

MCLE ARTICLE AND SELF-ASSESSMENT TEST

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by Eleanor H. Chin and Ryan D. Derry

alt-delete

Judges have made it clear that ignorance is no longer an excuse for spoliation of electronic evidence

LAWYERS may be surprised to learn the extent to which they risk sanctions for not preserving electronically stored information (ESI) correctly. Indeed, recent headlines regarding judicial action in the electronic discovery area reveal a minefield of sanctionable conduct. Fortunately, court decisions regarding the preservation of ESI provide practical insights into common mistakes that, once understood, are easy to avoid.

Courts have defined “spoliation” as the “destruction or significant alteration of evidence, or the failure to preserve evidence for another’s use in pending or future litigation.”¹ In January 2010, a federal district court in New York stated, “By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records—paper or electronic—and to

search in the right places for those records, will inevitably result in the spoliation of evidence.”² This statement, from the court’s decision in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities LLC*, captures the state of the law as it has developed in the past six years. It is expected to be the standard in the area of electronic evidence preservation for some time to come.

The *Pension Committee* decision also illustrates an emerging theme of judicial intolerance for litigants who convey to the court their inattention to detail in discovery practice and thus their lack of respect for the judicial process. *Pension Committee*’s author, Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York, also authored the seven opinions in *Zubulake*

v. UBS Warburg LLC, known as the *Zubulake* line of cases, which are the standard-setting decisions in modern electronic discovery.³ *Pension Committee* summarizes a number of key decisions in the intervening years since the last *Zubulake* opinion and contains the implicit admonition to lawyers that they clearly have not been paying attention to what the court held before.

This tone from the bench should make lit-

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igators sit up and take notice. The duty to preserve documents falls on both litigants and counsel. For this reason it is important for litigants to understand not only the substantive requirements in this area, including issuing a written instruction to preserve documents, but also the potential consequences—including sanctions against counsel personally.

Practice and precedent in the area of electronic discovery have been evolving since the late 1990s, with an increasing formalization since the adoption of amendments to the Federal Rules of Civil Procedure in 2006.⁴ State courts have also adopted rules to address the handling of electronic evidence in discovery and trial, including the adoption in California of Assembly Bill 5 in 2009, the Electronic Discovery Act.⁵ Federal and state courts around the country have issued detailed decisions analyzing many nuances of attorney decision making, providing practical guidance on handling ESI.

The California Court of Appeal recently explained that spoliation is condemned because it “can destroy fairness and justice.” Without access to complete evidentiary information, the risk of an erroneous decision increases.⁶ Most practitioners are well aware of the impact of spoliation and condemn the conscious destruction of evidence. However, “spoliation” encompasses far more than intentional destruction of materials. The culpability for spoliation ranges from negligence to intentional conduct.⁷

While many decisions addressing spoliation focus on intentional destruction of evidence, those rulings are not particularly enlightening to the average litigator. If parties or counsel cannot figure out on their own that such behavior is inappropriate, telling them so will not help. Cases involving the deliberate purging of data on BlackBerries (*Southeastern Mechanical Services v. Brody*)⁸ or disposing of laptops during litigation (*Arista Records LLC v. Usenet.com*)⁹ make entertaining reading in the sensational manner of reality television. Less clear is how lawyers can avoid conduct that could result in a finding of spoliation in which something less than conscious destruction occurs. For example, *Pension Committee* stands for the proposition that certain basic standards of practice regarding litigation are so commonplace and widely understood that ignorance, even if innocent, is no longer an excuse that will avoid sanctions.

