Proactive Records Retention and Evidence Preservation: Lessons Learned in the Litigation Process

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Scope of Discussion

- Records retention and document production issues as they bear on claims, pre-litigation (e.g., Charge phase of MHRA/EEOC claims), and litigation
  - Understand why we are bugging you.
  - Not an exhaustive list of what you need to do.
  - Rather, understanding the landscape and considering how you can be proactive about document preservation.
- Separate Resource: Missouri Records Retention Laws (https://www.sos.mo.gov/CMSImages/LocalRecords/Municipal.pdf)

Litigation Tactics Stemming from Evidence Preservation Issues

- Value of video evidence – especially with the increased availability of body cam and dash cam over the last few years.
- Some Plaintiff's attorneys employ "gotcha" tactics based on claimed discovery abuse or evidence preservation failures:
  - Scorch the Earth for discovery.
  - Attempt to catch the Defendant (City) or its attorney in a lack of diligence in discovery or in document retention.
  - Pursue sanctions against the Defendant to gain undue advantage in litigation.
  - Hope that the Judge hammers the Defendant.

Working Backwards – Potential Impact of Failing to Preserve Evidence

- Time, money, resources opposing the attack
- Human resources aspect for the City – can be overwhelming.
- Potential for sanctions order entered by Court, which could:
  - Preclude testimony or introduction of evidence
  - Order an “adverse inference” – that certain evidence was would have been unfavorable to Defendant’s position at trial
  - On the extreme end, strike Defendant’s pleadings (no liability defense at trial)

Spoliation

“Spoliation is the intentional act of destruction or significant alteration of evidence.” Hill v. SSM Health Care St. Louis, 563 S.W.3d 757, 761 (Mo. App. E.D. 2018) (citing Pisoni v. Steak 'N Shake Operations, Inc., 468 S.W.3d 922, 925 (Mo. App. E.D. 2015)).

“Spoliation may also be the concealment or suppression of relevant evidence or the failure to determine whether certain evidence exists.” Ball v. Allied Physicians Grp., L.L.C., 548 S.W.3d 373, 386 (Mo. App. E.D. 2018) (citing Marmaduke v. CBL & Assocs. Mgmt., Inc., 521 S.W.3d 257, 269 (Mo. App. E.D. 2017)).

Spoliation

- The burden is on the party seeking the benefit of the doctrine of spoliation "to prove the opponent destroyed, altered, concealed, or suppressed the evidence at issue under circumstances manifesting fraud, deceit, or bad faith." Ball, 548 S.W.3d at 386 (citing Marmaduke, 521 S.W.3d at 269).
- "[A] party's failure to adequately explain missing evidence[ ] may give rise to an adverse inference." Marmaduke, 521 S.W.3d at 269 (citing Pisoni, 468 S.W.3d at 926).
- "An inference of fraud and a desire to suppress the truth may be established if the alleged spoliator had a duty or should have recognized a duty to preserve the evidence." Hill, 563 S.W.3d at 761 (citing Marmaduke, 521 S.W.3d at 269).

Spoliation

- The type of sanctions available for spoliation include entry of default judgment, an adverse inference instruction to the jury, exclusion of evidence, and the imposition of the prejudiced party's attorneys' fees or other monetary sanction. Am. Builders & Contractors Supply Co. v. Roofers Mart, Inc., 2012 WL 2992627, at *3 (E.D.Mo. July 20, 2012).
- Dispositive sanction is rare. Sentis Group, Inc. v. Shell Oil Co., 559 F.3d 888, 899 (8th Cir. 2009)(Dispositive sanction "is among the harshest of sanctions, and there is a strong policy favoring a trial on the merits and against depriving a party of his day in court.")
- Adverse inference (discussed infra) is of the more common outcomes.
- TAKE AWAY: While the term "spoliation" suggests intentional misconduct pertaining to evidence preservation, Missouri case law indicates that certain failures to exercise due care can create an inference of such a desire to suppress the truth, therefore warranting a sanction.

