BRACE YOURSELF: E-DISCOVERY'S LATEST BOMBSHELL

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The Evolving Law of E-Discovery: Understanding Judge Scheindlin's Recent Decision in *Pension Committee*

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The requirements for the discovery of electronically stored information (ESI) are constantly developing. In 2003–2004, Judge Shira Scheindlin of the United States District Court for the Southern District of New York issued a series of opinions in *Zubulake v. UBS Warburg LLC* that established the scope of ESI subject to discovery and the extent of a party's duty to preserve ESI once litigation is reasonably anticipated. Further, recent amendments to the Federal Rules of Civil Procedure address the scope and process of e-discovery. However, neither *Zubulake* nor the amendments to the Federal Rules provide much detail regarding appropriate sanctions for a party's spoliation of ESI. Judge Scheindlin's recent decision in *Pension Committee of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010) addresses this issue.

Judge Scheindlin's Opening Remarks

At the outset of her opinion, Judge Scheindlin acknowledges that the proliferation of ESI has made discovery in certain cases "increasingly complex and expensive" such that courts "cannot . . . expect that any party can meet a standard of perfection." However, she also states that 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." When parties fall short of this expectation, sanctions may be appropriate.

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The Spectrum of Inappropriate Conduct

Judge Scheindlin then evaluates which sanctions are appropriate for different types of violations. She states that the appropriate sanction for spoliation will vary depending on the facts of the case. Judge Scheindlin then lays out a continuum of unacceptable conduct with negligence on one end, willfulness on the other, and gross negligence in the middle. Conduct falling on the willfulness end of the spectrum warrants the most severe sanctions, while less severe sanctions are appropriate for conduct falling on the negligence end. The opinion makes clear that any "failure to preserve evidence resulting in the loss or destruction of relevant information" is at the very least negligent. If the evidence is intentionally destroyed, the conduct is willful. Judge Scheindlin also placed specific actions on this continuum:

- Failure to issue a written litigation hold is gross negligence.

- Failure to collect ESI from key players constitutes gross negligence or willfulness depending on the circumstances.

- Destruction of e-mail or certain backup tapes (those that are the sole source of relevant information) after the duty to preserve has attached constitutes gross negligence or willfulness depending on the circumstances.

- Failure to obtain records from employees who only had a "passing encounter" with the issues in the litigation constitutes negligence.

Ultimately, however, where specific acts of misconduct fall on the continuum will turn on the facts of the case.

Burdens of Proof

Judge Scheindlin then turned to the burdens of proof that must be met before sanctions should be issued. For less severe sanctions like fines and cost-shifting, a court should focus primarily on the misconduct of the spoliating party. That is, the misconduct in itself warrants the sanctions. However, imposition of more severe sanctions like dismissal, preclusion, or the imposition of an adverse inference should turn on whether the spoliated evidence was relevant and whether the spoliation has prejudiced the innocent party. Relevance and prejudice, the Court found, cannot be established by merely showing that the spoliated evidence would have been responsive to a discovery demand. Instead, an innocent party establishes relevance and prejudice by showing that the missing evidence "would have been helpful to

proving its claims or defenses." In summary, before dismissal, preclusion, or an adverse inference become possible sanctions, the innocent party must establish that the spoliating party: "(1) had control over the evidence and an obligation to preserve it at the time of destruction or loss; (2) acted with a culpable state of mind [negligence, gross negligence, or willfulness] upon destroying or losing the evidence; and that (3) the missing evidence is relevant to the innocent party's claim or defense."

Judge Scheindlin next tackled which party should have the burden of establishing relevance and prejudice. In making this assessment, Scheindlin differentiated her burden placing based on the culpable state of mind in question.

- When the spoliation was done willfully, a court should presume relevance and prejudice.
- When the spoliation was done in a grossly negligent manner, a court may presume relevance and prejudice.
- When the spoliation was done in a negligent manner, a court should not presume relevance and prejudice. The innocent party must establish the relevance of the spoliated evidence and the prejudice such spoliation has caused it.

