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Spoliation Ethics: The Intersection of "Litigation Holds" and Destruction of Evidence

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Spoliation is defined as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2nd Cir. 1999) (citing Black's Law Dictionary). Neither spoliation nor sanctions for it are new. The Second Circuit in *West* noted that "[i]t has long been the rule that spoliators should not benefit from their wrongdoing, as illustrated by 'that favourite maxim of the law, *omnia presumuntur contra spoliatorem*.' 1 Sir T. Willes Chitty, et al., Smith's Leading Cases 404 (13th ed. 1929)." ("Let all be presumed against a spoiler of evidence.") *Id*. This column discusses two emerging facets of spoliation law. *First*, it notes how the growing role of lawyers (both internal and outside counsel) in managing the preservation of electronic evidence has also increasingly put lawyers at the center of spoliation charges. *Second*, it examines lawyers' duties for preserving evidence under the professional rules and how those duties may shape the development of both liability and sanctions for spoliation now that corporate information is largely stored in electronic form.

The Role of Lawyers in Preserving Evidence

In the past, spoliation cases often involved destruction of physical evidence such as a tire changing machine (*West*) or vehicle (*Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001)). In recent years, however, spoliation cases have more frequently focused on the destruction of electronic evidence, such as email or other electronic documents. *See Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (discussing spoliation in the electronic context); *accord In re Napster, Inc. Copyright Litigation*, 462 F.Supp.2d 1060 (N.D. Cal. 2006) (same).

As spoliation has more often involved electronic evidence, the role of lawyers has also moved to center stage. Unlike *West* and *Silvestri*, where plaintiffs in product liability cases themselves failed to preserve key physical evidence, internal and outside counsel now often play critical roles in instituting (or failing to institute) effective "litigation holds" to preserve email and other key electronic evidence. *See, e.g., Ed Schmidt Pontiac-GMC Truck, Inc. v. Chrysler Motors Co.*, LLC, 575 F.Supp.2d 837 (N.D. Ohio 2008) (examining whether internal counsel had instituted an effective litigation hold); *In re NTL, Inc., Securities Litigation*, 244 F.R.D. 179 (S.D.N.Y. 2007) (same).

The early and intimate role of lawyers today in preserving electronic evidence has a very practical impact on spoliation issues. Traditionally, spoliation has had a relatively high threshold because it is typically defined as the

"willful" destruction of evidence. By contrast, the duty to preserve evidence has had a relatively low threshold because it is typically triggered when a party has notice of pending or probable litigation. With corporate counsel closely involved in managing both litigation and resulting holds, as a practical matter the accent today can rest more heavily on the "duty" element than the "willful" element—in effect, making any subsequent destruction of evidence (whatever the reason) *look* "willful" in light of the duty to preserve evidence.

Lawyers' Duties and Their Influence in Spoliation Analysis

Courts have occasionally mentioned potential bar discipline when discussing spoliation remedies. *See, e.g.*, *Rizzuto v. Davidson Ladders, Inc.*, 905 A.2d 1165, 1177 (Conn. 2006); *Gribben v. Wal-Mart Stores, Inc.*, 824 N.E.2d 349, 351 (Ind. 2005); *Dowdle Butane Gas Co. v. Moore*, 831 So.2d 1124, 1127 (Miss. 2002). With the growing role lawyers play in determining when and how to implement litigation holds, however, the professional rules are more likely to have practical influence in highlighting the lawyers' duty to preserve evidence.

Two rules in particular come into play. The first is ABA Model Rule 3.4(a), which specifically prohibits lawyers from unlawfully altering or destroying evidence or from assisting other persons from doing so. The second is ABA Model Rule 8.4(d), which prohibits lawyers from engaging in conduct that is prejudicial to the administration of justice. Both have been cited in the cases noted that discuss spoliation remedies as including bar discipline. The ABA

Model Rules have now been adopted in most jurisdictions and, even in those that have not yet done so, the precepts involved reflect fundamental duties that lawyers have to the legal system. *See* Restatement (Third) of the Law Governing Lawyers § 118(2) (2000).

Lawyers' increasingly central role in the preservation of evidence may also play an increasingly central role in sanctions for spoliation. Spoliation remedies can range from dismissal to adverse inferences to, depending on state tort law, independent claims. Courts are usually accorded significant discretion in tailoring remedies for spoliation to the particular circumstances involved. The greater the sanction usually follows the greater the culpability. Lawyers' fundamental professional duties as reflected in Model Rules 3.4(a) and 8.4(d) may prove influential in assessing sanctions as judicial review focuses on lawyers' decisions on when and how to preserve key electronic evidence.

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