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# ANNUAL MEETING REVIEW: SPOILING FOR A FIGHT – PREVENTING, SPOTTING, AND ADDRESSING ESI DESTRUCTION

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One of the highlights of the Litigation Section’s Annual Meeting in Ocean City was a presentation on how to protect against the loss of evidence at the hands of a litigation adversary, detect spoliation of electronically stored information (“ESI”) when it occurs, and take appropriate steps with the opposition and the court to preserve and enforce the client’s rights. The presentation comprised three parts.

Michael Berman of Rifkin Weiner Livingston LLC led the first part of the presentation, entitled “Common Sense Makes Good Law.” He addressed the general legal principles applicable to the spoliation of evidence. Mr. Berman discussed current trends, rules amendments, and case law related to ESI preservation and spoliation. An analysis of the differences between Maryland and federal spoliation law is covered in more depth in “The Spoliation Doctrine in Maryland,” an article authored by Mr. Berman and Alicia Shelton, Esq. of Zuckerman Spaeder LLP, which appears in this issue of *The Maryland Litigator*.

Next, David Greetham of Ricoh Forensics presented “Computer Forensics – Beyond the Basics,” an overview of the science and technology behind legal ESI issues. Mr. Greetham explained that computer forensics is not an art, but a science, that has largely been driven by the need in law enforcement and litigation for objectively verifiable data analysis. For Mr. Greetham, forensic investigations in both the civil and criminal contexts commonly include fraud in accounting, banking, or securities, and related asset recovery efforts. A typical investigation begins by taking a snapshot of the data on a computer or other device (an “image”), by on-site or remote means. Mr. Greetham explained that an image can be searched not only for information that was meant to be stored on the device, but also data that were meant to be deleted. When a computer file is deleted in the traditional sense, the file is no longer readily accessible through the computer’s indexing system, but the actual information remains.<sup>1</sup> A spoliator can take additional steps to overwrite files so as to cause the data to be lost forever. Mr. Greetham described how a forensic investigator can detect artifacts of spoliation efforts. Even after this type of evidence destruction, a forensic professional can analyze metadata to determine when such actions were taken, as well as gain a wealth of information about any remaining data.<sup>2</sup>

In the final portion of the program, Kramon & Graham principals David Shuster and Jean Lewis demonstrated how the foregoing legal and technological principles applied to an actual case. In this regard, they presented a case study of *Schlossberg v. Abell*, United States Bankruptcy Court for the District of Maryland. The case involved a debtor who had

obtained hundreds of properties through mortgage rescue scams. Some of the victims won large judgments against him and his business. While those creditors attempted to collect on their judgments, the debtor filed for bankruptcy protection.

The Chapter 11 bankruptcy trustee engaged Kramon & Graham to serve as special litigation counsel to bring an adversary proceeding against the debtor and related parties to avoid fraudulent transfers and recover concealed assets for the benefit of creditors. This required investigating a web of business entities, properties, and bank accounts, and the examination of ESI on the business and personal computers of the debtor and his family.

The case had many of the hallmarks that should put an attorney on guard for potential spoliation, including allegations of fraud and deceptive business practices by the debtor and the debtor’s litigation history that included sanctions for discovery violations.

While a motion to dismiss the bankruptcy trustee’s complaint was pending,<sup>3</sup> the debtor was required in the main bankruptcy case to produce ESI.<sup>4</sup> The trustee issued subpoenas specifically seeking “bit-by-bit” images of all computers and devices, and engaged Ricoh as a forensic ESI consultant.

There were more warning signs that caused the trustee’s counsel to become concerned that evidence was at risk of being spoliated, including evolving excuses for delaying the production of the ESI. When the forensic images were finally obtained,<sup>5</sup> Ms. Lewis and Mr. Shuster – with the assistance of Ricoh – found compelling evidence of spoliation. Most notably, the team discovered that the computers had been “wiped” with a wiping program called CCleaner.

With counsel’s suspicions confirmed with scientific evidence,<sup>6</sup> Kramon & Graham quickly filed a motion for sanctions.<sup>7</sup> The parties entered a protective order requiring the defendants to stop further destruction, with monthly compliance reports from defendants’ ESI consultant. The Court ordered discovery on spoliation issues and held an evidentiary hearing to determine whether spoliation had occurred and, if so, the appropriate sanctions.

At the week-long evidentiary hearing, Mr. Shuster and Ms. Lewis presented evidence of widespread spoliation. That evidence included expert testimony and the testimony of several fact witnesses, like defendants’ IT professional, their bookkeeper, and defendants themselves. In addition, the trustee presented evidence that, in other court proceedings, defendants had been the subject of multiple orders compelling the production of in-

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formation. Likewise, the trustee's counsel presented evidence that the defendants were on notice and understood their duty to preserve ESI. Perhaps most importantly, the trustee's counsel presented compelling evidence that the acts of spoliation corresponded to key moments in the litigation – for example, just before the debtor was required to produce documents. This timeline was instrumental in demonstrating that the destruction of evidence was not inadvertent but rather was intentional.<sup>8</sup>

After the hearing and post-hearing briefing and argument, the Court held that the defendants who were the subject of the spoliation motion acted in bad faith and for the purpose of depriving the trustee and creditors of evidence. Accordingly, the Court awarded the severe sanction of default judgments on the bulk of the trustee's claims, as well as attorneys' fees and costs.<sup>9</sup> This case study shows how a vigilant lawyer, armed with objective forensic computer science, can protect a client's rights even in the face of an adversary who is determined to evade the law.

