An e-discovery guide to spoliation motions

Keep your electronic evidence from being flushed down the toilet. Once rare, spoliation cases are growing in number.

By Nick Brestoff

I have to begin by saying that trial lawyers really don't want to chase after defendants and their attorneys who negligently or intentionally destroy or alter "potentially relevant evidence." What we want is admissible evidence that we can use – in depositions, mediations, and at trial – to support our claims (or defenses, in case we have to deal with counterclaims).

But in these heady days of electronically stored information (ESI), what we get in discovery is *data*. Now, getting the evidence from the data we receive is a separate question; it is a question of "search," and I have addressed it elsewhere. (See N. Brestoff, "E-Discovery Search: The Truth, the Statistical Truth and Nothing But the Statistical Truth," ABA *E-Discovery & Digital Evidence Journal*, Vol. 1, No. 4 (Autumn 2010).)

Here, the problem is that the data is "potentially relevant" *and is missing*.

Spoliation

Let's define "Potentially Relevant ESI" to mean any ESI that may be used to support a claim or a defense. Of course, there are times when you'll know you're going to file a spoliation motion, when you *know* that Potentially Relevant ESI is "missing." You'll know it because your client or one of the key witnesses is like the former nurse in the 1982 Paul Newman movie, The Verdict.

In the movie, it was standard procedure not to operate soon after a patient had eaten. The form indicated that the patient had eaten nine hours before the surgery, which was safe. But on the stand in rebuttal, the nurse testified about the instructions she received from the surgeon, after the surgery (which had been disastrous; the patient was a vegetable): "He told me to change the '1' to a '9'... or else... or else he said, he said he'd fire me."

Her memory was strongly challenged by the defense (James Mason). Ah, but she had kept a *copy* of the form as she had written it originally. It showed a "1."

These days, you never know what will turn out to be a "smoking gun," which I take to mean a document that either reveals the truth or destroys a witness's credibility. *Any* witness's credibility will suffer if he or she has destroyed or altered any material document. So, if your client has relevant documents, you'll want to ask the defendants to produce them. If the other side had a duty to preserve them, but no longer has them and can't produce them, you'll be on Spoliation Road.

It is this *potential* you want to be aware of *before* discovery, and you'll want to watch for it as the process unfolds. When relevant documents that should have been preserved go AWOL, sanctions may follow. Spoliation worthy of sanctions has been defined as follows:

> (1) [T]he party having control over the evidence had an obligation to preserve it when it was destroyed or altered;
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> (2) the destruction or loss was accompanied by a "culpable state of mind;" and
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> (3) the evidence that was destroyed or altered was "relevant" to the claims or defenses of the party that sought the discovery of the spoliated evidence, to the extent that a reasonable factfinder could conclude that the lost evidence would have supported the claims or defenses of the party that sought it.

(*Victor Stanley, Inc. v. Creative Pipe, Inc.* (D.Md. Sept. 9, 2010) ___F.R.D. ___, 2010 WL 3530097 ("*Victor Stanley II*"); *see Leon v. IDX Systems Corp.* (9th Cir. 2006) 464 F.3d 951 (duty to preserve); *Henry v. Gill Indus.* (9th Cir. 1993) 983 F.2d 943, 948 (prejudice is when spoliation substantially denies a party the ability to support or defend the claim).)

But is spoliation "rare"? It used to be. Increasingly, the answer is no. So it's smart to have your antennae tuned for

spoliation circumstances, and to act accordingly.

Though they'll never admit it, disclosing defendants will *likely* fail to carry out their duties to preserve Potentially Relevant ESI. There are three key reasons for this. The first reason is that a defendant can no longer go to a drawer to find the paper files that would be responsive. These days, the potentially relevant evidence is in hard drives, laptops, thumb drives; the digital memory of that photocopier with scanning ability, and a host of other places. (See, e.g., *Qualcomm v. Broadcom* (S.D. Cal. Jan. 7, 2008) No. 05 Civ. 1958-B, *3-*11, 2008 U.S. Dist. LEXIS 911 (In a patent case, Qualcomm attorneys failed to "collect" the hard drive of a key employee; e-mails critical to a defense were discovered on cross-examination; sanctions included $8.5 million).)

