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Of All People...: DC District Court Hits Experienced Litigator Defendant With Terminating Sanctions for Failure to Preserve

In yet another cautionary tale displaying how seriously attorneys and clients must take discovery obligations, United States District Court Judge Beryl A. Howell entered a very rarely imposed default judgement against famed former U.S. Attorney and Mayor Rudy Giuliani for failure to preserve discovery in a defamation suit. Judge Howell's opinion in [Freeman, et al. v. Giuliani](#) represents a blunt condemnation of discovery gamesmanship that is part of a growing number of cases that impose the most severe sanctions for failure to comply with preserving electronic evidence.

In 2021, plaintiffs Ruby Freeman and Wandrea' ArShaye Moss brought suit against defendant Giuliani for defamation, intentional infliction of emotional distress, civil conspiracy, and punitive damage claims. In response to the plaintiffs' first set of discovery requests, Giuliani – an attorney for over 50 years – served an "initial production of 193 documents [that was] largely a single page of communications, blobs of indecipherable data, a sliver of the financial documents." After the plaintiffs' repeated inquiries into his preservation efforts and the court's intervention, Giuliani issued a sworn declaration providing that his only preservation effort was turning off the auto-delete function on a nondescript list of devices and social media and email accounts. Given Giuliani's admitted "preference to concede plaintiffs' claims rather than produce discovery in this case," the plaintiffs filed a motion for sanctions for failing to preserve electronically stored information (ESI).

As we have discussed in numerous [prior posts](#) since its December 2015 amendment, Rule 37(e) has highlighted all litigants' duty to preserve potentially relevant ESI and established that "sanctions may be imposed when ESI should have been preserved 'in the anticipation or conduct of litigation' but 'is lost due to a party's failure to take reasonable steps to preserve it[.]'" Moreover, where a

party's discovery misconduct is motivated by an intent to deprive the other party of the evidence in the litigation, Rule 37(e)(2) provides that the court may, among other serious sanctions, enter default judgment against the offending party.

Noting in detail Rule 37's requirements, Judge Howell admonished Giuliani's actions as a "willful shirking" and "flaunt[ing] [of] his discovery obligations." After his duty to preserve ESI arose in early 2021, Giuliani failed to take reasonable steps to preserve ESI and that ESI became irretrievable. In determining the severity of sanctions to impose, the court weighed Giuliani's willingness to fulfill his discovery obligations. Finding Giuliani "intentionally and willfully" disregarded his discovery obligations, which he admitted to understanding, given his 50 years of experience as a practicing attorney, Judge Howell exercised her discretion to enter the ultimate sanction under Rule 37(e)(2): default judgment against Giuliani on all counts. The court articulated its reasoning in the following poignant observation: "Where the discovery deficiencies are, as here, significant, with no sign of improvement in the production of responsive information, which may be forever lost due to a failure to preserve ESI, the obvious unfairness to the plaintiffs in frustrating their ability to obtain relevant evidence both to support their claims and rebut any defenses proffered by Giuliani makes entry of default judgment necessary."

In addition to ordering Giuliani to pay the plaintiffs' attorney fees and costs associated with bringing their motion for sanctions (totaling more than \$100,000), the court issued sanctions for the remaining damages trial, including "a mandatory instruction about his concealment of his net worth" and a requirement that Giuliani and his businesses produce responses to the plaintiffs' requests for financial information.

This case presents some of the most egregious spoliation conduct since Rule 37(e) was significantly amended in December 2015 and a very rare decision in which the court ultimately imposed terminating sanctions. Ironically, the perpetrator of these acts in this case was a highly experienced litigator, who, as the court noted, surely should have known better. While most litigants will not

engage in such extreme behavior, courts continue to take discovery obligations seriously, and a litigant's failure to fulfill its duty to preserve ESI – whether purposeful or not – may result in the imposition of serious sanctions.

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