2. A decision from the U.S. District Court for the Northern District of Illinois finding that a document demand from the DOJ related to potential anticompetitive conduct by Defendants' competitors did not give rise to a duty to preserve documents for a subsequent civil litigation (even where the scope of preservation overlapped) but that a subsequent document demand from the DOJ targeting conduct by one of the Defendants did give rise to such a duty.

In In re Local TV Advertising Antitrust Litigation, 2023 WL 5607997 (N.D. Ill. Aug. 30, 2023), U.S. District Judge Virginia M. Kendall addressed whether to impose spoliation sanctions for deletion of various categories of electronically stored information (ESI) based on Defendants' receipt of various document demands from the DOJ.

In this putative antitrust class action, Defendant Griffin Communications, Inc. (Griffin) was alleged to have colluded with its competitors regarding the price or other terms for spot advertising. Id. at *1. Griffin had received a civil investigative demand (CID) letter from the DOJ on September 11, 2017, related to an antitrust investigation into the proposed merger of Sinclair Broadcasting Group and Tribune Media Company. The September 2017 CID letter instructed Griffin to "take all necessary steps" to preserve documents relevant to the investigation, including ESI. After receiving the letter, Griffin placed a companywide "email hold" and a hold on information that was responsive to the CID letter.

Griffin received a second CID letter from the DOJ on February 8, 2018, this time related to an investigation into whether Griffin was exchanging competitive information with other broadcast stations in the Oklahoma City area or other areas. Id. at *2. The February 2018 CID letter required Griffin to preserve documents and ESI related to various topics for the Oklahoma City area and any other area in which Griffin exchanged competitive information with other broadcast stations.

Griffin implemented a document hold through its IT department "within one week" of receiving the February 2018 CID letter. Griffin's chief executive officer testified that he met with IT personnel and legal counsel and "made sure that Griffin put a document hold on everything and that no documents would be destroyed" and "instructed the staff." In addition, Griffin's director of local sales in Tulsa testified that employees were instructed to save all electronic and paper documents and that document-preservation responsibilities fell to the company's sales account representatives, who were in charge of keeping their documents and uploading them to shared drives for backing up by the IT department.

Griffin received a third CID letter from the DOJ on March 16, 2018, again related to an investigation of "competitively sensitive information exchanges in unreasonable restraint of trade."

Judge Kendall explained that Griffin had neither a formal ticketing system (to execute and track employees' IT requests and actions) nor an informal documentation scheme (to track actions related to IT). Id. at *3. Nor did Griffin track its physical IT assets, such as employees' computers, as would be typical for a similarly situated company. Because Griffin did not track its IT actions or IT physical assets, the judge explained that it was not possible to determine precisely how Griffin implemented its litigation holds in response to the DOJ CIDs.

Judge Kendall next described several categories of ESI that Griffin failed to preserve. First, Griffin did not preserve emails or computer files for Lex Sehl, an account executive supervisor who left Griffin on August 10, 2017, and Griffin could not identify when this ESI was deleted or what company-issued computer Sehl used before he left Griffin. Griffin represented that its general practice was to delete a departed employee's emails and files. Griffin did not have a practice of retaining a departed employee's emails and files, nor a practice of documenting when a departed employee's emails and files were deleted. Sehl's supervisor had access to Sehl's email account after his departure and produced emails sent to Sehl's account between August 10, 2017, and October 15, 2018. Additionally, Griffin produced over 3,000 emails and other documents sent by Sehl to others, or by others to Sehl, and obtained and produced text messages from Sehl's personal cell phone. Otherwise, Sehl's predeparture files and emails were deleted and were unrecoverable.

Second, Griffin did not preserve various ESI, including OneDrive files, hard drives, and text messages, for three account executives. Id. at *4. And third, Griffin did not preserve text messages from Griffin's president and its former chief operating officer, Rob Krier. Krier reportedly was "not sophisticated with respect to technology matters" and had a habit of deleting "almost all text messages," which continued up to his deposition.

