



## E-DISCOVERY TASK FORCE UPDATE

### E-Discovery Task Force Update

The legal framework in litigation for addressing the explosion in electronic communications has been in flux for a number of years. Sidley Austin LLP has established an "E-Discovery Task Force" to stay abreast of and advise clients on this shifting legal landscape. An inter-disciplinary group of more than 25 lawyers across all our domestic offices, the Task Force monitors and examines issues and developments in the law regarding electronic discovery. The Task Force works seamlessly with our firm's Litigators who regularly defend and prosecute all types of litigation matters in trial and appellate courts, federal and state agencies, arbitrations, and mediations throughout the country. The co-chairs of the E-Discovery Task Force are:

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### Notable E-Discovery Cases and Events

This update addresses the following recent rule changes and court decisions involving e-discovery issues:

1. A lengthy and important decision by Judge Shira Scheindlin — which she called “*Zubulake Revisited: Six Years Later*” — canvasses existing law and sets forth standards for imposition of sanctions for a party’s failure to preserve relevant documents in litigation;
2. An Idaho federal court decision finding no waiver of attorney-client privilege when a client’s email to counsel was sent to a third party as a result of the client’s inadvertent use of his email program address autofill feature; and
3. A New York federal court decision imposing an adverse inference for plaintiff’s destruction of a key voicemail communication.

**1. In *Pension Comm. of U. of Montreal Pension Plan v. Banc of America Securities, LLC*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010) (amended opinion and order), Judge Shira Scheindlin has written a lengthy opinion – which she called “*Zubulake Revisited: Six Years Later*” – reviewing the current state of the law and setting forth a framework for analyzing claims that a party failed to preserve ESI in litigation.**

In this securities action, defendants claimed that various plaintiffs had failed to preserve documents and sought sanctions. At the outset, Judge Scheindlin stated that “[c]ourts cannot and do not expect that any party can meet a standard of perfection.” *Id.* at \*1. She also noted that “[t]his case does not present any egregious examples of litigants purposefully destroying evidence. This is a case where plaintiffs failed to timely institute written litigation holds and engaged in careless and indifferent collection efforts after the duty to preserve arose.” *Id.* at \*2. Having said that, Judge Scheindlin then provided a framework for analyzing such cases: she reviewed the various negligence, gross negligence, and willfulness standards relating to spoliation, applied those standards to the duty to preserve and prevent spoliation, reviewed the applicable

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burdens of proof, and discussed the appropriate remedies for a party's failure to carrying out its discovery obligations.

On the applicable legal standards of negligence, gross negligence, and willfulness in the discovery context, Judge Scheindlin found that there was "no clear definition of these terms in the context of discovery misconduct" and noted that these terms "simply describe a continuum." *Id.* Judge Scheindlin acknowledged that the determination of whether a party's conduct is acceptable is inherently subjective,

"a judgment call that must be made by a court reviewing the conduct through the backward lens known as hindsight. It is also a call that cannot be measured with exactitude and might be called differently by a different judge. That said, it is well established that *negligence* involves unreasonable conduct in that it creates a risk of harm to others, but *willfulness* involves intentional or reckless conduct that is so unreasonable that harm is highly likely to occur." *Id.* (emphasis in original).

Judge Scheindlin set forth textbook definitions of negligence, gross negligence, and willfulness, and then applied them in the discovery context, discussing first the preservation obligation.

"[T]he first step in any discovery effort is the preservation of relevant information. A failure to preserve evidence resulting in the loss or destruction of relevant information is surely negligent, and, depending on the circumstances, may be grossly negligent or willful. For example, the intentional destruction of relevant records, either paper or electronic, after the duty to preserve has attached, is willful. Possibly after October, 2003, when *Zubulake IV* was issued, and definitely after July, 2004, when the final relevant *Zubulake* opinion was issued, the failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information." *Id.* at \*3 (citations omitted).

