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Caught in the Sauce: Papa John's Founder's Failure to Preserve ESI in Cellphones Leads to Curative Sanctions Despite Initial Preservation Efforts

Practitioners and litigants alike largely understand that they must preserve evidence related to anticipated litigation. One potential pitfall, however, lies in the continuing nature of that obligation. Generally, a litigant's duty to preserve evidence continues despite, for example, the collection of relevant documents or the imaging of devices containing relevant information. These principles were illustrated in a cautionary [opinion](#) by the Honorable Colin H. Lindsay, United States Magistrate Judge for the United States District Court for the Western District of Kentucky, in *Schnatter v. 247 Grp., LLC*, No. 3:20-3 (BJB) (CHL), 2022 WL 2402658 (W.D. Ky. Mar. 14, 2022).

The case arose in the wake of *Forbes* Magazine publishing an [article](#) detailing a leaked conference call between the founder of Papa John's, John H. Schnatter, and a marketing agency, during which Schnatter made racially charged comments. Within a week of publication, Schnatter was out as Chairman of Papa John's and the University of Louisville announced it would rename the then Papa John's Cardinal Stadium. Schnatter immediately retained counsel to assist in his separation with Papa John's and explore potential affirmative claims. On July 25, 2018, just two weeks after the *Forbes* article was published, Schnatter's own counsel sent him a Litigation Hold Notice. The Notice outlined his document preservation responsibilities, including suspending any automatic destruction processes that implicated potentially relevant information. The next day, Schnatter filed suit against Papa John's, and within the month Schnatter's counsel had his cellphone imaged to preserve electronically stored information (ESI).

Several months later, sometime between late 2018 and early 2019, Schnatter retained another law firm to explore claims against the

marketing agency and its parent company related to the leaked conference call recording. Schnatter filed suit on December 5, 2019, and the case was removed to the Western District of Kentucky on January 2, 2020. Through its requests for production, the marketing agency sought all documents and communications related to the conference call, Schnatter's resignation from Papa John's, and the *Forbes* article, including all "text messages, social media posts, websites, or direct messages." In August 2020, Schnatter had a second phone imaged to preserve ESI.

A protracted discovery dispute ensued after the marketing agency noticed Schnatter's production did not contain the counterparts to messages collected from his assistant and a long-term employee. While conferring with opposing counsel, Schnatter asserted he did not carry an "emergency" phone since 2017 and that he provided collections from the phones he had in 2018 and 2020. Opposing counsel persisted and, after again highlighting the missing counterparts during a court conference held 10 months after the initial notice of deficiency, Schnatter disclosed for the first time that he had a practice of routinely deleting his text messages. Opposing counsel also informed the court that they were aware Schnatter used "burner" phones and, eventually, sought leave to serve Schnatter with special discovery interrogatories. Schnatter's answers revealed that he actually owned 11 phones. Relevant here, he disclosed the use of two primary phones, one he used from February 2018 through January 2019, which was imaged in July 2018; and the other he used from October 2018 through January 2019, which was imaged in August 2020. He also disclosed using two backup phones from December 2019 through June 2020, which were never imaged. All of them had since been destroyed.

The court engaged in a four-part inquiry to determine whether Rule 37(e) remedial measures under 37(e)(1) or more serious sanctions under 37(e)(2) were appropriate.

First, addressing the threshold requirements of Rule 37(e) that we have discussed in prior posts, the court held Schnatter had a duty to preserve the information. The court found Schnatter was on notice of potential litigation as of the day the article was published and he resigned as Chairman of Papa John's. The court also rejected

Schnatter's argument that the cellphones did not contain relevant evidence because he strongly preferred calls, as opposed to emails or text messages, and only used his personal phones for business on a limited basis. The court commented that Schnatter's claimed "limited" use of his personal phone could not excuse his obligations to preserve potentially relevant information. Additionally, the court held Schnatter was on notice the phones likely contained relevant evidence generated after the July 2018 imaging because his own counsel advised him in the Litigation Hold Notice that his preservation obligations were ongoing, he submitted a phone obtained after publication of the article for imaging, and the discovery requests called for information generated after July 2018.

Second, the court considered what information was lost, noting static images (screenshots of certain texts taken by Schnatter) were an insufficient substitute for the native files that would have contained important metadata. Moreover, the court found all texts and information from his primary cellphones created after their respective imaging were lost. The court also found all text messages and information contained in the backup phones were lost.

Third, the court considered whether Schnatter took reasonable steps to preserve potentially relevant evidence. Schnatter's only excuse for continuing to delete messages and discarding the phones was that it was his routine practice and he was done with the phones. Consequently, the court found Schnatter took no steps to preserve potentially relevant evidence.

Fourth, highlighting "no measures should be taken against the litigant if the information can be recovered through additional discovery," the court turned to whether the lost information was recoverable. Schnatter's primary argument was that discovery from the third-party senders/recipients of the texts or the telephone carrier would effectively restore the information. The court rejected the argument because, in response to the special interrogatories, he only generally identified "senders/recipients" and was unable to identify any specific sender or recipient. He further never identified the carrier or whether the information lost could be recovered from it.

Despite these significant missteps, the court found curative sanctions under Rule 37(e)(1) were more appropriate than the more severe sanctions available under subsection (e)(2). The court reasoned that, while Schnatter's conduct was "concerning," there was no reason to doubt he routinely deleted his text messages in an effort to preserve his privacy. The court highlighted that there was no evidence Schnatter selectively deleted his texts to gain a favorable litigation position, *i.e.*, as Rule 37(e)(2) requires that he had an "intent to deprive [his adversary] of the information's use in the litigation," and noted some uncertainty in the scope of preservation obligations generally.

Accordingly, the court held the appropriate remedy was allowing opposing counsel to present evidence to the jury about the missing text messages and instruct the jury that it may draw whatever inferences it deems appropriate from those facts. Further, in light of Schnatter's lack of cooperation during the discovery dispute saga, including his evasive responses, the court ordered he pay opposing counsel's attorney's fees incurred in prosecuting their motion and attending certain conferences related to the dispute.

The opinion is quite interesting with respect to the remedy fashioned by the court, in that a curative jury instruction under 37(e)(1) allowing the jury to hear the evidence of spoliation and "draw any inference" it wants, including one that Schnatter intentionally spoliated, comes dangerously close to a *de facto* "permissive" adverse inference, a remedy only allowed under 37(e)(2)(B) where intent to deprive has been demonstrated (something the court had already ruled was not shown). In fact, the 2015 amendment to Rule 37(e) Advisory Committee Notes caution specifically about this, stating: "Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation."

Schnatter's case illustrates how clients and attorneys alike may assume their discovery obligations are satisfied once ESI is collected. But discovery obligations are ongoing, and document

collections made at the beginning of a litigation may be insufficient when new, potentially relevant information continues to be created. Practitioners and clients are cautioned to preserve material, even from sources perceived as private, that relate to ongoing litigation. While clients may feel the temptation to limit the information they preserve or disclose (even to their own attorneys), remember, most emails and text messages have counterparts, which are discoverable from the recipient directly. Judge Lindsay's opinion also contains an important lesson about maintaining a trustworthy reputation. This case demonstrates how a party's evasive responses and ill-founded discovery objections can wear down their credibility with the court and impact other determinations. Finally, the opinion teaches that courts can still be somewhat unpredictable in the application of Rule 37(e)'s remedial rubric, and there is a risk that conduct that may not rise to the level of serious (e)(2) sanctions may still result in a curative remedy that could have a game-changing effect on the outcome of the case.

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