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Kyle C. Bisceglie on

Zubulake Revisited: Six Years Later – Pension Committee and the Duty to Preserve in 2010 and Beyond

2010 Emerging Issues 5137

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Judge Scheindlin Identifies Gross Negligence in Failure to Preserve Relevant e-Discovery Evidence. Judge Scheindlin (author of the pivotal *Zubulake* decisions) issued another important, thorough and widely-discussed e-discovery opinion on January 11, 2010, amended and revised on January 15, 2010 and May 28, 2010: *Pension Committee of the University of Montreal Pension Plan et al. v. Banc of America Securities, LLC et al.*, [685 F. Supp. 2d 456](#) (S.D.N.Y. January 15, 2010) (“*Pension Committee*”). Therein she teaches us again that failure to comply with the duty to preserve and the resulting loss of evidence can have a dramatic impact on litigation. Significantly, the court found *inter alia* that, even without bad faith, the failure to issue a written litigation hold, preserve the documents of key players or preserve unique information on back-up tapes constitutes sanctionable gross negligence when evidence is lost.

January 15th and May 28th Revisions to *Pension Committee*. The January 15th amended opinion clarified ten or eleven points in the original decision, most notably with regard to backup tapes. Specifically, the court revised language and added footnote no. 99 to make clear that failure to preserve backup tapes constitutes gross negligence only if the backup tapes are the only source of relevant data from key players.

On May 28, 2010, the court revised a single sentence that had engendered some confusion, but fairly read in context of the entire decision does not change the implications of this case, prior *Zubulake* decisions or discovery obligations. The court struck and replaced this sentence on page 10, lines 7-10: “By contrast, the failure to obtain records from *all* employees (some of whom may have had only a passing encounter with the issues in the litigation), as opposed to key players, likely constitutes negligence as opposed to a higher degree of culpability.” The court substituted: “By contrast, the failure to obtain records from all those employees who had any involvement with the issues raised in the litigation or anticipated litigation, as opposed to key players, could constitute negligence.” This change reinforced both that (1) legal holds need only be issued to “key players” and not all employees and (2) that failure to obtain records from key players “could constitute negligence” rather than “likely constitutes negligence.” This revision does not substantively alter the court’s position in this case or prior *Zubulake* decisions but rather eliminates potentially misleading language about which commenta-

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tors have speculated. See, e.g., Boehning, H. Christopher and Toal J., Daniel, *In “Pension Committee,” Judge Revisits Zubulake*, N.Y.L.J. (February 2, 2010) (“Especially troubling is her suggestion that a failure to ‘obtain records from all employees ... is likely negligent.’ That would strike many experienced practitioners as an abrupt shift in the law. Discovery obligations require a search that is reasonable under the circumstances. Litigants thus have long been under a duty to search for responsive documents where they are reasonably likely to be found.”).

Through these revisions, the court apparently recognizes just how closely read these opinions are. Indeed, in a colloquy of lawyers with Judge Scheindlin on May 27, 2010 in Washington, D.C., an attorney asked about this very sentence, fretting it meant that the records of all employees had to be preserved! Judge Scheindlin’s response was that all of her opinions have been consistent that there is a duty to preserve only relevant evidence of key players and that this could be “one poorly drafted sentence.” Dutifully, the court issued the revised opinion the next day.

What was Involved in *Pension Committee*. In *Pension Committee*, a group of investors sued to recover \$550 million lost in the liquidation of two hedge funds. The investors filed state and federal securities claims against former directors, administrators, auditors, custodian of the funds and prime brokers. The investors retained counsel in the fall of 2003 after the hedge fund manager (“Lancer”) filed for bankruptcy in the spring of 2003. They filed suit in February of 2004 in the Southern District of Florida. The case was stayed under the Private Securities Litigation Reform Act, and then transferred to the Southern District of New York in September 2005. Discovery began in 2007. Following the close of discovery in October, 2008, the defendants sought sanctions against 13 plaintiffs for failing to preserve and produce documents, including ESI, and for submitting false declarations regarding their collection and production efforts.

The “Continuum” of Culpability. Much of the decision focused on the standards controlling applications for spoliation sanctions. The ruling makes clear that sanctions may be imposed for spoliation that is the result of negligent, grossly negligent, and willful and bad faith conduct. The court characterized these levels of culpability as residing on a “continuum” made via a “judgment call ... by a court reviewing conduct through the backward lens known as hindsight.”

