BUSINESS ETHICS IN LITIGATION

Prepared and Presented by:

GRADY S. HURLEY
JONES, WALKER
201 St. Charles Avenue
New Orleans, Louisiana 70170
504-582-8000 phone / 504-582-8583
www.joneswalker.com / ghurley@joneswalker.com

BUSINESS TORTS IN LOUISIANA

I. BUSINESS ETHICS IN LITIGATION

A sudden emergency occurs and a rash of e-mails are exchanged between departments in lieu of telephone calls. No one realizes that litigation may ensue. Legal counsel is not immediately consulted nor copied on e-mails. There is an unedited flow of opinion, facts and innuendo. Within the next week, potential evidence is lost, misplaced or destroyed before some managers suspect that the emergency may lead to litigation. Within thirty days, counsel is contacted and suit is filed within sixty days in federal court requiring initial disclosure within 45 days. A limited Protective Order is filed by one of the parties. What are the ethical and professional considerations with respect to e-discovery and spoliation of evidence when documents or tangibles are not preserved? What opinion and innuendo exchanged in the heat of the moment must or should be disclosed? What is the role of legal counsel in business litigation to be an advocate, but maintain ethical standards? In everyday practice, business litigators are faced with professional considerations to be resolved.

A. ETHICAL AND PROFESSIONAL CONSIDERATIONS

Ethical obligations are something that an attorney "shall do," while a professional consideration is something that an attorney "should do." In Louisiana our Code of Professionalism gives guidance to any attorney obligated to make a FRCP 26 initial disclosure or respond to a Protective Order.

Initially, the Louisiana Code of Professionalism approved in 1992 states that an attorney will never "mislead" other counsel and not "knowingly" make "untrue statements of law or fact." An attorney will identify changes that he has made to documents submitted to him. During discovery an attorney, while an advocate, will act with a sense of "fair play." Within the spirit of disclosure, an attorney in Louisiana will cooperate with counsel to reduce the cost of litigation.

The Louisiana Code of Professional Conduct of March 2004 mirrors the Louisiana Code of Professionalism and provides specific guidance in discovery issues.

Rule 1.2(d) discusses the relationship between a client and his attorney in the prosecution of a case:

> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

The confidentiality of information between a client and attorney is discussed in Rule 1.6. The general rule is set forth in Rule 1.6(a):

> (a) A lawyers shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Exceptions under Rule 1.6(b) include (b)(2).

> (b)(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.

There is an entire section of "Professional Conduct" related to the role of a lawyer as an advocate. Rule 3.2 echoes the prevailing sentiment of most jurisdictions that a "lawyer shall make reasonable efforts to expedite litigation," which may include initial disclosures.

Rule 3.3(b) places a burden upon an attorney to take reasonable measures to prevent his client from engaging in fraudulent conduct related to the pending proceeding. Expanding this rule is 3.4, which states that a lawyer "shall not" unlawfully obstruct access to evidence or alter, destroy or conceal a document.

Rule 3.4, "Fairness to Opposing Party and Counsel," states in full:

A lawyer shall not:

a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client, and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Under Rule 5.1, the partner in charge of a file is responsible to make reasonable efforts to ensure that his junior partners, associates, paralegals and secretaries abide by the fairness doctrine.

The simple understanding of Louisiana's Code of Professionalism and Code of Professional Conduct is fairness, reasonableness and disclosure.

B. FRCP 26

The obligation to disclose information is a fairness rule and intended to reduce the costs of discovery. As a body, the Federal Rules of Civil Procedure discourage any surprises, encourage production of non-privileged evidence, attempts to facilitate the judicial process and reduce litigation costs. The FRCP rules on disclosure require four types of information to be provided: individuals with knowledge, a description of documents, damages and insurance.

The two most challenging disclosures are identifying individuals with "discoverable information" and "documents" supporting claims and defenses. This requires an evaluation of material witnesses to a party's case but does not require the disclosure of individuals or evidence that assist the other party in the prosecution of their case.

Pursuant to FRCP 26(g)(1), an attorney is required to make a reasonable inquiry before making an initial disclosure. In complex litigation this may require an initial investigation, including a review of a company's electronic based records. Deleted e-files and e-mail may still exist on hard drives and, therefore, be within the custody of a client subject to production. Privileged documents, while not subject to disclosure, may, under certain circumstances, be the subject of a privilege log.

