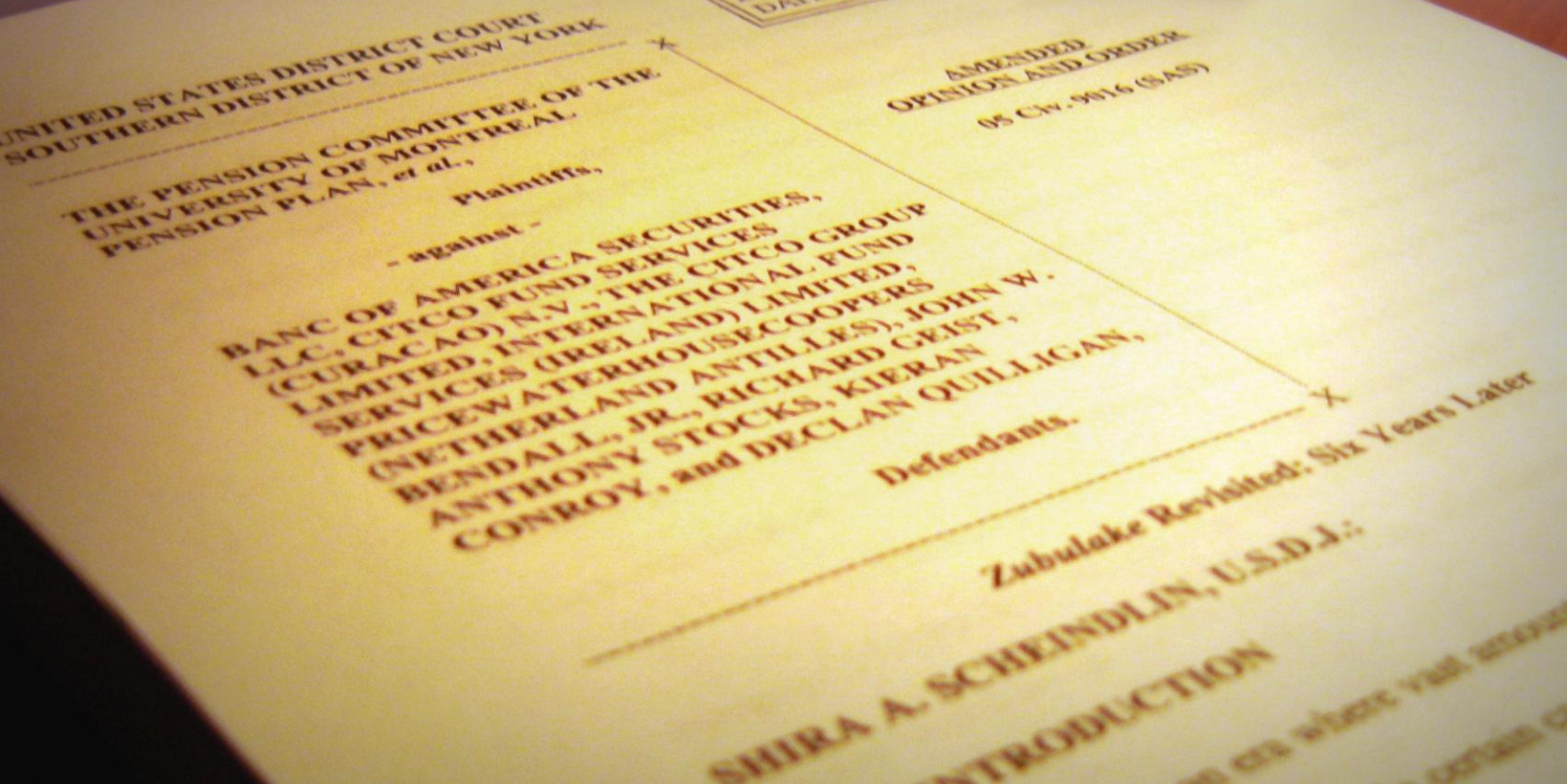


"The analysis of Judge Scheindlin's Pension Committee opinion is good, clear and useful. Harris and Jablonski ably summarize the case and suggest ways to apply the ruling to legal hold directives. It's a fine piece of scholarship."

– Craig Ball



# The Pension Committee Opinion

## Judge Scheindlin's Call to Action for Effective Legal Holds

By Brad Harris and John Jablonski

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February 2010

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## ABOUT ZAPPROVED INC.

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# A Legal Hold Pro™ Signature Paper

## The Pension Committee Opinion: Judge Scheindlin's Call to Action for Effective Legal Holds

By Brad Harris and John Jablonski

Reading U.S. District Court Judge Shira Scheindlin's opinion in *The Pension Committee* case, one might wonder what is the "big deal" since she revisits ideas and standards previously made famous six years ago in the *Zubulake*<sup>1</sup> case. Although little new ground is covered in terms of litigation hold and e-discovery duties, Judge Scheindlin makes it painfully clear that litigants in federal court must issue written litigation holds to avoid sanctions.

But don't be fooled, this lack of new ground doesn't make it any less significant. In fact, even though the opinion was first issued on January 11, 2010 (and later amended on January 15), *The Pension Committee* will likely go down as the most important and cited opinion of the year. Judge Scheindlin's opinion expresses the growing frustration of federal judges as they are forced to police the preservation of vast amounts of electronically stored information ("ESI") relevant to modern litigation. She goes out of her way to send a clear message – federal judges do not want to waste time poring over reams of submissions related to whether ESI has been properly preserved.

