



First Department Case Development on the Federal and New York Common Law Spoliation Standards

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Spoliation, or “[t]he intentional destruction, mutilation, alteration, or concealment of evidence,”^[1] is a sanctionable offense. However, precisely what constitutes spoliation has created some recent controversy. In October 2013, the First Department of the New York Appellate Division clarified the breadth and application of both the federal and New York common law spoliation standards. In *Strong v. City of N.Y.*,^[2] the First Department held that the New York spoliation common law, rather than the federal *Zubulake* standard, applies to the destruction of electronically stored information (“ESI”), such as the audiotape of a police radio communication, and non-ESI as well. This blog will delve deeper into the *Strong* opinion, and explore the developing case law for the two standards within the First Department.

The Federal Standard

The federal spoliation standard has come a long way since Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York rendered the five infamous spoliation rulings from 2003 to 2004 in the *Zubulake v. UBS Warburg* matter. In the initial proceedings, a plaintiff-employee sued her former employer on the grounds of gender discrimination, retaliation, and the failure to promote. As part of this lawsuit, the plaintiff made a series of discovery requests. Particularly, in “*Zubulake IV*,”^[3] the issue of spoliation arose when the defendant-employer discovered that it inadvertently deleted, and did not back up, some of the e-mails requested by the plaintiff.

Although the Southern District held that the employer had a duty to preserve all necessary information when given notice of an impending claim, it found that sanctions were not warranted because the plaintiff failed to demonstrate that the deleted e-mails were necessary in supporting her claim. Nonetheless, Judge Scheindlin reaffirmed the importance of evidence preservation by stating in her opinion, and simultaneously setting forth the federal spoliation standard, that “[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold.”^[4]

The five *Zubulake* opinions have been the seminal decisions guiding New York courts in addressing issues with respect to the destruction of ESI. Recently Judge Scheindlin re-applied the *Zubulake* standard in the case *Sekisui Am. Corp. v. Hart*.^[5] There, Judge Scheindlin imposed sanctions against an employer for the inadvertent deletion of requested e-mails. Judge Scheindlin found that once the employer was on notice about the litigation, the

employer had a duty to inform its outside technology provider to preserve any relevant documents. The employer's delay could only be classified as gross negligence, and therefore warranted sanctions. Judge Scheindlin emphasized that even though the relevance of the evidence is important, "the real argument here . . . [is] whether the destruction of that ESI prejudices" the non-spoiling party.[6]

When the New York Common Law Standard Applies

While New York courts have previously applied the federal *Zubulake* spoliation standard to discovery sanctions pertaining to ESI and non-ESI alike, the *Strong* court did not rely on *Zubulake* in imposing a spoliation-based sanction. Instead, the court determined that although the federal *Zubulake* standard is a useful tool to inform litigants as to when their e-discovery duties are triggered, spoliation of evidence can be fully addressed without reference to the federal standard. In other words, "the erasure of, and the obligation to preserve, relevant audiotapes and videotapes" could be properly analyzed under the New York common law standards.[7] However, the *Strong* court drew one caveat to this general rule. It noted that New York Civil Practice Law and Rules ("CPLR") 3126 governs spoliation when the evidence was destroyed by a party's refusal to comply with a discovery order or a willful failure to disclose.

In instances where CPLR 3126 does not apply, the *Strong* court clarified that under New York common law principles, spoliation sanctions are triggered when the destruction of evidence is merely negligent, rather than willful.[8] In supporting this decision, the court relied on the 1998 case, *Squitieri v. City of New York*.^[9] In *Squitieri*, a sanitation worker sued the city of New York for injuries incurred from carbon monoxide poisoning. While the case was ongoing, the city disposed of the sweeper vehicle alleged to be the source of the injury. When years later the city sought to implead the sweeper manufacturer as a third party, the sweeper manufacturer was granted a motion to dismiss (the spoliation sanction here) on the grounds that the sweeper's absence prevented the manufacturer from being able to argue that the vehicle was not defective and that the city's poor vehicle maintenance was instead the proximate cause of the plaintiff's injuries. The court's rationale for awarding a sanction of dismissal there was that "spoliation sanctions . . . are not limited to cases where the evidence was destroyed willfully or in bad faith, *since a party's negligent loss of evidence can be just as fatal to the other party's ability to present a defense.*"^[10]

In *Strong*, the evidentiary dispute revolved around police audiotapes that recorded a collision involving a police vehicle that mounted a sidewalk and struck five pedestrians. When the injured plaintiffs demanded the defendant New York City ("City") to disclose the audiotapes involving the accident, the City noted that the audiotapes could not be produced because they were deleted as part of the police department's standard 180-day retention policy. The Court, in rejecting the defendant's argument, noted that the City had notice of the lawsuit during the 180-day retention holding period. By reasoning that the City "had the obligation to take steps to prevent the automatic erasure of any audio recording from the incident," the court held that "its failure to do so constituted spoliation."^[11]

Regarding sanctions, the *Strong* court decided that because the audio recordings were not *key* to the plaintiff's case, lesser sanctions would suffice.^[12] Thus, the court ordered that the defendant would be precluded from introducing any testimony with respect to the contents of the recordings and, if necessary, the court would make an adverse inference charge at trial.

In order to avoid sanctions and properly prepare for litigation, individuals and companies should keep abreast of how courts continue to apply both the federal and New York common law spoliation standards. If you or your company has any questions or concerns regarding e-discovery related issues, contact Sean R. Gajewski at sgajewski@cullenanddykman.com or via his direct line at 516-357-3735.

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[1] Black's Law Dictionary 1437 (9th ed. 2009).

[2] 112 A.D.3d 15 (1st Dept. 2013).

[3] *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003).

[4] *Id.* at 218.

[5] 945 F. Supp. 2d 494 (S.D.N.Y. 2013).

[6] *Id.* at 508.

[7] *Strong*, 112 A.D.3d at 23.

[8] *Id.* at 21.

[9] 248 A.D.2d 201 (1st Dept. 1998).

[10] *Strong*, 112 A.D.3d at 21 (citations omitted).

[11] *Id.* at 22.

[12] The court expounded upon various sanctions that may be awarded against a spoliator for the negligent destruction of evidence, including, but not limited to, striking the pleadings submitted by the spoliator, evidence preclusion, and adverse inference instructions.