ETHICS COLUMN

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Avoiding Spoliation Penalties: Duties to Preserve Evidence

A recent Delaware Court of Chancery decision provides useful guidance regarding the obligation to preserve evidence in connection with litigation and the potential penalties for spoliation. In the matter styled *In re Facebook, Inc. Derivative Litigation*, (Del. Ch., Jan. 21, 2025), the court addressed spoliation in the context of a motion alleging that the chief operating officer (COO) of Facebook and one of the members of the board of directors had failed to preserve their personal email accounts that had been, at least occasionally, used to conduct company business. Despite the fact that they had received a litigation hold notice and reminders from counsel, both of them deleted emails from those personal accounts that would have been relevant to the litigation. The plaintiff sought various curative sanctions for the failure to preserve relevant electronically stored information (ESI).

The legal definition for spoliation is the destruction or significant alteration of evidence, or the failure to preserve evidence properly, or the improper concealment of evidence. Court of Chancery Rule 37(b) authorizes spoliation sanctions for failure to preserve ESI and requires that before sanctions can be imposed, it must be shown that the responding party had a duty to preserve the ESI, the ESI is lost, the loss is attributable to the responding party's failure to take reasonable steps to preserve the ESI, and the requesting party suffered prejudice.

Moreover, to obtain an adverse inference or case dispositive sanctions, the moving party must show that the responding party recklessly or intentionally failed to preserve ESI.

To determine when a duty to preserve arises, the court analyzes several issues. The first question under Rule 37(e) is whether ESI should have been preserved. As the court emphasized in this decision: "A party is not obligated to preserve every shred of a paper, every email or electronic document," but the party must preserve what it reasonably should know is relevant to the action. The duty applies to key people likely to have relevant data.

The second question posed in a Rule 37(e) analysis is whether the ESI is lost. For purposes of Rule 37(e), information is lost only if it is irretrievable from another source, including other custodians. The third question is whether ESI was lost because of the failure of a party to take reasonable steps to preserve it.

To understand preservation, as a threshold matter we must understand the components of ESI discovery. As illustrated by the court, there are five steps involved in ESI discovery: identification, preservation, collection, review, and production. In this case, the key issues were identification and preservation. Let's take a look at these:

Identification

Taking reasonable steps to identify where ESI is stored must be the first step in preserving evidence or information that should be collected and preserved. This involves locating the individuals that have custody of the relevant ESI or the ability to obtain it, as well as identifying the location and types of ESI. This may involve interviewing individuals who might have information about the location of relevant ESI.

Preservation

Of particular interest to practitioners is the court's discussion of the affirmative steps that both counsel and clients must take to preserve ESI. Counsel must not only send a litigation hold notice, but it must also take affirmative steps to ensure that the client understands the notice and takes steps to comply with it. The court provided examples of acceptable steps to comply, such as disabling an auto-delete feature. Importantly, the court explained that it should be "sensitive to the parties' sophistication with regard to litigation in evaluating preservation efforts; *some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation*" (emphasis added).

Steps Necessary to Preserve

The next step is to preserve ESI, but a party "need not preserve all documents in its possession; it must preserve what it knows and reasonably ought to know is relevant to possible litigation and is in its possession, custody, or control." The court distinguished between the practical steps an organization—compared to an individual—must take to preserve but indicated that both must suspend routine document destruction policies. For example, individuals must disable auto-delete functions and back up data on personal devices. Failure to do so

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may suggest they acted unreasonably. An individual must self-educate to learn what is necessary to prevent automatic deletion or destruction.

Applying the standards to the *Facebook* case, the court found that the COO was highly sophisticated in her role and knew what was required. She should have consulted company counsel if she had any doubts. Her failure to take steps to disable the auto-deletion of her email was not reasonable.

The court also explained that the board member who failed to disable his auto-delete function for his personal emails also acted unreasonably, but in his case there was no prejudice on that point.

Prejudice Required

If no prejudice resulted from the loss of ESI, no sanctions are to be imposed. The prejudice analysis requires that the moving party provide an explanation as to why the lost ESI could have been relevant, but the mere fact that evidence is lost will not be sufficient; a plausible explanation as to why evidence could have been relevant such that the failure to preserve is prejudicial must be provided. Once that initial burden is met, the party that failed to preserve must convince the court that the lost ESI did not result in prejudice. Some reasons could be that the material could not have been relevant, would not have been admissible, or could not have been used by the requesting party to its advantage.

The court explained why the loss of the COO's emails was prejudicial, but it concluded that no prejudice resulted from the loss of the board member's emails. Although various requests for curative sanctions were made, the court only imposed an elevated requirement for the burden of proof, as well as an award of fees for bringing the motion for sanctions.

This cautionary tale should serve as a reminder to litigants and their counsel of their obligations to preserve and produce ESI relevant to litigation. ◆

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