The duty to issue a written litigation hold is clearly viewed as a reasonable way for litigants to demonstrate the discharge of their preservation obligations. Judge Scheindlin seems to have written this opinion, which took more than 300 collective hours of her time and that of her two clerks,<sup>2</sup> to emphasize the steps necessary to properly preserve ESI, illustrating a laundry list of e-discovery short comings that are not overly egregious.

While *The Pension Committee* opinion will unquestionably be scrutinized by attorneys for years to come, this paper focuses on the practical impact on organizations and ways to proactively develop a litigation hold process to meet the standard outlined by Judge Scheindlin.

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<sup>1</sup> *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003) "*Zubulake IV*" and *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) "*Zubulake V*"

<sup>2</sup> *The Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities LLC, et al.*, Amended Order, Case No. 05-cv-9016 (SDNY Jan. 15, 2010), p.25, Footnote 56

## Executive Summary

There are a number of clear takeaways from *The Pension Committee* case:

- “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 in the right places for those records, will inevitably result in the spoliation of evidence.”
- The failure to issue a written litigation hold when litigation is reasonably anticipated is gross negligence.
- “[T]he failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.”
- “[O]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”
- “[T]he following failures support a finding of gross negligence, when the duty to preserve has attached: [1] to issue a *written* litigation hold; [2] to identify all of the key players and to ensure that their electronic and paper records are preserved; [3] to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and [4] to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players

*The Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities LLC, et al., Amended Order, Case No. 05-cv-9016 (SDNY Jan. 15, 2010)*

is not obtainable from readily accessible sources.”

- “[P]arties need to anticipate and undertake document preservation with the most serious and thorough care, if for no other reason than to avoid the detour of sanctions.”
- “[D]epending on the extent of the failure to collect evidence, or the sloppiness of the review, the resulting loss or destruction of evidence is surely negligent, and, depending on the circumstances may be grossly negligent or willful. For example, the failure to collect records – either paper or electronic – from key players constitutes gross negligence or willfulness as does the destruction of email or certain backup tapes after the duty to preserve has attached. By contrast, the 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, likely constitutes negligence as opposed to a higher degree of culpability. Similarly, the failure to take all appropriate measures to preserve ESI likely falls in the negligence category.”
- Spoliation sanctions “from least harsh to most harsh [include] further discovery, cost-shifting, fines, special jury instructions, preclusion, and the entry of default judgment or dismissal (terminating sanctions).”
- “Monetary sanctions are appropriate ‘to punish the offending party for its actions [and] to deter the litigant’s conduct, sending the message that egregious conduct will not be tolerated.’”

## The Case At Hand: A Summary of *The Pension Committee*

The case involves a complex securities litigation filed by a group of 96 investors trying to recover \$550 million in losses due to the collapse of two British Virgin Island-based hedge funds called Lancer Offshore and OmniFund in April 2003. The funds were managed by Lancer Management Group who retained Citco Fund Services to administer them.

The case was filed in the Southern District of Florida in February 2004. The case was transferred to the Southern District of New York in October 2005. Defendants began asserting discovery violations from October 2007 to June 2008, including allegations that plaintiffs failed to preserve ESI and other documents and then made “false and misleading declarations regarding their document collection and preservation efforts.”<sup>3</sup>

In anticipation of litigation, plaintiffs engaged outside counsel and those attorneys “telephoned and emailed plaintiffs”<sup>4</sup> requesting copies of relevant documents to help draft the complaint. Judge Scheindlin states at the outset that this case does not involve “any egregious examples of litigants purposefully destroying evidence.”<sup>5</sup> The discovery shortcomings, while minor, still caused Judge Scheindlin to issue sanctions because plaintiffs failed to meet the standard needed to avoid spoliation.

The Court noted that counsel’s emails and memoranda “did not meet the standard of a litigation hold” because plaintiff’s counsel

failed to direct employees to preserve all relevant records and failed to create a mechanism for collecting records.<sup>6</sup> The memoranda required employees to determine what was relevant and to respond without supervision by counsel. Further, the memoranda did not instruct employees to suspend the destruction of potentially relevant records. Plaintiffs did not issue a formal written litigation hold until 2007<sup>7</sup> – nearly four years after the trigger event in April 2003 at the time of Lancer’s bankruptcy filing.

Defendants, noticing gaps in the opposing side’s document production, made a request to the Court for declarations describing plaintiffs’ preservation efforts. In response, plaintiffs filed declarations in the first half of 2008. Following depositions of certain declarants, defendants uncovered significant gaps in discovery proffered by thirteen plaintiffs, including finding that “almost all of the declarations were false and misleading and/or executed by a declarant without personal knowledge of its contents.”<sup>8</sup>

According to the Court, defendants showed that the thirteen plaintiffs targeted by the motion “clearly failed to preserve and produce relevant documents.”<sup>9</sup> Missing documents included 311 cross-referenced emails that were not produced by some plaintiffs, although produced by other plaintiffs. The Court also concluded that unknown documents were missing, including documentation of the investors’ due diligence records that were presumed to have existed as part of plaintiffs’ fiduciary duty of due diligence prior to making

