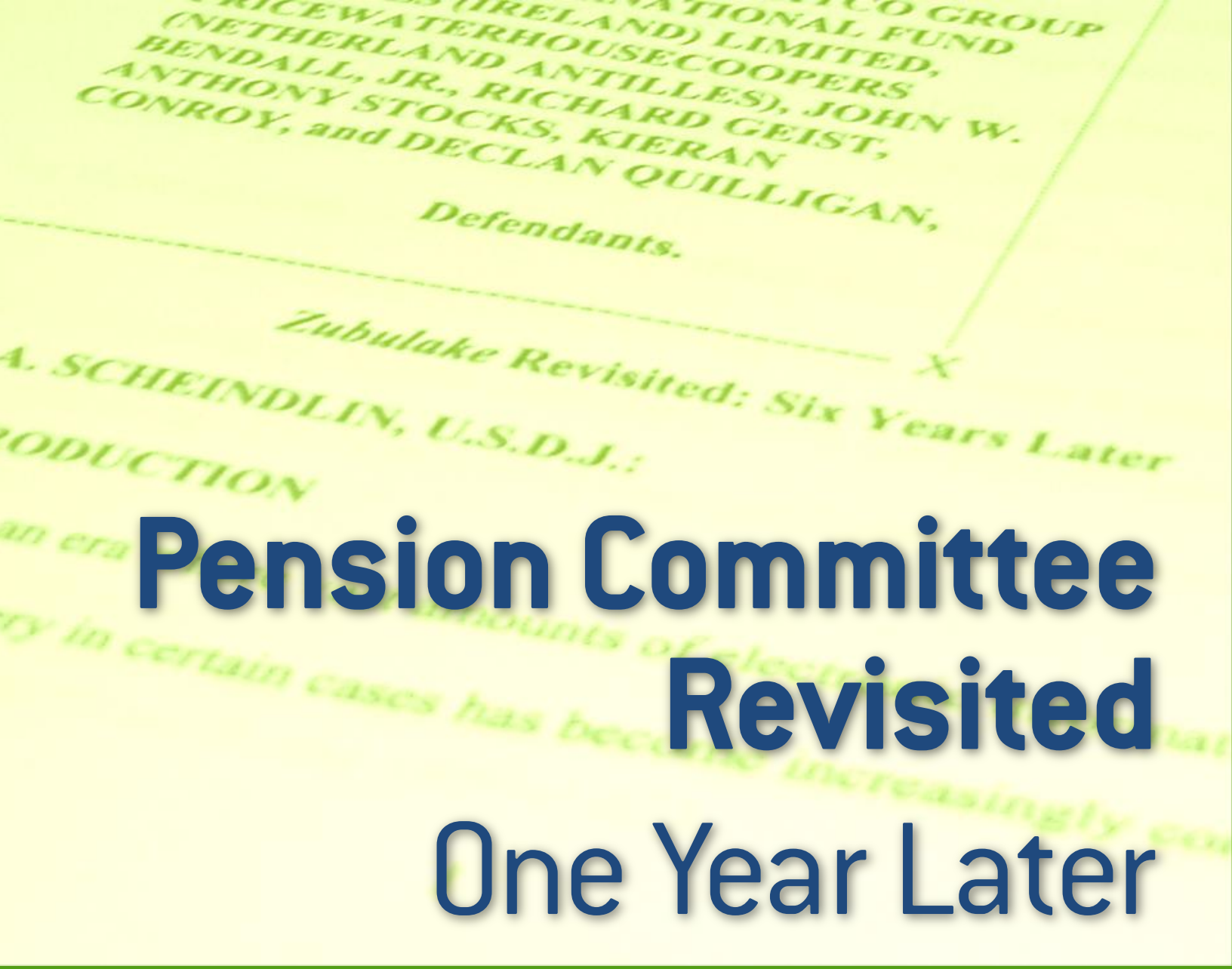

Pension Committee Revisited

One Year Later

A Retrospective on the Impact of Judge Scheindlin's Influential Opinion

Edited by Brad Harris and Ron Hedges

A Legal Hold Pro™ Signature Paper

February 2011

ABOUT BRAD HARRIS

VICE PRESIDENT OF LEGAL PRODUCTS, ZAPPROVED INC.

Brad Harris has more than 25 years of experience in the high technology and enterprise software sectors, including assisting Fortune 1000 companies enhance their e-discovery preparedness through technology and process improvement. Brad is a frequent author and speaker on data preservation and e-discovery issues, including articles in *Corporate Counsel, Metropolitan Corporate Counsel* and *Information Management* and presentations at leading industry events such as LegalTech New York. Prior to joining Zapproved, he led the development of electronic discovery readiness consulting efforts for Fios, Inc. from 2004 to 2009. He has held senior management positions at prominent public and privately held companies, including Hewlett-Packard, Tektronix and Merant.

ABOUT RONALD J. HEDGES

FORMER UNITED STATES MAGISTRATE JUDGE

Judge Ronald J. Hedges is the principal in Ronald J. Hedges, LLC. He has extensive experience in e-discovery and in management of complex civil litigation matters. Mr. Hedges was appointed in 1986 as a United States Magistrate Judge in the United States District Court for the District of New Jersey, where he served as the Compliance Judge for the Court Mediation Program, a member of the Lawyers Advisory Committee, and both a member and reporter for the Civil Justice Reform Act Advisory Committee. From 2001 to 2005 he was a member of the Advisory Group of Magistrate Judges. Mr. Hedges has also been an adjunct professor at Seton Hall University School of Law (1993-2007) and at Georgetown University Law Center since 2006. He is also Co-Chair on the Planning Committee of Georgetown University Law Center's Advanced E-Discovery Institute since November 2007.

Ron Hedges has not been compensated for contributing to this article, is not affiliated with Zapproved, Inc. and offers no endorsement of its products or services.

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Zapproved Inc.
19075 NW Tanasbourne, Suite 120, Hillsboro, OR 97124 USA
Tel: (888) 376-0666 Email: info@zapproved.com Website: www.zapproved.com

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Introduction

The story of "Pension Committee Revisited" really begins in 2003, when Judge Shira A. Scheindlin issued the first of several decisions in *Zubulake v. UBS Warburg LLC,* 217 F.R.D. 309 (S.D.N.Y. 2003), and brought into focus the preservation, production and spoliation of electronic information. In subsequent decisions in *Zubulake,* Judge Scheindlin expanded on those questions and, fair to say, illuminated existing legal obligations, began the continuing debate about those obligations, and helped pave the way for the 2006 amendments to the Federal Rules of Civil Procedure.

What is that continuing debate addressing? Among other things, the courts (both State and Federal) struggle with what might be called a "trilogy" of scienter (or state of mind), relevance and prejudice: Is negligent loss of electronic information sufficient for the imposition of severe sanctions or must there be some showing of intentional misconduct? How can the relevance of electronic information be established when that information no longer exists? Likewise, how can a party show that it has been prejudiced by the loss of electronic information? The courts continue to grapple with the interplay of the trilogy as they decide whether a party should be sanctioned for spoliation and what the proper sanction ought to be.

Zubulake, and its progeny, *Pension Committee,* remain in the forefront of argument about spoliation and sanctions. Subsequent decisions (including representative decisions referenced in this white paper) and future amendments to the Federal Rules of Civil Procedure may or may not follow Judge Scheindlin's conclusions. Nevertheless, Judge Scheindlin has framed the debate.

This white paper summarizes the 89 pages of *Pension Committee* and several opinions that followed, and hopefully contributes to the debate.

Ron Hedges

Looking Back at Pension Committee: A Summary of the Opinion

Adapted from *The Pension Committee Opinion: Judge Scheindlin's Call to Action for Effective Legal Holds* by John Jablonski and Brad Harris (February 2010)

The case involves a complex securities litigation filed by a group of 96 investors attempting to recover $550 million in losses due to the collapse of two British Virgin Island-based hedge funds in April 2003.

The case was filed in the Southern District of Florida in February 2004. The case was subsequently 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."[1]

Judge Scheindlin states at the outset that this case does not involve "any egregious examples of litigants purposefully destroying evidence."[2] Yet the discovery shortcomings caused Judge Scheindlin to issue sanctions because plaintiffs failed to meet the standard needed to avoid spoliation.

In anticipation of litigation, plaintiffs engaged outside counsel who "telephoned and emailed plaintiffs"[3] requesting copies of relevant documents to help draft the complaint. However, 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.[4] 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[5] – nearly four years after the time of the 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."[6]

According to the Court, defendants showed that the thirteen plaintiffs targeted by the motion "clearly failed to preserve and produce relevant documents."[7] 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 significant investments.[8]

Plaintiffs 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."[9]

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[1] Pension Comm. v. Banc of America Sec., LLC, 685 F. Supp. 2d 456 (S.D.N.Y. 2010),p.4
[2] Id., p.5
[3] Id., p.28
[4] Id., p.28
[5] Id., p.30
[6] Id., p.32-33
[7] Id., p.34
[8] Id., p.35
[9] Id., p.35

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 (although clearly established by mid-2004 in her jurisdiction following her *Zubulake V* opinion). Therefore, the court held that issuing a written legal hold was certainly appropriate in 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.[10]

Defendants were able to show that after the duty to preserve was established, a number of plaintiffs failed to collect and/or preserve documents, made even more serious by 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.[11] 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.[12]

Given the complexity of this securities case and the heterogeneous group of plaintiffs, the Court delved deeper and ruled 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 a number of missteps, including failing to issue a proper 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.[13] The latter group were spared harsher judgment "after careful consideration"[14] because the "failure to institute a written litigation hold" was "not yet generally required"[15] in early 2004 in federal court in Florida. As a result failure to issue a litigation hold alone was insufficient to constitute gross negligence, absent additional discovery violations.[16]

When meting out sanctions, Judge Scheindlin states that defendants "demonstrated that most plaintiffs conducted discovery in an ignorant and indifferent fashion."[17] The opinion includes a detailed "spoliation" jury instruction to be used to provide the jury with detailed information about the spoliation caused by the "grossly negligent" plaintiffs.[18] In the case of gross negligence, the burden of proof was shifted to the plaintiffs to rebut the presumption of relevance and prejudice caused by the missing documents, and an adverse inference was appropriate. For those deemed merely negligent, the defendants would be required to demonstrate that they were prejudiced by the spoliation.[19]

Monetary sanctions were also meted out to the plaintiffs. The Court awarded reasonable costs to defendants, including attorneys' fees associated with bringing the motion, deposing the declarants and reviewing declarations. Costs would be allocated among the thirteen plaintiffs.[20] The Court determined that an award of additional discovery "would not be fruitful"[21] with the exception of two plaintiffs who acknowledged that backup tapes had yet to be reviewed (and were subsequently ordered to search backup tapes at their own expense).[22]

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[10]Id., p.36
[11]Id., p.38
[12]Id., p.38
[13]Id., pp.42-43

[14]Id., p.63
[15]Id., p.64
[16]Id., p.64
[17]Id., p.82
[18]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 Id., pp. 21-23
[19]Id., p.41
[20] 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, given the complexities of the issues before the Court. See Id., p.84.
[21]Id., p.85
[22]Id., p.85

AMENDMENT ON MAY 28, 2010

On May 28, 2010, Judge Scheindlin made a minor adjustment to *Pension Committee* that followed the original opinion (January 11) and the amended opinion (January 15). It follows in its entirety:

> The Amended Opinion and Order filed January 15, 2010 is hereby corrected as follows:
>
> At page 10, lines 7-10 replace
>
> <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.> with <By contrast, the failure to obtain records from all those employees who had any involvement with the issues raised in the litigation or anticipated litigation, as opposed to key players, could constitute negligence.>.