C. "E" EVIDENCE

The days of searching through file cabinets for the "smoking gun" are passing. Over 90% of data is presently digital. Over a third of that data is never printed. E-mail is the principal means of office communication.

Most companies do not have policies for protecting the protocol or privilege of electronic information. Computers facilitate the free flow of information and the speed of information often encourages loose language and half truths. Computers do not filter guesses, suspicions or misinformation which may be later used as "Exhibit A." Many computer users believe that any misstatements will simply be deleted. Many have referred to an e-mail server as the "Pandora's Box" of legal issues and liability. While e-mail may be discoverable, their admissibility is still subject to hearsay rules. *U.S. v. Jackson*, 208 F.3d 633 (7th Cir. 2000); FRC 401, 402, 801-804, 901-902, 1001-1005.

Embedded in every e-document is a history of hidden notes, blind copies, edits and other traceable information. Information "deleted" can be found in servers and hard drives. To avoid the specter of spoliation, written and clear retention and discretion policies should be in place before and incident. An IT Director is an important potential witness in any commercial dispute.

In government investigations, the Sarbanes-Oxley Act of 2002 prohibits the alteration, destruction or falsification of records by any person with the intent to obstruct the administration by any government agency. In potential criminal matters, there are Fourth Amendment requirements under the Bill of Rights. Further, the Electronic Communications Privacy Act, 18 U.S.C.A. 2701-11 (West 2000) creates privacy rights for customers and subscribers of computer network subscribers.

In requesting electronic data, there are different types of documents, including e-mails, draft documents, and data bases. All of these information sources may be considered a "document" for purposes of FRCP 34(a) discovery. FRCP 34(b) allows for site inspection to determine deleted materials. Generally, computer data is relevant and discoverable. *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995 U.S. Dist. Lexis 16355 (S.D.N.Y. 1995). Under FRCP 33, Interrogatories may require a search of data bases for information. Under FRCP (b)(5) and (6), computer records and the operator of a company's computer system may be required to testify about how information concerning a disputed issue is stored.

Discoverable e-data may be costly and the requesting party is generally responsible for the costs. *Sa Har v. Motorola, Inc.*, 138 F.3d 1164 (7th Cir. 1998); *In re: Bristol-Meyers* Squibb, 205 FRD 437 (D.N.J. 2002); *Simon Property Group, L.P. v. My Simon, Inc.*, 194 FRD 639 (S.D. Ind. 2000). However, any request is subject to the limitations imposed by FRCP 26. If a party's own choice of electronic storage makes searching a retrieval of information problematic, then the FRCP 26 burdensome defense may be questioned. *In re: Brand Name Prescription Drugs Anti-Trust Litigation*, 1995 Lexis 8281 (N.D.Del.) The relevancy of data is weighed against the burden of producing same. FRD 401, 403. A request must be specific and not a fishing expedition. Privilege is never waived.

There are not many reported decisions on e-discovery. Most are criminal cases. Illustrative is *Murphy Oil Co. v. Fluor Daniel*, 52 Fed. R. Serv. 3d (E.D.La. 2002) involving a request to produce fourteen months of e-mails. Fluor wanted Murphy to not only pay the production costs, but also the legal costs of reviewing 19.7 million pages for

privilege defenses. In determining who should bear the burden and expense of production, Magistrate Shushan evoked several factors: specificity of the requests; the significance of the request; the accessibility of the information; the purpose of making the request; the benefit of retrieving the information and the costs. In essence, the Court wanted to ensure that the "hassle" was worth the benefit to be derived.[1]

To be used at trial, e-evidence is subject to the Rules of Evidence including relevancy, hearsay, authenticity, and best evidence.[2]

D. SPOLIATION

Spoliation has been defined as the destruction or significant alteration of discoverable evidence in the face of pending, imminent or reasonably foreseeable litigation. All forms of spoliation liability turn on foreseeability. Jamie S. Gorelick, Destruction of Evidence, §3.11 (1989 and Supp. 1998). Once suit has been filed, the foreseeability and need for evidence retention is heightened. Once a court determines that spoliation did occur, a balancing test in light of the specific facts of the case is undertaken to determine whether sanctions or tort liability are appropriate. A court has considerable discretion in creating a fair playing field for the litigants.

