

OUTSIDE COUNSEL

BY BERYL A. HOWELL

The Slippery Slope From Spoliation to Obstruction

Any complacency about the risks of criminal liability arising from compliance with data retention policies resulting from the U.S. Supreme Court's reversal of Arthur Andersen LLP (Andersen)'s conviction would be misplaced.¹

The deconstruction by the Supreme Court of the §1512 obstruction statute charged in *Andersen* is largely a defunct intellectual exercise since newer criminal statutes criminalize a far greater swath of conduct.

This article will describe how criminal liability under the new data destruction crimes enacted as part of the Sarbanes-Oxley Act may be triggered by the same set of facts underlying alleged spoliation.

Defining Spoliation

Spoliation is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."² The duty to preserve evidence is triggered when a party knows or should know that it is relevant to any present or future litigation.³ In its broadest sense, spoliation may arise with any destruction of evidence, including negligent data handling and even inadvertent data loss due to the routine operations of computer systems, which overwrite and alter data without any user action, direction or even awareness. For this reason, a pending amendment to Rule 37 of the Federal Rules of Civil Procedure would provide a "safe harbor" from sanctions for electronic data loss arising from the "routine, good-faith operation of an electronic information system."

The remedies for spoliation, as outlined in FedRCivP 37, allow the court to impose proportionate remedies, which may include monetary penalties, shifting costs of discovery, payment of reasonable attorney's fees, adverse jury instructions, dismissal of claims and even directed judgments.⁴ The court may also impose sanctions based on its inherent authority to control its own judicial proceedings. A court's inherent power "is governed not by rule or statute but by the control necessarily vested in courts to



manage their own affairs so as to achieve the orderly and expeditious disposition of cases."⁵

Short of imposing sanctions for spoliation, a court may make adjustments in how discovery is managed if a party is unable to provide relevant responsive information by, for example, ordering that additional witnesses be produced, additional interrogatories answered or other alternative solutions for the lost information.

In addition to severe civil sanctions, courts are empowered to make criminal referrals to law enforcement for investigation of violations of criminal law that can include obstructive conduct arising from egregious spoliation or failure to comply with discovery obligations.⁶ Determining whether any remedy is appropriate and, if so, which sanction to impose, usually turns on the culpability of the responding party whose data is lost or unavailable. The most serious sanctions for spoliation are reserved for instances when evidence is destroyed in bad faith (i.e., intentionally or willfully).⁷ It is at this end of the culpability spectrum where civil liability for spoliation and criminal liability for obstruction overlap.

Indeed, some jurisdictions considering whether to adopt an independent tort of intentional spoliation as an additional remedy to address litigation-related misconduct and discovery abuse have rejected such a tort remedy in favor of discovery sanctions within the context of an ongoing litigation rather than permitting multiple lawsuits for spoliation suits, and cited the fact that criminal penalties for obstructive conduct, such as perjury and data destruction are also available as a deterrence to such conduct.⁸

Criminal Liability Risks

But, after *Andersen*, have the criminal liability risks for obstruction been minimized, particularly for failure to preserve data before any formal proceeding has been instituted or formal document demand has been made? The Supreme

Court's decision in *Andersen* cannot be interpreted as providing a green light to enforce document retention policies that result in the destruction of records, which are reasonably likely to be the subject of a foreseeable regulatory or law enforcement investigation or litigation.⁹ Instead, that decision turned on the insufficiency of jury instructions explaining the necessary intent and nexus elements for the obstruction statute at issue, §1512(b) of title 18, U.S. Code. Two new data destruction crimes in the Sarbanes-Oxley Act, §§1512(c) and 1519, are both broader in scope and define the criminal conduct with terms that avoid the statutory language vagaries upon which the Supreme Court rested its decision. Taken together, these two data destruction crimes punish, with up to 20 years imprisonment, a person who "corruptly," in the case of §1512(c), or "knowingly," in the case of §1519, alters, destroys, mutilates, conceals, covers up, document or tangible object with the intent to impede, obstruct, or influence an official proceeding or investigation. Section 1519 also prohibits falsifying or making a false entry in any record. Both provisions apply to conduct before an investigation or proceeding has been formally instituted. This is not surprising since these statutes were drafted amid reports of Andersen's document shredding just before an anticipated subpoena was served. Indeed, §1519 expressly covers actions taken "in...contemplation of any such matter or case," a phrase echoed by the Supreme Court, which stated that a "knowingly...corrupt[t] persuade[r]" cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material.¹⁰

