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Board Of Contributors: Duty To Preserve Evidence Unclear In Florida

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Unlike in federal court, it is unclear in Florida state courts when the duty to preserve evidence arises.

Ostensibly, under Florida law, there is no legal duty to preserve evidence until a discovery request is made. While there is no doubt that a party can be sanctioned for failing to preserve evidence after it has a duty to do so, several Florida courts have sanctioned parties for failing to preserve evidence even when there was no such duty under Florida law.

Confronted with this uncertainty, counsel should send a litigation hold notice once litigation has been reasonably anticipated and confer with adverse parties to agree upon the scope of preservation at the earliest opportunity.

In federal court, the duty to preserve evidence arises when a party reasonably anticipates litigation. Unfortunately there is no singular and clear standard in Florida courts. Numerous cases have stated there is no common law duty to preserve evidence—the duty must originate in a contract, statute or discovery request. Some District Courts of Appeal, however, have made seemingly contradictory holdings.

In *St. Mary's Hospital, Inc. v. Brinson* (1996), the Fourth District Court of Appeal upheld a spoliation claim for the dismantling of a vaporizer shortly after surgery because the defendant hospital was alleged to have known "of the potential civil claim against the vaporizer's manufacturer," and thus had a duty to preserve it.

Later, that same appellate court, in *Hagopian v. Publix Supermarkets* (2001) reinstated a spoliation claim where a bottle injured the plaintiff's foot and the defendant disposed of it before suit was filed.

In an opinion unfavorable to plaintiff, the Fifth District Court of Appeal in *Torres v. Matsushita Electric* (2000) upheld the dismissal of a case because the plaintiff failed to preserve the allegedly defective item that was the basis of her claim. These cases throw into question whether there is not a common law duty to preserve evidence.

Proper Preservation

Perhaps more troubling is that some Florida state courts have sanctioned a party even when the court itself found the party had no duty to preserve evidence.

For example, in *Golden Yachts v. Hall* (2006), the Fourth District allowed an adverse inference instruction to be made against a defendant for failing to preserve evidence even though they lacked a legal duty to do so. That court reasoned an adverse inference "may arise in any situation" where a party loses potentially self-damaging evidence—including when the party had no legal duty to preserve it.

Given this lack of clarity, it may be difficult for counsel to determine what constitutes proper preservation. Attempting to understand the law becomes even more difficult when considering the routine alteration or deletion of electronically stored information.