Most computer systems have automatic deletion mechanisms. The "deletion" or "destruction" of e-mails may lead to a claim of spoliation of evidence. The issue of spoliation becomes particularly poignant when litigation has been initiated or notice of a claim has been made and e-mails or e-documents are deleted. Corporate officers could

[1] A resource for e-discovery guidance can be found in the ABA Section of Litigation, Civil Discovery Standards, §29(b)(1999).

[2] An excellent group of articles on the civil and criminal issues of e-discovery was presented at the Tulane 20th New Orleans Maritime Law Seminar, upon which this discussion was predicated in part.

be fined for preventing the purging of documents. *Danis v. USN Communications, Inc.*, 2000 WL 1694325 (N.D. Ill. Oct. 2000); *In re: Prudential Ins. Co. of Amer. Sales Practice Litigation*, 169 FRD 598 (D.N.J. 1997). A party may be prohibited from using data that was not produced in an understandable format during discovery. *Crown Life Ins. Co. v. Craig*, 999 F.2d 1376 (7th Cir. 1993). A party may defeat a claim of spoliation by showing that it destroyed data pursuant to a valid and consistent policy. *Lewis v. Remington Arms Co., Inc.*, 836 F.2d 1104 (8th Cir. 1987).

The law concerning spoliation of evidence varies in state and federal forums. Spoliation is a common law term, not a civil law concept. It refers to the intentional or negligent destruction of evidence. Louisiana courts have not articulated a clear test for a spoliation cause of action. Generally, Louisiana courts have applied an "adverse presumption" when a thing has been destroyed. *Salone v. Jefferson Parish Dept. of Water*, 645 So.2d 747 (La.App. 4th Cir. 1994). The Louisiana First Circuit Court of Appeals requires proof that the spoliator had notice of litigation when the evidence was destroyed in order to evoke the presumption. *Miller v. Montgomery Ward*, 317 So.2d 278 (La.App. 1st Cir. 1975); R*andolph v. GMC*, 646 So.2d 1019 (La.App. 1st Cir. 1994). The Louisiana Third and Fifth Circuits only apply the presumption if a reasonable explanation could not be afforded for the destruction of evidence. *Babineaux v. Black*, 396 So.2d 584 (La.App. 3rd Cir. 1981); *Bethea v. Modern Biomedical*, 704 So.2d 252 (La.App. 2nd Cir. 1997)(negligent spoliation found); *Nicoll v. LoCoco*, 701 So.2d 1062 (La.App. 5th Cir. 1997).

In *Moorehead v. Ford Motor Co.*, 694 So.2d 650 (La.App. 2nd Cir. 1997), the Court held that even with a reasonable explanation, an adverse presumption could be

found if the spoliator intended to deprive the other party of its use. See, *Carter v. Exide Corp.*, 661 So.2d 698 (La.App. 2nd Cir. 1995)(An employer's tort immunity does not shield spoliation.)

The Louisiana Fourth Circuit has no clear rule on applying the adverse presumption. Sometimes it has and other times it has not. *Kammer v. Sewerage & Water Board*, 633 So.2d 1357 (La.App. 4th Cir. 1994); *Williams v. GM*, 639 So.2d 275 (La.App. 5th Cir. 1994).

Federal courts are split as to whether spoliation is a procedural or substantive matter. As such, different remedies are often applied. Such remedies include: (1) sanctions; (2) an inference; (3) tort liability. In its strictest form, the "spoliation inference" establishes *prima facie* the elements of the injured party's claim that cannot be proven without the missing evidence, i.e., *Nation-Wide Check Corp. v. Forest Hills Distributors*, 692 F.2d 214 (1st Cir. 1982). An adverse inference serves two purposes: remediation and punishment.

The remedial purpose serves to place the prejudiced party in the same position to prove its case as it would have if the evidence had been preserved. This is especially true after litigation has begun and the destroyer knew or should have known that the thing destroyed was potential evidence. *Davis v. Wal-Mart Stores, Inc.*, 751 So.2d 357 (La.App. 5th Cir. 2000); *Byrnie v. Town of Cromwell Bd. of Education*, 243 F.3d 93 (2nd Cir. 2001); *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776 (2nd Cir. 1999); *Kronish v. U.S.*, 150 F.3d 112 (2nd Cir. 1998). In *Griffin v. Weingarden*, 752 So.2d 308 (La.App. 4th Cir. 2000), the owner of a floorboard through which plaintiff fell discarded the floorboard after the defendant was aware of a claim. The appellate court affirmed the

trial court's presumption that such evidence would have been unfavorable to the defendant.