Judge Scheindlin then discussed the same standards in connection with the collection and review process, again finding that failure to collect and retain documents from relevant personnel violates a party's discovery obligations:

"[T]he next step in the discovery process is collection and review. Once again, depending 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. These examples are not meant as a definitive list. Each case will turn on its own facts and the varieties of efforts and failures is infinite." *Id.*

On the duty to preserve and spoliation, Judge Scheindlin noted that a party's obligation to preserve evidence arises when the party "reasonably anticipates litigation." *Id.* at \*4. At that point, the party "must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Id.* (citation omitted). Judge Scheindlin stated that "a plaintiff's duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation." *Id.*

Judge Scheindlin described spoliation as the destruction or material alteration of evidence or the failure to preserve evidence in pending or reasonably foreseeable litigation. Courts have inherent authority to impose sanctions for

spoliation to preserve the integrity of the judicial process. In addition, the common law imposes a duty to preserve evidence relevant in litigation, and the breach of such duty and resulting spoliation can give rise to sanctions by the court. *Id.*

The Court then considered the issue of the burden of proof when evidence is no longer available. This issue involves both the relevance of such unavailable evidence and the prejudice to the innocent party as a result of the missing evidence. Judge Scheindlin noted that the nature of the burden depends in part on the severity of the sanction involved, with the focus resting largely on the spoliating party's conduct in the case of less severe sanctions (*e.g.*, fines and cost shifting) but with the focus more on the relevance of the missing evidence and prejudice to the innocent party in the case of more severe sanctions such as adverse inferences, preclusion, or dismissal. *Id.*

On the question of the relevance, citing Second Circuit precedent, Judge Scheindlin stated that a showing of relevance requires something more than simply satisfying the Fed. R. Evid. 401 relevance standard. *Id.* at \*5 (citing *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108-09 (2d Cir. 2002)).

“It is not enough for the innocent party to show that the destroyed evidence would have been responsive to a document request. The innocent party must also show that the evidence would have been helpful in proving its claims or defenses – *i.e.*, that the innocent party is prejudiced without that evidence. Proof of relevance does not necessarily equal proof of prejudice.” *Id.*

Judge Scheindlin set forth the following elements to be demonstrated by the innocent party to make out a claim of spoliation:

“that the spoliating party (1) had control over the evidence and an obligation to preserve it at the time of destruction or loss; (2) acted with a culpable state of mind upon destroying or losing the evidence; and that

(3) the missing evidence is relevant to the innocent party's claim or defense.” *Id.*

Judge Scheindlin then turned to the question of presumptions to be applied based on the spoliating party's conduct. In some instances, relevance and prejudice may be presumed when a spoliating party acted in bad faith or a grossly negligent manner. Even where such a presumption exists, however, the spoliating party should have the opportunity to rebut the presumption.

An innocent party must prove both relevance and prejudice when a spoliating party's conduct is merely negligent. An innocent party can make such a showing by introducing “extrinsic evidence tending to show that the destroyed [ESI] would have been favorable to [its] case,” and the burden of proof should not be “too strict” to avoid allowing a spoliating party to “profit” from such spoliation. *Id.* (citations omitted).

Judge Scheindlin noted that imposing a burden on the innocent party to show relevance could be unfair in certain instances but was necessary:

“while requiring the innocent party to demonstrate the relevance of information that it can never review may seem unfair, the party seeking relief has some obligation to make a showing of relevance and eventually prejudice, lest litigation become a ‘gotcha’ game rather than a full and fair opportunity to air the merits of a dispute. If a presumption of relevance and prejudice were awarded to every party who can show that an adversary failed to produce any document, even if such failure is completely inadvertent, the incentive to find such error and capitalize on it would be overwhelming. This would not be a good thing.” *Id.*

Judge Scheindlin summarized her approach on burden shifting as follows:

“When the spoliating party's conduct is sufficiently egregious to justify a court's *imposition* of a

presumption of relevance and prejudice, or when the spoliating party's conduct warrants *permitting* the jury to make such a presumption, the burden then shifts to the spoliating party to rebut that presumption. The spoliating party can do so, for example, by demonstrating that the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party's claims or defenses. If the spoliating party demonstrates to a court's satisfaction that there could not have been any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required." *Id.* at \*6 (emphasis in original).

