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A decorative graphic on the right side of the header, consisting of a large, flowing wave in shades of red, pink, and purple.

# A New Wave in Workplace Law

Inside Counsel Conference 2020

February 26–28, 2020

## Spoliation of Evidence

In-House Counsel Now Have An  
Evidentiary Sword & Shield

Under The 2015 Amendments to The  
Federal Rules of Civil Procedure

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# Introduction

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For years, the playing field was tilted against employers when it came to the preservation of evidence and its mishandling and spoliation. Courts focused on the asymmetry that characterized most employment litigations: employers had superior financial, information technology and human resources available relative to their current or former employees and many spoliation and e-discovery decisions seemed to force employers to allocate these resources to solve preservation problems even when it seemed inappropriate. Other cases involved punitive decisions that held employers responsible for inadvertent deletions and mishandling of electronically stored information (“ESI”). This in turn resulted in disproportionate legal expenditures by employers and attorneys relative to the actual threat that spoliation represented to the rights of employees and employers and increased pressure on federal and state courts to deal with sprawling e-discovery problems.

As the blizzard of legal hold notices and memos and revised document retention policies and armies of third-party e-discovery vendors and contract review attorneys seemed to overtake the aperture of the judiciary, in-house attorneys and private practitioners, a series of amendments to the Federal Rules of Civil Procedure addressing these problems began to get increased attention. Interestingly, this was not the first attempt to address these problems. In 2006 and 2009, amendments were passed but with little impact. But the 2012 amendments were different. They were an attempt to sweep the dirtiest corners, addressing the scope of discovery itself through proportionality; requiring intent to deprive a party of evidence to impose

strict sanctions; and overruling case law which imposed sanctions for accidental mishandling of ESI. These amendments to Federal Rules 26, 24 and 37 were enacted in 2015. Five years later, it appears that they are levelling the discovery playing field and, as this white paper explains, has equipped in-house counsel for employers with the tools needed to prosecute and defend the spoliation e-discovery disputes that have become the hallmark of employment litigation in the beginning of the 21<sup>st</sup> century.

## **I. The 2015 Amendments to the Federal Rules of Civil Procedure**

The 2015 amendments encompassed many different Rules, but the most consequential amendments for the purposes of spoliation and e-discovery involved Rules 26 and 37.

### **A. Federal Rule of Civil Procedure 37**

The changes to Rule 37 explicitly changes the law concerning spoliation of evidence. These amendments were designed to address the challenges created by the increasing proliferation of ESI, its preservation and loss by litigants. To tackle these challenges, the changes imposed three (3) requirements that must be satisfied before a court may even *consider* whether sanctions are appropriate for the loss of ESI. These requirements include the following elements:

#### **1. The ESI should have been preserved in the anticipation of or during the litigation.**

This codified into the Federal Rules the common law duty that case law imposed on litigants, and underscores that spoliation sanctions cannot be issued unless the duty to preserve was triggered.

2. **A litigant must have failed to take “reasonable steps” to preserve ESI.** This is one of the most important changes to the legal landscape of spoliation. Rather than require perfection, a standard explicitly rejected by the Amendments Committee, litigants are only required to take reasonable steps given the nature of the ESI, the cost and the scope of the duty to preserve. This eliminated what many in-house and outside litigation counsel perceived to be an almost strict-liability regime for the loss of relevant ESI.

3. **The lost ESI cannot be restored or replaced.** This too is a game-changing revision because, in many cases, courts and litigants do not address whether the ESI that was spoliated was a copy of the ESI. “If the information is restored or replaced,” the amendments provide, “no further measures should be taken.”

If these three required elements are proven, and the court finds prejudice on the other party from the loss of information, then the court has discretion to order curative measure that are “no greater than necessary to cure the prejudice.”

