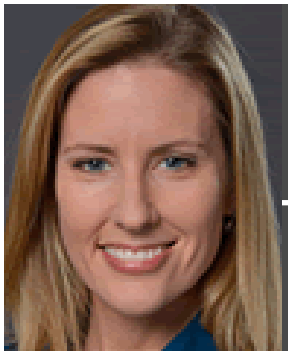


DISCOVERY SANCTIONS: A CLOSER LOOK

Nikki Nesbitt
Goodell DeVries Leech & Dann (Baltimore, MD)
410.783.4026 | knn@gdldlaw.com

Discovery Sanctions: Defendants Can Use This Tool Too

K. Nichole Nesbitt

Introduction

Most civil defense counsel are aware of their evidence preservation obligations and have experienced cases in which plaintiffs have used those obligations as leverage for negotiating an early (or more costly) resolution. In some cases, however, a plaintiff's failure to preserve evidence can drive a favorable outcome for the defense. Defense counsel should consider taking an aggressive approach to discovery – especially by requesting the plaintiff's electronically stored evidence – from the start of the case. This paper will discuss the obligations that form the basis for this approach and how it can be utilized to achieve a favorable outcome in the right case.

Parties' Obligations to Preserve Evidence

Utilizing sanctions as a tool in litigation only works if a plaintiff has violated his or her obligation to preserve evidence, so a brief review of that obligation is warranted. Jurisdictions differ in their approach to discovery obligations. See Paul W. Grimm, et al., Advanced Issues in Electronic Discovery: The Impact of the First Year of the Federal Rules and the Adoption of the Maryland Rules, 37 U. BALT. L. REV. 381, 389, n.36 (Spring 2008) ("Preservation obligations arise from independent sources of law and are dependent on the substantive law of each jurisdiction."). And questions like whether the issue is a procedural one or a substantive one, as well as whether spoliation of evidence gives rise to an independent tort or just sanctions differ from one jurisdiction to another. See The Duty to Preserve Evidence, American Bar Association, https://apps.americanbar.org/abastore/products/books/abstracts/ 5190497_chap1_abs.pdf. But there is consensus that a duty to preserve evidence – including electronically stored evidence – exists once litigation is filed, threatened, or reasonably foreseeable. Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212 (S.D.N.Y. 2003).

Discovery may be necessary on this point alone. In some cases, such as when a known injury occurs, the trigger for the preservation obligation will be obvious. In others, though, there may be a dispute as to when the plaintiff first realized he or she had a claim. Defendants should ensure that they have nailed down the parameters of the preservation obligation from the beginning of the litigation, as that will shape the remaining discovery strategy. A plaintiff's failure to preserve at the right time constitutes spoliation of evidence and is one basis for a motion for sanctions.

Strategies for Ensuring Plaintiffs are Meeting Their Discovery Obligations

Too often, defendants play a reactive, rather than proactive, role in the discovery process. Because the plaintiff's side has a head start in litigation, the plaintiff will already have a careful and thorough plan for discovery, and may already have crafted discovery requests, before the case is filed. Defendants find themselves having to answer discovery before propounding their own, and the process of strategizing about what is needed is skipped. Defendants should resist this and make the time to think through what they will need and how they are going to ask for it.

Step One: Create a Checklist of Information to Seek

As soon as possible in the litigation, defendants should create a list of information – and sources of information – that they will need to establish their defenses. While boilerplate discovery requests capture some of the information needed, targeted discovery requests get better results, not just because they are more likely to produce useful information, but because it is easier to establish spoliation or a discovery violation to the court if a plaintiff has failed to produce information in response to a targeted request.

In developing their list, defendants should consider each element of each claim and affirmative defense as well as each known or likely source of information. If a defendant plans to assert an assumption of risk defense, for example, then the defendant should note on the checklist that discovery requests should include all of the information the plaintiff knew in advance about the event at issue – research done, conversations had, documents read, etc. Likewise, if a defendant knows how a plaintiff keeps information (in paper, on a mobile device, or some other way) all such locations will need to be searched, and that should go on the checklist as well.

Remember that relevant discovery is not limited to just the claims and defenses; it should also extend to the plaintiff's credibility and background. Thus, any discovery checklist should include information about the plaintiff him- or herself. Defendants should make sure to ask about the plaintiff's criminal background, history of civil or bankruptcy matters, social media accounts (including user names and passwords), employment history, and other factors that might be relevant to his or her character and trustworthiness. While the defendants will make independent efforts to obtain this information, there are some facts that can be discovered only by asking the plaintiff directly, so this should go on the checklist.

