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Client Alert

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Zubulake Revisited: Defining Standards of Culpability for Electronic Discovery Abuses

"This case again demonstrates the crucial importance of taking complete control of the document preservation process at the outset of litigation, if not earlier."

In a recent decision referred to as "*Zubulake* Revisited: Six Years Later," US District Judge Shira A. Scheindlin rendered what will likely be regarded as another landmark decision on electronic discovery. Again faced with reviewing the adequacy of a party's discovery efforts to determine whether sanctions were appropriate, Judge Scheindlin sanctioned plaintiffs in a complex financial transaction dispute for "conducting discovery in an ignorant and indifferent fashion." *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of America Securities.*[1] In the course of an 87-page decision, Judge Scheindlin declares that:

> "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. … [W]hen this does not happen, the integrity of the judicial process is harmed and the courts are required to fashion a remedy."[2]

Although discovery obligations should be familiar to almost all litigators, Judge Scheindlin first states that a "fail[ure] to timely institute written litigation holds… can be presumed to have resulted in the destruction of relevant documents" or spoliation of evidence; and that to engage "in careless and indifferent collection efforts after the duty to preserve arose" constitutes sanctionable activity.

The consideration of appropriate sanctions for such spoliation requires the court to analyze first, the attorney's level of culpability, *i.e.*, whether their conduct of discovery was acceptable or negligent, grossly negligent or willful. Then, the court must consider the interplay between the duty to preserve evidence and the spoliation of evidence. Third, the court must determine which party should bear the burden of proving that evidence has been lost or destroyed and the consequences resulting from that loss. Finally, the court must set the appropriate remedy for the harm caused by the spoliation.

This *Alert* focuses on Judge Scheindlin's analysis of the levels of potential culpability from negligence to willfulness in the preservation, collection, review and production of electronically stored evidence.

Standards of Culpability in the Context of Discovery

Describing the three levels of culpability for discovery abuse as a "continuum," Judge Scheindlin provides a detailed

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analysis of the elements of negligence, gross negligence and willfulness. Though these terms are commonly defined in the context of tort law, she notes that the terms have not yet been sufficiently defined in the discovery context. Judge Scheindlin also specifically notes that sanctions in any case will be based on an extremely fact-sensitive analysis by the trial judge, and that the judgment call "cannot be measured with exactitude and might be called differently by a different judge." She nonetheless provides an instructive breakdown of the three levels of culpability.

Negligence

Negligence in the context of discovery is the failure of a party "to meet its obligation to participate meaningfully and fairly in the discovery phase of a judicial proceeding." Examples of negligence include:

- "A failure to preserve evidence resulting in the loss or destruction of relevant information;" this could also qualify as grossly negligent or willful depending on the circumstance.
- The loss or destruction of relevant evidence as a result of a failure to appropriately collect it or sloppiness in review.
- Failure to collect records from "all employees," as long as key players are collected.
- "Failure to assess the accuracy and validity of search terms."

Gross Negligence

Gross negligence is the "failure to exercise even that care which a careless person would use" and "differs from ordinary negligence only in degree, and not in kind." Significantly, what constitutes gross negligence will shift over time: "[a]fter a discovery duty is well established, the failure to adhere to contemporary standards can be considered gross negligence." Thus, "after the relevant *Zubulake* opinion in July, 2004," the following failures would support a finding of gross negligence:

- Failure to promptly issue a written litigation hold. Judge Scheindlin specifically criticized plaintiffs' counsel for the way it purported to issue a litigation hold by telephone and e-mail. That method failed to meet the appropriate standard of care. Counsel did not direct the *preservation* of relevant documents, and did not "create a mechanism for collecting the preserved records so that they c[ould] 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."
- Failure to suspend any routine document destruction policies, including the overwriting of backup tapes when they are the sole source of relevant information or relate to key players.
- Failure to identify and obtain records from *key* employees.
- Failure to collect information from the files of former employees that remain in the party's possession, custody or control.

Willfulness

Willful discovery violations include the same behavior that would otherwise be grossly negligent, but are committed with intent. Examples include:

- The intentional failure to collect from key players.
- The intentional destruction of email, backup tapes or other evidence after the duty to preserve has attached.

Conclusions

The *Pension* case is noteworthy because it does *not* involve "egregious examples of litigants purposefully destroying evidence," but rather sloppiness. The Court's bottom line is that, whatever the cause of the document destruction, "conduct is either acceptable or unacceptable. Once it is unacceptable the only question is how bad is the conduct." The fact that something was done merely without adequate care is not an excuse. Plaintiffs were sanctioned because they "failed to timely institute written litigation holds and engaged in careless and indifferent collection efforts after the duty to preserve arose."

This case again demonstrates the crucial importance of taking complete control of the document preservation process at the outset of litigation, if not earlier. Written litigation hold notices, and follow-up, to all potentially relevant individuals are required, immediate suspension of any automatic record deletion mechanisms is a must, and sloppy or careless actions will not be tolerated. Courts are not sympathetic to excuses based on volume or complexity, and fully expect litigants to understand the technology they use and to competently and thoughtfully preserve, collect, review and produce relevant evidence or face inevitable and potentially expensive sanctions.

Endnotes

[1] 2010 WL 184312 S.D.N.Y., January 15, 2010.

[2] *Id.* at 1-2.

If you have any questions about this *Client Alert*, please contact one of the authors listed below or the Latham attorney with whom you normally consult:

David Brodsky
+1.212.906.1628
david.brodsky@lw.com
New York

Kelly Farmer
+1.213.891.7166
kelly.farmer@lw.com
Manager of Data Governance and Discovery Services
Los Angeles

Micah Nash
+1.415.395.8801
micah.nash@lw.com
Discovery Services Attorney
San Francisco

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