Like the types of sanctions available for spoliation under the Federal Rules of Civil Procedure, the sanctions that the California Code of Civil Procedure provides are equally broad and far ranging. Following notice and opportunity for a hearing, a court may impose several types of sanctions: 1) monetary sanc-

tions (against a party or attorney), 2) issue sanctions, 3) evidence sanctions, or 4) terminating sanctions.¹⁰ As a general rule, sanctions imposed for spoliation are not intended to punish the offending party but are instead supposed to remedy the underlying discovery abuse that has been committed.¹¹ Issue or terminating sanctions are typically requested to remedy the loss of relevant evidence due to spoliation.¹² An issue sanction would result if a court orders that “designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process.”¹³ Or a court may issue terminating sanctions for particularly egregious cases of intentional spoliation of evidence.¹⁴

Federal and State Spoliation Tests

Federal courts typically apply a three-part test in determining whether a party is responsible for spoliation. The party seeking sanctions must show that:

- 1) The party that has control over the evidence had an obligation to preserve it at the time it was destroyed.
- 2) The records were destroyed with a culpable state of mind.¹⁵
- 3) The relevance of the destroyed evidence to the party’s claim would allow a reasonable trier of fact to find that the evidence would support that claim or defense.¹⁶

Courts have held that relevance can be established in a number of ways. They have found that relevance “may be inferred if the spoliator is shown to have a sufficiently culpable state of mind.”¹⁷ Also, the “moving party may submit extrinsic evidence tending to demonstrate that the missing evidence would have been favorable to it.”¹⁸

Application of the federal test continues to evolve. In *Scalera v. Electrograph Systems, Inc.*,¹⁹ a federal district court in the Eastern District of New York found the defendant negligent because counsel communicated the preservation obligation orally, and the defendant did not commence the process to search hard drives until after the human resources director had retired and her hard drive had been erased.²⁰ Nevertheless, the court ultimately did not impose any sanctions. Instead, the court held that the plaintiff had submitted no extrinsic evidence “tending to demonstrate” that the deleted materials would have been helpful to her case.²¹

The more recent *Pension Committee* case presents a slightly different analysis. In *Pension Committee*, a case originally filed in February 2004, the court held that a group of plaintiffs who failed to issue a written litigation hold until 2007 were not only negligent but grossly so.²² The court also found that one or more of the plaintiffs failed to collect or preserve any electronic documents

prior to 2007 and continued to delete documents after the duty to preserve arose. The court concluded that “it is fair to presume the responsible documents were lost or destroyed. The relevance of any destroyed documents and the prejudice caused by their loss may also be presumed.”²³ The court held that a spoliation instruction was the appropriate sanction.²⁴

Subsequent to *Pension Committee*, Judge Lee Rosenthal in the Southern District of Texas issued her ruling in *Rimkus Consulting Group v. Cammarata*²⁵—a decision commentators sometimes treat as a companion to *Pension Committee*. In *Rimkus*, Judge Rosenthal applied a slightly different standard for finding culpable negligence.²⁶ The *Rimkus* test includes an analysis of reasonableness and proportionality, compared to what many perceive as a bright-line test in *Pension Committee*. According to Judge Rosenthal, “Whether preservation or discovery conduct is acceptable in a case depends on what is reasonable, and that in turn depends on whether what was done—or not done—was proportional to that case and consistent with clearly established applicable standards.”²⁷ Accordingly, under the *Rimkus* test, the extent of preservation efforts should be analyzed in light of factors such as the size of the lawsuit and the burden of the preservation efforts.

In California, courts apply a burden-shifting approach that requires the accused spoliator to disprove any prejudice:

[A] party moving for discovery sanctions based on the spoliation of evidence must make an initial, prima facie showing that the responding party in fact destroyed evidence that had a substantial probability of damaging the moving party’s ability to establish an essential element of his claim or defense.²⁸

In *Williams v. Russ*,²⁹ the California Court of Appeal’s application of this burden-shifting test resulted in the imposition of terminating sanctions. The court determined that the plaintiff had intentionally allowed material unfavorable to his claims to be destroyed. As to the relevance test, the trial court applied a burden-shifting test that was affirmed on appeal: “Because [the plaintiff] bore the burden of disproving prejudice [under the burden-shifting test], he was required to show that any other documents from the file that he claimed existed [and did not spoliator] would in fact have allowed [the defendant] to adequately reconstruct the client file. He did not.”³⁰

A useful resource for lawyers analyzing the issue of electronic discovery sanctions can be found at the blog e-Discovery Team, written and moderated by electronic discovery scholar Ralph Losey.³¹ Losey’s blog offers a