Most importantly, the most severe sanctions that the courts can impose are no longer available unless the spoliator acted with the intent to deprive the other party of the information. For the first time, severe spoliation sanctions have a *mens rea* requirement of intentionality. The significance of this change cannot be overstated. As many of us know, before 2015, many courts have imposed severe spoliation sanctions for inadvertent or accidental failures to preserve, loss of ESI, miscommunications regarding suspension of document retention policies and failures to image computers before they were repurposed.

One of the other changes to Federal Rule 37 is the express identification of social media as a source of ESI that litigants and counsel must preserve and understand how to use. As the Advisory Committee Note provides, “[i]t is important that counsel become familiar with their clients’ information system and digital data – including social media – to address these issues.” This development is consequential to employment litigation, where employee and former-employee plaintiffs frequently post information, messages and photographs relevant to their career and employment, which can be relevant to litigation.

## **B. Federal Rule of Civil Procedure 26**

Amended Federal Rule 26(b)(1) contains a proportionality test with discrete elements that has reset the context of the scope of litigation discovery and, by extension, spoliation issues that might arise. The legal standard that was the hallmark of discovery for year, “relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence,” is no longer the standard. Instead of the “reasonably calculated” language, the new Rule 26(b)(1) states that parties may obtain discovery regarding non-privileged matters relevant to any party's claims or defenses and proportional to the needs of the case, considering the following six elements: (1) the importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties' relative access to relevant information, (4) the parties' resources, (5) the importance of the discovery in resolving the issues and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit.

## **II. Swords**

Courts also are leveling the playing field in spoliation and e-discovery by holding current- and former-employee plaintiffs accountable for their mishandling and intentional destruction of ESI. Striking the right balance has been difficult for courts for several reasons. First, the basic asymmetry of financial, human and technological resources between single-plaintiffs, on the one hand, and their former employer defendants, on the other hand, might leave courts reticent. Also, not all plaintiffs or their attorneys are facile in information technology, the handling of ESI and

social media. Finally, plaintiffs rarely if ever have responsibility for identifying, preserving and collecting ESI from multiple employee-custodians, vendors or remote locations – in other words, the law of large numbers makes it more likely that employers will be subjected to sanctions than employees who in any given case usually only have to take care of their own ESI.

This is changing due in part to the amended Federal Rules of Civil Procedure and a wave of case law that now gives employers more arrows in their e-discovery and spoliation quivers and several strategies to go on the attack in employment litigation. The holdings from these cases include a range of discovery sanctions against:

- Employees who update their OS on their computer, upgrade their computer or replace it risk spoliation sanctions.<sup>1</sup> An employer’s interrogatories and deposition examination should inquire about these issues.
- Employees who offer a computer or device that is not the computer or device that they actually used.<sup>2</sup> Employers should require former employee-plaintiffs to confirm all computers and devices used through interrogatories and deposition examination.
- Employees or attorneys who plead ignorance of how their computers, devices, where they claim that relevant ESI was lost or deleted.<sup>3</sup> Under the evolving Rules of Professional Conduct of many states, and the Advisory Committee Note to Rule 37, counsel can no longer make this argument.
- Plaintiffs who tried to argue that social media posts were not subject to disclosure and production in discovery solely because they were designated private by the plaintiff; the “public” versus “private” distinction on Facebook is meaningless.<sup>4</sup> Written discovery, document production, ESI protocols and deposition examination should specifically ask former employee-plaintiffs if they withheld any Facebook content because it is “private.”
- Plaintiffs who self-servingly testify that their intentional deletion of Facebook and Twitter posts were not motivated by the litigation in which the posts would be admissible.<sup>5</sup>
- Employees who “deactivate” their Facebook account, thereby resulting in the loss of relevant ESI, concluding that “deactivation” can result in the spoliation of ESI.<sup>6</sup>

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<sup>1</sup> Williams v American College of Education, No. 16-C-11746, 2019 WL 4412801 (N.D. Ill., Sept. 16, 2019)

<sup>2</sup> Goldrich v. Jersey City, No. 15-885, 2018 WL 449931 (D.N.J., Jul. 25, 2018), modified, 2018 WL 4489674 (D.N.J., Sept. 19, 2018).