These modifications to the January 15th opinion appear to clarify Judge Scheindlin's original intent and to dispel any uncertainties that the original opinion may have led to. In summary, the changes include:

- Clarifying that written legal holds need only be issued to "key players" rather than all employees; and
- Failure to obtain records from key players "could constitute negligence" rather than is "likely" to be deemed negligence.

With this one-sentence change, Judge Scheindlin updated some language that did not meet her precise meaning.

Selected Highlights from *Pension Committee*

DUTY TO PRESERVE MEANS WHAT IT SAYS

"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." (p.1)

WRITTEN LITIGATION HOLD

"[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." (p.4)

SUSPEND ROUTINE DOCUMENT RETENTION/DESTRUCTION

"[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." (p.5)

FINDING OF GROSS NEGLIGENCE

"[T]he 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.9)

AVOID THE DETOUR OF SANCTIONS

"[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." (p.9)

EXTENT OF THE FAILURE TO COLLECT EVIDENCE

"[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." (p.4)

SPOLIATION SANCTIONS

"[A] court should always impose the least harsh sanction that can provide an adequate remedy. The choices 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)." (p.7)

MONETARY 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.'" (p.9)

In Judge Scheindlin's Own Words:
Excerpts from Georgetown Advanced E-Discovery Institute

On November 18-19, 2010, Judge Scheindlin participated in the Georgetown University Law Center's Advanced E-Discovery Institute in Pentagon City, Virginia. The judge was free to speak about *Pension Committee* because the action had settled by that time. Following are transcriptions of her comments that help to enlighten her thought process behind her decision.

The comments were made during two sessions. The first was an e-discovery case law update that involved a panel of many preeminent jurists. The panel was moderated by The Sedona Conference's Ken Withers and included the following: Hon. John M. Facciola, Hon. Nan R. Nolan, Hon. Andrew J. Peck, Hon. James M. Rosenbaum (Ret.), Hon. Lee H. Rosenthal, and Judge Scheindlin. The second was called "2010 – A Sanctions Odyssey" that included Judge Scheindlin, Judge Rosenthal, William Butterfield, Paul Weiner, Jeane Thompson and was moderated by Ron Hedges.

The format of the panel discussions allowed the judges to maintain a relaxed, collegial rapport.

Note: This is an unofficial transcript of the event. Every effort has been made to ensure the accuracy of commentary provided by this esteemed panel.

ON SANCTIONING NEGLIGENCE:

I just have a couple of small points that I think are important to note. First of all, the Second Circuit is not alone. There are a couple of other Circuits that take the same view as the Second Circuit. But secondly, we have to distinguish among the kinds of sanctions.

Negligence, in any Circuit, may be sanctionable if there's a loss, if there's prejudice, if what was lost is relevant. It doesn't matter what sanction, but we may not get the adverse inference instruction, we may get a monetary sanction, but if people are negligent and the evidence is lost and somebody's hurt by it, the court has a basis to impose a sanction, in any Circuit. It's a matter of what sanction the conduct will support but we have to be careful to talk about that continuum from intentional, willful to reckless, gross negligence to negligence, but negligence counts. It depends on what happens as a result. I think it's an important point that we have to take away.

Hon. Shira A. Scheindlin

ON WRITTEN LEGAL HOLDS:

Now, the other rebuttal is I know that a lot of the world is unhappy with me about this litigation hold issue, but I've never understood what the big problem is. Write it up, protect yourself, it's credible, you can defend it, and I still… I'm not going to back off! I would go all over the country saying, "Why not issue a written litigation hold?" Spell out for your company what they have to do. It's wise. Instead of fighting me about it – just do it. Because if you just do it you will have a defensible process and people will have guidance as to what they have to hold on to.

ON SCOPING LEGAL HOLDS:

So, I mean, some people say, "Well, I have a company of one, do I have to issue a written legal hold to myself?" Now that's kind of ridiculous, and I'd like to think that judges aren't that dumb. So no, if you're one person, don't write a letter to yourself. Fine.

We're primarily talking about institutions and companies with lots of employees and lots of locations. What's the problem? Send out a blast email. Tell people what to do, and then if they don't do it, then that's a different issue, but at least you've shown the good faith. Counsel's shown the good faith. Counsel has supervised this to some degree. So there you have a little bit of prevention.

ON COMPLEXITY OF PENSION COMMITTEE:

First of all, I had thirteen plaintiffs that I dealt with there and the case had 96 plaintiffs, so not everybody failed in their preservation efforts.

Secondly, this case went back a long way. The case was brought in 2004 and I made that point very carefully. Had it been brought in 2007, 8 or 9, it would've been a different standard anyway.

The third point I want to make very quickly in my remaining seconds is that…about this reasonableness idea. Obviously it's an evolving concept and the more we learn the more we have a right to expect different litigants to act reasonably, but we talk about proportionality now. Proportionality is the word of the day. So if it's a smaller case with less documents we don't need to expect a Cadillac treatment. But if it's a larger case with $10 million or more at stake then people have to put the time and money into it.

ON PROPORTIONALITY:

So we do want to be proportional every time when judging the efforts that litigants have made. I do think plaintiffs are particularly unnoticed. When they're going to bring this lawsuit they know – they should know now — that they have to preserve everything exactly proportional to their business. Obviously we're not saying that they have to go outside and hire, necessarily, expensive outside vendors but they have to take the steps that are reasonable for that case.

> "The bottom line is that we really don't disagree, our Circuits disagree."

ON WHAT MADE THIS OPINION IMPORTANT:

I will add that *Pension Committee* was the toughest of cases on these lists because we don't have that intentional destruction, wiping, deletion. This is a case, in a sense, that teaches the most about best practices and preservation, I think, because it's not the dramatic case. Everybody knows that if you put on a shredding program, a Window Washer, you've been bad. That's easy. Those are the easy cases, and that's *Victor Stanley* which Judge Grimm said conduct was just so obvious and egregious. The tougher case is the "gray area." What conduct is enough to be reasonable and what's not?

ON CREATING MORE UNIFORMITY:

I want to start by saying that when the press has nothing else to write about they like to make trouble so they go around saying "Judge Rosenthal, Judge Scheindlin, they're on opposite sides. They're at war, they're fighting… And so one of the reasons that we're going to get to later for a national Rule is to harmonize, try to harmonize nationally one standard for sanctions.

So we have no warfare, it's really applying Circuit law that is different place by place and when you're practicing around the country you have to know what the Circuit law is. And I realize that's hard for clients because they want to know, "What's the law?" "How do I prepare?" All that said, I'm in the Second Circuit. You heard yesterday, the Second Circuit has a lower threshold of state of mind for imposing some of the more severe sanctions, that is, the sanction of an adverse inference can be imposed with negligent or grossly negligent conduct. In other Circuits, it has to be willful or intentional. So that's that basis really of this so-called split.

THRESHOLD FOR GROSS NEGLIGENCE:

How did I distinguish between the seven who were negligent and the six who were grossly negligent? I can tell you it wasn't easy, I changed my mind every day for a month. I had

"2010 - A Sanctions Odyssey" Panel with (l-r): Hon. Lee H. Rosenthal, William Butterfield, Paul Weiner, Hon. Shira A. Scheindlin, Jeane Thomas and Ron Hedges. Georgetown University Law Center Advanced E-Discovery Institute, Pentagon City, VA, Nov. 19, 2010 (Photo courtesy of Chris Dale)

somebody in one bucket and then moved them to the other bucket. Moved them back and forth. Went over and over the facts, so I didn't do this lightly. The court spent an awful lot of time analyzing what each party did.

Again, the negligent people didn't issue litigation holds or begin collections. They failed to supervise the collection efforts by their employees. They delegated search efforts to very junior personnel who did not really understand what they were supposed to be doing. They didn't do a wide enough search. They failed to collect from employees who had knowledge. They didn't search in all of the appropriate locations. And, again, they submitted witnesses to testify about the search efforts who then at a deposition couldn't explain what they were doing at all. So that was, yet again, another problem.

Other Voices from the Bench:
Citations of Pension Committee in Other Opinions

What makes *Pension Committee* significant is not only its language, but the immediate reaction of other federal judges to that language. Shortly after *Pension Committee* was decided another eminent and well-respected federal judge, Lee Rosenthal of the Southern District of Texas, issued *Rimkus Consulting,* in which she referred to *Pension Committee* in the course of ruling on preservation and spoliation questions in the action before her. What follows are descriptions of several of these post-*Pension Committee* decisions.

Rimkus v. Cammarata

Rimkus Consulting Group Inc. v. Nickie G. Cammarata, et al., 07-cv-00405 (SDTX Feb. 19, 2010)

Coming on the heels of Judge Scheindlin's *Pension Committee* opinion in January, an opinion was issued that centers around appropriate actions to preserve potentially relevant evidence. The case is *Rimkus v. Cammarata* out of the court of Judge Rosenthal in the U.S. District Court for the Southern District of Texas.

To summarize the case, a group of employees left and filed a suit against their former employer, Rimkus Consulting, to release them from their non-compete agreements. In a countersuit, Rimkus Consulting fired back that the former employees violated their non-competes and additionally made off with "trade secrets and proprietary information." (p.4)

The *Rimkus* opinion is a direct parallel to Judge Scheindlin's words in the *Pension Committee* opinion in which the Court is clear from the outset about its frustration regarding the distractions caused by spoliation of evidence:

> Spoliation of evidence – particularly of electronically stored information – has assumed a level of importance in litigation that raises grave concerns. Spoliation allegations and sanctions motions distract from the merits of a case, add costs to discovery, and delay resolution. The frequency of spoliation allegations may lead to decisions about preservation based more on fear of potential future sanctions than on reasonable need for information.[23]

Although Judge Rosenthal has a different perspective based on the facts of the *Rimkus* case and the precedent in her circuit, many of the same principles and ideas are applicable. Even though *Pension Committee* is little more than a month old when this opinion is written, the impact is marked. References to Judge Scheindlin's opinion are ubiquitous and Judge Rosenthal is deferential to the prior opinion as shown by the following reference:

> In her recent opinion in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC,* No. 05 Civ. 9016, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010), Judge Scheindlin has again done the courts a great service by laying out a careful analysis of spoliation and sanctions issues in electronic discovery. The focus of *Pension Committee* was on when negligent failures to preserve, collect, and produce documents – including electronically stored information – in discovery may justify the severe sanction

[23] Rimkus v. Cammarata, p.1

> of a form of adverse inference instruction. Unlike *Pension Committee,* the present case does not involve allegations of negligence in electronic discovery. Instead, this case involves allegations of intentional destruction of electronically stored evidence. But there are some common analytical issues between this case and *Pension Committee* that deserve brief discussion.[24]

Judge Rosenthal reinforces much of the preceding case law that has developed from *Zubulake* through *Pension Committee.* The Court affirms the need to preserve evidence at the time of the "trigger event"[25], the "unpersuasive" arguments as to the failure to preserve sufficiently[26], the lack of "safe harbor" in this case under Rule 37(e) because the destruction did not involve routine operation of computer systems.[27]

The *Rimkus* opinion also provides insight into how a court goes about deciding what type and level of sanctions are appropriate, and Judge Rosenthal outlines the need to consider both the spoliating party's culpability and the level of prejudice to the party seeking discovery.

Her conclusions in this case depart from *Pension Committee* opinion and are greatly influenced by the facts of the case. Even though there was willful destruction of evidence, a significant amount of the incriminating evidence was recovered by the plaintiff. The Court was unwilling to issue an adverse inference instruction and rather chose to present the facts as they are and allow the jury to determine the implications of the defendants' misconduct. Judge Rosenthal also ordered that the defendants pay attorneys' fees and costs associated with the spoliation motion.

