & Gamble, 179 F.R.D. at (denying request for adverse inference sanction because monetary sanctions would effectively punish defendants).

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What Types of Sanctions Are Available?

- A court has several remedies it may impose as a result of the destruction of electronic evidence. Capallupo v. FMC Corp., 126 F.R.D. 545, 551-553 (D. Minn. 1989) ("Within the Court's grasp is a spectrum of sanctions from which the most appropriate may be selected.").
- The spectrum of available sanctions include: (1) default judgment; (2) adverse jury instruction; (3) monetary sanctions; and (4) liability under an independent tort of spoliation. Spoliation sanctions are imposed for three purposes: (1) deterrence; (2) punishment; and (3) compensation. Id.
- Courts have authority to impose sanctions pursuant to the Federal Rules of Civil Procedure (Fed. R. Civ. P. 16(f) and 37) as well as inherent authority to sanction a party for spoliation. Chambers v. NASCO, Inc., 501 U.S. 32, 50-51, 111 S.Ct. 2123 (1991).
- The imposition of sanctions is reviewed by an appellate court for an abuse of discretion. Residential Funding, 306 F.3d at 108.

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What Types of Sanctions Are Available?

A. Default Judgment

- There are three primary factors a court will consider before ordering a default judgment for spoliation of electronic evidence: (1) if the offending party acted willfully or in bad faith; (2) if the aggrieved party was significantly prejudiced by the spoliation; and (3) if alternative sanctions would fail to adequately punish the offending party and compensate the aggrieved party. Capellupo, 126 F.R.D. at 552.
- A sanction of default judgment is rarely used, and is reserved for the most egregious cases. Id. See, e.g., Kucala Enter., Ltd. v. Auto Wax Co., Inc., 56 Fed. R. Serv. 3d 487 (West) (N.D. Ill. 2003) (ordering dismissal of the case after computer forensic expert found that a computer program called "Evidence Eliminator" was used to delete twelve thousand files from its owner's computer a few hours before the defendant's computer specialist was to inspect the computer).

What Types of Sanctions Are Available?

B. Adverse Jury Instruction

- **Generally, a party seeking an adverse jury instruction based on the destruction of electronic evidence, must demonstrate: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the documents were destroyed with a 'culpable' state of mind; and (3) that the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. Byrnie v. Town of Cromwell, 243 F.3d 93, 107-12 (2d. Cir. 2001).**

What Types of Sanctions Are Available?

- **There is a split of authority on what the required 'culpable' state of mind is before an adverse jury instruction will be imposed. Compare Residential Funding Corp., 306 F.3d at 108 ("The sanction of an adverse inference [for claims of spoliation of electronic evidence] may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence.") with Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997) ("The adverse inference must be predicated on the bad faith of the party destroying the records.").**

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What Types of Sanctions Are Available?

- **While there is no clear trend in the courts regarding the degree of culpability that is required before an adverse jury instruction will be given, clients should be advised that mere negligent destruction of relevant documents *may* be sufficient to warrant this sanction.**

What Types of Sanctions Are Available?

C. Monetary Penalty

- **Monetary fines and penalties are often imposed against parties that fail to preserve relevant electronic documents.**
- **The trial court is given broad discretion to determine an appropriate fine to effectively punish the offending party and compensate the aggrieved party. Residential Funding Corp., 306 F.3d at 108.**
- **It is common to award costs and fees to the moving party in the amount necessary to research and pursue the spoliation claim, and it is not uncommon for the court to impose a fine sufficient to compensate it for the amount of time spent on the motion. See United States v. Philip Morris, USA, Inc., 327 F. Supp. 2d 21, 26 (D.D.C. 2004) (imposing monetary sanction of $2,750,000 for spoliation of e-mail communications, with the court noting that the defendant had identified eleven corporate managers who failed to comply with the document retention policy and the court imposed a fine of $250,000 for each individual identified).**

What Types of Sanctions Are Available?

D. Independent Spoliation Tort? The Next Wave?

- **Traditionally, courts view the problem of evidence spoliation as an evidentiary problem and not as a separate cause of action. Trevino v. Ortega, 969 S.W.2d 950, 952 (Tex. 1997).**
- **A small number of courts have, however, embraced an independent tort of intentional or negligent spoliation for the following reasons:**
  1) the independent tort action promotes the desire to protect testimonial candor and the integrity of the adversarial system;
  2) the tort protects the probable expectation of a favorable judgment or defense in future litigation; and
  3) the tort deters future spoliation because the traditional evidentiary remedies and sanctions are not effective enough or available to deter spoliation. Dowdle Butane Gas Co., Inc., v. Moore, 831 So. 2d 1124, 1130 (Miss. 2002).

