VOL. 67/NO. 3 • October 2018

Virginia Lawyer

VIRGINIA LAWYER REGISTER

The Official Publication of the Virginia State Bar

The Litigation Issue

Sanctions for ESI Spoliation

Animal Bites on the Job

Avoiding Waiver in Unanticipated Rulings

A Tale of Two Litigators

Spoliation under Fed. R. Civ. P. 37(e):
What a Party Must Prove to Obtain Sanctions for Failure to Preserve ESI

by Kristan B. Burch

Spoliation refers to "the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."[1]

A party seeking a spoliation sanction in Virginia federal courts must establish the following elements in order to be entitled to relief:

1. The party having control over the evidence had an obligation to preserve it when it was destroyed or altered;
2. The destruction or loss was accompanied by a "culpable state of mind"; and,
3. The evidence that was destroyed or altered was "relevant" to the claims or defenses of the party that sought the discovery.[2]

Courts derive their "power to sanction a party for spoliation" from the Federal Rules of Civil Procedure and "the court's 'inherent power to control the judicial process and litigation.'"[3] When evidence is destroyed, altered, or not preserved, a district court "may use its inherent power to control the judicial process to determine an appropriate sanction to the extent necessary to redress conduct which disrupts the judicial process."[4] "The policy underlying this inherent power of the courts is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth."

Courts have "broad discretion to choose the appropriate sanction" for spoliation.[6] Sanctions available to a district court include judgment by default, preclusion of evidence, an adverse interference instruction, a monetary fine, and/or an assessment of attorney's fees and costs.[7]

On December 1, 2015, Rule 37(e) of the Federal Rules of Civil Procedure, which addresses failure to preserve electronically

stored information ("ESI"), was amended. The Advisory Committee Notes state that revised Rule 37(e) "authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures."

Rule 37(e) states that "[i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it," the court "upon finding prejudice to another party from loss of the information, may order measures…necessary to cure the prejudice."[8] Additionally, if the court finds "that the party acted with the intent to deprive another party of the information's use in the litigation," the court may "(A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment."[9]

Element 1: Obligation to Preserve

A party has a duty to preserve material evidence not only during litigation but also during "that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation."[10] Further, it is "'an objective standard, asking not whether the party in fact reasonably foresaw litigation, but whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation.'"[11] The duty to preserve may be imputed in order to avoid unfair prejudice.[12]

Element 2: Destruction or Loss Accompanied by a "Culpable State of Mind"

In order to impose sanctions for spoliation, the court must find "some degree of fault."[13] The Court of Appeals for the Fourth Circuit ("Fourth Circuit") has instructed that bad faith is not "an essential element of the spoliation rule."[14] Instead, "any level of fault, or culpable conduct" is sufficient "for a finding of spoliation," meaning conduct which is "merely negligent may serve as the basis for a finding of spoliation."[15]

The Fourth Circuit has held that "[e]ven the mere failure, without more, to produce evidence that naturally would have elucidated a fact at issue permits an inference that 'the party fears [to produce the evidence]; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party.'"[16]

Element 3: Relevance of the Evidence Destroyed or Altered to the Claims or Defenses

"To draw an adverse inference from the absence, loss or destruction of evidence, it would have to appear that the evidence would have been relevant to an issue at trial and otherwise would naturally have been introduced into evidence."[17]

Intent to Deprive under Rule 37(e)(2)

Based on the amendment to Rule 37(e) effective December 1, 2015, a court can use the "specified and very severe measures" outlined in Rule 37(e)(2) "only on finding that the party that lost the information acted with the intent to deprive another party of the information's use in the litigation."[18] Revised Rule 37(e)(2) "rejects cases…that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence" and instead limits the "most severe measures to instances of intentional loss or destruction."[19] This means that in order to enter a default judgment, dismiss an action, or give an adverse inference jury instruction, the moving party must show that the other party acted with an intent to deprive the moving party of use of the information in litigation.[20]

Rule 37(e) states that "[i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it," the court "upon finding prejudice to another party from loss of the information, may order measures…necessary to cure the prejudice."

