

# New York Law Journal

## Technology Today

WWW.NYLJ.COM

VOLUME 262—NO. 26

An ALM Publication

TUESDAY, AUGUST 6, 2019

### FEDERAL E-DISCOVERY

## 3rd Cir. Grants New Trial to Allow E-Discovery Expert Testimony



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Three years ago, we wrote about *GN Netcom v. Plantronics*, a federal district court case notable for imposing severe sanctions on a company under then-recently enacted Federal Rule of Civil Procedure 37(e) for an executive's intentional spoliation of evidence. Recently, the U.S. Court of Appeals for the Third Circuit issued a decision in the case that is notable for a different reason. The Third Circuit remanded the case for a new trial solely on the basis of the District Court's decision to exclude an expert's trial testimony on the extent of the defendant's e-discovery misconduct and spoliation. This case demonstrates the true impact and value that experts can have not only in discovery, but also on the potential outcome of the matter itself.

### District Court of Delaware

*GN Netcom v. Plantronics*, 2016 WL 3792833 (D. Del. 2016), is an antitrust dispute between two telephone headset competitors. As we wrote in 2016, the District Court of Delaware ordered severe sanctions under Rule 37(e) against defendant Plantronics for its

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significant spoliation of electronically stored information (ESI). Even though Plantronics had instituted a legal hold, an executive not only repeatedly ordered other employees to delete relevant emails, but also “double-deleted” thousands of his own emails to render them unrecoverable. Other executives similarly concealed relevant information in a variety of ways. The District Court further determined that Plantronics's efforts to remediate the spoliation were inadequate. For example, Plantronics halted an investigation by its forensics expert, which would have led to a report on the full extent of the spoliation, and instead, destroyed email back-up tapes.

The District Court found that spoliation had indeed occurred and granted Plaintiff GN Netcom's motion for spoliation sanctions. Relying on Rule 37(e), the District Court ordered monetary sanctions against Plantronics for almost 18 months of attorney fees and costs related to litigating the discovery misconduct, \$3 million in punitive sanctions, possible future evidentiary sanctions, and a permissive adverse inference jury instruction.

However, at trial, when GN Netcom sought to have its e-discovery expert testify and present evidence on the extent of Plantronics's spoliation, the District Court denied the request, citing

“a desire to reduce ‘the risk of spoliation taking over’ the trial and ‘the risk of unfair prejudice given the inflammatory nature of the evidence.’” *GN Netcom v. Plantronics*, 2019 WL 2998513 at \*3 (3d Cir. July 10, 2019) (citation omitted). Instead, the District Court “decided to read ‘stipulations’ to the jury and limit parties to referencing only the facts in those stipulations during trial.” *Id.* (citation omitted). After six days of trial, the jury found in Plantronics’s favor. GN Netcom moved for a new trial, which the District Court denied.

### Third Circuit

GN Netcom then appealed to the Third Circuit, asking it to change the sanction to a default judgment as it had originally requested of the District Court. GN Netcom also sought a new trial based on the District Court’s refusal to allow the testimony of its e-discovery expert, which GN Netcom argued could have impacted the jury’s understanding as to the spoliation of potentially key evidence. The Third Circuit first reviewed and affirmed the District Court’s sanctions decision, finding that the lower court “thoroughly examined alternatives to default judgment and provided due consideration to their fairness and deterrent value, and it committed no error of law or assessment of fact in the process.” *Id.* at \*5.

Next, the Third Circuit reviewed whether the District Court abused its discretion by excluding GN Netcom’s e-discovery expert’s testimony. The Third Circuit recognized that the expert’s testimony would be relevant under Federal Rules of Evidence 401 and 402 because “[t]he District Court’s permissive adverse inference instruction made Plantronics’s spoliation a material issue for the jury to consider at trial, so any spoliation-related evidence clears the baseline relevance hurdle of Rules 401 and 402.” *Id.* at \*7.

The court continued its review to determine whether the testimony, though relevant, could be excluded. Under Rule 403, “relevant evidence may be excluded ‘if its probative value

is substantially outweighed by a danger of ... unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.’” *Id.* (citation omitted). The court found that none of these factors substantially outweighed the highly probative value of the expert’s testimony and explained how the expert’s testimony could have been critical for the jury:

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As proffered, [the expert’s] proposed testimony would have tended to show that the scope of [the executive’s] spoliation was more significant than Plantronics had represented, thereby helping the jury decide whether to draw an adverse inference—as it was instructed it could do. The District Court explicitly chose to put certain issues of material fact, such as whether Plantronics engaged in a “massive cover-up to hide antitrust violations,” [] in the jury’s hands. By withholding evidence regarding the scope of the spoliation, the court deprived the jury of the ability to make an informed decision about the adverse inference, and the instruction was less effective.

*Id.* (internal citation omitted).

Furthermore, the Third Circuit determined that the District Court’s exclusion of the e-discovery expert’s proposed testimony was not harmless error because it was highly probable that the error had an impact on the outcome of the case. The court explained:

There was evidence of significant spoliation in this case and allegations that some of the destroyed evidence was damning to Plantronics’s defense. The District Court instructed the jury to determine

whether Plantronics’s spoliation was a massive cover-up, whether the missing evidence was damning, and whether it wished to draw an adverse inference. [The expert’s] excluded testimony could have assisted the jury in making those determinations, and thus could have changed the outcome of the case. We have determined that an error was not harmless in less weighty situations.

*Id.* at \*9. (citations omitted).

Thus, the Third Circuit concluded that the District Court abused its discretion when excluding the e-discovery expert’s spoliation-related testimony. The court reversed in part and remanded the case, granting a new trial. The court’s final decision was not unanimous. Chief Judge D. Brooks Smith wrote a vigorous dissent. He argued, in part, that the “stipulations gave the jury an adequate basis to decide whether to adopt the permissive adverse inference ... . By remanding, the majority not only sets the stage for another antitrust trial but probably for a not-so-mini spoliation trial as well.” *Id.* at \*11. Chief Judge Brooks expressed concern—consistent with the motivations behind the 2015 amendments to Rule 37(e)—that jurors might decide “to punish Plantronics for its spoliation instead of deciding the case on its merits.” *Id.*

### Conclusion

*GN Netcom v. Plantronics* serves as a reminder to parties and practitioners of the key importance of experts—and their testimony—as part of discovery. And, importantly, it also highlights the potential significant impact of insufficient discovery processes on the overall outcome of matters.