This checklist will be utilized for the remaining steps – especially establishing prejudice if a motion for sanctions is ultimately filed – so it is critical that it be devised at the earliest point in the litigation and updated as the case proceeds.

Step Two: Send Out Meaningful Litigation Hold Letters

Defendants need not wait until discovery commences to instruct a plaintiff to preserve evidence. As soon as they are aware of a potential claim, defendants should – with the use of their checklist – develop a comprehensive litigation hold notice and serve it on the plaintiff.

Some defendants issue broad and general litigation hold notices that instruct a plaintiff simply to preserve "all relevant information" without being more specific. While this is better than nothing, it does not optimize their position in discovery. When a defendant seeks sanctions for a plaintiff's failure to preserve or produce relevant evidence, a court is much more likely to grant that motion if the plaintiff was requested specifically to preserve that evidence, rather than "relevant evidence" in general. The instruction to preserve "relevant evidence" should be supplementary to specific requests; it should not be the only request in a litigation hold notice.

Once defendants create a checklist of information needed, putting together a comprehensive litigation hold becomes simpler. Specific items and specific sources of information have already been identified, and the litigation hold should specify all of them while keeping the "all other relevant evidence" catch-all.

Step Three: Maximize the Rule 26(f) Conference

In federal cases, unless waived by the court, the parties are required by Federal Rule of Civil Procedure 26(f) to meet and confer about the scope of discovery and how information will be exchanged. In many cases, because this meeting occurs at the outset of litigation, neither party is prepared to develop a meaningful set of parameters. Here again, it can be helpful to have a checklist. When defendants have already considered the information and sources they plan to pursue, there is no reason they cannot think through the means of production. If sought-after information is in electronic form, how will the defendant best be able to review it? Should a vendor make a forensic image of any electronic data, and if so, who should the vendor be? Are hard copy documents, static images, or PDFs sufficient? Is an original document or a native file the better means? Does the defendant want the plaintiff to make electronic data searchable, or would that be better done by the defense team?

It is true that defendants often possess more physical documents and electronically-stored information than a plaintiff, so the goose-gander rule ought to be considered: Whatever burdens the defendants wish to impose on the plaintiff will likely be imposed right back on them. But a plaintiff may have a particular intolerance for – or inability to – preserve, search for, and produce relevant documents and electronically-stored information as compared with defendants who have resources for doing this. It is appropriate to put pressure on a plaintiff early and often to comply with his or her discovery obligations, and the failure to do so can create leverage later in the case.

Additionally, the Rule 26(f) conference may provide insight into what information the plaintiff may already have spoliated. Recall that the duty to preserve likely occurred well prior to the filing of the plaintiff's complaint. If defendants are alerted to the fact that some relevant evidence has already been lost, the process of setting up a motion for sanctions can begin here.

Step Four: Serve Discovery Requests Early

Formal discovery requests should be tailored to the needs of the case and should be served as soon as permitted. In all cases, defendants should have responses to written discovery before they start deposing witnesses, because obviously documents and written responses will shape the questioning. But beyond this, if the case might devolve into discovery violations and motions practice, defendants need to be good actors. Most courts will not grant motions to compel (or motions for sanctions) if the defendants were delinquent in serving their requests and the plaintiff did not have time to respond adequately.

The key to a winning motion for sanctions is setting it up the right way. That means clearly identifying the information needed, giving the plaintiff every chance to make sure the information is preserved, consulting with the plaintiff's counsel about how it should be produced, and requesting the production in a timely manner.

Utilizing Motions for Sanctions When Plaintiffs Fail to Meet Their Discovery Obligations

If a plaintiff complies with his or her preservation obligations and responds timely to discovery responses, then the defendants are properly equipped to defend, and that is better for all concerned. But if the plaintiff fails at any point along the way, it is time to start considering whether a motion for sanctions is appropriate. That involves a separate planning process.

Step One: Send Discovery Deficiency Letters

Most courts have local rules that require the parties to work out any discovery issues prior to seeking court intervention. This means that the discovery deficiency must be identified with particularity and the non-compliant party be given an opportunity to cure. As with the discovery requests themselves, defendants should be specific about what still needs to be produced and put it in writing with a deadline for compliance and a clear statement that court intervention will be obtained if the plaintiff fails to fully respond.