Turning to her analysis, Judge Kendall first described the standards under Federal Rule of Civil Procedure 37(e) applicable to Plaintiffs' motion for spoliation sanctions. She noted that Plaintiffs moved under both Rule 37(b) and the court's inherent authority to sanction a party that has abused the judicial process, but she found that Rule 37(e) "provides the sole source of sanctions to address the loss of relevant ESI that was required to be preserved but was not because reasonable steps were not taken, resulting in prejudice to the opposing party."

Judge Kendall explained that under Rule 37(e) a court may sanction a party after finding, first, that "electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery," and second, either (1) that the loss prejudiced the party's opponent or (2) that the party acted with intent to deprive an opponent of the information's use in litigation. Id. at *5 (quoting Rule 37(e)). She further explained that Rule 37(e) sanctions require finding, as a threshold matter, that relevant ESI "should have been preserved in the anticipation or conduct of litigation."

Judge Kendall further explained that determining whether and when a duty to preserve arose requires consideration of the extent to which a party was on notice that litigation was likely and that the information would be relevant. If a duty to preserve existed, the court must next consider whether the party failed to take reasonable steps to do so, although perfection in this regard is not required and "overly expensive preservation methods are not required when substantially effective and less costly measures are available." Finally, Judge Kendall stated that once Rule 37(e)'s threshold requirements are met, sanctions may be awarded only upon a finding of prejudice, which involves "the thwarting of a party's ability to obtain the evidence it needs for its case." She noted that Rule 37(e) grants judges discretion to determine how best to assess prejudice in particular cases.

With respect to appropriate sanctions, Judge Kendall noted that if she were to find that Griffin intentionally deprived its opponent of evidence in litigation, she could impose any of the most severe spoliation sanctions: presuming the evidence unfavorable, giving an adverse inference jury instruction, dismissing the action, or entering a default judgment. Id. at *6. The intent-to-deprive determination equates to a finding of bad faith — that the spoliator had "a purpose of hiding adverse evidence," as in other spoliation contexts. However, loss of ESI through negligence or even gross negligence does not justify the harshest discovery sanctions.

Turning to the specific categories of documents at issue, Judge Kendall first concluded that Griffin did not fail to preserve Sehl's emails because they were lost before a duty to preserve them arose. Id. at *6-8. She noted that Griffin's duty to preserve ESI did not arise until, at the earliest, Griffin received the DOJ's February 2018 CID letter. By that point, Sehl had not been a Griffin employee for six months and Griffin typically did not retain former employees' emails and files after departure. She concluded that no evidence showed that Sehl's emails or other files existed beyond November 8, 2017 — three months after he left Griffin and three months before Griffin could have reasonably anticipated litigation.

Judge Kendall rejected Plaintiff's argument that Griffin's receipt of the September 2017 CID letter triggered its duty to preserve Sehl's ESI because the September 2017 CID letter (unlike the February 2018 CID letter) did not suggest either imminent or likely litigation involving Griffin. She concluded that nothing about the September 2017 CID letter suggested that Griffin was the subject of an investigation into anticompetitive conduct at that time.

Judge Kendall also rejected Plaintiff's argument that an instruction in the September 2017 CID letter to preserve documents relating to "competition between any of Tribune, Sinclair, and Griffin" triggered a duty to preserve Sehl's documents. She found that even if some of Sehl's communications might have been relevant to competition between Sinclair and Griffin, "the September 2017 CID letter did not, in itself, create a duty to preserve Sehl's ESI that might also be relevant to litigation before it was reasonably anticipated." Judge Kendall quoted extensively from the advisory committee's note on Rule 37(e)'s 2015 amendment on this point, which addresses the distinction between "the common-law obligation to preserve in the anticipation or conduct of litigation" and "an independent requirement that the lost information be preserved." In particular, the advisory committee's note cautions that "such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation." She further quoted: "The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and the fact that the party failed to observe some other preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case." Id. at *7 (quoting the advisory committee's note on Rule 37(e)'s 2015 amendment). Judge Kendall stated that "[t]he touchstone for a party's duty to preserve evidence remains the reasonable foreseeability of its involvement in litigation."