<sup>3</sup> Ibid., p.4

<sup>4</sup> Ibid., p.28

<sup>5</sup> Ibid., p.5

<sup>6</sup> Ibid., p.28

<sup>7</sup> Ibid., p.30

<sup>8</sup> Ibid., p.32-33

<sup>9</sup> Ibid., p.34

significant investments.<sup>10</sup> Defendants argued that it was absurd for them to be held responsible for an allegedly missing class of unknown documents. The Court disagreed, holding that “[t]he paucity of records produced by some plaintiffs and the admitted failure to preserve some records or search at all for others by all plaintiffs leads inexorably to the conclusion that relevant records have been lost or destroyed.”<sup>11</sup>

Judge Scheindlin, giving plaintiffs the benefit of any doubt, held that the duty to issue a written legal hold was not well established in 2003, but was clearly established by mid-2004 following her *Zubulake V* opinion. Therefore, the court held that issuing a written legal hold was required, no later than 2005 when the case was transferred to the Southern District of New York.

“The failure to [issue a written legal hold] as of that date was, at a minimum, grossly negligent.”<sup>12</sup>

Defendants failed to establish that responsive documents were destroyed after that date<sup>13</sup> helping plaintiffs avoid the most severe sanctions associated with destruction of evidence with a “culpable state of mind.”

Defendants were able to show, however, that one plaintiff destroyed backup tapes in 2004 after the duty to preserve was established. A number of plaintiffs did not collect or preserve documents, but even more serious were the sworn declarations offered by some plaintiffs claiming that “all” relevant ESI was produced. The Court held that the declarations were deliberately

vague, lacked detail seemingly “to mislead” defendants and the Court or were prepared by someone lacking sufficient knowledge of preservation efforts.<sup>14</sup> While none of this rose to the level of willful misconduct in the Court’s eyes, the lack of diligence in preservation was deemed grossly negligent by some and negligent by others.<sup>15</sup>

Given the complexity of this securities case and the heterogeneous group of plaintiffs, the Court delved deeper and delivered opinions on the preservation efforts of each plaintiff. Six plaintiffs were deemed grossly negligent, while the remaining seven were deemed merely negligent. In the Court’s analysis gross negligence was the result of failing to issue a written litigation hold prior to 2007, continuing to delete ESI after the trigger event, failing to request documents from key players, delegating search efforts without any supervision from management, destroying backup tapes relating to key players where other ESI was not readily available and/or submitting misleading or inaccurate declarations.<sup>16</sup> The latter group were spared harsher judgment “after careful consideration”<sup>17</sup> because the “failure to institute a written litigation hold” was “not yet generally required”<sup>18</sup> in early 2004 in federal court in Florida. As a result failure to issue a litigation hold alone was insufficient to constitute negligence, absent additional discovery violations.<sup>19</sup>

When meting out sanctions, Judge Scheindlin states that defendants “demonstrated that most plaintiffs conducted discovery in an ignorant and indifferent fashion.”<sup>20</sup> The opinion includes a

<sup>10</sup> Ibid., p.35  
<sup>11</sup> Ibid., p. 35  
<sup>12</sup> Ibid., p.36  
<sup>13</sup> Ibid., p.37

<sup>14</sup> Ibid., p.38  
<sup>15</sup> Ibid., p.38  
<sup>16</sup> Ibid., pp.42-43  
<sup>17</sup> Ibid., p.63  
<sup>18</sup> Ibid., p.64  
<sup>19</sup> Ibid., p.64  
<sup>20</sup> Ibid., p.82

detailed “spoliation” jury instruction to be used to provide the jury with detailed information about the spoliation caused by the “grossly negligent” plaintiffs.<sup>21</sup> The Court held that defendants were able to show that unknown documents were destroyed due to poor preservation and the lack of an effective litigation hold.<sup>22</sup> For the unknown missing documents, however, defendants will be required to demonstrate that they were prejudiced by the missing documents before the class of negligent plaintiffs will be sanctioned with a spoliation jury instruction.<sup>23</sup>

Monetary sanctions were also handed out to all plaintiffs. The Court awarded reasonable costs to defendants, including attorneys’ fees associated with bringing the motion, deposing the declarants and reviewing declarations, which will be allocated among the thirteen plaintiffs.<sup>24</sup> The Court determined that an award of additional discovery “would not be fruitful”<sup>25</sup> with the exception of two plaintiffs who acknowledged that backup tapes had yet to be reviewed. Accordingly, two plaintiffs were ordered to search backup tapes at their own expense.<sup>26</sup>

## Written Legal Holds Established as Contemporary Standard

*From January 11, 2010, the failure to issue a **written** legal hold notice whenever litigation is reasonably anticipated is gross negligence.*

Those who practice law recognize that a vast continuum of gray, open to nuance and interpretation, exists (or rather existed) regarding the duty to issue written litigation hold notices. While bright line rules can make life simpler, clear black and white is a rare occurrence. *The Pension Committee* opinion will be cited for years to come as the moment when *written* litigation holds became a black and white issue.