Sometimes, of course, the defendant cannot be controlled, even by honest and competent defense counsel. Some defendants think they can get away with massive deletion attempts. In *Victor Stanley II*, just before his work computer was scheduled to be imaged, the defendant's CEO deleted almost 4,000 files and someone ran Microsoft Window's Disk Defragmenter program immediately thereafter, rendering the files unrecoverable. But the fact that the wiping program had been installed and run *was* discovered. In *OZ Optics Limited v. Zeynep*, 2009 Cal. App. Unpub. LEXIS 2952, an executive ran a "scrubbing" program on a company laptop prior to handing it over, which was detected by plaintiff 's computer forensics expert, and a $90,000 sanction was ordered. The court refused to give a terminating sanction because there was no evidence that a claim or defense had been lost as a result.

The second reason is that ESI is vastly different from paper. More than 95 percent of what any company currently generates is ESI, and that ESI is generated so quickly (think e-mails copied to 20 people who then forward it to 20 more, etc.) that the growing volume is now much more than all the paper records the firm ever had, no matter how long the company's been in business. It's safe to say that defendants will lose or alter some of that data. To fully and completely carry out their preservation duties, corporate defendants have to herd a multiplicity of cats.

The third reason is that the duty to preserve potentially relevant ESI attaches when litigation can be "reasonably anticipated" or "reasonably foreseen," which means that the "preservation duty" can attach long before a complaint is filed.

For these reasons, even though the law expects a disclosing party to produce "all" of the non-privileged potentially relevant evidence, the mandate is easy and compliance is difficult.

For example, in *Zubulake v. UBS Warburg LLC* (S.D.N.Y. 2003) 20 F.R.D. 212, Judge Scheindlin held that the duty attached when "the relevant people at UBS anticipated litigation in April 2001," which was four months before Laura Zubulake filed her EEOC complaint in August of 2001, and more than nine months before the complaint was filed on February 15, 2002. The case of *Phillip M. Adams Associates, L.L.C. v. Dell, Inc.* 910801 (D.Utah March 30, 2009) 2009 WL is regarded as an outlier: there, the court held that the preservation duty attached *eight years* before suit was filed. But to understand the preservation duty, we have to separate the cases. In *Zubulake* and most (but not all) of the spoliation cases, the defendants failed in their preservation duties and plaintiffs' counsel were calling them to account.

But could a plaintiffs' lawyer be faced with a spoliation motion? Yes, the duty attaches *when litigation can be reasonably foreseen*. (See *Medcorp, Inc. v. Pinpoint Technologies, Inc.* (D.Colo. June 15, 2010) 2010 WL 2500301 (plaintiff intentionally destroyed 43 hard drives which contained information relevant to the dispute by failing to "stop the presses" on their ordinary recycling schedule).)

So, if you're a plaintiffs' attorney, when *does* the duty attach? There is no bright line. But, at the latest, the duty attaches when you sign the engagement letter, because at that point both you and your client both reasonably anticipate future litigation. So, right after the ink is dry, you have to ask your own client: "What kind of IT environment do you have?"

And after you've found out what electronic devices your client uses, and about the policies for erasing or altering data, send a written litigation "hold" notice to your own client. This is a *must*. The idea is for your client to put a "hold" on whatever document destruction policies that might be in place. If left uninterrupted, such policies could lead to the destruction or alteration of the ESI that the *defendants* may seek. Plaintiffs' counsel must issue a *written* "hold" letter, and then follow up. You cannot get away with a nice talk, or just sending the letter. If potentially relevant evidence is lost, your client may be found negligent, grossly negligent, or worse; and any of those findings could lead to sanctions. (See *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC* (S.D.N.Y. Jan. 15, 2010) 2010 WL 184312 ("*Pension Committee*").)

You can send a similar letter to the defendants. To differentiate them from a "hold" notice, these letters are often called "preservation" letters. They are different in content and tone but the message is the same: with respect to these issues, certain custodians, and during these timeframes, preserve all of the potentially relevant evidence!

Must you send a "preservation letter" to the prospective *defendants* and/or their counsel? No. As in *Zubulake*, a defendant's preservation duty may have *already* attached, because of the facts and circumstances which prompted your client to hire you in the first place. There is no *need* for a notice; it is not a required "trigger" for the preservation duty.

But then again, if the circumstances have not triggered a preservation duty, and you believe that the defendant will be put on notice only when the complaint is served, then sending a preservation

notice will do the trigger the duty to preserve.

And now you know the first step:

• **Step One**: Trigger the preservation duty. Draft and send a comprehensive "preservation letter" to all of the prospective defendants.

