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Filing for Spoliation Sanctions – Is it always worth it?

A recent order out of the District of Colorado provides a cautionary tale when it comes to filing motions requesting sanctions in response to alleged spoliation claims. It may not always be in your client's best interests.

As the Defendant's former employee, the Plaintiff had ongoing concerns regarding the Defendant's billing practices, namely, that at a family medical practice, intravenous (IV) drip start and stop times were not always being recorded solely by the administering nurse, and that if anyone but the administering nurse recorded the start and stop times such action amounted to fraud. The Plaintiff documented her concerns by emailing the Defendant's CFO, Angela Kobel, before placing those emails in a computer folder labeled "Angela." Thereafter, the Plaintiff was permitted to resign in lieu of being fired.

The Plaintiff's motion, requesting sanctions related to the Defendant's alleged spoliation of evidence, was heard by Judge N. Reid Neureiter on June 26, 2020. On July 13, 2020, Judge Neureiter issued an order denying the Plaintiff's motion.

> "Spoliation occurs when: (I) a party has a duty to preserve evidence, usually because the party knows or should know that the evidence is relevant to imminent or existing litigation; (ii) that party destroys the evidence intentionally or in bad faith; and (iii) the destruction of the evidence works to the opponent's prejudice." [1]

The Plaintiff alleged that the Defendant altered or destroyed electronically stored information ("ESI") that existed on the Plaintiff's computer prior to her resignation. The Plaintiff's expert alleged that unallocated space on the Plaintiff's hard drive was overwritten by routine system modifications, such as restarting the computer or updating system files. According to the Plaintiff's expert, this amount to an improper

change to the computer's ESI.

Additionally, the Plaintiff's expert had concerns regarding the access history of the Plaintiff's computer, stating that the history showed that three individuals logged in to access the computer. Further testimony identified these logins as being in response to the subpoena received from the Plaintiff on November 14, 2017, at which point the Defendant accessed the computer in order to obtain documents to comply with discovery. The Plaintiff's expert admitted that he found no evidence of any wiping software on the Plaintiff's computer.

The Defendant's expert openly agreed with the Plaintiff's expert that there was no evidence found of any wiping software on the computer, nor was there any evidence that ESI had been altered or deleted. Further, the Defendant's interim IT Director alleged that following the Plaintiff's resignation, a "write block" feature was placed on the Plaintiff's computer preventing the modification of ESI.

The Plaintiff alleged she sent between 45 and 85 emails regarding her concerns, which aligns with the number of documents produced by the Defendant during discovery. Even so, the Plaintiff claimed that certain information was still missing. When questioned about the missing information, she was unable to articulate what information she believed was not produced. Additionally, she did not testify or make herself otherwise available during the hearing.

The law regarding spoliation requires that the party asserting the allegations has the burden of proving by a preponderance of the evidence that the producing party either failed to preserve or otherwise destroyed evidence. Though, it is important to note that mere negligence resulting in the loss or destruction of evidence does not amount to spoliation due to the lack of conscious act or intent.

Here, the court found no merit in the Plaintiff's allegations, saying that if the Plaintiff's expert was to be believed, spoliation would occur in *every* case where ESI was involved.

> "[M]undane acts like turning a computer on and off or putting it in sleep mode will automatically create system files […]. Here, that would mean that by attempting to respond to [the] Plaintiff's subpoena, [the] Defendant engaged in spoliation of evidence. Such a result would be absurd."[1]

The court found the Plaintiff's motion to be unfounded and frivolous, finding that there was "zero evidence that [the Defendant] destroyed any relevant evidence." Clearly dissatisfied with the Plaintiff's failure to appear or be available for the hearing, the court stated:

> "It is beyond belief that a party whose lawyers assert she should be granted judgment without any trial as a sanction for intentional destruction of evidence would not be willing to appear by telephone or video-conference and swear under oath, subject to cross examination, as to what evidence she believes was destroyed. The Plaintiff presumably knows what was in the 'Angela' folder. She should have testified live about what was supposedly missing and subjected herself to cross examination."[1]

Most importantly, the court recognized the frivolity of the Plaintiff's allegations and went so far as to provide the Defendant with exact instructions on how and when to file a motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure, insinuating that such a motion would likely be granted. Fed.R.Civ.P 11 allows the Court to award sanctions when a pleading or motion contains factual claims or contentions that lack any evidentiary support.

After several additional filings, the Court has indicated that it will abstain from ruling on the Defendant's new motion for sanctions until a final decision is made regarding the Plaintiff's objections to and appeal of Judge Neureiter's denial of the Plaintiff's motion for sanctions. Following that order, which as of August 19, 2020 has not yet been memorialized, the Court will then hold a hearing to discuss the Defendant's motion.

Key Takeaways for Attorneys

1. If a client is considering filing a motion for sanctions regarding alleged spoliation, such a decision should not be made lightly as the risk could be worse than the reward.
2. If a client believes information is being withheld or was destroyed, confirm that the client can clearly articulate what information is missing.
3. When filing a motion where your client is requesting a judgment or sanctions as relief, best practice is to have your client present for the hearing.

4. Rule 11 motions for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b).

This blog post was drafted by Deena Duffy, an attorney in the Spencer Fane LLP Minneapolis, MN office. For more information, visit www.spencerfane.com.

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[1] *Bragg v. Southwest Health System, Inc. d/b/a Southwest Memorial Primary Care,* No. 18-cv-00763-MSK-NRN (D. Colo., July 13, 2020).