Much of *Rimkus* is in agreement with *Pension Committee* with variances that can be attributed to the facts of the case as well as differences between the jurisdictional standards for the Second and Fifth Circuits. The most notable differences within the context of these two opinions are about how to handle sanctions, judicious use of adverse inference instructions and the definition of "gross negligence," primarily around whether a culpable state of mind is needed to reach that standard.

"Unlike *Pension Committee,* the present case does not involve allegations of negligence in electronic discovery. Instead, this case involves allegations of intentional destruction of electronically stored evidence."

— Judge Lee H. Rosenthal, *Rimkus v. Cammarata*

[24] Id., p. 8-9
[25] Id., p.66
[26] Id., p.84
[27] Id., p.67

Crown Castle v. Fred Nudd Corporation

Crown Castle USA, Inc. v. Fred A. Nudd Corp., 2010 U.S. Dist. LEXIS 32982, (WDNY Mar. 31, 2010)

U.S. Magistrate Judge Marian W. Payson's opinion on a spoliation motion does not cite *Pension Committee,* but it does refer to Judge Scheindlin's earlier *Zubulake* extensively and thus reiterates the underpinnings of the judicial principles set out in the case. The opinion was issued in a commercial litigation involving a product defect of a cell transmission tower. Crown Castle, a leading owner and operator of cellular towers, sued the Fred A. Nudd Corporation, one of the top manufacturers of transmitter towers, following a November 2003 collapse of a tower.

During the course of the discovery process, the plaintiff made a number of errors that resulted in spoliation. After requesting information following the event that triggered the preservation obligation, counsel failed to monitor the approach used to determine where and what to look for in terms of responsive documents. The result was that many custodians missed information. As discovery progressed, a number of responsive emails were subsequently uncovered, nearly half of the total eventually produced. Among the afore-missing emails was one that showed that there was a product defect.[28]

The plaintiff also failed to take adequate steps to suspend the routine destruction of electronically-stored information, namely the automatic deletion of emails. Older emails were automatically purged according to company procedure, resulting in spoliation.

> It is undisputed that [the witness's] electronic documents were destroyed following his departure from Crown in August 2005, ten months after the duty to preserve arose and four months after this lawsuit was filed…such wholesale destruction is inexcusable.[29]

Finally, in failing to issue a litigation hold and the resulting loss of responsive information, including that from key players, the Court found that the plaintiff "failed to take adequate measures to preserve electronic documents."[30] Judge Payson concluded:

> Having found that Crown failed to implement a litigation hold, resulting in the destruction of [a key player's] documents, I must conclude that Crown acted with gross negligence. I cannot find that Crown acted in bad faith, however, as Nudd urges. No showing has been made that Crown intentionally sought to destroy documents or to conceal them from Nudd. Crown has produced a prodigious number of documents in this litigation; unfortunately, some were inexcusably destroyed, while others were produced exceedingly late. On this record, I find that the carelessness with which Crown attended to its duties to preserve and produce documents amounted to gross negligence, but not bad faith.[31]

The Court found Crown to be grossly negligent for not issuing a legal hold which aligns with *Pension Committee.* The Court cited Rule 37(d) when awarding attorneys' costs and fees and the costs for additional depositions.[32] While rejecting a claim for dismissal and an adverse inference instruction because the spoliation did not result in prejudice,[33] the Court left the door open to reconsidering that position pursuant to further discovery efforts.[34]

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[28] *Crown Castle v. Fred Nudd,* p.11

[29] Id., p.23
[30] Id., p.24
[31] Id., p.24
[32] Id., p.35
[33] Id., p.30-1
[34] Id., p.32

Merck Eprova v. Gnosis

Merck Eprova AG v. Gnosis S.p.A. et al., 07 Civ. 5898 (SDNY Apr. 20, 2010)

On April 20, 2010, U.S. District Judge Richard J. Sullivan strongly reiterated the need for a proper legal hold when he determined the defendants' failure to adequately preserve information was gross negligence and issued a $25,000 monetary sanction. The opinion referenced *Pension Committee* frequently.

This civil case was originally filed in June 2007 as a result of an alleged mislabeling of a nutritional ingredient. The defendant, an Italian biomedical company called Gnosis, did a "haphazard"[35] job of meeting its discovery obligations. Following a failed settlement agreement, the litigants entered into a year-long discovery battle.

After months of urging by the plaintiff, details emerged about the defendants' preservation efforts. In a hearing on January 22, 2010, (only days after the issuance of *Pension Committee)* the Gnosis CEO admitted that the company had not issued "an explicit litigation hold, much less a written one." Further, employees continued to delete, "or at least fail to prevent automatic deletion of" relevant emails, and the company failed to produce responsive documents because the custodians decided that they were not relevant.[36]

Judge Sullivan relied heavily on *Pension Committee*:

> In *Pension Committee,* Judge Scheindlin recently discussed in some depth the question of when discovery violations should be considered sanctionable, as well as the related question of what the appropriate remedies should be in such cases. The Court agrees with the analytical framework set forth in that opinion and will rely on it here.[37]

This included the expectation that a written legal hold represents a reasonable and good faith response to a preservation obligation.[38] Gnosis' CEO claimed he had instructed employees to "pay attention" to saving relevant documents. Yet the Court responded: "there is no doubt that Defendants failed to issue a written legal hold"[39] and ruled this failure a "clear case of gross negligence."[40]

The Court ordered that the defendants should pay costs and attorneys' fees and fined the defendants $25,000 "to deter future misconduct…and to instill a modicum of respect for the judicial process." Judge Sullivan continued: "Lesser sanctions…would simply be insufficient to achieve these purposes."[41] Additionally, a decision on an adverse jury instruction is pending further discovery, as well as consideration for more sanctions "down the road."[42]

[35] *Merck Eprova v. Gnosis Spa,* p.7
[36] Id., p.6
[37] Id. p.9
[38] Id., p.9
[39] Id., p.11
[40] Id., p.12
[41] Id., p.12
[42] Id., footnote 10

Passlogix v. 2FA Technology

Passlogix, Inc.v.2FA Technology LLC, et al., 2010 WL 1702216 (SDNY Apr. 27, 2010)

U.S. District Judge Peter K. Leisure issued his opinion for motions requesting sanctions for spoliation and committing fraud on the court in a breach of contract case. Judge Leisure, who sits in the same jurisdiction as Judge Scheindlin, cites *Pension Committee* as the standard around spoliation, including reiterating Judge Scheindlin's position that lack of a *written* legal hold constitutes gross negligence.[43]

In this case, the Court considered the egregious acts by the defendant to purposefully undermine the discovery process. The Court characterized the defendant's tactics were undertaken "in an effort to expand discovery, cause Passlogix competitive harm, and garner a favorable settlement."[44]

The plaintiff sought sanctions for the defendants' failure to issue a legal hold, specifically regarding the destruction of incriminating anonymous emails as well as computer records about the alleged email "spoofing."

Judge Leisure determined that the bad-faith spoliation by Passlogix was intentional, at which point the burden shifted to 2FA as the innocent party to demonstrate prejudice. The Court found that the case was indeed prejudiced by the defendant's actions. Additionally, the Court noted that the defendant failed in its preservation obligation and, despite the intentional spoliation by the defendant, the court denied issuing an adverse inference instruction and issued monetary sanction:

> The Court also holds that 2FA's failure to preserve relevant documents led to the spoliation of evidence in this case. Therefore, the Court hereby orders 2FA to pay a fine in the amount of ten thousand dollars ($10,000.00)….[45]

The Court took into account that the defendant was a small company, with only two principals, and both of whom were bad actors, so the sanction was designed to punish them directly.

[43] *Passlogix v. 2FA Technology,* p.69-70

[44] Id., p.3-4

[45] Id., p.104

Jones v. Bremen High School

Jones v. Bremen High School Dist. 228, 2010 WL 2106640 (N.D. Ill. May 25, 2010)

In May 2010, a new opinion was issued out of the Northern District of Illinois that is noteworthy in that it focuses on spoliation and determining sanctions without citing *Zubulake* or *Pension Committee.* Yet, U.S. Magistrate Judge Susan E. Cox independently arrives at a similar set of requirements for what constitutes reasonable and good faith effort when it comes to preserving potentially relevant data.

The case involved an EEOC complaint from an employee at a high school in suburban Chicago. The plaintiff alleged that she endured discrimination based on race and disability and was wrongfully terminated in retaliation for the discrimination charges.

The "trigger event" began when the plaintiff filed her EEOC charge in October 2007. Failing to issue a litigation hold, the defendant's initial response was to instruct three administrators to "search through their own electronic mail"[46] and save relevant messages. No further guidance by counsel was given. Furthermore, no effort was made to suspend routine destruction of ESI, such as a 30-day destruction policy of back-up tapes (and it wasn't until October 2008 that automatic archiving of email was initiated). Finally in the spring of 2009, the defendant instructed all of its employees to preserve emails which might be relevant to the litigation (plaintiff's first request for production was filed in May 2009).

In December 2009, the plaintiff filed a motion for sanctions due to spoliation of evidence. The defendant subsequently produced thousands of additional emails in an effort to fill in "most (if not all) of the gaps"[47] in their previous production. However, the Court concluded:

> [B]ecause there was no hold put in place on electronic documents and because emails could be manually and permanently deleted if an employee chose to do this, we cannot determine with certainty that all email relevant to plaintiff's claims were preserved.[48]

Judge Cox determined that sanctions were necessary because "defendant's attempts to preserve evidence were reckless and grossly negligent." [49] The sanctions included the following:

1. Jury instructions that the lack of discriminatory emails during the period when a legal hold was not issued is not evidence that no such statements were made. (Note that the Court denied issuing an adverse inference instruction.)
2. Defendant will cover plaintiff's costs and fees for preparing motion for sanctions.
3. Plaintiff can depose witnesses on recently produced emails and the defendant will pay for the court reporter.[50]

As previously mentioned, Judge Cox's opinion cites 15 cases with all but one of them originating in the Northern District of Illinois or the Seventh Circuit Court of Appeals which has jurisdiction. (The only outlier is a case from the District of Massachusetts.)

The Court does not automatically deem the failure to issue a legal hold as a breach of the duty to preserve, but the section on "Legal Standards" echoes the sentiments and guidelines outlined in other cases involving preservation, including:

- Trigger event – Defendant's duty to preserve is triggered when "it reasonably knows or can foresee [evidence] would be material (and thus relevant) to a potential legal action."
- Timely Issuance – "It is undisputed here that defendant did not place a litigation

[46] *Jones v. Bremen H.S.,* *3
[47] Id., *5
[48] Id.
[49] Id., *9
[50] Id., *10

hold…when it first learned" of the charge.
- Key Players – "Defendant inexplicably did not request all employees who had dealings with plaintiff to preserve emails so that they could be searched further for possible relevance…."
- Supervision by Counsel – Defendant "unreasonably" instructed employees "to search their own email without help from counsel and to cull from that email what would be relevant documents."
- Suspension of Automatic Back-up Deletion – "[D]efendant's technology department could have easily halted the auto-deletion process."[51]

In the past, some litigants have argued that issuing a legal hold is a burden. In this case, the Court takes that argument to task when raised by the defendant:

> [T]here is no evidence that a simple litigation hold to preserve existing electronic mail would have placed any burden on defendant.[52]

The defendant clearly failed to take reasonable steps to preserve information and the consequences in this case were sanctions.