MCLE Test No. 194

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

- The intent of sanctions for spoliation is to punish the offending party.
True.
False.
- The judge who decided *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities LLC* wrote which other significant electronic discovery decision?
A. *Qualcomm v. Broadcom*.
B. The *Zubulake v. UBS Warburg LLC* line of cases.
C. *William A. Gross Construction Associates, Inc. v. American Manufacturers Mutual Insurance Company*.
D. *Aguilar v. Immigration and Customs Enforcement Division of the U.S. Department of Homeland Security*.
- Under California law, sanctions for spoliation are limited to monetary sanctions against a party and/or the party's attorney.
True.
False.
- Federal courts apply a three-part test for determining whether a party is responsible for spoliation.
True.
False.
- California Assembly Bill 5, the Electronic Discovery Act, was codified in 2009.
True.
False.
- The court in *Pension Committee* held that the failure to issue a written litigation hold was grossly negligent.
True.
False.
- The U.S. District Court for the Southern District of New York decided *Swofford v. Eslinger*.
True.
False.
- The judge in *Rimkus Consulting Group v. Cammarata* applied a test based on reasonableness, proportionality, and clearly established applicable standards.
True.
False.
- The court of appeal in *Williams v. Russ* issued terminating sanctions after determining that the plaintiff had intentionally allowed material unfavorable to his claims to be destroyed.
True.
False.
- The *Swofford* court found that the evidence that was the subject of the litigation—including guns, radios, and uniforms—were appropriately preserved after the plaintiff sent preservation requests to counsel.
True.
False.
- What type of sanctions were imposed by the court in *Pension Committee* as a result of the plaintiffs' failures to correctly implement preservation procedures?
A. Monetary sanctions.
B. Adverse jury instructions.
C. Terminating sanctions.
D. A and C.
- In *Swofford*, the sanctions included:
A. An award against the defendants for the plaintiff's fees and costs.
B. Monetary sanctions against the defendants' in-house counsel.
C. Adverse inference instruction on lost e-mail.
D. All of the above.
- In *Scalera v. Electrograph Systems, Inc.*, the court found that the duty to preserve arose when:
A. The plaintiff slipped and fell at work.
B. The plaintiff retained counsel.
C. The defendant received plaintiff's counsel's demand letter.
D. The defendant received notice of the EEOC charge.
- Rimkus* was issued this year, 2010.
True.
False.
- A party moving for discovery sanctions in California courts must show that the responding party destroyed evidence having a substantial probability of damaging the moving party's ability to establish an essential element of his or her claim or defense.
True.
False.
- Lee Rosenthal is the author of the e-Discovery Team blog.
True.
False.
- In *Qualcomm*, outside counsel were personally sanctioned for their failure to produce documents until after trial.
True.
False.
- Swofford* included a 42 USC Section 1983 claim against the sheriff.
True.
False.
- The facts in *Scalera* included the erasure of the human resources director's hard drive following her retirement.
True.
False.
- Following *Pension Committee*, a party's best practice is to issue written instructions for the preservation of documents and electronically stored information when the party anticipates litigation.
True.
False.

MCLE Answer Sheet #194



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ANSWERS

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

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holistic approach that is informed but not driven by case law. In an article posted on the blog, William Hamilton presents an “E-Discovery Sanctions Cube” demonstrating how sanctions become increasingly likely as a party or counsel progresses along a graph of vertical and horizontal axes that represent willfulness, prejudice, and time.³² For example, discovery errors that occur with a low degree of willfulness but perhaps create prejudice may be less likely to result in sanctions than a more willful, equally prejudicial mistake. As time to correct or remedy the error before trial decreases, the likelihood of sanctions also increases.

Hamilton’s analytical framework is useful for considering *Pension Committee* and a number of other decisions in the electronic discovery arena, including the infamous *Qualcomm v. Broadcom*³³ series of decisions. These are often referred to as “judicial frustration” or “angry judge” cases. Without regard to the exact legal factors in a particular jurisdiction, it is simple and reasonable to look at a case and posit, “The longer you wait, the worse the problem gets; the worse the problem gets, the more prejudice to the party; and if you compound the problem by incompetence or inattention, you will offend the court.” Under these circumstances, woe betide the litigator.

