

Now Watch the Lawyers

Blitz

The NFL destroyed the tapes. But it still hasn't escaped the sack.

BY THOMAS J. SMITH

In the game of football, the greatest quarterbacks share some common traits. Perhaps chief among them is an uncanny ability to anticipate the blitz. Sensing the onrush of defenders, the savvy quarterback will sometimes throw the ball away to avoid a loss of yardage.

When legal counsel anticipate a blitz, in the form of a lawsuit or an investigation, “throwing the ball away” is not an option. To the contrary, the destruction of potential evidence may constitute the improper act of spoliation.

Now football fans, including one U.S. senator, are asking whether the National Football League has done exactly that. Did the NFL destroy evidence of cheating by the New England Patriots to avoid a bigger blitz on the game?

On Super Bowl Sunday, Feb. 3, the Patriots nearly completed only the second perfect season in NFL history, losing by three points to the New York Giants. The Patriots' season also had a less-than-perfect beginning, when the team was caught violating league rules by videotaping the New York Jets' calling of defensive plays in a scandal dubbed “Spygate.”

The NFL demanded, and reportedly obtained, all tapes the Patriots still had of other teams' defensive signals, including any that may have been made over the last seven years, dur-

ing which time the Patriots won three Super Bowls. The league required the team to “certify” that it had produced all such tapes and retained no copies. After receiving the tapes and other materials, the NFL reviewed and then destroyed them, thereby eliminating the opportunity for any third party to examine the extent to which the tapes may have helped the Patriots to win games.

Much speculation about the potential advantage gained by the Patriots centered upon the possibility that superstar quarterback Tom Brady was able to predict exactly when opponents would blitz and thereby nullify this key defensive weapon. Sen. Arlen Specter (R-Pa.)—an acknowledged fan of the Philadelphia Eagles, who lost to the Patriots in Super Bowl XXXIX—has suggested that the blitzes Brady may have avoided might pale in comparison to the blitz the NFL may have sidestepped by tossing the tapes. In a letter to NFL Commissioner Roger Goodell, dated Dec. 19, 2007, Specter calls the destruction of the tapes “highly suspicious.”

In a press conference, Specter gave the basis for his own involvement: “I think the integrity of football is very important, and I think the National Football League has a special duty to the American people—and further to the Congress—because they have an antitrust exemption.” (A limited antitrust exemption allows professional football teams to pool their national broadcast rights in reaching TV contracts.)

By letter dated Jan. 31, 2008, Goodell answered Specter. The commissioner assured the senator that “senior members of my staff” had reviewed the tapes and said, “Our goal [in destroying the tapes] was to ensure that the Patriots would not secure any competitive advantage as a result of the misconduct that had been identified.”

In an ESPN Radio interview on Super Bowl Sunday, Specter said that explanation “does not make any sense.” Even after meeting with Goodell on Feb. 13, Specter continued to deplore the NFL’s “enormous amount of haste.”

Specter’s skepticism is reflective of the general mistrust raised by any even remotely questionable destruction of documents or other electronically stored information by corporations, governments, or other organizations. Even where no specific litigation or investigation is pending, and no other legal requirement exists to retain such information, suspicions quickly arise if such information is wiped out and then becomes the subject of controversy. So the NFL’s decision to destroy the tapes seems to have exacerbated, rather than quelled, the Spygate debate.

Generally, parties in a court case have the right to obtain from their adversaries electronically stored information that may be relevant to the case. Courts have routinely found that video records are discoverable under these rules.

A well-established corollary is that a party in litigation or subject to government investigation must preserve any potentially relevant electronic data. Improper destruction of evidence—i.e., spoliation—can be sanctioned. Indeed, as e-discovery issues have exploded across the country, courts have imposed sanctions for spoliation with increasing frequency and severity.

Under some circumstances, the duty to preserve potential evidence may be triggered even earlier. The seminal opinion regarding a party’s obligation to preserve electronically stored information came in a 2003 decision in *Zubulake v. UBS Warburg*. U.S. District Judge Shira Scheindlin of the Southern District of New York held that “the obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.” This kind of prelitigation spoliation, involving parties such as Enron, has gained increasing court attention.

