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PERSPECTIVE

E-Discovery Principles Revisited

The new year is still in its infancy, but it has already yielded a significant new e-discovery opinion from Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York that picks up where her famed line of *Zubulake* opinions left off. Subtitled by Judge Scheindlin "*Zubulake* Revisited: Six Years Later," the new opinion addresses a series of e-discovery hot topics — document preservation, collection, spoliation and sanctions — and provides guidance on each. See *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, No. 05 Civ. 9016 (SAS), 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).

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The *Zubulake* opinions — issued during the period of 2004 through 2007 — are credited with developing key e-discovery principles. Referring back to those opinions, Judge Scheindlin writes in Pension Committee that "[o]nce again, I have been compelled to closely review the discovery efforts of parties in a litigation, and once again have found that those efforts were flawed. As famously noted, 'those who cannot remember the past are condemned to repeat it.'"

Judge Scheindlin ruled that 13 of the plaintiffs in Pension Committee were either negligent or grossly negligent for failing to preserve and produce documents and, in some cases, for submitting false and misleading declarations regarding their document collection and preservation efforts. Among other things, Judge Scheindlin found that the sanctioned plaintiffs failed to issue timely written litigation holds and were "careless" and "indifferent" in their document collection efforts, and that consequently "there can be little doubt that some documents were lost or destroyed." Judge Scheindlin imposed adverse inference sanctions, monetary sanctions for reasonable costs including attorneys' fees (in an amount not specified) and left open the possibility of further discovery of backup tapes that had not been searched.

The self-described "long and complicated" opinion is full of points of interest related to the factors that courts should consider in determining whether to impose discovery sanctions and what sanctions are appropriate for various levels of culpability. Here are some of the key lessons learned (and reinforced) in this opinion:

First and foremost, Judge Scheindlin's analysis of the flaws in plaintiffs' litigation hold notice and preservation efforts is one of the more notable aspects of the opinion — "Courts cannot and do not expect that any party can meet a standard of perfection. Nonetheless, the courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party."

The idea that is perhaps most likely to be pulled and parroted from this case is its support for the notion that failure to issue a written litigation hold notice is, in and of itself, grossly negligent. Judge Scheindlin asserted that the failure to issue such a notice in a timely manner can be presumed to have resulted in the destruction of relevant documents. Judge Scheindlin held that counsel's initial instructions to their clients — via telephone and e-mail — did not meet the requirements of a proper litigation hold notice.

According to the opinion, counsel failed to instruct employees to preserve all relevant records and did not create a mechanism for collecting the documents. Rather, "the directive places total reliance on the employee to search and select what that employee believed to be responsive records without any supervision from [c]ounsel." While not every employee necessarily requires hands-on supervision by an attorney, there is a need for attorney oversight of the process (including the ability to review, sample, or spot-check the collection efforts). The court observed that "[w]hile litigants are not required to execute document productions with absolute precision, at a minimum they must act diligently and search thoroughly at the time they reasonably anticipate litigation."

Although plaintiffs later issued a proper litigation hold notice, they did so years

after the preservation obligation was triggered, and Judge Scheindlin concluded that relevant documents had been lost or destroyed before its implementation.

Second, Judge Scheindlin focused her attention on defining culpability in the discovery context, given that the severity of sanctions to be applied for discovery failures hinges on the culpability of the party accused of the misconduct. Judge Scheindlin described a "continuum" of culpability in discovery conduct, ranging from innocence at one end, and progressing through negligence, gross negligence and willfulness. While these levels of culpability are routinely defined in treatises and case law in the context of tortious conduct, Judge Scheindlin found no such clear definitions in the context of discovery misconduct. She therefore posited the following definitions and examples, while noting that "[e]ach case will turn on its own facts and the varieties of efforts and failures is infinite." These definitions and examples, however, provide informative benchmarks for parties and their counsel to bear in mind:

Negligence: Judge Scheindlin posited that negligence in the discovery context is a failure to conform to standards of "what a party must do to meet its obligation to participate meaningfully and fairly in the discovery phase of a judicial proceeding," without an intent to violate the standard. Examples of negligence may include failure to preserve evidence resulting in the loss or destruction of relevant information (although such failure may also be grossly negligent or willful under the circumstances); failure to obtain records from all employees, as opposed to the key players; failure to take all appropriate measures to preserve electronically stored information; and failure to assess the accuracy and validity of selected search terms.

Gross Negligence: Judge Scheindlin described the standard definition of gross negligence as a "failure to exercise even that care which a careless person would use." It is "something more than negligence and differs from ordinary negligence only in degree and not in kind." Examples of gross negligence may include failure to issue a written litigation hold; failure to collect records — either paper or electronic — from key players (although that may also be willful under certain circumstances); failure to collect information from the files of former employees that remain in a party's possession, custody or control after the duty to preserve has attached; failure to identify the key players and to ensure that their electronic and paper records are preserved; failure to cease the deletion of e-mail or to preserve the records of former employees that are in a party's possession, custody, or control; and failure to preserve backup tapes when they are the sole source of relevant information or relate to key players, if the relevant information from those players is not obtainable from readily accessible sources.

Willfulness: Judge Scheindlin described willfulness as involving "intentional or reckless conduct that is so unreasonable that harm is highly likely to occur." A willful party acts "in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." Examples of willfulness may include the intentional destruction of relevant records, either paper or electronic, after the duty to preserve has attached; and failure to collect records — either paper or electronic — from key players (although that may also be grossly negligent under certain circumstances).

Third, Judge Scheindlin analyzed the range of available sanctions and reached a result that showed that conducting discovery in an "ignorant and indifferent fashion" is never in style. Judge Scheindlin acknowledged that selecting the appropriate sanction is a "delicate matter" that is time intensive for the court. Courts are required to "impose the least harsh sanction that can provide an adequate remedy." The range of options, from least to most harsh, include further discovery, cost-shifting, fines, special jury instructions, preclusion, and the entry of default judgment or dismissal (terminating sanctions).

Judge Scheindlin considered and rejected dismissal of the action — "the most extreme sanction" — because dismissal is only justified in "the most egregious cases, such as where a party has engaged in perjury, tampering with evidence, or intentionally destroying evidence by burning, shredding, or wiping out computer hard drives."

In Pension Committee, Judge Scheindlin found that an adverse inference and monetary sanctions were appropriate because the parties had conducted discovery in an "ignorant and indifferent fashion" constituting gross negligence. The court evaluated the facts and concluded that "[t]he paucity of records produced by some plaintiffs and the admitted failure to preserve some records or search at all for others by all plaintiffs leads inexorably to the conclusion that relevant records have been lost or destroyed."

Finally, Judge Scheindlin may be well known for her e-discovery opinions, but that does not mean that she — or any other judge - is eager to hear discovery motions. As Judge Scheindlin notes in the opinion, sanctions motions are "very, very time consuming, distracting and expensive for the parties and the court" and that litigants are increasingly seeking them is "not a good thing."

In sum, the Pension Committee case provides a thoughtful analysis of key e-discovery concepts and principles that should be of interest to both inside and outside counsel. As the case involved claims for approximately $550 million, the sanctions applied are a reminder to parties and their counsel of how imperative proper preservation and collection efforts are in the discovery process.