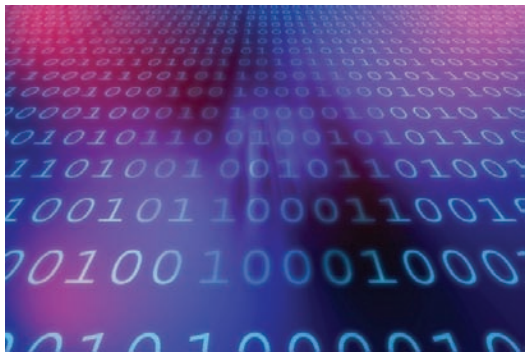
Finding Guidance on Electronic Discovery from the Court

By Greg Kaufman and Caroline Crenshaw

Despite the ubiquity of electronic discovery issues since the inception of the electronic age, courts historically have provided counsel with little guidance regarding discovery duties and sanctions upon lapse of those duties. Recently, however, a court with substantial experience in dealing with electronic discovery provided the clearest guidance yet regarding sanctions for the spoliation of electronically stored information.

In 2003, Judge Shira Scheindlin in the Southern District of New York established the duty to preserve electronic documents, explained what documents must be retained and broached possible remedies for violations of retention obligations in a series of five *Zubulake v. UBS Warburg* opinions.[1] Still, Judge Scheindlin did not elaborate on spoliation until January 2010 when she expanded on the levels of culpability for specific spoliation acts and corresponding sanctions in *The Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.*[2] The principles of *Pension Committee* have been applied in at least one other case and, like the *Zubulake* decision, will gain the attention of other courts throughout the country. This article summarizes the spoliation standards established in *Zubulake IV*, reviews the framework delineated in *Pension Committee* and provides an example of how *Pension Committee* has been applied.



Zubulake IV Revisited

Zubulake IV, a preeminent case on electronic discovery, defined spoliation as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation" (*Zubulake*, 216).[3] *Zubulake IV* made clear that "[t]he duty to preserve attache[s] at the time that litigation was reasonably anticipated" (*Zubulake*, 217). In sum, *Zubulake IV* held that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents" (*Zubulake*, 217). Failure to adequately search for and preserve relevant documents, both paper and electronic, could result in sanctions for spoliation (*Zubulake*, 212).

Sanctions for spoliation, Judge Scheindlin announced, range from cost shifting to adverse inference jury instructions to dismissing the case in its entirety. Severe sanctions are reserved for the most clearly relevant evidence destroyed with a "culpable state of mind." However, *Zubulake IV* provided limited guidance on the concept of a culpable state of mind.

The *Pension Committee* Case

Pension Committee, a case "where plaintiffs failed to timely institute written litigation holds and engaged in careless and indifferent collection efforts after the duty to preserve arose" (*Pension*, *5), discussed the various levels of intent associated with spoliation. According to *Pension Committee*, culpability occurs along a continuum, and the level of intent must be determined by the trial judge (*Pension*, *6).[4] Nevertheless, Judge Scheindlin provided specific examples differentiating negligence, gross negligence and willfulness, and suggested sanctions for each.

Judge Scheindlin recommended that lesser sanctions, fines and cost shifting, may be appropriate based on the conduct of the spoliating party rather than on the relevance of the lost documents and the subsequent prejudice to the innocent party (*Pension*, *14). Before imposing "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" (*Pension*, *14).

Negligence

Judge Scheindlin found the following to be examples of, at the very least, negligent behavior:

- Failure to preserve evidence, once the duty had arisen, resulting in any loss or destruction of relevant information.
- The loss or destruction of evidence due to a failure to collect evidence or due to a sloppy review.
- Failure to obtain records from any and all employees involved with the issues in the litigation or anticipated litigation.
- Failure to take appropriate measures to preserve electronically stored information.
- Failure to assess the accuracy and validity of selected search terms when collecting and reviewing documents (*Pension*, *8–11, 23).

Judge Scheindlin emphasized that "[f]ailure to conform to this standard is negligence even if it results from a pure heart and an empty head" and could result in sanctions (*Pension*, *8). A less severe sanction, such as a monetary sanction, "serves the remedial purpose of compensating the movant for the reasonable costs it incurred in bringing a motion for sanctions" when the spoliation is negligent (*Pension*, *23).[5] When the spoliating party is merely negligent, the innocent party also has the burden of proving that the lost information was relevant and the loss was prejudicial.