"[T]here is no evidence that a simple litigation hold to preserve existing electronic mail would have placed any burden on defendant."

— Judge Susan E. Cox, *Jones v. Bremen H.S.*

[51] Id., *5-6

[52] Id., *7

Medcorp v. Pinpoint Tech

Medcorp, Inc. v. Pinpoint Tech., Inc., 2010 WL 2500301 (D. Colo. June 15, 2010)

When analyzing failure to preserve, Magistrate Judge Kristen L. Mix in Colorado used *Pension Committee* as the template on which she based her decisions on sanctions. This opinion mirrors Judge Scheindlin's case in that the spoliation was on the part of the plaintiff. The opinion explores the appropriate sanctions pursuant to the Special Master's findings that the plaintiff destroyed 43 hard drives that contained relevant information to the case.

In the beginning of her opinion she states:

> The parties and Special Master agree that the standard set forth in *Pension Committee* provides the appropriate analysis regarding the types of sanctions which are justified when a party destroys evidence. Specifically, "[t]he determination of an appropriate sanction, if any, is confined to the sound discretion of the trial judge and is assessed on a case-by-case basis."[53]

The special master in this case determined that the destruction of the hard drives prejudiced the defendants' case and interfered with the judicial process. The finding was that the spoliation was willful "in the sense that Plaintiff was aware of its responsibilities to preserve relevant evidence and failed to take necessary steps to do so."[54] The defense was unable to show that the plaintiff was acting in bad faith or that the spoliation was the result of any action "other than what [Plaintiff] would do in the ordinary course of business."[55]The Court held that the conduct was negligent rather than intentional.[56]

On a motion to modify the order, Judge Mix upheld the order for adverse inference instruction:

> The negative inference instruction imposed by the Special Master is suited to accomplish by general terms what Defendants seek to accomplish by specific terms. In other words, the jury may very well conclude, as a result of being instructed that they may infer that the destroyed hard drives contained evidence which is unfavorable to Medcorp.[57]

Furthermore, the Court awarded reasonable costs in the case in the amount of $89,395.88. Judge Mix determined that the jury instruction adequately addressed defendants' concerns, the magistrate judge denied defendants' request to have facts admitted into evidence "indicating that Plaintiff's spoliation was intentional and knowing." The Court rejected a dismissal as too harsh of a punishment that was beyond the "least harsh" threshold laid out in *Pension Committee.*

[53] *Medcorp v. Pinpoint,* p.2
[54] Id., p.1
[55] Id., p.3
[56] Id., p.4
[57] Id., p.4

Victor Stanley II

Victor Stanley, Inc. v. Creative Pipe, Inc., et al. (D.MD, Sept. 9, 2010)

On September 9, 2010, Magistrate Judge Paul W. Grimm of the U.S. Fourth Circuit (D.MD) issued an 89-page opinion in the ongoing spoliation saga in *Victor Stanley v. Creative Pipe.*

Judge Grimm, in light of egregious spoliation, used the opinion to review the current state of spoliation and how it should be sanctioned which he states is his "attempt to synthesize" opinions.[58]

To summarize, the CEO of Creative Pipe, Mark Pappas, precipitated this civil action for intellectual property infringement when he went to his competitor's web site, downloaded their proprietary product design drawings and specs for office and public furnishings. He took these plans, manufactured them and then sold them in direct competition to Victor Stanley, Inc., the originator of the designs.

Once Victor Stanley discovered this conduct on Pappas' party, the company sued Creative Pipe for copyright infringement, patent infringement, unfair competition and Lanham Act violations. Realizing that he was going to be caught red-handed, Pappas began purposefully destroying and overwriting files in order to obfuscate incriminating evidence.

He went to great lengths to do so, and enlisted co-conspirators to help him destroy electronic records. He deleted files, defragged disks, replaced servers, used "scrubbing" programs – and then he lied about it to the Courts. Even after two *acknowledged* court orders to preserve data, Pappas continued to attempt to hide his actions.

Judge Grimm characterized what he saw this way:

> Collectively, they constitute the single most egregious example of spoliation that I have encountered in any case that I have handled or in any case described in the legion of spoliation cases I have read in nearly fourteen years on the bench.[59]

Following Pappas' prodigious attempts to cover up information, years of e-discovery effort and countless hours invested by attorneys and experts on both sides, in the end not much key evidence was lost. As Judge Grimm humorously put it, they were "the gang that couldn't spoliate straight."[60] Any information that was actually irretrievably lost was acknowledged as prejudicial by the Defendants.

Judge Grimm focused on what were the most appropriate sanctions since the bad-faith efforts ultimately failed to prejudice the case. Judge Grimm noted that "[r]ecent decisions…have generated concern…regarding the lack of uniform national standard governing" preservation and spoliation issues.[61]The judge continues:

> I will attempt to synthesize and provide counsel with an analytical framework that may enable them to resolve preservation/spoliation issues with greater level of comfort.[62]

In particular, he acknowledges that the courts are struggling with the following specifics:

- To know when the duty to preserve attaches,
- The level of culpability required to justify sanctions,
- The nature and severity of sanctions, and
- The scope of the duty to preserve and whether it is tempered by proportionality[63]

First of all, the opinion accepts that companies must issue a legal hold but he bristles at the different standards. He suggests that this causes concern among corporations, business and governments that operate in different jurisdictions because they have to

[58] *Victor Stanley II,* p.38
[59] Id., p.34
[60] Id., p.5
[61] Id., p.36-7
[62] Id., p.38
[63] Id., p.36-7

design a preservation policy that complies with the most demanding standard.[64]

Judge Grimm cites examples about what courts deem information under their "control" but some Districts extend that duty to preserve information held by third parties while others do not.[65] He also cites the fact that "courts differ in the fault they assign when a party fails to implement a legal hold."[66] He compares *Pension Committee's* automatic ruling of gross negligence versus *Haynes v. Dart* (N.D. Ill, Jan. 11, 2010) that a failure to implement a legal hold is relevant to the court's consideration but in and of itself is not sanctionable.

Judge Grimm expresses how the failure to preserve is a huge burden on the courts and a significant concern in both *Pension Committee* and *Rimkus.* Citing *Metropolitan Opera Association v. Local 100,* 212 F.R.D. 178, 228 (S.D.N.Y. 2003):

> For the judicial process to function properly, the court must rely "in large part on the good faith and diligence of counsel and the parties in abiding by these rules [of discovery] and conducting themselves and their judicial business honestly."[67]

Adding the following:

> The truth cannot be uncovered if information is not preserved. That the duty is owed to the court, and not to the party's adversary is subtle, but consequential, distinction.[68]

Judge Grimm is adamant that the failure to preserve also injures civil justice by putting focus on e-discovery rather than merits of the case and that it is "frustrating to the courts that there is no way to sanction for the courts time."[69]

The Court's conundrum in *Victor Stanley II* is how to match the appropriate sanction to the spoliating conduct.[70] What's worse: intentional spoliation that results in no prejudice, or simple negligence that results in "total loss of evidence essential to an adversary?" Clearly, the judicial process is damaged more by the latter than the former.

In the end, Judge Grimm metes out some harsh sanctions, but he does it thoughtfully. His approach to sanctions is captured in this statement: "In fashioning spoliation sanctions, Courts must strive to issue orders that generate light, rather than heat."[71] He grants default judgment on the account of copyright infringement, but not on others since the spoliation did not result in "irreparable or substantial prejudice."[72] The remaining claims will be "tried to the Court."[73] Similarly, he issued a permanent injunction on the copyright violation which the Defendant did not oppose.[74]

Finally, Judge Grimm granted reasonable attorney's fees and costs since the Court believes the Defendant may avoid payment, he will hold him in prison for civil contempt for up to two years until the fees are paid. As a final note, Judge Grimm admitted that Pappas' conduct was likely criminal, but is not referring for criminal prosecution due to the burden it would place on the overstretched criminal system.

To see the "Spoliation Sanctions by Circuit" chart that Judge Grimm appended to Victor Stanley II, *visit "Further Reading" on page 40 to learn how to download an electronic version.*

[64] Id., p.51
[65] Id., p.51-2
[66] Id., p.53
[67] Id., p.56
[68] Id., p.56-7
[69] Id., p.59
[70] Id., p.57
[71] Id., p.74
[72] Id., p.83
[73] Id., p.84
[74] Id., p.85

Orbit One v. Numerex

Orbit One Communications, Inc. v. Numerex Corp., 2010 WL 4615547 (S.D.N.Y., Oct. 26, 2010)

In late October 2010, Magistrate Judge James C. Francis issued an opinion that continued the judicial debate about preservation.

The case centers on an acquisition that went bad after Numerex acquired satellite communications provider Orbit One Communications. As part of the acquisition, Numerex offered $6 million worth of performance incentives for Orbit One executives to stay and run their former company as a standalone division. However, when sales were falling well short of earning those big bonuses, the executives alleged that the acquirer was mismanaging them and undermining their ability to earn incentives, thus devaluing the deal. Orbit One's shareholders and executives brought a suit and were then countersued by Numerex.

As the case went through discovery, Numerex's attorneys probed on preservation and a few discrepancies were discovered. In general, the legal team acted reasonably well in issuing timely legal holds, especially given the standards of 2007 when this was taking place. They suspended routine destruction of back-up media and saved equipment. However, Judge Francis noted some issues around preservation actions by Orbit One's CEO David Ronsen including the following:

- He archived some of his corporate email at the urging of the IT department as part of a documented ISO-driven information management initiative. Ronsen did delete some files at that time, but they predated the Numerex litigation and were mainly personal items. At that point there was no trigger event about the Numerex case.
- At the time of his archiving, Ronsen failed to alert the IT administrator that he was on a legal hold for an unrelated IP case which may have changed how the information was handled.
- He also had under his personal control several external hard drives, including the back-up media from the server that had been stored in his safe, as well as his original desktop computer. When requested, Ronsen turned over the external hard drives and the veracity of the data on those media may have been checked (a forensic expert did review other ESI) but no mention is made in the opinion.[75]

In light of these issues around preservation, the defendants sought an adverse inference instruction from Judge Francis for spoliation and an award of attorneys' fees and costs. Judge Francis denied the motion despite acknowledging the failure to "engage in model preservation"[76] because there was insufficient evidence that any lost ESI was relevant to the case.

Judge Francis took the opportunity to weigh the facts of *Orbit One* against the recent body of case law including *Pension Committee, Rimkus,* and *Victor Stanley II.* The nuance in this opinion focuses on relevance and culpability. He observes that:

> It is cold comfort to a party whose potentially critical evidence has just been destroyed to be told that the spoliator did not act in bad faith.[77]

Judge Francis takes a contrarian view to Judge Scheindlin in his interpretation of *Pension Committee.* In Judge Francis's opinion when spoliation occurs, he will start by evaluating whether the lost information was even relevant for discovery. Based on his reading, that is not how Judge Scheindlin wrote *Pension Committee:*

> Some decisions appear to omit such a requirement. In *Pension Committee,* for example, the court stated that '[r]elevance *and* prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner.' (emphasis added) Indeed, the court drew a distinction between

[75] *Orbit One v. Numerex,* p.13-5
[76] Id., p.15
[77] Id., p.10

> the types of sanctions available based on whether information had in fact been lost at all.[78]

He goes on to add:

> The implication of *Pension Committee,* then, appears to be that at least some sanctions are warranted as long as any information was lost through the failure to follow proper preservation practices, even if there have been no showing that the information had discovery relevance, let alone that it was likely to have been helpful to the innocent party. If this is a fair reading of *Pension Committee,* then I respectfully disagree.[79]

Judge Francis takes a position, similar to other members of the judiciary, about how to sanction spoliation. His litmus test is whether the spoliation prejudiced the opposition, regardless of what behavior led to the spoliation in the first place. As he notes, "It is difficult to see why even a party who destroys information purposefully or is grossly negligent should be sanctioned where there has been no showing that the information was at least minimally relevant."[80]

He continues with his position that it is not the purpose of the courts to enforce preservation practices, which he sees in *Pension Committee,* but rather to evaluate and punish losses that prejudice a case:

> Nor are sanctions warranted by a mere showing that a party's preservation efforts were inadequate… But, depending upon the circumstances of an individual case, the failure to abide by such standards does not necessarily constitute negligence, and certainly does not warrant sanctions if no relevant information is lost… Indeed, under some circumstances, a formal litigation hold may not be necessary at all. [81]

Judge Francis's *Orbit One* opinion is an alternative perspective from the Southern District of New York, arguably the epicenter of electronic discovery among the Federal Judiciary. The *Orbit One* opinion may offer a counterbalance to *Pension Committee,* but the facts of the case in which sanctions were being sought when little actual spoliation occurred adds another voice in this constantly evolving area of case law.