Significantly, when a party fails to give any timely response at all to a set of discovery requests, the requesting party has the ability under Rule 37 to seek sanctions without first sending a discovery deficiency letter and moving to compel. This is especially true when the reason the plaintiff failed to respond is that the evidence has already been spoliated. But most courts are loathe to impose sanctions right off the bat; they want to ensure that all efforts to obtain the information are exhausted before consequences are imposed. Sending the discovery deficiency letter is the first step toward doing that.

Defendants should also refuse to move to the next phase of discovery until the plaintiff's deficiencies are rectified. This will be important later when sanctions are sought, because it helps establish that prejudice occurred. Thus, for example, if a plaintiff produces requested emails but does not produce them in the format requested, it would be important for the defendants to insist that they be produced in the proper (and, if the Rule 26(f) conference went right, the agreed-upon) format before the plaintiff can be deposed. As another example, if a plaintiff produces documents or information that identify additional responsive information that has not yet produced, the defendants ought to include in their discovery deficiency letter a demand that the additional information be produced. Inevitably, that information was responsive to one of the targeted requests and, at a minimum, one of the catch-all requests. Be exhaustive here, and be sure to allow sufficient time for the plaintiff to discuss the matters and cure them before moving on to step two.

Step Two: Move to Compel

In many cases, courts have not allowed a party to seek sanctions for a discovery failure unless the party first filed a timely motion to compel. As stated earlier, spoliation or a complete failure to respond might obviate the need for a motion to compel, but that is the exception and not the rule. See, e.g., U.S v. Certain Real Property Located at Route 1, 126 F.3d 1314 (11th Cir. 1997) ("[W]e have consistently found Rule 37 sanctions such as dismissal or entry of default judgment to be appropriate . . . only where the party's conduct amounts to flagrant disregard and willful disobedience of discovery orders.") (emphasis in original).

The best way to set up a motion for sanctions, then, is to obtain an order compelling the discovery that the plaintiff will not or cannot provide. Again, this should be done timely; motions to compel made close to or after the close of discovery can be considered delinquent and may be denied, which would not be helpful to a motion for sanctions later. While Rule 37 does not itself provide a deadline for filing a motion to compel, many courts require that all discovery – to include compelled discovery

– be done prior to the discovery deadline. Thus, if a party fails to seek an order compelling discovery before the deadline, the entitlement to that discovery may be deemed waived. See, e.g., Packman v. Chicago Tribune Co., 267 F.3d 628 (7th Cir. 2001).

The more specific the order compelling discovery, the more persuasive a motion for sanctions may be if the plaintiff does not comply. Accordingly, the motion to compel ideally would enumerate specific categories of information sought. This is particularly true when the defendants have learned that there is information the plaintiff did not adequately preserve. While it might be tempting to jump straight to a motion for sanctions due to the plaintiff's spoliation, obtaining a court order to provide that information is an important step in obtaining sanctions.

Step Three: Move for Sanctions

"Federal courts have inherent discretionary power 'to fashion an appropriate sanction' for conduct like spoliation that 'abuses the judicial process.'" Gentex Corp. v. Sutter, 827 F. Supp. 2d 384, 390 (M.D. Pa. 2011) (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 44-45 (1991)). Spoliation is defined as "the intentional destruction, mutilation, alteration, or concealment of evidence." Gentex Corp. v. Sutter, 827 F. Supp. 2d 384, 390 (M.D. Pa. 2011) (citing Blacks Law Dictionary and Byrnie v. Town of Cromwell, 243 F.3d 93, 108 (2d Cir. 2011)).

Unless the failure to provide or supplement discovery was "substantially justified or is harmless," a court may impose various sanctions, including (a) an order prohibiting the non-producing party from using the requested information on a motion, at a hearing, or at trial; (b) an order requiring the non-producing party to pay reasonable expenses, including attorney's fees, caused by his failure; (c) an instruction to the jury of the non-producing party's failure; and (d) "other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(iv). The sanctions set forth in that provision include the following:

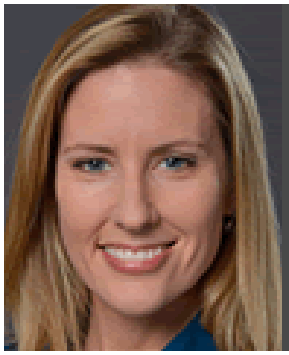
1. Directing that the matters embraced in [an order compelling discovery] or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
2. Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
3. Striking pleadings in whole or in part;
4. Staying further proceedings until the order [to compel] is obeyed;
5. Dismissing the action or proceeding in whole or in part;
6. Rendering a default judgment against the disobedient party; or
7. Treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Furthermore, Rule 37(e) provides that 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 may "dismiss the action or enter a default judgment" if it finds that "the party acted with the intent to deprive another party of the information's use in the litigation."

