ECKERT SEAMANS

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LABOR & EMPLOYMENT ALERT

ELECTRONIC DISCOVERY ISSUES – *ZUBULAKE* REVISITED: SIX YEARS LATER

Introduction

The seminal cases in the area of "E-discovery" are the *Zubulake* decisions, which were authored by Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York. Judge Scheindlin's highly publicized opinions were first issued in approximately 2004. Her opinions address the preservation and collection of electronic documents, as well as the sanctions applicable to parties accused of committing E-discovery violations.

On January 11, 2010, Judge Scheindlin issued another lengthy opinion on the topic of E-discovery, which she entitled "*Zubulake* Revisited: Six Years Later." A copy of Judge Scheindlin's 87-page Opinion and Order is attached. Recognizing that this would be another highly publicized and scrutinized opinion, Judge Scheindlin, on January 15, 2010, filed detailed revisions to her ruling, which revisions sought to clarify certain statements contained in the original opinion (many of which deal with the need to preserve back-up tapes). A copy of the January 15, 2010 amendments filed by Judge Scheindlin can be viewed at the following link (Scheindlin Amendments).

In her opinion, Judge Scheindlin endeavored to develop an analytical framework for addressing common E-discovery issues. She specifically addresses the analytical framework that, in her view, should be applied whenever one party accuses the other party of E-discovery violations and moves the court to issue sanctions.

This issue – namely, when to issue E-discovery sanctions – is becoming increasingly more prevalent in federal court litigation, and federal district judges across the country (and particularly those in the Western District of Pennsylvania) are likely to give considerable weight to the recent opinion of Judge Scheindlin. A copy of her "Zubulake Revisited" opinion can be viewed at the following link (Zubulake Revisited Opinion). A summary of that opinion follows.

The Starting Point for the E-Discovery Analysis

In what should be considered a scary proposition for companies that maintain electronic data (which, presumably, is all companies), Judge Scheindlin starts her analysis with the following proposition: The failure to preserve evidence resulting in the loss or destruction of relevant information is, at the very least, ***"negligent"*** conduct.

In other words, according to Judge Scheindlin, there are no ***innocent*** document destructions. Rather, anytime potentially relevant information is lost after a duty to preserve arises, the entity responsible for the information is guilty of behaving with a "culpable state of mind" – meaning, at the very least, the company is "negligent" with respect to its E-discovery obligations. As a consequence, the company is subject to sanctions.

These notions of "negligence" and "culpability" in the context of E-discovery are likely foreign concepts to many companies. As a general proposition, it is not outrageous to assume that a company in possession of hundreds of thousands, or, perhaps more realistically, millions of electronic documents

might, in the ordinary course of business, "lose" or "erase" a potentially relevant document without acting "unreasonably." To the ordinary business person, the inadvertent loss of an electronic document does not equate to a "culpable state of mind." However, given the current state of the law, businesses can no longer operate under the assumption that, so long as you are not intentionally destroying relevant documents, you need not worry about E-discovery sanctions.

As Judge Scheindlin stresses in her opinion, simple carelessness is sufficient to justify sanctions, even severe sanctions.

Going forward, trial courts relying on Judge Scheindlin's opinion (and others like it) will evaluate whether a party accused of E-discovery violations was "negligent," "grossly negligent" or engaged in "willful misconduct." These designations are central to the court's analysis, as they determine which party bears the burden of proof in connection with a motion for sanctions. As discussed below, determining which party bears the burden of proof will go a long way in determining what sanctions, if any, are appropriate.

