Civil Rights Update - 2019

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THE COUNTY ATTORNEY'S ASSOCIATION

OF THE

STATE OF NEW YORK

CIVIL RIGHTS UPDATE – 2019

I. **<u>Initial Investigation & Preservation of Evidence</u>** - Preservation of Evidence. In rapidly changing environment, important to recognize and adapt to appropriately investigate and preserve evidence. Most rapidly changing area is digital/electronic evidence – know, understand what electronic/digital/cloud based systems your county government, employees *and vendors* are using, and what the corresponding preservation requirements are. Examples: 3rd party IT provider; part-time employee investigator, etc.

a. **Legal Standard to Preserve Evidence - Federal Rule of Civil Procedure 37(e).** Spoliation sanctions based on a failure to preserve electronically stored information are governed by Rule 37(e), which came into effect in its present form on December 1, 2015.

b. **Current Rule 37(e) provides**: 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:

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

   ii. only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

      1. presume that the lost information was unfavorable to the party;
      2. instruct the jury that it may or must presume the information was unfavorable to the party; or,
      3. dismiss the action or enter a default judgment.

c. **Old Rule 37(e)** (before 2015 amendments to the Rule) had a "culpable state of mind" requirement. Under this old standard, standard, a movant was not required to demonstrate that the spoliator acted with knowledge or bad faith; a court had discretion to sanction a party for even negligent spoliation. *See Residential Funding*, 306 F.3d at 108.

d. **Amendment** from "culpable state of mind" to a more stringent "intent to deprive" requirement, described in committee notes – impact of amendment "rejects cases such as [*Residential Funding*] that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence").

   i. As the Advisory Committee Note explains: "Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. *Negligent or even grossly negligent behavior does not logically support that inference*."(emphasis added).

   ii. Thus, a party's conscious dereliction of a known duty to preserve electronic data is both necessary and sufficient to find that the party "acted with the intent to deprive another party of the information's use" under Rule 37(e)(2). Whether the spoliator *affirmatively* destroys the data, or *passively* allows it to be lost, is irrelevant; it is the spoliator's *state of mind* that logically supports the adverse inference. *See Moody v. CSX Transportation, Inc.*, 271 F.Supp.3d 410, 431 (W.D.N.Y. 2017) ("While knowing they had a duty to preserve the event recorder data, defendants allowed the original data on the event recorder to be overwritten.

e. **Duty to Preserve - Timing of the Duty to Preserve** – the duty arises when a party reasonably anticipates litigation.

f. **Culpability Prong -** Simple negligence is no longer a basis for sanctions. Must be gross negligence or bad faith. The level of culpability is important because when bad faith is found, the court presumes relevance; and when a party is grossly negligent, relevance is presumed under certain circumstances and a movant need not separately demonstrate the relevance of the material. See Byrnie v. Town of Cromwell, 243 F.3d 93, 108 (2d Cir. 2001) ("[A]t times, [the Second Circuit has] required a party to have intentionally destroyed evidence; at other times [it has] required action in bad faith; and at still other times [it has] allowed an adverse inference based on gross negligence....").

g. **Relevance Prong** – from old standard.

   i. When the destruction of documents is negligent, "the party seeking an adverse inference must adduce sufficient evidence from which a reasonable trier of fact could infer that the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction." Residential Funding Corp., 306 F.3d at 109 (alteration in original) (internal quotation marks omitted) (quoting Kronisch, 150 F.3d at 127).

   ii. When the destruction of evidence is intentional, relevance is inferred.

h. **Best Defense to Spoliation – "Reasonable Efforts to Preserve"** – a Litigation Hold Memo (attached).

II. Investigating/Preserving Evidence

a. **Video/Audio/Surveillance** – Where Found:

i. In facilities;

ii. In vehicles;

iii. Computers and personal devices (smart phones, tablets, etc.)

iv. On law enforcement personnel;

v. Outside Surveillance; and,

vi. 911 calls/recorded calls to facilities.

b. **Hearing Pursuant to Section 50h of General Municipal Law**

i. Only for Tort Claims

ii. However, often see Notice of Intent/Notice of Claim from *pro se* inmates alleging both negligence and civil rights violations. Even though a 50h hearing isn't a prerequisite to suing a 1983 claim, if you have a basis, do the 50h hearing.

