Motions for Sanctions Based Upon Spoliation of Evidence in Civil Cases

Report to the Judicial Conference
Advisory Committee on Civil Rules

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Executive Summary

In 2010, the Judicial Conference Advisory Committee on Civil Rules requested a study of motions for sanctions based on an allegation that the nonmoving party had destroyed evidence, especially electronically stored information (ESI). The study examined the electronic docket records of civil cases filed in 2007–2008 in 19 districts, including at least one district in every circuit except the District of Columbia Circuit.

This report summarizes the findings of that study and, where appropriate, compares those findings to other studies. The study found the following:

- A motion related to spoliation of evidence was identified in 209 total cases in the 19 districts, which was 0.15% of civil cases filed in the study districts in 2007–2008.
- The allegedly spoliated evidence included ESI in 53% of these 209 cases. It was exclusively ESI in 40%. In 9% of cases, the nature of the spoliated evidence could not be determined.
- For all spoliation motions, the most common nature-of-suit categories were torts (31%), contracts (30%), and civil rights (22%).
- For spoliation motions involving ESI, the most common nature-of-suit categories were contracts (36%), civil rights (26%), torts (14%), and intellectual property (11%).
- The moving party was a plaintiff in 64% of the cases and a defendant in 32%. Both sides moved for sanctions based on spoliation in 2% of cases.
- The typical plaintiff moving for sanctions was an individual, but in 31% of cases the plaintiff–movant was a business entity.
- Plaintiffs generally filed motions for sanctions against business entities (74%) or a government (21%).
- The typical defendant moving for sanctions was a business entity, accounting for almost 90% of defendant–movant cases.
- Defendants generally filed sanctions motions against individuals, but in 41% of defendant–movant cases the nonmoving party was a business entity.
- Motions for sanctions were granted in 18% of all cases and denied in 44% of all cases. Considering only cases with an order on the motion, motions were granted 28% of the time and denied 72% of the time.

- In ESI cases, motions for sanctions were granted 23% of the time and denied 44% of the time. Considering only cases with an order on the motion, motions were granted 34% of the time and denied 66% of the time.
- The most common type of sanction granted was an adverse inference jury instruction, which was granted in 44% of all cases in which a sanction was imposed and in 57% of comparable ESI cases. A dismissal or default judgment was only imposed in one case, which involved tangible evidence.

Findings

At the request of the Honorable Mark R. Kravitz, then chair of the Judicial Conference's Advisory Committee on Civil Rules ("Committee"), the Federal Judicial Center (FJC) conducted a study of motions filed in federal court alleging spoliation of evidence in civil cases. This report summarizes the findings of that study. The report consists of three parts. The first part attempts to answer the threshold question, how often is spoliation raised by motion? The second part describes the cases in which spoliation is alleged. The third part provides some information on how courts rule on motions for sanctions.

How often is spoliation raised?

The threshold question is, how often is spoliation raised by motion? The text-based search of the CM/ECF database employed in this study identified every case in the study districts filed in either 2007 or 2008 and in which the search terms[1] appeared in a docket entry. Clearly, this search cannot identify every motion for sanctions based on an allegation of spoliation, but I am generally satisfied that the search found most of these motions.[2]

I personally reviewed the docket records in every case in which the search terms appeared. After that review, I determined that the issue of spoliation had been raised in a motion (of some type) in 209 cases in the 19 study districts.[3] In 153 of those cases, the issue was raised in a motion for sanctions. In 29 cases, the issue was raised in a pretrial motion in limine. In 23 cases, the issue was raised in a motion related to jury instructions. And in four cases, the issue was raised in a motion for summary judgment.

1. The relevant search terms were "spoliation," "spoilation," "37(e)," "37e," "adverse inference," "violation" and "preservation" in same docket entry, and "destruction of evidence." My FJC colleague George Cort performed the searches of the relevant databases.