Identifying Gross Negligence

One of the most useful, albeit disconcerting, aspects of Judge Scheindlin's opinion is her summary of what constitutes "gross negligence" in the realm of E-discovery. For companies that maintain electronic information, Judge Scheindlin's opinion should be eye-opening. Examples of conduct that, according to Judge Scheindlin, amount to "***gross negligence***" include:

- The failure to issue a timely and comprehensive litigation hold notice[1];
- The failure to preserve electronic documents after a duty to preserve arises;[2]
- The failure to accurately identify key players and to ensure that their paper and electronic records, including e-mails, are preserved;
- The failure to request documents from all key players;
- The failure to cease the deletion of records for relevant *former* employees;
- Delegating search efforts to individual employees without adequate supervision from management and/or counsel – according to Judge Scheindlin, such conduct could be "negligent" or "grossly negligent," depending on the circumstances. Judge Scheindlin explained that both management and counsel should be involved in the collection effort, *i.e.*, simply telling

[1] In the context of employment cases, a litigation hold must be issued, ***at the latest***, whenever the administrative charge is filed. If, according to Judge Scheindlin, a company fails to issue a litigation hold notice at the time it receives an administrative charge, the company is guilty of "gross negligence" and, consequently, is subject to any number of the "severe" sanctions outlined below.

[2] The duty to preserve arises once litigation can reasonably be anticipated. In terms of failing to adequately preserve records, "gross negligence" would include, for example, failing to stop the automatic deletion of e-mails for relevant employees after litigation is reasonably anticipated.

employees to provide relevant information, without following up or overseeing the process, is ***not*** a sufficient collection effort – particularly if the employee is a lower level employee;[3]

- The failure to preserve back-up tapes when those tapes are the sole source of relevant information.[4]

According to the Judge, both "gross negligence" and "willful misconduct" fall into the category of "bad faith" behavior. Once there is a finding of "bad faith" (which, as highlighted above, does not require overly egregious conduct), the party defending against a motion for sanctions is in a precarious position and is likely to receive a "severe" E-discovery sanction.[5]

Avoiding Gross Negligence

Based on Judge Scheindlin's summary of "bad faith" conduct, avoiding a finding of "gross negligence" will, for most companies, require the institution of sound and defensible litigation hold procedures. Given the potential for relevant information to be inadvertently missed or lost, creating – *and enforcing* – sound and defensible litigation hold procedures at the front-end of the process will go a long way in avoiding E-discovery sanctions during the course of litigation.

The necessary processes would include, for example, implementing a system for identifying key players (and for communicating with those key players), setting up a systematic process for distributing timely litigation hold notices, and putting processes and procedures in place to ensure the preservation of both paper and electronic records for all key players.

In order to comply with the onerous document preservation requirements imposed by the courts, companies should (and in most instances, must) engage their IT personnel. If a company's preservation efforts are called into question, the fact that the company worked directly with IT personnel will demonstrate that the company took reasonable steps to comply with its E-discovery obligations. In other words, the direct involvement of IT personnel will provide a strong argument for avoiding a finding of "gross negligence."

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[3] In her subsequent Order revising her original opinion, Judge Scheindlin clarified her directive regarding delegating search efforts as follows: "I note that not every employee will require hands-on supervision from an attorney. However, attorney oversight of the process, including the ability to ***review, sample, or spot-check*** the collection effort is important. The adequacy of each search must be evaluated on a case-by-case basis."

[4] With regard to back up takes, the Judge's Order revising her original opinion provides the following clarification: "A cautionary note with respect to backup tapes is warranted. I am not requiring that all backup tapes must be preserved. Rather, if such tapes are the *sole* source of relevant information (*e.g.*, the active files of key players are no longer available), then such backup tapes should be segregated and preserved. When accessible data satisfies the requirement to search for and produce relevant information, there is no need to save or search backup tapes. *See* Fed. R. Civ. P. 26(b)(2)(B)."

[5] As a practical matter, most companies are not engaged in the intentional destruction of relevant documents. Consequently, most E-discovery disputes will not involve accusations of "willful misconduct." Rather, the question of whether or not a company acted in "bad faith" will usually boil down to whether the alleged E-discovery violator committed an act of "ordinary negligence" or "gross negligence."

Also, with respect to the collection of electronic information, many courts take the position that collecting e-mails (and other electronic information) requires the assistance and input of an IT representative.[6] Therefore, unless agreed upon by the parties, simply asking a custodian for his or her e-mails will probably not constitute a "reasonable" collection. The expectation of the courts is that counsel will meet with the appropriate IT personnel to discuss the retrieval of electronic data.

