

E-DISCOVERY ALERT

MARCH 2010

E-Discovery Obligations Revisited: Zubulake, Six Years Later

“Conduct is either acceptable or unacceptable. Once it is unacceptable the only question is how bad is the conduct.”
Pension Committee Opinion.

Providing the “criteria a court should review in evaluating discovery conduct,” Judge Shira A. Scheindlin revisits the issues surrounding e-discovery, spoliation and sanctions six years after her final landmark decision in the *Zubulake* matters (*See Zubulake v. UBS Warburg*, 229 F.R.D. 422 (S.D.N.Y. 2004)). Finding that discovery efforts of parties in litigation remain flawed despite the fact that litigants are expected to take the necessary steps to ensure relevant documents are preserved, Judge Scheindlin provides clear guidance so that corporate litigants may be better equipped to meet their e-discovery obligations.

In *The Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities LLC, et al.*, 2010 U.S. Dist. LEXIS 4546 (S.D.N.Y. Jan. 15, 2010), Judge Scheindlin provides a thorough and comprehensive overview of what it means to conduct e-discovery and how the Southern District of New York may deal with e-discovery abuses. Specifically, the Amended Opinion and Order address: (1) definitions of negligence, gross negligence and willfulness in the discovery context and what conduct falls

into each category; (2) issues of preservation and spoliations; (3) the interplay of the burden of proof and demonstrable prejudice; and (4) appropriate sanctions.

Gross Negligence

Notably, *Pension Committee* issues a strong warning against discovery abuses, providing the first true definition of “gross negligence” in the context of discovery misconduct:

After a discovery duty is well established, the failure to adhere to contemporary standards can be considered gross negligence. Thus, after the final relevant *Zubulake* opinion in July, 2004, the following failures support a finding of gross negligence, when the duty to preserve has attached: to issue a written litigation hold; to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of email or to preserve the records of former employees that are in a party’s possession, custody or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.

Id. at *32.

Specifically *Pension Committee* provides that the “failure to issue a written litigation hold constitutes gross negligence because that

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failure is likely to result in the destruction of relevant information.” *Id.* at *9. Relevance and prejudice may be presumed when a spoliating opponent acts in bad faith or in a grossly negligent manner. *Id.* at *19. Therefore, corporate litigants must heed the warnings of *Pension Committee* and know that the failure to issue a written litigation hold may be enough to warrant an adverse inference.

The *Pension Committee* Court reiterated the importance of preserving records of former employees that are in a party’s possession, custody or control, finding that failure to preserve such documents also supports a finding of gross negligence.

While each case must turn on its own individual facts, corporate litigants should be well advised of how the following acts **may** be defined by a court (and **will** be defined in the Southern District of New York):

- The intentional destruction of relevant records, either paper or electronic, after the duty to preserve has attached, is considered willful. *See id.* at *10.
- The failure to collect records – either paper or electronic – from key players constitutes gross negligence or willfulness, as does the destruction of e-mail or certain backup tapes after the duty to preserve has attached.
- The failure to obtain records from all employees, as opposed to the key players, likely constitutes negligence (as opposed to a higher degree of culpability).
- The failure to take all appropriate measures to preserve ESI likely falls into the negligence category.

- The failure to collect information from files of former employees that remain in a party’s possession, custody or control after the duty to preserve has attached is considered gross negligence.
- The failure to assess the accuracy and validity of selected search terms is considered negligence.

Interestingly, *Pension Committee* also recognizes the interplay between the burden of proof and its impact on the degree of prejudice which may be suffered by a party. In other words, if the evidence is gone, how is one to know if it was important or not? “Who then should bear the burden of establishing the relevance of evidence that can no longer be found?” *Id.* at *16. Moreover, the question remains as to “who should be required to prove that the absence of the missing material has caused prejudice to the innocent party. *Id.* The Court concludes that, not only must the innocent party show that the destroyed evidence would have been responsive to the document request, but, in addition, “the innocent party must also show that the evidence would have been helpful in providing its claims or defenses – *i.e.*, that the innocent party is prejudiced without that evidence. Proof of relevance does not necessarily equal proof of prejudice.” *Id.* at *18.