[78] Id., p.12 (citations omitted)
[79] Id.
[80] Id.
[81] Id., p.13

Potential Impact on FRCP

Referenced from "Reshaping the Rules of Civil Procedure for the 21st Century" by Lawyers for Civil Justice, et al., submitted to the 2010 Conference on Civil Litigation, Duke Law School, May 2, 2010. Available at www.civilconference.uscourts.gov.

In May, a white paper was submitted at the 2010 Conference on Civil Litigation (Duke Law School, May 10-11, 2010) on behalf of the Lawyers for Civil Justice, DRI, Federation of Defense & Corporate Counsel, and International Association of Defense Counsel. In this paper, the authors articulate the "need for clear, concise and meaningful amendments to key rules of civil procedure."

The authors make an interesting case for reevaluating the existing Federal Rules, including:

> [A]ttempting to redefine and balance the interrelationship of pleading and discovery, reevaluating the premises and focus of discovery, further refining the treatment of ediscovery, developing clear preservation standards, and deterring runaway litigation costs by reasonable cost allocation rules.

They propose changes to Rule 26 and Rule 34 to limit the scope of discovery "on the claims and defenses in the action" as asserted in pleadings, and to explicitly invoke the principle of proportionality (e.g., limiting the number of document requests, relevant timeframe, number of custodians and data sources; and identifying specific categories of ESI that should not be discoverable absent a showing of substantial need and good cause).

They also propose changes to specifically address preservation issues. As discussed in the paper, ancillary litigation ("discovery about discovery") has risen at an alarming rate, and existing litigation hold procedures have been created on an ad hoc basis by the courts. More guidance is required, including a proposal to permit spoliation sanctions "only where willful conduct for the purpose of depriving the other party of the use of the destroyed evidence results in actual prejudice to the other parties."

Finally, the authors point directly to the runaway discovery costs and the inability of current rules to create effective controls. The paper calls for amending Rule 26 to require each party to pay for the costs of the discovery it seeks. Such "a requester-pays rule will encourage parties to focus the scope of their discovery requests on evidence that is reasonably calculated to produce relevant information from the most cost-effective source."

As the authors describe, "preservation has developed into one of the most vexing issues affecting civil litigation in today's federal courts." All too often, organizations fear a conundrum of "damned if you do, damned if you don't" when it comes to deciding when a preservation duty attaches and what will constitute reasonable and good faith preservation efforts. Clearly, greater clarity and consistency from rules-making bodies is warranted. Yet just as critical is the need for organizations to develop a well-founded, consistently-applied, and proportional approach to recognizing and responding to a duty to preserve.

The Sedona Conference® Updated Guidelines for Legal Holds

The Sedona Conference® published an update to *The Sedona Conference Commentary on Legal Holds* in September 2010 in which recent case law was contemplated. The full text of this Commentary is available free for individual download from The Sedona Conference® web site at www.thesedonaconference.org.

GUIDELINE 1

A reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation.

GUIDELINE 2

Adopting and consistently following a policy or practice governing an organization's preservation obligations are factors that may demonstrate reasonableness and good faith.

GUIDELINE 3

Adopting a process for reporting information relating to a probable threat of litigation to a responsible decision maker may assist in demonstrating reasonableness and good faith.

GUIDELINE 4

Determining whether litigation is or should be reasonably anticipated should be based on a good faith and reasonable evaluation of relevant facts and circumstances.

GUIDELINE 5

Evaluating an organization's preservation decisions should be based on the good faith and reasonableness of the decisions undertaken (including whether a legal hold is necessary and how it should be executed) at the time they are made.

GUIDELINE 6

The duty to preserve involves reasonable and good faith efforts, taken as soon as is practicable and applied proportionately, to identify and, as necessary, notify persons likely to have relevant information to preserve the information.

GUIDELINE 7

Factors that may be considered in determining the scope of information that should be preserved include the nature of the issues raised in the matter, the accessibility of the information, the probative value of the information, and the relative burdens and costs of the preservation effort.

GUIDELINE 8

In circumstances where issuing a legal hold notice is appropriate, such a notice is most effective when the organization identifies the custodians and data stewards most likely to have relevant information, and when the notice:

(a) Communicates in a manner that assists persons in taking actions that are, in good faith, intended to be effective
(b) Is in an appropriate form, which may be written
(c) Provides information on how preservation is to be undertaken
(d) Is periodically reviewed and, when necessary, reissued in either its original or an amended form, and

(e) Addresses features of relevant information systems that may prevent retention of potentially discoverable information.

GUIDELINE 9
An organization should consider documenting the legal hold policy, and, when appropriate, the process of implementing the hold in a specific case, considering that both the policy and the process may be subject to scrutiny by opposing parties and review by the court.

GUIDELINE 10
Compliance with a legal hold should be regularly monitored.

GUIDELINE 11
Any legal hold policy, procedure, or practice should include provisions for releasing the hold upon the termination of the matter at issue so that the organization can adhere to policies for managing information through its useful lifecycle in the absence of a legal hold.

Legal Hold Best Practices

What constitutes "reasonable and good faith" efforts when responding to a preservation obligation continues to be a moving target. Both the judiciary, organizations like The Sedona Conference, and commentaries such as "Reshaping the Rules of Civil Procedure" will no doubt continue to call for greater clarity and consistency to control the burgeoning costs of e-discovery. In the meantime, here are some suggested best practices culled from *Pension Committee* and the other decisions we have discussed:

BEST PRACTICE	BENEFIT
1. Establish and follow a process	Having a well-defined process in place ensures greater repeatability, timeliness and defensibility
2. Issue timely, written legal holds	Writing it down fosters greater consistency and clarity, and creates a fact record
3. Communicate your expectations clearly	Having clear and detailed instructions facilitates greater understanding and follow-through by recipients
4. Follow-up to ensure understanding and compliance	Communication is a two-way street – requiring confirmation ensures receipt, understanding and acceptance of legal hold obligations
5. Have a process to issue periodic updates	Legal holds should be living documents, evolving as new information is gained over the life of the preservation obligation
6. Send periodic reminders	Recipients of legal holds should be periodically reminded of a continuing obligation to preserve information in their custody, possession or control
7. Document your actions	Keep track of your actions – Who was notified? What was communicated? When? How did they respond?

Perspectives on Pension Committee

The opinions expressed in the following commentaries are solely those of the individual author and should not be attributed to his/her firm or its clients. The comments should not be construed as legal advice or opinion and are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation.

Reflections on Pension Committee

By Craig Ball

Pension Committee is a bracing slap in the face of lawyers complacent in their failure to preserve electronic evidence. But, instead of saying, "Thanks, I needed that" and resolving to cultivate the skill and judgment needed to manage ESI, some still seek loopholes and rules changes to excuse incompetence. Are we really content to ignore or lose probative evidence rather than gut up and deal with it in cost-effective ways?

Judge Scheindlin's frustration fairly leaps from the page. She's mad as hell (at those who won't meet their duty to preserve ESI), and she's not going to take it anymore. Hurrah, Shira!

Pension Committee has its flaws, but Judge Scheindlin has mended some and (in public discourse) has cautioned against reading the decision in support of absurd results. Persistent concerns center on the dictate that a failure to issue a written legal hold is gross negligence per se, as well as the court's imposition of severe sanctions without proof that materially relevant information was lost. These concerns have prompted other influential jurists to (respectfully) distance themselves from the case as precedent.

Further, *Pension Committee's* unfortunate emphasis on the written legal hold as more document than process is prompting lawyers to spew deluges of boilerplate hold notices at clueless clients on the theory that if it moves, you hand it a hold notice, and if it doesn't move, you hold onto it. Hold directives that fail to communicate specific, relevant steps for custodians to follow are merely window dressing.

Despite all, Judge Scheindlin's message is clear and compelling: a proper litigation hold demands prompt, deliberate action by parties coupled with strong, skilled guidance from counsel. Preservation is a duty, and the negligent failure to preserve will be met with remedial or punitive sanctions geared to the gravity of the failure.

Justice Oliver Wendell Holmes famously observed, "Hard cases make bad law." Perhaps because it's still so hard for litigants and courts to grasp electronic evidence, the e-discovery case law is plagued by decisions that are rife with sense and sagacity within the cauldron of the case, but smack of bad policy and law on the cold pages of the reporter. Judge Scheindlin's holdings in *Pension Committee* were measured and wise vis-à-vis the case before her, but could drive draconian outcomes if applied too literally. Handle with care.

Even if *Pension Committee* proves an outlier, its enduring value flows from the spotlight it shines on preservation and the impetus it supplies to act swiftly and decisively to guard against spoliation of ESI.

Craig Ball *of Austin is a Board Certified trial lawyer, certified computer forensic examiner and electronic evidence expert. He's dedicated his globetrotting career to teaching the bench and bar about forensic technology and trial tactics. After decades trying lawsuits, Craig now limits his practice solely to serving as a court-appointed special master and consultant in computer forensics and electronic discovery, and to publishing and lecturing on computer forensics, emerging technologies, digital persuasion and electronic discovery. Craig writes the award-winning "Ball in Your Court" column on electronic discovery for Law Technology News and is the author of numerous articles on e-discovery and computer forensics, many available at www.craigball.com.*

Rekindling the National Debate on Preservation Best Practices

By Kevin F. Brady, Connolly Bove Lodge & Hutz LLP

The legacy of Judge Scheindlin's decision in *Pension Committee* will not be the substance of what is contained in the 88-page scholarly analysis on issues about whether there should be a bright line test for negligence, gross negligence or bad faith behavior or whether there should be a requirement for written legal holds. Instead, *Pension Committee* will be seen as the spark that reignited a national debate regarding best practices for handling ESI and refocused the attention of the legal community on the issue of preservation and the need for effective policies and procedures for preserving ESI irrespective of the circuit where the lawsuit is pending.

Judge Scheindlin's decisions in *Zubulake* starting in 2003 are largely credited with launching the discussion about the best practices for handling ESI. Her *Zubulake* decisions are still regarded as the seminal decisions on many of those topics. Indeed, the 2006 changes to the Federal Rules of Civil Procedure track in large part or are significantly influenced by those decisions. But after seven years of judicial decisions as well as federal and state rule changes, the landscape of electronic discovery is best described as the "land of confusion."