2. In a few districts, an alternate search strategy, using other information in the database identifying sanctions motions, was employed to validate the text-based search. The results of the alternate strategy suggested that the text-based search was not missing many cases. Moreover, the text-based search almost certainly identified cases that the alternate strategy would have missed, such as cases in which the spoliation issue was raised in a motion in limine. The search for sanctions motions was inefficient, in that it identified all sanctions motions, regardless of basis—including Federal Rule of Civil Procedure 11 motions, which are unrelated to evidence, and all motions for discovery sanctions, not limited to those based on spoliation.

3. The 19 study districts were Northern District of California, Colorado, Southern District of Florida, Northern District of Georgia, Northern District of Illinois, Northern District of Iowa, Eastern District of Louisiana, Massachusetts, Maryland, Minnesota, New Jersey, Eastern District of New York, Southern District of New York, Northern District of Ohio, Southern District of Ohio, Western District of Oklahoma, Eastern District of Pennsylvania, Southern District of Texas, and Western District of Wisconsin.

To determine the rate at which spoliation is raised by motion, the most direct method is to treat these 209 cases as the numerator and to treat the total number of (comparable) civil cases filed in the study districts in 2007–2008 as the denominator. The latter figure is 131,992 cases,[4] yielding a rate of 0.0015. In other words, a motion alleging spoliation was found in 0.15% of cases filed in 2007–2008 in the study districts.

This estimate compares favorably to other studies. I am not aware of any study that indicates that such motions are relatively common. An Institute for the Advancement of the American Legal System (IAALS) study of case processing in eight districts found that motions for discovery sanctions, not limited to spoliation motions, were filed in 3.2% of cases.[5] The present study's estimate is approximately 5% of that figure, which probably reflects that spoliation motions are not a very common form of sanctions motion. A study of published orders, prepared for the Civil Litigation Review Conference by Willoughby, Jones, and Antine ("Willoughby study"), found 401 total ESI cases in which sanctions were moved for in federal court, without time restriction.[6] The Willoughby study identified approximately 170 ESI cases with a sanctions motion in all federal districts in 2008–2009.[7] That estimate is not limited to spoliation motions. The Willoughby study identified only 136 cases over an almost 30-year period in which sanctions were granted for destruction of ESI.[8]

One other previous study warrants mention. The 2009 FJC closed-case survey asked attorneys in cases involving ESI whether any party raised a claim of spoliation of ESI. Fully 7.7% of plaintiff attorneys and 5% of defendant attorneys answered that, in the closed case, one or more claims of spoliation had been raised.[9] That figure was in ESI cases only. Those percentages would be about 3% of all plaintiffs' cases and 2% of all defendants' cases. Those percentages are much larger than the 0.15% reported here. The 2009 question, however, was not limited to mo-

4. This figure does not include prisoner cases, pro se cases, and MDL transfer cases; such cases were excluded from the study.

5. Civil Case Processing in the Federal District Courts: A 21st Century Analysis (Institute for the Advancement of the American Legal System 2009), at 46. The eight study districts were Arizona, Colorado, Delaware, Idaho, Eastern District of Missouri, Oregon, Eastern District of Washington, and Western District of Wisconsin.

6. Dan H. Willoughby, Jr., et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 Duke L. Rev. 789, 790 (2010) [hereinafter *Numbers*].

7. *Id.* at 795, fig. 1. This is the author's own approximation from the figure, which appears to show 70-plus cases decided in 2008 and 97 in 2009.

8. *Id.* at 803 ("[F]ailure to preserve ESI . . . was the sole basis for sanctions in ninety cases. It was also cited as one of the types of misconduct in forty-six cases . . . .").

9. Emery G. Lee III & Thomas E. Willging, Federal Judicial Center National Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules (Federal Judicial Center 2009), at 23–24, fig. 10.

tions. It is very likely that spoliation is raised in many cases in which it never becomes the basis for a motion.

