

“Spoliation of Evidence: A Trap for The Unwary in Age of Electronically Stored Information,” Proyecto Magazine

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As computer technology continuously progresses, together with the ability to store large amounts of data at a relatively low cost, this article explores the heightened obligations imposed by courts for businesses to retain documents for longer periods of time than traditionally required under spoliation of evidence law.

In our times of electronically stored information, the internet, smartphones and e-mail, it is not surprising that over ninety percent of the world’s data has been created in only the last two years. However, in today’s digital age, gone are the days when a party would need to incur thousands of dollars per year to store records since hundreds of thousands of pages of documents can be stored on a digital drive.

Many businesses are infrequently involved in litigation and therefore document retention and the discovery process may be unfamiliar. As a consequence to this technological convenience, it should be expected that litigants may need to retain all data for many years after the fact with courts imposing stricter penalties for companies having an insufficient document retention policy. Fortunately, with the assistance of counsel, by adopting a retention policy that employs computer forensics, scanning and cloud-based storage services spoliation of evidence is an easy pitfall to avoid.

Spoliation of evidence is a legal doctrine where a litigant either intentionally or negligently destroys or conceals relevant evidence in a case. When relevant records are unavailable and a party can show their adversaries either knew or should have known that the evidence may be relevant to future litigation, the inadvertent or intentional destruction of evidence are discovery violations that may subject a litigant to court sanctions.

These possible sanctions include negative inferences against the party, prohibiting that party from entering documents into evidence or the strictest sanction being dismissal of the claim or asserted defenses.

In Florida, before a court will find that spoliation of evidence has occurred it must determine that the evidence previously existed, the spoliator was obligated to

preserve the evidence and the evidence was critical to an opposing party's ability to prove its claim or defense.

The Florida Supreme Court has held there is a duty to preserve evidence when a party should reasonably foresee litigation even in the absence of a contract, statute, or discovery requests. Therefore, following a business transaction if a company has reason to believe that litigation may ensue a duty to retain all relevant documents could be imposed.

In the construction defect context, the best practice for the preservation of evidence requires a party to a construction project to retain its records for the entire ten-year statute of repose. Additionally, by maintaining all project records, such thoroughness may serve to buttress defenses which may be asserted.

For example, recently we had a case where a party had maintained its decade old project records which supported the client's defense that their scope of work had been modified to exclude many of the construction defects alleged.

In conclusion, in today's digital age, hundreds of thousands of pages of records, documents, correspondence, and project files can now all be stored electronically on a digital drive at a relatively low cost. With such ease of retention, the duration of an entity's responsibility to retain records has been extended.

Therefore, it is important to protect your organization by consulting counsel and acting immediately before litigation ensues. By taking the necessary steps to adopt an effective document retention policy for your business now, if there is litigation, application of the spoliation of evidence doctrine can be avoided and safeguard your ability to successfully assert claims or assert defenses should your business become a party litigant.

Please feel free to contact us for assistance in adopting a document retention policy for your business.

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