

1. A ruling from the District of Kansas denying the petitioners' motion for spoliation sanctions against the government for deletion of metadata from two hard drives that government employees had reformatted, because the petitioners failed to establish that the metadata actually existed on the hard drives prior to the deletion of data on the drives as a result of the reformatting.

In *In re: CCA Recordings 2255 Litigation, Petitioners, v. United States of America*, 2021 WL 2212758 (D. Kan. June 1, 2021), Chief U.S. District Judge Julie A. Robinson denied the Petitioners' motion for spoliation sanctions against the government for deletion of metadata that was alleged to have existed on a computer hard drive and that would contain logging information about who, when, and how government employees viewed recordings of the Petitioners' meetings with their counsel on the grounds that Petitioners failed to show that the metadata actually existed prior to the deletion.

This litigation involved claims that the government violated Petitioners' Sixth Amendment rights by viewing video recordings of meetings between Petitioners' and their counsel that the government received from the corrections facility where Petitioners were detained. *Id.* at \*2 and n.14. In a prior proceeding brought by federal public defenders, Chief Judge Robinson had found that the government failed to preserve evidence from two hard drives on a computer (the AVPC) on which government staff could view the video recordings obtained from the detention center. She had also found that any metadata electronically stored information (ESI) identifying who accessed the video viewing software, when they accessed, and how the software was used to view the videos would have resided on one of the two AVPC hard drives but that a government employee had reformatted the hard drives on September 6, 2016, as part of a scheduled PC refresh project of computers used by the government, which had the effect of wiping the hard drives.

In the prior proceeding, Chief Judge Robinson had also addressed the existence of the specific logging metadata ESI at issue in the instant case. Chief Judge Robinson described the testimony of the public defenders' expert there, who had opined that the AVPC had two hard drives, one for the operating system and one to store data, and the fact that both hard drives were reformatted and had the operating system installed suggested that the government's objective was to destroy data that existed on the drives. *Id.* at \*3. But the expert had not opined as to how much data, if any, was deleted or overwritten on the AVPC drives after they were reformatted and had not conducted a forensic examination of the AVPC and could not opine that the data, including any logging information that may have existed, was completely lost. Chief Judge Robinson ultimately denied the earlier public defenders' request for spoliation sanctions, concluding that "[t]here is no evidence that establishes whether metadata resided on the AVPC hard drive showing information about users' access to the" video software.

In support of Petitioners' instant motion, Petitioners relied on a report from the same expert that issued the report in the prior proceeding. The expert opined that viewing the videos from the detention center with the video software on the AVPC "would have left behind forensic evidence in numerous locations on the AVPC that should have been recoverable with forensic tools" and that the lack of forensic evidence of such activity suggested that the data was either wiped or overwritten by the continued use of the computer. The expert also opined that she would have expected that use of the AVPC to log in and view the detention center videos would have generated system log files. In particular, the expert opined that the video software was a web browser plugin that should have left behind certain forensic artifacts within the internet history on the AVPC prior

to the operating system upgrade. That internet history should have existed in the unallocated space after the formatting and the upgrade had the hard drives not been wiped or otherwise overwritten. However, the expert did not find any relevant data in the unallocated and allocated space of both hard drives on the AVPC.

Chief Judge Robinson began her analysis in the instant case with a review of the relevant standards under Federal Rule of Civil Procedure 37(e) and *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004). *Zubulake* defined spoliation as “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.” *Id.* at \*5. She then described the two tracks for imposing spoliation sanctions under Rule 37(e), depending on whether there is a finding of prejudice to another party from loss of the information, based on which the court “may order measures no greater than necessary to cure the prejudice” or whether there is a finding that the spoliating party intended to deprive another party of the information’s use in the litigation. Based on that, the court could presume that the lost information was unfavorable to the party, or instruct the jury that it may or must presume the information was unfavorable to the party, or dismiss the action or enter a default judgment. *Id.* at \*6.

Chief Judge Robinson noted that a finding of intent was required in this case because Petitioners requested the sanction of an adverse inference or a presumption that government prosecutors intentionally watched the video recordings listed in petitioners’ privilege logs. Before concluding that such a sanction is warranted, the court must find that four prerequisites are met: (1) ESI was lost; (2) a party had a duty to preserve the lost ESI; (3) the party failed to take reasonable steps to discharge its duty; and (4) the lost ESI cannot be restored or replaced. Once these requirements are met, the court may go on to determine whether there has been a requisite showing of bad-faith intent necessary to impose sanctions under subsection 37(e)(2).

Chief Judge Robinson next addressed whether Petitioners’ motion for spoliation sanctions under Rule 37(e) was moot because she already intended to impose an essentially identical sanction under Rule 37(b)(2). Petitioners argued that given the government’s position that the existing record was insufficient to warrant the taken-as-established privy to element under Rule 37(b)(2), proceeding on the request for spoliation sanctions may both bolster the court’s existing Rule 37(b)(2) analysis or provide an alternative basis for entering the privy-to adverse inference. Chief Judge Robinson agreed with Petitioners, finding that although the requested spoliation sanction under Rule 37(e) mirrors the sanction that the court intended to impose under Rule 37(b)(2), the grounds for the sanction are alternative and distinct. *Id.* at \*7.

Chief Judge Robinson then turned to the prerequisites for finding sanctions under Rule 37(e), starting with whether any ESI was lost. The government argued that Petitioners had failed to show that any relevant metadata would have been created on the AVPC hard drive if anyone viewed videos using the video software and that Petitioners had therefore failed to show that any relevant data was lost in September 2016 when the AVPC’s hard drives were reformatted for purposes of installing a new operating system as part of a regularly scheduled upgrade. *Id.* at \*7. In response, Petitioners argued that they did not need to show the specific metadata ESI that existed on the AVPC at the time of the deletion, but only that the government deleted ESI with the requisite intent to deprive Petitioners of the ESI’s use in litigation. *Id.* at \*8. In this context, Chief Judge Robinson noted that there was no dispute that some ESI on the AVPC existed, but the question was whether

the particular logging metadata relevant to Petitioners' Sixth Amendment video claims existed. *Id.* at \*9. She also noted that Petitioners were not claiming that they lost the ability to determine if that metadata existed at all, and in fact Petitioners' expert had the ability to test whether such metadata was generated by the government's system but did not do so.

Chief Judge Robinson agreed with the government that Petitioners had failed to present evidence that the logging metadata that was the subject of Petitioners' spoliation motion ever existed, including that Petitioners' expert had failed to conduct tests to determine whether the logging metadata ESI existed. Chief Judge Robinson explained that the court must determine whether and what ESI was lost before addressing any other requirements under Rule 37(e). "In addition to the threshold requirements under Rule 37(e), there is the obvious requirement that the evidence must have existed. ... A successful claim for spoliation of evidence cannot be premised on mere speculation on the existence of such evidence." *Id.* at \*8 (quotations omitted). Chief Judge Robinson found that Petitioners' argument that relevant logging metadata ESI was overwritten as a result of the government's conduct presupposed that the logging metadata actually existed in the first place prior to being destroyed. *Id.* at \*9.

Chief Judge Robinson ultimately concluded that if there was no evidence that logging metadata ever existed, it could not have been intentionally destroyed to deprive Petitioners of its use, and there could be no spoliation as it relates to that specific ESI relevant to Petitioners' claims. She also found that absent any evidence that such ESI existed and was destroyed, she did not need to engage in a substantive spoliation analysis. For these reasons, she denied Petitioners' motion for spoliation sanctions.