The spoliation cases are different from civil cases in general in at least two noteworthy ways. First, spoliation usually becomes an issue relatively late in a case—indeed, spoliation motions tend to occur after the typical case would have already ended. Part of the explanation for this is that spoliation cases have much longer processing times than civil cases in general. The average disposition time was about 1.8 years (649 days) for the 152 spoliation cases that had terminated at the time of data collection. The average disposition time for civil cases, in general, was about 0.7 years (253 days). The first reference to one of the search terms in the study cases occurred, on average, 513 days after filing—or about twice the time that the average civil case would have taken to reach disposition.

Second, the spoliation cases terminated at trial 16.5% of the time, compared to just 0.6% of civil cases in general. Given that the spoliation trial cases are included in the civil cases in general, the frequency of trial in the spoliation cases is even more remarkable.

These two differences indicate that the spoliation cases can be accurately described as ones in which the parties found it extremely difficult to reach a settlement. These are often cases in which there is "bad blood" between the parties.

To conclude this section, it is important to note a few caveats. First, this study is not able to provide a hard estimate of the frequency of spoliation as an issue. It did not cover every district, and there is no doubt that the study has missed some motions activity in the study districts. But even if this study is off by a factor of ten, then spoliation motions would be filed in about 1.5% of civil cases. Given that spoliation may be raised much more often than it becomes the basis for a motion, it is probably safe to consider the 2009 closed-case survey's findings as an estimate of the frequency with which spoliation is raised, in any way, in ESI cases. Even then, it is raised as an issue in less than 10% of ESI cases.

Second, this study cannot account for trends, as it is limited to a particular filing cohort. The Willoughby study addresses trends.[10] The trend identified in that article, however, is limited to sanctions for ESI violations. It is not surprising that such claims have increased in recent years. But it would be interesting to know the overall trends in spoliation claims. If spoliation motions represent a kind of strategy by parties, especially late in cases, then it is possible that, in years past, parties raised spoliation just as often, but not with respect to ESI. As discussed in the next section, parties still raise spoliation of paper records and tangible evidence in civil cases.

Third, nothing in this section should be taken as denying that the fear of spoliation motions might motivate parties to over-preserve ESI for fear of being subject to a motion in the future. Moreover, this study does not provide any reasonable grounds for concluding that these fears are irrational. As discussed below, rela-

10. Willoughby et al., *Numbers*, *supra* note 6, at 793–94.

tively severe sanctions may be imposed in the event that a court finds that a party destroyed evidence. Even a relatively small probability of sanctions might rationally drive behavior if the potential sanctions are severe enough. It is also important to remember that, even without sanctions being imposed, a dispute over spoliation may cost a party a great deal. A 2010 report to the Committee found that a party's litigation costs increased by approximately 10% for each type of dispute over ESI, including spoliation.[11]

Description of the cases

This section details elements of the cases in which spoliation was raised by motion: the nature of the allegedly spoliated evidence, the types of cases in which the motions were made, and the parties involved.

Nature of evidence. As discussed in the previous section, the text-based search identified 209 cases in which spoliation of evidence was raised in a motion. In 40% of the spoliation cases, the evidence was ESI only; in an additional 13%, the evidence was ESI and some other kind of evidence (e.g., paper records or tangible evidence). In short, the allegedly spoliated evidence included ESI in slightly more than half the cases. Tangible objects accounted for 21% of the spoliation cases. These included "destructive testing" cases and insurance cases in which the insurer, as plaintiff suing as subrogee, was unable to produce damaged property for the defendant's expert. Somewhat surprisingly, there were a number of purely paper spoliation cases (18%).

In 18 cases, or 9% of the total, I could not determine the nature of the allegedly destroyed evidence. In many of these cases, the motion papers themselves described the evidence in question merely as "documents," which could mean either paper or electronic records (or both). In addition, in a number of these cases, the evidence in question was described merely as "photographs." If the records clearly indicated that the photographs were digital, the case was coded as ESI. In one case, for example, the evidence included photographs taken with a cellphone.

It is possible, then, that as many as 62% of spoliation cases identified in the study involved ESI. Still, that means that four in ten spoliation cases involved paper records or tangible objects.

