Don't Lose (Much) Sleep Over Electronic Evidence Spoliation

A Review of the Application of Spoliation Law to e-Discovery

By Sean A. Renshaw and Jessica G. Katz

It's the middle of the night and you're wide awake staring at the ceiling. You received notice from the court that opposing counsel has filed a motion alleging spoliation of electronic evidence by your client. As your mind wanders, you keep thinking back to *Zubulake v UBS Warburg LLC*,[1] in which UBS Warburg was required to pay $29.3 million in damages and the jury was instructed that it was permitted—but not required—to infer that destroyed e-mails would have been unfavorable to the defendant. You also recall *Coleman Holdings v Morgan Stanley & Co*,[2] in which Morgan Stanley was ordered to pay $604.3 million in compensatory damages and $850 million in punitive damages because it failed to respond properly to an e-discovery request. Your mind is in overdrive and you remember *Qualcomm, Inc v Broadcom Corp*,[3] in which Qualcomm was ordered to pay more than $8.5 million in sanctions for intentionally withholding 300,000+ pages of potentially relevant documents. You sit up in bed as you remember reading about a case last month in which a senior executive of an e-discovery service provider

Fast Facts:

Spoliation of evidence is a procedural finding, not a separate tort action.

Sanctions—meant to serve punitive as well as fairness goals—can include presumptive inferences, significant fines, summary judgment, or case dismissal.

Judges considering spoliation sanctions will evaluate the accused party's level of fault and willfulness.

destroyed e-mail and was required to pay one-third of the defendant's trial-related litigation costs and all of the defendant's fees and expenses in connection with the sanctions hearing.[4] If the court finds that your client spoliated evidence, the sanctions could range from a simple jury instruction to multimillion-dollar fines, assumption of costs, or both.

The issue of spoliation as it relates to e-discovery could (and possibly should) keep you up at night. In this article, we discuss several topics to help put the issue of e-discovery spoliation into focus for litigators and their clients and hopefully avoid some of the sanctions that might be imposed for failing to properly preserve electronic evidence.

Spoliation defined

It is helpful to have a better understanding of how spoliation is defined. The Michigan Court of Appeals in *State Farm Mut Auto Ins Co v Mich Mun Risk Mgt Auth*[5] stated that "[s]poliation [of the evidence] refers to 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."[6] This definition is similar to how many other jurisdictions view the issue and applies to all evidence, whether electronic or not.[7]

Procedurally, Michigan does not recognize spoliation of evidence as a separate tort.[8] In particular, the court in *Teel v Meredith*[9] stated that "[t]he traditional response to the problem of evidence spoliation frames the alleged wrong as an evidentiary concept, not as a separate cause of action."[10] That being said, courts have not explicitly refused to consider spoliation of evidence as an actionable tort claim, indicating that an independent tort may exist if the right fact pattern is present.[11] In *Adkins v Wolever*,[12] the court ruled that "[t]he more prudent path, and the one we adopt today, is to consider incidences raising spoliation question on a case-by-case basis, considering the purposes of a spoliation sanction and the factors for determining whether one should be imposed."[13]

Preservation obligations

It may be tempting to exercise an abundance of caution and adopt an overly broad policy of information retention—if you never destroy or dispose of any materials, you can never be accused of spoliation, right? Unfortunately, the rise of electronically stored information and the sheer volume of information involved in even one case make such retention burdensome and nearly impossible. Accordingly, courts widely agree that litigants should be held responsible for preserving evidence only when an obligation to preserve such evidence arises, which is to say, "when a party should have known that the evidence may be relevant to future litigation,"[14] but if there was "no notice of pending litigation, the destruction of evidence does not point to consciousness of a weak case" and intentional destruction.[15] It is generally assumed that a party is on notice of its duty to preserve when a suit has already been filed, "providing the party responsible for the destruction with express notice, but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation."[16]

There is little, if any, clear guidance in Michigan common law to determine when a duty to preserve arises. Federal courts have pointed to "knowledge that a suit will be filed, investigation of a possible claim by a plaintiff's attorney, pre-litigation correspondence or pre-litigation discussions between counsel, and filing of an administrative claim" as triggers for the duty to preserve.[17] Simply put, a party can be put on notice—and thus be saddled with an obligation to preserve evidence—by the filing of a lawsuit[18] or even by its own inherent knowledge that it engaged in conduct that may lead to litigation.[19] A party can even proactively assume an obligation to preserve evidence where none would have existed otherwise.[20]

