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Significant Sanctions Possible When Documents Are Not Properly Preserved or Collected

Spoliation of evidence - the destruction or other non-preservation of evidence in pending or reasonably foreseeable litigation - has been a popular topic lately. A recent decision highlights the severity of sanctions that may be imposed when a party fails to preserve documents.

The Pension Committee decision

In *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010), Judge Scheindlin warns that the failure to avoid spoliation merits swift and sometimes case-altering punishment. Although this opinion does not directly control North Carolina courts, similar sanctions are available in North Carolina.

In *Pension Committee*, the plaintiffs were instructed by counsel to begin collecting documents in the fall of 2003 in preparation for suit, which they filed in early 2004. The case was stayed between 2004 and 2007, and no discovery efforts were made during that time. When the defendants began requesting documents in mid-2007, they quickly found significant gaps in what the plaintiffs produced. Judge Scheindlin found that not only did most of the plaintiffs fail to preserve documents in a meaningful way until 2007, but their attempts to collect and review relevant documents were severely deficient. Judge Scheindlin found the plaintiffs' behavior to range from negligent to grossly negligent or willful and imposed significant sanctions.

Spoliation standards and guidance

Courts often classify spoliation behavior into negligence, gross negligence, willfulness. Intentional destruction or alteration of evidence goes beyond those classifications and may justify a sanction terminating a party's claims. Willful and grossly negligent behavior may warrant special instructions permitting or requiring the jury to presume that any missing documents were relevant and prejudicial. Merely negligent behavior, even if documents are eventually produced, may result in monetary fines.

The following is concrete guidance from the *Pension Committee* case about what kinds of activity may give rise to sanctions:

Preservation stage

- **Duty**: Preserve relevant or potentially-relevant information when litigation becomes reasonably likely.
 - Failure to preserve information that leads to the loss or destruction of relevant information (negligence);
 - Failure to issue a written litigation hold in a timely manner (gross negligence);
 - Intentional destruction of relevant paper or electronic records after litigation becomes reasonably likely (willful).

Collection and review stage

- **Duty**: Search for relevant or potentially relevant information thoroughly and in the right places, and conduct an effective review of the search results.
 - Failure to identify, and collect records from, key players (willful or gross negligence);
 - Failure to cease the deletion of email or the destruction of back tapes after duty to preserve has attached (gross negligence);

- Failure to collect information from former employee files that are still in the party's possession or control (gross negligence);
- Failure to obtain records from all employees with even a passing encounter with the issues involved (negligence);
- Failure to execute a comprehensive search for documents (gross negligence or negligence);
- Failure to sufficiently supervise or monitor employee document collection (gross negligence or negligence);
- Failure to take appropriate measures to preserve electronically stored information (negligence);
- Failure to assess the accuracy and validity of selected search terms (negligence);
- Failure to search backup tapes when it is clear that relevant material either did or should have existed yet was not produced through other means (negligence).

As soon as litigation becomes reasonably likely, regular document destruction practices should be halted as to any potentially-relevant information, and employees should receive detailed written instructions on how to preserve information on a going-forward basis and where to deliver relevant documents. The files, including email, of all current and former employees (not just key players) likely to have any potentially relevant information related to the lawsuit, should be combed. Servers and filing systems should be searched comprehensively for relevant information, including back-up tapes. Personnel in charge of document preservation and retrieval should receive sufficient training and oversight to ensure effective document collection. Finally, under no circumstances should relevant documents be intentionally destroyed, no matter how "bad" they seem to be for the case. Of course, counsel should be consulted and involved in this process from the beginning.

For further information, please contact the Smith Anderson lawyer with whom you have a relationship.

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