<sup>3</sup> Calvert v. Red Robin Int’l, Inc., No. 11-03026, 2012 WL 1668980 (N.D. Cal., May 11, 2012).

<sup>4</sup> Forman v. Henkin, 93 N.E.3d 882, 30 N.Y.3d. 656 (N.Y. 2018).

<sup>5</sup> Nutrition Distrib. LLC v. PEP Research, LLC, et al., No. 16-cv-02328, 2018 WL 3769162 (S.D. Cal., Aug. 9, 2018).

<sup>6</sup> Gatto v. United Air Lines, Inc., et al., Civ. A. No. 10-cv-1090-ES-SCM, 2013 WL 1285285 (D.N.J., Mar. 25, 2013).

A critical element of cases in which discovery sanctions are entered against employee-plaintiffs is a misrepresentation about ESI and e-discovery. This makes sense given the amendments to Federal Rule 37 to require a showing of an intent to deprive a part of evidence: a former employee-plaintiff's attempt to hide harmful text messages or email is evidence of intent. Where employers learn through the prosecution of discovery that employee-plaintiffs misstated the existence of documents, the availability of ESI, whether they have a social media account or some fact along these lines, the courts have reacted clearly and strongly. While such misrepresentations and fraud are not new to employment litigation, their materiality to sanctions and spoliation is now explicit under Federal Rule 37.

Going on the attack in e-discovery is not limited to seeking sanctions, and there are even strategies that employers can deploy before there is a clear evidence that a former-employee plaintiff has destroyed evidence. One of the targets that employers can put in their cross-hairs is attorney-client privileged communications between a former-employee plaintiff and his or her attorney. A preliminary showing or suggestion of spoliation results in the discoverability of attorney-client privilege on litigation hold and preservation communications between counsel and his client, reflecting the "growing trend among courts to find the attorney-client privilege is lost when spoliation has occurred."<sup>7</sup> This can be a powerful pressure point: rather than focusing on the prosecution of the case-in-chief, a former-employee plaintiff's counsel suddenly has to cover his or her flank by defending motions by the employer seeking to pierce the privilege. Often these motions show that counsel neglected to use good litigation hold hygiene or threaten to expose a troubling spoliation that is about to emerge, thereby changing the settlement leverage and dynamics in the case itself.

Finally, when a former employee-plaintiff spoliates ESI, employers should consider asserting substantive causes of action regarding the unavailability of such evidence. This of course depends on the procedural posture of the litigation and the jurisdiction in which it was filed. When the deletion of ESI from an employer's computer systems is unauthorized, and the only copy of the ESI is now unavailable because of the deletion, it could give rise to a cause of action under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. Similar causes of action might be available under state law, as is the case with New Jersey's common law fraudulent concealment of evidence. Other states have such causes of action too, and in some jurisdictions, these claims can be asserted in the litigation in which the ESI was destroyed. Such claims can be asserted through counterclaims in the case itself, in addition to the pursuit of discovery motions and sanctions against a former-employee plaintiff.

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<sup>7</sup> Radiologix, Inc., et al. v. Radiology and Nuclear Medicine, LLC, Case No. 15-4927-DDC, 2018 WL 2364662 (D. Kan., May 24, 2018); Magnetar Tech. Corp. v. Six Flags Theme Park Inc., 886 F.Supp.2d 466 (D. Del. 2012); City of Colton v. American Promotional Events, Inc., Civ. No. EDCV 09-01864 PSG, 2012 WL 13223880 (C.D. Cal., Nov. 22, 2011); Major Tours, Inc. v. Colorel, et al., Civ. No. 05-3091, 2009 WL 2413631 (D.N.J., Aug. 4, 2009).