What Types of Sanctions Are Available?

- **Spoliation of evidence claims have evolved into four independent torts: (1) intentional first-party spoliation; (2) negligent first-party spoliation; (3) intentional third-party spoliation; and (4) negligent third-party spoliation. See Robert L. Tucker, The Flexible Doctrine of Spoliation of Evidence: Cause of Action, Defense, Evidentiary Presumption and Discovery Sanction, 27 U. Tol. L. Rev. 67, 68-70 (1995).**
- **The majority of states have refused to adopt an independent tort for spoliation by a party to the litigation or a third party.**

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Other Individuals and Parties that are Subject to Spoliation Sanctions

A. Senior Management

- **Senior management has a specific obligation to preserve and to take affirmative steps to ensure electronic documents are retained. If senior management fails to perform this duty, they may be sanctioned by the court. See Danis v. USN Communications, Inc., No. 98-7482, 2000 WL 1694325, at *14 (N.D. Ill. Oct. 20, 2000) (imposing sanctions against the CEO of the defendant organization for failing to consult with outside law firm regarding a suitable document retention policy for a major securities lawsuit).**
- **Imposing sanctions against the company's senior management has become more widely accepted as courts have become more familiar with electronic documents and discovery.**
- **The justification is that senior management should be aware of pending or potential litigation and they are in the best position to notify employees of the duty to preserve all electronic evidence that may be potentially relevant to the claim.**

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Other Individuals and Parties that are Subject to Spoliation Sanctions

B. Counsel

- **The courts have imposed significant responsibilities on outside and in-house counsel to continually and actively ensure document retention compliance. Zubulake V, 2004 U.S. Dist. LEXIS 13574, at *7-8.**
- **In Zubulake V, the court described the duties and responsibilities of outside counsel to avoid spoliation sanctions. Id. at *8-9.**
- **First, counsel must issue a litigation hold to ensure all relevant documents are retained. Id. at *8.**
- **Second, counsel must communicate with "key players" to the litigation the importance of retaining all electronic documents. Id.**

Other Individuals and Parties that are Subject to Spoliation Sanctions

- Lastly, "counsel should instruct all employees to produce electronic copies of their relevant active files." Id. at 10. This includes making sure that all back-up media is identified and stored in a safe place. Id.
- Available sanctions against counsel include monetary fines, public or private reprimand by the court, or possible disbarment. See Metro. Opera Ass'n., Inc. v. Local 100, 212 F.R.D. 178, 222-223 (S.D.N.Y. 2003) (criticizing in-house and outside counsel for a variety of discovery abuses, including failing to give their client adequate instructions on document retention, failing to implement a document retention policy, and delegating retention responsibilities to an individual that did not understand that electronic documents include drafts, back-up copies, and e-mail communications).
- In-house counsel may also be sanctioned for their client's spoliation of electronic documents. See Danis, 2000 WL 1694325, at *14 (imposing sanction of $10,000 fine against corporation in part because in-house counsel failed to establish a meaningful document retention program).

Utah and the Tenth Circuit Cases

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Utah Generally

- One of the first reported cases of spoliation in Utah, Burns v. Cannondale Bicycle Co., 876 P.2d 415 (Utah Ct. App. 1994), deals with spoliation only tangentially.
- In Burns, the Utah Court of Appeals upheld a trial court's decision to decline to issue an adverse jury instruction due to spoliation of evidence because the party that destroyed the evidence was not on notice of any potential litigation. 876 P.2d at 419.
- Additionally, the court in Burns declined to recognize an independent tort of spoliation. Id.
- Similarly, in Cook Assoc's, Inc. v. PCS Sales, Inc., 271 F. Supp. 2d 1343 (D. Utah 2003), Judge Paul Cassell, interpreting Utah law, refused to impose sanctions for the negligent destruction of evidence because the party that destroyed the evidence was not on notice to retain it. 271 F. Supp. 2d at 1357.