On the issue of remedies, Judge Scheindlin noted that courts have available a range of potential sanctions — further discovery, cost shifting, fines, special jury instructions, preclusion, and the entry of a default judgment. The terminating sanction of dismissal should be reserved for “only the most egregious cases, such as where a party has engaged in perjury, tampering with evidence, or intentionally destroying evidence by burning, shredding, or wiping out computer hard drives.” *Id.*

Judge Scheindlin stated that an adverse inference instruction can take many forms, and the harshness of the instruction would depend on the nature of the spoliating party's conduct. In a case of willfulness or bad faith, a jury instruction could require the jury to deem certain facts to be admitted and accepted as true. Where a party has acted willfully or recklessly, a mandatory presumption may be appropriate, but such a presumption is rebuttable. *Id.*

According to Judge Scheindlin, the “least harsh instruction *permits* (but does not require) a jury to *presume* that the lost evidence is both relevant and favorable to the innocent party.” *Id.* at \*7 (emphasis in original). She termed this presumption a “spoliation charge,” and the spoliating party is allowed to rebut the presumption based on evidence it presents, with the jury

then deciding whether to draw an adverse inference against the spoliating party. *Id.*

Monetary sanctions can also be awarded against a party, and such sanctions serve a remedial purpose and compensate a party for the work and effort required to address the spoliating party's discovery failures.

Judge Scheindlin concluded her analysis of the issues with a couple observations. She noted that the imposition of sanctions is inherently subjective, but “[a] court has a ‘gut reaction’ based on years of experience as to whether a litigant has complied with its discovery obligations and how hard it worked to comply.” *Id.* She also indicated that each inquiry is fact intensive and must be decided on a case by case basis.

The Judge summarized her view as following:

“After a discovery duty is well established, the failure to adhere to contemporary standards can be considered gross negligence. Thus, after the final relevant *Zubulake* opinion in July, 2004, the following failures support a finding of gross negligence, when the duty to preserve has attached: to issue a written litigation hold; to identify all of the key players and to ensure that their electronic and paper records are preserved; 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 when they relate to key players, if the relevant information maintained by those players 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.” *Id.*

Having provided this analytical framework, Judge Scheindlin considered the issues arising in the case at hand and issued sanctions of adverse inference instructions and monetary

sanctions after concluding that various parties were guilty of negligence and gross negligence in failing to impose litigation hold notices and in the retention and production of ESI. In so doing, she noted certain points:

- Written litigation hold notices should be issued to appropriate employees and custodians, and such notices should direct the retention of relevant documents and the suspension of policies or practices that would lead to the destruction of relevant ESI. A mechanism for collection of relevant ESI is also necessary so that the ESI can be searched by someone other than the employee. *Id.* at \*8.
- Counsel should monitor the collection and production of ESI, and all involved in the process should be knowledgeable about discovery issues. *Id.* Parties should carefully monitor their collection, review and production processes so that they can recreate the steps taken and demonstrate their thoroughness if a challenge arises. Any supporting declarations should be based on personal knowledge. *Id.* at \*9.
- Searches should be conducted of all relevant personnel, including former personnel. *Id.* at \*14 & n 125.
- Searches should be comprehensive and collect all types of ESI, including information on personal computers, electronic devices such as PDAs, network files and servers. Backup tapes containing responsive documents of key players that are not otherwise available should be retained and not destroyed or overwritten, but only if they are the “sole source of relevant information. . . . When accessible data satisfies the requirement to search for and produce relevant information, there is no need to save or search backup tapes.” *Id.* at \*12 and n. 99.
- Discovery obligations continue, even if a stay of the litigation is issued. *Id.* at \*8.

This decision is important and deserves careful study by all litigators and clients.

**2. In *Multiquip, Inc. v. Water Management Systems LLC*, 2009 WL 4261214 (D. Idaho, Nov. 23, 2009), Magistrate Judge Ronald E. Bush held that a defendant did not waive attorney-client privilege when his privileged email to his counsel was sent to a third party as a result of his inadvertent use of his email program address autofill feature.**

On April 8, 2009, defendant David Muhs responded to an email from his attorney, adding two additional attorneys (Roy Thomson and Mark Hubert) to the response. *Id.* at \*1. In typing the first few letters of Mark Hubert’s name however, the computer automatically populated the address field with the email information of Matteo Tagliani, a non-party to the suit who happened to be tangentially involved in the matter. *Id.* at \*1. Muhs failed to notice the error. *Id.* Upon receipt of the email, Tagliani forwarded it to another non-party who ultimately forwarded it to plaintiff’s counsel. *Id.* at \*2.