UPON FURTHER REVIEW

So let’s return to the Patriots’ videotapes. Here is the relevant timeline:

Sept. 9, 2007: A Patriots videographer is caught by NFL security personnel during a game filming the Jets’ defensive play-calling signals.

Sept. 11: Media outlets begin widely to report the story.

Sept. 13: The NFL fines Patriots Coach Bill Belichick \$500,000, fines the Patriots \$250,000, and takes away a future draft pick. The NFL states that the Patriots engaged in a “calculated and deliberate attempt to avoid long-standing rules designed to encourage fair play and promote honest competition.” The NFL also orders the team to turn over all illegal videotapes and related materials, but does not make this order public.

Sept. 16: In a live TV interview, Goodell states that the NFL has ordered the Patriots to produce all illegal videotapes and any copies and that the NFL will be reviewing the matter further. He says, “I still reserve my right, and I have notified the Patriots of that, that if there is any information that I have not been made aware of or is inconsistent [with] what I have been told, I will revisit [the penalty imposed].”

Sept. 17-20: Sometime during these three days, the Patriots provide to the NFL the rule-breaking tapes they have.

Sept. 20: The NFL announces that it has reviewed and destroyed the tapes and related materials.

Sept. 22-23: In e-mail exchanges with an ESPN reporter, NFL spokesman Greg Aiello does not state unequivocally that the tapes did not give the Patriots an unfair advantage in any game.

Sept. 28: A class action is filed against the Patriots and Belichick on behalf of New York Jets season ticket holders, seeking \$184 million in compensatory damages and additional punitive damages. The plaintiffs claim they were defrauded by being charged for tickets to games in which the Patriots cheated. The suit is brought under the federal Racketeering Influenced and Corrupt Organizations Act; New Jersey anti-racketeering, consumer fraud, and deceptive business practices laws; and common law doctrines on fraud and tortious interference with contractual relations.

Oct. 10: Goodell reportedly tells an NBC reporter that it was “always his intention to destroy the tapes.” He also reportedly says he “found no evidence” that the videotaping affected any of the Patriots’ playoff games.

Nov. 15: Specter writes to Goodell inquiring about the results of the NFL’s investigation into the possibility of “the Patriots’ stealing Eagles’ signals during the [2005] Super Bowl game.”

Dec. 19: Specter sends a second letter to Goodell, expressing “surprise” that the NFL destroyed the tapes.

Jan. 31, 2008: Goodell writes to Specter that “[o]ur investigation specifically disclosed nothing relating to the stealing of Eagles’ signals” during that Super Bowl game. Goodell also holds a press conference in which, apparently for the first time, he declares publicly that the tapes and other materials dated back only to 2006, and not to the Patriots’ Super Bowl victories of 2002, 2004, and 2005.

Specter writes back the same day that he is “very concerned about the underlying facts on the taping, the reasons for your judgment on the limited penalties and, most of all, on the inexplicable destruction of the tapes.”

Feb. 13: Goodell meets with Specter. The commissioner confirms that the Patriots’ taping began in 2000, when Belichick was hired. He also confirms that both the Detroit Lions and the Green Bay Packers had caught the Patriots taping their defensive signals in 2006.

ANTICIPATION?

As a result of the destruction of the tapes, the NFL now faces tough questions. In that Super Bowl Sunday interview, Specter, a former prosecutor and ranking minority member of the Senate Judiciary Committee, opined, “I think that it

does not make any sense when [the NFL] say[s] the tapes were destroyed to prevent anybody else from getting a competitive advantage. If the tapes are locked in the NFL headquarters, how can somebody else get an advantage? And you just don't destroy something which could be evidence, which could be relevant at a later time."

If Specter initiates a congressional inquiry, he may focus on whether the NFL engaged in spoliation of potential evidence. Should the NFL reasonably have anticipated that the tapes might be relevant to a potential investigation or litigation? If the Patriots had destroyed the tapes themselves, it seems likely the NFL would have imposed severe consequences because the team was on notice of the league's investigation. Specter may be thinking the NFL should have likewise anticipated future litigation, such as the case actually filed against the Patriots on Sept. 28.