Tenth Circuit Generally

- **In the Tenth Circuit, courts broadly consider five factors before imposing sanctions for spoliation. Ehrenhaus v. Reynolds, 965 F.2d 916, 921 (10th Cir. 1992).**
- **They include:**

1) the degree of actual prejudice to the requesting party;
2) the amount of interference with the judicial process;
3) the culpability of the litigant;
4) whether the court warned the party in advance that sanctions may be imposed for non-compliance; and
5) the efficacy of less severe spoliation sanctions. Id.

Tenth Circuit Generally

- The Ehrenhaus factors were originally used only for dispositive sanctions, however subsequent decisions have broadened the scope of the rule to include all discovery sanctions. See Gates Rubber Co. v. Bando Chemical Indus. Ltd., 167 F.R.D. 90, 102 (D. Colo. 1996) ("There is nothing in [Ehrenhaus] which suggests that the Court intended to restrict trial courts to a consideration of these factors in only those cases which involve dispositive sanctions.").
- Prior to December 12, 2006, Jordan F. Miller Corp. v. Mid-Continent Aircraft Service, Inc., an unpublished opinion from 1998, was the only case decided by the Tenth Circuit that addressed sanctions for spoliation beyond an adverse inference instruction. 1998 WL 68879, at *1-7 (10th Cir. Feb. 20, 1998).

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Tenth Circuit Generally

- **However, in 103 Investors I, L.P., v. Square D. Co., the Tenth Circuit briefly addressed spoliation sanctions holding that sanctions, other than an adverse inference instruction, could be imposed without a showing of bad faith. --- F.3d ---, 2006 WL 3598392, at *2 (10th Cir. Dec. 12, 2006). In that case, the court held:**

  [d]efendant was not required to show that plaintiff acted in bad faith in destroying the evidence in order to prevail on its request for spoliation sanctions. The district court found that plaintiff had a duty to preserve the evidence because it knew or should have known that litigation was imminent, and defendant was prejudiced by the destruction of the evidence because there was no substitute for a direct visual examination of the busway. The district court also imposed the least severe sanction that would be appropriate to balance out the prejudice to the defendant.

  Id. at * 3.

Tenth Circuit Generally

- **Similar to Ehrenhaus and the discussion above, the court considered the culpability of the offending party, the prejudice to the requesting party, whether the offending party had a duty to preserve the evidence, and the efficacy of less severe sanctions.**
- **Under 103 Investors, and similar to other circuits, the two factors of *intent* and *prejudice* have taken on particular importance in claims of spoliation. Id.**

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INTENT & BAD FAITH

- **Regarding intent, the Tenth Circuit still requires a showing of bad faith before an adverse jury instruction will be given. See Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997) ("The adverse inference must be predicated on the bad faith of the party destroying the records.").**
- **An adverse inference is appropriate when a party acts with a consciousness of a weak case. Workman v. AB Electrolux Corp., 2005 WL 1896246, at *7 (D. Kan. Aug. 8, 2005).**
- **However, the Tenth Circuit does not impose a similar requirement of bad faith when considering other sanctions for spoliation. 103 Investors, 2005 WL 3598392 at *3.**

PREJUDICE

- **Regarding prejudice, the Tenth Circuit mirrors other circuits and holds that, where the prejudice to the requesting party is substantial, serious sanctions may be appropriate. Id. at *3.**
- **The burden is on the aggrieved party to establish "a reasonable possibility, based on concrete evidence rather than a fertile imagination" that access to the destroyed material would have produced evidence favorable to its claim. Gates Rubber Co., 167 F.R.D. at 104.**
- **Recognizing that in many cases proving relevance is difficult because all traces of the evidence have been destroyed, the court acknowledged that, proving that the destroyed documents fall into a *category* of documents that are relevant to the claim, may be sufficient to establish the necessary prejudice to warrant dispositive sanctions. Id. See also Teletron v. Overhead Door Corp., 116 F.R.D. 107 (S.D. Fla. 1987) (awarding default judgment against defendants for destroying certain documents that fell into category of documents that were relevant to plaintiff's claim).**

Spoliation of Electronic Evidence: Recent Utah And 10th Circuit Cases

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Phillip M. Adams v. Gateway, Inc., Case No. 2:02-CV-106 TS:

- On March 6, 2006, the Honorable Judge Ted Stewart issued a Sealed Memorandum Decision And Order On De Novo Review Of Magistrate Judge's Reports And Recommendations And Imposing Sanctions, which has now been unsealed.
- The decision involved an appeal from two earlier Reports and Recommendations issued by the Honorable Magistrate Judge David Nuffer, which concluded that defendant Gateway, Inc. ("Gateway") had spoliated and failed to disclose evidence.
- The Magistrate's reports recommended sanctions, including that Gateway be prohibited from asserting the attorney-client or work product privilege, imposing negative inferences, awarding attorneys fees and costs, and issuing a warning that further missing evidence or tardy disclosure of evidence may result in entry of judgment against Gateway.

