

# Contrasting Developments In the Law Related to Electronic Discovery: THE BURDEN OF DEMONSTRATING PREJUDICE DUE TO SPOILIATION



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After the *Zubulake*<sup>1</sup> decision, the law governing electronic discovery has not stood still and decisions are rendered every week which influence not only the law related to electronic discovery but the law of spoliation and discovery generally. Two decisions illustrate the struggle courts experience when trying to equitably address the issues which arise in relation to electronic discovery and destruction of electronic documents.

## A. *Pension Committee* Case: Prejudice In Cases of Intentional or Grossly Negligent Spoliation is Presumed.

Judge Scheindlin is in the spotlight again with her order in *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, LLC*<sup>2</sup>. Shira Scheindlin, U.S. District Judge for the Southern District of New York, became famous in legal circles for the seminal electronic discovery opinions she authored in *Zubulake v. UBS Warburg*. The *Zubulake* opinions sought to define the parameters of what electronic information is discoverable in litigation, and set the precedent

for stiff monetary and procedural sanctions for parties who fail to preserve appropriate electronically stored information.

Six years later, Judge Scheindlin reinforced *Zubulake* in rendering her decision in *Pension Committee*, an opinion she titled “*Zubulake Revisited: Six Years Later*.” The *Pension Committee* order is 89 pages long with 251 footnotes. She took the opportunity *Pension Committee* presented to revisit *Zubulake*’s central themes, which she stated from the outset should be self-evident six years later. While Judge Scheindlin acknowledged “[c]ourts cannot and do not expect that any party can meet a standard of perfection” in the complex world of electronic discovery, she stated “[b]y 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.” Unsaid, but implicit in that sentence, is that spoliation leads to monetary and procedural sanctions against the offending party.

The opinion itself is extensive, focusing largely on case-specific facts and details. In short, however, Judge Scheindlin found that “plaintiffs failed to timely institute written litigation holds and engaged in careless and indifferent collection efforts after the duty to preserve arose.” Under the “abundantly clear” standard of *Zubulake*, it logically followed that

she sanctioned the plaintiffs, granting the moving defendants “reasonable costs and attorneys’ fees.” In addition, she charged the jury on spoliation, allowing the jury to presume the lost evidence was relevant and would have been favorable to the defendants. Cautioning against rote application of her holding to any case, however, she noted “at the end of the day the judgment call of whether to award sanctions is inherently subjective. A court has a ‘gut reaction’ . . . as to whether a litigant has complied with its discovery obligations and how hard it worked to comply.” Despite this admonition, Judge Scheindlin illuminated a specific analytical framework to govern future electronic discovery disputes.

Having determined documents were lost or destroyed, Judge Scheindlin set forth a four-step analysis for whether she would impose sanctions, and what the sanctions would be. First, she analyzed the plaintiff’s level of culpability in every phase of discovery: were they negligent, grossly negligent or willful in failing to preserve documents? Second, she looked at the interplay between the duty to preserve and the spoliation of evidence. Third, she developed a burden-shifting paradigm when a party’s failure to preserve documents is particularly egregious. Fourth, she determined the remedy in light of the harm caused.

The Court in *Pension Committee* developed a burden shifting paradigm that is unique and a change in the law of spoliation. The court held that determining prejudice in situations

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where the documents no longer exist is “virtually impossible.” The Court then held that since Plaintiff was the bad actor, she could only conclude that the Defendants had carried their “limited burden.” Accordingly, the Court in *Pension Committee* held that it would instruct the jury that the destruction resulted from gross negligence and that both relevance and prejudice could be presumed when there is evidence of bad faith or gross negligence.

Judge Scheindlin then delineated what is, in her estimation, de facto gross negligence. She began by stating what should be obvious: intentional destruction of relevant records, emails, or backup tapes after the duty to preserve has attached is willful, and therefore subject to a stiff sanction up to and including dismissal. She then set forth a laundry list of other failures she found constituted gross negligence, which she defined as failure to use that care, which even a careless person would use, once the duty to preserve attached. Her list of failures that were grossly negligent included failures to perform the following: (a) to identify key players and preserve and collect their records; (b) to issue a written litigation hold; (c) to cease deletion of email; (d) to preserve records of former employees; and (e) to preserve backup tapes that are the sole source of relevant information.

In addition to this list of grossly negligent actions, Judge Scheindlin also noted actions that were merely negligent. As a starting premise Judge Scheindlin held that a failure to preserve evidence resulting in the loss of relevant information “is surely negligent . . .” Judge Scheindlin specifically identified as negligent the failure to obtain records from *all* employees (some of whom may have had only a passing encounter with the issues in the litigation), failure to take all appropriate measures to preserve electronically stored information and failure to assess the accuracy and validity of selected search terms. Of course, even simple negligence could carry sanctions under the analytical

framework set forth in *Pension Committee*.