Beyond Zubulake

The decisions in electronic discovery cases are fact-intensive. Reading them requires a time investment, but practitioners can derive practical benefits from the mistakes of others in this area. The rulings apply critical judicial hindsight to litigation decision processes (or sometimes the lack of decisions).

*Pension Committee*³⁴ involved parties who were accused not of misconduct but merely of carelessness. The case involved claims by multiple investors of securities fraud against a group of funds. Judge Scheindlin found that numerous plaintiffs had been aware of the likelihood of litigation and yet failed to issue written litigation holds or undertake practical steps to preserve documents. As a result of the plaintiffs’ failures to correctly implement preservation procedures, the court found that e-mail had actually been deleted and lost, and the circumstances warranted a finding that the lost material would have been relevant. Ultimately a number of plaintiffs were sanctioned for spoliation in the form of an adverse jury instruction.³⁵

Judge Scheindlin took the opportunity to outline standards for finding negligence, gross negligence, and willfulness, as those terms are used regarding spoliation of evidence. Also, with respect to the actions of the plaintiffs, she discussed the type of conduct that

falls in each of these categories, both generally and specifically. The judge found that in addition to the failure to issue written preservation instructions, the processes that the plaintiffs had followed to collect documents were inconsistent and unreliable, often including failure to identify and collect large amounts of e-mail. Some of these failures were a result of allowing the plaintiffs’ executives or employees to decide individually what information might be relevant, and some resulted from having the data collection overseen by those with little knowledge of the parties’ IT infrastructure or the steps necessary for proper collection.

The basic lessons of *Pension Committee* are first, when the party anticipates litigation, the party should issue instructions—in writing—to preserve documents and ESI. Second, those accountable for implementing the litigation hold should have sufficient personal knowledge of the technical processes to determine whether they are appropriate and are actually likely to capture all relevant information. *Pension Committee*’s explicit requirement that the litigation hold notice must be in writing arguably changes the existing standard. However, the accountability requirement is not new. Instead, it simply restates what litigators should already know. They must understand the evidence—most specifically, what it is, and where it resides.

Swofford v. Eslinger,³⁶ a September 2009 decision from the Middle District of Florida, is a decision in which the facts are straightforward, the language is blunt, and the take-home message for attorneys is unambiguous. If attorneys had not learned from *Zubulake* and its progeny to date that counsel is responsible for implementing and monitoring effective preservation of evidence, including specifically ESI, they cannot miss that message in *Swofford*.

The court captures the time frame for ESI preservation (or lack thereof) with precision. The claim was a state law tort and 42 USC Section 1983 action brought by Robert Swofford against the sheriff of Seminole County, Florida, and two individual deputies. The deputies had shot Swofford multiple times during the pursuit of an unrelated fleeing criminal suspect onto Swofford’s property. The incident with Swofford and the deputies occurred in April 2006. In August 2006 and February 2007, Swofford’s counsel sent letters to the sheriff’s office requesting that evidence relating to the incident be preserved. Both deputies permanently deleted e-mails from their accounts between April 2006 and April 2007. The laptop of one of the deputies was erased in October 2007. Key physical evidence—including the guns, radios, and uniforms the deputies wore during the incident—were recycled, misplaced, or destroyed at

various times after the plaintiff sent the preservation requests to counsel.

The court found that the steps taken by the sheriff’s office to preserve documents were so ineffective as to warrant a finding of deliberate misconduct.³⁷ The in-house counsel of the sheriff’s office acknowledged receiving the letter to preserve evidence, but admitted that he had done nothing to see that evidence was actually preserved other than send copies of the letter to the sheriff and several high-ranking officers within the sheriff’s office. The two individual defendants never personally saw the request to preserve evidence, although the court found they had received notice through the in-house counsel and were accountable for complying. The court cited *Zubulake* and noted, “It is well established that counsel may not simply distribute a single written request to preserve evidence and do nothing more.”³⁸

The *Swofford* court granted the plaintiff’s motion for sanctions for bad faith spoliation, including the recycling of the deputies’ laptops and the deletion of e-mail. The order also sanctioned the in-house counsel personally for not effectively implementing the hold as well as issuing monetary sanctions in the form of a fee award and an adverse inference instruction.