Although criminal prosecution for spoliation is uncommon, it has been both threatened by the courts and undertaken by the government. For example, in a series of products liability cases brought against E.I. DuPont de Nemours and Co. concerning the plant fungicide Benlate, the company was found to have falsely represented the results of soil tests, falsely denied withholding certain evidence, and improperly invoked work product protection to resist disclosure.¹¹ This activity was only discovered after certain plaintiffs had settled. In review of the sanctions imposed by a district court for DuPont's conduct

Beryl A. Howell an attorney, is a partner at Stroz Friedberg, a consulting and technical services firm specializing in digital forensics, electronic discovery and cyber-security investigations, and a commissioner on the U.S. Sentencing Commission.

in withholding this evidence, the U.S. Court of Appeals for the Eleventh Circuit noted the "serious nature of the allegations" and stated that it assumed the U.S. attorney would conduct an investigation.¹² To be sure of that, on remand, the district court asked the U.S. attorney to "investigate and prosecute DuPont for criminal contempt."¹³

Criminal Obstruction

Spoilation became a criminal obstruction prosecution in *United States v. Lundwall*.¹⁴ Two former officials of Texaco Inc. were charged with obstruction of justice based upon their misconduct in pretrial discovery in a civil class action employment discrimination suit. Specifically, the defendants, who were given responsibility for collecting responsive documents for production in the case, were accused of first withholding and then destroying documents sought by the class-action plaintiffs. One of the defendants had secretly tape-recorded executives' meetings where comments about shredding documents containing disparaging comments about black employees were made.¹⁵ The court rejected the defendants' assertion that §1503 of title 18 does not cover the willful destruction of documents during civil litigation.¹⁶

The risk that a spoliation motion in a run-of-the-mill civil litigation will prompt review by a federal prosecutor for possible prosecution as a data destruction crime is remote. Prosecutors would likely decline to seek charges against a company or target who allegedly committed a violation of a data destruction crime if the case is viewed as inconsequential or the victim is able to obtain adequate redress through a sanction imposed as part of the civil litigation. Nevertheless, where the spoliation is egregious, undertaken with the blessing of senior management, or done by a person other than the civil parties or their counsel, civil remedies and sanctions may be inadequate and both prompt and warrant law enforcement attention.¹⁷

While the allocation of limited prosecutorial time and resources may generally strongly favor declining prosecution when spoliation occurs in civil litigation, in other contexts, including regulatory or administrative proceedings or criminal investigations, prosecutors are more likely to view spoliation through the lens of criminal obstruction. The Department of Justice charged Andersen with obstruction relating to its conduct with respect to an imminent SEC proceeding, even though it could have also charged the firm with obstructing imminent private civil litigation as well. In addition, prosecutors may have strategic reasons to bring ancillary charges or want to vindicate the public and law enforcement interests in prompt, thorough, and complete compliance with agency document demands—particularly where the party had a history of such abuses. Moreover, in criminal or quasi-criminal matters, prosecutors may view enforcement of the data destruction crimes as a way to deter dilatory or faulty responses to document demands, particularly if potential health or safety issues are at stake.

Even where a prosecutor would decline to bring charges for data destruction for spoliation arising in a civil case, civil litigants can invoke one of the data destruction crimes added by the Sarbanes-Oxley Act as part of a civil RICO (Racketeer Influenced and Corrupt Organizations Act) charge.

