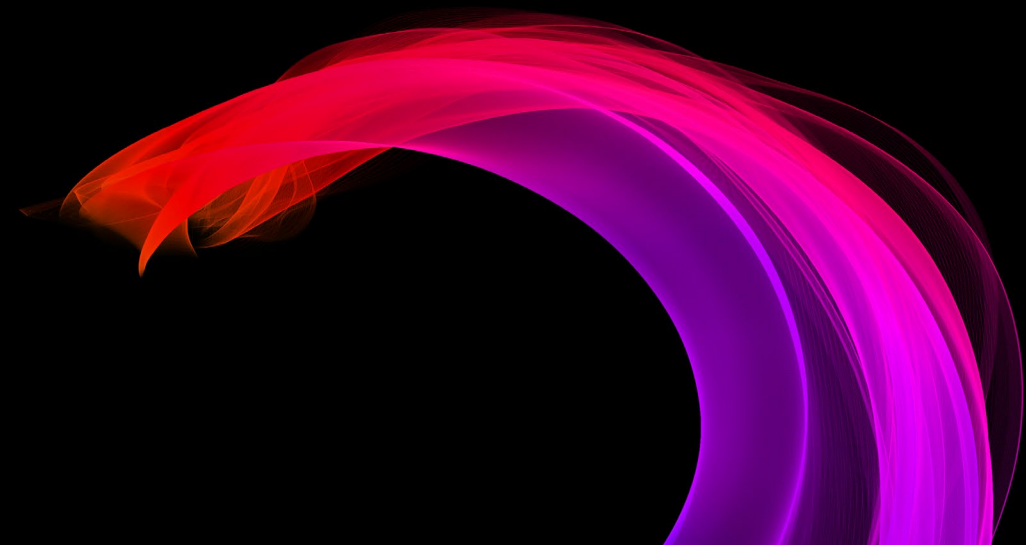




A New Wave in Workplace Law

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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Friday, February 28, 2020

10:45 – 11:30 am

**“Good news, Chief.
A computer virus destroyed all our documents.”**



2015 Amendments to the Federal Rules of Civil Procedure

Changed Spoliation: Swords & Shields

Shields

- Sanctions against employers are not the threat that they once were
- Perfection is not required in legal hold
- Case law favorable to employers is emerging

Swords

- Spoliation is more clearly a two-way street: plaintiff-employees must comply
- Plaintiffs have obligations that cannot be evaded and courts are enforcing these
- Your former employee's social media is fair game – and Rule 37 says so

2015 Amendments to the Federal Rules of Civil Procedure

Changed Spoliation: The Shields

Fed. R. Civ. P. 37(e)(2)

- Now: sanctions requires proof of **intent to deprive a party of the use of evidence**
- Previously: Rule 37 interpreted to allow for sanctions when there is a negligent destruction of evidence; now: sanctions cannot issue where reasonable steps have been taken

Fed. R. Civ. P. 37(e)'s Advisory Committee Note

“It is important that counsel become familiar with their clients’ information systems and digital data – **including social media** – to address these issues.” (Emphasis added.)

Shields: HR Complaints Might Not Trigger Legal Hold

Show of hands: how many people think that the following fact would cause you to advise your company that the litigation hold was triggered?

- You called outside counsel in response to an employee's complaint to HR
- The employee's complaint to HR was that this employee:
 - Was subject to a hostile work environment
 - Was intentionally overworked
 - Bosses were conspiring to fire employee

Cruz v G-Star Inc., 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)

Shields: HR Complaints Might Not Trigger Legal Hold

Show of hands: how many people think that the following fact would cause you to advise your company that the litigation hold was triggered?

- Employee tells you that she retained an attorney regarding her complaints – and that she was not comfortable answering questions without conferring with her attorney

...surely this all triggers the litigation hold, correct?

Not so fast.