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- On *de novo* review, the district court found and concluded "that not only are the Reports and Recommendations correct in all respects, but the supplemental record presented to this Court since the Magistrate issued his recommendations confirms the necessity of severe, but not terminating, sanctions." Id. at 2.
- At issue on appeal to the district court was a March 29, 2005 Sealed Report and Recommendation on Adams' Motion for Judgment Based upon Gateway's Spoliation of Evidence.
- In that Report, the Magistrate considered a list of nine items of evidence formerly in Gateway's control that were missing.

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- The Magistrate found the loss of all nine to be prejudicial.
- The Magistrate also found that, of the nine, two were evidence that was clearly central to the case and their absence was not remediated or minimized by other evidence.
- The Magistrate found that there was no direct evidence that their loss was rooted in bad faith, but rather there was simply no explanation offered by Gateway for their loss.
- However, because of the potential for abuse, the Magistrate recommended that an adverse evidentiary inference be imposed concerning the missing evidence, that Gateway be warned that the loss of further evidence may result in terminating sanctions, and imposed attorneys' fees and costs.

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- **On appeal, the district court held that:**

  Gateway intentionally destroyed or lost the missing Ma to Woon e-mail. While the Magistrate did not go that far, this Court does. It is the only interpretation of the entire record of the discovery in this case that makes sense. It is true that there is no direct evidence of the bad faith destruction of the Ma to Woon e-mail, but neither is there any evidence that it was merely innocently or negligently lost. . . . There is however, ample circumstantial evidence of a bad faith spoliation. . . . the Court finds that it is clear that for years Gateway did everything it could to avoid producing complete copies of all of the relevant e-mails. There is no explanation of the reason that this crucial e-mail is missing. Based upon the entire record, this Court concludes that he explanation is that it was destroyed in bad faith by Gateway.

  Id. at 6-8.

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- **As a result, the district court agreed with and adopted the Magistrate's findings. The district court also held:**

  In addition, the Court adds its own findings that it is clear that the Ma to Woon e-mail would have been extremely relevant to this case and there is sufficient circumstantial evidence that (1) it was destroyed by Gateway during the time that Gateway had a duty to preserve it and to produce it in discovery; and (2) Gateway's conduct in destroying the evidence is in bad faith. These findings warrant imposition of an evidentiary inference that the missing e-mail would have been favorable to Adams.

  Id. at 8.

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- **The district court thus awarded Adams his attorneys' fees and costs, and upheld the evidentiary inferences.**
- **However, the district court did not impose a terminating sanction because:**
  - i. Gateway was not warned that such terminating sanctions could be imposed;
  - ii. the sanction of evidentiary inferences and imposition of attorneys' fees and costs is an appropriate remedy that is more tailored to the violation and less drastic than dismissal; and
  - iii. although the spoliation of evidence has made it more difficult and expensive for Adams to make his case, it has not destroyed his ability to do so, so long as there is an appropriate inference. Id. at 9.

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- With respect to a second magistrate report entitled Sealed Report and Recommendation Re: Gateway's Possession of Adams' Detector and Designation of Consulting Experts issued on March 29, 2005, the district court affirmed the Magistrate's report as well.
- In this second report, the Magistrate found that Gateway failed to comply with a specific order that it provide a complete accounting of the possession, use or transmittal of the detector file, the patented software at issue in the case, during the time of the alleged infringement.
- The Magistrate found that Gateway had improperly used a consulting expert designation and claims of privilege to hide non-privileged evidence.

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- **Based on this conduct, the Magistrate recommended making findings and drawing adverse inferences from Gateway's delayed production of evidence, and recommended an award of attorneys' fees and sanctions, the issuance of a warning that further conduct will result in entry of judgment, and an order prohibiting Gateway from asserting the attorney-client and attorney work product privileges as to Adams as it relates to the claims in the case.**
- **In reviewing the record, the district court stated that the information wrongfully withheld under the guise of privilege "was indeed stunning." Id. at 11. Reviewing the conduct of counsel in the case, the district court also held that:**

  > Gateway failed to comply with the discovery orders of this Court; that its failure to do so is in bad faith; and has prejudiced Adams. Not only has Adams been prejudiced by the delay of several years, there has been the unnecessary time and great expense caused by Gateway's improper use of privileges as well as the expenses necessary to resolve discovery on the detector issue.
  >
  > Id. at 15. The district court concluded that "Gateway has no one but 'itself to blame.'" Id. at 17.