Finally, for companies appearing before the district courts in the Western District of Pennsylvania, several local judges specifically advise that larger companies ***identify dedicated IT personnel to participate directly in the discovery process***. According to the judges, the preservation and retrieval of Electronically Stored Information ("ESI") is now an unavoidable "cost of doing business."[7]

The Typical E-Discovery Sanctions

Courts may award a wide range of sanctions against a party accused of E-discovery violations. What sanction to award is a determination that falls within the sound discretion of the trial judge. The available sanctions vary in terms of severity. On the “less severe” side are the following:

- An order awarding the moving party with the right to take additional discovery;
- An order shifting the cost of discovery; and
- An order awarding fines.

On the “more severe” side are the following:

- An order entitling the moving party to a special jury instruction – *i.e.*, a spoliation instruction;
- An order precluding a party from offering evidence on a particular point; and,
- An order dismissing the case altogether (this is the ultimate sanction and is appropriate only in the most egregious of circumstances, which typically involve such willful acts as perjury, tampering with evidence and/or intentionally destroying relevant evidence).

When considering the imposition of sanctions, a trial court must consider not only the conduct (or culpability) of the alleged spoliator, but whether or not the evidence at issue was “relevant” to a pending

[6] In fact, here in the Western District of Pennsylvania., Local Rule 26.2 specifically requires that counsel identify a person with knowledge of the client's ESI, including how it is "stored, preserved, accessed, retrieved and produced." *See* Local Rule 26.2. Moreover, the new Rule 26 form report (as adopted by the Western District of Pennsylvania) specifically asks the parties to agree on electronic "search terms" that will be used in the retrieval of data.

[7] As a general observation, it is the larger corporations that, simply by virtue of their size, have the most difficulty complying with the ever-increasing E-discovery obligations. Nevertheless, and somewhat ironically, it is these same entities that are being held to the highest standards and, consequently, are often suffering the most severe sanctions.

claim or defense, and whether or not the moving party has suffered "prejudice" as a result of the evidence being lost. As explained by Judge Scheindlin, proving "relevance" and "prejudice" is often difficult, if not impossible, in the context of E-discovery disputes.

The E-Discovery Dilemma: If a Document is Missing, How Do We Know What It Says?

When a party moves for E-discovery sanctions, the motion typically deals with ***non-existent*** documents (*i.e.*, documents that were lost or inadvertently destroyed). Both the parties and the courts, therefore, find themselves in the dark as to the nature of the very documents that lie at the heart of the E-discovery dispute. Although one side is claiming that certain documents are missing, neither side knows exactly what those "missing" documents are. Similarly, neither side knows how many documents are missing, nor does either side know what the missing documents do (or do not) say.

As explained by Judge Scheindlin, "because we do not know what documents have been destroyed, it is impossible to accurately assess what harm has been done to the innocent party and what prejudice it has suffered." Indeed, the documents at issue could have been helpful to the party *seeking* sanctions, could have been helpful to the party *defending* against the sanctions, or could have been helpful to nobody. Given this uncertainty, it becomes critical to determine which party bears the burden of proving that the allegedly lost documents are (or were) "relevant," and that the failure to produce those documents resulted in "prejudice."

"Negligence" versus "Gross Negligence" – Why Should the Parties Care?

As noted above, Judge Scheindlin provides litigants with a list of general practices that she considers to be "grossly negligent" (and, consequently, evidence of "bad faith"). Given the judge's analysis, the next question becomes: Why do we care?

Although the difference between "negligence" and "gross negligence" may appear to some to be a matter of semantics, the designation will likely be of central importance to the courts. According to Judge Scheindlin, the designation determines which party bears the all-important "burden of proving" that the information in question was directly relevant to the case.

The Burden-Shifting Test Adopted by Judge Scheindlin

Judge Scheindlin's resolution to the uncertainty surrounding "missing" electronic documents is to adopt the following analysis: If the alleged spoliator is deemed to be "grossly negligent" with respect to its E-discovery obligations, the court will permit the jury to ***presume*** that the missing documents are ***relevant*** and that the opposing side was ***prejudiced*** by the failure to preserve and produce the documents. The Judge referred to this resolution as a "burden shifting" test, whereby, in cases involving gross negligence, the burden is shifted to the alleged spoliator to rebut the presumption that the evidence at issue was both relevant and prejudicial.

