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GUEST COMMENTARY

On January 15, 2010, Judge Shira Scheindlin, author of the famous series of e-discovery opinions in *Zubulake v. UBS Warburg*, which highlighted the need for counsel and their clients to properly preserve relevant information or risk sanctions for spoliation, issued an 85-page amended opinion that is certain to be another ''must-read'' on e-discovery. Judge Scheindlin signalled the importance of *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC* by doing something judges rarely do, giving it a title—''*Zubulake* Revisited: Six Years Later.'' Kevin F. Brady, partner at Connolly Bove Lodge & Hutz LLP provides analysis.

Pension Committee: Zubulake Through a Looking Glass?

By Kevin F. Brady

In some respects, *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, S.D. N.Y., No. 05 Civ 9010 (SAS), 1/15/10 is a mirror-image of *Zubulake* in that *Pension Committee* analyzes the duty to properly preserve relevant information from the perspective of the *plaintiff*.

In *Pension Committee,* plaintiffs not only failed to institute written litigation holds in a timely manner, they also engaged in, ''careless and indifferent collection efforts after the duty to preserve arose.'' The end result was that relevant ESI had been lost.

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Ultimately, Judge Scheindlin ordered an adverse inference instruction as well as costs against six plaintiffs who were grossly negligent in dealing with their preservation obligations. She sanctioned seven other plaintiffs who were merely negligent in meeting their preservation obligations with only costs.

Warnings from the Bench. Judge Scheindlin was very quick to set the stage for the post-*Zubulake* expectations of the court by stating:

> 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. As discussed six years ago in the *Zubulake* opinions, when this does not happen, the integrity of the judicial process is harmed and the courts are required to fashion a remedy.

Judge Scheindlin also felt compelled to reiterate what should be axiomatic by now—but apparently is not—that there is a common law duty to preserve and it must be followed. She stated: ''[b]y 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.''

And if that weren't enough of an admonition, she cited a quotation that stands as a stern warning for those litigators and parties who will appear before her: ''[t]hose who cannot remember the past are condemned to repeat it.''

Background. In February, 2004, a group of 96 investors brought an action under the Private Securities Litigation Reform Act to recover $550 million in losses from the liquidation of two British Virgin Islands-based hedge funds. Discovery was stayed from 2004 to 2007 while motions to dismiss were being briefed and decided. There were no discussions about discovery during this period.

When discovery commenced, and defendants received the plaintiffs' document productions, defendants noticed gaps in them. Defendants ultimately alleged that 13 of the 96 plaintiffs had failed to properly preserve and produce information/documents, including electronically stored information (''ESI''), and they sought a number of sanctions including dismissal of the Complaint.

Four-Pronged Analytical Framework. The issue before the court was whether the plaintiffs' conduct warranted sanctions for the spoliation of evidence. Judge Scheindlin started with a four-pronged analysis.

The first prong had to do with the spoliating party's level of culpability on a continuum from acceptable, negligent, grossly negligent, to willful.

The second factor involves the duty to preserve and the spoliation of evidence. It is clear that the preservation trigger mandates that a party also suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents. The failure to adequately implement this process and the resulting spoliation of evidence may cause a court to impose sanctions because of its obligation to ensure that the judicial process is not abused.

The third, critically important prong focuses on which party bears the burden of proving that evidence has been lost or destroyed and the consequences resulting from that loss.

Finally, the fourth prong involves the appropriate remedy as a result of the spoliation.

Defining Levels of Culpability. For the first time in the context of electronic discovery, Judge Scheindlin analyzed in great detail ways to define the levels of culpability—negligence, gross negligence, and willfulness—describing them as part of a continuum separating conduct that is acceptable from conduct that is unacceptable.

Practice Pointers

1) The importance of an early meet and confer. The controversy of *Pension Committee* might have been eliminated if the parties had a meet and confer around the time the case was filed and reached an agreement on certain issues such as of scope of preservation (including of backup tapes), the identity of key players, form of production, etc.

2) Have a defensible preservation plan in place and stick to it. It is very important to recognize the factual framework of this case and in particular what happened and what did not happen. The litigation started in 2004 and because of a stay in the case, no discovery of electronic information occurred for years. Timing is very important. When the duty to preserve is triggered, it is critically important that a litigation hold be implemented irrespective of the discovery schedule. Moreover, there must be ongoing monitoring and updating of the scope of the hold with documentation to support the process. Finally, as in most cases, the problems the plaintiffs encountered by failing to act in 2004 are being evaluated and measured six years later with bright lights, a full record, and twenty-twenty judicial hindsight.

3) Be proactive and consider using all of the discovery tools in the toolbox. There is no mention in this opinion of any discussions between the parties about the concepts of ''proportionality'' or the *Cooperation Proclamation* currently being championed by the Sedona Conference®. Those are just two more examples of opportunities to significantly reduce the likelihood if not avoid altogether the problems highlighted in this decision.

