Presented:
35th Annual Conference on Securities Regulation and Business Law

February 7-8, 2013
Austin, Texas

Justice or a Game of "Gotcha"? Emerging Standards Concerning Preservation (and Spoliation) of Electronically Stored Information

Roger B. Greenberg
Zach Wolfe
Jason P. Sharp

Schwartz, Junell, Greenberg & Oathout, LLP

Author contact information:

Roger B. Greenberg (rgreenberg@sjgolaw.com)
Zach Wolfe (zwolfe@sjgolaw.com)
Jason P. Sharp (jsharp@sjgolaw.com)
Schwartz, Junell, Greenberg & Oathout, LLP
909 Fannin, Suite 2700
Houston, Texas 77010
713-752-0017

TABLE OF CONTENTS

I. Introduction

Let's say you are the general counsel to a mid-size technology company with about a hundred employees. Your CEO attends a meeting with one of your biggest shareholders. The shareholder says he was misled by financial information he was provided in connection with buying stock in the company six months earlier. He says he never would have invested if he had been given an accurate picture of the company's finances. He demands that the company buy back his stock at the purchase price, but your CEO says the company didn't mislead anybody and won't do it. The investor says he strongly disagrees and storms out of the meeting.

The CEO comes to you and asks what the company needs to do. While you think about the cost of hiring outside counsel to defend a lawsuit, you remember reading an article saying that disputes over spoliation of evidence, especially electronically stored information (ESI), are becoming increasingly common in litigation. If you are lucky, your head is filled with questions. At this point, is it reasonable for your company to expect a lawsuit? Do you need to issue a litigation hold to the company's employees? If so, which employees should get the litigation hold? Does the litigation hold need to include emails and other documents that the employees have on their computers? If you are not so lucky, these questions don't even occur to you.

And that is just the beginning. If you decide to issue a litigation hold, what will it require, and how much will it cost? Let's say your company has an IT "department" consisting of two employees. The company keeps computer backup tapes for disaster recovery and recycles the tapes every 90 days. You also have a computer system that does not allow emails to be saved for more than 60 days, and a voice mail system that will delete a voice mail if it is over 30 days old unless an employee specifically archives it. What issues do these systems raise?

Is it enough to tell employees not to delete relevant documents on their computers? Do you need to preserve all the backup tapes? Do you need to change the email system to allow emails to be saved for a longer time? Do you need to archive all voice mails? Let's say most of your employees do their work on laptop computers that they take home and on trips. Most of them send and receive business emails on their smartphones and tablets. Do you need to physically gather the laptops? Do you need to hire an outside company to make a forensic mirror image of each employee's laptop? What about the smartphones and tablets?

These are the kinds of questions lawyers must be prepared to address in this age of electronic discovery and the threat of sanctions for spoliation of evidence. Unfortunately, the law on preservation of ESI does not provide easy answers to all of these questions. Even aside from the difficulty of answering these questions, some lawyers don't know enough to ask the questions.

But the scope of the legal duty to preserve ESI is not a complete mystery. For

about a decade now, courts across the country have been addressing the difficult issues that arise from applying the duty to preserve evidence to ESI. While many questions remain unanswered, the case law reflects identifiable trends and valuable lessons that both in-house lawyers and outside counsel need to know about, and in many cases lawyers will be a step ahead just by knowing the right questions to ask.

II. Law on Spoliation Generally

Of course, spoliation of evidence is not a new concept. The word "spoliation," from the Latin root *spoliatio*, originally meant the act of plundering, but it was later used in the law to mean alteration or destruction of a document. The Texas Supreme Court addressed spoliation of evidence as early as 1890, when it held that a jury could infer that evidence altered or destroyed by a creditor would have been favorable to the debtor if it had been preserved. *Curtis & Co. Mfg v. Douglass*, 15 S.W. 154, 155 (Tex. 1890).

Even at that time, presuming that spoliated evidence would have been adverse to the spoliator was a longstanding principle in the common law. As far back as 1617, English courts had applied the doctrine of *omnia praesumuntur contra spoliatorem*: all things are presumed against a despoiler. *See Rex v. Arundel*, 80 Eng. Rep. 258 (K.B. 1617).

Thus, courts today are not writing on a blank slate when they address spoliation of ESI. The basic concept of drawing an adverse inference from the spoliation of evidence has been developing for a long time.[1] Understanding the legal standards that govern spoliation generally is the first step in analyzing spoliation of ESI.

To determine whether spoliation sanctions are warranted, the court must consider whether the accused party had a duty to preserve the evidence, whether the accused party negligently or intentionally spoliated evidence, and whether the spoliation prejudiced the other party's ability to present its case or defense. *Offshore Pipelines, Inc. v. Schooley*, 984 S.W.2d 654, 666 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (citing *Trevino v. Ortega*, 969 S.W.2d 950, 954-55 (Tex. 1998) (Baker, J., concurring)).[2]

Thus, there are five major legal issues that typically arise in a spoliation dispute: (1) whether there was a duty to preserve evidence at the time when it was lost or altered; (2) the scope of the duty and whether it was breached; (3) whether the spoliator acted with a culpable mental state; (4) what evidence is sufficient to show prejudice to the non-spoliating party; and (5) whether an adverse inference instruction to the jury is the appropriate sanction.

A. Duty to Preserve

There is a common law duty to preserve evidence that arises "when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim."

[1] In some states, but not Texas, spoliation of evidence is also an independent cause of action. *See Trevino v. Ortega*, 969 S.W.2d 950, 952-53 (Tex. 1998).

[2] All cites to *Trevino* below are to Justice Baker's concurring opinion.

Title search: Justice or a Game of “Gotcha”? Emerging Standards Concerning Preservation (and Spoliation) of Electronically Stored Information

First appeared as part of the conference materials for the
35th Annual Securities Regulation and Business Law session
"A Game of "Gotcha"? Emerging Standards Concerning Preservation (and Spoliation) of Electronically Stored Information"