Swofford and *Pension Committee* are cases in which the facts were complex and the stakes were high. Moreover, those high stakes were most likely apparent from the inception of the case. Both *Scalera v. Electrograph Systems, Inc.*³⁹ and *Estrada v. Delhi Community Center*⁴⁰ involved sanctions for spoliation of ESI in single-plaintiff employment discrimination cases. *Rimkus v. Cammarata*, a noncompetition case, falls somewhere in the middle.

One of the common questions that arises in discussions of electronic discovery is how to manage its impact in smaller cases, including those involving small business contracts, collections, and single-plaintiff employment claims. Practitioners should know that the underlying ethical and process management requirements in a small case are no different than in a large case and should in some ways be easier to address.

In *Scalera*, the plaintiff brought suit under the Americans with Disabilities Act and New York’s human rights law for claimed failures to accommodate her chronic illness. She had a fall on the job and filed a workers’ compensation claim. Her employment ended, she made an claim with the EEOC, and then she brought suit. The decision addressed her motion for sanctions for spoliation. The plaintiff alleged that the defendant had been negligent in not properly implementing a litigation hold and in failing to produce e-mail communications that would have revealed

the plaintiff's requests for accommodation. The defendant contended that various types of ESI were unrecoverable,⁴¹ and the plaintiff requested an adverse inference instruction.

The court found that the employer's determination of when the duty to preserve arose was the right one. The defendant was on notice when it received the EEOC notice, not when the plaintiff fell or when she retained a lawyer or sent a demand letter to the landlord on a slip-and-fall injury.⁴² Thus, because the EEOC charge was received after the date the plaintiff's hard drive and e-mails were erased pursuant to the defendant's poli-

cies, no duty to preserve potential evidence was breached.⁴³ In contrast, the hard drive of the director of human resources was erased following her retirement, which occurred over a month after the defendant received the plaintiff's EEOC charge. Thus, the court found that the defendant had been negligent in failing to preserve those documents, because the obligation to preserve already existed.

Given the influence of Judge Scheindlin's rulings in this area, the standard in *Pension Committee* is likely to be cited over the *Scalera* analysis of culpability and nonimposition of sanctions. However, the facts in *Scalera* remain illustrative of common dis-

covery problems that crop up in smaller cases. Much of the defendant's initial response to litigation appears to have been conducted in house—probably because the claim was straightforward, and keeping costs low was a priority.

In-house counsel called a meeting to instruct employees to preserve data but did not circulate a formal litigation hold instruction. The company's IT group began collecting data from individuals designated by counsel at the first meeting as sufficiently important within the company. The key HR executive's computer was wiped and recycled. (This is a common risk when a litigation hold goes only to individuals with knowledge of case-specific facts and not to institutional custodians of information, such as management for IT and HR.) Individual employees

had idiosyncratic ways of retaining e-mail outside of the company's backup system, and the company did not account for this, claiming that its HR records process provided for all pertinent records, such as e-mail requests for accommodation, to be printed out and placed in individual personnel files. The plaintiff produced e-mails that had not been printed and had not been produced by the defendant.

The defendant escaped sanctions because the court concluded that the lost data would not have helped the plaintiff. But the fact remains that the court found in this case that

was informed about the reinstallation process and aware that it would result in the deletion of data.⁴⁴ There was no question that the plaintiff was on notice of the need to preserve data, because her counsel was closely involved in ongoing discovery, and the computer was alleged to contain material relating to her claims.