### III. Shields

#### A. Cruz v. G-Star, Inc.: A Case to Watch

One of the more important cases for employers to watch is Cruz v. G-Star, Inc.<sup>8</sup> This case involved an employee who filed complaints with the Head of Human Resources regarding work conditions. The employee claimed that she was subject to a hostile work environment, was intentionally overworked, and that her supervisors were conspiring to fire her. The employee also told HR that she hired an attorney and that she was not comfortable answering questions without conferring with her attorney and would not share text messages relevant to her claims on advice of counsel. Within four days after receiving Plaintiff's complaint, the Head of HR sought legal advice from outside counsel. Shortly thereafter, management began to compile reasons to fire Plaintiff and ultimately terminated her employment.

In the Plaintiff's subsequent wrongful termination lawsuit, it was revealed that the employer destroyed relevant ESI. Magistrate Judge Wang entered a Recommendation and Report which concluded that the employer's duty to preserve was triggered when complaints were made to the Head of HR because management at employer anticipated litigation. Judge Wang ordered an adverse inference jury instruction at trial and awarded plaintiff attorney's fees and costs on the motion.

This decision was overruled as clearly erroneous by Judge Gardephe. His Honor held that the duty to preserve was not triggered because there was no legal claim articulated by Plaintiff. In reaching this conclusion, Judge Gardephe preliminarily assessed Plaintiff's complaints to HR, noting that Plaintiff claimed that he was overworked but did not claim that she was denied overtime pay; Plaintiff claimed a hostile work environment but did not claim sexual harassment or discrimination. And while Plaintiff claimed that she consulted an attorney, she did not threaten to file a lawsuit. Moreover, HR's consultation with an attorney and discussion of termination of employment did not mean that the employer thought that litigation was likely. Disagreeing directly with Judge Wang, Judge Gardephe concluded that the duty to preserve was not triggered before the ESI was lost.

This decision is a bit of an outlier, making its precedential value difficult to foresee. The extent to which Judge Gardephe pressure-tested Plaintiff's allegations to assess whether litigation was foreseeable is unusual. It is not clear how many other courts will take these steps. As a result, G-Star is important for two reasons: first, to see if it is the tip of a larger iceberg in spoliation cases. If it is, then employer's will be able to leverage these decisions to defend spoliation cases

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<sup>8</sup> No. 17-Civ.-7685, 2019 WL 4805765 (S.D.N.Y., Sept. 30, 2019), *overruling in part*, 2019 WL 2521299 (S.D.N.Y., Jun. 19, 2019).

at the duty-to-preserve level. For the time being, it functions as a case that employers can reach for when if there has been a breakdown in litigation hold.

## B. The Employer's Armory

Several other important decisions have provided employers with critical defenses to be utilized in objecting to litigation hold demands, discovery requests, "meet and confer" correspondence and motions to compel and for sanctions. These include:

- The regular practice of deleting former employee's email folder upon termination is malicious intent to spoliage evidence.<sup>9</sup>
- Employer's duty to preserve arises when it initiates a disciplinary proceeding against an employee.<sup>10</sup>
- The legal hold obligations set forth in federal employment regulations, FMLA Regulations, 29 C.F.R. § 825.500 (a) – (c), and EEOC Regulations, 29 C.F.R. § 1602.14, do not include managerial email correspondence.<sup>11</sup>
- Courts are increasingly permitting practitioners to capture static images of social media data – screen shots and .pdf images – as a means of preservation, with courts allowing such evidence at trial and, in one case, admonishing party for not doing this.<sup>12</sup>

## C. An Employer's Control of ESI on an Employee's Private Computers, Smart Phones, Email Accounts and Other Electronic Devices

### 1. One Federal Judiciary and Three Different Control Analyses

One of the thorniest spoliation problem arises when employees lose or destroy relevant ESI residing on their private computers, email accounts, smart phones or other electronic devices. In this context, "private" means computers, accounts and devices owned, acquired or purchased by employees exclusively or primarily for use non-business purposes. When such devices and ESI is used for work purposes or to further the business goals of the employer, then the loss of relevant ESI can become a problem for the employer – because a growing body of law has treats such ESI as though it was within the employer's control. This, in turn, means that the employer had a legal duty to ensure that such ESI was preserved and faced spoliation sanctions for the mishandling and loss of the ESI. Such risks have forced employers and employees, the courts

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<sup>9</sup> Nekich v. Wisconsin Central Limited, Civ. No. 16-2399, 2017 WL 11454634 (D. Minn., Sept. 12, 2017).