I recently heard one state court judge, from a very sophisticated business court, say that the majority of the lawyers who appear before him are not competent when it comes to preservation and ESI. That speaks volumes as to the scope of the problem that still exists. Lawyers who once feared the phrase "electronic discovery" now openly admit that they don't know very much about e-discovery and they are not interested or motivated to learn about it. We are in a slow-moving state of transition but unfortunately it is not clear where we are, how far we have come or how far we have to go.

Thankfully *Pension Committee* came along and the debate has begun anew with judicial heavyweights like Judges Rosenthal, Facciola, Grimm and Francis all weighing in on the subject in 2010.

Old favorites like preservation, legal holds and spoliation continue to garner much of the attention in the judicial decisions, however, new topics like transparency, cooperation and proportionality are helping to sharpen and refine the debate. Now the discussion includes questions like "Should there be a federal (or state) rule of procedure regarding preservation?" "Is self-collection or self-preservation ever a reasonable approach to handling ESI?" and "Does a company set its policies and procedures regarding retention and preservation of ESI to meet the standard of a certain circuit?"

While much work still needs to be done to educate the lawyers, clients and judges in order to reduce the uncertainty and ambiguity regarding ESI, the movement to effectuate change is now back in full swing due in large part to *Pension Committee*.

Kevin F. Brady *is a Partner in the Connolly Bove Lodge & Hutz's Business Law Group. Kevin is the chair of the Business Law Group and the Information Security, Electronic Discovery and Records Management Group. He represents clients in a variety of areas including corporate litigation, commercial litigation, electronic discovery and records management, insurance litigation and arbitration and mediation.*

Judge Scheindlin Upholds Fairness to Non-Spoliating Parties

By William P. Butterfield, Hausfeld LLP

I have a question for those who complain about Judge Scheindlin's decision in *Pension Committee*. Have you ever tried to prove that your client was adversely impacted by the loss of evidence that clearly should have been preserved by the opposing party? I have. Without knowing the content of the information that has been lost, how do you establish that it would have helped you prove your case? How do you respond to the other side's typical defense of a spoliation claim ("So what? No litigation hold program is perfect. Show us how our loss of evidence prejudiced your client.")? Isn't discovery supposed to be about finding the truth? And, as Judge Grimm notes in *Victor Stanley II*, "The truth cannot be uncovered if information is not preserved."[82]

In my opinion, the most important objective Judge Scheindlin sought to achieve in *Pension Committee* was simply fairness to the non-spoliating party. She recognized the unfairness of requiring the innocent party to show how it was impacted by the loss of evidence, when the very evidence that would facilitate that proof is gone:

> It is often impossible to know what lost documents would have contained. At best, their content can be inferred from existing documents or recalled during depositions. But this is not always possible. Who then should bear the burden of establishing the relevance of evidence that can no longer be found? And, an even more difficult question is who should be required to prove that the absence of the missing material has caused prejudice to the innocent party.[83]

Judge Scheindlin's decision in *Pension Committee* does two important things to restore fairness: 1) it provides a roadmap of the actions required of a preserving party and attempts to link the failure to carry out defined litigation hold tasks (written hold notice, identification and notification of key players, follow-up, adequate collection, etc.) with concepts of negligence and gross negligence; 2) where the spoliation results from bad faith or gross negligence, it provides a rebuttable presumption that the innocent party was prejudiced. Reasonable people can differ about where the lines should be drawn between conduct that is acceptable, negligent or grossly negligent (and the debate on that issue is far from over), but where spoliation occurs because a preserving party's conduct so greatly departs from the ordinary care expected, it seems eminently fair that the innocent party should not be required to take on the difficult – if not impossible – task of proving that it was prejudiced.

Some judicial thought-leaders take the position that in determining sanctions, the court should look to the degree of prejudice to the innocent party, rather than the degree of fault by the spoliating party. See, e.g., *Orbit One* at 11, *Victor Stanley* II, 269 F.R.D. at 526. In other words, they ask whether the material that was lost was relevant, and whether that information would have assisted the non-spoliating party in proving its claims. While that approach seems logical, here is the problem: if there has been complete spoliation (*i.e.*, there are no duplicate records or no other way to tell what information has been lost), it is difficult, if not impossible, for the innocent party to prove that the lost information was relevant or would have favorably assisted its cause. For that reason, I believe that Judge Scheindlin got it right. If the conduct of the spoliating party was in bad faith or grossly negligent, the inference is that lost information was relevant, and there is a *rebuttable* presumption that the innocent party was adversely affected. Note that the presumption is rebuttable. If the spoliating party

[82] *Victor Stanley II* at 56.
[83] *Pension Committee* at 466-7.

can show that the innocent party was not prejudiced by the absence of the missing information, then severe sanctions can be avoided.[84]

There is much merit to the call for nationwide litigation hold standards and there are many issues yet to be determined. But even if you disagree with where Judge Scheindlin draws the lines, she deserves much credit for starting the debate in *Zubulake*, and refining it in *Pension Committee*.

William Butterfield *is a partner at Hausfeld LLP, a global claimants' law firm. He focuses his practice on antitrust litigation and electronic discovery. He has testified as an expert witness on e-discovery issues, and speaks frequently on that topic domestically and abroad. Mr. Butterfield teaches a class on e-discovery at American University, Washington College of Law. He is on the Steering Committee of The Sedona Conference® Working Group on Electronic Document Retention and Production, and the Working Group on International Electronic Information Management, Discovery and Disclosure. Mr. Butterfield also serves on the Masters Conference Advisory Board, and on the faculty of Georgetown University Law Center's Advanced E-Discovery Institute.*

"Even if you disagree with where Judge Scheindlin draws the lines, she deserves much credit for starting the debate in *Zubulake*, and refining it in *Pension Committee*."

— William Butterfield

[84] *Pension Committee* at 468-9.

Pension Committee: A Catalyst for a Change in the Federal Rules?

By Maura R. Grossman, Wachtell, Lipton, Rosen & Katz

Before the opinion in *Pension Committee* was issued, it was sometimes a challenge to convince attorneys, or their clients, that preservation obligations – which can be onerous and costly at times – were serious business. No longer is that the case. The shift in attitude has been noticeable. Since January 2010, the legal community has been placing a far greater emphasis on preservation activities.

The question no longer is, "Should we send out a legal hold?" Now, litigants are asking, "Have we sent out the hold yet?" Judge Francis recently took the position in *Orbit One* that a *written* legal hold may not be necessary in *every* case. While there can be exceptions to the general rule, in the vast majority of civil litigation, a corporate litigant would likely be hard pressed to walk into a federal court today and state that it was unaware that it had an obligation to implement a legal hold when it reasonably anticipated litigation.

Pension Committee may have dictated the standards applicable to legal holds for much, if not all of the U.S., because most corporations operate in multiple jurisdictions and do not typically know in advance where they will be sued, so the safest course may be to apply the strictest standard, which is the standard in the Southern District of New York. Moreover, Judge Scheindlin is a highly prominent and influential jurist in the area of e-discovery and courts in other jurisdictions have looked to her for leadership in this area.

One of the things we observed in 2010 is that the Circuits were all over the map on the applicable standard for the imposition of sanctions, a point that was brought home in Judge Grimm's *Victor Stanley II* opinion. Similar to the preservation context, the impact on a multi-jurisdictional company is often that it is impossible to know in advance exactly which standard will apply. As a practitioner, it is challenging to know how to advise a client when you don't know where the litigation may end up.

It seems fairly obvious at this point that the most likely consequence of this inconsistency and uncertainty is that there will be some changes to the Federal Rules, most likely to Federal Rule of Civil Procedure 37. What the revised rule will say, however, and how far it will go remains to be seen, but there is clearly a growing cry for movement in the direction of uniformity, driven by the desire for greater predictability. This will take time because the rules process requires careful consideration and the opportunity for dialogue and feedback. It would probably be fair to say that *Pension Committee* and its progeny – particularly, *Rimkus* and *Victor Stanley II* – have served as the catalyst for this change.

The continuum of views on the necessity of prejudice to the requesting party in spoliation opinions by lower courts, even in the same jurisdiction, has ranged from Judge Scheindlin's rejection of the "pure heart, empty head" defense, to the "no harm, no foul" approach taken by Judge Francis in *Orbit One.* These cases are obviously very fact-dependent, and naturally, the law can vary by jurisdiction, but all of this variability has led some lawyers (and their clients) to throw up their hands in frustration. One option in situations where there has been a willful effort to destroy evidence, but where has not been prejudice to the requesting party, would be to shift the punitive consequence away from spoliation sanctions, per se, towards contempt. That way, the courts can differentiate the "mistake-makers," where case management may be the more appropriate response, from the "wrongdoers," where a more punitive and deterrent approach may be warranted.

Regardless of how the judiciary or Rules Committee chooses to resolve these thorny issues, the impact today is that expectations – and those actions that constitute basic competence – have irrevocably changed. Until any revision to the Federal Rules is made, organizations and their outside counsel need to take a hard look at preservation issues because

the stakes are much higher than they were merely a year ago.

Maura R. Grossman *is Counsel at Wachtell, Lipton, Rosen & Katz, where she has represented Fortune 100 companies and major financial services institutions in corporate and securities litigation, including both civil actions and white-collar criminal and regulatory investigations. Maura was appointed by the Chief Administrative Judge to serve as co-chair of the E-Discovery Working Group advising the New York State Unified Court System. Maura also is a coordinator of the 2010 and 2011 Legal Track of the National Institute of Standards and Technology's Text Retrieval Conference ("TREC"), and an adjunct professor at both the Rutgers School of Law – Newark and Pace Law School. She also is active in several The Sedona Conference® Working Groups, and serves on the Advisory Boards of BNA's Digital Discovery and E-Evidence Report and the Georgetown University Law Center's Advanced E-Discovery Institute.*

Lessons from the Frontlines

By John J. Jablonski, Goldberg Segalla LLP

To the uninitiated the focus on litigation holds in 2010 seems overblown. For those in the trenches, 2010 certainly added to the collective angst highlighting the risks and consequences litigants face whenever a litigation hold is contemplated. Cases like *Pension Committee* and *Rimkus* confirmed that a defensible litigation hold business process is more important now than at any other point in the United States. 2010 is also notable because there is a very real possibility that help may be on its way in the form of a new federal rule addressing preservation. The specific form of help, however, is still in the works and likely years away.

As an author, commentator and practicing attorney devoted to helping organizations with litigation hold issues I was able to participate in all aspects of litigation holds in 2010 – from helping companies struggling with developing a defensible preservation business process; helping implement litigation holds; defending litigation holds during litigation; explaining emerging case law to judges, practitioners and clients; and authoring two significant submissions to the Federal Rules Advisory Committee seeking a preservation amendment to the Federal Rules of Civil Procedure. I am drawing from these experiences to offer a few lessons for companies, attorneys and judges.

COMPANIES

The number one lesson for companies is simple. Be sure to document the good faith efforts taken to preserve evidence. The best way to do this is to issue a written litigation hold and then memorialize the steps taken to enforce the litigation hold. An email, memorandum or litigation hold software notice is a valuable first step toward avoiding sanctions. Developing even a basic litigation hold business process will create a significant return on investment. The process does not need to be complex, merely repeatable. Accusing a company of spoliation is a common tactic. The costs associated with defending against spoliation accusations can eclipse any actual sanctions. Spending a little time, effort and money early should take this argument away from your opponents.

ATTORNEYS

Two important lessons gleaned for attorneys. First, attorneys need to understand what it means to their clients to implement a litigation hold. For companies with complex computer systems, it is not as simple as flipping a switch to preserve "any and all ESI related to the facts and circumstances relevant to the Smith case." Be sure to speak with your clients about any internal processes already in place and work with your clients to efficiently implement a

litigation hold. Second, stop sending your clients litigation hold "advice" letters seemingly more designed to prevent legal malpractice then to actually alert your clients to their duty to preserve ESI. You need to be a friend in the process, not an adversary. Offer guidance to help implement a litigation hold, develop its scope and enforce it.

