

## The Importance of *Pension Committee* for E-Discovery

[By Susan Nassar](#)

[Texas Lawyer](#)

July 5, 2010

Since 2006, many states, including Texas, have adopted the Federal Rules of Civil Procedure or variations thereof that apply to electronic discovery. Despite the trend toward more uniformity in rules, courts' interpretations of e-discovery obligations can vary considerably from state to state. A recent decision provides in-house counsel with guidance regarding e-discovery pitfalls to avoid. However, because there is a circuit split regarding the culpability required for severe sanctions in e-discovery disputes, in-house attorneys must pay close attention to the varied application of the e-discovery rules among jurisdictions.

U.S. District Judge Shira A. Scheindlin's Jan. 15 analysis in *Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities LLC* for deciding spoliation claims in e-discovery cases offers a helpful framework for considering e-discovery practices. The Southern District of New York jurist is well known for her e-discovery decisions in *Zubulake v. Warburg LLC* (2003) (*Zubulake I-IV*), which, among other things, dealt with the duty to preserve electronic documents. As a result, courts likely will view her analysis as persuasive authority on e-discovery matters.

Pension Committee's analysis focuses on four factors to determine if e-discovery sanctions are appropriate: 1. the spoliating party's duty to preserve evidence; 2. the spoliating party's culpability; 3. a determination of which party should bear the burden of proving evidence was lost or destroyed and what harm resulted; and 4. the appropriate remedy for the harm caused by the spoliation, given the level of prejudice to the party seeking discovery.

Scheindlin pointed out that these factors provide guidance but should not be used as a checklist for determining whether a party's conduct is acceptable because analysis of spoliation claims depends heavily on the facts and circumstances of each case.

The first factor — duty to preserve evidence — is well established. It generally arises when a party has notice that evidence is relevant to litigation or the party should have known evidence may be relevant to future litigation. Scheindlin addressed this duty in *Zubulake IV*. Although this is not a new concept, courts still struggle in distinguishing between acceptable and unacceptable preservation practices.

The second factor — culpability — focuses on whether the spoliating party's discovery conduct was negligent, grossly negligent or willful. Scheindlin defined negligence as unreasonable conduct, which

creates a risk of harm to others and may occur in situations involving complete inadvertence or awareness of possible consequences. Gross negligence is more than negligence but differs only in degree. To be willful, wanton and reckless, conduct must be intentional and unreasonable and involve a known or obvious risk so great it is likely to result in harm. Such conduct is normally done with conscious indifference to the consequences.

Scheindlin provided several useful examples of how these definitions might apply in the discovery context, which are helpful to in-house counsel thinking through and preparing an e-discovery policy.

- A party's failure to preserve evidence that results in the loss or destruction of relevant evidence is negligent, whereas the intentional destruction of relevant electronic evidence after the duty to preserve arises is willful.
- After the duty to preserve arises, destruction of relevant e-mails and backup tapes and failure to gather documents (paper or electronic) from key employees or witnesses is gross negligence or willfulness. Failure to collect documents from employees or witnesses who have played a minor role or have little knowledge of the litigation issues, however, would only constitute negligence.
- Failing to take all appropriate measures to preserve electronically stored evidence would also likely constitute negligence. A party's failure to issue a written litigation hold is gross negligence because of the likelihood it will result in the loss or destruction of relevant evidence.
- A party's haphazard document review or failure to gather electronic documents that results in the loss or destruction of evidence is negligent and may be grossly negligent or willful depending on the circumstances.
- A party's failure to collect information from former employees that remains in a party's possession, custody or control after the duty to preserve arises is gross negligence, whereas a party's failure to select appropriate search terms for identifying relevant documents constitutes negligence.

According to Scheindlin, the above examples were based on the facts in *Pension Committee* and other recent cases, but were not intended to be a definitive list.

The third factor — burden of proof — applies when evidence is no longer available. Generally, the innocent party must prove 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."

As the court explained, however, the burden of proof and the burden-shifting test courts apply will differ depending on the severity of prejudice and the sanction. A court may presume relevance and prejudice when a party intentionally destroys evidence in bad faith or in a grossly negligent manner. The spoliating party then will have the opportunity to rebut the presumption with evidence — for example, that the innocent party was not prejudiced.

The fourth factor — the appropriate remedy or sanction — will necessarily vary from case to case. As explained by Scheindlin, the harshness of the sanction should coincide with the spoliating party's conduct: "[T]he more egregious the conduct, the more harsh the instruction." Remedies may include lesser sanctions such as shifting the costs of discovery to the spoliating party, fines and special jury instructions. More severe sanctions might include claim preclusion, default judgment or an adverse-inference instruction that permits a jury to infer that destroyed evidence would have been adverse to the spoliating party.

## **Circuit Split**

The analytical framework in *Pension Committee* already has received a good deal of attention by courts due to Scheindlin's reputation for authoring the *Zubulake* opinions. However, as noted on Feb. 19 by U.S. District Judge Lee H. Rosenthal of the Southern District of Texas in *Rimkus Consulting Group Inc. v. Cammarata*, there is a split of authority among courts regarding the level of culpability required to support more severe discovery sanctions.

According to *Rimkus*, the 2nd and 6th U.S. Circuit Courts of Appeals and some California district courts have held that negligent destruction of evidence is sufficient to warrant a severe sanction such as an adverse-inference instruction. The 5th and 11th U.S. Circuit Courts of Appeals, on the other hand, require bad faith for an adverse-inference instruction. The 1st, 4th and 9th U.S. Circuit Courts of Appeals focus on prejudice to the innocent party and do not require bad faith for giving adverse-inference instructions, although courts often emphasize those factors. The 3rd U.S. Circuit Court of Appeals balances prejudice and culpability.

*Rimkus* further noted that, although *Pension Committee* determined that it was appropriate to presume that destroyed evidence was relevant or its loss prejudicial for purposes of severe sanctions when a spoliating party's conduct is grossly negligent, the 5th Circuit has not addressed this precise issue.

Some, but not all, state courts in Texas appear to acknowledge that courts can and should hold parties accountable for negligent spoliation, but severe sanctions are only appropriate if 1. a party is prejudiced or hindered in its ability to present its case or defense and 2. the sanction is properly tailored to remedy the prejudice. Courts that have reached this conclusion base their reasoning on Texas Supreme Court Justice James A. Baker's notable concurring opinion in *Trevino v. Ortega* (1998).

Regardless of the differences in court opinions, these and other recent cases indicate that e-discovery expectations and obligations will continue to increase as more courts become e-discovery savvy. Though the reach of *Pension Committee* is still unclear, it and *Rimkus* underscore how important it is for in-house counsel to keep up with changes in e-discovery rules and how different jurisdictions apply those rules. This is key not only for litigation purposes but also for drafting and negotiating contracts that include venue, governing law and record access-retention provisions, which ultimately could impact a party's e-discovery obligations.

*Susan Nassar is an associate with Elrod PLLC in Dallas and editor-contributor for the State Bar of Texas Litigation Section's News for the Bar. Her e-mail address is [snassar@elrodtrial.com](mailto:snassar@elrodtrial.com).*

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