

# Spoliation of Electronic Evidence Can Lead to Death-Knell Sanctions



**By Eric Sinrod,**

There is little doubt now that discovery in civil litigation encompasses relevant electronic data. Some parties may think that they can avoid the consequences of producing such data by simply deleting the data or by employing tools that are designed to erase data. Such spoliation of evidence is a very bad idea, as courts are willing to impose serious and even death-knell sanctions, as demonstrated in a recent case.

In [\*Gutman v. Klein\*](#), a federal magistrate in the Eastern District of New York was called upon to handle the plaintiffs' claim that a defendant had spoliated crucial evidence on his laptop computer. The procedural history of the case included five prior years of discovery, and along the way the magistrate had ordered the defendant to make his computer hard drives available for examination by the plaintiffs. When the plaintiffs inspected the laptop, circumstances caused them to suspect that the defendant's laptop and its data had been tampered with.

Accordingly, the magistrate ordered a court-appointed forensic expert to conduct an examination. The expert's report indicated that a file deletion program had been downloaded, and that numerous files from the laptop had been deleted and rendered unrecoverable, among other findings. Taken together, the expert concluded that this evidence "is indicative of the behavior of a user who was attempting to permanently delete selective files from the machine and then cover up the chronology of system changes occurring in the hours and days just prior to a forensic preservation." Moreover, "it is unlikely that the changes made to the . . . laptop in the days preceding its imaging occurred accidentally."

On this record, the magistrate did not have much problem in finding that spoliation had taken place. Litigation had started between the parties years earlier, the defendant was on notice of the issues at stake, he had a duty to preserve relevant evidence, and instead, such evidence on the laptop was deleted and made unrecoverable. The magistrate found that the defendant's explanations were contradictory and incredible.

The magistrate then had to decide what to do in response to the spoliation. In coming to his conclusion, he noted that there is wide judicial discretion in sanctioning a party for discovery

abuses. Still, he recognized that use of the harshest sanctions is limited to cases involving willfulness, bad faith or fault of a disobedient party. In terms of the ultimate sanction of a default judgment, the magistrate stated his understanding that it should not be imposed lightly, especially when there are alternative remedies available to address the spoliation.

Based on the record, the magistrate concluded that sanctions lesser than a default judgment would be inadequate, given the bad faith involved and the fact that the computer files on the laptop had been irretrievably deleted. Accordingly, the magistrate recommended the imposition of a default judgment, and while he denied the imposition of punitive damages, he did find that the plaintiffs were entitled to their attorney's fees and costs.

This case should send fair warning to civil litigants -- take your e-discovery obligations seriously. The failure to preserve relevant electronic data can lead to serious sanctions, and the intentional deletion of relevant data can result in a default judgment -- the ultimate death-knell sanction -- which awards judgment in favor of the opposing party in a lawsuit.

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