What emerges from “Zubulake Revisited,” then is a disconcerting change in the rules related to spoliation in the form of a burden shift when it comes to establishing prejudice and relevance necessary to garner an adverse jury instruction. In addition, what also emerges is a check list of activities companies and their attorneys should likely undertake once the duty to preserve documents attaches, i.e., once litigation is reasonably anticipated. First, litigation holds are mandatory. The hold should include a mandate to immediately suspend all routine document destruction practices. Second, identify and preserve records from *all* employees (including key employees) who may have even had a passing encounter with the issues in the litigation. Third, take all appropriate steps to preserve sources of electronically stored information. All of these steps have been part of the electronic discovery checklist, or should have been part of that checklist, for at least six years. But, just in case there was any lingering doubt, Judge Scheindlin has concretely set that doubt aside.

While *Pension Committee* is not law in every jurisdiction, Judge Scheindlin’s opinions have historically been carefully considered by most federal courts and are instructive as guidelines for electronic discovery disputes. Since this opinion unequivocally mandates that failure to preserve relevant evidence is negligence and may rise to grossly negligent or willful conduct, businesses should work proactively with their counsel to check off each of the above steps, at a minimum, to avoid monetary and procedural sanctions.

## **B. The *Rimkus* Decision: Prejudice Must Be Established For An Adverse Inference.**

United States District Court Judge Lee Rosenthal recently authored an opinion concerning spoliation and

electronic discovery that will likely be as persuasive and as important to understand as the *Pension Committee* case. Judge Lee’s decision in *Rimkus Consulting Group, Inc. v. Nickie G. Cammarata, et al.*,<sup>3</sup> is an order that is 139 pages long.

In *Rimkus* a forensic engineering contractor brought an action against two former employees seeking to enforce noncompetition and nonsolicitation covenants in employment agreements. The record established that the defendants deleted some emails and attachments after the duty arose to preserve them. The duty to preserve the emails and attachments arose because the defendants were actually just about to file lawsuits in which they would be plaintiffs against *Rimkus*. The individuals who deleted the emails denied they were intentionally deleted but gave inconsistent testimony about the reasons for the deletion and some of the testimony was not supported by the record. The court found that there was sufficient evidence for a jury to determine that the emails and attachments were intentionally deleted to prevent their use in anticipated or pending litigation.

The court in *Rimkus* imposed sanctions against the defendants for intentional spoliation of relevant electronically stored information after a year of conducting discovery on spoliation rather than the merits of the case. In assessing the sanctions, the court reviewed the approaches taken among the federal judicial circuits regarding the degree of culpability necessary for the imposition of sanctions. The court crafted a permissive adverse inference instruction that left it to the jury to decide whether, in fact, defendants acted willfully; whether the lost electronically stored information was relevant; and whether the plaintiff was prejudiced by the loss.


The court in *Rimkus* essentially crafted a sliding rule that asked the jury to assess whether the destruction was inadvertent destruction or

intended to prevent use in litigation. Then the jury would be required to assess whether the lost information resulted in any prejudice on a scale ranging from information that prevents the party from proving a claim to no impact at all. The Court in *Rimkus* would instruct the jury to apply proportionality principles to assess the damage done by the party which destroyed or lost the electronic information.

The court declined to set forth holdings similar to the holdings in the *Pension Committee* case. The court held that the party alleging that spoliation occurred still needs to demonstrate that the information was relevant and its loss prejudicial for any adverse inference to accrue.

In *Rimkus* the court attempted to take into account the value of what was destroyed as well as assess the intentions of the party engaging in the destruction. One disconcerting result for the parties is that the court in *Rimkus* determined that the jury will ultimately judge the intent of the party that destroyed the information and assess the value of the lost information in determining how the destruction of information impacts the ultimate outcome. Accordingly, the court established that a trial within the trial would occur that would focus on discovery and the destruction of documents. *Rimkus* refused to shift the burden of establishing spoliation but it did shift the issue to the jury resulting in a trial within a trial.

## Conclusion

Courts continue to struggle with the issues involving electronic document discovery and the destruction of electronic information, whether accidental or intentional. It is critical for parties involved in any litigation that involves electronic documents to be proactive and thorough in the process of collecting and gathering such documents. The process, beginning with the litigation hold and continuing through discovery, is critically important and every attorney should spend time and effort insuring that the process utilized is defensible and reasonable to avoid placing the court in a position where it has to try to balance the equities as it views them. 

## Endnotes

1. *Laura Zubulake v. UBS Warburg LLC, UBS Warburg and UBS AG*, 217 F.R.D. 309 (S.D.N.Y. 2003)(Zubulake I); *Laura Zubulake v. UBS Warburg LLC, UBS Warburg and UBS AG*, 230 F.R.D. 290 (S.D. N.Y. 2003)(Zubulake II); *Laura Zubulake v. UBS Warburg LLC, UBS Warburg and UBS AG*, 216 F.R.D. 280 (S.D.N.Y. 2003)(Zubulake III); *Laura Zubulake v. UBS Warburg LLC, UBS Warburg and UBS AG*, 220 F.R.D. 212 (S.D.N.Y. 2003)(Zubulake IV); and *Laura Zubulake v. UBS Warburg LLC, UBS Warburg and UBS AG*, 229 F.R.D. 422 (S.D.N.Y. 2004)(Zubulake V)
2. 685 F. Supp. 2d 456 (S.D.N.Y. Jan. 15, 2010).
3. 688 F. Supp. 2d 598 (S.D. Texas 2010).