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Spencer v. Lunada Bay Boys, No. 16-cv-02129 (C.D. Cal., Dec. 13, 2017), *aff'd*, 2018 WL 839862 (C.D. Cal., Feb. 12, 2018); Michigan v. Liceaga, No. 280726, 2009 WL 186229, (Mich. Ct. App., Jan. 27, 2009), United States v. Ebersole, No. 06-4956, 263, Fed. Appx. 251 (3d Cir., Feb. 6, 2012).



and in-house and outside counsel to focus on the definition of “control.” It also put employers in the awkward if not impossible position of having to take possession of private computers, devices and email to ensure that preservation requirements were met.

In this setting, the litigation over “control” has been driven by several factors. First, the Federal Rules of Civil Procedure do not define the term “control,” which has left it to the federal judiciary to define this term and provide legal analyses. Not surprisingly, the federal district courts have not used the same definition or legal analysis to define control. As of today, there are officially two definitions in use in different areas of the country – and a third approach that is emerging.

Confounding this lack of jurisprudential clarity is technological innovation itself. The technologies and the functionality of electronic devices are constantly improving, and employers logically move to harness and leverage these innovations to help their businesses succeed. The innovations include new software and communications applications, which help businesses to succeed but sometimes obscures who, between and employer and an employee, actually “controls” data for purposes of preservation and production. And the American workplace has become a Petri dish in which these issues have thrived, as proven by the large number of spoliation and control cases that arise in employment litigation.

The first control test asks whether the employer has the legal right to obtain the ESI from the employee and his or her private computers, smart phones and electronic devices. This test is used by federal courts in the First, Third, Fourth, Sixth, Ninth and Eleventh Circuits.<sup>13</sup> The legal right to obtain ESI from an employee can come from an employment agreement, which requires an employee to return business files or records upon a reasonable demand. It also might come from workplace policies that require cooperation in workplace investigations; allow employees to use their own personal devices for work purposes; or define ESI that can be found on the employer’s computers as the property of the employer.

The second control test focuses on whether employers have access or the practical ability to obtain the ESI. This test is used in the Second, Fourth, Eighth, Tenth, Eleventh and District of

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<sup>13</sup> The definition of legal right to obtain ESI can be found in Mercy Catholic Med. Ctr. v. Thompson, 380 F.3d 142, 160 (3d Cir. 2004); Stream Companies, Inc. v. Windward Advertising, et al., No. 12-cv-4549, 2013 U.S. Dist. LEXIS 100319 (E.D. Pa., Jul. 17, 2013); Pasley v. Caruso, No. 10-cv-11805, 2013 WL 2149136, at \*5 (E.D. Mich., May 16, 2013); In re Citric Acid Litig., 191 F.3d 1090, 1107 (9th Cir. 1999); Siddiq v. Saudi Arabian Airlines Corp., No. 6:11-cv-69-ORL, 2011 WL 6936485 (M.D. Fla., Dec. 7, 2011); Vazquez-Fernandez v. Cambridge Coll., Inc., 269 F.R.D. 150, 164 (D.P.R. 2010); Calzaturificio S.C.A.R.P.A. s.p.a v. Fabiano Shoe Co., Inc., 201 F.R.D. 33 (D. Mass. 2001); Engel v. Town of Roseland, No. 3:06-cv-430, 2007 WL 2903196, at \*3 (N.D. Ind., Oct. 1, 2007); Morningware, Inc. v. Hearthware Home Products, Inc., No. 09-C-4348, 2011 WL 4715189 (N.D. Ill., Oct 6, 2011); U.S. v. Approx. \$7,400 in U.S. Currency, 274 F.R.D. 646, 647 (E.D. Wis. 2011); Al Naomi v. Zaid, 283 F.R.D. 639, 641 (D. Kan. 2012); Ebersole v. Kline-Perry, 85 Fed. R. Serv. 3d 1004 (E.D. Va. 2013) (control pertains to documents that one has a legal right to obtain on demand); Beyer v. Medico Ins. Group, No. CIV 09-5058, 2009 WL 736759 (D.S.D., Mar. 17, 2009).

