



NEW YORK STATE E-DISCOVERY LAW

BY MARK A. BERMAN AND HAL N. BEERMAN

Duty to Preserve and Preservation Orders Under N.Y. Law

Spoliation of evidence applications are becoming increasingly common and, when granted, sanctions can range from directing a monetary payment to the preclusion of evidence or even to the drastic result of striking a pleading.¹

For a claim of spoliation to be asserted, however, it must be established that the party which allegedly "spoiled" the materials had a duty to preserve them.

The general rule is that a person or entity has no duty to preserve and can use and dispose of its property as it sees fit.² Only under certain circumstances does a duty to preserve arise. An attorney should not simply rely upon an adverse party to preserve evidence, most importantly inculpatory materials, but needs to take precautions—actively and affirmatively—to ensure that such materials are not destroyed or lost.

'MetLife Auto & Home'

The New York State Court of Appeals in *MetLife Auto & Home v. Joe Basil Chevrolet, Inc.*³ held:

...MetLife made no effort to preserve the evidence by court order or written agreement. Although MetLife verbally requested the preservation of the vehicle [from the entity that had the vehicle at one point], it never placed that request in writing or volunteered to cover the costs associated with preservation. The burden of forcing a party to preserve when it has no notice of an impending lawsuit, and the difficulty of assessing damages militate against establishing a cause of action for spoliation in this case, where there was no duty, court order, contract or special relationship.⁴

The Court further noted that:

As MetLife acknowledges, it could have sought pre-action disclosure or a temporary restraining order. It also could have bought the car from Royal, offered to pay the costs associated with preservation or commenced suit and issued a subpoena duces tecum to Royal. MetLife did none of these things.⁵

The Appellate Division in *MetLife* stated that the duty to preserve evidence imposed upon the employer "is rather limited" and it is "impossible" to formulate a duty to preserve evidence running from Royal, the owner of the "spoiled" car, to MetLife (or to MetLife's subrogor) by virtue of an insurance contract and rejected a "duty to preserve



evidence based upon Royal's voluntary promise and undertaking to do so."⁶

Developments in the Duty to Preserve

Seeking to summarize the current state of the law in New York, a recent trial court decision in *Brown v. Parfums Jacques Bogart SA*⁷ stated:

In the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices, but sanctions should be imposed where party destroys evidence, once litigation is pending. *Sanctions for spoliation may be imposed if a party destroys evidence prior to a notice or order to produce it, or prior to becoming a party, so long as the party is on notice that the evidence might be needed for the future.*

Addressing the duty to preserve electronically stored information, the trial court in *McCarthy v. Philips Electronics NA*⁸ stated:

Defendants' response provides little information concerning their policies regarding maintenance and deletion of electronic communications, aside from the routine overwriting of back-up tapes. The existence or nonexistence of procedures to preserve evidence relevant to anticipated litigation may be of special concern in this case, since documents produced by defendants provide a basis for finding that defendants anticipated litigation well before plaintiff brought suit...and even before [plaintiff] was notified of his job elimination.... It may be urged that, from that time on, defendants had a duty to preserve relevant evidence, which encompasses electronic data. The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation. Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation

hold' to ensure the preservation of relevant documents, and retain back up tapes storing the documents of key players to the existing or threatened litigation.

Recently, in *Clifford v. Toys "R" Us-Delaware Inc.*,⁹ in connection with the production of an alleged videotape of an accident, a trial court stated:

A party has a duty to preserve evidence when it has notice of pending litigation; notice of an accident can sometimes serve as notice of pending litigation, but in the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices.

Burden Is on Person Seeking Preservation

The Court of Appeals has made it clear that the burden is on the person or entity that wants to preserve a specific item or information in the possession of another to act affirmatively.¹⁰ The more aggressively counsel puts an adversary and/or the court on notice of the need to preserve certain information, the greater the likelihood of later obtaining a ruling of spoliation if the information is not preserved.¹¹ Courts are loathe to impose a duty of preservation absent counsel affirmatively seeking preservation by: (i) notifying the party from whom preservation is sought of anticipated litigation,¹² (ii) requesting in writing that the relevant materials be preserved, (iii) offering to pay for the preservation of the materials,¹³ and/or (iv) obtaining a court order requiring the preservation of materials.¹⁴

However, even without a court order or specific notice, courts have found that the allegations in a pleading have sufficiently put a party on notice that it has a duty to preserve certain information. As the trial court stated in *Brown v. Parfums Jacques Bogart*:¹⁵

Plaintiffs will never know what was in the records, or whether TFG was deliberately denuded of assets, which is why [defendant] should have preserved the records. In an action to pierce the corporate veil, records of transactions between the related corporate entities is perhaps the only evidence, other than self-serving statements of the principals seeking to disprove domination and control. The French record retention laws did not relieve [defendant] of the obligation to preserve evidence relating to this case, which was in active litigation when records were destroyed. [Defendant] was on notice that the records of transactions between [defendant] and TFG

Mark A. Berman, a partner at *Ganfer & Shore*, has extensive experience in securities and general commercial litigation. Coauthor **Hal N. Beerman** is an associate at the firm.

