OAJ

E-Discovery, Spoliation, & Reasonable Inquiry

E-Discovery is becoming increasingly more complicated, especially in reference to plaintiff and defense counsel's obligations and duties when encountering electronically stored information(ESI). Discovery is designed to be a collaborative process.[1] Although E-Discovery has often made it hard for Plaintiff's counsel to obtain ESI as well as obtain appropriate sanctions in spoliation claims, the courts have required defense counsel to notify all parties and make a reasonable inquiry regarding potential evidence.[2] Defense counsel has more responsibilities and duties than to merely inform their client to preserve possibly relevant information and walk away.

Even as more information continues to be stored by companies with third parties, it does not release defense counsel from making reasonable inquiries regarding discoverable information. Whether it is video, location technology, logs, or digital sale reports; defense counsel remains responsible for identifying, locating, and disclosing all potentially discoverable information under the federal rules.[3]

THE CASE LAW & WHY DO WE CARE AS PLAINTIFF'S LAWYERS?

In *DiLuzio*, the Southern District of Ohio decided a case where the facts of spoliation were so apparent that the magistrate ordered a default judgment against all defendants. The entire case concerned a fire that occurred to Plaintiff's property that he believed to have been started by the Fire Chief himself. Plaintiff claimed that the fire was intentional in an effort to force him to sell his property in the Village of Yorkville. Although this case's facts appear to be something out of the movies, it is very illustrative of some of the facts the court has appeared to focus on.

First, plaintiff's attorney made three requests over a nine-month period for the production of documents and even gave an extension of 30 days after the third request before filing a motion for sanctions and default judgment. Plaintiff's counsel also made informal request via email to defense counsel regarding the documents. The request was for the emergency squad records of the Plaintiff himself and the fire chief whom the plaintiff believed to be under the influence of alcohol at the time and location of the fire at plaintiff's property. Defense counsel repeatedly did not comply with any of the discovery requests and when doing so often gave blatantly false information. When the credibility of the Fire Chief's wife came into question, supplemental discovery regarding her embezzlement charges became an issue.

Second, the mayor of the village lied during his deposition about whether or not he had maintained original discovery documents. He specifically indicated that the notes used during the deposition were typed for legibility purposes and he had possibly destroyed the original

---

[1] Fed. R. of Civ. P. 26(f); *DiLuzio v. Vill. Of Yorkville*, No. 2:11-cv-1102, 2016 U.S. Dist. LEXIS 177378 (S.D. Ohio, December 22, 2016)

[2] *Brown v. Tellermate Holdings Ltd*., 2014 U.S. Dist. LXIS 90123 (S.D. Ohio July 1, 2014)

[3] *Id*.

handwritten notes of the village council meeting. He later produced his original handwritten notes which were perfectly legible. Defense counsel indicated that the mayor had not consulted with him regarding the destruction or retyping of the notes.

The court reasoned that although the mayor had not consulted with his attorney regarding the notes, it is certainly required of Defense Counsel to preserve this information. The Court ultimately ruled that although defense counsel's actions and inactions with regard to safeguarding the discovery process occurred quite frequently, Defendant's themselves did not comply with the discovery process at all and were a majority cause for default judgment.[4]

Although this case rinks of conspiracy it illustrates very well the factors both the federal and state courts are considering when ruling on spoliation. However, we often do not live in the fairytale of *DiLuzio*, our facts usually resembles something more like *Ferron*.

In *Ferron*, plaintiff alleged that 703 commercial email advertisements with the name and logo of DISH Network were sent to his email account by E-Management Group, Inc, Dish Pronto, Inc., and 411 Web Directory in violation of the Ohio Consumer Sales Practices Act (O.R.C. 1345.01).[5] Plaintiff requested copies of these emails in electronic format and Defendant E-Management provided the emails in paper form. Plaintiff claimed that paper copies of the emails did not preserve the invisible information contained in the graphic images in their electronic form and requested sanctions. Defendant E-Management claimed that some graphics within the emails had been disabled before the production request of the Plaintiff. Defendant also claimed that they were not responsible for maintaining the sites where the graphic or website links were maintained. However, what appeared most important to the court was how the Plaintiff was harmed without the electronic form of the emails.