Columbia Circuits.<sup>14</sup> As The Sedona Conference has noted, Federal Rule of Evidence 34 does not require legal ownership or actual physical possession of the ESI and that the “practical ability” to obtain the ESI on demand is sufficient to establish control. This definition of control has implications in the employment setting, where a company could demand that an employee give the employer relevant ESI as part of a litigation hold and collection. The employee is then placed in a position where he or she might provide an employer with incriminating evidence and no meaningful ability to refuse without a risk of some adverse employment action. The potential for such a coercive outcome was the subject of criticism by The Sedona Conference.<sup>15</sup>

The third approach arises from cases in which courts have held employers responsible for the spoliation of evidence on their employees’ private computers, smart phones and electronic devices where the employer was aware of their use by the employees. In Puerto Rico Telephone Company, Inc, et al., v. San Juan Cable LLC, No. 11-2135, 2013 WL 5533711 (D.P.R., Oct. 7, 2013), a former employee-plaintiff contended that San Juan Cable spoliated evidence by failing to preserve relevant emails from the personal email accounts of three of its former officers who were not parties to the litigation. The federal district court found sufficient evidence to establish the Defendant’s failure to preserve relevant emails within its control (even though said emails were from the officers’ personal email accounts) because the officers had used their accounts to manage the company for as long as seven years. The court concluded the Defendant “presumably knew its managing officers used their personal email accounts to engage in company business, and thus its duty to preserve extended to those personal email accounts.” Notably, no mention was made of the “legal right” or “practical ability” definitions mentioned in other cases. Instead, the “presumable knowledge” standard seems to suggest that employers could be expected to control any work communications, regardless of the device/network, used by their employees whenever the employer knows or should have known about such communications. Importantly, the Motion for Sanctions was denied without prejudice due to finding an absence of bad faith as well as a failure to demonstrate prejudice which, in part, is why the employer’s “awareness” is an open question.

The employer’s awareness that its employees were using their private smart phones for work purposes resulted in serious litigation complications in wage and hour case, Perez v.

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<sup>14</sup> The practical ability to possess definition can be found in Thai Lao Lignite (Thailand) Co., Ltd. v. Gov’t of Lao People’s Democratic Republic, 924 F. Supp. 2d 508, 515 (S.D.N.Y. 2013); Scherbakovsky v. Da Capo Al Fine, Ltd., 490 F.3d 130, 138 (2d Cir. 2007); D.J.’s Diamond Imports, LLC v. Brown, No. WMN-11-2027, 2013 WL 1345082 (D. Md., Apr. 1, 2013); Grayson v. Cathcart, 2013 WL 1401617 (D.S.C., Apr. 8, 2013); Lafleur v. Ean Holdings LLC, No. 12-233, 2013 WL 2490613 (M.D. La., Jun. 10, 2013); Anz Advanced Techs. V. Bush Hog, LLC, No. Civ. A. 09-0028-KD-N, 2011 WL 814612 (S.D. Ala., Jan. 26, 2011); Shell Global Solutions (US) Inc. v. RMS Eng’g, Inc., No. 09-cv-3778, 2011 WL 3418396 (S.D. Tex., Aug. 3, 2011); New Alliance Bean & Grain Co. v. Anderson Commodities, Inc., No. 8:12-cv-197, 2013 WL 1869832 (D. Neb., May 2, 2013); Digital Vending Services Int’l, Inc. v. The University of Phoenix, No. 2:09-cv-555, 2013 WL 311820 (E.D. Va., Oct. 3, 2013).

