

## Computer “Clean-Up” Constitutes Spoliation: Court Orders Forensic Exam, Grants Adverse Inference Instruction and Awards Attorneys’ Fees

By Susan A. Ardisson, Esq.

In a trade secret case, the defendant testified that he conducted a “clean-up” of his Dell computer following the issuance of a TRO and preliminary injunction against him. The defendant’s housekeeping activities on

AMG’s expert. According to the AMG court, Reis’ “clean-up” included deleting financial information that he prepared for former AMG clients, including financial projections, and his contacts with these clients during the pendency of the

*“Reis’ ‘clean-up’ included deleting financial information that he prepared for former AMG clients, including financial projections, and his contacts with these clients during the pendency of the court’s orders.”*

his computer included the deletion of certain financial information and evidence of his subsequent contacts with the plaintiff’s customers in violation of the TRO and preliminary injunction. Armed with this information, the plaintiff in *AMG National Trust Bank v. Reis*, 2011 WL 3099629 (E.D. Pa. July 22, 2011) moved for contempt and for sanctions based on the defendant’s spoliation of evidence. Commenting on the defendant’s conduct, the AMG court concluded that “the evidence strongly suggests that his purpose in deleting the files was to prevent their discovery.” Accordingly, the court granted the plaintiff’s motion for spoliation sanctions and ordered the defendant to pay for a forensic examination of his computer to recover any available electronic evidence and to pay for the plaintiff’s attorneys’ fees. While the court declined to enter the ultimate spoliation sanction of judgment in favor of the plaintiff, the court ruled that the plaintiff was entitled to a “spoliation inference” at trial.

In this case, AMG National Trust Bank obtained a TRO and preliminary injunction against Steven Reis, a former AMG employee, based on a breach of his employment agreement which prohibited him from contacting or providing financial related services to AMG’s clients. The Third Circuit affirmed and discovery continued in the case. Reis apparently testified at this deposition that he cleaned up his computer before turning it over to

### More ESI Spoliation: “No Harm, No Foul” Defense Rejected

In *E.I. Du Pont de Nemours and Company v. Kolon Industries, Inc.*, 2011 WL 2966862 (E.D. Va. July 21, 2011), defense counsel turned over “screenshots” from key employees’ computers containing instructions to “Delete,” “Need to Delete,” “Remove All,” and “Get Rid of” that were created in the days after the employees learned of Du Pont’s complaint alleging that that Kolon had wrongfully obtained its trade secrets from a former Du Pont employee. Forensic examinations later determined that, despite the issuance of two litigation holds, Kolon’s key employees intentionally destroyed relevant documents and email that would have been helpful to Du Pont. Because Du Pont was able to recover some of the ESI by forensic examination of the key systems, Kolon argued a “no harm, no foul” defense, which, not surprisingly, the court rejected and instead ordered Kolon to pay Du Pont’s attorneys’ fees, and the costs of the forensic investigation based on its finding that Kolon intentionally and in bad faith sought to destroy crucial email and documents. Like the *AMG* case, the court declined to grant judgment against Kolon as a sanction for its conduct, but instead held that an adverse inference instruction at trial was the lesser appropriate sanction.

**This issue of qubit and past  
issues are available on our website at:  
[www.bit-x-bit.com](http://www.bit-x-bit.com)**

## Computer “Clean-Up” Constitutes Spoliation

(from p. 1)

court’s orders. Additionally, AMG apparently obtained and provided the court with corroborating evidence from third parties.

The court began its analysis with a review of the duty to preserve evidence, quoting *Paramount Pictures Corp. v. Davis*, 234 F.R.D. 102 (E.D. Pa. 2005) that:

A litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action.... Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.

When spoliation of evidence is established, the court must then determine the appropriate remedy or sanction which

tion is available.” *Travelers Prop. Cas. Co. v. Cooper Crouse-Hinds, LLC*, 2007 WL 2571450 (E.D. Pa. Aug. 31, 2007).

According to the AMG court, Reis’ conduct in this case was “very suspect” and suggested that his motive was to “prevent” the discovery of the evidence, thereby warranting under *Schmid* “a strong sanction.” In the court’s view, Reis bore “personal responsibility” for the deletion of the evidence which was in his control and was relevant to the issues in the case, as it “showed financial information prepared for AMG clients during the pendency of the court orders and restrictive covenant.”

Although the court declined to enter judgment against Reis because of the “uncertainty” that there may be additional “files and contacts that have not come to light” in the litigation, the court nevertheless ordered Reis to pay for a forensic examination of his computer “to determine what,

***“According to the AMG court, Reis’ conduct in this case was ‘very suspect’ and suggested that his motive was to ‘prevent’ the discovery of the evidence, thereby warranting under Schmid ‘a strong sanction.’”***

can include: “(1) the dismissal of a claim or granting judgment in favor of a prejudiced party; (2) suppression of evidence; (3) an adverse inference referred to as the spoliation inference; (4) fines; and (5) attorneys’ fees and costs.”

The AMG court began its discussion of the appropriate sanction with an analysis of the three factors in the Third Circuit’s decision in *Schmid v. Milwaukee Elect. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994). They are:

(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.

The court should “resort to the drastic sanction of entering judgment against a spoliating party only when `no alternative remedy by way of a lesser, but equally efficient sanc-

if any, evidence can be recovered.” The court also ordered Reis to pay AMG’s attorneys’ fees and costs as compensatory relief and held that AMG was entitled to a spoliation instruction with the “language to be determined after the results of the forensic examination when the plaintiff and this court have a better basis for determining the amount of prejudice to plaintiff.”

◇ ◇ ◇ ◇ ◇

For questions or comments regarding this issue of qubit, please contact us at [info@bit-x-bit.com](mailto:info@bit-x-bit.com).

**qubit** \`kyü -bit\ n. a quantum bit, the counterpart in quantum computing to the binary digit or bit of classical computing. Just as a bit is the basic unit of information in a classical computer, a qubit is the basic unit of information in a quantum computer. [whatis.com](http://whatis.com)

This publication is for informational purposes only and is not meant to be, nor should it be, construed as legal advice.

© 2011 bit-x-bit, LLC. All rights reserved.