Proctor & Gamble, et al. v. Randy L. Haugen, et al, Case No. 1:95-cv-00094-TS-PMW (D.C. No. 1:05-CV-94-K):

- On appeal to the Tenth Circuit, the Procter & Gamble Company and the Procter & Gamble Distributing Company (collectively, "P&G") challenged the district court's dismissal of a Lanham Act claim that the district court had granted on the grounds that (i) P&G failed to preserve and produce to defendants relevant electronic data; and (ii) P&G's expert testimony was inadmissible at trial.
- P&G's complaint filed in 1995 alleged that defendant Randy Haugen ("Haugen") disseminated a voice-mail message to thousands of Amway distributors, falsely stating that the president of P&G had recently appeared on television, announced that he was associated with the Church of Satan, and stated that a large portion of the profits from forty-three different P&G products were used to support the Church of Satan.

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- P&G alleged that it lost customers as a result of such statements.
- In its initial post-complaint efforts at assessing damages, P&G assigned one of its own employees, Steven McDonald, to analyze how much the Satanism rumors had impacted the sales and market share of the forty-three P&G products referred to in Haugen's voice-mail message.
- In his work, McDonald turned to electronic "market share information" that was available from a company called Information Resources Incorporated ("IRI").

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- Based on such informed, McDonald allegedly concluded that the IRI data available to him was inconclusive. Subsequently, P&G hired two expert witnesses, Dr. Robert Hall and Dr. Harvey Rosen, to investigate and testify regarding this issue.
- Both Hall and Rosen also turned to the IRI data to conduct their analyses.
- At issue in the case were discovery requests seeking production of the IRI data, and orders of the district court directing P&G to produce the IRI data.

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- Although defendants were provided with all IRI data used by Dr. Rosen in analyzing damages, defendants argued that they were entitled to all of the IRI data that P&G had access to during the course of the litigation, and that, due to P&G's alleged failure to preserve all such data, they were entitled to dismissal of P&G's claims for lost profits.
- In seeking spoliation sanctions against P&G, defendants argued that, beginning in 1995 or 1996, P&G should have preserved all of the IRI online data it had accessed, not just the data ultimately used by Rosen in his expert report.

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- **As a result, on August 19, 2003, the district court granted defendants' motion for sanctions and dismissed the case with prejudice for three reasons:**
  - i. Plaintiffs failed to preserve relevant electronic data that Plaintiffs knew was critical to their case and to the defense, and in so doing, violated four separate discovery orders;
  - ii. it would be impossible for Defendants to defend the case without the electronic data that was not preserved; and
  - iii. P&G's damages testimony and studies are not admissible under Rule 702 of the Federal Rules of Evidence and the *Daubert* line of cases.

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- **Relying on *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992), the Tenth Circuit Court of Appeals *reversed.***

  [W]e conclude in this case that the district court erred in imposing dismissal as a sanction for P&G's alleged misconduct. Not only did the district court fail to consider the *Ehrenhaus* factors on the record, our own independent review of the record on appeal suggests that several of the *Ehrenhaus* factors weight in favor of P&G, and that, in any event, the extreme sanction of dismissal was clearly inappropriate under the circumstances presented here.

  Id. at 24.

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- **The primary reason for the reversal was the district court's "failure to address on the record any of the *Ehnrenhaus* factors." Id.**
- ***Ehnrenhaus* requires district courts imposing dismissal as a sanction to evaluate the following factors on the record: (i) the degree of actual prejudice to the other party; (ii) the amount of interference with the judicial process; (iii) the culpability of the litigant; (iv) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (v) the efficacy of lesser sanctions. Id. at 20 (citing *Grip v. City of Enid*, 312 F.3d 1184, 1187 (10th Cir. 2002)(quoting *Ehrenhaus*, 965 F.2d at 921)).**