Cruz v G-Star Inc., 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)

Shields: Employers Were Not Sanctioned

Cruz v. G-Star, Inc., 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)

- Consulting with outside counsel does not mean management thought litigation was likely - seeking legal advice often done to avoid litigation
- Deletion of email before retention policy guidelines was not spoliation
- Management's discussions of termination does not reflect a belief that litigation is likely

Shields: Federal Regulations Hold Duties Are Narrow

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

- Age and disability discrimination and leave case
- Email and notes of manager who tracked FMLA leave destroyed
- Held:
 - Regular practice of deleting former employee's email folder upon termination **does not reflect an intent to spoliage evidence**
 - Employer's duty to preserve **does not arise** when it initiates a disciplinary proceeding against an employee
 - **FMLA Regulations, 29 C.F.R. § 825.500 (a) – (c), and EEOC Regulations, 29 C.F.R. § 1602.14, do not include the manager's email**

Shields: Courts Accepting Static Format Productions

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

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)

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)

Shields: Federal Rule 34

When Employers “Control” Their Employees’ Private ESI

Winning Arguments that Employers “Control” ESI Residing on Employees’ Personal Computers, Devices and Email Accounts

- *De minimus* relevant ESI argument – very few work-related emails
- Employers do not control text messages exchanged on employees’ cell phones
- Uncontradicted sworn statements from employees that they did not use private home computers, smart phones or personal email accounts for work

Int’l Longshore & Warehouse Union v. ICTSI Oregon, Inc.,
No. 3:12-cv-1058, 2018 WL 6305665 (D. Ore., Dec. 3, 2018)

H.J. Heinz Co. v. Starr Surplus Lines Ins.,
No. 2:15-cv-00631, 2015 WL 12791338 (W.D. Pa., Jul. 28, 2015)

Lalumiere v. Willow Springs Care, Inc., et al.,
No. 1:16-CV-3133, 2017 WL 6943148 (E.D. Wash., Sept. 18, 2017)

Cotton v. Costco Wholesale Corp.,
No. 12-2731, 2013 WL 3819974 (D. Kan., Jul. 24, 2013)

Swords: Employers Obtaining Sanctions - Dismissal

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

- Racial discrimination case where personal laptop ESI was spoliated
- Employer moved for sanctions against former employee
- Former employee was an IT Professional, who reinstalled the OS on his computer right after termination of employment
- Forensic expert found evidence files were deleted irretrievably
- Former employee claimed he did not reinstall the OS but lied
- **Case dismissed under Rule 37 – intent to deprive found**

Swords: Employers Obtaining Sanctions – Adverse Inference

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)

- New Jersey CEPA and retaliation claims
- Employee claimed his home computer had a virus that destroyed requested discovery
- Employee produced a bogus computer for forensic examination
- **Held:**
 - Mag. Judge: no evidence of intent to deprive – instruction to the jury how to consider the loss of evidence and forensic and attorney’s fees and costs were the sanction
 - Article III Judge: production of bogus computer reflected an intent to deprive – adverse inference instruction to the jury ordered as a sanction

Swords: Weaponizing Rules of Professional Conduct

Plaintiff's Counsel Cannot Plead Ignorance of Tech

Pennsylvania Rules of Professional Conduct

- Rule 1.1, Competence
- Rule 1.6, Confidentiality of Information
- Rule 5.3, Responsibilities Regarding Non-lawyer Assistance



Each Rule was amended to require attorneys to be sufficiently familiar with ESI, media and electronic devices to avoid problems like spoliation – **so plaintiff's counsel cannot argue that they do not understand how the technology works when defending spoliation motions**

Swords: Plaintiff Sanctioned for Putting Head in the Sand

Calvert v. Red Robin Int'l, Inc., No. 11-03026, 2012 WL 1668980 (N.D. Cal., May 11, 2012)

- Class action
- Named plaintiff failed to disclose relevant communications on social media
- Held: monetary sanctions against plaintiff
- Court rejected the following arguments from Plaintiff's counsel in opposition to the motion for sanctions:
 - Counsel was unfamiliar with social media technology
 - Counsel had no choice but to rely on his client's misrepresentations
 - All responsive documents had been produced

Swords: Attacking Plaintiff-Employee's Litigation Hold

A preliminary showing of spoliation results in the discoverability of attorney-client privilege on litigation hold and preservation communications between Plaintiff's counsel and his client, reflecting the "growing trend among courts to find the attorney-client privilege is lost when spoliation has occurred."

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)

Swords: Targeting Plaintiff's Social Media

“Because certain types of social media evidence can be readily destroyed (whether intentionally, unintentionally, or by a third party), counsel must take steps early in the case to assess the potential relevance of their client’s social media content. Counsel must then help the client take reasonable steps to preserve it once a duty to preserve has been triggered.”