Judge Scheindlin inaugurated the concept of legal holds in her landmark *Zubulake* opinions, and her latest opinion serves as a bookend. (In fact, she went so far as to subtitle *The Pension Committee* opinion “*Zubulake Revisited: Six Years Later.*”<sup>27</sup>) It is clear from her 89-page opinion that she is taking this opportunity to show her impatience for counsel not taking seriously the duty to preserve relevant records. As a result of the failure to issue written litigation holds, litigants are undermining the integrity of the judicial process. She notes in her introduction:

“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 in the right places for those records, will inevitably result in the spoliation of evidence.”<sup>28</sup>

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<sup>21</sup> The Court drew a distinction between a “spoliation” jury instruction and an adverse jury instruction, reserving the later harsh instruction for cases of egregious conduct akin to willful destruction of ESI. See *Ibid.*, pp. 21-23

<sup>22</sup> *Ibid.*, p.40-41

<sup>23</sup> *Ibid.*, p.41

<sup>24</sup> *Ibid.*, p.84. Although projected costs associated with monetary sanctions were not discussed, it is reasonable to assume that these costs will be in excess of \$100,000.00, given the complexities of the issues before the Court.

<sup>25</sup> *Ibid.*, p.85

<sup>26</sup> *Ibid.*, p.85

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<sup>27</sup> *Ibid.*, p.1

<sup>28</sup> *Ibid.*, p.2

The lengthy opinion is written as if it were an academic treatise<sup>29</sup>, bolstering the weight of the Court's opinion. Judge Scheindlin begins by quoting the philosopher Santayana and then

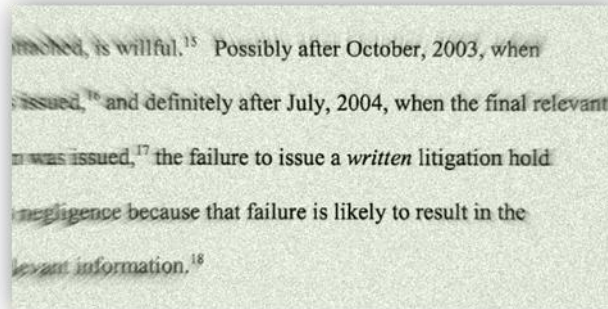
delves into the meaning and implication of terms such as "negligence," "gross negligence," and "willfulness" in the context of e-discovery. The opinion cites the law school mainstay *Prosser & Keeton on Torts*<sup>30</sup> for its definition of negligence:

"Conduct 'which falls below the standard established by law for the protection of others against unreasonable risk of harm.' [Negligence] is caused by heedlessness or inadvertence, by which the negligent party is unaware of the results which may follow from [its] act."<sup>31</sup>

The opinion leaves determinations of negligence to the experience and wisdom of the Court, but adds that the party must meet its obligation to participate meaningfully and fairly in the discovery proceeding. "A failure to conform to this standard is negligent even if it results from pure heart and an empty head."<sup>32</sup>

Gross negligence is defined as:

"a failure to exercise even that care which a careless person would use."<sup>33</sup>



Turning to the discussion at hand, Judge Scheindlin proceeds to apply these definitions to the discovery process by stating that, "[a]fter a discovery duty is well established,

the failure to adhere to contemporary standards can be considered gross negligence."<sup>34</sup> The standards that apply for discovery today were laid out in Judge Scheindlin's seminal *Zubulake V* opinion in July 2004:

"The obligations that counsel should take to ensure compliance with the preservation obligation...issu[ing] a "litigation hold" at the outset of litigation or whenever litigation can be reasonably anticipated. The litigation hold should be periodically re-issued..."

"[C]ounsel should communicate directly with 'key players' in the litigation...."

Even though other courts have found the lack of issuance of a written litigation hold as grossly negligent, the weight of Judge Scheindlin's opinion is notable in that it strongly affirms the need for the hold to be issued in a written form as follows:

"The failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information."<sup>35</sup>

<sup>29</sup> The opinion contains 251 footnotes.

<sup>30</sup> Prosser, William, et al., *Prosser & Keeton on Torts*, 5<sup>th</sup> Edition, West Group, 1984

<sup>31</sup> *The Pension Committee*, p.7

<sup>32</sup> *Ibid.*, p.8

<sup>33</sup> *Ibid.*, p.8

<sup>34</sup> *Ibid.*, p.24

<sup>35</sup> *Ibid.*, p.9

The emphasis on the word “written” is indeed in the opinion. The desired outcome is to create an effective and more accountable process. The discipline of putting the hold in writing and then distributing it creates an audit trail that courts can follow to understand whether a litigant fulfilled its obligation to preserve evidence.

Further, the opinion emphasizes the concept of “timeliness” as a litigation hold standard,<sup>36</sup> requiring a finding of gross negligence for the failure to issue a *timely* litigation hold notice. As some parties found out in *Pension Committee*, sanctions are a very real consequence of failing to issue written litigation holds until well beyond the “trigger event” that gave rise to the duty to preserve ESI and other documents in this litigation.

Judge Scheindlin unambiguously points the way for counsel to do a better job in the process of preservation. It is clear that this Judge is echoing the sentiment of a bench that has lost its patience for shoddy preservation and discovery efforts. Despite the obvious hurdles created by exploding amounts of ESI, preservation remains a core duty in litigation. It is an important duty because the failure to take reasonable steps to ensure preservation is an affront to the integrity of the judicial process. Distilling preservation efforts into an auditable written litigation hold process improves the efficiency of the courts and avoids the waste of judicial resources spent analyzing piles of spoliation motion papers. The bickering back and forth among the multiple litigants in *The Pension Committee* case consumed significant resources of the litigants and the Court (as Judge Scheindlin was quick to point out in her comment

about the total time spent on preparing this opinion). According to Judge Scheindlin, courts should be spending their resources resolving controversies rather than chasing down “detours” like spoliation motions. It is hard to imagine a more pertinent example of a case that needs to stay on course than this one – remember it is a \$550 million claim. Instead significant resources were spent on depositions, declarations and motion practice. Reading between the lines, Judge Scheindlin believes that her time analyzing preservation could have been saved if a written litigation hold had been timely implemented with appropriate follow up (also known as due diligence in legal terms).