Types of cases. In all spoliation cases, there were slightly more torts cases (31%) than contracts cases (30%). Civil rights cases made up 22% of all cases, intellectual property cases 6%, and labor 4%. Fifteen cases (7%) were in other nature-of-suit categories.

In the ESI spoliation cases, the largest nature-of-suit category was contracts (36%), then civil rights (26%), torts (14%), intellectual property (11%), labor

11. Emery G. Lee III & Thomas E. Willging, Litigation Costs in Civil Cases: Multivariate Analysis, Report to the Judicial Conference Advisory Committee on Civil Rules (Federal Judicial Center 2010), at 5, 7.

(4%), and other (9%). It is worth noting that the contracts category includes both insurance cases and cases involving noncompetition clauses in employment contracts, as well as some complex commercial transactions.

The parties. Given that plaintiffs will more likely be requesting than producing parties, it is not surprising that in more than six cases in ten (134 cases, or 64%), the moving party was a plaintiff. In 66 cases (32%), the moving party was a defendant. These figures include cases in which a party raised the spoliation issue in a motion in limine to prevent the other side from raising the spoliation issue at trial.

Both sides made a spoliation-based motion in four cases (2%). If the assessment that the spoliation cases are "bad blood" cases is correct, then these are cases in which the parties really did not like each other. Finally, five cases (2%) involved a motion by a party not easily classified as plaintiff or defendant, such as a third-party defendant.

When the plaintiff was the moving party, the plaintiff tended to be an individual—this was found in 94 of 138 cases (68%). This includes three cases in which the individual was a putative class representative. Interestingly, the moving plaintiff was a business entity in 43 cases (31%). This includes one case in which the plaintiff was a law firm. In one other case, the plaintiff was a municipality suing the federal government over Medicaid reimbursements.

Of the 138 cases in which the plaintiff was the moving party, the nonmoving party was a business entity in 102 cases (74%) and a government in 29 cases (21%). Plaintiffs moved against individuals in five cases (4%) and against private schools in two cases (1%).

Of the 70 cases in which the defendant was the moving party, the defendant was a business entity in 62 of these cases (89%). In an additional five cases (7%), the defendant was a government, and in three additional cases the defendant was "other." The "other" cases were diverse: one involved an individual defendant, one a labor union, and one a religious institution (a Hindu ashram).

In 39 of 70 cases (56%) in which the defendant was the moving party, the nonmoving party was an individual. However, in 29 of those cases (41%), the nonmoving party was a business entity. Two nonmoving parties (3%) were "other."

In terms of parties, these findings suggest that spoliation cases tend toward two poles. At one end, there is the stereotypical asymmetrical case, which pits an individual plaintiff with expansive discovery requests against an information-rich business entity. In such a case, the individual plaintiff charges that the information-rich business entity has spoliated evidence. But, of course, defendant business entities can also move for sanctions against individual plaintiffs based on spoliation, as the evidence shows. At the other end, there are business-to-business disputes, often involving intellectual property and complex commercial transactions. In short, both relatively unsophisticated and relatively sophisticated parties are affected by the rules related to spoliation of evidence.

Rulings on motions

This section is limited to the 153 cases in which a motion for sanctions based on spoliation was filed and excludes motions related to jury instructions and motions in limine. It covers both rulings on motions and the nature of the sanctions imposed.

Rulings. Considering all spoliation cases, a motion for sanctions was granted in 27 of 153 cases (18%) and denied in 68 cases (44%). Twelve motions (8%) were pending as of the data collection. There was no court action on 30% of the motions, often because the case settled before the motion could be ruled upon. Indeed, in several cases, the motion for sanctions was filed very shortly before settlement, which may signal that the motion was being used in bargaining.

In terms of only those motions on which an order was issued, in all spoliation cases the motion was granted in 27 of 95 cases (28%) and denied in 68 cases (72%).

Considering only spoliation cases involving ESI, the motion was granted in 20 of 87 cases (23%) and denied in 38 cases (44%). Five such motions (6%) were pending as of data collection, and the court took no action on a further 24 cases (28%). Again, these cases tended to be ones that settled prior to a ruling on the motion, although it is possible for the motion to be withdrawn as well.

