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Zubulake Revisited: *Pension Committee* Decision Offers Spoliation Guidance


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The recent decision by Judge Shira Scheindlin in *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of America Securities*, 2010 U.S. Dist. LEXIS 4546 (S.D.N.Y. Jan. 15, 2010), promises to significantly affect the way e-discovery is practiced and litigated in the federal courts. Scheindlin, who wrote the influential *Zubulake* opinions, is one of a handful of judicial authorities on e-discovery whose work is accepted as the cutting edge of e-discovery law, and the *Pension Committee* decision – subtitled "*Zubulake* Revisited: Six Years Later" – will likely prove influential.

The opinion touches on a variety of important issues. Importantly, it provides guidance as to what discovery conduct may be considered (1) negligent, (2) grossly negligent, or (3) willful. Categorization of the conduct, in turn, determines the level of prejudice the complaining party must prove and the nature of available sanctions. Scheindlin acknowledges that such categorization "will turn on its own facts." *Id*. at *12-*13. Then she lays out several examples, including:

- Ordinary negligence:
  - not collecting from all employees
  - delegation of search efforts to inexperienced employees without supervision
  - failure to search backup tapes, under certain circumstances
- Gross negligence, if the duty to preserve attached after the final *Zubulake* opinion:
  - not circulating a written litigation hold
  - not collecting documents from "key players"
  - destruction of former employees' email
  - destruction of backup tapes that contain non-duplicative data that is either relevant or generated by "key players"
- Willfulness:
  - "[T]he intentional destruction of relevant records, either paper or electronic, after the duty to preserve has attached." *Id*. at *10.

If the spoliating conduct was negligent, sanctions are only appropriate if the complaining party can establish, via extrinsic evidence, that it was prejudiced. But if the conduct was grossly negligent or willful, the court may, within its discretion, impose a rebuttable presumption of prejudice. If it does award sanctions, the court should select the least harsh sanction available that will (1) deter parties from spoliating; (2) place the risk of an erroneous judgment on the party who created the risk; and (3) restore the "prejudiced party to the same position [it] would have been in absent the wrongful destruction of evidence by the opposing party." *Id*. at *24.

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