Judge Kendall ultimately concluded that while the September 2017 CID letter might have imposed a duty to preserve ESI for the DOJ's 2017 merger investigation, that letter "did not provide Griffin with reasonable notice of impending litigation for its own anticompetitive

conduct" and "Griffin's independent obligation to preserve ESI for the DOJ is distinct from its duty to preserve ESI" for the litigation. Id. at *8. She contrasted this with the February 2018 CID letter, after which "Griffin was on notice that private civil litigation could reasonably follow from the DOJ's investigation into its alleged anticompetitive conduct" because the February 2018 CID letter explicitly named Griffin as a subject of investigation and specified the alleged anticompetitive conduct that the department suspected. As a result, she found that Griffin's duty to preserve Sehl's emails arose in February 2018 and the emails were not lost after Griffin's duty arose.

Turning to an analysis of the ESI for the three account executives that Griffin did not retain, Judge Kendall found that spoliation may have occurred, but no sanctions were warranted. Id. at *8-9. She noted that one of the account executives left Griffin in November 2017 before Griffin had a duty to preserve relevant ESI. With respect to the other two account executives, who left around or after receipt of the February 2018 CID letter, Judge Kendall noted that "[t]he record provides very few facts about why the OneDrive files, hard drive[s], and text messages of these employees were not preserved." For purposes of Plaintiffs' motion, she therefore assumed that Griffin should have preserved this ESI but declined to impose sanctions because no prejudice to Plaintiffs resulted from its loss. In particular, she found that Plaintiffs had not shown "the value of the missing information in the full context of Griffin's voluminous ESI production." Id. at *9. She further noted that there was no evidence that Griffin intended to deprive Plaintiffs of this information's use in litigation; rather, the lost ESI was likely "due to Griffin's generally haphazard approach to its IT systems." In this regard she noted that "[n]egligent failure to preserve . . . does not clear the high bad-faith bar."

Finally, with respect to Krier's deleting nearly all his text messages until January 2023, Judge Kendall found that Rule 37(e)'s elements were all met. She concluded that at least some information in the text messages was likely relevant and that the messages could not be recovered. She also found that Griffin failed to take reasonable steps to preserve this ESI, noting that Griffin had provided no documentation of its litigation holds nor how they were implemented beyond "generalized testimony from a handful of company officers and employees." She stated that the "lack of attorney involvement rendered Griffin's preservation efforts substandard."

Judge Kendall described the lack of reasonable preservation steps taken by Griffin in general, and failure to preserve Krier's text messages specifically, including that Griffin did not even maintain a standard IT ticketing system to track IT actions, and counsel relied on Griffin to self-collect and self-monitor preservation of their ESI. Id. at *10. She stated that "Griffin is a sophisticated enough corporate entity that the lack of documented attorney involvement in and oversight of a significant litigation hold is baffling."

Next, Judge Kendall held that Plaintiffs were prejudiced by the loss of Krier's text messages. Id. at *11. She found that at least some of the messages "very likely" contained relevant information and that there was "enough evidence to suggest their relevance to Plaintiffs' claims that Griffin engaged in anticompetitive, collusive behavior." Further, "Plaintiffs' ability to use Krier's text messages as evidence of such behavior would go a long way toward proving their claim that the highest levels of Griffin's leadership engaged in anticompetitive conduct," and Plaintiffs were

“deprived of the opportunity to know the precise nature and frequency of those private communications, which occurred during a critical time period.” However, she found that there was insufficient evidence of bad faith intent because the record suggested negligence rather than intent to conceal adverse information.

Turning to an appropriate remedy for the spoliation of Krier’s text messages, Judge Kendall rejected several of Plaintiffs’ requested sanctions, including discovery into Griffin’s written litigation hold, appointment of a neutral forensic expert, and presentment and prohibition of evidence related to loss of this ESI. She concluded that these sanctions “would send the parties down a rabbit hole for little tangible gain.” However, she held that “limited cost-shifting sanctions” were appropriate here to reimburse Plaintiffs for the expenses incurred in connection with their efforts to understand and remedy the deletion. Id. at *12. She noted that she had “discretion to award appropriate fee-shifting sanctions to make Plaintiffs whole for their investigation into discovery to which they were entitled.”