Applying this continuum to discovery, the court found as follows:

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- (i) A failure to preserve “is surely negligent, and, depending on the circumstances, may be grossly negligent or willful.”
- (ii) The intentional destruction of evidence after the duty to preserve has attached is “willful.”
- (iii) Possibly after October, 2003, when *Zubulake IV* was issued, and definitely after July, 2004, when the final *Zubulake* opinion was issued, the failure to issue a written litigation hold “constitutes gross negligence because that failure is likely to result in the destruction of relevant information.”
- (iv) The failure to collect and review resulting in loss or destruction of evidence is “surely negligent, and depending on the circumstances, may be grossly negligent or willful.”
- (v) As revised in the May 28th opinion, “the failure to obtain records from *all those employees* who had any involvement with the issues raised in the litigation or anticipated litigation, as opposed to key players, could constitute negligence.”
- (vi) “[F]ailure to take all appropriate measures to preserve ESI likely falls in the negligence category.”

The court noted other decisions where (vii) the “failure to collect information from files of former employees that remain in the party’s possession, custody, or control after the duty to preserve has attached” was gross negligence and (viii) “failure to assess the accuracy and validity of selected search terms” is negligence. These examples are illustrative only – the court emphasized that its list is not definitive and “[e]ach case will turn on its own facts and the varieties of efforts and failures is infinite.” Practitioners take note: there are additional ways to act with negligence or gross negligence in attempts to preserve evidence.

The most serious conduct – willful and bad faith conduct – is punishable with the most severe sanctions, including “terminating sanctions,” such as dismissal of claims and entering of default judgments. In cases of negligence or gross-negligence, an adverse inference instruction or “less severe sanctions – such as fines and cost shifting,” may be imposed even without a showing that particular materials were lost. “Like many other sanctions, an adverse inference instruction can take many forms, again ranging in degrees of harshness. The harshness of the instruction should be determined based on

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the nature of the spoliating party's conduct – the more egregious the conduct, the more harsh the instruction.” [685 F. Supp. 2d 456, 471](#). The least harsh instruction – which should be administered for mere negligence and termed a spoliation instruction – “permits (but does not require) a jury to presume that the lost evidence is both relevant and favorable to the innocent party.”

It appears that Judge Scheindlin applied sanctions under the Court’s inherent power rather than under [Fed. R. Civ. P. 37](#). Much can be said about the varying standards with respect to levels of culpability applied by different circuit courts to determine if an adverse inference instruction is warranted. In the Second Circuit, negligence is enough to warrant an adverse inference instruction if the prejudice is sufficient. See *Residential Funding Corp. v. DeGeorge Fin. Corp.*, [306 F.3d 99, 108-109](#) (2d Cir. 2002). Not so in other circuits: some, like the Fifth and Eleventh, require bad faith and others, like the Eighth, require intent.

In *Pension Committee*, the court found some plaintiffs grossly negligent and others negligent. Most notably, Judge Scheindlin explicitly found gross negligence for the failure to issue a formal, written litigation hold at the time litigation is reasonably anticipated. Reasoning that the absence of a litigation hold will “inevitably result” in the spoliation of evidence, the court found that the failure to issue a written litigation hold is indicative of a high level of culpability, and that potentially severe sanctions are warranted. Additionally, Judge Scheindlin noted that “the following failures support a finding of gross negligence, when the duty to preserve has attached: ... 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.” [685 F. Supp. 2d 456, 471](#).

Lessons from Pension Committee. Much can be learned from the *Pension Committee* plaintiffs’ efforts at preservation and the court’s assessment of their efforts. Some of these lessons are related below; practitioners are encouraged to read the entire opinion.

The court described plaintiffs’ efforts at preservation and production as follows: “Counsel telephoned and emailed plaintiffs and distributed memoranda instructing plaintiffs to be over, rather than under, inclusive, and noting that emails and electronic documents should be included in the production.” The court found that:

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It does not direct employees to *preserve* all relevant records – both paper and electronic – nor does it create a mechanism for *collecting* the preserved records so that they can be searched by someone other than the employee. 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 Counsel. Throughout the litigation, Counsel sent plaintiffs monthly case status memoranda, which included additional requests for Lancer-related documents, including electronic documents. But these memoranda never specifically instructed plaintiffs not to destroy records so that Counsel could monitor the collection and production of documents.