JUDGES

Judges (although some are trying) continue to apply outdated legal concepts like spoliation to litigation hold issues. This has forced some companies to spend millions of dollars preserving ESI in a legally defensible way – despite the absence of a written rule directly requiring litigation holds. Well intentioned companies are jumping through judicially created hoops to demonstrate good faith with uncertain results. The gotcha game of testing the reasonable limits of preservation to gain a tactical advantage in litigation continues to grow. In the digital age information is fluid – not static. In other words, the very benefits of ESI (the speed at which it is created, shared, stored and destroyed) make it extraordinarily difficult to identify and preserve. Yet, many judges believe that the solution is to simply buy more storage capacity. This misses the point.

The need for change is well documented in *Preservation – Moving the Paradigm* (Lawyers for Civil Justice, Nov. 10, 2010) and submitted to the Federal Rules Advisory Committee. Judges need to focus on the evidence that exists in a case and not the evidence that was lost. Adverse inferences and other harsh sanctions should only be granted when ESI is intentionally destroyed with the intent to prevent its use in litigation. In most cases a significant amount of evidence remains and a missing email or two should be no different than a faded memory. A new way of thinking about preservation must emerge to meet the demands of the 21st century. The current preservation—spoliation paradigm must change. A change in the Federal Rules may be coming, but any change is years away.

This past year will always be known to me as the year of the litigation hold. Hopefully it will also be known as the year that tipped the scales toward finding solutions and not just a sign of spoliation cases to come.

John J. Jablonski *is a partner at Goldberg Segalla LLP. An experienced trial lawyer, John consults with Fortune 500 companies about records management, retention schedules, legal hold policies and procedures, pre-litigation planning, and electronic discovery. John is a frequent author in publications and speaker on records management, legal holds, and e-discovery. John is Editor of www.legalholds.typepad.com, a blog devoted to current document preservation trends. He is also the co-author of "7 Steps for Legal Holds of ESI and Other Documents" (ARMA 2009).*

"Cases like *Pension Committee* and *Rimkus* confirmed that a defensible litigation hold business process is more important now than at any other point…"

— John Jablonski

Disagreement with Pension Committee Requirement that All Hold Notices be in Writing

By Ralph C. Losey, Jackson Lewis, LLP

One of the most controversial requirements in *Pension Committee* is that litigation hold notices must always be in writing. At least one judicial opinion expressly disagrees with this requirement: *Orbit One Communications, Inc. v. Numerex Corp*.[85] Magistrate Judge James Francis opined in *Orbit One* that verbal hold notices may be appropriate, maybe even better than written hold notices in some circumstances. Others agree with Judge Scheindlin and argue that a verbal hold notice is not worth the paper it is written on.

Judge Francis and others imagine many circumstances where exceptions to written to notice should apply. For instance, they would not necessarily require notices to be in writing where small enterprises are involved. In the words of Judge Francis:

> Nor are sanctions warranted by a mere showing that a party's preservation efforts were inadequate. … But, depending upon the circumstances of an individual case, the failure to abide by such standards does not necessarily constitute negligence, and certainly does not warrant sanctions if no relevant information is lost. **For instance, in a small enterprise, issuing a written litigation hold may not only be unnecessary, but it could be counterproductive, since such a hold would likely be more general and less tailored to individual records custodians than oral directives could be. Indeed, under some circumstances, a formal litigation hold may not be necessary at all.** (emphasis added)[86]

I am inclined to agree with Judge Scheindlin in *Pension Committee* on the issue of written notice. I think that preservation notices should always be in writing, even for "small enterprises." The only exception I can see is the where the only notice would be from the sender to him or herself. In this not uncommon situation a written notice would be an empty gesture and should not be required. But still, even in that situation, the attorney representing such a solo defendant or plaintiff should advise their client of their duty to preserve in writing.

Judge Francis and others disagree with the writing requirement primarily because they oppose the automatic imposition of at least some sanctions from such an omission, and contend that this is inevitable under *Pension Committee*. They recognize, correctly I think, that in some occasions this omission of a writing could be minor error. They object to automatically assuming the omission to be gross-negligence with resulting presumptions of destruction of relevant evidence. This is the stated rationale of Judge Francis' objection at *11 of *Orbit One*:

> The implication of *Pension Committee*, then, appears to be that at least some sanctions are warranted as long as any information was lost through the failure to follow proper preservation practices, even if there have been no showing that the information had discovery relevance, let alone that it was likely to have been helpful to the innocent party. If this is a fair reading of *Pension Committee*, then I respectfully disagree.

This is not a fair reading of *Pension Committee. Pension Committee* does not require the *automatic* imposition of sanctions when only verbal notice is given. It requires a finding of gross negligence, to be sure, but that does not in turn require a presumption of harm.

[85] *Orbit One Communications, Inc. v. Numerex Corp.,* 2010 WL 4615547 (S.D.N.Y., Oct. 26, 2010)
[86] *Id.* at 811.

> Relevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner.[87]

The key word here is "may." The holding "*may* be presumed" is far different from "*shall* be presumed." Judge Scheindlin emphasizes this point when she goes on to state in the same paragraph that:

> Although many courts in this district presume relevance where there is a finding of gross negligence, application of the presumption is not required.[88]

Judge Francis' reading of *Pension Committee* ignores this important distinction. It also ignores Judge Scheindlin's emphasis on the importance of the total facts and the judge's "gut reaction" to them.

> *First*, I stress that at the end of the day the judgment call of whether to award sanctions is inherently subjective. 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. *Second*, while it would be helpful to develop a list of relevant criteria a court should review in evaluating discovery conduct, these inquiries are inherently fact intensive and must be reviewed case by case.[89]

The paramount role of judicial discretion and fact-finding should not be overlooked. The presumption of gross negligence established in *Pension Committee* for a variety of omissions, including written notice, is just the beginning of sanctions analysis. All of the facts must still be considered and carefully examined before any court determines that sanctions are warranted, and if so, what remedy is appropriate.

Ralph C. Losey *is a partner of Jackson Lewis where he leads the firm's Electronic Discovery practice group. He is the author of four books on electronic discovery in the last four years, published by West Thomson and the ABA. His latest book, Adventures in Electronic Discovery, will be published by West in Spring 2011. Ralph is also the publisher and principle author of the e-Discovery Team Blog at http://e-discoveryteam.com, and the online training program http://e-discoveryteamtraining.com. Ralph is also an Adjunct Professor of Law at the University of Florida where he teaches both introductory and advanced electronic discovery.*

[87] *Pension Committee*, 685 F.Supp.2d at 467.
[88] *Id.*
[89] *Id.*

It's Up to Us to Right-Size Our Preservation Efforts

By Browning Marean, DLA Piper

No doubt about it: When I look back on 2010 *Pension Committee* was certainly one of the most significant cases of the year. And it's interesting to note that more ink has been spilled on this case than perhaps any other, including those out of the U.S. Supreme Court. Judge Scheindlin's proclamations certainly were noteworthy, and reflect a growing recognition that pre-litigation actions need to be considered in the Rules that guide discovery.

The *Pension Committee* provides a lot of useful guidance to practitioners. However, one of the challenges that we face, and one not discussed in this opinion, is the issue of proportionality. A lack of clear and uniform standards complicates this further, and although many in the industry may have seen Judge Francis' opinion in *Orbit One* recently as a breath of fresh air, the fact remains that we must look to the strictest standard when uncertain what jurisdiction may ultimately apply to our cases. Without question, the *Pension Committee* is now that gold standard for preservation.

In practical terms, we need to figure out how we're going to right-size our litigation holds to address reasonableness and proportionality in a given case. Since it isn't clear what may pass muster, we must continue to rely on opinions that have come before, and magistrate judges to help interpret them going forward.

Achieving greater consistency and predictability through changes in the Rules is a noble goal, and one that we need to strive toward. However, it's important to remember that consistency at the Federal level is just one aspect. When one considers that an estimated 97 percent of all litigation is handled in the state courts, the issue of uniformity is certainly not likely to get resolved anytime soon.

In the meantime, approaching the challenge laid out by Judge Scheindlin and others requires reasoned thought, flexibility and some degree of risk-taking. In the same way that "no battle plan survives its first contact with the enemy," one should expect that a litigation hold will rarely survive its first contact with the data. A legal hold is not a "fire-and-forget" missile -- you have to not only aim carefully, but keep control of it from beginning to end. You also have to have the courage to decide when it is reasonable not to go out with "all your guns blazing" (i.e., preserve everything forever), taking instead a reasoned and proportional response to the litigation threat.

The *Pension Committee*, and the opinions that followed, reinforce some fundamental best practices that should already be in place. First, ensure that you have a process to follow when responding to a duty to preserve. And second, keep an audit trail. Maintain a database anytime a triggering event is considered, and keep track of the analysis done in determining if and when a duty to preserve has arisen. Keep track of the process of determining scope. Keep track of your legal holds, and what steps the organization took in response. Consistency, transparency and documentation always make it easier to defend your actions later.

The *Pension Committee* didn't set any new precedent, nor is it the law of the land, but given the same facts, I believe most jurisdictions would have reached the same exact conclusion. Courts have and will continue to take lawyers to task for organizations not doing what they should have done to preserve data. So there's no turning back, and over time such opinions will undoubtedly be ratified by the law.

Browning Marean *is a partner in DLA Piper's San Diego office. He is a member of the firm's Litigation Group and is co-chair of the firm's Electronic Discovery Readiness and Response Group. Mr. Marean specializes in the areas of complex business litigation, technology matters, professional responsibility, and knowledge management. He is admitted to practice in California and Texas. Mr. Marean joined the firm (then Gray Cary Ames & Frye) in 1969. He is a member of DLA Piper's Technology Committee, and is an emeritus member of the California State Bar Law Practice Management Committee. He is a member of the San Diego County Bar Association Ethics Committee and the Sedona Conference. Mr. Marean is a nationally known teacher*

and lecturer on various topics including electronic discovery, records retention, knowledge management and computer technology. Mr. Marean received his law degree from the University of California, Hastings College of Law and his undergraduate degree from Stanford University.

Pension Committee Renews Focus on Education and Execution

By Jonathan Redgrave, Redgrave LLP

When Judge Shira Scheindlin issued her decision in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, in January of 2010, many observers (including me) predicted that the case would be widely-cited. That prediction has proven true, with multiple citations in cases, briefs and articles in the past twelve months. Each of those citations have their own story for why and how they refer to the *Pension Committee* decision and certainly some take issue with parts of the opinion while others cite it as governing authority.

Stepping away from the specific facts and holdings of the case, the *Pension Committee* decision is perhaps most notable for the way in which it has galvanized dialogue on three core issues that impact cases across the country in different Circuits and in state courts:

(1) the criteria for evaluating whether certain discovery failings constitute harmless conduct, negligence, gross negligence or willfulness;
(2) the interplay between any prejudice suffered by a requesting party and the applicable burden of proof necessary to establish the basis for any sanctions; and
(3) identifying the possible sanction remedies appropriate and proportional to the demonstrated culpability and the actual prejudice suffered.

The ensuing discussion of these issues in academic literature and in 2010 decisions such as *Rimkus*, *Victor Stanley* and *Orbit One* confirms that the law remains unsettled in many respects and that variation between federal Circuits on spoliation issues is significant.