Gross Negligence

When the spoliation is a result of gross negligence or willfulness, the moving party has a lower threshold of proving adverse consequences. Gross negligence "differs from ordinary negligence only in degree, and not in kind" (*Pension*, *8),[6] and can be defined as "a failure to exercise even that care which a careless person would use" (*Pension*, *8).[7] Examples of gross negligence include:

- Failure to issue a *written* litigation hold after the duty to preserve has attached.
- Failure to identify and collect records from key players.
- 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 suspend routine destruction of records once the duty to preserve has attached.
- Failure to prevent destruction of e-mail or backup tapes after the duty to preserve has attached.
- Delegating search and collection efforts to employees without experience managing data and without supervision of outside counsel.
- Relying totally on the search and selection process of the employee for relevant and responsive records without supervision from outside counsel.
- Simply sending an e-mail asking employees to search through and provide their own relevant documents.
- Failure to locate and peruse documents that were off site or on personal computers (*Pension*, *24, 42–62).

Depending on the individual facts and circumstances of each case, the above behavior could also be deemed willful. Sanctions for gross negligence can range from lesser, such as monetary, to more severe, such as adverse inferences. For gross negligence, jury instructions can *permit but not require* a jury to presume that the lost evidence is both relevant and favorable to the innocent party. This "spoliation charge" is less severe than when the jury is directed to presume that the lost or destroyed evidence would be favorable to the innocent party, which could be an instruction in a willful spoliation case (*Pension*, *23). *Pension Committee* noted that, although many other courts "presume relevance where there is a finding of gross negligence, application of the presumption is not required" (*Pension*, *15).

Willful, Wanton and Reckless

At the most extreme end of the continuum, "*willfulness* involves intentional or reckless conduct that is so unreasonable that harm is highly likely to occur" (*Pension*, *7). An example of such behavior would be "the intentional destruction of relevant records, either paper or electronic, after the duty to preserve has attached" (*Pension*, *10). Possible sanctions for willful conduct include:

- A jury instruction that "[r]elevance and prejudice may be presumed when the spoliating party acted in bad faith…." (*Pension*, *15). The spoliating party can always rebut the presumption by proving there was no prejudice through a showing that the evidence was not relevant or was duplicative of what the opposing party already had.
- Dismissal, "justified in only 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" (*Pension*, *20).
- Jury instructions that "certain facts are deemed admitted and must be accepted as true" (*Pension*, *21).[8]

Pension Committee Conclusions

Despite the guidelines provided in *Pension Committee*, Judge Scheindlin cautioned that "[a] Court has a 'gut reaction' based on years of experience as to whether a litigant has complied with its discovery obligations and how hard it worked to comply" and that "parties need to anticipate and undertake document preservation with the most serious and thorough care, if for no other reason than to avoid the detour of sanctions" (*Pension*, *25). After methodically reviewing the actions of each plaintiff, Judge Scheindlin found that some acted negligently and others acted with gross negligence. All of these parties, however, failed to "act diligently and search thoroughly at the time they reasonably anticipate[d] litigation" (*Pension*, *84–85). Consequently, all plaintiffs were ordered to pay monetary sanctions, including reasonable costs and attorneys' fees. Judge Scheindlin also issued an adverse jury instruction against those plaintiffs found to have acted with gross negligence.

Pension Committee Applied

Judge Lee Rosenthal in the Southern District of Texas used the framework of *Pension Committee* in *Rimkus Consulting Group, Inc. v. Cammarata* indicating that *Pension Committee* will be relied upon in jurisdictions other than just Judge Scheindlin's courtroom.[9] Like Judge Scheindlin, Judge Rosenthal found that culpability and prejudice exist on a continuum. Unlike Judge Scheindlin, Judge Rosenthal specifically limited the most severe sanctions—granting default judgment, striking pleadings or giving an adverse