It appeared that emails were transmitted to the plaintiff by one company, but the links or websites in the graphic images were maintained by another company. The court reasoned however that it is the plaintiff's burden to show why they were harmed by the missing electronically stored information. The court further reasoned that the Plaintiff did not show what the missing electronic information was or was likely to prove with regard to their claim of an Ohio Consumer law violation.

Finally, in *Tellermate*[6], Plaintiff's alleged that they were terminated from Tellermate based on their age and they requested salesforce.com reports of themselves and other employees at their former employer. Salesforce.com is an independent company that provides sales based customer tracking via a web application. Salesforce reports were requested by Plaintiff to compare their performance with that of other or younger employees to prove their performance was comparable if not better than other employees at *Tellermate*.

The contract between *Tellermate* and Salesreport.com gave complete ownership of the customer data to *Tellermate*. They were able to access their information via two administrators

[4] *DiLuzio v. Vill. Of Yorkville*, No. 2:11-cv-1102, 2016 U.S. Dist. LEXIS 177378 (S.D. Ohio, December 22, 2016)

[5] *Ferron v. Echostar Satellite, LLC*, No. 2:06-CV-453, 658 F. Supp. 2d 859, 2009 U.S. Dist. LEXIS 66637 (July 30, 2009)

[6] *Brown v. Tellermate Holdings Ltd*., 2014 U.S. Dist. LXIS 90123 (S.D. Ohio July 1, 2014)

at *Tellermate* and had 24/7 access to the customer information. Tellermate did not maintain the data it was clearly maintained by Salesreport.com.

During the discovery process, Defense counsel for Tellermate indicated three particular reasons for not producing any salesforce.com reports. First, they indicated that Tellermate does not maintain salesforce.com information in a hard copy format; second, defense counsel indicates they could not print out accurate historical records from salesforce.com; and finally, they indicated that requests for the information should be directed to the third party salesforce.com.

Most important to this case was the fact that Tellermate employees had complete access to the client profiles. The Court reasoned that because employees had complete access to the profiles and Tellermate owned the information per their agreement, they had misrepresented this in their discovery response. The indicated specifically that they could not print out historical records from salesforce.com when they actually could. More specifically, defense counsel would have known this information after a pretty simple inquiry.

WHY DO WE CARE AS PLAINTIFF'S LAWYERS?

First, we should care as plaintiff's attorneys because with the proliferation of more information it gives us more access to the unconscious and subconscious actions of defendants. Technology is interwoven with our lives so much now that many of us forget it is even there. Many of us are finding it harder to hide our true beliefs, intentions, and actions. Our public and private persona are starting to become one and the same. This provides us with a lot of information about companies and individuals who have harmed our clients, including defense attorneys who fail to perform a reasonable inquiry.

HOW THIS INFORMATION CAN HELP US?

Each of the above cases gives us plaintiff's attorney significant information to move forward with as we draft spoliation letters as well as try to preserve evidence that will potentially help our clients.

First and foremost, we must give all parties notice. Although the court appears to require that defense counsel put all parties who might have discoverable information on notice, we must do our due diligence to discover who actually controls the information or data as well as whether the defendant has unequivocal access. As we see in *Tellermate*, access made all the difference with being required to produce the salesforce reports, while *Ferron* had not shown who controlled the digital images themselves. This can be done by requesting any agreements between providers of technological services and the defendant.

Second, we must continue with both formal and informal inquiries into discoverable information. Each court looked into informal communications as well as formal communications regarding Defense Counsel's actions, inactions, and fabrication regarding discoverable information. This appears pivotal in the court determining whether actions or inactions of the defense counsel are being done in bad faith.

Finally, we must actually request appropriate sanctions from the court when the discovery process has been abused and we have expended time and have been harmed by the lack of preservation. More specifically, we must articulate with particularity how our theory has been affected by the integrity or lack of evidence and that there no quality alternative exist.