The court expected the plaintiffs to maintain documents related to due diligence. The court noted the paucity of evidence and the admitted failure to preserve and the inexcusable result: that relevant records were lost or destroyed.

Six plaintiffs were charged with gross negligence for a combination of the following:

- Taking “no action to collect or preserve electronic documents prior to 2007;” failing to oversee employees’ collection of documents and misleading initial disclosures and declarations;
- Deleting emails after November 2003; failure to seek documents from a current and former employee who had knowledge of the subject of the dispute; and inconsistencies in deposition testimony and declaration;
- Using an employee with no search experience to handle document production without supervision from an attorney; failing to search files of 17 employees with knowledge; defendants could identify 39 relevant emails plaintiffs failed to produce;
- Failing to suspend recycling of back-up tapes; failing to ask 11 employees with potential knowledge; and failing to produce documents produced by other plaintiffs.

In contrast, the seven plaintiffs who were merely negligent engaged in much of the same behavior to a lesser degree and without the inaccurate and misleading declarations. The court observed that, while they did not initiate a litigation hold, they were

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merely negligent in significant part because the case was filed in the Southern District of Florida in early 2004 before that court had adopted a “well-established duty” to issue a written litigation hold (in contrast with the Southern District of New York – via Judge Scheindlin – which had done so in mid-2004). The court further identified as a factor for leniency that, by the time the case was transferred to New York in 2005, the electronic records from 2003 would have already been lost.

Even after a careful review of each of the court’s findings it is difficult to state precisely the difference between negligence and gross negligence. Perhaps this illustrates the court’s observation that these determinations are “fact intensive” and involve a “gut reaction based on years of experience as to whether a litigant has complied with its discovery obligations and how hard it has worked to comply.” [685 F. Supp. 2d 456, 471](#). Negligent plaintiffs worked just a little harder than grossly negligent plaintiffs, apparently.

Significance of *Pension Committee*. This case may well be the most important e-discovery case of 2010 and is important reading given the subtitle Judge Scheindlin chose for the court’s decision: “Zubulake Revisited: Six Years Later.” Many clients and practitioners may continue to resist the issuance of a written litigation hold for fear that breaching it will make matters worse. Under *Pension Committee*, that is not advisable. The court suggested a bright-line rule for written legal holds (the failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information. [685 F. Supp. 2d 456, 465](#)) although the court appeared to undermine that rule at times, stating that sanctionable conduct “cannot be measured with exactitude and might be called differently by a different judge.”

The practitioner should also be aware that the preservation obligation applies equally to plaintiffs and defendants. All parties have an obligation to preserve evidence, including ESI, that is relevant to current or to reasonably anticipated future litigations. “Identifying the boundaries of the duty to preserve involves two related inquiries: *when* does the duty to preserve attach, and *what* evidence must be preserved?” *Zubulake v. UBS Warburg LLC*, [220 F.R.D. 212, 216](#) (S.D.N.Y. 2003) (“*Zubulake IV*”). “The obligation to preserve arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.” [220 F.R.D. 212, 216](#). See also *Fujitsu Ltd. v. Federal Exp. Corp.*, [247 F.3d 423, 436](#) (2d Cir. 2001) (obligation to preserve evidence arises when party has notice that evidence is relevant to litigation or when party should have known that evidence may be relevant to future litigation). This duty often arises first for the plaintiff, as “plaintiff’s duty is more often triggered before litigation commences, in large part because plaintiffs control the

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timing of litigation.” (In *Pension Committee*, the duty to preserve arose in April 2003 although suit was not filed until February 2004.) However, the mere existence of a dispute between two parties does not necessarily mean that a party should have reasonably anticipated litigation at that time and taken steps to preserve ESI. *Treppel v. Biovail Corp.*, [233 F.R.D. 363, 371](#) (S.D.N.Y. 2006) (the company was on notice of preservation obligations only when it became aware that suit was about to be served).