Now, a preservation letter is not argumentative. Good preservation letters should be clear and comprehensive, but above all they should be instructive, not only in content but also in tone. They should explain the facts and the presently contemplated theories of the case, and identify all of the known "custodians" of information; that is, anyone who had "any involvement with the issues." (*Pension Committee* (second amendment on May 28, 2010).)

A good letter should even list as many of the places where a prospective defendant could locate the potentially relevant evidence you will be seeking. A comprehensive preservation letter not only teaches the defendants what they must do, it sets you up as acting with transparency and in good faith, which is optimal for a future spoliation motion.

Because of the perceived cost of e-discovery, such a letter may be taken as an invitation to pre-litigation negotiations, but how the other side perceives your letter is irrelevant.

On the other hand, in the rare case where you believe the letter will trigger an e-shredding delete-o-thon, you should consider seeking a temporary restraining order and/or the appointment of a special master.

But in the usual case, you may wind up with a preservation order. For an example, see *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liab. Lit.*, 8:10ML021251 JVS (FMOx), 2010 WL 2901798 (July 20, 2010) (Order For Preservation of Documents and Tangible Things).)

In federal court

The Federal Rules of Civil Procedure were amended effective December 1, 2006, to take account of ESI. Because these rules preceded California's adoption of statutes and rules pertaining to the discovery of ESI by 30 to 36 months, the federal ESI case law is better developed. The federal rules are worth knowing, however, because California's ESI statutes and rules were modeled on them.

• So the next step is to re-read Rules 26(a), 26(f) and 16(b) of the Federal Rules of Civil Procedure, in that order, in order to get ready for the following steps in the *pre-discovery* stage of the case.

• Then hold "meetings and conferences" about the initial disclosures to be made per Rule 26(a)(1), which should begin to take place as soon as is practical after the responsive pleadings are filed or the Rule 12(b)(6) motions are resolved, but no later than 21 days before the court is set to hold a Scheduling Conference per Rule 16(b)(2) ("the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; **make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan**." Rule 26(f)(2) (boldface added)).

Suppose opposing counsel will not identify the "key players;" that is, his or her client's employees who are custodians of Potentially Relevant ESI (which in this means the ESI that may support any defenses or any counterclaims), as required by Rule 26(a)(1)(i). Write a stiff letter.

Suppose opposing counsel will not provide you with "a copy – or a description by category and location – of all documents, electronically stored information … that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses." Rule 26(a)(1)(ii). Write another stiff letter.

Suppose opposing counsel will not provide you with a copy of "any insurance agreement under which an insurance business may be liable to satisfy all or part of the possible judgment … or to indemnify or reimburse for payments made to satisfy the judgment." Rule 26(a)(1)(iv). Write a letter.

But also note: as Plaintiffs' counsel, you have an obligation to disclose "a computation of each category of damages claimed by the disclosing party," along with supporting documents and "materials bearing on the nature and extent of injuries suffered." Rule 26(a)(1)(iii). If you don't, expect a stiff letter.

• Suppose the letters get you nowhere. Take one or more Rule 30(b)(6) "organization" depositions.

Note 1: As a reminder, Rule 30(b)(6) requires an organization to produce one or more witnesses who must testify "about information known or reasonably available to the organization" based on topics described with "reasonable particularity."

Note 2: a Rule 30(b)(6) deposition would be indicated at this point only if you can credibly argue that a defendant was failing to comply in good faith with Rule 26(a)(1).

Note 3: You may want to seek leave of court for an "early disclosure" Rule 30(b)(6) deposition, so that it will not count towards the 10 "substantive" depositions permitted without leave of court under Rules 30 and 31.

• Cooperate with opposing counsel to prepare and file a discovery plan per Rule 26(f)(2), due 14 days after the end of the Rule 26(f)(1) conferences (or 7 days before the Scheduling Conference).

Note 1: "A discovery plan **must** state the parties' views and proposals on: … (C) **any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced**; (and) (D) **any issues about claims of privilege or of protection as trial-preparation materials** …." Rule 26(f)(3) (boldface added).

• Make (and receive) the initial disclosures per Rule 26(a)(1)(C), due 14 days after the end of the Rule 26(f)(1) conferences (or 7 days before the Scheduling Conference). Per Rule 26(g)(1), the disclosing party's attorney (including you) must sign a certification that the disclosure is "complete and correct as of the

time it is made." (I discussed this topic in my ABA article on Search (above) and I caution against making a certification in the language of the Rule. With so much data, how do you know? It's better to completely and correctly describe the process underlying the disclosures.

• Attend the Scheduling Conference, held per Rule 16(b)(2).

