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Email Spoliation Sanctions: Timing Is Everything

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Spoliation sanctions need to be proportionate to the offense and counsel should take care not to overreach in its demand. Then the sanction, if granted, needs to be definite and have "teeth" in order to be effective and have a meaningful effect. Counsel should consider crafting the proposed specific relief and not leave it to the court to craft its own adverse order. In the end, if spoliation is sought on an inadequate record, it will be denied. However, if there still remains a "smell" to the "spoliation" facts, as discussed below, courts have creative options in their arsenal.

In *Brandsway Hospitality v. Delshah Capital*, 173 A.D.3d 457 (1st Dept. 2019), the First Department affirmed the motion court ordering that an information technology expert examine the issue of email deletion and retrieval before ruling on spoliation. A detailed affidavit specifying what the motion court wanted explained to it was required in *Kohl v. Trans High*, 2019 N.Y. Misc. LEXIS 5613 (Sup. Ct. N.Y. Co. Oct. 15, 2019), before spoliation would be considered. If granted spoliation sanctions need to be proportional and

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motion courts in *ABL Advisor v. Patriot Credit Co.*, 2019 N.Y. Misc. LEXIS 4826 (Sup. Ct. N.Y. Co. Sept. 3, 2019), and in *Dantzig v. ORIX AM Holdings*, 2019 N.Y. Misc. LEXIS 5464 (Sup. Ct. N.Y. Co. Oct. 4, 2019), refused to dismiss a pleading and/or issue a preclusion order due to spoliation, but, instead, set out in detail the adverse inference it would issue so the parties would not have to wait for trial to learn it for the first time, and would have the opportunity early on to appreciate the significance of the precise adverse inference.

Referred to an IT Expert Before a Spoliation Sanction Is Considered. In *Brandsway,* the First Department affirmed the motion court's denial to dismiss a pleading "for spoliation of electronic evidence and found that the motion court properly referred the issues to an expert in information technology to examine various email accounts, servers and domains to determine who deleted emails, when they were deleted, and whether they could be retrieved."

Court Denies Imaging of Device and Takes a 'Wait and See' View on Spoliation. In *Kohl,* defendant requested that plaintiff's personal devices be forensically examined and argued that searching a digital image of plaintiff's devices (the "entirety" of each devices data) "may" result in the discovery of responsive emails saved to the devices, screenshot images of responsive emails or saved attachments to such emails. Plaintiff stated that he did not use the account in his employment, but believed that he may have occasionally sent employment-related emails from the account by mistake on his mobile phone and that he "conducted a diligent search" of the account and found no emails in the "sent folder" from any time prior to April 2017. The court motion declined to grant the "highly-intrusive request" based on the submissions before the court predicated upon "specul[ation] that more emails may exist or have existed based on the existence of a solitary email."

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The motion court did hold, however, that plaintiff failed to preserve, at least, that Feb. 27, 2016 email from his account. Accordingly, plaintiff was directed to file an affidavit setting forth the following information:

(a) all devices, including mobile phones, computers, laptops, tablets, etc., on which he has accessed or had access to his account from the date of the Preservation Letter to present, whether he still owns those devices (or, if not, when and the manner in which he lost, destroyed, or otherwise disposed of those devices);

(b) the manner in which he used his account during the 2016 Period;

(c) why there are no emails dating from 2016 in the Account, and the manner of and date on which the loss or destruction of any 2016 Period emails occurred; and

(d) what efforts, if any, he took to preserve the

contents of the Account and when he made such efforts.

Following filing of plaintiff's affidavit, the court indicated that it would determine an appropriate penalty for plaintiff's failure to preserve email(s) in the account after receiving the preservation letter or notice of its contents from his counsel.

Spoliation Sanctions Must Be Proportional. In *ABL,* while defendants failed to preserve relevant evidence by failing to institute a litigation hold and failing to preserve documents and emails on a certain. computer, the motion court held that the sanction of striking defendants' answer was unwarranted as it appeared that plaintiffs were able to obtain the relevant information from the borrowers, and thus the spoliated evidence did not constitute the "sole means" by which plaintiffs can prove their case. Accordingly, the motion court held that at the time of trial an adverse inference charge would be the appropriate sanction "regarding the missing emails and loan calculation documents, including but not limited to the inference that defendants failed to properly maintain such records to the extent this is required by the participation agreements."

In *Dantzig,* the court noted that a spoliation sanction must "reflect an appropriate balancing under the circumstances." A such, the motion court found:

> [in] fashioning a spoliation sanction, Danzig has not articulated or shown that the destruction of the ESI has deprived him of any means of establishing a prima facie case. Although Dantzig asserts that without the ESI, he cannot prove the expected compensation of Fund II, disparagement damages, or the failure of the ORIX to maximize the value of NHCP, these assertions are conclusory, and unpersuasive in light of the other disclosure devices available. Accordingly, the proposed sanction that is tantamount to striking the answer - finding that the ORIX Defendants breached their agreements by disparaging Dantzig - is denied. Finding that Danzig's damages include those that would have flowed from Fund II, or precluding the ORIX defendants from offering proof contrary to Dantzig's evidence concerning the funds also do not reflect an appropriate balancing under these circumstances. Accordingly, the most appropriate sanction here, as proposed by Dantzig, is an adverse inference that the destroyed ESI would not contradict Dantzig's evidence at trial. The motion is granted to the extent set forth above.

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