The opinion then examines two other aspects: burdens of proof and remedies. Once spoliation of evidence is indicated and actual evidence is no longer available, what standards apply to each party to rectify the situation in terms of determining how damaging the loss is (burden of proof) and what corrective actions (remedies) are called for? These two concepts, although addressed separately, are relevant to each other.

Determining the impact on a case when evidence is no longer available is a conundrum. Judge Scheindlin lays out a compelling framework around this delicate area. In some situations, the evidence can be reconstructed through circumstantial evidence and deposition. When content is not able to be reconstructed or remains in dispute, then the burden of proof corresponds to the severity of the sanction.<sup>37</sup> In cases of negligence, the innocent party must prove that the destroyed evidence was not just responsive to the request but also helpful in proving its

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<sup>36</sup> Ibid., p.63

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<sup>37</sup> Ibid., p.13

claims or defenses.<sup>38</sup> The test is whether the innocent party can show (1) that the spoliating party had control over the evidence and an obligation to preserve it, (2) acted with a culpable state of mind upon destroying or losing the evidence, and (3) that the missing evidence is relevant to the claim or defense.<sup>39</sup>

Relevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner.<sup>40</sup> When bad faith is found in evidence destruction, courts can conclude that “the missing evidence was unfavorable to that party.”<sup>41</sup> This presumption is also applicable to cases where gross negligence is found, although such finding is at the court’s discretion.<sup>42</sup> If the court decides there is sufficient cause for an adverse inference instruction, then the burden of proof shifts to the spoliating party to demonstrate that the innocent party has not been prejudiced by the absence of the missing information.<sup>43</sup>

Regarding remedies, courts should only impose the least harsh sanction necessary to address the harm. The range of remedies “include – from least harsh to most harsh – further discovery, cost-shifting, fines, special jury instructions, preclusion and the entry of default judgment or dismissal (terminating sanctions).”<sup>44</sup> The objective of sanctions is to: “1) deter the parties from engaging in spoliation; 2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and 3) restore the prejudiced party to the same position [it]

would have been absent the wrongful destruction of evidence by the opposing party.”<sup>45</sup>

The opinion analyzes proportionality of different types of sanctions, spending considerable time on special jury instructions, including creating a lesser “spoliation” jury instruction in addition to the harsher “adverse inference” jury instruction.<sup>46</sup> The Court also discusses monetary sanctions which are deemed appropriate in this case “to punish the offending party and send a message that egregious conduct will not be tolerated.”<sup>47</sup> The Court awarded monetary sanctions to compensate the innocent party (defendant) for the costs incurred due to the spoliating parties’ actions.<sup>48</sup>

By way of simple deduction, *not* issuing a written litigation hold is conduct that this Court will not tolerate by anyone, in particular a careless one. The simple failure to issue a written litigation hold goes beyond mere negligence and is now gross negligence, as a matter of law. Clearly, ignoring this new duty is an unnecessary, serious and avoidable risk that will only invite serious sanctions. Judge Scheindlin’s patience is gone and it takes little imagination to extrapolate this lack of tolerance to the rest of the federal bench and beyond.

There is no ambiguity. It does not matter if you are a plaintiff or a defendant. A written and timely litigation hold is a requirement once a duty to preserve data has attached. The duty attaches whenever litigation is reasonably anticipated. An organization’s knowledge of a trigger event is judged on a

<sup>38</sup> Ibid., p.14

<sup>39</sup> Ibid., p.15 citing *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108-09 (2d Cir. 2002)

<sup>40</sup> Ibid., p.15

<sup>41</sup> Ibid., p.15

<sup>42</sup> Ibid., p.15

<sup>43</sup> Ibid., p.17

<sup>44</sup> Ibid., p.19

<sup>45</sup> Ibid., p.19

<sup>46</sup> Ibid., pp.22-23

<sup>47</sup> Ibid., p.23

<sup>48</sup> Ibid., p.23

case-by-case basis using a knew or should have known standard. When faced with a clear trigger event an organization must issue a written litigation hold or face the prospects of sanctions.<sup>49</sup>

## Designing an Effective Legal Hold

Sifting through the opinion and understanding its gravity is a necessary first step to extracting the practical ramifications of meeting Judge Scheindlin's litigation hold standards. Helping organizations understand the standards and apply them is the goal of this paper. Between her *Zubulake* and *The Pension Committee* opinions, Judge Scheindlin provides a definitive set of minimum standards that her Court requires following an event that triggers the duty to preserve evidence for litigation. The objective is not for perfection, as she writes in the introduction, but primarily to ensure that "relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing parties."<sup>50</sup>

*The Pension Committee* includes this list of litigation hold standards (referring back to the final *Zubulake V* opinion) to be followed by litigants to meet their duty to preserve:

- issue a written litigation hold;
- identify the key players and to ensure that their electronic and paper records are preserved;
- cease the deletion of email;
- preserve the records of former employees that are in a party's possession, custody, or control; and

- preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.<sup>51</sup>

Since the *Zubulake* opinion, the importance of legal holds has grown. In December 2006, the Federal Rules of Civil Procedure (FRCP) were amended to make accommodations for electronic discovery and allow for a safe harbor against inadvertent destruction of ESI due to the routine operation of an organization's IT systems. The commentary to the safe harbor amendment requires good faith operation to avoid sanctions, advising that good faith may require suspension of an IT system's auto-delete features (such as automatic deletion of email every 90 days). *The Sedona Conference® Commentary on Legal Holds*,<sup>52</sup> issued in August 2007 (*Commentary*), references Rule 37(e) of the FRCP in Guideline 10 about monitoring legal holds on an ongoing basis:

"[t]his provision places a premium on the legal hold process... Without a defined process, the safe harbor will be difficult to invoke and may offer little safety at all."<sup>53</sup>

In an attempt to set forth best practices for legal holds, the *Commentary* points out that a legal hold is most effective when it does the following:

- Identifies the persons who are likely to have the relevant information;

<sup>49</sup> See *7 Steps for Legal Holds of ESI and Other Documents*

<sup>50</sup> *The Pension Committee*, p.2

<sup>51</sup> Ibid. p.24 (Note: The formatting was changed to a bulleted list for readability. No text was changed.)

<sup>52</sup> *The Sedona Conference® Commentary on Legal Holds*, The Sedona Conference, 2007

<sup>53</sup> *The Sedona Conference® Commentary*, p.16

- Communicates in a manner that ensures the recipients will receive actual, comprehensible and effective notice;
- Is in a written form;
- Clearly defines what information is to be preserved and how the preservation is to be undertaken; and
- Is periodically reviewed and, when necessary, reissued in either its original or an amended form.<sup>54</sup>

In the meantime, dozens of opinions have been written in federal and state courts to clarify what constitutes an effective litigation hold, including failures that amount to negligent and grossly negligent conduct by litigants to preserve evidence. Opinions such as *Acorn v. County of Nassau*<sup>55</sup> from March 2009 show the ineffectiveness of a verbal litigation hold, deemed to be grossly negligent. Ultimately, a defensible preservation effort needs a “reasonable and good faith” design that is built on transparency, consistency, predictability and timeliness.

### Contemporary Standard for Litigation Holds Checklist

The *Pension Committee* opinion enumerates various litigation hold duties, but Judge Scheindlin does not gather them into a unified list. The following is our attempt to aggregate duties articulated by Judge Scheindlin and recent trends in case law to serve as a reference list when checking the effectiveness of a litigation hold process.

❑ *Written Form* – The opinion emphasizes the importance of written notification to ensure both effectiveness and

defensibility.<sup>56</sup> Failure to issue a litigation hold in written form is considered gross negligence because such failure will likely lead to spoliation.

❑ *Timely Issuance* – A hold must be issued in a timely manner, defined in *Zubulake* as the following: “counsel must issue a ‘litigation hold’ at the outset of litigation or whenever litigation is reasonably anticipated.”<sup>57</sup> In *The Pension Committee*, Judge Scheindlin reiterates this position: “[Litigants] must act diligently and search thoroughly at the time they reasonably anticipate litigation.”<sup>58</sup> Although the standard applies to both plaintiffs and defendants, “[a] plaintiff’s duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation.”<sup>59</sup>

❑ *Priority on Key Players* – Ensure that the most relevant people are identified and “counsel should communicate directly with the ‘key players, i.e., the people identified in a party’s initial disclosure and any subsequent supplementation thereto. Because these ‘key players’ are the ‘employees likely to have relevant information,’ it is particularly important that the preservation duty be communicated clearly to them.”<sup>60</sup> Counsel must “ensure that their electronic and paper records are preserved.”<sup>61</sup>

❑ *Affirmative Custodial Responses* – A robust legal hold notification process must include affirmative custodial responses.

<sup>54</sup> *The Sedona Conference® Commentary*, p.4

<sup>55</sup> *Acorn v. Co. of Nassau*, 2009 WL 605859, (EDNY March 9, 2009)

<sup>56</sup> *The Pension Committee*, p.24

<sup>57</sup> *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (“Zubulake V”)

<sup>58</sup> *The Pension Committee*, p.85 citing *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 433, 436 (2d Cir. 2001)

<sup>59</sup> *Ibid.*, p.12

<sup>60</sup> *Zubulake V*

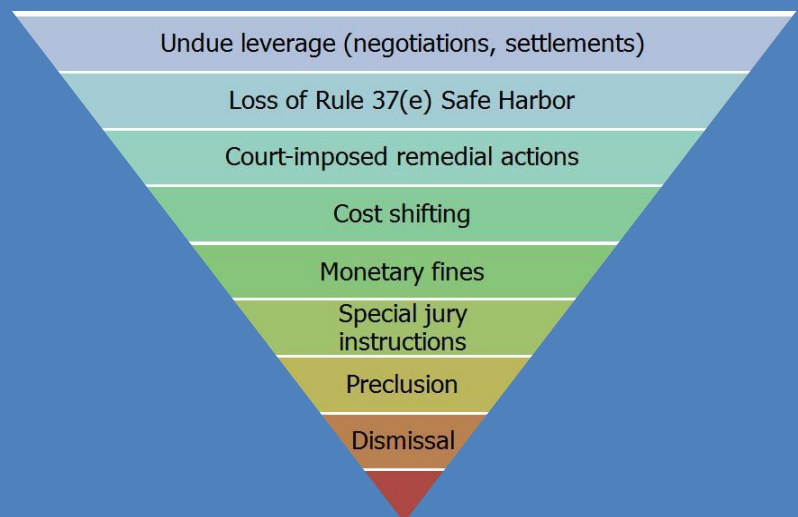
<sup>61</sup> *The Pension Committee*, p.24