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- **The second reason for reversal was that the Tenth Circuit believed that the record did not indicate willful or bad faith behavior in terms of culpability.**
- **The Tenth Circuit was influenced by the fact that P&G did not own the IRI data, but instead had simply accessed the data from the owner and provider of that data, which data remained available in theory to defendants for a substantial fee. Id. at 25-28.**
- **The third reason for reversal was that the Tenth Circuit was not convinced that there was any prejudice to defendants because defendants did not make any showing of how such data could have been used to rebut Dr. Rosen's expert testimony.**
- **The Tenth Circuit thus concluded that genuine issues of material fact remained concerning whether defendants were in fact prejudiced by their lack of access to all IRI-related data. Id. at 28-30.**

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- **Finally, the Tenth Circuit noted that the district court did not give P&G a warning that it faced dismissal as a sanction, and it did not consider the efficacy of lesser sanctions as an alternative to dismissal.**

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Palmer v. Wal-Mart Stores, Inc., Civil No. 2:04 CV 0956 DAK:

- **On November 7, 2005, the Honorable Magistrate Judge Brook C. Wells issued an Order and Memorandum Decision in which the court was called on to evaluate the factors set forth *in Gripe v. City of Enid*, 312 F.3d 1184, 1187 (10th Cir. 2002)(quoting *Ehnrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992) before imposing dismissal as a sanction.**
- **In the Magistrate's order, the court determined as follows:**

> The court finds Palmer's counsel . . . was negligent in returning phone calls, simply failed to notify Wal-Mart's counsel that his client could not attend a scheduled deposition, failed to provide the requested relevant discovery, and acted with blatant indifference toward Wal-Mart's counsel . . . .
>
> Id. at 2.

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- **Based on these findings, the Magistrate granted Wal-Mart's motion to compel, its motion to expedite briefing, and its request for attorneys' fees and costs.**
- **Plaintiff's counsel was ordered to provide all discovery requested by Wal-Mart, to supply an affidavit to the court attesting that all such discovery has been provided to Wal-Mart, and to cooperate in scheduling any necessary depositions. The Magistrate also awarded attorneys' fees and costs, and held as follows:**

> Based on well established case law, the court hereby warns [Plaintiff's counsel] that failure to cooperate and abide by the court's orders may result in the dismissal of the instant action along with further sanctions. If [Plaintiff] does not wish to pursue the instant action or if [Plaintiff's counsel] cannot diligently prosecute this matter, then Plaintiff should voluntarily dismiss this action.
>
> Id. at 3.

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Recent Cases in Other Jurisdictions:

Morgan Stanley

- **Morgan Stanley was ordered to pay $1.57 billion for failing to identify and produce records from backup tapes in litigation with investor Ronald Perelman.**
- **Moran Stanley claimed it did not have e-mail records for a particular time period, then later said it had the records but it would cost hundreds of thousands of dollars and several months to locate them.**
- **This assertion turned out to be false, and the judge issued a default judgment designed to penalize the firm for concealing evidence. The award was overturned by an appeals court, but Perelman is appealing.**

Microsoft

- **Microsoft, sued by z4 Technologies for patent infringement, was ordered by a federal judge in Texas to pay enhanced damages of $25 million plus almost $2 million in attorney's fees for, among other things, failing to produce a key e-mail on a timely basis during discovery and failing to disclose the existence of a database.**

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Columbia Pictures

- In *Columbia Pictures Inc. v. Bunnell*, No. 2:06-cv-01093 (C.D. Cal. Dec. 13, 2007), the court imposed terminating sanctions and entered default judgment against defendants in a copyright case a result of defendants' willful spoliation of evidence.
- The court found that defendants had deleted and/or modified relevant TorrentSpy user forums postings, deleted directory headings that referenced copyrighted works, destroyed user IP addresses and withheld the identities and addresses of site moderators.
- The court concluded that defendants' misconduct had 'inalterably prejudiced" plaintiffs' ability to prove their case, and that terminating sanctions were the only effective recourse.

The Implications of Qualcomm:

- In *Qualcomm, Inc. v. Broadcom Corp*., 2008 U.S. Dist. LEXIS 911 (S.D. Cal. Jan. 7, 2008), San Diego Federal Magistrate Judge Barbara L. Major sanctioned Qualcomm for withholding "tens of thousands of e-mails" in a lawsuit it brought against Broadcom Corp. and ordered Qualcomm to pay Broadcom's legal bills, which total more than $8.568 million.
- Magistrate Judge Major also referred six of Qualcomm's outside attorneys, whom she described as "talented, well-educated and experienced," to the State Bar for discipline.
- In the final days of the trial, a Qualcomm engineer disclosed that key e-mails had not been turned over to the defense. After the trial, thousands more documents were discovered.