1. Substance of claims

a. Liability

b. Damages

2. Physical Examination –

a. "It is well settled that where, in response to the service of a *404 notice of claim, a municipal entity demands a physical examination pursuant to General Municipal Law § 50 h, compliance with that demand is a condition precedent absent which no action for damages may be commenced (*see Best v. City*

of New York, 97 A.D.2d 389, 468 N.Y.S.2d 7, *affd.* 61 N.Y.2d 847, 473 N.Y.S.2d 975, 462 N.E.2d 152; *Asaro v. Gilpin,* 289 A.D.2d 429, 735 N.Y.S.2d 403; *Matter of Pelekanos v. City of New York,* 264 A.D.2d 446, 694 N.Y.S.2d 694; *Matter of Johnson v. City of Yonkers,* 262 A.D.2d 563, 691 N.Y.S.2d 789)." Wilson v. New York City Hous. Auth., 303 A.D.2d 403, 403–04, 756 N.Y.S.2d 279, 280 (2003)

b. *Wilson,* Lead paint case – NYC Housing Authority demanded authorizations and a physical examination of infant plaintiff. Plaintiff failed to appear for physical examination. Case dismissed. the plaintiffs' unexplained failure to comply with the defendant's demands precludes this action, and the Supreme Court was without authority to forgive this fatal default (*see Asaro v. Gilpin,* supra; *Matter of Pelekanos v. City of New York,* supra). Wilson v. New York City Hous. Auth., 303 A.D.2d 403, 404, 756 N.Y.S.2d 279, 280 (2003)

3. Failure to Exhaust Administrative Remedies - According to the Prison Litigation Reform Act ("PLRA"): "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

a. Pursuant to the PLRA, failure to exhaust administrative remedies is an affirmative defense and "inmates are not required to specially plead or demonstrate exhaustion in their complaints." Jones v. Bock, 549 U.S. 199, 216, 127 S. Ct. 910, 912, 166 L.Ed. 2d 798 (2007).

b. Dismissal for failure to exhaust is appropriate when " 'on the face of the complaint, it is clear that a plaintiff did not exhaust administrative remedies.' " Abreu v. Schriro, No. 14-CV-6418, 2016 WL 3647958, at *8 (S.D.N.Y. July 1, 2016) (quoting Williams v. Dep't of Corr., No. 11-CV-1515, 2011 WL 3962596, at *5 (S.D.N.Y. Sept. 7, 2011)).

c. **Interview Employees/Witnesses**

i. Practice from Insurance Industry - Recorded statements – not admissible, but useful for preparing witnesses.

ii. For transient employees/witnesses

1. Affidavits; and/or
2. Pre-suit depositions.

iii. Evidence from 3rd Parties – the value of a site inspection

1. Go to the scene and figure out where cameras are, send preservation letters, subpoenas immediately.

III. Discovery Under Amended Rule 26.

a. **Amended Rule 26 (2015)-** the Supreme Court approved amendments to Rule 26(b) in 2015 which relocate proportionality language that appeared in other parts of Rule 26 since 1983 (Fed. R. Civ. P. 26(g) (1993)) to the forefront. The latest amendments restored proportionality factors "to their original place in defining the scope of discovery," Fed. R. Civ. P. 26 advisory committee's notes 2015 amendments.

b. **Relevance under Rule 26(b)(1)** is now tempered by proportionality; particular items may be relevant but discovery to obtain them may not be proportionate for that case. These amendments would have the parties consider these factors in making their discovery requests, even at the Rule 26(f) conference among the parties and at the Rule 16 scheduling conference with the Court, id.

c. Another intention of this amendment was to have **"greater judicial involvement in the discovery process,"** (quoting Fed. R. Civ. P. 26 advisory committee's notes 1983 amendments), to avoid discovery becoming "an instrument for delay or oppression," (quoting Fed. R. Civ. P. 26 advisory committee's notes 1993 amendments). The Advisory Committee opined that "it is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own," id. Or as one commentator summarized, under this amendment "the universe of discoverable information is smaller than before. We [parties] should not need to produce as much. We should not expect to get as much. The boundary between discoverable and non-discoverable information remains blurry," Kenneth

Berman, Reinventing Discovery under the New Federal Rules, 42 Litigation 1, 5 (Spr. 2016), where "instead of fencing over whether the requested information is related to the subject matter or likely to lead to admissible evidence, the parties will fight over whether the information is relevant to a party's claim or defense," and "proportionality will be the key metric by which discovery requests and objections will be measured, and it will be the primary basis on which discovery disputes will be decided.

d. Reasonableness. "Almost always, whichever side appears more reasonable will be better off," id. In effect, the concept of undue burden that has been in Rule 26 for the last thirty plus years has been replaced by proportionality, with the burden as one factor to determine whether the discovery demand is proportionate to the case.

e. Makes it more difficult to obtain inconsistent/non-conforming evidence from multiple sources – opponent's response is – "you already have this, therefore, under amended Rule 26 proportionality," you don't need this and my having to produce it is unduly burdensome.