In terms of only those motions on which an order was issued in ESI cases, the motion was granted in 20 of 65 cases (34%) and denied in 38 cases (66%).

The number of rulings, especially in ESI cases (58), is small enough that I am uncomfortable making any generalizations about how courts decide motions. It is interesting, however, that very few motions (seven) involving types of evidence other than ESI were granted. In addition, it should be noted that the grant rates observed in the present study are much lower than that in the Willoughby study, which found that 230 out of 401 (57%) of motions for sanctions ruled on were granted. It is not, however, surprising that a study relying on published orders (the Willoughby study) would yield a higher grant rate than one relying upon docket records (the present study).

Types of sanctions. Courts have a number of options in imposing sanctions for spoliation, ranging in severity from a default judgment against a party or dismissal of a plaintiff's claims to simply ordering more discovery on an issue. In what follows, sanctions are defined in a nominal sense—i.e., any time a court granted a motion *and* imposed some burden on the nonmoving party, it was captured as a sanction. In addition, more than one sanction may be imposed in a single order. The court, for example, might preclude certain testimony as a sanction for destruction of evidence *and* reopen discovery for limited purposes. For this reason, the percentages in what follows do not sum to 100%.

In all cases in which a sanction was imposed, the most common sanction imposed was an adverse inference instruction to the jury, which was imposed in 14 of 32 cases, or 44% of the sanctions cases. Precluded evidence or testimony and costs only were both imposed in 6 cases (19%). The count for costs only includes cases

in which the motion was actually denied but in which costs were granted under Rule 37.[12] The court ordered that discovery be reopened in five cases (16%), monetary sanctions only in two cases (6%), and struck part of a pleading in one case (3%). The most severe sanction observed, default judgment on a claim, was entered in one case involving tangible evidence.

In ESI cases in which a sanction was imposed, an adverse inference instruction to the jury was again the most common sanction, imposed in 13 of 23 cases, or 57%. In four cases each (17%), the court granted costs only (this includes cases in which the motion was actually denied but the court awarded costs)[13] or reopened discovery as a sanction. Precluded evidence or testimony was imposed in three cases (13%). Monetary sanctions were imposed in two additional cases (9%), and part of a pleading was struck in one case (4%).

Given that the study only identified 23 ESI cases in which a sanction was imposed, I would caution against drawing any firm conclusions from these findings. It is interesting to note, however, that the Willoughby study found 20 reported cases in which some kind of case-terminating sanction was imposed for spoliation of ESI.[14] Some case-terminating sanctions may be imposed in unreported cases, of course, but it is likely that Willoughby and co-authors have identified most of such orders in ESI cases in federal court. In short, it is probably safe to conclude that case-terminating sanctions are rarely imposed.

One final note: There was some interest in learning whether sanctions were being imposed under Rule 37, for violation of a discovery order, or using the court's inherent authority. In truth, it is not always clear in reading the orders what the basis is for imposition of sanctions.[15] In many cases, the court cites both bases. It might be helpful to look to the Willoughby study on this point. That study found that Rule 37 and inherent authority are the most common bases for imposition of sanctions, with Rule 37 cited in 136 of the 230 cases (59%) in which sanctions were imposed.[16] In cases in which case-terminating sanctions were imposed, Rule 37 was invoked, because a discovery order had been violated, in 23 of 36 cases, or 64%.[17]

12. The denominator for this paragraph is 32 cases, because of the inclusion of these cases.

13. The denominator for this paragraph is 23, because of the inclusion of these cases.

14. Willoughby et al., *Numbers*, *supra* note 6, at 805 n.65. Here, "case-terminating" means dismissal or default judgment.

15. *Cf. id.* at 800 ("Courts are not always precise in identifying the rule or statute upon which their sanction decisions are based. In some instances, no basis is identified.").

16. *Id.* at 801.

17. *Id.* at 810.