<sup>15</sup> The Sedona Conference Commentary on Rule 34 and Rule 45, 17 Sedona. Conf. J. 1, 44 (2016).

Shippers Transport Express, Inc., Case No. 2:13-CV-04255-BRO-PLA, 2014 WL 856201 (C.D. Cal., Jul. 8, 2014). The employer, a trucking and shipping company, was investigated by the Department of Labor for its allegedly unlawful wage and hour practices. One of the central issues in this matter was the timing when employer's driver-employees began work. The employer did not take custody of, image or preserve text messages from the personal cell phone of its dispatcher, who testified at his deposition that he regularly used his personal cell phone to text the drivers on their personal cell phones regarding their shifts and routes, particularly at the beginning of each day. Ultimately, the employer was sanctioned for failing to adequately preserve these text messages, which were relevant to the central issue of when the drivers began their work day.

## 2. Three Cases in Which Employers Beat Control Arguments

In three recent cases, employers defended arguments that they controlled relevant ESI residing on their employees' private devices, and these cases are instructive for employers.

In Lalumiere v. Willow Springs Care, Inc., et al., No. 1:16-CV-3133, 2017 WL 6943148 (E.D. Wash., Sept. 18, 2017) a former employee-plaintiff filed a wrongful termination lawsuit and filed a motion to compel text messages exchanged between Defendants' employees on their personal cell phones about her termination and other events alleged in the Complaint. Importantly, several of these other employees were defendants in the litigation. But the employer objected to the discovery requests for the text messages because the text messages were not in the employer's control. The court agreed. It held that the employer Defendant did not have to produce texts from its employees' personal cell phones and that the defendant-employees themselves were required to produce them. This opinion is foundational when it comes to the issue of control, and is most useful in cases in which a defendant employer alone is facing spoliation claims because of the loss of ESI residing on its employees' personal cell phones or personal computers and devices.

In Int'l Longshore and Warehouse Union v. ICTSI Oregon, Inc., No. 3:12-cv-1058, 2018 WL 6305665 (D. Ore., Dec. 3, 2018), an employee defended a motion to compel the production of email from an employee's personal email account. The basis of the court's holding was the lack of evidence that the employee used the email account for work. The only evidence of such use was one email that related to work. But this email was not material to the claims and defenses in the case. The court held that this *de minimus* showing was not enough to justify a finding that the employer should have known about the employee's use of the account. While this holding is not a basis upon which a discovery strategy can be based, it is a useful precedent where an employee has used his or her personal email account to transmit a small number of emails for work purposes and there is no indication that the account was used for communications material to the litigation.

In H.J. Heinz Co. v. Starr Surplus Lines Ins., Civ. A. No. 2:15-cv-00631, 2015 WL 12791338 (W.D. Pa., Jul. 28, 2015), an employer defended a motion to compel employer to produce text messages from its employee's cell phones. The crux of the court's holding was that the employees' un rebutted testimony that their private cell phones were not used for work and contained nothing relevant to the claims at issue. Notably, the employer had a bring-your-own-device policy, which provided that all of the ESI on its employee's personal devices belonged to the employer. Although a policy like this can establish the legal right of the employer to access or obtain the ESI, the court found that the testimony of the employees was controlling. This holding highlights (1) the potential downside of BYOD policies that contain similar language and (2) the importance of un rebutted testimony by employees in this context. But employers should beware. If such testimony is later exposed as incomplete, inaccurate or false, then it will be cited as evidence of an intent to deprive a party of evidence under amended Federal Rule 37, which could have a calamitous impact on the employer.