JENNER&BLOCK

Complex Commercial
Litigation Practice

Client Advisory

January 2010

Do's and Don't's for E-Discovery: New Sanctions Opinion Offers Guidance for Litigants

by Martina E. Vandenberg and Brian J. Fischer

Judge Shira A. Scheindlin, S.D.N.Y., has issued another blockbuster e-discovery decision that is sure to become required reading for litigants throughout the United States. In *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC,et al.*, Judge Scheindlin, author of the five *Zubulake* decisions pre-dating the e-discovery amendments to the Federal Rules of Civil Procedure, provides an analytical framework for litigators to assess their e-discovery performance and judges to calibrate sanctions. 05 Civ. 9016 (SAS) (S.D.N.Y. Jan. 15, 2010), Amended Opinion and Order (the "Slip Op."). Judge Scheindlin christened her decision "*Zubulake* Revisited: Six Years Later."

Boiled down to its core, the 85-page opinion suggests a laundry list of do's and don't's for litigators handling pre-trial discovery.

Judge Scheindlin's Pension Committee Case DO's

- **Do issue written litigation holds.** Litigation holds should be in writing and disseminated to the widest of audiences early. For prospective plaintiffs, litigation holds should be issued no later than upon retention of outside counsel. Litigation holds should explicitly instruct employees and potential custodians not to destroy records. Slip Op. at 12, 29, 33, 44, 47, 72.
- **Do search broadly.** Preservation and collection of the records of employees who were key players in the events in dispute is a given. The failure to preserve and obtain records of employees with relatively minor or even redundant roles, however, could also be branded as negligent. Likewise, failure to collect the documents of former employees or those of individuals who may have changed jobs within the company can trigger unwelcome scrutiny. Slip Op. at 10, 49, 53, 58, 67-69.
- **Do supervise discovery adequately.** Individuals well-versed in discovery responsibilities, such as in-house or outside counsel, should seize control of preservation and collection activities. Delegating these duties to an unsupervised, inexperienced assistant or paralegal, or affording employees the discretion to determine what should be maintained and turned over, can be problematic. Slip Op. at 28, 50-54, 65, 77.
- **Do chronicle discovery efforts contemporaneously.** Keeping close track of one's own discovery efforts – e.g., when preservation was mandated; what has been preserved; which custodians have had their files collected; what has been produced; why ostensible sources of discovery were not tapped – will be invaluably helpful if those efforts are later challenged by the opposition. Being able to pronounce with certainty that those efforts were diligent and thorough should minimize the danger of a discovery skirmish turning into an all-out battle before the court. Slip Op. 30-33, 54-57.
- **Do assume that oversights will be identified.** Multi-front and multi-party suits carry unique concerns, as do actions where discovery is obtained by subpoena from non-parties. Adversaries can often track down the documents that should have appeared, but did not appear, in your production – or at least identify the gaps. Overselling the reliability of your collection and production, as plaintiffs did with glowing affidavits here, will only do permanent damage to your credibility before the court. Slip Op. at 32.
- **Do monitor and manage discovery, even in the wake of a stay.** A discovery stay is not a release from discovery obligations. Discovery stays may be imposed for a variety of reasons, such as pending adjudication of a motion to dismiss implicating the PSLRA, or pending resolution of a related first-filed proceeding. Preservation of electronic or paper

©2010 Jenner & Block LLP. Jenner & Block is an Illinois Limited Liability Partnership including professional corporations. This publication is not intended to provide legal advice but to provide information on legal matters. Transmission is not intended to create and receipt does not establish an attorney-client relationship. Readers should seek specific legal advice before taking any action with respect to matters mentioned in this publication. The attorney responsible for this publication is Martina E. Vandenberg. Masthead image from the Collection of the Supreme Court of the United States. Attorney Advertising. Prior results do not guarantee a similar outcome.

documents should not await termination of the stay, or lapse during the stay. Slip Op. at 47.

- **Do "anticipate and undertake document preservation with the most serious and thorough care, if for no other reason than to avoid the detour of sanctions."** Slip Op. at 25. In addition to facing sanctions, the plaintiffs here were forced to devote months and considerable resources to defending their discovery efforts – time and money that could have been better spent pursuing their claims against the defendants.
- **Do sweep all forms of ESI. Restricting preservation and collection to email inboxes is insufficient.** An appropriately comprehensive discovery plan considers other sources, including central electronic and network files, personal computers on which employees conducted company work, PDAs, and backup tapes (when "such tapes are the sole source of relevant information"). Slip Op. at 43 n.99, 59-60, 70, 73.