The Sedona Conference,
Primer On Social Media, Second Edition,
20 Sedona Conf. J. at 23 (Sept. 2019)

Swords: Legal Basis for Going After Social Media

“Where, as here, Defendants had control over the content posted on its website, then follows *a fortiori* that it had the power to delete such content ... Despite the inevitable presence of an intermediary when posting content on the Web, **the Court finds that Defendants still had the ultimate authority, and thus control, to add, delete, or modify the website’s content.**”

Arteria Prop. Pty Ltd. v. Universal Funding V.T.O., Inc.,
No. 05-4896, 2008 WL 4513696 (D.N.J., Oct. 1, 2008)

Swords: “Private” Facebook Posts Cannot Be Withheld

Forman v. Henkin, 93 N.E.3d 882, 30 N.Y.3d. 656 (N.Y. 2018)

- Plaintiff injured falling off of horse and sued horse’s owner
- Defendant sought complete access to Plaintiff’s Facebook account – private and public posts
- Plaintiff argued that there was one public photo relevant to the case and refused to provide access to private side of her account
- **Held:**
 - **Public versus private distinction on Facebook is meaningless**
 - Rejected notion that private setting governed the scope of social media disclosures
 - Plaintiff could not withhold private posts on Facebook

Swords: Sanctions for Facebook, Twitter Spoliation

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

- Lanham Act Plaintiff presented evidence that individual defendants destroyed Facebook and Twitter posts relating to products and advertising at issue in the case
- Defendant's deposition testimony: admitted to deletions but claimed it had to do with "copycat lawsuits and not this one" and he had the right to delete whatever he wanted even though no deletions had to do with this case
- **Held:**
 - Adverse inference instruction issued
 - Monetary sanction request was denied

Swords: Sanctions for Facebook Account Deactivation

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)

- Employee sued employer and vendor regarding workplace incident
- Employer subpoenaed Facebook for access to Plaintiff's account
- Plaintiff de-activated his Facebook account, which resulted in deletions
- **Held:**
 - Facebook account was within Plaintiff's control
 - Deactivation was intentional and caused permanent deletion
 - Deactivation of the account resulted in the deletion of evidence on the Facebook page and adverse inference was imposed against Plaintiff

Swords: Sanctions for Deactivating Facebook Account

Crowe v. Marquette Transp. Co. Gulf Island, LLC, Civ. A. No. 14-1130, 2015 WL 254633 (E.D. La., Jan. 20, 2015)

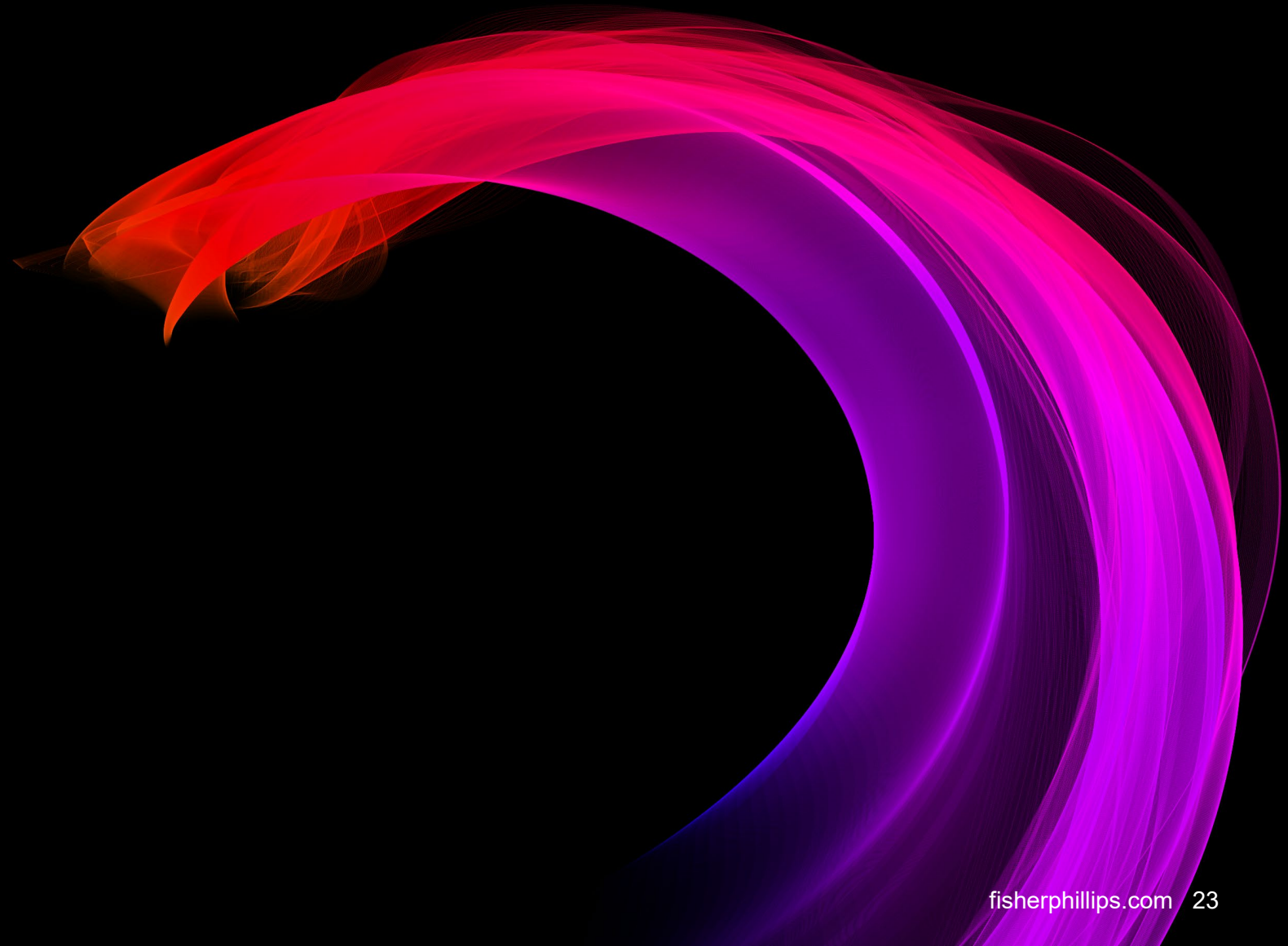
- Personal injury action - Plaintiff's Facebook history sought in discovery but Plaintiff responded that he "does not presently have a Facebook account"
- Court ordered *in camera* production of Plaintiff's Facebook history
- Plaintiff produced a 4,000 page history from Facebook
- **Held:**
 - Facebook account deactivation versus deletion discussed
 - Plaintiff ordered to produce history for a second account he created
 - Allowed for subpoena of Facebook too