The case law recognizes that the amendment to Rule 37(e) in 2015 creates a "heightened evidentiary rule" which was not re-

quired under the earlier version of the rule.[21] This conclusion is based upon the fact that the "intent to deprive" standard is "tantamount to a finding of bad faith spoliation."[22]

What is less clear over two and a half years after this amendment is the "level of intent" required under Rule 37(e)(2).[23] Can intent be proven by circumstantial evidence? Or must there be direct evidence to establish intent to deceive? The Fourth Circuit has not yet provided guidance on this issue.[24]

To date, Virginia district courts have been reluctant to impose the more severe sanctions under Rule 37(e)(2) such as dismissal or entry of default judgment.

To date, Virginia district courts have been reluctant to impose the more severe sanctions under Rule 37(e)(2) such as dismissal or entry of default judgment. In a 2016 case in which intentionality was found, the court addressed the issue through a jury instruction which "alerted the jury to the fact of spoliation, identified the missing evidence, and permitted them to consider that fact in their deliberations."[25]

Conclusion

Obtaining sanctions under Rule 37(e) is challenging based upon the level of proof required. Proving spoliation of ESI requires a threshold finding that the ESI at issue should have been preserved in the anticipation or conduct of litigation, was lost, and cannot be restored or replaced because a party failed to take reasonable steps to preserve the ESI. If the moving party can prove prejudice, the court can order measures to cure the prejudice. If the moving party can prove that the other party acted with an intent to deprive, the court can award more severe sanctions such as dismissal, entry of default judgment, or issuance to the jury of adverse inference instructions. The Virginia federal district court decisions issued since revised Rule 37(e) was adopted in December 2015 confirm that it is difficult to prove intent to deprive and even more difficult to obtain a dismissal or entry of default judgment as a sanction for spoliation.

Kristan B. Burch is a partner in the Litigation Section at Kaufman & Canoles, P.C. in Norfolk, Virginia where she focuses on construction law and intellectual property. Kristan served two terms as the chair of the Litigation Section of the Virginia State Bar and previously served as chair of the Construction and Public Contracts Law Section and the Intellectual Property Section of the Virginia State Bar. Special thanks to Luke Bresnahan and Alicia Penn who completed research used in writing this article.

Endnotes:

1 *Silvestri v. GMC*, 271 F.3d 583, 590 (4th Cir. 2001) (citations omitted).

2 *Federico v. Lincoln Military Hous., LLC*, Case No. 2:12-cv-80, 2014 U.S. Dist. LEXIS 178943, at *18 (E.D. Va. Dec. 31, 2014) (Miller, J.); *see also Buckley v. Mukasey*, 538 F.3d 306, 322 (4th Cir. 2008); *Walker v. Owens*, Civil Action No. 7:13cv00425, 2016 U.S. Dist. LEXIS 8727, at *8 (W.D. Va. Jan. 26, 2016) (Moon, J.).

3 *Jenkins v. Woody*, No. 3:15cv355, 2017 U.S. Dist. LEXIS 9581, at *30 (E.D. Va. Jan. 21, 2017) (quoting *Silvestri v. GMC*, 271 F.3d 583, 590 (4th Cir. 2001)).

4 *Kettler Int'l, Inc. v. Starbucks Corp.*, 81 F. Supp. 3d 495, 500 (E.D. Va. 2015) (Morgan, J.). (citations omitted).

5 *Silvestri*, 271 F.3d at 590.