Spoliation sanctions

If the court finds that spoliation occurred, it has broad discretion to impose sanctions for destruction or failure to produce evidence.[21] The court in *Brenner v Kolk*[22] explained that "in a case involving the failure of a party to preserve evidence, a trial court properly exercises its discretion when it carefully fashions a sanction that denies that party the fruits of the party's misconduct, but that does not interfere with the party's right to produce other relevant evidence."[23]

The court in *Adkins*, the Sixth Circuit matter originating in the district court in Grand Rapids, ruled that "[t]o warrant a spoliation sanction, the party seeking the sanction must show that the evidence was destroyed with a culpable state of mind."[24] In Michigan, such willful destruction will typically entitle the aggrieved party to a presumption that the spoliated evidence would have been adverse to the offending party.[25]

Acts of spoliation can range from accidental to negligent to willful, and courts agree that appropriate sanctions should reflect the accused party's level of culpability. Courts may impose such sanctions as levying compensatory or punitive fines, excluding testimony, imposing a non-rebuttable adverse inference or a rebuttable adverse presumption, dismissing the case, or granting a motion for summary judgment.[26]

Perhaps it is this careful consideration of the spectrum of culpability that has kept courts from imposing sanctions for spoliation in vast numbers. As of 2011, "seventeen citing decisions within the Sixth Circuit ha[d] considered an adverse inference. Thirteen denied the adverse inference. Three granted a permissive instruction. Only one granted a non-rebuttable adverse inference where crucial evidence was lost."[27] Of these cases, seven originated in Michigan: five denied the adverse inference and two granted a permissive instruction.[28]

From a real-world perspective, there are many situations in which spoliation of electronic evidence might happen unintentionally. One example of inadvertent spoliation might occur when e-mail data is routinely purged after 60 days as a normal course of business operation but the automatic expungement of data is not turned off after the obligation to preserve data has started.

Conversely, there are situations in which intentional spoliation might take place. In these situations, someone willfully and purposely destroys electronic evidence. This can be as simple as deleting relevant documents or as complex as using a program to permanently overwrite data so it cannot be recovered even with advanced digital forensic tools.

Michigan spoliation safe-harbor provision

The growing e-discovery market is evidence enough of the challenges involved in managing copious amounts of electronically stored information. As previously discussed, when imposing spoliation sanctions, courts consider the spectrum of culpability and imposing lesser sanctions for merely negligent acts of spoliation. But what about accidental spoliation? The Michigan Court Rules added a limited "safe harbor" for electronically stored information in 2009. The new provision added language to MCR 2.302 that states:

> Absent extraordinary circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.[29]

At its adoption, the Michigan rule reflected Federal Rule of Civil Procedure 37(e) verbatim.[30] However, because of the limitations of the 2006 amendments, FR Civ P 37 was amended again in 2015.[31] It now reads:

> If 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, and it cannot be restored or replaced through additional discovery, the court:
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> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
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> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation 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.[32]

While the federal rule now offers clearer guidance for courts considering the imposition of sanctions, both the Michigan and federal rules provide that the safe-harbor provision is meant to apply only to electronically stored information and only in cases of "good faith," where relevant electronic material has been lost not through a party's action, but by its failure to counteract the normal operation of a "routine electronic information system."[33] Indeed, the federal rule (and, it could be inferred, the Michigan rule) is meant to reflect that "[d]ue to the ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible."[34] Simply put, a party should not be sanctioned, or should be minimally sanctioned, for its failure to produce electronically stored information that would have been lost or destroyed in the normal course of business had notice of litigation or a duty to preserve not arisen.

Perhaps due to the recent adoption of the rule or the very narrow application intended, there is no available caselaw specifically considering MCR 2.302(B)(5).[35] Federal law provides at least one example of how Rule 37(e) will be applied: Sixth Circuit case *Brackett v Stellar Recovery, Inc*[36] highlights the intent to make the safe harbor available only to electronically stored information lost in good faith. In that matter, call logs for an account unrelated to the plaintiff were destroyed in the normal course of business by a third-party vendor. Considering the defendant did not exercise bad faith that resulted in the destruction of the information and the court's determination that the plaintiff's case was not prejudiced by the destruction of the information, the court ruled that the defendant was protected from sanctions under Rule 37(e).[37]

Conclusion

The issue of e-discovery spoliation is a perpetual topic of conversation and can keep attorneys and their clients up at night trying to determine if electronic evidence is being properly preserved. They often ask themselves if the scope of the

preservation is broad enough and whether the necessary steps have been taken to prevent the systematic deletion or overwriting of data.