Regardless of whether or not relevance and prejudice is presumed, the spoliating party must have an opportunity to establish that the innocent party has not been prejudiced by the spoliation. Therefore, when the spoliation is done willfully, the burden is on the spoliating party to establish lack of relevance and/or prejudice in order to avoid dismissal, preclusion, or an adverse inference. Whereas, when the spoliation is done negligently, the burden is on the innocent party to establish relevance and prejudice for the spoliating party to be sanctioned with dismissal, preclusion, or an adverse inference. If the spoliation is done in a grossly negligent manner, where the burden is placed will be within the court's discretion.

Appropriate Sanctions

The appropriate sanction for spoliation is always within the court's discretion to be determined on a case-by-case basis. Judge Scheindlin, therefore, addressed the factors that should be considered when deciding on appropriate sanctions for spoliation. Appropriate sanctions should "(1) deter the parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position it would have been in absent the

wrongful destruction of evidence by the opposing party." Furthermore, Judge Scheindlin noted that "a court should always impose the least harsh remedy that can provide an adequate remedy" with the choices being (from least harsh to most harsh) further discovery, cost-shifting, fines, special jury instructions, preclusion, and dismissal. Thus, dismissal is only appropriate 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."

Conclusion

Judge Scheindlin's opinion in *Pension Committee* spans over eighty pages, and while it provides some guidance on when sanctions should be handed down and what those sanctions should be, there are still many questions that need to be answered regarding the evolving law of e-discovery. Following *Pension Committee*, the biggest question may be whether these rules can be practically applied without rendering it impossible for large corporations, who produce thousands of documents everyday, to ever avoid spoliation sanctions. The resolution of this question, however, will have to wait for another day.

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Joseph Ortego has approximately twenty-nine years of litigation and business experience. Mr. Ortego has tried over 100 cases to verdict for major corporations ranging from financial institutions to automotive and chemical companies, including Fortune 100 commercial, environmental, and toxic tort cases. He focuses in the areas of aggregated and class actions, commercial disputes, toxic tort, environmental, employment, intellectual property, and product liability matters. He serves as national trial counsel for a number of clients who desire a consistent approach to class action and aggregate litigation matters filed in multiple states, as well as representing small, mid-size, and publicly traded companies.

A frequent author and speaker both domestically and internationally, as well as a legal consultant on network television, Mr. Ortego serves as a professor of trial techniques at the ABA TIPS National Trial Academy, a diverse program combining the latest technology with the country's top trial lawyers as faculty members and personal mentors, along with Supreme Court justices, professors, and trial judges from state and federal courts. He has authored numerous publications and serves on the editorial board of *The Practical Litigator*, and is a member of the American Law Institute, the American Bar Foundation, and the American Board of Trial Advocates. Mr. Ortego has earned the Martindale-Hubbell Law Directory's AV rating, the Directory's highest accolade, and has earned a designation in New York SuperLawyers for products liability and class action administration.

Mr. Ortego also served as a New York County (Manhattan) assistant district attorney from 1979 to 1983. Serving in the Felony Trial Bureau and Homicide units, he investigated and tried complex and high-profile felony and homicide cases to verdict.

Publications

"Coordination of Mass Tort Proceedings," The Practical Litigator, March 2008, Joseph J. Ortego, James W. Weller, and Aaron S. Halpern

"The Lawyer's Evolving Role As … IT Specialist?" The Practical Litigator, January 2008, Joseph J. Ortego, Scott P. Eisenberg

"Coordination of Mass Torts in State Court," The New York Law Journal, September 10, 2007, Joseph J. Ortego, James W. Weller

"Putting Plaintiff to the Test: The Crashworthiness Doctrine," Law Journal Newsletters, Product Liability, Law & Strategy, Volume 24, Number 11, May 2006, Joseph J. Ortego, James W. Weller, Santo Borruso