The senator may also contend that, in ordering the Patriots to produce the tapes, the NFL accepted responsibility to fulfill any preservation obligations to which the Patriots were subject. Or that the NFL had an independent obligation to preserve the tapes, given that the league could have anticipated potential suits—by fans, other teams, networks that paid substantial sums to televise fair competition, legal gamblers who lost vast sums wagering against the Patriots, or any other number of potential plaintiffs.

A congressional inquiry could raise some hard questions about the conclusions reached by the NFL upon reviewing the tapes. After NFL senior staff reviewed the tapes, did they conclude that the Patriots had, in fact, gained a competitive advantage—an advantage that may have helped them to win three close Super Bowls? Did they see video evidence of Tom Brady escaping key blitzes that were signaled using the same signs captured on the Patriots' illegal tapes? Were they more concerned that the NFL itself would be sacked for a large loss should the most successful franchise of the last decade be proven to have cheated repeatedly? Did they anticipate that a blitz of litigation would follow any exposure of the tapes?

And facing such a blitz, a congressional committee may ask, did the NFL decide simply to throw the ball away by destroying the tapes? If so, some may argue the NFL engaged in spoliation.

At least two facts might lead the football-watching public to conclude that the tapes did contain evidence of a competitive advantage for the Patriots. First, the Patriots continued the rule-breaking practice over seven seasons. Would the team have risked being exposed as cheaters for so long if the tapes were not providing significant value? Second, the NFL, in essence, acknowledged the advantage the tapes provided when Goodell stated that the tapes were destroyed "to ensure that the Patriots would not secure any possible competitive advantage."

Even if the tapes proved a competitive advantage, the NFL may still contend that it could not reasonably have anticipated litigation at the time it destroyed the tapes. Even as the controversy has lingered, the NFL itself has not been sued. As for expecting an investigation, particularly a con-

gressional one, the league's first contact with Specter was a letter dated nearly two months after destruction of the tapes. For these reasons, the NFL likely would assert that it had no obligation whatsoever to preserve the tapes.

THE LEGAL BLITZ

Once spoliation occurs, of course, it is difficult, if not impossible, to prove exactly what the destroyed evidence showed.

One approach taken by courts is to give an "adverse inference" instruction to the jury. The judge explains that a party possessed evidence that may have been relevant, the party destroyed that evidence, and therefore the jury may infer that the evidence was unfavorable to the party's position. Football fans and congressional investigators might reach a similar conclusion.

In a Senate inquiry, the NFL should expect focused efforts by congressional staffers to learn exactly what the tapes showed and exactly why the NFL destroyed them. It should expect depositions of the senior staff who reviewed the tapes, and possibly of Goodell himself, who may be asked to explain why the head of a league with significant litigation experience would not have expected lawsuits. He might also be asked why, in his nationally televised interview just days after the Patriots were caught cheating, he did not make clear the league's intention to destroy the tapes. Questions may also be raised about the NFL's internal record retention policies and past practices, and whether the league adhered to them. Regardless of whether an adequate foundation exists for such inquiries, they are commonplace when spoliation of electronic data is suspected.

If it is proved that the NFL destroyed the tapes when it reasonably anticipated litigation, then Congress or a court may impose consequences on the league.

But even the most severe of these consequences, including loss of the antitrust exemption and monetary fines, would probably not have the devastating impact that the disclosure of the tapes themselves would have had *if the tapes proved* that the Patriots used them to help win games. If the tapes showed that and had been made public, the NFL's most valuable asset—the integrity of its game—could have been irreparably harmed.

Could the league have avoided rewriting the record books? Would the league have had to supplant its marketing of Brady and Belichick with apologies for the Patriots' cheating? How would the many legal gamblers who lost money betting against the Patriots have reacted? Without doubt, the NFL's image would have taken a great blow.

Just what the tapes actually showed, however, will now remain a mystery. In this sense, regardless of its motivation in destroying the tapes, the NFL indeed may have escaped the sack. Except, perhaps, for that late-blitzing senator from Pennsylvania.

Thomas J. Smith is a litigation partner in the Pittsburgh office of Kirkpatrick & Lockhart Preston Gates Ellis. The views expressed here are his own and not necessarily those of K&L Gates or its clients.