Five Common Electronic Discovery Mistakes to Avoid

By Jeff Kirksey

1. *Improperly Budgeting Electronic Discovery Costs*. It is easy to overlook steps and associated costs when dealing with electronic discovery. Engaging a qualified vendor or litigation support analyst early in the process can be beneficial for budgeting costs.
2. *Missing Production Deadlines*. Certain production formats take longer than others to process. For example, converting to TIFF and branding can take multiples of the time that exporting native files can take. Understand the implications of and agree on a production format early so that you can work with your vendor or litigation support analyst to ensure that your review schedule will meet your deadlines. If possible, allocate time for dealing with exceptions and glitches.
3. *Failing to Consider Data Collection Options*. Self-collection of data is tempting. After all, who knows your clients' systems better than they do? However, even the simplest mistakes can invite scrutiny. The cost of expert third-party collection may be more expensive upfront but can be worth the time and effort saved down the road when dealing with regulators, litigants and judges.
4. *Comparing Vendor Pricing (Apples to Oranges)*. Do not hesitate to demand pricing models that work for your project. There is enough competition in the market to encourage vendors to offer pricing models that include greater degrees of price certainty.
5. *Pressing the Start Button on a Review Too Early*. Document reviews often begin with great energy and haste but without appropriate attention to planning. Understanding the data and planning for its review can result in less data to review, saving time and money in the end.

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inference instruction—to cases involving bad faith and prejudice (*Rimkus*, *7, 30). Ruling in *Rimkus* that the defendants acted in bad faith, Judge Rosenthal balanced the relevance of the documents with the prejudice Rimkus suffered. Judge Rosenthal found that

- Rimkus was able to obtain a significant amount of evidence despite the spoliation;
- Defendants did produce numerous relevant documents; and
- Belatedly, defendants presented other responsive, relevant documents.

The lack of irreparable prejudice made dismissal or default judgment inappropriate (*Rimkus*, *32). Rather, Judge Rosenthal issued an adverse inference instruction and awarded fees. The court found that the defendants had a duty to preserve documents and defendants intentionally deleted e-mails that were relevant and favorable to Rimkus.

The clarity of the guidance articulated in *Pension Committee* makes it likely that it will become the standard for evaluating claims of spoliation.

The court analyzed the facts in *Rimkus* and applied the law within the basic framework of both *Zubulake IV* and *Pension Committee*. The fact that the ultimate sanctions may have varied from Judge Scheindlin's guidance does not demonstrate a fundamental disagreement with Judge Scheindlin. Instead, as Judge Scheindlin stated, determining where conduct and sanctions fall on the continuum will remain a "gut" decision made by the judge hearing the dispute.

As of early 2010, *Zubulake IV* has been cited 1,686 times,[10] and its persuasive value is undeniable. The clarity of the guidance articulated in *Pension Committee* makes it likely that it will become the standard for evaluating claims of spoliation. As a result, litigants should be knowledgeable of the standard of care announced in that decision.

Endnotes

1. *Zubulake v. UBS Warbug LLC* (Zubulake IV), 220 F.R.D. 212, 220 (S.D.N.Y. 2003). Future references to this work are denoted by *Zubulake* and are cited in the text.
2. *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, No. 05 Civ. 9016, 2010 WL 184312 (S.D.N.Y. January 15, 2010). Future references to this work are denoted by *Pension* and are cited in the text.
3. Quoting *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).
4. Citing *Reilly v. Natwest Markets Grp. Inc.*, 181 F.3d 253, 267 (2d Cir. 1999).
5. Internal citations omitted.
6. Citing Prosser & Keeton on Torts § 34 at 212 (5th ed. 1984), quoting Restatement (Second) of Torts § 282. Internal citations omitted.
7. Citing Prosser & Keeton on Torts § 34 at 211–12 (5th ed. 1984), quoting Restatement (Second) of Torts § 282. Internal citations omitted.
8. Internal citations omitted.
9. *Rimkus Consulting Group, Inc. v. Cammarata*, 2010 WL 645253 (S.D.Tex. 2010). Future references to this work are denoted by *Rimkus* and are cited in the text.
10. Dany, Larry, et al. April 8, 2010. "*Zubulake* Revisited: Six Years Later." Address to Sutherland Asbill and Brennan LLP Attorneys.

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