



Self Collection or Self Destruction? A Practical Checklist for Avoiding Sanctions

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Sanctions are becoming increasingly commonplace in the preservation and collection of electronically stored information (ESI). Such sanctions are a result of misconceptions regarding proper collections practice, but they may be avoided. Accordingly, this article traces recent U.S. case law on the matter, and provides two practical checklists for avoiding common ESI collection pitfalls.

Courts across the U.S. are placing increasing burdens on counsel to properly manage the preservation and analysis of ESI alongside their clients. The courts are providing specific guidelines on preservation techniques. In one of the leading cases on the matter, *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, No. 05 Civ. 9016 (SAS), 2010 WL 93124 (S.D.N.Y. Jan. 11, 2010), the Southern District of New York reaffirmed that a party's failure to issue a written litigation hold notice automatically constitutes gross negligence, "even if results from a pure heart and an empty head". In other words, the Court made clear that ignorance is no longer an excuse.

Building on the Court's ruling in *Pension Committee*, the Court in *Victor Stanley, Inc. v. Creative Pipe, Inc.*, WL 3530097 (D. Md. 2010) provided further guidance. In *Creative Pipe*, the defendant not only failed to implement a litigation hold, but also deliberately deleted ESI and misrepresented the completeness of discovery. Such egregious behavior led to sanctions, attorneys' fees, contempt, and could possibly even lead to jail time. While such extreme conduct is uncommon, it does demonstrate that the potential consequences for botching the preservation/collection of ESI are severe.

In *Creative Pipe*, Judge Grimm states that "many lawyers, as well as institutional, organizational, or governmental litigants, view preservation obligations as one of the greatest contributors to the cost of litigation being disproportionately expensive in cases where ESI will play an evidentiary role". No doubt he is correct. The opportunity for wrongdoing, even if unintentional, should serve as a wake-up call for litigants.

The Sedona Principles, 2nd Edition, state that preservation requires "reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation". In a common law discovery system, where discovery efforts are often trust-based, room for error is quite high. In *re A&M Florida Properties II LLC*, 2010 WL 1418861 (Bankr. S.D.N.Y. Apr. 7, 2010) holds that collection of ESI should not be delegated to clients. Instead, it should be supervised both by the legal team and an outside discovery expert. Moreover, in some jurisdictions it is no longer enough for an attorney or a vendor to run the ESI collection process – instead, it is becoming increasingly commonplace that litigants, their attorneys and vendors all work in unison to ensure proper practice.

It is true that "self collection" of ESI can be undertaken internally, providing substantial cost savings to companies with sufficient internal IT capabilities. But there are many pitfalls with such an approach. The Delaware Chancery Court took an alarming position in *Roffe v. Eagle Rock Energy GP, et al.*, C.A. No. 5258-VCL (Del Ch. Apr. 8, 2010), putting the entire legal world on notice that lawyers must be heavily involved in the collections process. The Roffe Court ruled that self collection of ESI is inadequate and all ESI collections must be done under the direct supervision of counsel, suggesting that a lawyer must be "physically present" during an ESI collection. Regardless of whether or not an ESI collection requires the actual physical presence of counsel, Roffe makes clear that active involvement by counsel is an absolute necessity.

Notwithstanding the foregoing, self collections (when properly undertaken by a litigant) provide the following benefits: (i) easy to administer the process internally, (ii) minimal software expense and (iii) reasonably defensible when agreed upon in advance with opposing counsel. The benefits, however, do not outweigh the potential harm. What

is the potential harm, and what is the best way to avoid common collection pitfalls? The two checklists below answer both questions.

Counsel must ask the following questions before a litigant undertakes a self collection:

1. Does litigant have forensic-grade software that ensures bit by bit copying with hash value verification?
2. Does litigant have experience using such software?
3. Have all sources of ESI been identified? Are custodial interviews being performed by a neutral party?
4. What decryption and encryption procedures are in place?
5. Is the collection procedure modifying or altering any metadata on the original media?
6. Is there any inherent bias or self-interest involved in the collection?
7. Does the litigant have sufficient IT staff to divert to the task of collection?
8. Are proper chain of custody procedures in place?
9. Does the person performing the collection have sufficient case knowledge (legal and factual)?

Potential pitfalls of self collection:

1. Attorneys lose control of the process when delegating to clients
2. Failure to create forensic images for preservation purposes
3. Under-collection of ESI
4. Metadata alteration
5. Chain of custody challenges
6. Internal staff is generally not adept in testifying about collection procedures and practices
7. Inability to recover and preserve deleted files
8. Possibility of losing files due to limitations in a Windows operating system
9. Possibility of destroying folder paths used to trace the source of ESI
10. Collecting ESI by applying keywords in Outlook or other MS applications does not yield all responsive data, including non-searchable PDFs, encrypted and password protected files, embedded items, etc.
11. Loss of independent, strategic advice

It is widely accepted that forensic ESI acquisitions are the foolproof practice to avoid claims of spoliation. If, after proper analysis, counsel decides that a self collection is not appropriate, counsel should strongly consider a full forensic collection. Forensic collections are the benchmark because they involve the copying of each bit of information, including active, latent and deleted files. Further, the opportunity for a full forensic investigation at some point in the future, if required by the Court, is fully preserved in the forensic images that have already been created. A meet and confer process should be used to agree, at the outset, upon collection practices that will not be challenged in the future.

When considering whether to undertake a self collection, both litigants and counsel should consult the two checklists above to make an informed decision on the matter. The risks of failing to adhere to proper practice are simply too great to be treated lightly.