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Digital Disruption: A Practicum on the Importance of Electronic Discovery

Practitioners can no longer plead ignorance in the face of electronic discovery; they must be conversant with their client's obligation to preserve ESI, lest they face the consequences outlined here.

By Vincenzo Mogavero and Sarah Klein

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Over the past year and a half, as our judiciary and members of the bar have risen to meet the challenges presented by COVID-19, the adoption of technology has increased exponentially. For many of us, that has translated to Zoom or telephonic court appearances and hearings, and in our experience, virtual trials. It has been a digital renaissance of sorts for a profession revered for its fidelity to history, precedent, and long-engrained modes of doing business. While practitioners are catching up in some respects to this digital transformation, our clients, and the litigation spawned by their relationships, have been at the vanguard of this electronic transformation for decades. More specifically, the modes of communication they utilize—email, instant messaging, videoconferencing, social media, and customer relationship management (CRM) platforms—have put e-discovery at the forefront of almost every litigation.

Put simply, mastering the art of e-discovery is no longer optional for practitioners. From counseling your clients on suspending routine document retention policies; to explaining the nuts and bolts of instituting litigation holds on their computers, cell phones, and other electronic devices; to prosecuting your adversary's failure to do so, e-discovery has become an essential tool that can change the complexion of any litigation.

So, what does the average practitioner need to know about e-discovery?

The most critical step in addressing electronically stored information (ESI) is the first one: preservation. The general rule in New Jersey with respect to preservation of evidence is that a party "is under a duty to preserve what it knows, or reasonably should know, will likely be

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requested in reasonably foreseeable litigation." *Mosaid Tech. v. Samsung Electronics Co., Ltd.*, 348 F. Supp. 2d 332, 336 (D.N.J. 2008). In other words, the duty to preserve discoverable documents, including ESI, arises *prior* to the initiation of a litigation. Meeting this obligation requires timely counsel to issue litigation holds to preserve emails, instant messages, social media posts, and any other relevant forms of ESI, plus all attendant metadata. It also requires the suspension of any routine archival or deletion processes on a party's electronic systems.

As reflected by the recent adoption of the Complex Business Litigation Program (CBLP), the New Jersey Rules have trailed the Federal Rules of Civil Procedure in addressing e-discovery issues and spoliation of ESI.

New Jersey Court Rule 4:23-6 (Electronically Stored Information), which was adopted on July 27, 2006 (effective Sept. 1, 2006), provides that "[a]bsent exceptional circumstances, the 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." This rule reflected the common-sense observation that inadvertent loss of ESI, in the absence of any notice of reasonably foreseeable litigation, without more, could not ground liability. Critically, R. 4:23-6 is identical to former Fed. R. Civ. P. 37(e), which was also adopted in 2006, but was completely revamped during the 2015 amendments. Thus, to understand the evolution of this body of law, which is based on the Federal Rules of Civil Procedure, it is appropriate to turn to federal case law for guidance. Freeman v. Lincoln Beach Motel, 182 N.J. Super. 483, 485 (Law. Div. 1981).

The current version of Fed. R. Civ. P. 37(e) provides:

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: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (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.

Interestingly, in adopting the current version of Fed. R. Civ. P. 37(e), the legislature observed in the comments to the rule that the 2006 version, "ha[d] not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information." Indeed, those same issues persist in our state courts.

In our experience, some practitioners have tried to twist the outdated language of R. 4:23-6 in order to shield the affirmative spoliation of ESI. While it may strain credulity, given the dearth of case law interpreting R. 4:23-6, some parties have even gone as far as to assert that the intentional deletion of ESI from a computer after litigation is *pending* equates to conduct shielded by the "routine, good faith operation" language of R. 4:23-6. Of course, this position is not only incongruent with both New Jersey state and federal case law; it perverts the spirit of this rule. When parties destroy evidence, including ESI, they suffer the consequences of their conduct. *See, e.g., Mid Atlantic Framing v. Grayrock Properties*, Docket No. HNT-L-242-13.

