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Deleting Company Emails and Spoliation Concerns

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Emails are quickly replacing phone conversations and printed correspondence as the primary communications medium in business. Therefore, emails are also becoming relevant and admissible evidence in a wide array of civil disputes. But, when is there a duty to protect or preserve these documents? The doctrine of *spoliation* permits the imposition of sanctions for the destruction of evidence in litigation and "is based on the premise that a party who has negligently or intentionally lost or destroyed evidence known to be relevant for an upcoming legal proceeding should be held accountable for any unfair prejudice that results." Keene v. Brigham and Women's Hosp., Inc., 439 Mass. 223, 234 (2003). Explicitly not a tort cause of action, but available by motion, Massachusetts law allows a trial judge broad discretion in fashioning the appropriate remedy for spoliation. See Fletcher v. Dorchester Mutual Ins. Co., 437 Mass. 544 (2002).

When Does A Duty Attach?

An issue the court addressed was under what circumstances a person is charged with a *duty* to preserve evidence. Fletcher, 437 Mass. at 548. From the outset, the court noted that persons who are not a party to litigation would not have a duty to preserve evidence. Id. Non-parties to litigation who have evidence relevant to litigation may not be held accountable for spoliation unless and until some event occurs to instill a duty, such as a subpoena or an agreement. Id. at 548-49. The duty begins once a subpoena is served or an agreement is entered into, no earlier. Id. at 549. However, when a person is involved in litigation, or "know that they likely will be involved," a duty to preserve evidence attaches. Fletcher, 437 Mass. at 550. This will apply to a party's expert as well. Id. "Once 'a litigant or its experts knows or reasonably should know that the evidence might be relevant to a possible action," the duty to preserve evidence attaches at that point. Id.,

citing Kippehan v. Chaulk, Serve., Inc., 428 Mass. 124, 127 (1998). This duty in anticipation for litigation is of particular concern to small business owners.

Repercussions for Spoliation?

Permissible remedies for spoliation include exclusion of evidence that would unfairly prejudice the non-spoliating party, admission of evidence regarding the spoliation itself, a jury instruction regarding inferences that may be drawn from spoliation, and, in the most egregious situations, default judgment against the spoliator. Gath v. M/A-COM, Inc., 440 Mass. 482, 488 (2003). Sanctions must be tailored to remedy the precise unfairness and punish only the party responsible for the spoliation. Id. at 550-51. As an example, the court noted that if an expert is basing his testimony from destroyed evidence, that testimony will be excluded as far as it is based on the destroyed evidence. Id. at 550. This will leave no benefit to the spoliator and be narrowly tailored to the prejudice suffered.

In Wiedmann v. The Bradford Group, Inc., 444 Mass. 698 (2005), acting *sua sponte*, the Supreme Judicial Court ("SJC") upheld spoliation sanctions awarded by the Superior Court. The plaintiff in Wiedmann sued her former employer over the calculation of commission wages pursuant to an oral employment agreement. Id. at 699. After knowing that the plaintiff had an actionable claim, the defendant destroyed records regarding payments to the plaintiff. The employer's practice was to keep such records. The plaintiff motioned for spoliation sanctions, and her motion was granted. Id. The tailored sanctions precluded the defendant from opposing the plaintiff's calculation of commission wages unless the defendant could provide supporting evidence; this also precluded the admission of oral testimony. Id. at 704-05. The defendant, unable to mount a defense based on the spoliation sanctions, lost the case on summary judgment because the destroyed documents were necessary for its defense. Id. at 705.

The SJC upheld the sanctions and began its decision by noting that the trial judge is allowed an inference that the destroyed evidence is behooving to the non-spoliator's case. Wiedmann, 444 Mass. at 706.

The spoliation rule can apply and impose a more serious result in cases where the evidence is destroyed intentionally, or in bad faith. For example, In Keene v. Brigham and

Women's Hosp., Inc., 439 Mass. 223 (2003), the plaintiff sued the defendant hospital for medical malpractice stemming from care of the plaintiff's new born infant. After the hospital was on notice of the plaintiff's claim, certain critical medical records of the infant were no longer available and could not be found. Id. at 229. The plaintiff moved for default judgment and to strike the hospital's charitable organization damages cap as the appropriate sanction. The trial court judge granted the motion. Id. at 232.

The court immediately pointed out that spoliation is the appropriate way to handle the loss of the hospital's medical records after it knew it there was a possibility for a claim by plaintiffs; and that there was a statutory duty to keep and maintain the lost records, similar to Wiedmann. Id. at 234-35. The SJC did note that default judgment is an extraordinary sanction, only to be employed in rare circumstances where there is bad faith, id. at 235-36, but that the lost medical records were the only way the plaintiff's would be able to prove their claim. Id. at 237. Although the spoliation did result in default judgment, the SJC did reverse the strike of the damages cap because it was against the mandate of the legislature and not tailored to cure the prejudice caused by the spoliation. This resulted in an award of $20,000 plus costs and interest for the plaintiffs. Id. at 242 (The amount of liability for a charitable organization is statutorily capped at $20,000 under G.L. c. 231, §85K).

As with most developing legal issues, electronic mail as evidence is still evolving without any clear answers. It certainly does appear that if you anticipate that your past email correspondence may be relevant evidence, a duty to preserve those messages may have already attached. Generally, therefore, it is inadvisable to delete those emails if there is any reasonable anticipation of a dispute concerning the conversations. The best advice, as always, is to contact your attorney, or your company's General Counsel and formulate an electronic mail policy.

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