

The Burdens Of E-Discovery Grow Even Larger

The landscape for E-Discovery became even more treacherous and uncertain this past month by an 84-page Amended Opinion and Order issued by a federal judge in the Southern District of New York. Although obviously intended to be an E-Discovery roadmap, the opinion in Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, Case No. 05-Civ 9016 (SAS), emphasizes how unpredictable and uncertain electronic discovery can be. E-discovery is, as the Pension Committee opinion noted, too much of a “gotchya” searching for spoliation rather than searching for evidence.

The judge who wrote the Pension Committee opinion, the Hon. Shira A. Scheindlin of the influential Southern District of New York, subtitled her ruling, “*Zubulake* Revisited: Six Years Later”, an obvious reference to the series of her earlier opinions that served as a previous guide in this new age of trying to decipher a standard for electronic discovery.

While this new opinion provides standards for determining how to deal with the spoliation of electronic evidence, such as emails, the application of these standards among the 13 different plaintiffs sanctioned for destruction of electronic evidence varies so much that the opinion ultimately leaves the very uncertainty it sought to resolve. The key for determining the degree of sanction for electronic evidence spoliation is now the “culpability” of the party who destroyed that electronic data. If the party who destroyed electronic evidence acted “willfully” or with “gross negligence”, the lost electronic evidence is presumed to have been relevant to the underlying lawsuit. If the party destroying the electronic evidence was merely “negligent”, then the party seeking spoliation sanctions must show that the lost data was relevant. That later burden of proof is not an easy one, since, if the evidence is truly lost, one can only guess at its missing contents. For those looking for certainty, they look in vain. Judge Scheindlin concedes this culpability standard’s application is “subjective”. Comparing her application of these

standards to the 13 plaintiffs she sanctioned in Pension Committee and her other illustrative examples of this misconduct creates as many questions as it answers, thereby defeating the Opinion's purpose which was to close loopholes rather than open them. For example,

- Failing to issue a written litigation hold and properly supervising the hold program is now not mere negligence but “gross negligence” after Zubalake 4. Yet, seven of the 13 plaintiffs in Pension Committee were found not to have instituted a written litigation hold “in a timely manner” but all of them were held merely negligent rather than grossly negligent.
- Which files were searched, how the search was conducted, who was asked to search, what they were told, and extent of any supervision of the search are all questions which can determine whether a party was grossly negligent or merely negligent. For one of the plaintiffs, the search was delegated to an employee and, because the employee had no prior experience conducting searches, received no instruction from the general counsel and had no supervision or contact with counsel during the search, that plaintiff was found to have been grossly negligent. Yet another plaintiff's president with similarly no experience and no follow-up did the email search himself and was found to be merely negligent.
- Even more disturbing was yet another of the 13 plaintiffs was found “negligent” where the plaintiff's general counsel delegated the search to a paralegal, who then distributed a company wide email directing all employees to search their records for documents related to the dispute. In other words, the Opinion suggests e-discovery cannot be just delegated by counsel.
- Not identifying key players in the dispute and ensuring that their records are preserved is said to be gross negligence. Yet, not searching the

records of all employees is merely negligent. But who knows at the beginning of a lawsuit who all the “key” players are?

- Failing to seize and preserve the electronic records of former employees was held to be grossly negligent. Yet, how many times do employees leave a company during the long pendency of a lawsuit; and
- Failing to preserve backup tapes were they are the “sole source” is also grossly negligence.

To the extent that the Pension Committee provides amidst its 84-pages a guideline for e-discovery, the following rules appear to apply:

1. A litigation hold should be properly and timely issued whenever it reasonably appears a dispute has arising. The problem is when a party is on notice of a dispute is often open to debate. Does each angry letter require an immediate company-wide hold notice? But if you want the most risk free approach, at that first moment of any claim or demand—even well before a legal action is commenced—send out that litigation hold. But your burden does not stop there.
2. Follow up to that litigation hold must be done diligently and carefully. If in-house or outside counsel-assign it to a paralegal or other administrative staff, they must first make sure that the staff member is trained in issues of electronic discovery and, secondly, they must personally supervise and regularly follow-up on the activity of the individual to whom the collection is assigned or, under Pension Committee, the client—and inferentially the lawyer—could be held “negligent”.
3. Key players should be promptly identified and their records obtained and secured. The problem here is often the key players are not clear at the commencement of the initial notice of the dispute. Periodic rereview of the hold notice recipients should be regularly redone to review who the

key players are as the lawsuit develops and make sure they are contacted and their electronic documents preserved.

4. Each employee affected by litigation hold should be individually contacted to make sure the employee is actually paying attention to hold notice and complying with its directives. It is not enough to distribute the hold and assume that employees are following it.
5. Electronic records of departed employees should be preserved. Often long after a litigation hold is issued, an employee leaves the company. Their laptop or desktop computer is wiped clean and recycled. Someone needs to be expressly responsible for preserving the departing employees' harddrive which may have electronic evidence stored on the c:/ or other drives and not generally available on the company's computer network.
6. System backup tapes should be preserved where they are the sole source of the electronic data. In other words, if that individual computer is lost, then the backup tape may be the only source.

All of these rules will add tremendous costs to e-discovery. The safest but most uneconomical choice is to never destroy anything. Departing from that stark choice leaves parties open to be second guessed with the benefit of hindsight as to when a dispute arose and who were the key players. Companies need to review their e-discovery personnel and practices. Containing e-discovery risks will require more active regular policing that litigation holds are being followed long after they were issued. Indeed, the increased burdens from the Pension Committee 84-page opinion will be substantial, but the cost of a directed verdict for "grossly negligent" spoliation of evidence could be far greater. E-discovery continues to take on a life—and a cost—of its own.