As our Supreme Court held in *Robertet Flavors v. Tri-Form Construction*, 203 N.J. 252, 284-85 (2010), our courts must ensure "that the consequences of the lost evidence fall on the spoliator rather than on an innocent party." Spoliation sanctions, including ESI, are "predicated upon the common-sense observation that when a party destroys evidence that is relevant to a claim or defense in a case, the party did so out of the well-founded fear that the contents would harm him." *Mosaid Techs. v. Samsung Elec. Co.*, 348 F. Supp. 2d at 336. Sanctions are appropriate to vindicate the integrity of the Court:

They serve a remedial function by leveling the playing field or restoring the prejudiced party to the position it would have been without spoliation. They also serve a punitive function, by punishing the spoliator for its actions, and a

deterrent function, by sending a clear message to other potential litigants that this type of behavior will not be tolerated and will be dealt with appropriately if need be.

Id. at 335.

These remedies can include discovery sanctions, an adverse inference, or where appropriate, dismissal of a claim or suppression of a defense. Robertet, 203 N.J. at 272. The trial court in its discretion must select a remedy: "to make whole, as nearly as possible, the litigant whose cause of action has been impaired by the absence of crucial evidence; to punish the wrongdoer; and to deter others from such conduct." *Bldg. Materials Corp. of Am. v. Allstate Ins. Co.*, 424 N.J. Super. 448, 472 (App. Div.) (*quoting Rosenblit v. Zimmerman*, 166 N.J. 391, 401 (2001)), *certif. denied*, 212 N.J. 198 (2012); *Smolinski v. Dickes*, No. A-0037-15T4, 2017 WL 1833450, at *15 (App. Div. May 8, 2017) (finding that trial court's imposition of only an adverse inference amounted to an abuse of discretion).

Putting aside the spoliator's intent in destroying ESI, and despite the fact that it is often difficult or impossible to discern exactly what was contained in electronic records that were destroyed, courts have not been shy about imposing spoliation sanctions against litigants who have spoliated ESI. *See, e.g., TelQuest Int'l Corp. v. Dedicated Bus. Sys.*, No. CIV.A. 06-5359PGS, 2009 WL 690996 (D.N.J. Mar. 11, 2009) (imposing an adverse inference and awarding attorney fees where forensic analysis showed that defendants deleted electronic records during the course of litigation); *State Nat'l Ins. Co. v. Cty. of Camden*, No. CV 08-5128 (NLH/AMD), 2011 WL 13257149 (D.N.J. June 30, 2011) (awarding attorney fees and costs where defendant failed to institute a litigation hold, to disable its automatic email deletion program, and to preserve copies of backup tapes and plaintiff was forced to expend time and resources determining the extent and scope of the spoliation); *Edelson v. Cheung*, No. 213CV5870JLLJAD, 2017 WL 150241 (D.N.J. Jan. 12, 2017) (imposing an adverse inference and permitting plaintiff to file an affidavit setting forth its attorney fees and costs expending in pursuing spoliation where defendant deleted emails).

The recent formation of the CBLP in the Superior Court represents an acknowledgment by our legislature and the judiciary of the growing importance of ESI and e-discovery issues in litigation, both in the types of cases it includes and the CBLP rules specifically developed to govern e-discovery in those cases. *See* R. 4:102-2(b):

Cases appropriate for the CBLP arise from business or commercial transactions or construction projects that involve potentially significant damages awards. Program cases may have complex or novel factual or legal issues; large numbers of separately represented parties; large numbers of lay and expert witnesses; *a substantial amount of documentary evidence, including electronically stored information*; or require a substantial amount of time to complete trial. [Emphasis added.]

Furthermore, participants in the CBLP are encouraged to utilize the CBLP's Model Stipulation and Order which requires parties to affirmatively certify that "they have taken reasonable steps to preserve all ESI and electronically stored documents" and to formulate and exchange lists of ESI custodians and search terms to marshal responsive electronic discovery.

Importantly, R. 4:104-5(b)(1) (Failure to Provide Electronically Stored Information) (adopted July 27, 2018; effective Sept. 1, 2018), which governs discovery in the CBLP, is identical to Fed. R. Civ. P. 37(e) (Failure to Preserve Electronically Stored Information), as it was amended in 2015. In other words, it resolves the "safe harbor" argument some have advanced under R. 4:23-6 and codifies the prevailing case law of this state.

In order to meet discovery obligations, protect clients, and play by our Court Rules, practitioners can no longer plead ignorance in the face of electronic discovery; they must be conversant with their client's obligation to preserve ESI, lest they face the consequences of digital disruption: the remedies set forth in *Robertet, Mosaid*, R. 4:104-5(b)(1) and Fed. R. Civ. P. 37(e).