

Spoiling Evidence Intentionally Comes With A Price

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The same tools and practices that help technology users maintain and administer their computer systems in an efficient and confidential manner may also be used improperly to spoil digital data and other evidence that is subject to discovery in a lawsuit. Misuse in this manner is short-sighted, improper and opens a party to legal sanctions, including contempt and monetary damages, not to mention the negative impact such conduct may have on the merits of the case.

These factors were all in play in a recent Minnesota case in which employees of the defendant tried to purposely avoid complying with a discovery request by deleting digital information and failing to enclose encrypted data. [*Multifeeder Tech. Inc. v. British Confectionery Co. Ltd.*, No. 09-1090 (JRT/TNL), 2012 WL 4135848 (D.Minn. Sept. 18, 2012)]

The specific actions with respect to evidence in this case included use of commercial wiping software on a laptop, the deletion of certain files from a computer and reformatting of various hard drives. In addition, concealment and failure to disclose the use of an encrypted volume to the forensics investigator appointed by the Court was also found to be conduct worthy of sanctions for violating the Court order which accompanied the investigator's appointment.

Based on the above, a Magistrate Judge held the defendant in *Multifeeder* in contempt and required it to pay \$25,000 plus \$475,000 in damages for expenses incurred by the plaintiff, including fees for the forensic examiner.

On appeal, the US District Court increased the monetary damages to \$600,000 to better compensate the plaintiff for fees payable to the forensic investigator and its attorneys.

This case highlights the importance of instructing employees to maintain, preserve and produce all relevant evidence that is responsive to a valid discovery request, including digital evidence. The cost of failing to do so, especially if such failure is intentional, can lead to significant damages and irreparably harm a party's position in the underlying case.

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