Importantly, however, Judge Scheindlin's *Pension Committee* opinion has once again (like the *Zubulake* progeny) helped frame the debate across the board.

In terms of immediate impact, Judge Scheindlin's opinion in *Pension Committee* made clear that, at the end of the day, litigants in other cases must realize that they will need to think through and be prepared to explain why the efforts in their cases were reasonable, appropriate and in accordance with accepted practices at the time those efforts were undertaken. Significantly, even with the guidance provided in the *Pension Committee* opinion and in other cases, this reckoning does not look to a talismanic checklist because, in Judge Scheindlin's words, "[e]ach case will turn on its own facts and the varieties of efforts and failures is infinite." Moreover, Judge Scheindlin explicitly (and correctly in my view) recognized that "[c]ourts cannot and do not expect that any party can meet a standard of perfection."

Thus, the *Pension Committee* opinion hammered home the fact that parties and counsel have to exercise reasonable, good faith judgments in discovery matters and, not surprisingly, be able to defend that exercise of judgment down the road. Indeed, Judge Scheindlin described her after-the-fact role as making "a judgment call" where the court will employ "'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." While perhaps stating the obvious, Judge Scheindlin's description of her role has renewed the focus of parties and counsel on the need for education, execution and documentation with respect to acceptable and defensible practices for discovery matters, which is a benefit for all.

Jonathan Redgrave *is a partner at Redgrave LLP. He serves many Fortune 500 clients and also represents numerous clients involved in litigation and government investigations and has worked as an expert witness and with special masters. He is internationally recognized for his work, has authored, co-authored and edited numerous publications in the area of electronic discovery, privacy and data security, and has spoken around the world on these issues. Jonathan has extensive experience in all areas of complex litigation in state and federal courts, and focuses his practice on Information Law matters. Jonathan has been recognized for exceptional standing in the legal community (Band 1) in* Chambers USA: America's Leading Lawyers for Business for 2010 *for eDiscovery. Jonathan helped found, was the first Chair of and is currently Chair Emeritus of the renowned Sedona Conference Working Group on Electronic Document Retention and Production. He is also a co-chair of the acclaimed Georgetown University Law School eDiscovery Institute.*

The Importance of Being Transparent

By Denise J. Talbert, Shook Hardy & Bacon LLP

I have a confession: When I first read *Pension Committee,* I was taken aback. As someone who spends most of the day partnering with clients to ensure compliance with document preservation, collection and production obligations, it was bracing to me because of the potential implications it had on me and my clients. I can't say that I agree with all of the positions that Judge Scheindlin wrote in her opinion, but after I had time to digest it, I have been able to identify some helpful practical implications.

It's interesting to reflect back on the last year. The *Pension Committee* didn't really prompt a lot of changes in how I counseled my clients from the standpoint of understanding all discovery-related actions would be judged in the rear-view mirror and the importance of documentation, documentation, documentation. But I believe *Pension Committee* has provided the catalyst for proactive discussions with some clients about why legal holds and the whole preservation process continues to be so very important and more complicated than it would seem at first blush. Following *Pension Committee,* more and more clients are receptive to having a dialogue around legal hold practices that includes, for instance, a representative from the IT department, a representative from human resources, etc. As a result, we have more of an "interdisciplinary" group of individuals working together to avoid some of the really bad things that could happen.

I think a second outcome from *Pension Committee* is reinforcing the import of mutual transparency. The old school of keeping your cards close to the vest when it comes to data preservation, collection and production efforts just won't cut it. The value of cooperation, collaboration and communication with both opposing counsel and the courts is clear. This requires greater documentation – keeping track of every interaction and each decision along the way to both manage expectations and create that all-important audit trail for defensibility. By doing so, we've overcome spoliation motions or avoided them altogether. It's not perfection, but good faith, reasonableness and proactive steps that are the standard (and, hopefully, Judge Scheindlin would agree).

As an aside, I've also seen success in using cases like *Pension Committee* and its progeny to help inside counsel make the business case for investing the time and money in records management process improvement and other information management initiatives. The business team can better understand the value, and the real consequences of failing to act.

I do have concerns. The lack of uniformity across jurisdictions that requires responding to the harshest standards in multi-jurisdictional litigation. The rather cavalier attitude that comes

across in some of these opinions when looking at our actions through the benefit of hindsight. The uncertainty of self-collection as a reasonable and proportional response to many litigation claims. Seeming to equate preservation with collection and not allowing parties to "preserve in place". But in the end, when faced with opinions like *Pension Committee,* we need to counsel our clients to adopt consistent and defensible procedures and remain actively engaged, ask more questions, validate the outcomes, and document the steps along the way. We also become stronger advocates for the adoption of practical, reasonable and proportional e-discovery rules. And that's a good thing.

Denise Talbert *chairs SHB's eDiscovery, Data & Document Management Practice (eD3) and is a partner in the Global Product Liability Group and Business Records Management & Consultation Practice. She has over 14 years of experience in cost-effective discovery management in complex litigation, including the preservation, collection, organization, review, and production of documents. She has represented business interests in the chemical, communications, insurance, pharmaceutical, retail, tobacco, and transportation industries. Denise has published materials on eDiscovery law and routinely offers CLE presentations on this topic. She is also a member of The Sedona Conference Working Group on Electronic Document Retention and Production, and has been appointed to the LexisNexis Advisory Board.*

E-Discovery Is Here to Stay!

By Paul D. Weiner, Littler Mendelson PC

Once again, the Legal Community owes Judge Scheindlin a debt of gratitude for issuing a landmark opinion on e-discovery. Just like the *Zubulake* line of cases that laid the groundwork for what has become a multibillion-dollar-a-year subspecialty of the law, *Pension Committee* once again establishes a baseline set of contemporary standards for the preservation, collection, review and production of electronically stored information ("ESI") in litigation. The impact of this decision is felt most strongly in three key areas:

1. E-Discovery is not a paper tiger

There is no question that we live in a digital world and the volume of ESI is staggering. By way of example only: billions of e-mails are sent and received by U.S. businesses everyday; a single laptop computer can store the equivalent of 40 million typewritten pages of paper documents; Facebook users collectively spend 6 billion minutes a day on Facebook; in the United States alone, 3.5 billion cell phone text messages are sent everyday; there are about 50 million "tweets" on Twitter everyday; and over 1.5 billion people use the Internet worldwide. Amazingly, however, some clients, lawyers and judges still do not view e-discovery as a serious issue in litigation or view it as something that "other parties in other cases" have to deal with.

The *Zubulake* cases served as a proverbial wake-up call that squarely put "parties and their counsel . . . fully on notice of their responsibility to preserve and produce [ESI]," in accordance with "rapidly evolving" guidance and developing standards. *Pension Committee* had the same awakening effect. It made clear that 6 years later, at least in the Second Circuit, certain duties are so well established that they have become the contemporary standards of the day, and failure to follow those standards – even if not done willfully or in bad faith – will result in serious consequences, including an adverse inference instruction. (It should be no surprise to anyone that shortly after the adverse inference rulings were issued in *Pension Committee*, the case promptly settled.)

Thus, *Pension Committee* reinforces that, in today's digital world, when a duty to preserve has been triggered, activities like issuing written litigation holds, identifying key players and

preserving their electronic and paper records, and preserving the records of former employees, especially in the Second Circuit, are not optional. While this may not seem like an eye-opening proposition to those of us who "live and breathe" e-discovery, it is often difficult medicine to swallow for clients and counsel that are not familiar with those processes, especially when coupled with challenging (and oftentime consuming, disruptive to day-to-day business, and expensive) recommendations about what needs to be done to properly meet e-discovery obligations in complex cases.

2. E-Discovery is a two-way street

Simply stated, e-discovery is a two-way street. Preservation, search, and production burdens, as well as sanctions for improper conduct, apply to plaintiffs as strongly as defendants, even in asymmetrical (*e.g.*, single plaintiff v. corporation) cases. *See, e.g., Leon v. IDX Sys. Corp.,* 2006 WL 2684512 (9th Cir. Sept. 20, 2006) (affirming spoliation sanction and dismissal of plaintiff's ADA/discrimination lawsuit because plaintiff wiped the unallocated space on his laptop's hard drive before turning it over to defendant's expert for examination); *Kvitka v. Puffin Co., LLC*, 2009 WL 385582 (M.D.Pa. Feb. 13, 2009) (dismissing plaintiff's lawsuit because plaintiff threw away "old" laptop upon purchasing a new one, after the duty to preserve had been triggered).

Yet, in my experience, there is still a perception among litigants, counsel and some judges that e-discovery obligations somehow apply only or with greater force to defendants. *Pension Committee* makes clear that all parties on each side of the "versus" in a lawsuit have duties and responsibilities with respect to e-discovery, and that failure to abide by them could have serious consequences. Indeed, in *Pension Committee*, Judge Scheindlin not only sanctioned the plaintiffs for e-discovery misconduct, but she also instructed that: "[a] plaintiff's duty is more often triggered before litigation commences, in large part, because plaintiffs control the timing of litigation." *See also*, *Rimkus v. Cammarata* ("The alleged spoliators are the plaintiffs in an earlier-filed, related case.")

This issue is particularly important as the sources of ESI that plaintiffs control, *e.g.*, home/personal e-mails and computers, text messages, social networking communications, blog postings, "tweets," etc., continue to emerge as technology develops and expands.

3. Defining the contours for potential national standards

Finally, decisions like *Pension Committee* and its progeny define the contours of the many unsettled questions that still remain in the e-discovery world, and set the stage for discussions around whether national standards are warranted, and if so, what those standards should be. See, e.g., *Rimkus v. Cammarata* (noting that unlike the Second Circuit where *Pension Committee* was decided, the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits all require some showing of "bad faith," severe prejudice or intentional misconduct before severe sanctions like an adverse inference instruction may be imposed); *Victor Stanley II,* "Spoliation Sanctions by Circuit" Chart/Appendix (column 1, addressing the "Scope of Duty to Preserve," and noting while some jurisdictions require actual "control" over data for preservation/sanctions purposes, others jurisdictions expand the duty to non-party data over which a party has the "right, authority or practical ability" to obtain); *Is It Time For a Federal Rule on Preservation*, *Litigation News,* Aug. 1, 2010, *available at* http://www.abanet.org/litigation/litigationnews/top_stories/080210-e-discovery-preservation-new-rule.html (last visited Jan. 4, 2011).

Paul Weiner *serves as Littler's National e-Discovery Counsel. He is a nationally recognized thought leader in the area of electronic discovery and has lectured and published extensively in the area of e-discovery, including publishing several articles in the American Bar Association's Journal of Litigation. Paul's work has served to educate lawyers, judges and business people about the technical and legal issues governing electronic discovery. His work was cited by the landmark Zubulake opinion. Paul's work on e-discovery is also referenced in the Federal Judicial Center's database on significant cases and articles. He has also served as a Court-appointed E-Discovery Special Master for the United States District Court for the Eastern District of Pennsylvania.*

FURTHER READING

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Working Group on Electronic Document Retention and Production, *The Sedona Conference Commentary on Legal Holds,* The Sedona Conference®, 2010.

"Spoliation Sanctions by Circuit" Poster

We have created a poster of Judge Paul W. Grimm's addendum to *Victor Stanley II* that reviews the standards across every U.S. Circuit. Download an electronic copy at the following URL:

www.legalholdpro.com/pensioncommittee

"In her recent opinion in *Pension Committee,* Judge Scheindlin has again done the courts a great service by laying out a careful analysis of spoliation and sanctions issues in electronic discovery."

U.S. District Judge Lee H. Rosenthal
Rimkus v. Cammarata
(SDTX, February 19, 2010)

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