Guidance for Litigators

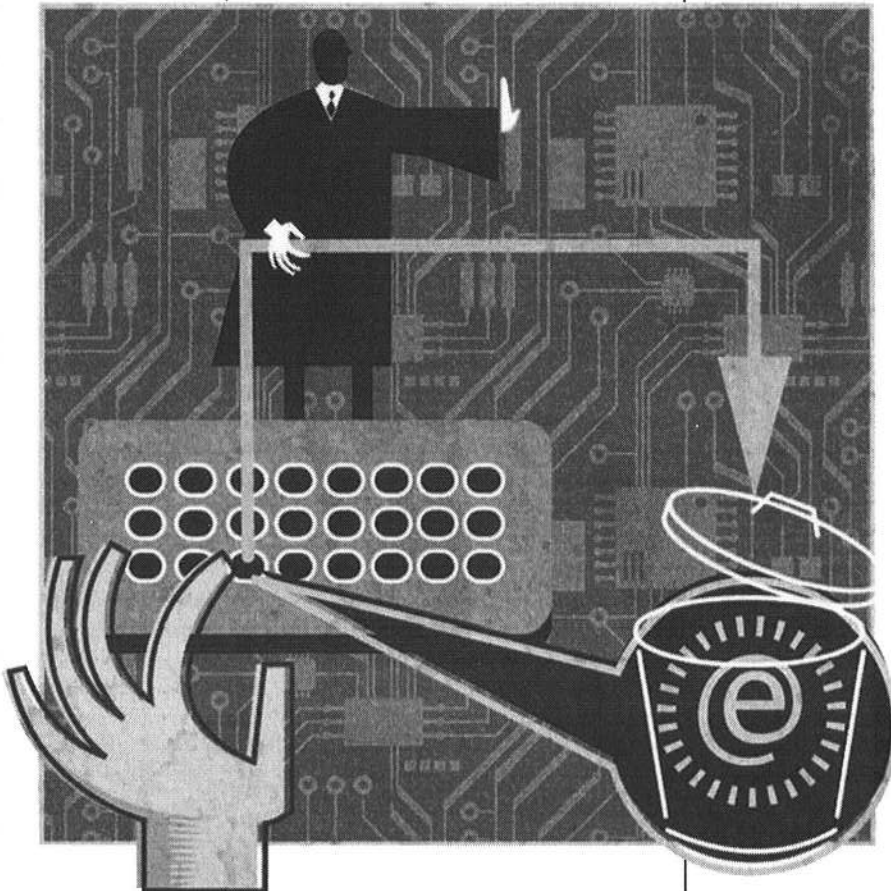
By the time a problem with the preservation of ESI comes to light, courts are left to reconstruct decisions made months if not years before, as in *Pension Committee*. The

body of law on spoliation of ESI has now evolved well enough to be very useful for litigators generally, if not for the parties in the already decided sanctions decisions.

Pension Committee has attracted voluminous, detailed commentary and analysis, including discussions on the standards of care and whether the decision mandates that failure to issue a written litigation hold is negligence per se. *Pension Committee* does not address counsel conduct separate from that of the party, but *Swofford* received attention because it addresses the part of the *Zubulake* decisions establishing that evidence preservation is a lawyer's personal and ethical responsibility,

separate from the obligation of his or her litigant client. While *Swofford* involves no written instruction to preserve documents other than the request of the plaintiff's counsel, the activity in that case occurred when *Zubulake* was a well-known and well-publicized legal standard. *Zubulake* and *Swofford* teach that a lawyer must have personal knowledge of the measures taken to implement a litigation hold. The cases further instruct that a party (and thus the party's lawyer) must conform to a specific standard of conduct to ensure that documents do not actually get deleted or disappear.

Attorneys are required to perform their duties competently in the representation of their clients.⁴⁵ Competence includes the ability to advise clients about preservation—both the timing of preservation obligations and

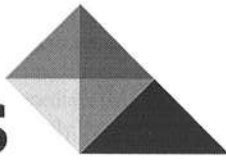


the discovery response was negligent.

