Mixed Reviews for Zubulake II

TWO JUDGES DIFFER ON HOW TO PENALIZE FLAWED DISCOVERY EFFORTS.

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JUDGES AREN'T ALWAYS known as the most technologically savvy lawyers, but federal district court judges Shira Scheindlin in Manhattan and Lee Rosenthal in Houston have fearlessly plugged themselves into the complex and convoluted world of e-discovery. The two judges have helped shape the ground rules for the preservation of electronic evidence—especially when it comes to sanctioning lawyers for failing to meet their responsibilities.

But as two recent decisions show, the two judges remain far apart when it comes to putting those rules into practice. Scheindlin is taking a much tougher line on lawyers who fail to meet e-discovery obligations than her Texas counterpart. Which standard prevails could have a major impact on the risks for counsel in e-discovery disputes.

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Six years ago, Scheindlin, a Bill Clinton appointee, issued a series of landmark opinions that grappled with the problems of e-discovery in a gender discrimination case filed by plaintiff Laura Zubulake against her former employer, UBS Warburg. In taking UBS Investment Bank to task for discarding e-mail backup tapes, Scheindlin laid out what have become key e-discovery principles regarding the preservation of evidence: Companies must preserve electronic documents once it becomes clear that they might face litigation, and their lawyers must put in place "legal holds" to prevent the company from destroying such evidence. Lawyers who fail to do so could face sanctions—such as the dreaded adverse inference at trial: When evidence is lost, the jury is instructed that lost evidence is presumed to be harmful to the party that failed to preserve it.

Last January, Scheindlin reiterated these rules in *The Pension Committee of the University of Montreal Pension Plan, et al.* v. *Banc of America Securities, LLC*. (She subtitled the decision "Zubulake Revisited: Six Years Later.") *Pension Committee* involved evidence in a lawsuit filed by investors to recover funds lost in the liquidation of two offshore hedge funds. As Scheindlin confronted the issue of missing electronic evidence in this second suit, it was clear that she was not happy about it.

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"Once again I have been compelled to closely review the discovery efforts of parties in a litigation, and once again have found that these efforts were flawed," Scheindlin wrote.

This time, Scheindlin held that litigation holds must be issued in writing to the key players involved to preserve their electronic and paper records, such as e-mails, memos, and even backup tapes when they are the sole source of information. Failure to issue a timely written hold is considered gross negligence, and could lead to sanctions. She levied monetary sanctions against 13 of the 96 plaintiffs for failing to preserve evidence and imposed the adverse inference sanction against six plaintiffs for failing to issue written holds, among other things.

"By now, it should be abundantly clear," Scheindlin wrote, "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."

While Scheindlin was careful to advocate that courts impose the least harsh sanction—as well as examine each case individually—some lawyers were taken aback by the hard line she took,

especially regarding the failure to issue written holds. "We should be looking to see if there's intentional conduct to destroy evidence, not punish people who are doing their best but just can't find things," says John Jablonski, a partner at Buffalo-based Goldberg Segalla who maintains a blog devoted to covering legal holds. "The worry is that it could become a very effective litigation tactic to attack an opponent's litigation hold and e-discovery process to drive up costs of litigation. And it's an easy path on the way to an adverse inference charge, which is one of the worst sanctions you can ever have when you're on trial."

A month after Scheindlin's "Zubulake Revisited" opinion, Rosenthal handed down a decision in *Rimkus* v. *Cammarata* that many legal observers saw as a response to Scheindlin. While Scheindlin may have been among the first to rule on e-discovery, George W. Bush appointee Rosenthal essentially wrote the book on the topic. She chaired the Advisory Committee on the Federal Rules of Civil Procedure from 2003 to 2007—during the period when the Federal Rules of Civil Procedure were amended to cover e-discovery—before being appointed chair of the Judicial Conference Committee on the Rules of Practice and Procedure by Chief Justice John Roberts.

In *Rimkus*, a consulting company sued a group of former employees for setting up their own shop, an alleged violation of a noncompete agreement. Unlike *Pension Committee*, the case involved intentional destruction of evidence, since the former employees were found to have deleted e-mails. Rosenthal imposed monetary sanctions and an adverse inference sanction on the former employees for deleting the e-mails. But she declined to follow Scheindlin's hard-line stance, finding that harsh sanctions should be applied only given a finding of bad faith. Although Rosenthal took time in her opinion to praise Scheindlin for performing "a great service," she decided that a blanket rule like the one Scheindlin put forth in *Pension Committee* was inappropriate. The court should also weigh the effect of the missing evidence, she said.

"A court's response to the loss of evidence depends on both the degree of culpability and the extent of prejudice," Rosenthal wrote. "Even if there is intentional destruction of potentially relevant evidence, if there is no prejudice to the opposing party, that influences the sanctions consequence."

In her opinion, Rosenthal also questioned whether *Pension Committee* would last, given the split among the circuits and a U.S. Supreme Court precedent (*Chambers* v. *Nasco, Inc.*) that indicates the level of culpability before applying sanctions is more than negligence.

Rosenthal declined to follow Scheindlin's hard-line stance.

For their part, Rosenthal and Scheindlin are quick to downplay any notion of a feud between them. Asked to comment for this article, the two judges responded with a joint statement: "While they respect each other greatly, their approaches as district judges, and their recent decisions, necessarily reflect differences in the law of their two circuits (the Second and the Fifth)." They also underlined their common ground: "the need for greater vigilance by parties in preserving their electronic evidence and the need to examine whether a national standard is needed as to what degree of culpability is required for imposing sanctions."

Still, the differences between the two judges' positions, subtle as they may be, could have wide-ranging consequences. According to Jablonski, the Supreme Court doesn't usually rule on procedural issues and matters relating to a trial judge's discretion, so the split could be around for a long time.

"It's something that is probably better handled by amending the rules—but that could take five to seven years," says Jablonski [see "A Work in Progress?," page 12].

Additionally, while *Zubulake* has long been the more influential case, clearly not all judges are on board with Scheindlin's stringent approach. Washington, D.C., federal magistrate judge John Facciola, who has presided over several high-profile cases involving e-discovery, including demands by the Citizens for Responsibility and Ethics in Washington for White House e-mails and documents relating to the Iraq war and the Valerie Plame affair, ruled in August that a party had to prove that the other acted in bad faith before sanctions would be considered.

This schism ensures that litigators will have to make a choice in the e-discovery process: either err on the side of caution and preserve everything, or assume they're covered as long as they don't act in bad faith.

"One way that you could describe these two cases is that they are like inkblot tests," says Dante Stella, head of Dykema Gossett's e-discovery practice. "Parties will see what they want to see. If you're in a jurisdiction where you're not clear what the law is, the best thing to do is to follow the worst-case precautions—in other word, go with what Schendlin says. It's a more severe form, but it's better to be safe than sorry."

The real winners could be e-discovery vendors. "Companies that do e-discovery processing don't want to see their customers in trouble, so they advise those customers to take precautions—sometimes more extreme than required," says Stella. "But a lot of those companies price by the gross gigabyte for processing, so caution can also be good for business."

—Victor Li