The Implications of Qualcomm:

- **Trial Judge Rudi Brewster found "clear and convincing evidence" of litigation misconduct and ordered Qualcomm to pay Broadcom's attorneys' fees. Indeed, after the trial, Qualcomm located more than 46,000 documents, totaling more than 300,000 pages, that had been requested but not produced in discovery.**
- **Although Qualcomm denied any wrongdoing, it replaced its general counsel.**
- **Magistrate Judge Major ordered 19 lawyers in the case to appear at an October 2007 hearing, where they submitted declarations and said that they did not intentionally withhold evidence.**

The Implications of Qualcomm:

- However, Qualcomm asserted the attorney-client privilege, in essence preventing them from defending themselves.
- Ultimately, Magistrate Judge Major referred six lawyers to the California state bar, and specified that the lawyers may have violated two Rules of Professional Conduct: Rule 5-200, which prohibits misleading a judge or jury with false statements, and Rule 5-220, which prohibits suppressing evidence that an attorney or client has a legal obligation to reveal.

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The Implications of Qualcomm:

- However, in an order dated March 5, 2008, Judge Rudi Brewster vacated Magistrate Barbara Major's sanctions order of January 8, 2008 as to the attorneys sanctioned, but not as to Qualcomm.
- Judge Brewster ordered a new trial for the six sanctioned lawyers, holding that their rights to due process had been violated because they were not allowed to testify as to what their client, Qualcomm, had said and done concerning the e-discovery issues underlying the sanctions motion.
- Judge Brewster held that the lawyers had a right to defend themselves in that proceeding, and not be silenced by the secrecy restraints of the attorney-client privilege.
- The Court held that "[t]he attorneys have a due process right to defend themselves under the totality of circumstances presented in this sanctions hearing where their alleged conduct regarding discovery is in conflict with that alleged by Qualcomm concerning performance of discovery responsibilities."

Best Practices:

i. Outside counsel should make sure that they have advised the client of the risks of a failure to disclose, and seek assurances from the client that full disclosure has occurred;

ii. Error in favor of production. The more you have to explain the rationale for a decision to withhold evidence, the less likely a court is going to find the decision justifiable.

iii. The more you don't want to produce a damaging document, the more important it is to produce the document (absent an applicable privilege).

iv. If the client refuses to do the right thing, be prepared to resign as counsel.

v. If a mistake is made, acknowledge the mistake, and do not hide it behind the attorney-client privilege.

Best Practices:

- **The single greatest protection against spoliation accusations and sanctions is for a company to implement a reasonable document retention policy prior to potential or imminent litigation.**
- **A document retention policy formalizes a company's protocol for retaining and destroying documents received or created during the normal course of business.**
- **Some documents, such as tax documents or workplace records governed by OSHA, must be retained for a specific period of time.**

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Best Practices:

- Most other workplace documents fall outside this mandate and may be destroyed or retained pursuant to a policy that is reasonably tailored to the company's needs. Setting a document retention policy however, is not sufficient to protect a company from claims of spoliation. The policy must be valid and consistently enforced.
- The Eighth Circuit has set out a reasonableness standard that many other courts have followed to determine if a company's retention policy is valid. Levy v. Remington Arms Co., 836 F.2d 1104 (8th Cir. 1988).
- The standard identifies three general issues to consider when determining if a document retention policy is reasonable. Levy, 836 F.2d at 1112.

Best Practices:

- **First, is the policy reasonable considering the facts and circumstances surrounding the relevant documents? Id.**
- **For example, a three-year document retention period may be sufficient for standard workplace documents, but may not be sufficient for other documents such as records of customer or employee complaints.**

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Best Practices:

- **Second, have similar lawsuits been filed in the past, thus putting the company on notice that certain types of documents are particularly relevant? Id. See Stevenson, 354 F.3d at 747-48 (imposing sanctions against Union Pacific for failing to preserve voice recordings following train collision from the train crew to dispatch pursuant to a valid document destruction policy because Union Pacific knew, based on previous litigation, that voice tapes were particularly relevant in train collision litigation).**

Best Practices:

- **Third, was the document retention policy instituted in bad faith? Levy, 836 F.2d at 1112.**
- **For example, a document destruction policy that was not enforced prior to litigation, but was strictly enforced after the company was on notice of potential or imminent litigation is likely to be found to be instituted in bad faith.**
- **To avoid claims of spoliation, the company and its counsel must be educated on the document retention policy in place, the types of documents that are created and later destroyed, and on the potential claims that may arise and create an affirmative duty to preserve certain electronic documents irrespective of the retention policy in place.**

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Best Practices

Below are a list of recommendations and policies for the company and its counsel to adopt to avoid future claims of spoliation and unnecessary liability due to the negligent destruction of relevant documents.