Rebutting the Presumption

In addition, *Pension Committee* provides further instruction for those instances where a presumption is made against the alleged spoliating party. Where the presumption is made that missing information is

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relevant, the offending party may rebut the presumption by demonstrating that the innocent party has not suffered prejudice. *Id.* at *22. Thus, the burden shifts to the offending party. “No matter what level of culpability is found, any presumption is rebuttable and the spoliating party should have the opportunity to demonstrate that the innocent party has not been prejudiced by the absence of the missing information.” *Id.* Specifically, the Court provides the following burden shifting test:

When the spoliating party’s conduct is sufficiently egregious to justify a court’s **imposition** of a presumption of relevance and prejudice, or when the spoliating party’s conduct warrants **permitting** the jury to make such a presumption, the burden then shifts to the spoliating party to rebut that presumption. The spoliating party can do so, for example, by demonstrating that the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party’s claims or defenses. If the spoliating party demonstrates to a court’s satisfaction that there could not have been any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required.

Id. at *23-24.

Backup Tapes

The Amended Opinion and Order in *Pension Committee* was amended to specifically provide guidance on the issue of preserving backup tapes. The Court clarified that there is no duty to preserve backup tapes unless

the tapes are the sole source of relevant information for the key players and the information is not obtainable from readily accessible sources. *See id.* at *58 n. 99. The Court stressed that “[w]hen accessible data satisfies the requirement to search for and produce relevant information, there is no need to save or search backup tapes.” *Id.* Thus, corporate litigants should take note that backup tapes should be preserved in those instances where active files of key players are no longer available.

Sanctions

While courts have broad discretion to impose appropriate remedies, *Pension Committee* provides a thoughtful analysis of sanctions in light of the harm done. Sanctions may include less severe penalties such as fines and cost shifting, to more severe penalties such as dismissal, preclusion, or the imposition of an adverse inference. *See id.* at *25. Extreme sanctions, however, are only appropriate in cases of intentional bad faith conduct. Examples of such conduct include findings of perjury, evidence tampering or intentional destruction of ESI (electronically stored information). *See id.* at *26. Corporate entities should note that the failure to issue a written litigation hold constitutes **gross negligence** and sanctions include an adverse inference against the spoliating party that the information destroyed was both relevant and prejudicial. *See id.* at *19.

With respect to adverse inference instructions, *Pension Committee* explains how this type of sanction can take on several

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forms, where the more egregious conduct warrants a harsh adverse inference instruction:

In its most harsh form, when a spoliating party has acted willfully or in bad faith, a jury can be instructed that certain facts are deemed admitted and must be accepted as true. At the next level, when a spoliating party has acted willfully or recklessly, a court may impose a mandatory presumption. Even a mandatory **presumption**, however, is considered to be rebuttable. The least harsh instruction **permits** (but does not require) a jury to **presume** that the lost evidence is both relevant and favorable to the innocent party. If it makes this presumption, the spoliating party's rebuttal evidence must then be considered by the jury, which must then decide whether to draw an adverse inference against the spoliating party. This sanction still benefits the innocent party in that it allows the jury to consider both the misconduct of the spoliating party as well as proof of prejudice to the innocent party. Such a charge should be termed a "spoliation charge" to distinguish it from a charge where the a jury is **directed** to presume, albeit still subject to rebuttal, that the missing evidence would have been favorable to the innocent party, and from a charge where the jury is **directed** to deem certain facts admitted.

See id. at *28 – *30 (citations omitted).

Regarding monetary sanctions, the Court determined they are appropriate to "punish the offending party for its actions [and] to deter the litigant's conduct, sending the message that egregious conduct will not be tolerated." *Id.* at *31. (internal citations omitted).

Conclusion

While each case will turn on its own facts and the efforts, as well as failures of the parties, *Pension Committee* provides a clear message to both litigants and their counsel with regard to e-discovery, spoliation and sanctions. Every corporate litigant, whether plaintiff or defendant, should have an awareness of its obligations regarding ESI and the production of same. At a minimum, corporate entities either contemplating litigation or being sued must send out a written litigation hold notice. Failing to do so may result in a finding of gross negligence, and place a litigant "well on the path to sanctions." ■

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