The endgame of this first phase of federal court discovery is the Scheduling Order. The Scheduling Order is, essentially, the end of the beginning. It is more like discovery *planning* than anything else. Why? Because (omitting four exceptions) Rule 26(d)(1) states: "A party may **not** seek discovery from any source **before** the parties have conferred as required by Rule 26(f) …." (Boldface added).

The court must issue the Scheduling Order "as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared."(Rule 16(b)(2).)

A Scheduling Order *must* "limit the time to join other parties, amend the pleadings, complete discovery, and file motions." This mandatory content is important. If new parties are added or if new pleadings making claims are filed, you should remind defense counsel that a new effort to identify, preserve, and collect potentially relevant evidence must commence, which means that their previously issued Litigation Hold Notices must be amended.

A Scheduling Order *may* (among other things) "provide for disclosure or discovery of electronically stored information," Rule 16(b)(3)(B)(iii); "include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced," Rule 16(b)(3)(B)(iv); and "set dates for pretrial conferences and for trial." (Rule 16(b)(3)(B)(v).)

With respect to the discovery cut-off date, it is vital to understand that the deadline to complete discovery has been set by the district court. It *cannot be changed* by the magistrate judge who is handling whatever discovery disputes arise, including motions to compel further production and/or sanctions for spoliation.

So, after the Scheduling Order, formal discovery may commence. Now you have to read Rule 34. It permits a requesting party or representative "to inspect, copy, test, or sample … **any** designated documents or electronically stored information … stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form …." (Boldface added.)

Perhaps the most useful provision is Rule 34(b)(3). It permits you to "specify the form or forms in which electronically stored information is to be produced." In your Requests, specify "native data with metadata intact," and define your terms. You won't be sorry.

So there you have it: after early disclosure, the rules open the door to "any" ESI that is nonprivileged and relevant to a party's claim. You can hunt through the defendant's data to find those "smoking guns."

And if data has been altered or destroyed, then there are two questions: (1) What level of fault can be assigned to such a calamity? and (2) Was the destroyed or altered data relevant to a claim or a defense? The range of sanctions – from an award of attorney fees and costs to the entry of a default against the spoliating defendant – will depend on what the facts indicate about these issues.

But before discussing some of the cases where sanctions were imposed, let's look at the differences between federal law and California law.

In state court

In California, the amendments to the California Code of Civil Procedure ("CCP") parallel the federal rules, for the most part. California's rules went into effect on June 29, 2009. There are only a few differences, but they are beyond the scope of this article. (For them, I refer you to the Kelleher treatise published by Matthew Bender, California E-Discovery and Evidence.)

But one difference is clear and very important: E-discovery issues will arise *much more quickly* in state court than in federal court.

In state court, which Plaintiffs' counsel prefer for other reasons, attorneys have to start thinking about e-discovery when they are writing the complaint because Plaintiffs' counsel must be prepared to discuss "any" issues relating to the discovery of ESI, pursuant to California Rules of Court ("CRC") Rule 3.724(8) of the California Rules of Court (effective August 14, 2009) *at least 30 days before the Case Management Conference*. And, remember, the court is required to hold the Case Management Conference "no later than 180 days after the filing of the initial complaint." (CRC Rule 3.721.)

There's no such thing as early disclosure or a bar on formal discovery until after the entry of a Scheduling Order.

There is only a very short hold on formal discovery. A plaintiff must wait only 10 days after service of the summons on a party, or that party's appearance, whichever comes first, before serving discovery requests. (See CCP § 2030.020(b) (Interrogatories; 10 day hold); CCP § 2031.020(b) (Requests for Inspection and Production of Documents, etc.); CCP § 2033.020(b) (Requests for Admission).)

These deadlines mean that you must first address the issues with your client within the first 30 to 60 days after the complaint is filed, *if not sooner*.

Step Two: Read CRC 3.724[8]

What must you consider under CRC Rule 3.724(8)?

> **Any** issues relating to the discovery of electronically stored information, including:
>
> (A) Issues relating to the preservation of discoverable electronically stored information;
>
> (B) The form or forms in which information will be produced;

(C) The time within which the information will be produced;

(D) The scope of discovery of the information;

(E) The method for asserting or preserving claims of privilege or attorney work product, including whether such claims may be asserted after production;

(F) The method for asserting or preserving the confidentiality, privacy, trade secrets, or proprietary status of information relating to a party or person not a party to the civil proceedings;

(G) How the cost of production of electronically stored information is to be allocated among the parties;

(H) Any other issues relating to the discovery of electronically stored information, including developing a proposed plan relating to the discovery of the information ….