The alleged spoliator can meet this burden by, for example, demonstrating that the moving party had access to the "lost" evidence, or that the evidence at issue would not have supported the moving party's claims or defenses. Under this burden-shifting analysis, if the alleged spoliator demonstrates (to the court's satisfaction) that the evidence at issue was irrelevant, or that the other side suffered no prejudice, a motion requesting a "severe" sanction, such as a spoliation charge, will be denied. In many cases,

however, these questions may ultimately find their way to the jury box, as judges can (and presumably will) defer the underlying questions of relevance and prejudice to the jury. *See* below.

When distilled to a simple proposition, Judge Scheindlin's "burden shifting" analysis boils down to the following: If you are "grossly negligent" in connection with your E-discovery duties, and if the other side moves for sanctions as a result, the other side, ***without the need to prove that any lost or missing evidence is relevant to its case,*** will likely be entitled to a severe sanction – typically a spoliation charge – at the time of trial. In other words, if your conduct is considered "grossly negligent," you will be severely sanctioned.

Although Judge Scheindlin stresses that the presumption of relevance and prejudice is rebuttable (meaning, again, that the alleged spoliator is entitled to present evidence that any lost documents would *not* have been relevant, or that there was no prejudice to the other side), convincing a court (or worse, a jury) that the destruction of documents was harmless is an onerous task – especially when the evidence in question is gone. Indeed, neither side wants to be forced to prove (or disprove) the relevance of a non-existent document.[8]

The Burden of Proof in the Absence of Gross Negligence

In the absence of "gross negligence," a different analysis applies. If the alleged spoliator is considered "negligent" with respect to its E-discovery obligations (as opposed to "grossly negligent"), the party seeking E-discovery sanctions will bear the burden of proving that the evidence at issue was relevant. Similarly, the moving party must prove that the failure to produce the evidence resulted in prejudice. This means that, in situations involving ordinary "negligence," the trial court will likely refuse to issue a severe sanction, such as a spoliation instruction, absent extrinsic evidence that the documentation at issue was particularly relevant to a pending claim or defense. According to Judge Scheindlin, in order to establish relevance and prejudice, it is not enough to show that the missing evidence would have been responsive to a document request. Rather, the moving party must show that the evidence would have been helpful in proving a claim or defense – *i.e.*, that the moving party was actually ***prejudiced*** by the absence of the evidence.

Given the fact that both sides are inevitably dealing with "unknown" documents, the party burdened with the obligation to establish relevance and prejudice is at a distinct disadvantage.

The Jury's Role in Assessing Alleged Spoliation

Based on the analysis outlined by Judge Scheindlin, trial judges may find themselves deferring the questions of relevance and prejudice to the jury – in which case the jury, in addition to being charged on the substantive law that applies to the underlying claims in the case, will be instructed on the alleged

[8] Nevertheless, in circumstances where one party actually has, in its possession, documents that it believes the other party *should have* produced, the party accused of spoliation has a strong argument against the existence of prejudice. In other words, if the party seeking sanctions actually obtained the information in question, albeit from some other source, that party likely suffered no prejudice as a result of the opposing party's failure to produce. The more difficult scenario arises when neither side knows what documents are missing, in which case the burden of proof becomes significant.

"spoliation of evidence." Because there are obvious "factual" components to the spoliation issue and, given the difficulty and time involved in addressing an accusation of spoliation,[9] a trial court may ultimately defer such questions to the jury.

In such circumstances, the fact that the jury is instructed on the *possibility* that relevant evidence was destroyed is a resounding "win" for the party alleging spoliation.