## Effective Preservation Avoids Serious Sanctions

The courts are becoming less tolerant resulting in higher expectations when it comes to preserving ESI. At best, poor preservation practices will result in undue leverage for your opponent. When good faith is called into question, your ability to negotiate a fair and reasonable scope of discovery during a meet and confer may be limited.

Poor preservation can directly lead to increased time and cost related to discovery (especially when court-directed), and negotiating settlements becomes harder since issues may go beyond the merits of the case.

All this leads to increasing risk – loss of a safe harbor and court-imposed sanctions ranging from imposing further discovery, cost shifting, fines, special jury instructions, preclusion or even default judgments.



Obtaining an affirmative response is a key component in an effective legal hold notification process going back to the *Zubulake* decision. In her opinion, Judge Scheindlin articulated the following expectation: “The party must see that the litigation hold is complied with, ‘monitoring the party’s efforts to retain and produce the relevant documents.”<sup>62</sup>

❑ *Clearly Articulated Preservation Instructions* – A written hold notification must include clear and direct instructions to custodians to preserve records. Analyzing language that was not acceptable to the Court, the opinion states the following: “[t]his instruction does not meet the standard for a litigation hold. It does not direct employees to preserve all relevant records – both paper and electronic.”<sup>63</sup> Instruct employees in a way that “[c]learly defines what information is to be preserved

and how the preservation is to be undertaken”<sup>64</sup> as specified by Guideline 8(d) of *The Sedona Commentary*. In her book on electronic discovery, Judge Scheindlin includes a sample litigation hold that includes instructions to “immediately suspend the destruction of any responsive” paper or electronic documents or data.”<sup>65</sup>

❑ *Review and Issue Routine Hold Reminders* – It is important to remind custodians of their ongoing obligation to preserve information. The *Zubulake* opinion instructs that “[t]he litigation hold should be periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees.”<sup>66</sup> *The Sedona Commentary’s* Guideline 8(e) reinforces this point by adding that a legal hold is most effective when it is “periodically

<sup>62</sup> *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004)

<sup>63</sup> *The Pension Committee*, p.28

<sup>64</sup> *The Sedona Conference Commentary*, p. 4

<sup>65</sup> Scheindlin, Shira A., et al., *Electronic Discovery and Digital Evidence: Cases and Materials*, p.147-49 (2009)

<sup>66</sup> *Zubulake V*

reviewed and, when necessary, reissued in either its original or an amended form.”<sup>67</sup>

❑ *Supervision by Counsel – The Pension Committee* opinion cites several occasions when counsel failed to supervise the preservation process. Such failure “did not meet the standard for a litigation hold” including placing “total reliance on the employee to search and select what that employee believed to be responsive records without any supervision from Counsel.”<sup>68</sup> In a subsequent review of grossly negligent behavior, the court called out that fact that counsel “delegated search efforts without any supervision.”<sup>69</sup> Lackadaisical attitudes toward litigation holds by counsel, including delegating the management of the litigation hold process to custodians, does not meet Judge Scheindlin’s threshold.

❑ *Institute a Collection Process – To complement the hold notification and to ensure preservation of evidence, create a process for collection of preserved records for review by counsel.* When analyzing the memoranda allegedly constituting a litigation hold, the Court held that the notice was insufficient because it did not “create a mechanism for collecting the preserved records so that they can be searched by someone other than the employee. Rather, the directive places total reliance on the employee to search and select what the employee believed to be responsive records without any supervision by counsel.”<sup>70</sup> Creating a transparent and predictable methodology to have counsel or a knowledgeable person contact employees to discuss potentially responsive information is a critical and necessary component to avoiding spoliation and resulting sanctions.

❑ *Suspend Automatic Deletion and Preserve Backup Media – The Pension Committee* opinion requires litigants “to cease the deletion of email or to preserve the records of former employees that are in a party’s possession, custody, or control, and to preserve backup tapes when they are the sole source of relevant information or relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.”<sup>71</sup> “Failure to do so is a breach of duty to preserve, and the resulting spoliation of evidence, may result in the imposition of sanctions by a court because the court has the obligation to ensure that the judicial process is not abused.”<sup>72</sup> The *Zubulake* opinion contains a more detailed explanation:

“Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place. In cases involving a small number of relevant backup tapes, counsel might be advised to take physical possession of backup tapes. In other cases, it might make sense for relevant backup tapes to be segregated and placed in storage. Regardless of what particular arrangement counsel chooses to employ, the point is to separate relevant backup tapes from others. One of the primary reasons that electronic data is lost is ineffective communication with information technology personnel. By taking possession of, or otherwise safeguarding, all potentially relevant backup tapes, counsel eliminates the possibility that such tapes will be inadvertently recycled.”<sup>73</sup>

