Hold the (cell) phone! NFL Lawsuit May Hinge on Spoliation

Across New England, armchair attorneys and quarterbacks alike are talking spoliation, discovery, and cell phones.

With National Football League Commissioner Roger Goodell's announcement of his decision on New England Patriots' quarterback Tom Brady's appeal comes news that Mr. Brady destroyed his cell phone at almost the same time that he met with league investigators. This has led directly to a sharp uptick in the use of the word "spoliation" by non-attorneys. So what, exactly, is spoliation? And what is the impact of someone spoliating evidence?

Generally speaking, spoliation is the destruction or modification of discoverable information in violation of a duty not to do so. Sanctions for spoliation can vary from subjecting the spoliator to additional discovery, to monetary sanctions, to even harsher sanctions. Bad faith failure to preserve relevant information can be punished even by an irrefutable inference that the "missing" data contained information unfavorable to the spoliating party at trial. *But there can't be a legal rule that says I can't destroy my own cell phone whenever I want, can there?*

To answer that, first we need to take a brief step back. We all leave behind a massive "digital footprint" when we use digital media. This is the record of your activities when using digital services such as internet browsing, smart device applications, cell phones, social media, text messages, and email (to name just a few categories). Generally, the records that comprise your digital footprint remain until deleted. They may be deleted by some automatic process (such as "delete all messages over ninety days old"), or through active deletion by a user. Otherwise, those records live on in your inbox, on your tablet, on your cell phone, as attachments to emails or message board posts, as files on hard drives, cloud drives, backups, and on external USB drives. Once deleted, they can *still* often be recovered through the use of forensic tools.

In 21st century litigation, discovery of the digital footprint of parties and witnesses has largely eclipsed traditional "paper" discovery in terms of volume. The legal community has struggled over the past decade to develop rules and procedures for the discovery of electronically stored information ("ESI"); the digital footprint is but one piece of what has at times been referred to as "e-discovery" but is essentially just traditional discovery applied to new technologies for storing information.

Ok, but the rule itself is simple enough, right? Don't modify or destroy evidence when you have a duty not to do so. But when does this duty arise? Therein lies the rub – the duty to preserve information (ESI or otherwise) arises when a party knows or reasonably should know that the evidence may be relevant to future litigation. Once litigation is reasonably anticipated, there is a corresponding duty to preserve evidence, to suspend any automatic deletion or destruction policies, and to act to ensure that relevant documents are neither modified nor destroyed.

This means that the duty to preserve evidence (for example, a personal cell phone) can arise *before* a lawsuit is filed. It makes no difference if the documents, data, or electronic device containing documents and data belongs to the plaintiff or defendant. The duty to preserve relevant information arises as soon as litigation is reasonably anticipated.

In the matter of the most hotly-contested football air pressure dispute of all time, this duty may spell doom for Mr. Brady's recourse to the courts. Mr. Brady may be forced to argue that litigation was not reasonably anticipated at the time he destroyed his cell phone, despite literally hundreds of news stories discussing the likelihood of such a lawsuit. That is because once there is a duty to preserve evidence, a party's "cell phone

destruction policies" – even if they were a regular part of the party's cell phone use and not in any way related to an effort to hide the phone's contents – should be halted.

Courts are not amused by spoliation. As one federal court has noted, "[a]side perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence." *United Medical Supply Company, Inc. v. U.S.*, 77 Fed. Cl. 257, 259 (2007).

When a court finds that spoliation has occurred, the trial judge will decide on a remedy to address it. Judges generally try to craft a remedy for spoliation that matches up with the precise unfairness that would otherwise result from the spoliation itself. The general rule is that "a judge should impose the least severe sanction necessary to remedy the prejudice to the innocent party." *Landsberg v. Beck*, No. 09-P-1257, 2010 WL 1286448, at *1 (Mass. App. Ct. April 6, 2010) (citing *Keene v. Brigham and Women's Hosp.*, Inc., 439 Mass. 223, 235 (2003)).

Best practice is, not surprisingly, to err on the side of caution. Once litigation is reasonably anticipated, if you haven't already, contact an attorney. Suspend the operation of regular document and device destruction policies. Do not modify or delete key files, records, or documents, either locally stored or cloud-based. Issue a "litigation hold letter" to inform key custodians of the need to preserve records.

And do *not* physically destroy your cell phone.

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