6 *Id.*

7 *Kettler*, 81 F. Supp. 3d at 500; BMG Rights Mgmt. (US) *LLC v. Cox Commc'ns, Inc.*, 199 F. Supp. 3d 958, 986 (E.D. Va. 2016) ("Spoliation instructions can take many forms and range in degree of severity. The Court is satisfied the instruction given alerted the jury to the fact of spoliation, identified the missing evidence, and permitted them to consider that fact in their deliberations."), aff'd in part, rev'd in part, 881 F.3d 293 (4th Cir. 2018).

8 Fed. R. Civ. P. 37(e)(1).

9 *Id.*; BMG Rights Mgmt., 199 F. Supp. 3d at 986 ("Dismissal is reserved for only the most egregious circumstances.")

10 *Silvestri*, 271 F.3d at 591 (citations omitted); Wall v. Mefford, No. 7:16cv00305, 2018 U.S. Dist. LEXIS 73717, at *7 (W.D. Va. May 2, 2018) ("the evidence does not support a finding that the defendants or their co-workers should have known to preserve the recording before deleting it").

11 *Jorgensen v. United Commc'ns Group Ltd. P'ship*, No. 8:10-cv-00429-AW, 2013 U.S. Dist. LEXIS 56201, at *10 (D. Md. Apr. 19, 2013) (quoting *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011)).

12 *Muhammad v. Mathena*, No. 7:14CV00529, 2017 U.S. Dist. LEXIS 11734, at *7, 11 (W.D. Va. Jan. 27, 2017) ("[A]lthough the defendants to [the claim]

personally committed no misconduct related to the failure to retain the desired footage, imputation to these defendants of other officials' negligent spoliation [was] necessary to avoid unfair prejudice to" the defendant). *See also Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, n.16 (D.Md. 2009) ("A party may be held responsible for the spoliation of relevant evidence done by its agents. Thus, agency law is directly applicable to a spoliation motion, and the level of culpability of the agent can be imputed to the master.") (citations omitted).

13 *Silvestri*, 271 F.3d at 590.

14 *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995).

15 *Francis v. Woody*, Civil Action No. 3:09cv235, 2011 U.S. Dist. LEXIS 74269, at *25 (E.D. Va. July 10, 2011) (Payne, J.) (quoting *E.I. du Pont de Nemours and Co. v. Kolon Indus., Inc.*, 2011 U.S. Dist. LEXIS 45888, at *10 (E.D. Va. 2011)), aff'd, 450 F. App'x 303 (4th Cir. 2011).

16 *Vodusek*, 71 F.3d at 156 (citing 2 Wigmore on Evidence, § 285 at 192 (Chadbourn rev. 1979)).

17 *Id*.

18 Fed. R. Civ. P. 37 Advisory Committee Notes (2015).

19 *Id*.

20 *Raynor v. Pugh*, No. 1:13cv1117, 2016 U.S. Dist. LEXIS 187186, at *19 (E.D. Va. Nov. 7, 2014).

21 *Id*., 2016 U.S. Dist. LEXIS 187186, at *25; *Linlor v. Polson*, No. 1:17cv0013, 2017 U.S. Dist. LEXIS 216708, at *5 (E.D. Va. Dec. 6, 2017) ("The relief sought in this motion (either a default judgment or instruction to the jury) would require a showing that the defendant acted with the intent to deprive the plaintiff of use of the information in the litigation.")

22 Raynor, 2016 U.S. Dist. LEXIS 187186, at *25; Jenkins, 2017 U.S. Dist. LEXIS 9581, at *44 ("While some aspects of this record give the Court significant pause, the Court is unable to find that Sheriff Woody had the requisite intent to deprive Ms. Jenkins of use of this information at issue in litigation.").

23 *Steves & Sons, Inc. v. Jeld-Wen, Inc.*, No. 3:16-cv-545, 2018 U.S. Dist. LEXIS 74460, at *29 (E.D. Va. May 1, 2018).

24 Jenkins, 2017 U.S. Dist. LEXIS 9581, at *43 ("The standard for proving intent under the rule is not settled.")

25 BMG Rights Mgmt., 199 F. Supp. 3d at 986.