

In Herzig v. Arkansas Found. for Med. Care, Inc., 2019 WL 2870106 (W.D. Ark. July 3, 2019), Judge P.K. Holmes III held that technologically sophisticated plaintiffs’ use of an ephemeral messaging application that automatically deleted messages between them, when earlier communications had proven to be responsive to requests for production, constituted intentional bad-faith spoliation of evidence.

In this employment discrimination litigation, IT professionals at a medical care facility who developed an in-house medical review software sued their former employer alleging age discrimination. *Id.* at *2. The software contained a flaw that permitted unauthorized access to protected health information, and defendant terminated the plaintiffs after discovering the flaw and conducting an investigation. *Id.* at *3-*4.

During the Rule 26(f) conference, plaintiffs agreed to take “reasonable measures to preserve potentially discoverable data from alteration or destruction,” including information on their cellphones. In their initial responses to discovery requests, however, plaintiffs claimed to not have any responsive documents. Plaintiffs eventually produced a limited set of text messages and, following a motion to compel, produced additional text messages, but the date of the last-produced text messages was well before the end of the discovery period. One of the plaintiffs stated at his deposition late in the discovery process that plaintiffs had begun using the ephemeral messaging application Signal on their phones to communicate during the course of the litigation: “Signal allows users to send and receive encrypted text messages accessible only to sender and recipient, and to change settings to automatically delete these messages after a short period of time. [Plaintiffs] set the application to delete their communications.” *Id.* at *4.

Following disclosure of plaintiffs’ use of Signal, defendant filed a motion to dismiss or for an adverse inference due to spoliation in conjunction with a motion for summary judgment. As to the sanctions motion, defendant argued that using Signal and automatically deleting messages was contrary to plaintiffs’ obligation to impose litigation holds and update their responses to discovery requests. Plaintiffs countered that “they had no duty to allow [defendant] to see all their communications, only communications responsive to the requests for production” and that defendant had no evidence that they “had responsive communications using Signal or that the destruction of those communications was in bad faith.” Plaintiffs alleged that they used Signal only to arrange meetings with one another or their attorney. *Id.*

In addressing the standard of review, the court noted that it had “inherent authority to fashion appropriate sanctions for conduct which abuses the judicial process.” *Id.* at *1 (citing *Stevenson v. Union Pac. R. Co.*, 354 F.3d 739, 745 (8th Cir. 2004)). To impose “[a] spoliation-of-evidence sanction requires ‘a finding of intentional destruction indicating a desire to suppress the truth.’ ” *Herzig*, 2019 WL 2870106 at *1 (quoting *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007)). “If the movant shows the spoliation was done in bad faith, the Court may give an adverse inference or dismiss the case.” *Id.* (citing *Menz v. New Holland N. Am., Inc.*, 440 F.3d 1002, 1006 (8th Cir. 2006)).

The court concluded that plaintiffs had spoliated evidence in bad faith based on their actions and technological knowledge. Plaintiffs had “numerous responsive communications with one another and with other [of defendant’s] employees prior to responding to the requests for production” and

did not disclose their use of Signal until discovery was nearly complete.” Id. at *5. Having found that plaintiffs’ prior communications were responsive, the court inferred that the “content of their later communications using Signal were responsive” and relied on the following facts supporting their conclusion “that the decision to withhold and destroy those likely-responsive communications was intentional and done in bad faith”:

[Plaintiffs’] familiarity with information technology, their reluctance to produce responsive communications, the initial misleading response from [one plaintiff] that he had no responsive communications, their knowledge that they must retain and produce discoverable evidence, and the necessity of manually configuring Signal to delete text communications.

The court held that the “intentional, bad-faith spoliation of evidence was an abuse of the judicial process and warrant[ed] a sanction.” Ultimately, however, the court did not decide on an appropriate sanction because it chose to grant the defendant summary judgment based on the underlying merits of the case. Id.