

## **2. A decision from the U.S. District Court for District of Columbia granting Plaintiffs a default judgment against former New York mayor Rudy Giuliani as sanctions for Giuliani's repeated noncompliance with discovery requests and for failing to take steps to preserve documents other than turning off the auto-delete functions for his devices and accounts.**

In *Freeman v. Giuliani*, --- F.Supp.3d ----, 2023 WL 5600316 (D.D.C. Aug. 30, 2023), U.S. District Court Judge Beryl A. Howell addressed whether Plaintiff was entitled to a default judgment as sanctions for Defendant's spoliation of evidence.

Plaintiffs, two election workers for the 2020 presidential election, brought this litigation against former New York mayor Rudy Giuliani and others for defamation, intentional infliction of emotional distress, and civil conspiracy related to statements regarding the election being "stolen." During discovery, Giuliani advised Plaintiffs that the Federal Bureau of Investigation (FBI) had seized his electronic devices in April 2021 and that he had lost access to some of his accounts after the seizure. *Id.* at \*3-4. Giuliani's counsel also informed Plaintiffs of a dataset held by TrustPoint One (TrustPoint), which he said contained all of the data collected by the FBI from Giuliani's seized devices. Giuliani later claimed that his devices seized by the FBI in April 2021 were found to be "wiped out" when returned to him. *Id.* at \*4.

Giuliani produced what Plaintiffs believed was a "meager number of documents" during discovery and Plaintiffs requested confirmation from Giuliani's counsel that Giuliani had taken reasonable steps to preserve his electronic evidence. However, Giuliani's counsel disclaimed awareness of his preservation efforts. Giuliani himself testified at a deposition that he used multiple phones, email addresses, and messaging applications in the months following the 2020 presidential election and that he had taken "a quick look" for responsive material on messaging platforms and some of his devices, without providing any detail as to whether that "quick" search was tailored to the litigation or whether he ever reached out to any of the companies he used for messaging applications to ask that his data be preserved.

At a March 21, 2023 court hearing, Giuliani's counsel equivocated about Giuliani's preservation efforts but also indicated that the TrustPoint dataset contained complete images of all data on Giuliani's devices seized by the FBI in April 2021. *Id.* at \*5. The court later ordered Giuliani to submit a written explanation describing in specific terms the data on the TrustPoint dataset that were searched in response to Plaintiffs' production requests, in response to which Giuliani filed a report that failed to describe in specific terms the data sources located on TrustPoint or what locations and data sources remained to be searched.

Plaintiffs then filed a motion to compel Giuliani to produce all materials responsive to Plaintiffs' requests for production and to provide a sworn declaration regarding his preservation efforts. *Id.* at \*6. In response, Giuliani submitted a declaration about his efforts to preserve and search for records, including additional statements that the TrustPoint dataset contained all documents that were extracted from his electronic devices taken by the U.S. Department of Justice (DOJ), and that he had conducted manual searches of his electronic devices obtained after the April 2021 DOJ seizure for text messages, emails, and other documents, as well as all of his social media messaging accounts. Giuliani also, for the first time, claimed that any further searches of the TrustPoint dataset would not be possible because those "documents have now been archived."

At a May 19, 2023 hearing, Giuliani acknowledged his obligation to preserve documents and that this obligation arose before Plaintiffs filed the litigation. *Id.* at \*7. Giuliani also represented that he had not deleted any documents and blamed the government's seizure of his devices in April 2021 for his purported loss of access to data created before that date. Thereafter, the court ordered Giuliani to provide another declaration describing his efforts to preserve, collect, and search potentially responsive data and locations that may contain responsive materials. Giuliani filed this declaration, which summarized six different data sources as likely to contain or having contained at some point, responsive information, including (1) three personal email accounts; (2) an iCloud account; (3) three phone numbers; (4) three messaging applications; (5) five social media handles; (6) and nine devices, two of which were not seized by the FBI. Giuliani also stated in his declaration that his only step to preserve evidence on his devices and accounts was to turn off the auto-delete function "sometime in late

2020 or early 2021” on his “email, messaging, communication, or other document storage platforms” and that “he did not manually delete any electronic documents or dispose of any paper files.”