The practitioner should note the importance of establishing an accurate and defensible position early on. Many of the plaintiffs in *Pension Committee* made submissions to the court that were later contradicted, found to be misleading based on their deposition testimony, and, most notably, resulted in lost evidence. Likewise, *Pension Committee* suggests that a practitioner should be careful about permitting a client to self-preserve without adequate attorney supervision. Practitioners must be careful about limiting the employees who receive the litigation hold and ensuring that former employees are included in preservation and collection efforts. Practitioners who need to establish and maintain a defensible and repeatable position on e-discovery must read the 88 page *Pension Committee* decision. While promising some flexibility such that courts “cannot and do not expect ... perfection,” the standards *Pension Committee* applies seem to require something pretty close to perfection and will often be applied by hindsight, which can be harsh.

Practitioners may want to develop a comprehensive preservation plan with the client. Pro-active counsel should encourage clients to develop and implement a litigation preparedness plan in advance of the litigation. For a discussion of this topic, see Kyle C. Bisceglie, *LexisNexis Practice Guide: New York e-Discovery and Evidence*, §§ 16.06 to 16.12 (LexisNexis Matthew Bender).

Preservation after *Pension Committee*. Practitioners should strongly consider issuing a written legal or litigation hold taking into account the practitioner’s prior experiences, the nature of issues raised, and the amount in controversy. The litigation hold should be issued to those key players who hold relevant evidence in a way that ensures they will, in fact, receive it. Counsel and client should use a generous definition of key player based on available facts to ensure preservation of all evidence. Counsel must monitor compliance with the litigation hold. The following general guidelines should be considered as part of the issuance of a litigation hold and other document preservation efforts:

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1. Develop a pre-litigation action plan of steps to take in the event of a potential investigation, regulatory inquiry or litigation that necessitates preserving documents or ESI.
2. Issue a litigation hold at the time litigation is reasonably anticipated. That point will, in most cases, fall earlier for plaintiffs than for defendants. However, a defendant who is the target of threatened litigation should issue a litigation hold immediately and should not wait for commencement of a lawsuit. That hold should be in writing under *Pension Committee*. If your client will not issue a litigation hold in writing, ensure that the client is making such decision for sound reasons and document all steps taken to preserve evidence.
3. Re-issue the litigation hold periodically to ensure that its requirements are fresh in the minds of employees and known to new hires.
4. Designate a manager with knowledge of the client's document retention practices and policies to supervise the process of identifying and preserving potentially discoverable documents and ESI. Employees searching for relevant documents should be adequately supervised by the designated manager and counsel. At a minimum, counsel must understand the IT involved and the employees' role and provide the employee with adequate instruction on any role the employee plays in collection efforts.
5. Suspend routine overwriting and data destruction procedures that would affect relevant evidence. Turn over relevant backup tapes or other media containing relevant evidence to counsel, or store such materials in a segregated location, away from other materials available for use in the ordinary course.
6. Make meaningful efforts to identify all "key players" based on available facts and provide their names to counsel. Search for and retain all files for key players, including computer systems, emails, backup servers or tapes and hard copy documents.
7. Identify former employees and any third-parties that may have relevant evidence. If the party has the legal or practical ability to retrieve that evidence, extend the hold to those former employees and third-parties.

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8. Keep a log of specific actions taken to identify and preserve potentially relevant documents. This log should be labeled “created at the request of counsel for use by counsel.” Litigants are often called upon by the court or opposing parties to recount their efforts to comply with discovery obligations and the ability to provide all relevant information and witnesses is crucial.
9. A party need only preserve relevant evidence. Making the determination of what sources may or may not contain relevant information involves subjective judgment. In determining what sources of ESI may contain relevant evidence and whether to preserve, weigh the usually inconsequential cost of preserving evidence against the usually high consequences of failing to preserve it.
10. Promptly extend and expand the hold as new allegations or facts become known that suggest the possibility of additional relevant evidence that has not yet been preserved.

Kyle C. Bisceglie, Thomas J. Fleming, Jeffrey A. Udell, *Client Alert: Preservation and Production of Electronically-Stored Information* (February 8, 2010). Available at http://www.olshanlaw.com/docs/Client_Alert_1002.pdf.

The duty to preserve certainly may extend to third-parties where a party has a practical or legal right to obtain relevant evidence. See *Gordon Partners et. al. v. Blumenthal (In re NTL, Inc. Sec. Litig.)*, [244 F.R.D. 179](#) (S.D.N.Y. 2007) (document production required when party has legal or practical ability to obtain them from third parties). “Control [does] not require legal ownership or actual physical possession; rather, documents [are] considered to be under a party’s control when that party had the right, authority, or practical ability to obtain the documents from a non-party.” *SSangyong Corp. v. Vida Shoes Int’l, Inc.*, [2004 U.S. Dist. LEXIS 9101, at *9-10](#) (D. Colo. 2007) (defendant “retained control” over third-party administrator of pension plan and had authority and ability to obtain and produce requested data).

