



Revisiting *Zubulake*: What You Really Need to Know

While the recent decision in [*Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities, LLC, et al.*](#), Case No. 05 Civ. 9016 (S.D.N.Y. January 15, 2010), does not break new ground in the e-discovery world, it does expand upon the seminal *Zubulake* opinions profoundly impacting the e-discovery practices of parties and their counsel. Titled "*Zubulake* Revisited: Six Years Later," the opinion underscores the critical importance of taking necessary steps in preserving and collecting all potentially relevant data, both electronic and paper, once litigation is reasonably anticipated.

In short, the decision teaches that all litigants, upon reasonable anticipation of litigation, must do all of the following:

- Issue a *written* litigation hold;
- Identify *all* key players and ensure those individuals' electronic and paper records are preserved;
- Cease deletion of email or preserve records of former employees that are in the party's possession; and
- Preserve back-up tapes when those tapes are the sole source of relevant data.

Failure to do so constitutes gross negligence, according to the court. Sanctions can include further discovery, cost-shifting, fines, special jury instructions, preclusion

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or the entry of a default judgment/dismissal.

Standard of Acceptable Conduct

During discovery in *Pension Committee*, defendants found substantial gaps in the plaintiffs' document productions, resulting in discovery-related depositions and declarations. Judge Shira A. Scheindlin felt reluctantly "compelled to closely review the discovery efforts of parties in a litigation." She pointed out that "by 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 the right places for those records, will inevitably result in the spoliation of evidence." *Pension Committee* at 2.

The opinion emphasizes that intent is not a factor: "failure to conform to this standard is negligent even if it results from a pure heart and an empty head." *Id.* at 8. Further, the degree of negligence (e.g., negligence, gross negligence or willful misconduct) will be determined by the circumstances surrounding the failure to comply.

In addition to characterizing the failure to take the above listed steps as gross negligence, the court pointed out other examples of "negligent" conduct, which have potential far-reaching implications. For example, the court noted that failure to obtain records from *all* employees (some of whom may have had only a passing encounter with the issues in the litigation), as opposed to key players only, likely constitutes negligence.

Burden of Proof

The *Pension Committee* opinion also addresses the question of who bears the burden of proving that the documents can no longer be found and that the lost documents have prejudiced the innocent party. Judge Scheindlin suggests that when an innocent party is seeking a lesser sanction, such as additional discovery, fines or cost-shifting, the innocent party must show that documents were lost and relevant. For more severe sanctions, however, such as dismissal, preclusion or imposition of an adverse inference, the innocent party must prove three elements:

1. The spoliating party had control over the evidence and an obligation to preserve it at the time of destruction or loss;
2. The spoliating party acted with a culpable state of mind upon destroying or losing the evidence; and
3. The missing evidence is relevant to the innocent

party's claim or defense.

When the spoliating party acts in bad faith to destroy evidence, courts will allow a presumption that the missing evidence was unfavorable to that party. If the spoliating party was merely negligent, the innocent party must prove both relevance and prejudice in order to justify the imposition of a severe sanction. Further, if an innocent party meets its burden and a jury is permitted to presume lost documents are relevant and prejudicial, the burden then shifts to the spoliating party to rebut the presumption by showing the innocent party had alternate access to the missing data or that the missing data would not have supported the innocent party's claims or defenses.

A white paper with a more in-depth discussion of the *Pension Committee* decision is [available online](#). The Squire Sanders e-discovery and document management team is well equipped to help clients efficiently identify, understand and manage the e-discovery issues they may face in litigation. For further information, please visit our [e-discovery and data management page](#) or contact one of the individuals listed in this Update.

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations. Counsel should be consulted for legal planning and advice.

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