While no private cause of action is provided in §1512(c),¹⁸ this section is included as one of the enumerated predicate offenses in the definition of "racketeering activity" in RICO.¹⁹ As one court noted, "litigation conduct, to the extent it constitutes a prohibited action set forth in 18 USC §1961(1), may form the basis for predicate racketeering acts...."²⁰ Consequently, §1512(c) violations involving the hiding and falsifying of evidence may provide the basis for a civil RICO lawsuit, if of course the other RICO requirements are met, with the potential for treble damages and the cost of the suit and reasonable attorney's fees.²¹ The standard of proof applicable to an allegation of obstruction in a civil RICO claim would be the preponderance of the evidence, which is the presumed standard applicable in civil actions and applies even to allegations that the defendant engaged in criminal or quasi-criminal conduct.²²

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Conclusion

The Supreme Court's reversal of Andersen's obstruction conviction provides only cold comfort to civil parties navigating their data preservation obligations in private and regulatory litigation. Civil sanctions and criminal obstruction laws continue to have vigor, and make it important for counsel to carefully assess the handling of documents, particularly in the time period before receipt of a document demand and litigation has ensued when spoliation and obstruction law can ensnare the unwary.

1. 544 U.S. ___, 125 S. Ct. 2129 (May 31, 2005).
 2. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (*Zubulake IV*), quoting *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999).
 3. *Zubulake IV*, 220 F.R.D. at 216; *Rambus, Inc. v. Infineon Technologies AG*, 222 F.R.D. 280, 287 (E.D. Va. 2004); *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001).
 4. See Fed. R. Civ. P. 37(b) and (d); see also *E*Trade Securities LLC v. Deutsche Bank AG*, 2005 U.S. Dist. LEXIS 3021 at 3 (D. MN); *The Clark Construction Group, Inc. v. City of Memphis*, 2005 U.S. Dist. LEXIS 13808 at 27 (W.D. TN) (City failed to establish a procedure to eliminate the likelihood that potentially relevant documents would be destroyed or for a lawyer to review documents before destruction related to pending case, resulting directly or indirectly in allowing 2000 relevant documents to be shredded and warranting sanction of rebuttable presumption that trier of fact may presume the contents of the destroyed documents would have been adverse).
 5. *The Clark Construction Group, Inc. v. City of Memphis*, 2005 U.S. Dist. LEXIS 13808, *14 (W.D. Tenn. March 14, 2005) (defendant shredded over 2,000 pages of documents subject to preservation; the court imposed sanction of rebuttable adverse inference that the destroyed documents would have been detrimental to defendant's case); see also *Chambers v. NASCO, Inc.*, 501 U.S. 32,

45-46 (1991) (courts possess the inherent power to sanction party who acts in "bad faith, vexatiously, wantonly, or for oppressive reasons").

6. Counsel should be cautious, of course, in alleging obstructive, criminal or unethical conduct arising from perceived discovery abuses. See *Ross v. Kansas City Power and Light Company*, 197 F.R.D. 646, 658, 663 (W.D. MO 2000) (court critical of counsel who threatened to make a criminal referral when opposing counsel directed witnesses not to answer questions at deposition).

7. *Zubulake v. UBS Warburg LLC* ("*Zubulake V*"), 2004 U.S. Dist. LEXIS 13574 (S.D.N.Y.). When the destruction is negligent, relevance must be proven by the party seeking the sanctions. Where spoliation is willful, intentional, grossly negligent or in bad faith, the destroyed evidence is generally presumed to be relevant and the courts may direct the fact-finder to make the presumption that the evidence would have been harmful to the spoliator. See *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 109 (2d Cir. 2002); *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 176 (S.D.N.Y. 2004).

8. *Gribben v. Wal-Mart Stores, Inc.*, 824 N.E.2d 349, 354 (Sup. Ct. Ind. March 22, 2005); *Cedars-Sinai Medical Center*, 954 P.2d 511, 518 (Sup. Ct. Cal. May 11, 1998).