While researching information for this article, it became clear that the legislature and courts in Michigan are keenly aware of the potential for spoliation of evidence, whether electronic or not. They also seem to be realistic about how to approach imposing sanctions, whether applying well-considered tests to determine the issue of willfulness or creating a safe harbor by which to protect parties from sanctions due to inadvertent actions. This should give some comfort to attorneys as they face the never-ending onslaught of electronic evidence discovery requests. So close your eyes and go to sleep, and stop thinking about *Zubulake v UBS Warburg LLC*, *Coleman Holdings v Morgan Stanley* and *Qualcomm, Inc v Broadcom Corp* for at least one night. ■

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ENDNOTES

1. *Zubulake v UBS Warburg LLC*, 220 FRD 212 (SD NY, 2003).
2. *Morgan Stanley & Co v Coleman Holdings Inc*, 955 So 2d 1124, 1127–1128 (Fla App, 2007).
3. *Qualcomm Inc v Broadcom Corp*, unpublished opinion of the US District Court for the Southern District of California, issued August 6, 2007 (Docket No. 05-cv-1958).
4. See *In re Shawe & Elting LLC*, unpublished memorandum opinion of the Delaware Court of Chancery, issued July 20, 2016 (Docket No. 10449-CB).
5. *State Farm Mut Auto Ins Co v Mich Mun Risk Mgt Auth*, unpublished opinion per curiam of the Court of Appeals, issued August 13, 2013 (Docket No. 306844).
6. *Id.* at 5, quoting *Silvestri v Gen Motors Corp*, 271 F3d 583, 590 (CA 4, 2011).
7. *Brenner v Kolk*, 226 Mich App 149; 573 NW2d 65 (1997).
8. *Panich v Iron Wood Prods Corp*, 179 Mich App 136; 445 NW2d 795 (1989).
9. *Teel v Meredith*, 284 Mich App 660; 774 NW2d 527 (2009).
10. *Id.* at 664.
11. *Wilson v Sinai Grace Hosp*, unpublished opinion per curiam of the Court of Appeals, issued April 29, 2004 (Docket No. 243425).
12. *Adkins v Wolever*, 692 F3d 499 (CA 6, 2012).
13. *Id.* at 506.
14. *Kronisch v United States*, 150 F3d 112, 126 (CA 2, 1998).
15. *Joostberns v UPS*, 166 F Appx 783, 797 (CA 6, 2006).
16. *Kronisch*, 150 F3d at 126.
17. Grand Valley State University, *Digital Workplace* <https://www.gvsu.edu/e-hr/michigan-e-discovery-guidelines-96.htm> (accessed December 8, 2016).
18. See *Turner v Hudson Transit Lines, Inc*, 142 FRD 68, 72–73; *Kronisch*, 150 F3d 112.
19. See *Kronisch v United States*, unpublished opinion of the US District Court for the Southern District of California, issued April 14, 1997 (Docket No. 83-civ-2458), p 22; *Kronisch*, 150 F3d 112.
20. *Panich*, 179 Mich App at 142.
21. *Brenner*, 226 Mich App at 160.
22. *Brenner*, 226 Mich App 149.
23. *Id.* at 161.
24. *Adkins*, 692 F3d at 504.
25. *Trupiano v Cully*, 349 Mich 568, 570; 84 NW2d 747 (1957).
26. FR Civ P 37(b) and (c).
27. Krabacher & Gerken, *E-Discovery Spoliation Sanction Standards in Ohio State and Federal Courts: Differing Culpable Mental States* <http://www.bricker.com/people/daniel-gerken/insights-resources/publications/e-discovery-spoliation-sanction-standards-in-ohio-state-and-federal-courts-differing-culpable-mental-states> (accessed December 8, 2016).
28. *Id.* at nn 13 and 14.
29. MCR 2.302(B)(5).
30. FR Civ P 37, Notes of Advisory Committee on 2015 Amendments.
31. *Id.*
32. FR Civ P 37(e).
33. MCR 2.302.
34. FR Civ P 37, Notes of Advisory Committee on 2015 Amendments.
35. See *Gillett v Mich Farm Bureau*, unpublished opinion per curiam of the Court of Appeals, issued December 22, 2009 (Docket No. 286076).
36. *Brackett v Stellar Recovery, Inc*, ___ F Supp 3d ___ (ED Tenn, 2016) (Docket No. 3:15-cv-00024).
37. *Id.*