<sup>67</sup> *The Sedona Conference Commentary*, p.4

<sup>68</sup> *The Pension Committee*, p.28

<sup>69</sup> *Ibid.*, p.42-3

<sup>70</sup> *Ibid.*, p.28

<sup>71</sup> *Ibid.*, p.24-5

<sup>72</sup> *Ibid.*, p.12

<sup>73</sup> *Zubulake V*

## Conclusion

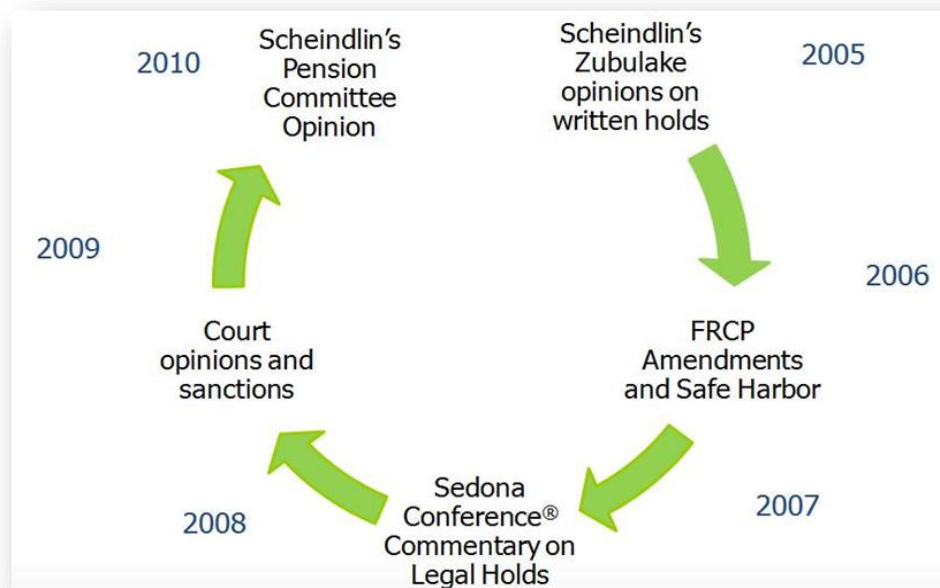
It should be clear from reading *The Pension Committee* opinion that little has changed in the six years since Judge Scheindlin's *Zubulake* opinion. This fact alone could be the reason relatively common litigation hold failures were painstakingly detailed and sanctioned by the Court. The opinion reiterates nothing new. The standard for litigation holds and preservation, however, are now clear and more firmly established as a contemporary standard. Sanction case after sanction case stands as a stark reminder that preservation should not be undertaken lightly.<sup>74</sup> Significant portions of the recent opinion revisit *Zubulake*, hence the subtitle "*Zubulake* Revisited: Six Years Later" reinforcing this very salient point: after six years the Courts' patience is at an end. As Judge Scheindlin mentions in her opening:

"Once again, I have been compelled

to closely review the discovery efforts of parties in a litigation, and once again have found that those efforts are flawed."<sup>75</sup>

Judge Scheindlin has serious concerns about how the failure to properly preserve evidence undermines the integrity of the judicial process, adding that "it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records... will inevitably result in the spoliation of evidence."<sup>76</sup> At the core of her concerns are the repeated failures of litigants to take their preservation obligations seriously, as detailed in case after case.

With the issuance of *The Pension Committee* opinion, the burden is now on counsel to help organizations observe adequate practices for preservation; including implementing effective legal holds.



<sup>74</sup> See *12 Myths about Legal Holds* by Brad Harris for analysis of recent cases and bibliography

<sup>75</sup> *The Pension Committee*, p.2

<sup>76</sup> *Ibid.*, p.2

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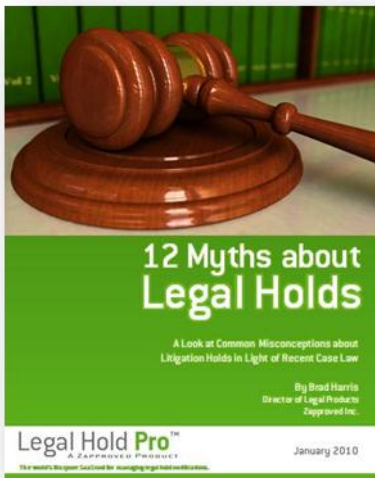
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## Other Titles about Legal Holds



### 12 Myths about Legal Holds

By Brad Harris

This 12-page publication published in January 2010 zeroes in on common misconceptions about litigation holds that are frequently encountered within organizations that are failing to implement reasonable and good faith efforts when it comes to executing legal holds for discovery. Mr. Harris uses recent case law, particularly experience throughout 2009 during a watershed year for legal hold findings, to illuminate current best practices for legal hold notification and compliance procedures.

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### 7 Steps for Legal Holds of ESI and Other Documents

By John Isaza and John Jablonski

(ARMA 2009)

This book is a practical, how-to guide describing step-by-step a best practice process for identifying trigger events and implementing a litigation hold. It provides a straightforward description of why the law requires preservation, the scope of preservation, and practical tips on how to preserve records in an acceptable manner.

Visit [www.arma.org/bookstore](http://www.arma.org/bookstore) to purchase your copy!

“The failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.”

Judge Shira Scheindlin  
The Pension Committee v.  
Banc of America Securities  
(SDNY, January 11, 2010)

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