9. *Rambus, Inc. v. Infineon Technologies AG*, 222 F.R.D. 280, *296 (E.D. Va. 2004) (Rambus adopted its document retention program because it anticipated litigation and as an integral part of its patent litigation strategy, warranting grant of additional discovery addressed to the appropriate sanctions).

10. *Andersen*, 544 U.S. ___, slip op. at 11.

11. *Living Designs, Inc. v. E.I. DuPont de Nemours and Company*, 431 F.3d 353, 2005 U.S. App. LEXIS 26468, *6-7 (9th Cir. 2005).

12. *Id.*

13. *Id.* A settlement was ultimately reached resolving the matter.

14. 1 F.Supp. 2d 249 (S.D.N.Y. 1998).

15. A jury ultimately acquitted the executives. "Two former Texaco execs acquitted of obstruction," *The Minnesota Daily*, May 13, 1998.

16. 1 F.Supp.2d at 249.

17. As the court in the *Lundwall* case observed, "[o]f course, there are a great many good reasons why federal prosecutors should be reluctant to bring criminal charges relating to conduct in ongoing civil litigation. Civil litigation typically involves parties protected by counsel who bring frequently exaggerated claims that, under the supervision of a judicial officer, are narrowed and ultimately compromised during pretrial proceedings. Prosecutorial resources would risk quick depletion if abuses in civil proceedings—even the most flagrant ones—were the subject of criminal prosecutions rather than civil remedies. Thus, for numerous prudential reasons, prosecutors might avoid entering this area. But that is quite different from concluding that §1503 precludes their doing so." 1 F.Supp. 2d at 254.

18. See *Carpenter v. Weichert Realtors*, 2004 U.S. Dist. LEXIS 16443 (E.D. PA) (plaintiff's pro se complaint alleging certain defendants destroyed records in a bankruptcy action, in violation of 18 U.S.C. §1519, dismissed since the statute does not give rise to a private cause of action).

19. 18 U.S.C. §1961(1)(B). The data destruction crimes in §§1519 and 1520 are not RICO predicate offenses.

20. *Florida Evergreen Foliage v. E.I. DuPont de Nemours and Company*, 135 F.Supp. 2d 1271, 1285 (S.D. Fla. 2001), citing *Levit v. Brodner*, 75 B.R. 281, 285 (N.D. Ill. 1987) (perjury and destruction of evidence in bankruptcy action might serve as predicate act in subsequent RICO suit).

21. 18 U.S.C. §1964(c). See *Living Designs, Inc. v. E.I. DuPont de Nemours and Company*, supra, 2005 U.S. App. LEXIS 26468, *21, n. 7 (reversed dismissal of plaintiffs' civil RICO complaint predicated upon DuPont's fraudulent misrepresentations in mail and wire fraud acts, but upheld dismissal of obstruction of justice predicate acts based upon DuPont's discovery violations in another case failed to allege a "direct relationship between the injury and the alleged wrongdoing"); but see *Green Leaf Nursery v. E.I. DuPont de Nemours & Co.*, 341 F.3d 1292 (11 Cir. 2003) (plaintiffs' civil RICO claim predicated, in part, on violation of §1512 for obstruction of justice in falsifying evidence, dismissed since obstruction was against third party in previous litigation and plaintiff could not show obstruction was proximate cause of their alleged injury).

22. *Ty Inc. v. Sofibel's Inc.*, 2005 U.S. Dist. LEXIS 22060 (N.D. Ill. Sept. 30, 2005) (court applied preponderance standard to evaluate proof that president of plaintiff company had engaged in witness tampering and other serious misconduct in trademark infringement action, resulting in sanction of forfeit of damages award), citing *Herman & Maclean v. Huddleston*, 459 U.S. 375, 389 (1983); *U.S. v. Regan*, 232 U.S. 37, 48-49 (1914) (proof by a preponderance of the evidence suffices in civil suits involving proof of acts that expose a party to criminal prosecution).