(Boldface added.)

If you (or the other side) come to the "meet and confer" process or CMC unprepared, and so fail to participate in good faith, then you (or the other side) are engaging in a discovery abuse. (See CCP § 2023.010(i); see *Liberty Mutual Fire Ins. v. LCL Administrators* (2008) 163 Cal.App.4th 1093, 1104 (repeatedly ignoring "meet and confer" letters is a separate ground for discovery sanctions).)

But, with respect to spoliation, the preservation duty is the same. If data is altered or destroyed after the duty to preserve ESI has been triggered, then courts will inquire into the sort of misconduct that led to the loss, and how relevant the lost data was to proving a cause of action or a defense.

War stories

Now, to get through all these procedures, especially when you have a concern for possible spoliation, you need two character traits: (1) persistence and (2) curiosity. I think it's natural for trial attorneys to be persistent, so I think curiosity is the key to e-discovery success. In order to find your way through the e-discovery maze, you have to enjoy playing Sherlock Holmes.

To elucidate, let me describe and urge you to read two different state court cases: *Magana v. Hyundai Motors*, a personal injury case in Washington, and*Doppes v. Bentley*, a California lemon law case.

• ***Magana v. Hyundai Motors*** **(Personal Injury)**

In *Magana v. Hyundai Motor Am*. (Wash. Nov. 25, 2009) 2009 WL 4070952, the plaintiff was a paraplegic as the result of a car crash. At the first trial, the jury awarded $8 million, but the court of appeal reversed. On remand, plaintiff's counsel argued that spoliation by the defense made it impossible to fairly try the case, because Hyundai's in-house counsel had searched for responsive documents, *but only in its own legal department*. The trial court agreed.

The trial court found that (1) the parties had not agreed to limit discovery in this way; (2) the defendant falsely responded to plaintiff's request for production of documents and interrogatories; (3) the potentially relevant evidence was lost forever; and (4) the plaintiff was substantially prejudiced in preparing for trial. The trial court considered lesser sanctions, but concluded that the only just remedy was the entry of a default judgment, *for $8 million*. The appellate court reversed, but the Washington Supreme Court reinstated the trial court's ruling and, in addition, awarded attorney fees to the plaintiff pertaining to both the trial and appellate proceedings.

• ***Doppes v. Bentley Motors*** **(Lemon Law)**

The case of *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967 is a "lemon law" case about a Bentley with an oil-wax stink. There, the appellate court held that the trial court abused its discretion when it denied plaintiff's request for terminating sanctions against Bentley. Imagine that! An appellate court ordered the imposition of sanctions and they were terminating sanctions. It happened, and the Supreme Court denied review.

The lesson is in *why* it happened. In *Doppes*, defendant Bentley violated four discovery orders or discovery referee determinations prior to trial, such that the trial court was persuaded to give an adverse inference instruction.

But then, during trial, plaintiff's counsel discovered impeaching e-mails and the deletion of potentially relevant e-mails, so that Bentley's discovery violations were found to have been worse than had been previously known. Persistence, remember?

Still the trial court would not grant terminating sanctions and instead gave another adverse inference instruction. On appeal (after jury verdicts in favor of plaintiff on two causes of action), the appellate court affirmed the verdicts, and then ordered terminating sanctions and a *default judgment* on a cause of action which the jury had rejected – for *fraud*. Not only that, the appellate court ordered an increase in the amount of attorney fees the trial court had awarded to plaintiff for having to make the successful discovery motions (from $344,600 to $402,187), and opened the door for a greater award by the trial court on remand.

Conclusion

During the past few decades, spoliation was a rarity. Today, well, the cases above are only a few of the many spoliation cases that have been published. We must learn from them, not only to avoid having to face spoliation charges ourselves, but to use spoliation motions for the sanctions that spoliators so richly deserve.


Brestoff

After graduating with a B.S. in engineering systems from the University of California at Los Angeles (U.C.L.A.), Nick Brestoff earned an M.S. in environmental engineering science from the California Institute of Technology (Caltech) and graduated from the Gould School of Law at the University of Southern California (U.S.C.). During his litigation career, he has litigated business tort, employment, environmental, and other civil disputes in state and federal court. He is currently the Western Regional Director, Discovery Strategy & Management, of International Litigation Services *(www.ilsTeam.com). He may be reached at nbrestoff@ilsTeam.com.*