Electronically Stored Evidence (“ESI”)

- Missouri Supreme Court Rules 56.01(b)(3) and 58.01 now expressly permit discovery of ESI and permit a party to request that ESI be produced in native format. However, a responding party is not required to produce ESI that is not reasonably accessible because of undue burden or cost. A court may nonetheless order the ESI produced if the requesting party shows good cause.
- Federal Rule 34 allows parties to request ESI “stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.” In addition, parties may request production of ESI in a specified form. Parties must produce ESI in the form in which it is ordinarily maintained “or in a reasonably usable form or forms.”
- SHORT FORM ANSWER: Plan on e-discovery, and plan on it being costly (time and money).

Electronically Stored Evidence (“ESI”)

- Requests for production of ESI – often extensive.
- Often a battle with opposing counsel as to the appropriate scope of the search for and production of ESI
  - Scope: proportional to the needs of Plaintiff’s case
  - “Undue burden or cost” claim. In our experience, federal and state courts will require the search and production of ESI regardless of the burden and even if the cost is significant.
  - Cannot just turn over information wholesale; while inadvertent production of privileged documents can be “clawed back,” that’s still a bell than cannot be unrung.
  - Common: extensive negotiations with opposing counsel as to the appropriate scope (email custodians, search terms, etc.)

Electronically Stored Evidence (“ESI”)

- Can be a burdensome endeavor for Cities.
- Trust me, your attorneys do not want to do this either.
- Essential:
  - Someone at the City has a good understanding of electronic records retention and how to access those records.
  - Or, someone at the City can ensure that IT vendors are accessible to counsel for the City
  - ALSO, succession planning for when city personnel or IT vendors change.

FRCP 37(e) – Failure to Preserve ESI

(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.

Duty to Preserve Evidence

- CLEAR DUTY: Lawsuit filed.
  - Less clear: What evidence must be preserved?
    - The spectrum: video of a slip and fall at Schnucks (clear) versus all internal emails of members of a Schnucks's safety committee.
- CLEAR DUTY: Preservation Letter from Plaintiff's counsel.
- LESS CLEAR: When "litigation is imminent"
  - The obligation to preserve evidence begins when a party knows or should have known that the evidence is relevant to future or current litigation. E*Trade Sec. LLC v. Deutsche Bank AG, 230 F.R.D. 582, 588 (D.Minn.2005).
- RECOMMENDATION: ERR ON THE SIDE OF CAUTION
- NOTE: This "duty" is independent of separate records retention duties existing under Missouri law

Rule 37(e) – ESI
Bad Faith and Intent Required…. but not exactly

A spoliation-of-evidence sanction requires "a finding of intentional destruction indicating a desire to suppress the truth." Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1035 (8th Cir.2007) (quoting Stevenson v. Union Pac. R.R. Co., 354 F.3d 739, 746 (8th. Cir.2004)).

An explicit finding of bad faith is not required to impose sanctions on a party that destroys specifically-requested evidence after litigation has commenced. Gallagher v. Magner, 619 F.3d 823, 845 (8th Cir.2010) (quoting Stevenson, 354 F.3d at 749–50).

Failure to Impose a Litigation Hold

- Numerous federal courts have found that the failure to implement an internal "litigation hold" can establish the necessary intent to destroy evidence that would support the imposition of sanctions.
- Many decisions involve the inadvertent deletion or failure to retain emails. Fidelity National, 2015 WL 94560, at *2 (E.D. Mo. Jan. 7, 2015)(citing other federal cases).
- "When litigation is imminent or has already commenced, a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy." Fidelity National, 2015 WL 94560, at *2 (E.D. Mo. Jan. 7, 2015) Stevenson, 354 F.3d at 749.

Suggestions - Litigation Holds

- Consult City attorney or litigation counsel.
- My opinion: case specific, not “one size fits all”
- Recommendations: ASAP, and do not hesitate to ask questions.
- Assuming a claimant’s attorney has sent an evidence preservation letter, the litigation hold should, at a minimum, mirror that.
- Recommendation: Round table this issue to make sure this is well thought out.