It will be important to establish to the court not only that the information was requested and opportunities to cure were given, but also that the defendants were prejudiced in not obtaining the information. See Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497 (D. Md. 2010). This is the most challenging aspect of obtaining sanctions, because, as the saying goes, "you don't know what you don't know." If evidence was not produced at all, it is difficult to articulate how that evidence, if produced, would impact the case. But the goal is to establish that the failure to produce information – or the spoliation of that information – prevents the defendants from establishing an essential aspect of their defense. Id. The efforts in creating a checklist, issuing a litigation hold, making detailed requests for information and moving to compel all support the prejudice argument, because they show a consistent effort by the defense and a repeated failure by the plaintiff to obtain the requested information.
If defendants do their homework, an order sanctioning the plaintiff for losing evidence or failing to produce it will follow. Given the spectrum of sanctions available – up to and including the dismissal of the case – the efforts to set up the motion are well worth the energy.

Conclusion

A motion for sanctions for a party's failure to preserve evidence is not just for plaintiffs. Defendants have the same tool available to them, and counsel should consider the benefit of this tool at the outset of the litigation, particularly if it becomes clear that the plaintiff might have lost evidence that he or she should have preserved. A thoughtful and methodical approach to discovery provides one more opportunity to win the case.



K. NICHOLE NESBITT

Partner

GOODELL DEVRIES LEECH & DANN (Baltimore, MD)

410.783.4026 | knn@gdldlaw.com

Ms. Nesbitt is a partner with the firm. Her current practice concentrates on medical malpractice defense and complex commercial litigation, as well as cases that combine the two fields. She represents several health systems in Maryland and the District of Columbia, handling complicated malpractice cases as well as credentialing, employment, and compliance-related matters. Ms. Nesbitt also handles employment matters outside of the healthcare context for employers in this region and beyond. Ms. Nesbitt's experience as a litigator provides her with insight to counsel her employment clients on drafting guidelines, policies, and agreements, in addition to defending matters that have already proceeded to litigation.

Practice Areas

- Commercial and Business Tort Litigation
- Employment Litigation
- Medical Malpractice
- Medical Institutions Law
- Professional Liability
- Hospitality Law

Representative Matters

- Wilds v. MedStar Washington Hospital Center (2018), Superior Court for the District of Columbia. Obtained defense verdict for hospital and its special police officers in connection with an excessive force claim brought by a visitor. The plaintiff claimed she was wrongfully taken to the ground and handcuffed following an altercation with two special police officers, resulting in injury to her shoulders. The jury returned a verdict in favor of the hospital and the officers after a four-day trial.
- Wood v. MedStar Harbor Hospital (2017), Circuit Court for Baltimore City. Obtained defense verdict for physician accused of injuring another physician in the course of performing surgery on a patient. The plaintiff, an orthopedic surgeon, accused the defendant, also an orthopedic surgeon, of negligently striking him in the elbow with a drill while both surgeons were performing a knee replacement. The plaintiff claimed the injury was career-ending. After an eight-day trial, the jury returned with a verdict in favor of Ms. Nesbitt's client.
- Al-Ameri v. The Johns Hopkins Health System (2017), United States District Court for the District of Maryland. Obtained summary judgment on claims for more than $1M in medical expenses on the grounds that all expenses were paid by the government of the plaintiff's home country, the United Arab Emirates.

Honors and Awards

- Best Lawyers in America- Commerical Litigation (2016, 2018)
- Chambers- Healthcare, Maryland (2017)
- Leading Women Award from The Daily Record (2011)
- Super Lawyers Rising Stars (2009-2014)

Education

- University of Maryland (B.A., cum laude, 1996)
- University of Maryland, School of Law (J.D., 1999) - Order of the Coif