4) Think broadly for preservation. Judge Scheindlin highlighted the problems associated with taking a narrow view of a preservation obligation. It is important early on to identify ''key players,'' ''key custodians'' and their assistants, and prioritize those individuals for preservation and collection. Furthermore, this case shows that it is important to follow up and identify *all* current and former employees who had any connection to the subject matter of the litigation and evaluate whether their information should be preserved and collected.

5) Backup tapes are traps for the unwary. It is critically important to determine very early on whether accessible data satisfies your obligation to search for and produce relevant information. If it does then there is no need to preserve or search all backup tapes. However, if accessible data does not satisfy your discovery obligation under Rule 26(b)(2)(B) or its equivalent, and backup tapes are the *sole* source of relevant information, you might have to segregate and preserve those backup tapes.

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Unfortunately for those practitioners looking for a bright line test, there is none here because, as Judge Scheindlin pointed out, the conduct in question cannot be measured with exactitude and might be viewed differently by a different judge in a different jurisdiction. She did, however, say that it is well established that *negligence* involves unreasonable conduct in that it creates a risk of harm to others, but *willfulness* involves intentional or reckless conduct that is so unreasonable that harm is highly likely to occur. Because of space limitations, please refer to the decision for the definitions for each category.

Judge Scheindlin did set out examples of the following ''failures'' and their corresponding levels of culpability:

- the failure to issue a written litigation hold subsequent to *Zubulake V's* issuance (gross negligence);
- the failure to collect information from key players (gross negligence or willfulness);
- the failure to preserve e-mail or backup tapes after the duty to preserve has attached (gross negligence or willfulness);
- the failure to obtain records from *all* employees (some of whom might have had only a passing encounter with the issues in the litigation), as opposed to key players (negligence);
- the failure to take all appropriate measures to preserve ESI (negligence at a minimum);
- the 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 (gross negligence); and
- the failure to assess the accuracy and validity of selected search terms (negligence).

Who Bears the Burden of Proof? Judge Scheindlin noted, as a general matter, that it is almost impossible to know the extent of the prejudice suffered by a party as a result of electronic information being permanently lost due to another party's conduct. Consequently, the tipping point in the analysis becomes identifying who has the burden of establishing the relevance of evidence that can no longer be found and who should be required to prove that the absence of the missing material has caused prejudice to the innocent party.

It is not sufficient for the innocent party to show that the destroyed evidence would have been responsive to a document request.The innocent party must also show that the evidence would have been helpful in proving its claims or defenses, i.e., that the innocent party is prejudiced without that evidence.

Judge Scheindlin also discussed how the burden of proof question differs depending on the severity of the sanction. For less severe sanctions (such as fines or cost-shifting) the inquiry should, ''focus more on the conduct of the spoliating party than on whether documents were lost, and, if so, whether those documents were relevant and resulted in prejudice to the innocent party.''

For more severe sanctions (such as dismissal, preclusion, or the imposition of an adverse inference), ''the court must consider, in addition to the conduct of the spoliating party, whether any missing evidence was relevant and whether the innocent party has suffered prejudice as a result of the loss of evidence.''

An Innovative Approach: Burden Shifting. Judge Scheindlin offered an interesting and innovative solution to these difficult issues. For a situation where the spoliating party was merely negligent, she suggested that the innocent party should bear the burden of proving both relevance and prejudice in order to justify the imposition of a severe sanction. This could be done by presenting extrinsic evidence tending to show that the destroyed evidence would have been favorable to its case.

However, for a situation where the spoliating party acts in a grossly negligent manner or in bad faith, she posited that relevance and prejudice should be presumed.

Judge Scheindlin also set out a new 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, the burden would shift to the spoliating party to rebut that presumption, which it can do 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 rebuts the presumption, then no severe sanction would be warranted but lesser sanctions might still be required.

Preservation of Backup Tapes. In an area that causes great angst to practitioners and their clients—preservation of backup tapes—Judge Scheindlin provided some more guidance. She explained that as a general rule under Fed. R. Civ. P. 26(b)(2)(B), when accessible data satisfies the producing party's obligation to search for and produce relevant information, there is no need to preserve or search backup tapes because there is no requirement that *all* backup tapes automatically be preserved and searched. However, as Judge Scheindlin noted, if there are backup tapes that are ''the *sole* source of relevant information (e.g., the active files of key players are no longer available), then those backup tapes should be segregated and preserved.''

Moreover, if it can be shown that relevant material existed but was not produced or such material *should have existed* but was not produced, backup tapes should be searched.

Conclusion. This is a case where plaintiffs failed to institute written litigation holds in a timely manner and ESI was lost. As in many cases where ESI is lost or destroyed, the true tipping point of the litigation as to who bears the burden of proof could hang in the balance. Given the detailed explanation and analysis by Judge Scheindlin in her opinion in *Pension Committee*, the decision has provided significant guidance for practitioners and clients (and other judges) who are facing similar challenges to compliance with the rules regarding e-discovery.