Guidelines for Client

- First, the company should develop and consistently follow a pre-litigation document retention policy.
- The company, including senior management, should know what types of documents are being created, where the documents are stored and organized, and how long the company must keep the documents to comply with applicable state and federal statutes.
- This policy must include electronic documents, including the types discussed above.
- Also, the retained documents and back-up systems should be easily searchable to allow for cost effective retrieval of retained documents.
- The document destruction policy must single out e-mail communications because they are currently the most sought after, and frequently the most damaging electronic document.
- A e-mail destruction policy should include an automatic destruction of deleted e-mails at the conclusion of the business day or week, and must include a litigation hold procedure that can be quickly implemented to preserve potentially relevant e-mail communications.

Guidelines for Client

- **Second, the company's technology department must be involved in the creation and enforcement of the policy.**
- **Technology departments are often responsible for preserving lost documents or corrupt systems and may not realize the implications and potentially severe consequences for retaining documents beyond the time necessary to perform this task.**

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Guidelines for Client

- **Third, there must be clear accountability for the policy. Lower-level employees must be educated about document creation and deletion and held accountable for failing to follow the established policy.**
- **Moreover, it is important to designate one individual or team as being responsible for enforcement of the policy. This individual or group must be educated on the possible sanctions that may result from a lack of enforcement.**

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Guidelines for Client

- **Fourth, all employees must be educated about general electronic communication.**
- **Many commentators have stated that before an email is sent, an employee should be trained to ask themselves what a jury would think about the content or language of the e-mail. In addition, employees should be educated about the false sense of security that exists when a document is 'deleted.'**

Guidelines for Client

- **Fifth, the policy must include a litigation hold procedure that all employees are familiar with.**
- **This procedure must be enacted quickly to ensure that potentially relevant documents are not destroyed during the normal course of document destruction, as courts have become increasingly intolerant of even negligent destruction of electronic documents.**

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Guidelines for Client

- **Lastly, periodic audits should be performed to ensure that the policy is consistent with the types of documents being created, the technologies being used, and the claims made by or against the company.**

Guidelines for Counsel

- **First, outside counsel must educate themselves about their client's document production and retention programs.**
- **This includes understanding how documents are preserved and for what reason, what types of documents are created by the company, what back-up systems are in place for retrieval and disaster recovery, and the types of claims the company has been involved with in the past to understand what types of documents were, and may again, be relevant.**

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Guidelines for Counsel

- **Second, the attorney must inform the client immediately if a discovery order, preservation request, or complaint is received to ensure that a litigation hold is placed on all potentially relevant electronic documents.**
- **Attorneys have been sanctioned for spoliation for not diligently informing, and continually monitoring their client to preserve electronic documents.**

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Guidelines for Counsel

- **Third, attorneys seeking preservation and disclosure of electronic documents should immediately send a preservation request to opposing counsel to ensure that potentially relevant electronic documents are not destroyed in accordance with a regular document destruction policy.**

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Guidelines for Counsel

- **Fourth, entering into an agreement with opposing counsel that privilege will not be waived if a privileged document is inadvertently disclosed should be considered, given the scope and volume of electronic documents that are potentially relevant to a claim.**

Guidelines for Counsel

- Lastly, an attorney should keep a written log of electronic document requests, conversations with the client about preserving all potentially relevant electronic documents, and conversations with opposing counsel about electronic documents.
- This log will be an attorney's protection against a claim that they failed to adequately inform their client to preserve electronic documents, and can be used as support for a discovery order or sanctions against a party accused of destroying potentially relevant documents.
- An attorney may be sanctioned for their client's spoliation of electronic documents.
- To avoid a sanction, an attorney must be diligent and persistent in notifying the client to preserve all forms of electronic documents that may be potentially relevant to a claim.
- Learning and staying abreast of changing technologies and document preparation and retention will provide the advantage of being better able to request and discover relevant electronic evidence from the opposition than a less-informed attorney.