By way of example, Judge Scheindlin, in her January 11, 2010 opinion, ruled that the following spoliation instruction would be given to the jury, even though she specifically concluded that no party committed willful misconduct and that no party was guilty of intentionally destroying relevant documents:[10]

> **The Citco Defendants have argued that 2M, Hunnicutt, Coronation, the Chagnon Plaintiffs, Bombardier Trusts and the Bombardier Foundation destroyed relevant evidence, or failed to prevent the destruction of relevant evidence. This is known as the "spoliation of evidence."**
>
> **Spoliation is the destruction of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. To demonstrate that spoliation occurred, the Citco defendants bear the burden of proving the following two elements by a preponderance of the evidence:**
>
> ***First*, that *relevant* evidence was destroyed after the duty to preserve arose. Evidence is relevant if it would have clarified a fact at issue in the trial and otherwise would naturally have been introduced into evidence; and**
>
> ***Second*, that 2M, Hunnicutt, Coronation, the Chagnon Plaintiffs, Bombardier Trusts, and the Bombardier Foundation were grossly negligent in their failure to preserve the evidence.**
>
> **I instruct you, as a matter of law, that each of these plaintiffs failed to preserve evidence after its duty to preserve arose. As a result, you may presume, if you so choose, that such lost evidence was relevant, and that it would have been favorable to the Citco Defendants. In deciding whether to adopt this presumption, you may take into account the egregiousness of the plaintiffs' conduct in failing to preserve evidence.**
>
> **However, each of these plaintiffs has offered evidence that (1) no evidence was lost; (2) if evidence was lost, it was not relevant; and (3) if evidence was lost and it was relevant, it would not have been favorable to the Citco Defendants.**
>
> **If you decline to presume that the lost evidence was relevant or would have been favorable to the Citco Defendants, then your consideration of the lost evidence is at an end, and you will *not* draw any inference arising from the lost evidence.**

[9] In her opinion, Judge Scheindlin noted that she and her staff spent approximately 300 hours ruling on the plaintiff's motion for E-discovery sanctions.

[10] The actual instruction crafted by Judge Scheindlin is included in its entirety.

> **However, if you decide to presume that the lost evidence was relevant and would have been unfavorable to the Citco Defendants, then you must next decide whether any of the following plaintiffs have rebutted that presumption: 2M, Hunnicutt, Coronation, the Chagnon Plaintiffs, Bombardier Trusts or the Bombardier Foundation. If you determine that a plaintiff has *rebutted* the presumption that lost evidence was either relevant or favorable to the Citco Defendants, you will *not* draw any inference arising from the lost evidence against that plaintiff. If, on the other hand, you determine that a plaintiff has *not rebutted* the presumption that the lost evidence was both relevant and favorable to the Citco Defendants, you may draw an inference against that plaintiff and in favor of the Citco Defendants – namely that the lost evidence would have been favorable to the Citco defendants.**
>
> **Each plaintiff is entitled to your separate consideration. The question as to whether the Citco Defendants have proven spoliation is personal to each plaintiff and must be decided by you as to each plaintiff individually.**

In addition to providing the jury with the foregoing spoliation instruction, the judge issued monetary sanctions against all of the plaintiffs in the case. The monetary sanctions covered all reasonable costs, including attorneys' fees, associated with preparing for and filing the motion for E-discovery sanctions.

Conclusion

As attorneys become more sensitive to E-discovery issues, the number of E-discovery disputes and, in particular, the number of motions seeking E-discovery sanctions will continue to increase. Moreover, until companies learn how to better manage their electronic documents, litigants will have the opportunity to exploit the E-discovery process, including using that process as a weapon to force settlement, or as a means to influence the judge's perception of a case. In this environment, and when presented with an E-discovery dispute, judges across the country will likely be inclined to follow Judge Scheindlin's lead in awarding sanctions for alleged E-discovery violations.

All companies, therefore, should pay particular attention to the conduct that Judge Scheindlin deems to be "grossly negligent." Companies are advised to work with counsel to develop sound litigation hold practices, including the implementation of systematic document preservation and collection procedures. Given the potential for inadvertent destruction and/or simple oversight, having well-established litigation hold practices and procedures is the best defense against a motion for E-discovery sanctions. In addition, having such practices in place can serve as a deterrent for opposing parties who seek to exploit the E-discovery process.

The Labor & Employment Alert is intended to keep readers current on matters affecting labor & employment, and is not intended to be legal advice. If you have any questions, please call ***Ryan Siciliano*** *at 412.566.2839 or any other attorney with whom you have been working.*