

Attempted Spoliation Translates Into Fee-Shifting

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Late on New Year's Eve 2013, Philip Shawe broke into the office of his business partner, Elizabeth Elting, removed her hard drive, instructed an employee to image the hard drive, and then returned the hard drive to Elting's office after concealing any evidence that it had been taken. In the following days and months, Shawe used the hard drive image to gain access to Elting's electronic files and emails, including 19,000 Gmail messages. Among those Gmail messages were approximately 12,000 privileged communications between Elting and her attorneys ([In re Shawe & Elting](#), No. CV 10449-CB, 4-6 (Del. Ch. 2016)). Shawe also hired an individual to sneak into Elting's office and periodically photograph the contents of her files and personal belongings. Later, Shawe destroyed his own iPhone, repeatedly deleted material from his laptop, and lied in numerous sworn documents and testimony about his actions.

This is not the beginning of a novel, but rather these are facts found by Delaware Court of Chancery Chancellor Andre G. Bouchard after an evidentiary hearing in connection with a lawsuit between a former couple who co-owned and operated TransPerfect Global Inc., a translation company (see Katia Savchuk's [Forbes article](#), "Inside the Nasty Corporate Divorce Between Ex-Lovers Who Built a Company Worth Nearly \$1 Billion").

The Court of Chancery concluded that Shawe had intentionally destroyed evidence, given false testimony, and failed to protect other lost evidence, and ordered Shawe to pay "a significant portion" of Elting's legal fees incurred in the litigation.

In doing so, the Chancery Court explained the applicable legal standard to determine whether a party has engaged in spoliation of evidence and under what circumstances a fee-shifting award is an appropriate remedy. This article summarizes the court's order.

Fee Shifting Requirements

Delaware applies the "American Rule," under which each party bears their own legal fees unless the "losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Although the court has broad discretion in setting the amount of fees awarded, the exception is an extraordinary remedy that the Court of Chancery has held may only apply where there is clear evidence of "unusually deplorable behavior." Delaware courts have imposed fee shifting when a party has either delayed litigation, asserted frivolous motions, falsified evidence, or changed his testimony to suit his needs.

Spoliation—even if ultimately unsuccessful—can trigger fee-shifting when the court finds that the spoliator intended to destroy the evidence.

The Facts

In 1992, Shawe and Elting founded TransPerfect. They were dating and both at the New York University Stern School of Business. TransPerfect grew into a successful translation company, but Shawe and Elting did not survive as a couple. Shawe, it seems, could never handle Elting breaking up with him—he even hid under her bed during the break-up.

By 2011 and 2012, they were completely dysfunctional managers of the company. But after Elting hired a lawyer, things got even nastier. Instead of hiring his own counsel, Shawe "undertook a campaign to spy on Elting in pursuit of what had become a personal battle in which Shawe was determined to get his way over Elting at all costs."

First, Shawe's employees intercepted Elting's mail and phone calls. Then, in an effort to steal her email, he broke into her office on New Year's Eve, and had an employee make a scanned image of her hard drive. Eventually, Shawe gained remote access to Elting's hard drive, and ultimately accessed 19,000 of Elting's emails, "including approximately 12,000 privileged communications" with Elting's attorneys related to the litigation.

Still wanting more, Shawe hired another employee whose sole responsibility as a "consultant" for the company was to help Shawe spy on Elting. He would take files from Elting's office and bring them to Shawe's counsel's investigator.

As the trial approached, Shawe began to destroy evidence of his spying even though he was under litigation hold notices. First, his iPhone (containing text messages specifically covered by the litigation hold notices) was allegedly ruined by his niece, and then mysteriously thrown away by his assistant. Next, before turning over his laptop to a forensics expert as ordered by the court, Shawe deleted 19,000 files, making an image of his hard drive to give the expert as little information as possible. He also made a backup image that contained even fewer files to send to the expert, in case the deletion was discovered. However, the expert realized that information was deleted from the hard drive, and recovered almost all the files, including Shawe's copies of Elting's emails.

Finally, during the sanctions phase of the litigation, the evidence showed that Shawe gave false answers to interrogatories and in depositions throughout the merits trial and the post-trial briefing. Shawe misled the court in an effort to conceal his employee's involvement in the scheme, and to claim only he and the now-inaccessible "consultant" (who resigned from the company and went to Europe) were responsible.

The Chancery Court's Rulings

The court found Shawe had acted in bad faith.

First, Shawe intentionally destroyed evidence on his computer to make it unavailable for forensic discovery. This was "in direct contravention of the Expedited Discovery Order," which required Shawe to provide the laptop to the forensic expert. Although almost all the evidence was recovered, Shawe's ineffectualness did not "negate the intention to spoliage." Indeed, Shawe's attempted spoliage "prejudiced Elting's ability to litigate effectively, drove up the costs of litigation, and wasted the court's resources."

Second, Shawe recklessly failed to safeguard the information on his iPhone. He knew early on he had a duty to preserve the information because he knew the iPhone was relevant, could reasonably lead to discovering admissible evidence, and Elting was likely to request it during discovery.

Finally, Shawe committed perjury by repeatedly lying under oath to conceal both his secret extraction of information from Elting's computer and the deletion of information from his laptop. This was "obvious bad faith" and done "intentionally to conceal the truth of his surreptitious activities."

The court looked at three factors when considering the appropriate remedy for Shawe's spoliage. First, it examined Shawe's culpability. Then, it looked at Elting's "degree of prejudice suffered." Finally, it considered whether lighter sanctions could accomplish the same amount of deterrence. The court evaluated the "totality of the party's misconduct to determine" the award. The court found Shawe's bad faith "prejudiced Elting's ability to develop the record for, and needlessly complicated the litigation of, the merits trial." Shawe's misconduct also forced the parties to have the second evidentiary hearing for the sanctions motion.

The court awarded Elting reasonable attorney fees and expenses "incurred in prosecuting the sanctions motion." Additionally, Shawe was ordered to pay 33 percent of Elting's fees and expenses for the merits trial because "Shawe's bad-faith misconduct significantly complicated and permeated the litigation of the merits trial."

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