Swords: Prosecuting Causes of Action for Spoliation

When employees destroy ESI before or during litigation, employer should consider filing claims arising under federal law and the law of a few states:

- Federal cause of action for destroying ESI without the authorization of the employer, under the Computer Fraud and Abuse Act, 18 U.S.C. §1030
- State law causes of action
 - New Jersey's fraudulent concealment cause of action
 - Alabama, Alaska, Florida, Indiana, Kansas, Louisiana, Montana, New Mexico, Ohio and West Virginia recognize similar causes of action

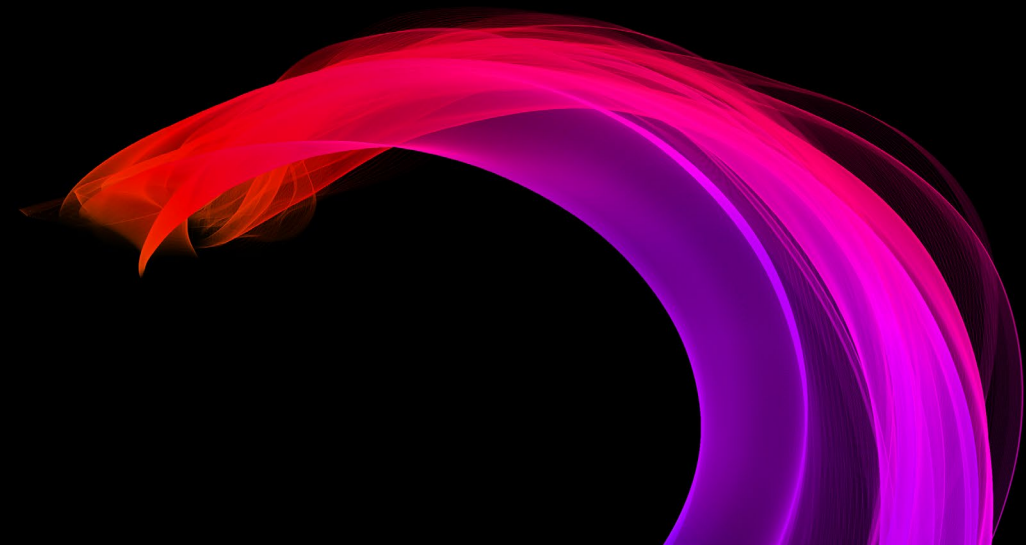
Questions?





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Thank you

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