Estrada v. Delhi Community Center, an unpublished 2009 court of appeal decision, is an unusual case because the plaintiff received terminating sanctions for electronic discovery violations (as well as other discovery problems). A close reading of the facts indicates that plaintiff's counsel was making multiple inappropriate tactical decisions and abusing the discovery process in more ways than just those concerning the electronically stored evidence. The electronic discovery issue was the plaintiff's conduct in taking her personal computer to a repair shop and having the operating system reinstalled during the course of the litigation. It is not clear how technically sophisticated she was personally (or how sophisticated her counsel was), but the court held that the plaintiff



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the actual substance and process of preservation, including the type of data and format for collection, but also what kind of ESI is likely to be inadvertently lost. Judges now expect counsel to be competent in electronic discovery. In admonishing counsel, a judge stated, "Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI....It is time that the Bar—even those lawyers who did not come of age in the computer era—understand this."⁴⁶

Effective electronic discovery starts with properly implemented preservation, including the issuance of clear, practical, preservation instructions. The duty to preserve is a dual duty, falling on both counsel and parties. Decisions like *Swofford*⁴⁷ make it clear that attorneys have an independent duty to preserve information as well as a duty to ensure that the client also does so. Failure to properly preserve electronic evidence is a breach of an attorney's professional obligations as well as a breach of the attorney's duty to provide competent professional service to the client. Counsel who breach their dual duties place themselves and their clients at risk for sanctions.

What *Pension Committee* requires for parties regarding their conduct indirectly creates more specific and detailed requirements for counsel.⁴⁸ In *Pension Committee* the absence of a written litigation hold was part of the problem.⁴⁹ Most counsel will probably deduce that they must issue a formal written communication for a litigation hold. This is a prudent default approach but, like all rules, proper application depends mostly on lawyers having a nuanced, context-sensitive understanding of what the rule means. For example, if a client is a very small entity with very few computers (as were some of the sanctioned plaintiffs in *Pension Committee*), counsel may question whether it is really necessary to issue a written preservation instruction. However, if the employees in the small organization are not tech savvy and have no understanding how to prevent deletion of documents, counsel's obligations include the development of that understanding on the part of both counsel and client employees and instructing the client to make a record of the necessary instruction and its implementation.

By contrast, in a large and complex organization with a well-informed and sophisticated IT staff, the client presumably is capable of implementing a litigation hold. Indeed, the client may have an existing litigation hold protocol and a written form for issuing the holds. However, if the claim concerns sexual harassment, for example, or stalking by an executive or a technically sophisticated employee with a high security clearance, issuing a written litigation hold may be affirma-

SECTION, E-DISCOVERY POCKET GUIDE (Aug. 2008), available at <http://www.calbar.ca.gov/calbar/pdfs/sections/litigation/e-discovery-pocket-guide.pdf>.

⁶ See *Williams v. Russ*, 167 Cal. App. 4th 1215, 1223 (2009).

⁷ See *id.* at 1221 (discussing a finding of negligent spoliation by discovery referee); *In re NTL, Inc. Sec. Litig.* (Gordon Partners v. Blumenthal), 244 F.R.D. 179, 198 (S.D. N.Y. 2007) ("The culpable state of mind requirement is satisfied in this circuit by a showing of ordinary negligence.").

⁸ *Southeastern Mech. Servs. v. Brody*, 2009 WL 2883057 (M.D. Fla. Aug. 31, 2009).

⁹ *Arista Records LLC v. Usenet.com*, 2009 WL 1873589 (S.D. N.Y. June 20, 2009).

¹⁰ See CODE CIV. PROC. §2023.030.

¹¹ See *Williams*, 167 Cal. App. 4th at 1223 ("Sanctions should be tailored to serve that remedial purpose [of remedying the underlying discovery abuse], [they] should not put the moving party in a better position than he would otherwise have been had he obtained the requested discovery....").

¹² See, e.g., *id.* at 1227 ("Without knowing the content and weight of the spoliated evidence, it would be impossible for the jury to meaningfully assess what role the missing evidence would have played in the determination of the underlying action.") (quoting *Cedars-Sinai Med. Ctr. v. Superior Court*, 18 Cal. 4th 1, 14 (1998)).

¹³ See CODE CIV. PROC. §2023.020(b).

¹⁴ See *R. S. Creative, Inc. v. Creative Cotton, Ltd.*, 75 Cal. App. 4th 486, 497 (1999).