IV. Mandatory Mediation

a. **Unofficial discovery before deposition(s)** – find out:

   a. Areas where more investigation is needed;

   b. viability of claim; and,

   c. potential questions of fact which may reduce or eliminate viability of a dispositive motion.

b. Settlement Negotiations:

   a. Rule 68 Offers – Sword and a Shield –

   b. Rule 68 Offer of Judgment, can effectively eliminate attorneys' fees pursuant to § 1986, if used early and appropriately. Scenario: civil rights violation with either no or little actual damages, or fixed actual damages.

      i. Ex.: Wrongful foreclosure action – County government foreclosed on property. At the time, County government followed the NYS Notice Statute. After foreclosure and before lawsuit commenced, US Supreme Court ruling on *Jones v Flowers*, 126 S.Ct. 1708 (2006), NYS Notice Statute was deemed unconstitutional.

      ii. Real value in case is attorneys' fees per § 1986.

      iii. Rule 68 Offer to cover actual damages from foreclosure and attorney's fees up until that point, eliminated additional attorneys' fees awarded under § 1986.

MAYNARD
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MEMORANDUM

TO: Municipal Client

FROM: Adam T. Mandell, Esq.

DATE: March 20, 2019

RE: **J. Doe v County Government**
Our File No.: xxx.xxxxxxx

PRIVILEGED & CONFIDENTIAL

ATTORNEY-CLIENT COMMUNICATION

Summary

J. Doe has filed a lawsuit against County Government alleging negligence/civil rights violations. Your insurer has retained this firm to defend against this claim.

The purpose of this memorandum is to ask you to **PRESERVE** any documents regarding the Claims of J. Doe, as well as any documents relating to her generally, including any correspondence, e-mails, analyses, reports, memorandums, interview notes, medical records, or other materials. ***At this point, we are not collecting any information.***

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Document Retention

PLEASE DO NOT DELETE ANY INFORMATION THAT MAY IN ANY WAY BE RELEVANT TO THE CLAIMS OF J. Doe.

The categories of documents you are required to continue to maintain include:

(1) Electronic Mail and Other Electronic Messages

(2) Paper Documents

(3) Electronic Information Other Than E-Mails

The following is a list of examples of information which may fall into one of these categories: letters, analyses, reports, calendars, messages, texts, documents, photographs, videos, CDs, voice mail or other telephonic recordings.

Electronic Information: You should preserve all electronic information relating to the Claims in their original form. That includes documents and information that are stored on computers and other electronic devices at home and at the office (even if there is no hard copy printout that separately exists), as well as material contained in personal computers, tablets, cellular phones, appointment books, phone message records, electronic mail and voice mail systems. The requirement is to preserve electronic information that presently exists in your files and information that you create or receive in the future (while the litigation is ongoing).

Please review your electronic files and take steps to ensure that electronic information relating to the subjects listed above are not disposed of, lost, or destroyed. If relevant records or documents exist, please keep them, without alteration, organized in the order in which they

would normally be kept for business purposes. This includes your correspondence files and all electronic records, including e-mail. Please review your document retention settings on e-mail and other electronic devices and disable any auto-delete function or establish a rule to insure relevant data is preserved and not automatically deleted.

Paper Documents: You must also preserve all paper documents and files relating to the Claims of J. Doe. ***We are not collecting any paper documents at this time. We will work with you to collect these if and when appropriate.*** If we begin collection of paper documents, we will attempt to complete this process with minimal interference.

Please also remind any staff person with whom you work to preserve any documents related to the above-referenced Claims and notify your staff to suspend all record destruction relating to such Claims.

If we do collect information, any information you have preserved will be reviewed prior to any disclosure to third parties. Where it is appropriate, confidential and privileged information will be protected.

Future Communications: We understand that you will need to communicate with your colleagues to continue your day-to-day duties. You should refrain from commenting on or giving your opinion of the Claims of J. Doe against County Government, their merits, or anything else related to the substance of her Claims.

The request to preserve documents covers not only documents created in the past but also – and importantly – those that you may create from now on relating to the above-referenced

matter. This includes any document that you write and any document that you receive. It also includes any e-mail that you send and any e-mail that you receive. In other words, you may not delete any e-mail or destroy any document that you receive or send that relates to her Claims.

Please do not discuss with any third parties the substance of her Claims, your search efforts, or your communications with counsel or other employees regarding this litigation. Such discussions may jeopardize the attorney-client privilege.

Thank you again for your prompt attention to this matter and your diligence in continuing to preserve information related to this dispute.