On April 9, 2009, Plaintiff’s counsel informed defendant’s counsel that he was in receipt of the communication, which he now considered to be “published.” *Id.* Defendant’s counsel asserted privilege over the email, claiming it had been inadvertently disclosed. Over the next two days defense counsel twice requested that the email be returned and all copies destroyed. *Id.* Plaintiff refused this request and subsequently attached the email communication as an exhibit to a motion submitted to the court. *Id.* Defendant brought this motion to exclude. *Id.*

Under Federal Rule of Evidence 502, production of privileged documents does not constitute a waiver of privilege if disclosure of the document was inadvertent, the privilege holder took reasonably steps to prevent disclosure, and the privilege holder took prompt and reasonable steps to correct the error. Fed. R. Evid. 502. After dismissing plaintiff’s argument that Fed. R. Evid. 502 applies only to documents disclosed during discovery, the Magistrate Judge held that the attorney-client privilege had not been waived. He first determined that there was no real dispute that the disclosure was inadvertent; Muhs did not intend to send the email to

Matteo, and even the plaintiff did not claim otherwise. *Id.* at \*4. Second, the Magistrate Judge found that the use of the autofill feature was not an unreasonable method by which to send privileged communications, particularly when Muhs had used this feature successfully on many previous communications with his counsel. *Id.* at \*5. Third, he noted that Muhs' attorney acted promptly to correct the inadvertent disclosure when he asked twice that the document be returned and destroyed, and he did so as soon as he became aware of the error. *Id.* at \*6. As all three elements of Fed. R. Evid. 502 were satisfied, the Magistrate Judge granted the order to exclude the email communication and ordered all copies of the email to be destroyed. *Id.*

**3. In *Vagenos v. LDG Financial Services, LLC*, 2009 WL 5219021 (E.D.N.Y., Dec. 31, 2009), U.S. District Judge Cogan granted an adverse inference instruction against a party for spoliation of evidence after the party failed to preserve a key voicemail communication.**

In the underlying dispute, the plaintiff claimed that the defendant, a debt collection agency, engaged in deceptive practices. *Id.* at \*1. Critical to his claim was a voicemail purportedly left by the defendant on the plaintiff's cell phone. The plaintiff claimed that this voicemail was destroyed when he switched cell phone service companies and, not having access to the original recording, he sought to introduce at trial a subsequent recording that was allegedly made by his attorney on his own device. *Id.* The re-recording included the original message as well as background noise of the attorney and plaintiff talking while the recording was made. *Id.* The defendant questioned the authenticity of the re-recording and brought a motion to exclude. *Id.*

The Court first noted that Fed. R. Evid. 1004(1) allows the “use [of] secondary evidence to prove contents of an original” when “[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith.” *Id.* Finding no clear evidence of bad faith and noting the importance of the voicemail to the plaintiff's case, the Court was hesitant to grant the defendant's motion to exclude. *Id.* However, the Court questioned the failure of plaintiff's lawyer to inform his client of his duty to preserve the voicemail prior to his switching cell phone companies. *Id.* at \*2. An obligation to preserve arises when a party is on notice that evidence is relevant to litigation, and in this case, the voicemail was not only relevant to the litigation at hand but was the lynchpin of the plaintiff's case. The Court was particularly troubled by plaintiff counsel's lack of awareness of his client's obligation to preserve the data, particularly in light of the lawyer's assistance in making the copy of the recording. *Id.*

The Court denied defendant's motion to exclude the re-recording, stating that exclusion of the re-recording “would be the death knell of this case.” *Id.* The Court, however, did grant an adverse instruction for spoliation of evidence allowing the jury to infer from the destruction of evidence that the original voicemail contained information detrimental to the plaintiff. In support of this decision, the Court cited *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), and *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995) (“Even if a court determines not to exclude secondary evidence, it may still permit the jury to draw unfavorable inferences against the party responsible for the loss or destruction of the original evidence.”) *Vagenos* at \*2.

If you have questions about any of these items, please contact your regular Sidley Austin LLP contact.

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