¹⁵ Negligence can be a sufficient "culpable state of mind" for a finding of spoliation.

¹⁶ See *Scalera v. Electrograph Sys., Inc.*, ___ F.R.D. ___, 2009 WL 3126637, at *8 (E.D. N.Y. Sept. 29, 2009).

¹⁷ *Id.* at *16.

¹⁸ *Id.*

¹⁹ *Id.* at *1.

²⁰ *Id.* at *16 ("[H]ad clearer instructions been provided, [the] hard drive would have been searched (rather than erased) at or before the time she retired.").

²¹ *Id.* at *17.

²² Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec. LLC, Amended Op. and Order, Case No. 05 Civ. 9016 (SAS), 2010 WL 184312, at *3 (S.D. N.Y. Jan. 15, 2010) ("[D]efinitely after July, 2004 when the final relevant *Zubulake* opinion was issued, the failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.").

²³ *Id.* at *12.

²⁴ *Id.*

²⁵ *Rimkus Consulting Group v. Cammarata*, 2010 WL 645253 (S.D. Tex. Feb. 19, 2010).

²⁶ *Id.*

²⁷ *Id.* at *5.

²⁸ *Williams v. Russ*, 167 Cal. App. 4th 1215, 1226-27 (2009).

²⁹ *Id.*

³⁰ *Id.* at 1227 ("In fact, the record does not show that [the plaintiff] ever supplied the trial court with, or has ever described, the contents of the 11 file boxes he did copy. Without those documents as a starting point, it seems impossible to determine whether those documents might have been sufficient for [the defendant] to mount an adequate defense.").

³¹ <http://www.e-discoveryteam.com>.

³² <http://e-discoveryteam.com/2009/11/29/the-e-discovery-sanctions-cube/>.

³³ *Qualcomm v. Broadcom*, Case No. 05cv1958-B (B.M.), 2010 WL 1336937 (S.D. Cal. Apr. 2, 2010). This is the final of a series of decisions concerning the failure to produce documents until after trial. Despite

an order to show cause in 2008, the court determined counsel would not be sanctioned personally.

³⁴ Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec. LLC, Amended Op. and Order, Case No. 05 Civ. 9016 (SAS), 2010 WL 184312, at *1 (S.D. N.Y. Jan. 15, 2010).

³⁵ *Id.* at *23.

³⁶ *Swofford v. Eslinger*, ___ F. Supp. 2d ___, 2009 WL 3818593 (M.D. Fla. 2009).

³⁷ *Id.* at *8.

³⁸ *Id.* at *5-8.

³⁹ *Scalera v. Electrograph Sys., Inc.*, ___ F.R.D. ___, 2009 WL 3126637, at *1 (E.D. N.Y. Sept. 29, 2009).

⁴⁰ *Estrada v. Delhi Cmty. Ctr.*, Superior Court Case No. 06CC12880, Cal. App. 4th Dist. No. G040405, 2009 WL 3359194 (2009) (unpublished).

⁴¹ *Scalera*, 2009 WL 3126637, at *12-13.

⁴² *Id.* at *12.

⁴³ *Id.*

⁴⁴ *Estrada*, 2009 WL 3359194, at *3-8.

⁴⁵ CAL. RULES OF PROF'L CONDUCT 3-110; ABA MODEL RULES OF PROF'L CONDUCT 1.1.

⁴⁶ *William A. Gross Constr. Assoc., Inc. v. American Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134 (S.D. N.Y. 2009) (Judge Andrew Peck admonishing counsel over the creation of key words).

⁴⁷ *Swofford v. Eslinger*, ___ F. Supp. 2d ___, 2009 WL 3818593 (M.D. Fla. 2009).

⁴⁸ See, e.g., *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (2003) (*Zubulake IV*); see also *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 324 (2003) (*Zubulake I*) (setting forth seven cost and relevance factors to determine whether cost-shifting is appropriate).

⁴⁹ The *Zubulake* series of decisions set forth the standard under which a court should consider the relative importance and accessibility of electronic information in the context of backup tapes.

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