In a June 30, 2023 joint status report, Plaintiffs claimed that Giuliani had “taken no steps to collect and search repositories outside of TrustPoint” and had produced no materials from his businesses. *Id.* at \*9. Giuliani did not dispute these discovery shortcomings, but the court provided Giuliani with another opportunity to comply with his discovery obligations and cautioned that a failure to comply “may result in severe discovery sanctions.” Notwithstanding these warnings, Giuliani did not comply with the court’s orders, and Plaintiffs filed a motion for sanctions, including for the sanction of a default judgment. *Id.* at \*11.

Judge Howell began her analysis with a survey of the relevant federal rules authorizing the imposition of sanctions for the failure by a party to a civil lawsuit to preserve ESI and to comply with a court’s discovery orders, including Rules 37(b) and (e). *Id.* at \*12. She explained that a party to federal litigation that is either anticipated or pending is required to preserve potentially relevant evidence. When ESI “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,” a court may “order measures no greater than necessary to cure the prejudice.” *Id.* (quoting Rule 37(e)(1)). Moreover, upon a finding “that the party acted with the intent to deprive another party of the information’s use in the litigation,” a court is empowered to impose serious sanctions, including “presum[ing] that the lost information was unfavorable to the party; instructing the jury that it may or must presume the information was unfavorable to the party; or dismissing the action or entering a default judgment.” *Id.* (quoting Rule (e)(2)). Judge Howell noted that similarly serious sanctions were authorized under Rule 37(b) if a party fails to obey an order to provide or permit discovery.

Judge Howell found that Plaintiffs had met their burden of establishing that spoliation sanctions were warranted under Rule 37(e) by proving the four required elements: (1) ESI should have been preserved in the anticipation or conduct of litigation; (2) a party failed to take reasonable steps to preserve the ESI; (3) ESI was lost as a result; and (4) the ESI could not be restored or replaced by additional discovery. *Id.* at \*13.

First, Judge Howell found that Giuliani should have, but did not, preserve ESI by early 2021. She noted that Giuliani admitted in a declaration that he received “notice of potential litigation issues surrounding his involvement in contesting the 2020 Election in late 2020 or early 2021.” Thus, Giuliani had a duty to preserve potentially relevant ESI on his devices and accounts by at least early 2021.

Second, Judge Howell found that Giuliani did not take reasonable steps to preserve his ESI. She explained that once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents. She further explained that courts have normally held that litigants must prevent destruction of ESI on phones or other electronic devices by backing up the data to that device’s cloud network.

Judge Howell agreed with Plaintiffs that Giuliani did not take reasonable efforts to preserve his ESI by turning off auto-delete at some time “in late 2020 or early 2021” on his email, messaging, communication, or other document storage platforms and by refraining from manually deleting electronic documents or disposing of paper files. *Id.* at \*14. She noted that Giuliani could have, but chose not to, take any other reasonable steps to preserve his ESI, such as backing up his iMessage communications to his iCloud account, downloading the contents of his other messaging and email applications onto an external storage device or confirming that the contents of communications on those platforms were preserved on the cloud, or otherwise engaging an expert to preserve the material that existed outside of his physical devices. Citing to the advisory committee notes to Rule 37, Judge Howell also found Giuliani’s sophistication as a litigant — including serving as the U.S. Attorney for the Southern District of New York — “only underscores his lackluster preservation efforts.”

Judge Howell also rejected Giuliani’s efforts to shift blame for his preservation failures to the government. She noted that a declaration submitted by Giuliani’s attorney established, among other things, that the TrustPoint dataset did not contain a full extraction of Giuliani’s devices, that the TrustPoint dataset contained some corrupted files, and that there were other devices that had not been seized by the government, all of which cast

doubt on Giuliani's assertion that the TrustPoint dataset contained the entire repository of his pre-April 2021 ESI. Judge Howell noted that Giuliani "plainly should have known better, and had he taken the proper steps prior to or even after the FBI's seizure of his devices, his potentially relevant ESI could have been preserved." She added, "Simply put, the government is not Giuliani's ESI preservation team, and the FBI's seizure of Giuliani's electronic devices did not obviate his obligation to take additional preservation efforts before and after the seizure."

