

## Judge Scheindlin Issues Landmark Decision on Preservation of Electronic Evidence, Spoliation and Sanctions

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In a 38 page opinion, Judge Shira A. Scheindlin began her discussion and analysis in *Pension Committee of University of Montreal Pension Plan, et al. v. Bank of America Securities, LLC, et al.* 2010 WL 93124 (S.D.N.Y. Jan. 11, 2010) with the admonition that “[t]hose who cannot remember the past are condemned to repeat it.”\* Citing the court’s previous decisions in *Zubulake*, Judge Scheindlin wrote that:

By 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.

In the introductory portion of the opinion, Judge Scheindlin stated that given the vast amounts of electronic information and its increasing complexity, the “[c]ourts cannot and do not expect that any party can meet a standard of perfection.” Nevertheless, Judge Scheindlin wrote that:

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.

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In a motion brought by the Citco defendants against thirteen plaintiffs for spoliation of evidence and the imposition of sanctions, the court concluded that all thirteen plaintiffs “were either negligent or grossly negligent in meeting their discovery obligations.” Stating that most of the plaintiffs “conducted discovery in an ignorant and indifferent fashion,” the court awarded monetary sanctions against all thirteen plaintiffs and held that the defendants were entitled to an adverse inference jury instruction against six plaintiffs whose failure to preserve relevant electronic evidence was “grossly negligent.”

The opinion, which will no doubt be regarded as a landmark decision on electronic discovery like the *Zubulake* opinions, sets out in detail the obligations of parties to preserve electronic evidence, the requirements for the implementation and supervision of written litigation holds, what constitutes negligence and gross negligence in the context of spoliation of electronic discovery, and the appropriate sanctions.

In this securities litigation case, 96 plaintiff investors sued various defendants to recover 550 million dollars in losses resulting from the liquidation of two British Virgin Island hedge funds. The lawsuit was filed in February of 2004, but some plaintiffs retained counsel as early as March 2003.

One of the first key issues addressed by the court was when duty to preserve evidence was triggered in this case. Noting the well established rule that “the duty to preserve evidence arises when a party reasonably anticipates litigation,” the court stated that “[a] plaintiff’s duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litiga-

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tion.” Once the duty to preserve attaches, then a party “must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”

The court next examined what constitutes negligence, gross negligence and willfulness, stating that there were no clear definitions in the context of electronic discovery. On this point Judge Scheindlin stated that:

It is apparent to me that these terms simply describe a continuum. Conduct is either acceptable or unacceptable. Once it is unacceptable the only question is how bad is the conduct. That is a judgment call that must be made by a court reviewing the conduct through the backward lens known as hindsight. It is also a call that cannot be measured with exactitude and might be called differently by a different judge.

inference instruction, the innocent party must establish that:

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 upon destroying or losing the evidence; and that (3) the missing evidence is relevant to the innocent party’s claim or defense.

Judge Scheindlin then turned to particular plaintiffs and reviewed their conduct in detail, noting that she and her two law clerks had spent “close to three hundred hours resolving the motion,” and which diverted the court’s time from “deciding cases on their merits.” Citing examples such as the failure to issue written litigation holds until 2007, the failure to search for potentially relevant electronic documents until 2007, and filing inaccurate and false declarations, the court held that six plaintiffs’ con-

***“In the context of electronic discovery, Judge Scheindlin stated that the ‘failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.’”***

In the context of electronic discovery, Judge Scheindlin stated that the “failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.” [Emphasis in original.] Similarly, the failure to collect either paper or electronic evidence from “key players constitutes gross negligence or willfulness as does the destruction of email or backup tapes after the duty to preserve has attached.” The court pointed out, however, that:

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.

According to the Judge Scheindlin, “[t]hese examples are not meant as a definitive list. Each case will turn on its own facts and the varieties of efforts and failures is infinite.”

The court next addressed the burden of proof required for the imposition of sanctions. In the case of an adverse

duct was grossly negligent, entitling the defendants to an adverse inference instruction at trial for lost or destroyed. The court also awarded the defendants all of their costs and attorneys’ fees associated with reviewing the declarations, conducting depositions and costs incurred in bringing the motion and directed that all thirteen plaintiffs to share in payment of these sanctions.

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\*George Santayana, *Reason in Common Sense*, Vol. I of *The Life of Reason* (1905) (Prometheus Books 1998 at 82).

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