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<sup>1</sup> The data may be automatically overwritten over time as hard drive space becomes needed. In the case of a device with a large amount of storage, automatic overwriting may only become necessary after a long time, if ever. Therefore, "deleted" information may remain on a computer indefinitely.

<sup>2</sup> Mr. Greetham also explained the challenges ahead in light of the exponential expansion of the amount of data created in the world every day. With the rise of the "Internet of Things" — the proliferation of objects like home appliances that have Internet connectivity — the rate of data creation will only rise.

<sup>3</sup> The defendants' motion to dismiss was denied as to forty of the forty-three counts in the complaint. *Schlossberg v. Abell (In re Abell)*, 549 B.R. 631, 677 (Bankr. D. Md. 2016).

<sup>4</sup> See Fed. R. Bankr. P. 2004.

<sup>5</sup> Ricoh deployed a device called a Remlox (invented by Mr. Greetham) that plugs into a computer and creates a bit-by-bit image. The Remlox is sent to the owner of the computer, with simple instructions to connect the Remlox at the end of the work day, without the need to disconnect or move the machine. Thus, there was no credible argument to be made that imaging the computers would disrupt the defendants' business or otherwise impose a burden. From the images, Ricoh produced reports like lists of deleted and active files, and the history of external hard drives that had been connected to a given computer, to help counsel plan discovery.

<sup>6</sup> The Trustee's ESI consultant, Ricoh's David Hendershott, summarized the forensic evidence in a detailed affidavit.

<sup>7</sup> "[T]here is a particular need for [spoliation sanctions] motions to be filed as soon as reasonably possible after discovery of the facts that underlie the motion. This is because resolution of spoliation motions are fact intensive, requiring the court to assess when the duty to preserve commenced, whether the party accused of spoliation properly complied with its preservation duty, the degree of culpability involved, the relevance of the lost evidence to the case, and the concomitant prejudice to the party that was deprived of access to the evidence because it was not preserved." *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 508 (D. Md. 2009).

<sup>8</sup> Proving an adversary's state of mind is often very difficult; spoliators will rarely admit that they destroyed evidence for the purpose of keeping it from the opponent. The case law on spoliation has developed to identify the type of indirect evidence that can show bad faith that justifies the harshest sanctions. In particular, the volume and timing of data deletion can be highly probative of a spoliator's bad faith. See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 531 (D. Md. 2010). The timeline in the

Abell case also showed a long period between 2012 and 2015 where wiping was not done, undercutting the defense argument that the wiping program was part of normal computer maintenance or used in the ordinary course of business.

<sup>9</sup> *Schlossberg v. Abell (In re Abell)*, No. 13-13847, Adv. No. 14-0417, 2016 WL 1556024 (Bankr. D. Md. Apr. 14, 2016).

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rely on the "broad discretion" of trial courts in sanctioning spoliation. *Cumberland*, 226 Md. App. at 699, 130 A.3d at 1188.

Initially, Maryland courts, like Federal courts under FRCP 37(e), insist that, for there to be spoliation, litigation must be reasonably anticipated when ESI goes missing. For example, in *Clar v. Muehlhauser*, No. 0851, 2017 WL 2962816 (Md. Ct. Spec. App. July 12, 2017) (unreported), the Court of Special Appeals rejected the appellants' request for an adverse inference as a sanction for the appellee's destruction of alleged surreptitious videos of a women's rest room, because the destruction occurred before litigation was reasonably anticipated. In doing so, the Court looked at the four-factor test set forth in *Klupt v. Krongard*, 126 Md. App. 179, 199, 728 A.2d 727, 737 (1999) (citing *White v. Office of the Public Defender*, 170 F.R.D. 138, 147-48 (D. Md. 1997)) ("*White test*")<sup>2</sup>. Contrary to FRCP 37(e)(1), the Court noted that the elements of the spoliation test include "an intent to destroy the evidence...." But, consistent with FRCP 37(e) (providing an "anticipation... of litigation" requirement), because the "destruction occurred before the lawsuit was filed and even before discovery of the subject camera that gave rise to such lawsuit," the elements of the *White test* had not been met. *Clar*, 2017 WL 2962816, at \*7.

In *Cumberland*, 226 Md. App. at 691, 130 A.3d at 1183, the Court addressed, as a matter of first impression, how to apply the spoliation doctrine where the evidence or physical object that was destroyed, in this instance a house, was itself the subject of the case. The litigation arose from a house fire. The plaintiff home insurer maintained access to the meter box that it argued was responsible for the fire, but demolished the remains of the house itself. The defendant power company moved for sanctions in the form of dismissal, arguing that by demolishing what remained of the house, the plaintiff had irreparably prejudiced the defendant from developing possible defenses. The trial court dismissed the plaintiff's claims and in affirming the trial court, the appellate court weighed "the degree of fault (or, in some instances, intent) on the part of the spoliator, on the one hand, with the level of prejudice that inures to the defense because the evidence has

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