The Limitations of Pension Committee. While practitioners should heed the lessons of *Pension Committee*, it is unclear how many other courts will apply the same level of scrutiny to e-discovery as this court did. By its own estimate, the court and its law clerks spent approximately 300 hours resolving this single motion. See n. 56. At nine hours a day, 300 hours amounts to over 33 days of time spent exclusively on producing this opinion. Not every court can or will apply that amount of attention to every motion. All

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practitioners know that there are still many judges who are disengaged for one reason or another from day-to-day discovery battles and shortcomings under the theoretically self-executing nature of the Federal Rules of Civil Procedure. Many courts rely on a heightened expectation of counsel that sadly is not always achieved in practice. Many jurists will certainly wade into palpable and obvious disputes that are well-articulated by counsel, but few will take anywhere close to 300 hours of time to sort out complicated, technical and fact-intensive e-discovery disputes.

Pension Committee should not be read literally, but with an eye to the facts of the specific case at hand. For example, although *Pension Committee* provides strong argument for the need for a written litigation hold, it is more important that the litigation hold be effective, whether written or oral, which may vary with the circumstances of the client. After all, at its core, *Pension Committee* was nothing more than a case about missing relevant evidence that should have been preserved. Practitioners are well-advised to focus on doing their job in preserving relevant evidence, and the rest will follow.

With respect to this unofficial “Supreme Court of e-Discovery,” there are a series of federal judges playing a major role in developing law on electronic discovery issues including Judge Scheindlin, Magistrate Judge Andrew Peck also in the Southern District, Magistrate Judge John Facciola in the District of Columbia, Magistrate Judge Paul Grimm in the District of Maryland and Magistrate Judge David Waxse in the District of Kansas. Some of these judges have stated their practice of reading their brethren’s judicial rulings on e-discovery to inform their own thoughts. Practitioners may wish to do the same.

For additional information about e-discovery, consult Kyle C. Bisceglie, *LexisNexis Practice Guide: New York e-Discovery and Evidence* (LexisNexis Matthew Bender).

For further explanation of the duty to preserve, see [Kyle C. Bisceglie, LexisNexis Practice Guide New York e-Discovery and Evidence, Ch. 10, Analyzing Duty to Preserve](#)

For further discussion of litigation holds, see [Kyle C. Bisceglie, LexisNexis Practice Guide New York e-Discovery and Evidence, Ch. 16, Establishing Best Practices for Electronic Document Management](#)

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About the Author. Kyle C. Bisceglie, a Partner at Olshan Grundman Frome Rosenzweig & Wolosky LLP in New York City, maintains a national practice counseling corporations, partnerships and individuals with respect to complex commercial litigation, Alternative Dispute Resolution (ADR), contracts, business advice and litigation avoidance. Mr. Bisceglie represents investment banks, hedge and private equity funds, merchant and credit card processors, software publishers, licensors of famous intellectual property, health, medical and dental instruments as well as entrepreneurial ventures and businesses in software, technology infrastructure, advertising, event production, insurance, chemical distribution, fashion and consulting fields. Representative clients include Marvel Entertainment, Atari, First Data Corporation, Credit Suisse, UBS Securities, DTE Energy, GE Commercial Finance, Inovio Biomedical Corporation, ADK and Guidance Endodontics. He has tried numerous cases without loss. Most recently, he won a \$44 million verdict for his client, an endodontic manufacturer, against the largest dental instrument company in the world, and also has participated in the investigation of the worldwide derivatives trading practices of a New York based merchant bank, represented US policyholders in the largest insurance insolvency in North American history, and negotiated the transfer of a major beverage and spirit company's most valuable brand. In 2010, Mr. Bisceglie authored the *LexisNexis Practice Guide: New York e-Discovery and Evidence*, a 900 page treatise on New York state and federal e-Discovery, that has already become a widely-used reference guide for New York practitioners. He is Martindale-Hubbell AV rated by his peers and can be reached by phone at 212-451-2207 or by email at Kbisceglie@olshanlaw.com.

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