

Spoliation of Evidence: Innocent or Guilty?



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***ARMA INTERNATIONAL – RICHMOND
CHAPTER***

Spoliation – A Very Hot Topic!

- **For Liberals:**

- Enron-Andersen
- Big Tobacco

- **For Conservatives:**

- Hillary Clinton

- **For Celebrity Haters:**

- Martha Stewart
- Peter Bacanovic

- **For Government Haters:**

- The FBI

- **For Football Widows:**

- The NFL

- **For Old Folks Like Me:**

- Ollie North
- Richard Nixon

Spoliation – What is It?



The Destruction, or the significant and meaningful alteration, of a document or instrument.

--- Black's Law Dictionary

Spoliation – What is It?



Bad faith destruction of a document relevant to proof of an issue at trial gives rise to an inference that production of the document would have been unfavorable to the party responsible for its destruction.

-- Aramburu v. Boeing Co., 112 F.3d 1398 (10th Cir. 1997)

Spoliation – The Majority View



Because only the bad faith loss or destruction of a document will support an inference of consciousness of a weak case, no adverse inference should arise from spoliation that is merely negligent.

-- Miller v. American Eagle Insurance Co., 97-5089 (10th Cir. 1998)

Spoliation – The Minority View



To restore the evidentiary balance, an adverse inference should arise even when the spoliation was merely negligent, because the prejudice to the other party is the same, regardless of the despoiler's intent.

-- Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68 (S.D.N.Y. 1991)

So What Really Happens in Court?



- What do courts look at?
- How do they decide whether someone is guilty of spoliation?
- What penalties can they impose?

Duty to Preserve



- **Was there a duty to preserve the evidence?**
 - **Statutory duty – A records retention statute or regulation requiring retention of the record**
 - **Duty as litigant -- A litigant has a duty to preserve evidence that he knows or should know is relevant to imminent or ongoing litigation**
- **The duty may persist even if title and possession of the evidence have passed to a third party**

Prejudice to the Other Party



Before a sanction for destruction of the evidence is appropriate, there must also be a finding that the destruction prejudiced the opposing party.

-- Dillon v. Nissan Motor Co., 986 F.2d 263 (8th Cir. 1993)

Factors in Deciding Sanctions



- The degree of culpability of the party who lost or destroyed the evidence
- The degree of actual prejudice to the other party
- *Note: Ignorance and Stupidity have not* proven to be the bases for sound defenses.

The Goal of Sanctions



- To remedy the prejudice caused by spoliation
- To punish wrongdoing
- To deter future wrongdoing

How Much to Sanction?



A court should impose the least onerous sanction that will remedy the prejudice and, where applicable, punish the past wrongdoing and deter future wrongdoing.

-- Dillon v. Nissan Motor Co., 986 F.2d 263 (8th Cir. 1993)

What Kind of Sanctions Are Imposed?



- **Monetary – attorney fees, costs of discovery**
- **Jury Instructions regarding the spoliation**
- **Adverse inferences**
- **Dismissal of claims**
- **Default or summary judgment**

How Does the Court Decide if Spoliation Has Occurred?



- The court hears evidence
- The evidence is weighed
- The important factors – duty, breach, prejudice – are considered
- The court draws a conclusion

Important Things to Remember



- **There are no hard and fast rules**
- **Circumstantial evidence is as good as any other evidence**
- **Credibility is part of the mix**
- **Judges and juries read newspapers and have opinions and prejudices**
- **Conclusions can be very subjective**

Circumstantial Evidence and Credibility



Failure to maintain a record required by law is in and of itself enough evidence of culpable behavior to warrant sanctions

Circumstantial Evidence and Credibility



Inability to find records and information can in and of itself be enough evidence of culpable behavior to warrant sanctions if it appears unreasonable



Anytime an opponent asks for a record that you should have, if you don't have it, or can't produce it, you risk a spoliation claim.

What Can I Do?



- Know your duty
 - Statutes and regulations and retention periods
 - Be aware of:
 - ✦ *impending or ongoing litigation*
 - ✦ *Impending or ongoing audits*
 - ✦ *Impending or ongoing regulatory actions*

What Can I Do?



- **Tighten your policies and procedures**
 - **Is the retention schedule up to standards?**
 - **Do we have a foolproof litigation hold procedure?**
 - **To we have a mechanism for identifying impending litigation, audit or regulatory action?**

What Can I Do?



- **Make defensible decisions**
 - Ad hoc destruction can look very bad
 - Consider retention periods in terms of “reasonable” practice
 - Poorly timed decisions can appear unreasonable based on timing, even when they might have gone unnoticed at other times

What Can I Do?



- Document those defensible decisions
 - Records destruction certificates
 - Policy rationales that are reasonable

The Value of Good RM



- A sound program may head 'em off at the pass
 - Reasonable decisions
 - Sound documentation
 - Transparent and good faith compliance
- These may serve to quash any notions the other side has of raising spoliation as an issue

If You Wind Up In Court . . .



- **Judges and juries weigh credibility heavily in making decisions**
- **Reasonableness and industry practice can be used as evidence**
 - Your opponent will often come up with an “expert” to testify on records destruction
 - If you’re in compliance with RM best practices, or the new ARMA-backed standards, don’t be afraid to use expert testimony – you have lots of ammunition



***Thank You for your attention.
Questions?***

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