Spoliation Trial by Jury

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Sanction litigation concerning lost electronically stored information (ESI) has evolved into a cottage industry. Litigators commonly and aggressively pursue spoliation-related evidence in a quest for an adverse inference instruction or, worse, case-terminating sanctions. Clients approve of those tactics because spoliation can yield a potentially profitable return that avoids the merits of a case and spotlights an opposing party's misconduct.

Based on a 2015 advisory committee note to Rule 37(e) of the Federal Rules of Civil Procedure, courts are increasingly looking to jurors to determine whether a putative spoliator has acted with the intent necessary to warrant remedies under the rule. The note also explains that if the jury finds that a "party acted with the intent to deprive another party of the" spoliated ESI's "use in the litigation," the court "should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it."

Aggressive litigators will likely pursue such an instruction as something of a Holy Grail because, in the words of one court, an adverse inference instruction is "tantamount to a death-penalty sanction." Regardless of the jury's ultimate determination, litigating spoliation before a jury may be just as bad; lost ESI can be an incendiary and significantly persuasive issue.

The note to Rule 37 gives no guidance on what standard courts should apply before letting a jury decide a dispositive discovery dispute. Nor have courts filled the void. Four cases illustrate how Rule 37(e) can turn any case into litigation about litigation, highlighting the need for courts to establish criteria for permitting and presiding over a spoliation mini-trial.

In *Cahill v. Dart*, a magistrate judge found that while the defendants failed to preserve ESI, the plaintiff had no evidence to prove intentional destruction of that ESI. For this reason, the magistrate refused to award case-dispositive remedies and instead recommended a lesser sanction short of an adverse inference instruction. The district court disagreed, holding that, notwithstanding the plaintiff's lack of evidence, the question of whether the defendants intentionally destroyed ESI was "a close one" and decided that the "best course is for a jury to decide the question of intent." The district court ruled that jurors would be instructed that, if they were persuaded as to intent, they must presume that the lost ESI was unfavorable to the defendants.

Spencer v. Lanada Bay Boys addressed a similar issue related to the defendants' unrecoverable text messages. A magistrate judge held there was insufficient evidence to find the defendants had the requisite intent for Rule 37(e)(2) sanctions. The plaintiffs had learned of the lost ESI only after certain discovery had been completed, however, and consequently were unable to "fully probe spoliation and the intent behind the destruction or failure to preserve" the ESI. The magistrate judge concluded that the plaintiffs should be permitted to present evidence at trial as to "whether the Defendant acted with the intent to deprive Plaintiffs of the use of the evidence at issue." The district court agreed.

In *BankDirect Capital Finance v. Capital Premium Financing*, another magistrate judge ruled that the plaintiff's "now unavailable emails" were "intentionally" not preserved, relying on *Cahill*. As a result, the magistrate recommended that the district court "allow the appropriate evidence to be presented to the jury, which under proper instructions will determine the reasons for the non-production …. Alternatively if the court is not inclined to let the matter go to jury, it is recommended the court give a permissive spoliation instruction to the jury…."

Finally, as *McQueen v. Aramark Corp.* illustrates, courts may ask jurors to assess more than a putative spoliator's intent. There, the defendant failed to send timely hold notices, and ESI was destroyed as a result. The magistrate judge attributed the ESI loss to the defendant's "gross negligence," which was "insufficient to show" the intent that Rule 37(e)(2) requires. Because the court could not determine the relevance of the lost ESI, the magistrate recommended permitting the parties to "present evidence to the jury regarding the spoliation and to argue any inferences they want the jury to find," subject to the trial judge's determination of the "appropriate mechanism for permitting the presentation of the evidence and argument at trial."

Litigants will continue to leverage lost ESI and seek sanctions. Courts are responding, in part, by asking jurors to resolve spoliation-related issues. In so doing, courts should establish clear standards relating to when a spoliation sanction mini-trial is warranted. Courts can also use their gatekeeping function under Rule 104(b) of the Federal Rules of Evidence to determine threshold issues of admissibility and to exclude less probative evidence that would likely inflame jurors and unfairly prejudice the spoliator under Rule 403. Courts should consider these options to prevent litigation abuses.

RESOURCES

- *BankDirect Capital Fin., LLC v. Capital Premium Fin., Inc.*, 2018 U.S. Dist. LEXIS 57254 (N.D. Ill. 2018).
- *Cahill v. Dart*, 2016 U.S. Dist. LEXIS 166831 (N.D. Ill. 2016).
- *McQueen v. Aramark Corp.*, 2016 U.S. Dist. LEXIS 164678 (D. Utah 2016).
- *Spencer v. Lanada Bay Boys*, 2017 U.S.Dist Lexis 217424 (C.D. Cal. 2017).

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