The Fifth Circuit Court of Appeal has occasionally reviewed the "tort" of spoliation of evidence, the parameters of which are still being defined by the Court. In *Pham v. Contico International, Inc.*, 2000 W.L. 325700 (5th Cir. 2000), the Court stated:

> The theory of spoliation of evidence refers to an intentional destruction of evidence for the purpose of depriving opposing parties of its use. The tort of spoliation of evidence has its roots in the evidentiary doctrine of adverse presumption, which allows a jury instruction for the presumption that the destroyed evidence contained information detrimental to the party who destroyed the evidence unless such destruction is adequately explained. The only remedy Louisiana courts have granted for spoliation of evidence claims has been the application of the above-mentioned adverse presumption. Recently several Louisiana jurisdictions may have set the stage to recognize spoliation of evidence as a distinct and separate source.

Id. at *3.

An older, but often cited, Fifth Circuit case, *Vick v. Texas Employment Commission*, 514 F.2d 734 (5th Cir. 1975) noted in finding spoliation of evidence and applying "adverse inference" to the destruction of records or evidence, the following:

> The adverse inference to be drawn from the destruction of records is predicated on bad conduct of the defendant. Moreover, the circumstances of the act must manifest bad faith. Mere negligence is not enough for it does not sustain an inference of consciousness of a weak case. There was an indication here that the records were destroyed under routine procedures without bad faith and well in advance of Vick's service of Interrogatories. Certainly there were sufficient grounds for the trial court to so conclude.

Id. at 737; *See also Burge v. St. Tammany Parish Sheriff's Office*, 2000 W.L. 815879 (E.D.La. 2000).

The seriousness of the sanctions that a court may impose depends on consideration of the following elements: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future. *Menges v. Cliff Drilling Co.*, 2000 W.L. 765082 (E.D.La. 2000).

As part of these sanctions, a court may exclude the spoiled evidence or allow the jury to infer that the party spoiled the evidence because the evidence was unfavorable to that party's case. *Menges v. Cliff Drilling Co.*, 2000 W.L. 765082 (E.D.La. 2000). However, exclusion of spoiled evidence is a drastic sanction that courts will generally try to avoid because exclusion would often unnecessarily eviscerate the plaintiff's case, especially when a lesser sanction would sufficiently even the playing field. *See id.* The preferred alternative is the principal of law that a party's intentional destruction of evidence relative to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction. See also, *Anderson v. Production Management Corp.*, 2000 WL 492095 (E.D.La. 2000).

Recently, the U.S. Fifth Circuit decided two spoliation cases. In *Fruge v. Parker Drilling Co.*, 337 F.2rd 558 (5th Cir. 2003), a hose ruptured and injured an offshore worker. The hose was lost before suit was filed. Since the hose was lost before suit or a Protective Order was filed, spoliation was not found. There was no suggestion of bad faith.

In *King v. Illn. Central R.R.*, 337 F.3rd 550 (5th Cir. 2003), a railroad crossing signal allegedly malfunctioned, causing injury. Although the plaintiff notified the

railroad of a claim, he did not specify that the signal malfunctioned, nor request its preservation before it was destroyed. Since bad faith could not be found, no adverse inference was allowed.

Spoliation has been recognized in the Eastern District and the Fifth Circuit. The remedies for spoliation are many and include the exclusion of evidence based on spoiled evidence and the application of the adverse inference rule discussed above. The Court's view exclusion of the evidence as a more drastic remedy than the adverse inference instruction. Additionally, even if the adverse inference instruction is not given, the fact of the destruction of the evidence may still be relevant and, in some cases, may still be presented at trial of the matter.

Courts view exclusion of evidence as a more drastic remedy than an adverse inference instruction when evidence has been destroyed. In federal courts, spoliation inference is an equitable means to punish those who abuse discovery in bad faith. State courts are still struggling with a consistent approach to the issue.