Litigation Holds and Preservation Specific Issues

- All City custodial email accounts, including elected officers.
- Be mindful of evidence and media that may have automatic purge settings
  - Surveillance footage at City Hall or at PD
  - Body Cam
    - Case Example: Thompson v. City (Not a MIRMA member)
      - Innocuous call later evolved into a criminal matter; turns into protracted federal civil case
      - Body cam was docked; call not recharacterized; footage automatically purged
      - Faced a Motion for Sanctions
- Even though something is not in your possession, it might be something that you need to go get to protect your defense of future litigation.
  - One example: audio from calls over shared Emergency Services dispatch.

Case Study: Sanction of Adverse Inference

- The most common sanction for spoliation is an adverse evidentiary inference. In Missouri, this requires the sanctioned party to "to admit that the destroyed evidence would have been unfavorable to their position." *Tribus, LLC v. Greater Metro, Inc*., 589 S.W,3d 679, 693 (Mo. Ct. App. 2019)
- Wilson v. City (Not a MIRMA Member)
  - Case Background – numerous claims under MHRA.
    - Race, Retaliation, Pregnancy Discrimination for requiring fit for duty examination
    - Hostile work environment
    - Issues were numerous
    - Plaintiff changes story at end of case. Minor issue (allegation that officer was denied backup) became big issue.
    - Preservation letter sent to City before my involvement
    - Radio traffic and footage from surveillance cameras in PD.
    - Slipped though the cracks. Overwritten.
    - Adverse inference at trial – that the radio traffic would have been unfavorable to the City's case.
    - RESULT: NON-ISSUE BECOMES HUGE PROBLEM

Police Cases

Body camera

Dash Camera

Cell footage; Interrogation Rooms; Surveillance Footage (at PD and externally gathered)

Use of Force Documentation

Internal Affairs Investigations and Reports

Taser Logs (arc timing; error logs)

CAD logs; any audio of calls

Probable Cause Statements

“Dangerous Condition” cases

- Mo. Rev. Stat. 537.600:
  - (2) Injuries caused by the condition of a public entity's property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury directly resulted from the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that either a negligent or wrongful act or omission of an employee of the public entity within the course of his employment created the dangerous condition or a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition.
- Types of Cases and Related Documentation (not an exhaustive list):
  - Sidewalks
  - Snow/Ice
  - Road conditions
  - Maintenance logs
  - Documentation received from contractors

Inverse Condemnation Cases

- Sewer Cases
  - Compliance with any schedules for routine inspections and maintenance of sewer mains (even if such schedules are aspirational)
  - Tangible documentation as to reasons for not being able to meet schedule
  - Documentation as to list of projects, priorities, funding.
- Flooding/Water Infiltration Cases
  - Public works projects
  - City’s own logs
  - Require reports from contractors

Employment Cases

- Often are “email heavy”
- Suggestions regarding email communications
  - Take a deep breath.
  - Stick to the facts.
  - Emotion will be twisted against you.
- Personnel files
  - Police personnel files versus administrative file
- Almost always require evidence of the treatment of other “similarly situated” employees

Case Studies and Related Lessons/Recommendations

Woods v. City, et al.

Jail Death Case – Federal

Evidentiary Issues: Discussions with Paramedics in Dispute
Body Cam: Muted
Documentation: Incomplete

Preservation letter sent by Plaintiff's counsel prior to my involvement.

Spoliation Issue: Only a portion of cell footage was retained.

Moreover, lack of video almost certainly hurt a causation defense – that Plaintiff's decedent was fine before she had an unforeseen acute cardiac event.

LESSON: When securing evidence, get counsel involved early.

Case Study – Hinkebein v. County

- Police excessive force case
  - Plaintiff grabbed officer's service gun, shot through officer's holster, had control of gun.
  - Fellow officer utilized deadly force, shooting Plaintiff in the head.
  - Plaintiff survived, with debilitating injuries.
  - No body camera footage was available.
  - Preservation letter sent by Plaintiff's counsel – to include physical evidence (the gun, the holster)
  - All physical evidence was cataloged by the County but then discarded.
  - Plaintiff filed Motion for Sanctions, seeking to have dispositive sanction entered, striking defenses.
  - Result: Costly settlement in otherwise defensible case.

QUESTIONS?