Judge Scheindlin's *Pension Committee* Case DON'T's:

- **Don't dawdle.** Issue a litigation hold notice as soon as practicable.
- **Don't claim that you have produced "all" documents.** In the age of ESI, this is an impossible standard. Use of the word "all" undermines credibility, particularly when opposing counsel finds the 311 documents you failed to produce. Slip Op. at 32.
- **Don't rely on employees to determine what is responsive and what is not.** Supervision by counsel is essential.
- **Don't issue oral litigation hold orders.** Only written litigation holds will protect an entity engaged in a heated discovery battle.
- **Don't take a discovery hiatus just because your case has been stayed.** Discovery obligations remain, even when the underlying litigation is dormant.
- **Don't delegate collection efforts to inexperienced staff lacking training and supervision.** If nothing else, the tide of opinions from courts across the country on what constitutes adequate discharge of electronic discovery responsibilities – including Judge Scheindlin's voluminous contributions – confirms that this is a crucial aspect of litigation that should not be delegated to the uninitiated.
- **Don't forget to collect materials from home computers and PDAs used for work that may reasonably be thought to contain potentially responsive or relevant information.** Potentially relevant information should be gathered from all known media and sources.
- **Don't neglect to cancel regular destruction orders that may be in place for back-up tapes, archived documents, and even custodial material.** Litigants who fail to discontinue deletion of unique data once the duty to preserve has attached will not be exonerated simply because the destruction may be deemed "ordinary course."
- **Don't submit affidavits attesting to the excellence and diligence of your preservation efforts from individuals without personal knowledge of the relevant events.** Review deposition testimony on retention and collection efforts that might contradict affidavits you intend to file with the court. Slip Op. at 44.

What Are The Consequences?

Judge Scheindlin's decision illustrates the potentially unpleasant consequences of the failure to adequately preserve and produce documents. Notwithstanding the court's statement that courts "cannot and do not expect that any party can meet a standard of perfection," (Slip Op. at 2), the decision makes clear that indifferent, ignorant, and sloppy document collections will be punished. "While litigants are not required to execute document productions with absolute precision, at a minimum they must act diligently and search thoroughly at the time they reasonably anticipate litigation." Slip Op. at 85.

In her opinion, Judge Scheindlin found that six plaintiffs had acted in a grossly negligent manner, and seven plaintiffs had acted negligently. Although the court declined to dismiss the complaint as defendants sought, Judge Scheindlin did order significant sanctions against all thirteen plaintiffs targeted in defendants' motion.

At trial, the six plaintiffs found to have acted with gross negligence will face a charge instructing the jury that they "failed to preserve evidence after [their] duty to preserve arose," a "failure [that] resulted from their gross negligence in performing their discovery obligations." Slip Op. at 83. Because of this, the

jury will have the option of presuming "that such lost evidence was relevant, and that it would have been favorable" to the defendants. Slip Op. at 83. Further, the defendants will be permitted to offer evidence about the egregiousness of the misconduct, although the plaintiffs will be allowed to offer evidence downplaying the harm caused. Slip Op. at 83.

Whatever conclusion the jury reaches, the "trial within a trial" that these discovery lapses have spawned will be a major distraction in an already-complex case.

The seven plaintiffs whose conduct fell short of gross negligence, but were nonetheless found to have acted negligently in failing to institute a litigation hold and committing a variety of other collection and production omissions, escaped the spoliation jury charge because the defendants could not establish in their motion that the evidence those seven plaintiffs lost "prejudiced [defendants'] ability to defend the case." Slip Op. at 41.

The dividing line between "gross negligence" and mere "negligence" is fuzzy, and indeed Judge Scheindlin acknowledged that "[e]ach case will turn on its own facts and the varieties of efforts and failures is infinite." Slip Op. at 10. Invoking a leading torts treatise, Judge Scheindlin noted that gross negligence "differs from ordinary negligence only in degree, and not in kind." Slip Op. at 8. Her plaintiff-by-plaintiff evaluations of misconduct bear that out. Those deemed grossly negligent were cited for more disconcerting and less justifiable acts and omissions than those deemed merely negligent.

The difficulty in identifying precisely where the line has been crossed is further reason to avoid a finding of misconduct altogether, as is Judge Scheindlin's imposition of monetary sanctions on all thirteen plaintiffs – both the grossly and merely negligent. In particular, the plaintiffs were ordered to compensate defendants for their reasonable costs incurred, including attorneys' fees, in identifying discovery failures and bringing them to the court's attention.

Although Judge Scheindlin disclaimed at the outset of her opinion that "[t]his case does not present any egregious examples of litigants purposefully destroying evidence," (Slip Op. at 5), these are serious sanctions. Moreover, Judge Scheindlin warned that instances of intentional misconduct, while not present in this case, would invite the most severe of sanctions – preclusion of evidence and dismissal of claims. Slip Op. at 14, 19-20.

Ultimately, Judge Scheindlin's ruling is further evidence that litigants failing to take proactive steps to manage electronic discovery risk reputational damage, distraction from the case's merits, significant litigation, and monetary sanctions. A well-considered, timely, and comprehensive plan for preserving, gathering, and searching electronically stored information might have allowed plaintiffs to avoid this upset. The up-front time and expense is a crucial investment. If foregone, the consequences suffered later in litigation can be exponentially more costly.

While this advisory distills into Do's and Don't's best practices from Judge Scheindlin's opinion, document preservation, collection, and production – particularly in complex litigation –necessarily requires judgment and discretion in attempting to assure full compliance with legal obligations while at the same time making the inevitable burdens as manageable and cost-effective as possible. Accordingly, no set of Do's and Don't's – including those derived from Judge Scheindlin's opinion – can substitute for informed judgment that accounts for all facts and circumstances and the context of the litigation.

For more information, please contact the following Jenner & Block attorneys:

Martina E. Vandenberg
Partner
Tel: 202 639-6046
E-mail: mvandenberg@jenner.com

Brian J. Fischer
Partner
Tel: 212 891-1629
E-mail: bfischer@jenner.com