Third, Judge Howell found that Giuliani's ESI was irretrievable. She explained that ESI is irretrievable when it "cannot be restored or replaced through additional discovery." She concluded that Plaintiffs established this element because Giuliani admitted that his ESI had either been "wiped" or that he has lost access to it, and Giuliani had not shown that any of his potentially responsive ESI could be retrieved through alternative means.

Fourth, Judge Howell found that sanctions under Rule 37(e)(2) were warranted. *Id.* at \*16. She explained that Rule 37(e) authorizes district courts to (1) order measures no greater than necessary to cure the prejudice or (2) upon finding that the party acted with the intent to deprive another party of the information's use in the litigation, then presume that the information was unfavorable to the party, 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.

Judge Howell found that Plaintiffs were prejudiced by Giuliani's failure to preserve his ESI. She explained that prejudice from the loss of ESI is judged by "the information's importance in the litigation" and "ranges along a continuum from an inability to prove claims or defenses to little or no impact on the presentation of proof." Under this standard, Judge Howell found that Giuliani's ESI was relevant to each of Plaintiffs' claims and that Plaintiffs were "severely hampered in being able to refute Giuliani's defense that he made his statements about Freeman merely negligently." Judge Howell also found that several communications involving Giuliani that Plaintiff received from third parties but not from Giuliani showed that relevant evidence that "goes to the heart of claims in this lawsuit" were not preserved. *Id.* at \*17. Ultimately, Judge Howell held that Giuliani's failure to preserve his ESI significantly prejudiced Plaintiffs' ability to prove their claims because circumstantial evidence of Giuliani's knowledge of the falsity of his claims concerning Plaintiffs likely would have existed in his lost ESI. *Id.* at \*18.

Judge Howell concluded that Plaintiffs had proven that the only reasonable explanation for Giuliani's failure to take any reasonable preservation steps "is that he did so deliberately to deny Plaintiffs evidence that would be helpful to their case." She noted that Giuliani was responsible for preserving his own ESI and that he was sophisticated and understood his obligations. Accordingly, she found that Giuliani's failure to preserve potentially relevant ESI warranted Rule 37(e)(2) sanctions.

Judge Howell also concluded that an entry of default against Giuliani was an appropriate sanction under the circumstances. She explained that "default judgment is inappropriate unless the litigant's misconduct is accompanied by willfulness, bad faith, or fault." *Id.* at \*20. Accordingly, the grant of default judgment must be based upon a finding of "clear and convincing evidence of misconduct" and accompanied by "a specific, reasoned explanation for rejecting lesser sanctions, such as fines, attorneys' fees, or adverse evidentiary rulings." According to Judge Howell, a default judgment was appropriate under this standard because Giuliani deliberately failed to preserve his ESI and to comply with several court orders, repeatedly "flaunted his discovery obligations," and forced Plaintiffs to waste time by wading through irrelevant discovery and forced the expenditure of judicial resources to assess and ensure compliance with the most basic of discovery obligations. *Id.* at \*20-21. She rejected Giuliani's argument that his stipulation to the factual elements of Plaintiffs' claims obviated his discovery obligations, finding that "this discovery shortcut is simply unfair and will not be permitted here."

Judge Howell next found that lesser sanctions would not deter the conduct at issue. *Id.* at \*21. She explained that a default judgment is warranted as a sanction when "the party typically has engaged in a pattern of disobedience or noncompliance with court orders and the noncompliance most often has prejudiced the opposing party, so that the court concludes that no lesser sanction is warranted." She concluded that the seriousness of Giuliani's multiple discovery violations over the course of the litigation made plain that Giuliani had no interest in participating in discovery and that an entry of default was warranted.